Freedom and religion[1].

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Each person should be left free to form her own beliefs on matters of religion in conditions of wide freedom of speech and expression. Each person should be free to affiliate with any existing church that is willing to take her on as a member, or form her own church or sect or association directed to religious aims, with willing fellow adherents. Each person should be free to worship, in public and in private, with likeminded others, according to the tenets of her faith. Moreover, each person should be left free to practice the tenets of her religious faith, unless the actions her religion prompts her to take would violate the moral rights of other persons.

Many people in the contemporary world affirm religious freedom as just characterized. In addition, many of us also believe that each person has the right to be free from state interference in matters of religious faith. That means that the government should not sponsor one religion or church, or endorse or support any particular religion or church or religious views. Nor should the government favor religion over nonreligion or the religious over the nonreligious. Nor should citizens seek to bring it about that government does any of these forbidden things (Audi 1989, but see McConnell 1990 and 1992).

In the U.S. Constitution, these two aspects of religious liberty are summarized in the part of the First Amendment that prohibits government from establishing any religion and from hindering its free exercise. Many written constitutions of many countries profess a similar doctrine.

Although freedom of religion has wide appeal around the world in our time, the doctrine is also widely controversial. But even among those who broadly favor religious liberty, deep unresolved puzzles remain as to how it is best understood and how it might best be justified. This chapter examines some of these unresolved puzzles.

A preliminary clarification is needed, although it introduces large issues this chapter will not try to settle. When we discuss *religious* liberty, what exactly are we talking about? What distinguishes the religious from the nonreligious? Many answers that have been given will strike many of us as underinclusive or overinclusive or both (underinclusive in some respects and overinclusive in others). If we say religions profess faith in a Supreme Being, a God of traditional theology, we are narrowly excluding Buddhism and Hinduism and other religious traditions beyond the Judeo-Christian. If we identify religion with "faith in some higher or deeper reality than exists on the surface of everyday life or can be established by scientific inquiry" (Greenawalt 2006, 134) we would be including speculative philosophical metaphysical doctrines as religious, which seems inapt. Also, some longstanding churches such as the Unitarian, whose doctrinal content is thin to the vanishing point, would be classified as nonreligious. If we identify the religious with "all deep convictions about the purpose and responsibilities of life" (Dworkin 2013, 107), we obliterate the line between religion and secular moral thought.

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For practical purposes it may suffice to start with doctrines and practices that ordinary common confidently classifies as religious and then simply identify the religious as anything sufficiently similar to that. We can identify features that often mark what is paradigmatically religious without seeking necessary and sufficient conditions. Here I follow suggestions made by Greenawalt 2006. In seeking a rough idea of the religious, we should have in mind not only types of belief and doctrine but also churches and sects and similar institutional practices. Not all those who propound religious ideas seek to found communities of the likeminded who will band together for ritual, worship, the building or organization, and proselytism, but many do.

The arguments of this chapter deny that qualifying as religion or religious should entitle one to special protection of liberty. Nor should special accommodation be made to the religious to help them carry on in their beliefs and practices. If nothing by way of special treatment should turn on whether an entity is or is not a religion, the sketchiness and vagueness of the idea may not matter so much.

1. Religious liberty and religious establishment.

A political society that protects the liberty of each person to speak freely on religious matters, worship according to one's creed, and organize churches and sects with likeminded others, might yet be nonneutral in its religious policies, by sponsoring or supporting one religion or set of religious beliefs over others (Greenawalt 2008, Leiter 2012). State sponsorship of some sectarian doctrine over others might seem unfair to adherents of nonfavored sects.

One attempt to see state establishment as possibly fair proposes that we should not confine our view to some particular political society but should rather look at government sponsorship and favoritism on a world scale. Suppose the world were divided into many independent political societies, some of which establish particular religious doctrines, in such a way that everyone's religious belief will be established in some society to which she has access. Imagine that Judaism is the established faith in Israel, the Sunni Moslem faith in Iraq, evangelical Christianity in the U.S., atheism in Sweden, and so on. Might this world regime qualify as fair to all religious adherents? One might hold that establishment would be unfair to adherents of nonestablished views, who receive less favored treatment in their home societies, even if a privileged status is available for them elsewhere. The idea might be that the global establishment scheme is more unfair to individuals, the more burdensome and costly it would be for them to relocate to a society in which their favored doctrine is privileged.

Another possibility is that a state establishment that gives privileges to false beliefs would be bad, but a state establishment that involves state support of true beliefs warranted by the balance of available reasons would be good. As a practical matter, some might doubt that public officials or democratic voters would be reliable at singling out true rather than false beliefs for establishment. Such suspicion of government competence would be compatible with holding that state establishment properly oriented to the right and the good would be unobjectionable.

2. A puzzle about state neutrality.

Here's one puzzle. Many people are inclined to hold that the truth of a religious claim is irrelevant to its aptness as a basis for morally acceptable public policy. Morally

acceptable public policies must be justifiable in terms acceptable to all citizens regardless of their particular religious commitments. David Estlund (2008) states this idea with elegant simplicity: Even if the Roman Catholic Pope has a pipeline to God, that would not give the Pope the moral right to make Roman Catholicism the established religion and use state power in other ways to favor this particular religious doctrine over others.

Let us suppose that having a "pipeline to God" means that the Pope has a true warranted belief that Roman Catholicism is the unique route to salvation and that unless people live and die as Catholics, they lose irrevocably the chance to gain in the afterlife an eternity if bliss. Imposing and maintaining Catholicism as the established religion does not guarantee that those who live under this regime will embrace the true faith and attain salvation. But this course of action would increase everyone's chance of gaining eternal salvation. Given all this, if the Pope recognizes even a modest duty of beneficence (to act efficiently to improve people's welfare), he ought to seize state power and impose and maintain Catholicism as the established religion, if he can do so. And the rest of us ought to assist him in this effort. The imperative to respect religious liberty, no matter the weight of reasons that support it, is cancelled in these circumstances. The stakes are just too high. This argument does not literally require the claim that outside the Church there us no salvation and that the payoff of salvation for an individual is infinite in value—an extremely high finite value will do.

On the other hand, if the Pope has a high subjective confidence that he uniquely has a pipeline to God, but there is no reasoned warrant for this idea, then we ought to band together to prevent him from gaining any power, much less state power or political power of global reach. The greater his subjective confidence, and that of his followers, and the more we suspect he will conscientiously act beneficently by his lights, the more dangerous he is likely to be.

Some respond to the deep and sharp conflicts of opinion among people of diverse theological views by saying we can all have sufficient confidence in our particular salvation beliefs reasonably to guide our own lives by them but insufficient confidence to impose our views by force on others. But this comfortable vision of people disagreeing tooth and nail while peacefully living together in harmony requires the idea of a private reason—a consideration that is a reason for one person, but not for others. But reasons are inescapably public. If there is reason for me to save the whales, there is reason for others in a position to help. If there are agent-relative reasons for me to help my own children, there are agent-relative reasons for anyone to help her own children. If the reasons I have that bear on choice of conduct are genuine reasons, they are in principle shareable—my reasons can be made available to you, and become your reasons. A principled basis for mutual toleration of other people professing views that are anathema from your standpoint is not ready to hand plain common sense—just the opposite.

Another possibility is that even if I believe my own religious views are correct and others are in error, I might also believe that it is wrong to force others to act against their beliefs unless they are wrongfully harming others. My moral inhibition against coercing others might be strengthened, the less confidence I have in my current beliefs. These beliefs suffice as reasons for guiding my own conduct, but fall short of what would be required to overturn the moral norm against coercion.

However, one might flip this point on its head. The more confidence I have in the correctness of my beliefs, then if I accept an obligation of beneficence to save others

from peril, the more the no-forcing norm looks overrideable. If I am very confident that you will plunge off a bridge to your death unless I force you to sway from your present path, I should help you by forcing you.

Of course, the Roman Catholic Church is not saying *extra ecclesiam nulla salvatione* these days. But the basic problem remains. Religions claim that enormous benefits will accrue to followers, and only their followers, and religions differ widely in theologies and prescribed rituals and commandments for daily life. Compromise is difficult, between adherents of radically opposed theological views. Jesus Christ is either the Redeemer and Son of God, who has shown us the path to salvation we must follow—or he is not. If the end of the world is fast approaching, as many Christians believe is foretold in the Bible, it is silly to worry about worldly issues such as climate change and war and the diffusion of nuclear armaments and the prospects for economic development of the underdeveloped regions of the Earth. If there is no reason to believe the end of the world is fast approaching, the religious claims to the contrary are very dangerous ideas.

The puzzle is that religious liberty is often partially interpreted as requiring government neutrality on religious matters. The government is to take no stance for or against any religious doctrine. Neutrality here requires that the government should not act to promote one controversial religious doctrine over others, nor favor the adherents of some controversial doctrine over the adherents of other views, not pursue any policy that can be justified by a claim that some controversial religious doctrine is superior to others (on the idea of neutrality, see Patten 2012). But this stance of neutrality makes no sense, especially where huge consequences are at stake. Religions make large empirical and metaphysical and moral claims that if true are of the utmost importance for all of us. The claims cry out for assessment. If religious claims, claims backed by religious reasons, e.g. about divine intentions as revealed in a sacred book, are inapt as a basis for state laws and other public policies, that can only because the arguments and evidence that can be adduced for these claims do not withstand critical scrutiny. But if the norm of government neutrality in religious matters is rejected, then it would seem that the state should favor better religious doctrines and steer its members away from worse ones, and the question arises, why should the state even tolerate religious creeds and sects that are exceptionally defective from an epistemic standpoint, promulgating claims no reasonable person should accept?

The generic case for wide freedom of speech and expression and for other basic civil liberties provides a sensible reply to the suggestion that in matters of religion the state should act to restrict people's liberty to embrace defective heresies, dangerous falsehoods. Let us assume that it is accepted that there should be wide freedom of speech and expression along with freedom of assembly and freedom of association. These basic civil liberties will encompass the liberty to speak freely on religious matters, proselytize for one's chosen faith, assemble with likeminded others to worship and engage in ceremonies and rituals of one's choosing, and form organizations to promote adherence to one or another particular religious doctrine. We do not need to advance special religious freedom rights to secure these widely accepted freedoms. The religious freedom rights are included in generic civil liberties.

The response to the first puzzle just suggested immediately gives rise to another puzzle. Many us believe that we all owe one another special solicitude for religious liberty. Not all liberties are of equal importance. The government via its traffic safety

regulations massively restricts one's freedom to drive cars however one might wish, but this is not deemed oppressive. But religious liberty has special importance. Moreover, religious liberty includes not only liberty of speech and expression and worship but also liberty to put one's faith in practice, live according to the dictates of one's chosen faith, at least up to the point at which one's acting on religious belief violates basic moral rights of others. The puzzle is to interpret and assess the claimed special status of religion and religious liberty.

3. A thumb on the scale favoring religious concerns?

Freedom of religion, though under threat in some regions, is assigned special protection in the written constitutions of many political societies. The European Convention on Human Rights stipulates that "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Why single out religion for special protection in this way? The judgment that ordinary religious activities such as proselytizing and churchgoing merit protection does not require a further judgment that religion merits special protection.

The question, why single religion out for special protection, bites hard for those who hold the background belief that in a democratic society, the majority should rule, and that up to some point, the fact that a law has been enacted by duly established democratic procedures, renders it legitimate to enforce the law both on the majority that supported it and on others who do not support it. Is there is a special right to religious freedom that stands in the way of enforcing an otherwise legitimate democratic law on the ground that enforcing it would interfere with religious people's freely practicing their religion? On this issue, see Koppelman 2013, Greenawalt 2006 and 2008, and Leiter 2012.

Examples may help to clarify this concern. Suppose that a democratic political society bans the production and sale and gift and consumption of hallucinogenic drugs such as LSD and mescaline. These laws might be justified or unjustified; set that question to the side. Consider three claimants who might demand that the law should be rewritten or interpreted by courts to exempt them from the requirement to conform to this law on the ground that it restricts their freedom unjustifiably. That is, the claimants maintain that even if the law is acceptable as applied to most people, it would not be acceptable if imposed on them, because they would be specially burdened by conformity. One claimant objects that her religion requires the use of hallucinogenic drugs in religious ceremonies and rituals that are crucial to the practice of her faith. A second claimant objects that her deepest ethical convictions require her to explore altered states of consciousness, including the altered states induced by LSD or mescaline, to facilitate her attainment of emotional states favorable to treating people as they ought to be treated and to her discovery of the important moral truths. A third claimant objects that her chosen way of life places at its center an activity such as surfing or rock-climbing that becomes a sublimely valuable experience when practiced while in an altered state of mind induced by appropriate doses of hallucinogens. If the society in which these claimants live has a political constitution that forbids government to restrict the free exercise of religion or in some similar way gives special legal protection to freedom to carry on religious activities, the first claimant has a presumptive good claim to legal

relief, and the second a doubtful but possible claim, and the third no claim at all. Why is this fair?

If one examines current writings that touch on this question by constitutional law scholars and interpreters of religious liberty, one finds two broad types of answer. One says that religion is really morally special, and merits special protection. The second response denies that religion is really morally special. On this view, either the appearance that current policies in democratic societies that are especially solicitous of religious liberty is false, or the appearance is correct, in which case the legal policies that cater to religious concerns in a way that would be justifiable only if religion were somehow special ought to be eliminated or reformed.

4. Religion is special in that it should be specially disfavored *and* favored.

The "religion is special" response to the puzzle about why religion should be singled out for special favorable treatment when governments are handing out benefits or restricting people's freedom itself divides into two broad categories. One line of thought suggests that religious beliefs are both specially disfavored and specially favored in the government policies of a morally acceptable democratic constitutional regime, the disfavoring and favoring roughly balancing each other. Compare the belief that God hates heresy and the belief that racial discrimination is wrong. A political society ought to abjure the establishment of religion, as does the U.S. Constitution and as do those of many other societies. This means that the government should not take action that supports one religious belief over others or supports the religious over the nonreligious. Any government action to suppress heresy would be based on some particular religious belief as to what is true religion and what is heresy, and government action on this basis would run afoul of any sensible no-establishment rule. In contrast, there is no bar to government taking action on nonreligious beliefs such as the belief that it is wrong to discriminate against people on the basis of race of sex or religion or national origin. Establishment of moral claims by such actions as passing laws forbidding discriminatory conduct is perfectly acceptable in a country that rejects all religious establishment. So religious beliefs are disfavored in a way.

Given this fact, and given its appropriateness, there may be some need for redress or compensation, which takes the form of giving special weight to claims that the enforcement of a law that has a legitimate secular purpose and is not on its face motivated by dislike or hostility to any religious group would nonetheless pinch hard against the religious interests of some people, who should on this ground be exempted from the legal requirement to conform to the law. Call this position *special-accommodation-for-religion-offsets-the-no-establishment-burden* (Greene 1993).

Objection: The suggestion advanced in this chapter is that the basis for ruling out religious claims as the grounding of laws and public policies is that these views are poorly supported by evidence and argument. We lack reason to believe any of these religious doctrines is true, so we lack reason to put state power behind any of them. But this is not any sort of reason to put a thumb on the scale favoring special protection of religious liberty or favoring religious over nonreligious demands for exemption from requirements to obey otherwise acceptable laws.

The countersuggestion might be that the main reason to favor no-establishment is not that religious doctrines per se have epistemic defects but rather the judgment that

governments are particularly inept at distinguishing better from worse religious doctrines and so should be barred from endorsing any. Reply: The fact that a claim is likely to be controversial is not per se a reason that it cannot figure in a sound justification of state policy. Moreover, even if governments tend to be bad at discriminating better from worse doctrines, that should not inhibit a government that is exceptional in this regard from basing policy on sound judgments.

One possible basis for holding that religion requires special treatment is that religious disputes are specially explosive and likely to cause conflict, reduce people's disposition to cooperate with those deemed outsiders, and threaten civil peace. Also, adherents of religious views held by a small minority of a society's population are specially vulnerable to discrimination and even persecution, even in democracies.

Objection: in many modern democracies with diverse populations, the tendency of religious disputes to cause civil strife is very muted, if discernible at all. Where this is so, this argument for special treatment for religion has slight purchase. But also, if it is so that religious discord does gives rise to persecution, the ground for state action here is to protect people from persecution. This we should do in an even-handed way, whether the persecutors are motivated by religion, racial ideology, national chauvinism, contempt for people who do not espouse liberal opinions, or other motives.

Further objection: If religious disputes threaten social cooperation and civil peace, we might suspect that the tendency of people to embrace simplistic religious dogmas insulated from rational reflection and criticism is the underlying problem. So rather than treat religion with kid gloves, perhaps the government should promote secular education and deliberative institutions and practices and campaign against irrational embrace of religious dogmas, while sustaining full civil liberties including free speech for all. This in effect would be a regime of secular establishment.

5. Religion is especially valuable and should be favored.

The second line of thought along the "religion is special" path forthrightly affirms that religious activities and practices are on the whole specially valuable in a way that justifies special favorable legal treatment of religion and special protection specifically if religious liberty.

The claim to the special quality of religion takes various forms.

One version of the claim is that religious dictates present themselves to adherents as absolute categorical imperatives that we must obey come what may (McConnell 1990 and 1992). Religious demands are implacable, and so when they put a believer in conflict with man-made law, the demand for compliance is unreasonable, or at least specially burdensome. Or one might hold that duties to a divine being are orders of magnitude more compelling than any secular obligations to behave in one way or another toward other members of society. The secular obligations are apt for compromise and flexibility, the religious obligations, not so.

Objection: These contrasts fade upon examination. Many versions of morality impose duties that are categorical in the sense that we are bound to obey them regardless of our desires or aims. Some moral duties may be exceptionless, and are deemed to hold come what may. Many people in fact treat requirements of secular morality as imposing obligations of conscience that are of overwhelming importance in their lives and present unyielding demands. Moreover, in fact, people who are religious vary in the degree to

which they are religious or uphold religious commandments as overpowering their other aims and concerns, brooking no compromise.

Another version of the claim is that religions offer frameworks of belief that endow life with meaning and significance and purpose. Religions answer persistent and urgent questions about what kinds if beings we are and what is our proper relationship to other humans and to the natural universe. Art and other human enterprises contribute to this quest for meaning, but by history and tradition, religion is the preeminent human enterprise that plays this role. (see Nussbaum 2008, Koppelman 2006).

Objection: First, it is not obvious that the search for cosmic significance in meaning in life is valuable at all much less of incomparable value. Perhaps the search for enormous significance in human life reflects illusion or the understandable but unjustified wish of humans to see themselves as central players in a narrative of great importance.

Setting this worry aside, we should resist the idea that religion uniquely or specially or in some quintessentially wondrous way endows our lives with meaning and significance. People find meaning and significance in many ways. Any goal that one regards as worth pursuing can give meaning. Religious doctrines often provide adherents with some ways of making sense of frightening and distressing aspects of the human condition, and these consoling religious ideas, such as an eternal afterlife and transmigration of souls, are highly appealing and resonate with our deepest aspirations and fears. But consolation and solace come in many varieties, many of them secular.

Martha Nussbaum associates the special value in religion with the human capacity to search for ultimate meaning in life, a full account of the place of humans in the cosmos and of how we should live and what is valuable. The capacity is one all humans have, and its exercises merit special respect and solicitude. A related view suggested by Andrew Koppelman asserts that finding the true ultimate meaning of human life has objective value, and hence searching for ultimate meaning is instrumentally valuable, and since the state is appropriately barred from pronouncing on the comparative worth of different methods and strategies for the search for ultimate significance, the reasonable state policy is a blanket support for any and all of them.

Objection: The ensemble of ways of searching for ultimate meaning encompasses astrology, searching for ways to interact with outer space aliens, devoting oneself to a family business, extolling the Mafia, and much else. The proposal under review sweeps too broadly, and would if accepted justify a policy of special protection for a very wide range of activities that no one finds deserving of that status. Moreover, even if the capacity to search for meaning is valuable, it is implausible to think that any exercise of the capacity, good bad, or ugly, has value. If we focus on more narrowly religious exercises of the capacity, taking religion to be whatever is sufficiently similar to paradigm cases of religion such as Christianity, Judaism, Buddhism, Hinduism, and so on, we are back to the question we started with: what makes religion per se specially valuable?

Brian Leiter (2012) denies that religion should be appraised highly, because our ordinary understanding of religion identifies it as inter alia beliefs that are chosen and ratified in epistemically defective ways that fall short of standards of scientific method and moral argument. It seems misleading to define *religion* as a belief system that is epistemically defective. Some religions claim to be rationalist enterprises, and if, for example, we somehow came to decide that Roman Catholicism as defended by St.

Thomas Aquinas is a uniquely rational belief system, we would not cease regarding Roman Catholicism as a religion. But Leiter nonetheless might be correct that religious beliefs as a matter of fact are accepted by their defenders, including sophisticated defenders, on the basis of epistemically suspect reasons that pay little heed to standards of rationality we should embrace.

We seem to be encountering a dilemma. Attempts to explain why religion is special and therefore merits special legal deference either fail to distinguish religion from other types of human practice and activity or if they succeed in identifying what is unique about religion, fail to explain why religion so conceived should be thought specially valuable or meritorious. On either horn of the dilemma, we lack good reason to treat religion as special in a way that justifies deference to it, favoring religion over other interests and concerns of citizens.

6. Conscience should receive deferential treatment.

One strategy of response to the puzzle of understanding why freedom of religion is especially important and merits special legal protection identifies freedom of religion with liberty of conscience and proposes a norm of respect for conscience (see Perry 2007, also Arneson 2010 and 2014).

If conscience is a capacity to form a judgment about what is morally required, prohibited, and permissible, respect for conscience might be thought to manifest itself canonically in willingness to exempt from the requirement to do what is legally required a person whose conscience conflicts with that requirement. Someone who is conscientiously opposed to fighting in wars might be exempted from conscription into military service; someone who is conscientiously opposed to paying income taxes might be excused from the requirement to do so.

One immediate worry is that accommodations of religion that many people support do not involve eschewing the attempt to force people to act against their conscience. Another worry is that accommodations of religion that tend to be provided in current societies are overwhelmingly limited to religious claimants, not a broader category of conscientious objectors.

Moreover, it is far from clear or obvious that the fact that someone conscientiously opposes what law requires him to do is in itself a basis for exempting him from the requirement to obey. We might argue that in a well functioning diverse democracy one should conform one's conduct to legal requirements to which one is conscientiously opposed, unless one reasonably believes that the consequence of acting against one's conscience would be serious violation of some people's important moral rights. In a diverse democracy people will tend to disagree on important moral matters. Conscientious judgments on many issues do not tend to converge. In this situation, there might well be many sets of rules such that enforcing any one of them would be better from everyone's moral standpoint than enforcing none. One loses from being required to conform to rules that offend one's beliefs but gains when others do the same. In this scenario, allowing majority rule to override conscientious judgment as the determiner of what we do can be a fair cooperative practice. Given that we benefit from others suppressing conscience and conforming to majority rule, we should reciprocate when majority rule requires us to act against out own conscience. Here we are going against our first-order conscientious judgment, that just considers the issues on their merits and

ignores what others are doing, but we are conforming to our second-order judgment that does take account of the behavior of others regarding the deliverances of their first-order conscientious judgments.

The cooperative practice of being willing to go along with others when we think they are morally in error for the sake of securing the greater moral gains of coordination is important. But quite apart from this consideration, there is a further question about the fairness of accommodating dissenting conscience by allowing conscientious objectors to avoid the costs of conforming to law. On the face of it, shifting the burdens of compliance with law in the way that the exemption for conscientious objectors does is unfair to those required to bear the burdens of conforming.

If an exemption to the general requirement imposed on citizens to obey the law is sparingly granted, the negative consequences for others may be slight. Since almost all citizens are still required to obey the law, even with the narrow exemption in place, whatever legitimate purposes the law was enacted to achieve will still be fulfilled. Since very few persons are exempted from the law, the consequences of shifting the burdens of compliance on the remaining citizens will be very slight. Yet a problem is evident. Unless there is justification for singling out some people for exemption on a narrow basis, the scheme is unfair. In actual fact, if we take recent history as our guide, the supposedly broad norm of accommodation to claims of conscience will in practice become a narrow norm of accommodation to claims of the religious. This occurs because the courts and other legal agencies granting exemptions can see that a wide interpretation would trigger a deluge of claims and this they want to avoid. So we are left with the initial puzzle: why single out religion for special status, in the form of a disposition on the part of democratic governments to grant exemptions from legal requirements to those who can claim that conforming to the requirements would get in the way of the practice of their religious faith.

7. Equal citizenship?

A perhaps more promising doctrine of religious liberty starts with the idea that the state is obligated to show equal respect and concern to all citizens and refrain from imposing policies that fail to treat all citizens as equal citizens. (For an argument that core liberal ideas require the state to refrain not just from promoting some controversial religious views but more broadly from promoting any controversial views as to what is intrinsically valuable in life, see Quong 2011.) The claim then is that a generous doctrine of accommodation if religion is required to show equal respect and concern to religious adherents along with other citizens and to avoid imposing policies that treat some as second-class citizens.

Laws and other state directives that single out particular religious doctrines or their adherents for disfavored treatment are plausibly ruled out by equal respect and concern. For example, a law that offers a benefit to all citizens except Lutherans would be treating Lutherans as second-class citizens. So would a law that was crafted to disfavor Lutherans specifically without referring to them by name.

The rub here lies in our interpretation of the requirement to disparage none and treat all as equal citizens. This requirement is said to apply to the state and to individuals insofar as they seek to influence state policies. Assume the requirement, suitably

interpreted, is acceptable. Without attempting a full interpretation of the requirement, we should accept these constraints on any plausible construal.

First, the fact that a state policy with its justification conflicts with some moral or empirical belief one holds is false does not in itself qualify the policy as failing to treat one with equal respect or denying that one has the status of equal citizen. For example, if my religion tells me that whites are the superior race and good jobs and positions of authority should be reserved for whites only, a state policy that forbids discrimination on the basis of race in employment and assignment to public office opposes my belief. Religious doctrines take clear and substantive stands on a raft of empirical and moral questions, and many of these doctrines are flatly opposed to scientific consensus and any reasonable moral principles.

Second, that the law benefits some citizens more than others, including me, or benefits some and imposes disadvantages on others, including me, does not automatically indicate that I am being disparaged, treated as less than equal. In a pluralistic democratic society, majority will routinely ends up favoring some and disfavoring others. If we pass banking regulations, some bank stockholders and bank customers may lose, and others may gain. Even if we hold that government should be neutral as between controversial ways of life and conceptions of the good, this neutrality norm does not plausibly require that each government action must be neutral in its effects, bringing about exactly the same net benefit for all citizens who might be affected. So the sheer fact that an otherwise acceptable law happens to bring about worse consequences for those trying to practice Methodism than for others should not in itself raise red flags of warning that something is amiss. However, whenever law pinches some with extra severity, there is the possibility that an accommodation for those especially burdened may be justified.

8. Accommodation: the welfare approach.

Law is a blunt instrument of social control. Legal rules will employ fairly coarse-grained distinctions, and rightly so, because in many settings the attempt to make the law more nuanced and more closely in conformity to what is morally right would create a fine-grained rule that is difficult and costly to administer, with predictably worse results as assessed from the standpoint of moral principle. So consider a law that is appropriately coarse-grained. For purposes of illustration, let us just assume that a law that prohibits suicide and assisted suicide is morally acceptable, because most suicides are wrong in virtue of bringing about bad consequences for the person who kills herself or for other affected persons. If someone says "I want to kill myself," you hand the person a loaded gun, with the intention of facilitating the person's killing himself, and the person shoots himself and dies, you should be criminally liable for the death. Nonetheless some suicides are surely permissible and some may even be morally required, and assisting someone to commit suicide reasonably may be morally permissible or required.

The mechanism of enforcement of law can provide needed flexibility for such cases. A citizen who witnesses a legally prohibited assisted suicide may decline to report the incident to the authorities; a policeman who witnesses such an event may decline to make an arrest; if an arrest is made, a prosecuting attorney may decline to prosecute; and if a trial is held, a jury can vote to acquit even if the facts of the case and applicable law indicate a guilty verdict is called for. Such discretion can go awry, but

can also improve the degree to which the legal system protects rights and advances the general welfare.

Even a perfectly fine-grained legal rule tuned with exquisite sensitivity to moral requirements might place greater burdens on some citizens asked to conform to the rule. But consider the broad range of cases in which the achievement of a collective good requires costly conformity to rule, and conformity is far more costly for some citizens, who might be excused from this requirement with little or no loss of achievement of the collective good. In such cases the law is more fair if it bends in one way or another to allow those specially burdened the freedom not to comply. This is accommodation of those specially burdened. The law against assisted suicide induces a morally better outcome if it allows physicians to assist the suicide of those who face painful terminal illness or a devastating chronic medical problem that makes continued life a punishment for self and others. Or consider a legal rule that forbids swimming after dark at the sole local swimming hole, in its application to a handicapped disfigured strong swimmer who very much values the activity of swimming but unavoidably finds it psychologically very hard to swim at a public beach in daylight. He should be allowed to swim at night. In all cases the metric for assessing an accommodation claim is the degree to which the person seeking accommodation, compared to others, would suffer a welfare loss if it is not granted, balanced against the degree to which either (1) the ends of the law are less fulfilled or (2) the burdens on those expected to conform to law are increased, if the exemption is granted.

So far we have been considering informal accommodation, but sometimes a degree of formality is helpful. Confronted with a legal ban on nude swimming on public beaches and a well-known proclivity of nudist enthusiasts to frolic without clothes on a certain remote beach, the police may announce publicly that they will devote zero resources to enforcing the nudity ban at that particular beach. But there might also be a court-ordered rule or an exemption written into a statute by lawmakers. (These maneuvers make the law more fine-grained and possibly more difficult to administer, but without triggering prohibitive practical difficulties.)

For any accommodation, the question arises, is it fair. It may be unfair to single out one class of persons and not others from exemption. Granting an exemption to some may also increase the burdens of compliance with law on others, and this can be unfair. The welfare accommodation account just outlined provides a framework, not a formula for resolving these issues. The suggestion then is that religious interests and concerns as such should get no special priority or privilege in the determination of whether any accommodations should be made with respect to the enforcement of any particular law. In the determination as to whether an otherwise acceptable law unduly pinches some who fall within its scope by imposing disproportionate burdens of welfare loss on them, religious interests and nonreligious interests should be treated evenhandedly.

9. Religious accommodation.

The approach to accommodation outlined here can be compared to other approaches to accommodation of religion advanced by legal and political theorists. I focus attention on discussions concerned to interpret the religion clauses of the First Amendment of the U.S. Constitution, but readers should keep in mind that our topic is

what morality requires, not what the U.S. Constitution or any other country's written constitution is best interpreted as asserting.

At some time in the past the U.S. Supreme Court seemed to be committed to a position that singles out religious freedom as taking special priority. On this view, a citizen can successfully claim entitlement to accommodation in the form of exemption from the requirement to obey an otherwise applicable law if she can show that (a) that the law applied to her imposes substantial burden on the free exercise of her religion and (b) no compelling state interest opposes granting her an exemption. If there are few religious claimants, the degree to which the law's purposes are fulfilled would typically be only slightly lessened if exemption is granted, so a compelling state interest opposing the granting the exemption sought will rarely be identifiable. The manifest problem with this approach is that it puts a heavy thumb on the scale favoring citizens with religious commitments and religious interests over other citizens, and this is unfair.

A hypothetical example of a case in which accommodation to facilitate religious freedom would likely be acceptable according to the approach to accommodation endorsed in this chapter may help to show where lines of controversy emerge. Imagine that there is a public school system in place funded by general tax revenue, and the public school system operates alongside privately funded and operated schools. Suppose the privately funded schools are either exclusive schools attended by the children of wealthy parents or religious schools. The curricula of all private schools are vetted and regulated by the state to ensure all children receive adequate education. The nonwealthy parents who want to provide religious schooling for their children complain that the requirement to pay tuition and fees for religious schools and also to contribute as taxpayers to the public school system poses a special onerous burden on them, which neither wealthy parents placing their children in nonreligious private schools nor parents sending their children to public schools have to bear. They ask for either state contributions to tuition payments paid by parents sending their children to religious schools or tax relief from the full burden of contributing to the public school system (Galston 2002, Macedo 1995). This claim on its face has merit.

One might endorse aid to religious schools or a voucher system to the same effect without accepting the idea that parents have a right to determine the content of their children's education. Parents generally have a strong right to raise their children as they see fit so long as the parents are adequately competent. These parental rights must be balanced against independent rights of children. Prominent among these rights is the right of each child to be educated in ways that expose her to alternative perspectives on the world and that give her the capacity to think critically and independently about the beliefs instilled into her by others including her parents. Parents have rights to indoctrinate their children into their own favored beliefs, but children have rights to be trained and socialized in ways that equip them to seek the truth by their own lights. Along the same line, each child has the right to be trained into general purpose skills that will help her to flourish in any of a wide variety of plans of life that she might as an adult choose for herself.

What exactly the child's right to independence requires by way of state assistance is not obvious and clearly varies with circumstances. One boundary line is evident in the case of *Wisconsin v. Yoder*. In that case the parents of a religious sect demanded exemption from a state law requiring attendance at school by all children through the age

of sixteen. The parents claimed that attendance at secondary school would reduce the prospects that the child would eventually maintain allegiance to the religious sect community and would interfere with the religious community's efforts to socialize adolescents into community sect loyalty. The child's right to independence and an open future should have trumped these considerations and brought about denial by courts of this demand for religious accommodation. In the same way, a demand by nonreligious farming parents that their children be excused from secondary school attendance in order to increase the child's willingness and ability to work as adults on the family farm does not add up to a justified claim for exemption from applicable state law.

Some examples that might be construed as religious accommodation cases are better understood as free speech cases, with the understanding that religious speakers have the same free speech rights as anyone else. Consider compelled speech in public schools, by way of such practices as compulsory saluting of the national flag in the classroom and compulsory recitation of a Pledge of Allegiance affirming loyalty to the nation's basic political arrangements. Freedom to speak as one wishes on matters of public concern includes the right not to speak at all, and a fortiori not to speak in favor of views one rejects. Hence it would be wrong to force or pressure adult citizens to salute the flag or recite a pledge of allegiance. What about children? Children lack the full free speech rights of adults, but gradually acquire some rights of freedom of expression as they grow older. It would be wrong to prevent high school age children from having some opportunity to express their views on controversial matters in the school setting, by speech and also symbolic means such as wearing pins or medallions or shirts with slogans printed on them. Some residue of free speech rights attaches even to primary school youngsters, mainly rights not to be compelled to engage in speech or symbolic acts with speech content against their convictions.

Consider now another range of cases. If state law forbids consumption of LSD, peyote, mescaline, and other hallucinogenic drugs, should an exemption be granted to members of a religious sect whose central church rituals revolve around consumption of some hallucinogenic drugs? (See Marshall 2000, Galston 2002.) The example is perhaps clouded by initial doubts that there could be a reasonable justification of any law along these lines in the first place. Let us set this concern to the side, as irrelevant for our purposes. The welfare accommodation approach would not rule out the possibility that accommodation could be justified, but would rule out favoring the religious by granting an exemption to the law for those who need (say) peyote for religious ceremonies while denying an exemption for those who need peyote for serious enhancement of nonreligious activities (such as climbing or surfing). If widening the exemption would be too costly or destructive of the law's purposes, and no nonarbitrary narrowly crafted exemption can be devised, there should be no exemptions, and certainly not a special exemption just for the religious claimants.

The welfare accommodation approach might prompt the objection that it is fatally tone-deaf to the special nature of claims of conscience and improperly assimilates them to concerns about people's welfare or well-being. The objection would be that it is not that one would be worse off in self-interested terms if one acts against conscience, but that acting against conscience is wrongful behavior, destructive of one's integrity, and the state should make every effort to avoid presenting its citizens with the choice of acting

against conscience or being forced with serious criminal penalties for violation of the state's law.

This objection raises issues already discussed in this chapter. Roughly, if the state forbids an act that is permissible or even morally obligatory, this is wrong (sometimes horrendously wrong) and a serious violation of the autonomy of the citizen whose chosen course of action is forbidden. If the state forbids what is anyway wrongful (e.g., theft or murder), and this prohibition conflicts with the individual's conscientious judgment, the affront to autonomy should have no weight on the scales. If the state forbids what would be permissible except for the state's scheme, including prohibition, to advance some legitimate purpose, the issue is more subtle. However, if the state's plan including coercion is morally acceptable, the sheer fact that one conscientiously disagrees is not a reason to exempt one from the requirement. Conscientious objection to a law might in some cases reasonably prompt supporters of the law to lessen their degree of confidence in its justification, but sometimes is not always.

We do all have a general interest in living by our own lights and being guided by our own views of what is right and good and appropriate and what strikes our fancy (so coercion always requires a justification). Being confronted with a conflict between the state's commands and one's conscience presents one with a messy and unpleasant situation, which anyone would reasonably prefer to avoid. If a grievous and especially aggravating situation of this sort can be avoided by minor adjustment on the part of others, at small cost to them, this is an accommodation the others ought to extend. This welfarist reading of the generic case for accommodation does not in any obvious way make hash of claims of conscience.

Christopher Eisgruber and Lawrence Sager (2007) propose an interpretation of religious liberty as demanded by the U.S. Constitution that is in some respects close to the welfare accommodation approach this chapter is defending. (Recall, our issue is not what this or that country's constitution asserts, but what morality requires. So the concern of this chapter and the issue that Eisgruber and Sager are addressing are different.) Let us imagine that someone might propose that the U.S. Constitution as interpreted by Eisgruber and Sager gets it right so far as the morality of religious liberty is concerned. Whether or not they are right as a matter of constitutional interpretation, what they propose might be right as a claim about political morality—what we owe to one another by way of uses of state power.

Their suggested approach has three components. One is the insistence that religious people like others have robust rights of free speech and expression, freedom of association and assembly, and other basic civil liberties. We should agree with them on this point. A second component in their view is that "no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects. Religious faith deserves special constitutional solicitude in this respect, but only because of its vulnerability to hostility and neglect" (2007, 52). The third component is a claim that government should be neutral in its treatment of citizens' religious and nonreligious concerns—that is to say, apart from concern to prevent religious discrimination, "we have no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities" (Ibid.).

Regarded as a claim about how a decent society should set its political arrangements, the nondiscrimination or "no devaluation" view is appealing but

problematic. A decent society seeks to regulate its affairs according to what is truly just and right. The just state does not aspire to be neutral between correct and incorrect views about what ways of treating people are fair and unfair and what life outcomes for people are advantageous and disadvantageous for them. Nor can the just state be neutral between empirically adequate and empirically inadequate views as to what the actual and likely consequences will be of the policies it might enact. Religions pronounce on these matters. Insofar as religious views dovetail with our best accounts of what is right and good, the laws and public policies of a just state will not conflict with religious views. Insofar as the state succeeds in enacting just policies, and these conflict with religious doctrines, in a clear and obvious sense the state does devalue or disparage these views.

We need to be careful to avoid a sort of Orwellian doublespeak here that pretends that religious people who experience state policies as hostile to their cherished beliefs are simply mistaken or confused (see Smith 1995 and 2001 for a sympathetic account of the plight of the religious under a secular constitutional regime). For example, if my religion tells me that whites are the superior race and good jobs and positions of authority should be reserved for whites only, a state policy that forbids discrimination on the basis of race in employment and assignment to public office opposes my belief. If my religion tells me that God created the world in six days, a public school curriculum that includes a scientifically sound biology class puts the weight of state authority against my religious belief. Religious doctrines take clear and substantive stands on a raft of empirical and moral questions, and many of these doctrines are flatly opposed to scientific consensus and any reasonable moral principles.

Moreover, a society that eschews endorsing particular or generic religious claims and does not eschew endorsing particular moral and scientific claims in effect has embraced a secular establishment. Its treatment of religious and nonreligious claims is asymmetrical and nonneutral. From the religious believer's point of view, not only does the state refrain from endorsing particular religious views that she regards as true and of the greatest importance for our lives, the state also implicitly or explicitly rejects the methods that she considers appropriate for discerning the fundamental truths that we must accept in order to live well. These methods include absorption of divine revelation as recorded in a sacred book authenticated by one's religious tradition, and as plumbed by interpretations of its message, along with introspection and meditation on one's own religious experiences. They are given no credence whatsoever in the public culture of a secular society striving to be just.

10. Conclusion.

The argument of this chapter may seem to have come full circle in a disastrous way. Its starting point is that religious liberty is violated by state establishment of religion—the state's endorsing some religious doctrine or favoring adherents of some religious doctrines over others. But we added that religious liberty is not violated if—a big if—the state's laws and other directives enact justice (are justified by correct moral principles), even if just laws make it more burdensome for people to live according to their religious faith. Doesn't this amount to embrace of unfair state establishment of secular humanism or atheist morality or the like? Is the suggestion supposed to be that secular ideas are privileged as possibly acceptable justifications for state laws whereas religious doctrines are ruled out as inadmissible? Why would this be fair?

Some respond to this worry by maintaining that state power should be used only in ways that are justifiable from any reasonable citizen's standpoint, be it religious or nonreligious (Rawls 1996, Weithman 2010). The trick in carrying out this strategy successfully would be to identify uncontroversial and consensual justifications of policies that meet this constraint without ruling out as inadmissible policies that surely ought to be established and enforced (no slavery, no totalitarian intrusions on privacy, no discrimination on the basis of race or skin color). The suggestion advanced in this chapter is that only secular moral ideas will be suitable bases for state policies—not any and all such ideas, only correct ones, or ones that in our present state of moral knowledge are singled out as most likely to be correct. The suggestion licenses a form of secular establishment. But the claim that only certain secular moral ideas are picked out by the balance of moral reasons properly weighed is just an assumption we have made, not a claim we have tried to support by argument. Reason goes where it goes. So far as the arguments of this chapter go, it could turn out to be the case that some particular religious doctrine—for example, some version of evangelical Christianity or the Sunni Moslem faith—is singled out as correct by the balance of reasons properly weighed (for skeptical arguments against theistic claims see Mackie 1982). If so, the correct religious liberty doctrine would scrap no-establishment while still embracing religious liberty in the form of toleration (wide civil liberties for all, including adherents of any and all faiths and doctrines). In the same spirit, we should conclude by noting that the acceptability of the welfare accommodation approach to the problem of whether to make special legal provision so state laws do not prevent people from living according to the dictates of their religious faith depends on arguments, which we have not tried to supply, showing that this approach is supported by decisive moral arguments and required by justice rightly understood.

References

Arneson, Richard. 2010. 'Against freedom of conscience,' *San Diego Law Review* 47: 1015-1040.

Arneson, Richard. 2014. 'Political liberalism, religious liberty, and religious establishment,'in The Role of Religion in Human Rights Discourse*,* Hanoch Dagan, Shafar Lifshitz, and Yedidia Z. Stern, eds, 117-144. Jerusalem: Israel democracy Institute.

Audi, R, 1989, 'The separation of church and state and the obligations of citizenship,' *Philosophy and Public Affairs* 18: 259-296.

Dworkin, Ronald. 2013. Religion without God. Cambridge, MA: Harvard University Press.

Eisgruber, Christopher L., and Sager, Lawrence G. 2007. Religious Freedom and the Constitution. Cambridge, MA: Harvard University Press.

Estlund, David. M. 2008. Democratic Authority: A Philosophical Framework. Princeton: Princeton University Press.

Galston, William G. 2002. Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice.

Greenawalt, Kent, 2006. Religion and the Constitution, vol. 1, Free Exercise and Fairness. Princeton and Oxford: Princeton University Press.

Greenawalt, Kent. 2008. Religion and the Constitution, vol. 2, Establishment and Fairness. Princeton and Oxford: Princeton University Press.

Koppelman, Andrew. 2006. 'Is it fair to give religion special treatment?,' *University of Illinois Law Review* 571:

Greene, Abner S. 1993. 'The political balance of the religion clauses, *Yale Law Journal* 102: 1611-.

Koppelman, Andrew. 2013. Defending American Religious Neutrality. Cambridge, MA: Harvard University Press.

Leiter, Brian. 2012. Why Tolerate Religion?. Princeton: Princeton University Press.

Macedo, S, 1995, 'Liberal civic education and religious fundamentalism: the case of God v. John Rawls, *Ethics*, vol. 105

Mackie, J.L. 1982. The Miracle of Theism: Arguments for and against the Existence of God. Oxford: Oxford University Press.

Marshall, William P., 2000, 'What is the matter with equality? An assessment of the equal treatment of religion and nonreligon in first amendment jurisprudence,' *Indiana Law Journal* 75: 193-217.

McConnell, Michael W. 1990. 'Free exercise revisionism and the *Smith* decision,' *University of Chicago Law Review*, vol. 57, pp. 1109-1153.

McConnell, MW. 1992 'Religious freedom at a crossroads,' *University of Chicago Law Review,* vol. 115

Nussbaum, M. 2008. Liberty of Conscience: In Defense of America's Tradition of Religious Liberty. New York: Basic Books.

Nussbaum, Martha. 2011. 'Political liberalism and perfectionist liberalism,' *Philosophy and Public Affairs* 39: 3-45.

Patten, Allen. 2012. 'Liberal neutrality: a reinterpretaion and defense,' *Journal of Political Philosophy* 20: 249-272.

Perry, Michael J. 2007. Toward a Theory of Human Rights: Religion, Law, Courts. Cambridge: Cambridge University Press.

Quong, Jonathan. 2011. Liberalism without Perfection. Oxford: Oxford University Press.

Rawls, John. 1996. Political Liberalism. New York: Columbia Press.

Smith, Steven D. 1995. Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom. Oxford: Oxford University Press.

Smith, Steven D. 2001. Getting over Equality: A Critical Diagnosis of Religious Freedom in America. New York: New York University PresO.

Weithman, Paul. 2010. Why Political Liberalism? On John Rawls's Political Turn. Oxford: Oxford University Press.