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## Neutrality and the religion analogy

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Neutralitarian liberalism, which holds that the state should be neutral toward controversial conceptions of the good, is often defended as a generalization from religious liberty. The analogy misapprehends the core case upon which it is based. The American tradition of freedom of religion itself rests on a controversial conception of the good: the idea that religion is valuable and that legal rules should be crafted for the purpose of protecting that value.

Disestablishment of religion entails a *kind* of neutrality toward *certain* contested conceptions of the good. The state may not favor one religion over another. It also may not take a position on contested theological propositions. The justification of this neutrality, however, is not itself neutral. Free exercise and disestablishment, at least in the United States, are both devices for promoting religion. Perhaps that exercise of state authority is unjust to nonreligious views, but the case for holding it to be so can find no support in the tradition of religious toleration.

In neutralitarian liberalism, religion disappears as a category of justification for rules of law. The state's task is to provide citizens with all-purpose goods that enable them to exercise their moral powers. Religious activity is merely one

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of many ways of exercising those powers. Singling out religion for special treatment is thus arbitrary and unfair.

This way of thinking has led many contemporary theories of religious liberty to identify some substitute for "religion" as the appropriate category of protection - comprehensive conceptions of the good, beliefs central to one's identity, or something else that isn't a contested idea of what's good. The most commonly cited substitute is conscience. This transformation fails to capture settled American intuitions about religious liberty. That failure suggests that perhaps neutralitarianism cannot achieve reflective equilibrium.

This paper's aim is modest. It describes the status quo of American religious neutrality that these writers hope to upend and sketches some of its attractions. Those attractions are not a conclusive refutation of neutralitarianism. But any case for neutralitarianism must reckon with them, and none of these writers do that. I close with some reflections on why these weak arguments have persuaded so many people.

## 1. The Religion Analogy

John Rawls claimed that the "intuitive idea" of his theory was "to generalize the principle of religious toleration to a social form."<sup>1</sup> Other exponents of liberal neutrality have described their project in similar terms. Bruce Ackerman: "The first principle [of Neutrality], a generalization of the Establishment and Free Exercise clauses of the Constitution, forbids citizens from justifying their legal rights by asserting the possession of an insight into the moral universe intrinsically superior to that of their fellows."<sup>2</sup> David Richards: "the moral basis of the free exercise clause, properly understood, is a negative liberty immunizing from state coercion the exercise of the conceptions of a life well and ethically lived and expressive of a mature person's rational and

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<sup>1</sup> See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971; revised ed., 1999), 206 n./180n. rev.; see also *ibid.* 220/193 rev. ("the principle of equal liberty . . . which arose historically with religious toleration can be extended to other instances."); John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 154 ("were justice as fairness to make an overlapping consensus possible it would complete and extend the movement of thought that began three centuries ago with the gradual acceptance of the principle of toleration and led to the nonconfessional state and equal liberty of conscience.").

<sup>2</sup> Bruce Ackerman, *Reconstructing American Law* (Cambridge: Harvard University Press, 1984), 99 (footnote omitted).

reasonable powers.”<sup>3</sup> Charles Larmore: “Liberalism . . . depends on moral commitments, but on ones that are neutral with respect to the general ideals of individualism and tradition. . . . It becomes again what it was in early modern times with regard to religious controversy: an appropriate response to the problem of reasonable disagreement about the good life.”<sup>4</sup> Gerald Gaus: “liberal political theory removes certain proposals from the political agenda, not simply on the practical ground that they are too divisive, but because they have been defeated in public discussion. This liberal conviction – that impositions of religion were defeated – evolved into a more general conviction that justifications for imposing ways of living were also defeated.”<sup>5</sup> Sonu Bedi: “Religious neutrality constitutes a specific commitment to the more general principle of liberal neutrality.”<sup>6</sup>

In what does the generalization consist? One succinct answer is stated by Ronald Dworkin. Freedom of religion must consist in “some particularly important interest people have, an interest so important that it deserves special protection against official or other injury.”<sup>7</sup> There is, however, no such interest that exclusively attaches to theistic religion. “So we must expand that right’s scope to reflect a better justification.”<sup>8</sup> How? One can try to expand the definition of religion, but then its outer boundaries are uncertain. A better solution is “abandoning the idea of a special right to religious freedom with its high hurdle of protection and therefore its compelling need for strict limits and careful definition.”<sup>9</sup> Instead, we should endorse a more general right to “ethical independence,” which “means that government must never restrict freedom just because it assumes that one way for people to live their lives – one idea about what lives are most worth living just in themselves – is intrinsically better than another, not because its consequences are better but because people who live that way are better people.”<sup>10</sup> Religious liberty is an imperfect

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<sup>3</sup> David Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986), 140.

<sup>4</sup> Charles Larmore, *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996), 144.

<sup>5</sup> Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (New York: Oxford University Press, 1996), 170.

<sup>6</sup> Sonu Bedi, *Beyond Race, Sex, and Sexual Orientation: Legal Equality Without Identity* (Cambridge: Cambridge University Press, 2013), 83.

<sup>7</sup> Ronald Dworkin, *Religion Without God* (Cambridge: Harvard University Press, 2013), 111.

<sup>8</sup> *Ibid.*, 117.

<sup>9</sup> *Ibid.*, 132.

<sup>10</sup> *Ibid.*, 130.

anticipation of this right. "We know why, historically, the right was expressed as limited to religion, but we insist that we make the best contemporary sense of the right, and supply the best available justification for it, by taking religious tolerance as an example of the more general right."<sup>11</sup>

This is not much of an argument: one option is summarily rejected and a different one substituted with no attention to the rest of the menu. Neglect of the menu is doing a lot of work, not only in Dworkin but for the other neutralitarians as well.<sup>12</sup>

## 2. The limits of generalization

What does it mean to generalize from a practice? One may, perhaps, state a principle that is consistent with the practice, and that can govern future practice. This way of understanding the practice of justification is however indeterminate. Any practice, understood merely as a pattern of behavior, is likely to be consistent with more than one principle. The requirement that the principle fit the practice does not tell us which of these principles we should choose.

The problem is familiar to lawyers. If you are clever enough, you should be able to think of a principle that (1) is consistent with the precedents and (2) entails that your client wins. Judges who are presented with such arguments on both sides must choose a principle on some basis other than consistency with the outcomes of past cases. Political philosophy thus inevitably is part of adjudication. Judges decide cases by developing the best moral and political theory that is consistent with the precedents, or most of them.<sup>13</sup>

What good is precedent, then? One reason for following past practices is that they have a point. It is possible that the point will not be clear to us until we have engaged in, and reflect upon, the practice. The appropriate principle, then, will articulate the point of the practice.

If however more than one principle is consistent with the practice, then if we choose the wrong principle, we may block the goals that animated the core case. Consider the following dialogue:

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<sup>11</sup> Ibid., 133.

<sup>12</sup> Dworkin thinks the "great difficulty in defining the scope of [the] supposed moral right" to religious freedom is dispositive against it. Ibid., 129. As I explain below, the difficulty of definition is a feature, not a bug.

<sup>13</sup> Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

THEORIST: You weed that garden of yours with great skill. You pull the weeds up by the roots, and you manage to yank a lot of them very quickly.

GARDENER: Yes, I've been doing this for a long time.

THEORIST: I'd like to propose a generalization of your practice. Every time you pull up a weed, you kill a plant. Your animating principle, then, evidently is Plants Must Die. If you really want to be consistent with the principle that is implicit in your practice, you ought to clear your entire property with fire and infuse the soil with toxic chemicals so that nothing can grow there again. That would generalize from your practice of weeding.

GARDENER: Get away from my plants, you ninny.

Theorist cannot legitimately enlist the authority of the core case of weeding to support his scheme, because he doesn't understand the point of that core case. His herbicidal principle is somewhat consistent with Gardener's behavior (though it can't account for the selectivity of the weeding, which it must regard as an error). It is however a bad interpretation of Gardener's practice.

Religious liberty has two dimensions, individual and social - classically corresponding with free exercise and disestablishment. Consider the classic arguments for each. I'll focus on John Locke's. Can they be generalized to support neutralitarianism?

A classic argument for both is civil peace: Locke was writing in response to nasty wars of religion. But we already have civil peace without neutralitarianism.<sup>14</sup> So we must look to more specific arguments.

In defense of free exercise, Locke argued that law could not compel religion, because "true and saving Religion consists in the inward perswasion of the Mind, without which nothing can be acceptable to God. And such is the nature of the Understanding, that it cannot be compell'd to the belief of anything by outward force."<sup>15</sup> Not only is this argument religion-specific; it presumes a distinctly Protestant conception of religion. What analogue could there be for conceptions of the good? Dworkin understands that, if one were going to generalize from this to a rule that "people have a right in principle to the free exercise of their profound convictions about life and its responsibilities," that special rights would attach to "all passionately held conviction." The

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<sup>14</sup> See Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), 152-86.

<sup>15</sup> John Locke, *A Letter Concerning Toleration*, ed. James H. Tully, tr., William Popple (Indianapolis: Hackett, 1983) (1689), 27; cf. *ibid.*, 38-39.

trouble is obvious: "no community could possibly accept that extended right."<sup>16</sup> Neutralitarianism is indifferent to the impact of laws so long as its constraint is respected in those laws' justification.

It might be possible to expand Locke's claims to some *subset* of passionately held conviction that was deemed, like religion, to have intense personal significance and the value of which is likely to be opaque to the state. But that would require some procedure for specifying the contents of that subset. More on this anon.

Now consider disestablishment. One of its principal rationales, anticipated in Locke, is the state's incompetence in religious matters: "The one only narrow way which leads to Heaven is not better known to the Magistrate than to private Persons," Locke wrote, "and therefore I cannot safely take him for my Guide, who may probably be as ignorant of the way as my self, and who certainly is less concerned for my Salvation than I my self am."<sup>17</sup> This argument, too, is religion-specific. It would be hard to reconstruct it so that it entails neutralitarianism. The state is not incompetent to determine anything about the human good.<sup>18</sup>

The state may not be able to force the universal embrace of religious truth, but it can facilitate citizens' coming to see some ends as good. That result is hardly a futile aim. Rather, it is inevitable. The point has been put nicely by, of all people, Rawls: "the basic structure of a social and economic regime is not only an arrangement that satisfies given desires and aspirations but also an arrangement that arouses further desires and aspirations in the future."<sup>19</sup> Given that "the various contingencies of social life affect the content of people's final ends and purposes, as well as the vigor and confidence with which they pursue them,"<sup>20</sup> it is legitimate for political planners to try to shape those contingencies. People's preferences are inevitably shaped in nonrational ways by their environment.<sup>21</sup> George Sher asks, "exactly what is

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<sup>16</sup> *Religion Without God*, 117.

<sup>17</sup> Locke, *A Letter Concerning Toleration*, 37.

<sup>18</sup> See George Sher, *Beyond Neutrality: Perfectionism and Politics* (Cambridge: Cambridge University Press, 1997), 140-55.

<sup>19</sup> John Rawls, *Lectures on the History of Moral Philosophy*, ed. Barbara Herman (Cambridge: Harvard University Press, 2000), 367.

<sup>20</sup> *Ibid.*

<sup>21</sup> For a catalogue of the ways in which this occurs, see Cass R. Sunstein and Richard H. Thaler, "Libertarian Paternalism is Not an Oxymoron," *U. Chi. L. Rev.* 70 (2003): 1159-1202.

disrespectful about taking (benign) advantage of a causal process that would occur anyway?"<sup>22</sup>

In short, while Locke's arguments could be revised to entail a somewhat neutralitarian right of free exercise, no comparable move is possible with respect to disestablishment.

### 3. The American way

American First Amendment doctrine has used "neutrality" as one of its master concepts,<sup>23</sup> but it treats religion as a good thing. Its neutrality is its insistence that religion's goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute. It holds that religion's value is best honored by prohibiting the state from trying to answer religious questions.<sup>24</sup>

Religion, as such, is routinely given special treatment. Quakers' and Mennonites' objections to participation in war have been accommodated since Colonial times. Such accommodations are ubiquitous and very popular. Americans like religion, even minority religions. When Congress enacted the Religious Freedom Restoration Act (RFRA), which required states to grant such exemptions, the bill passed unanimously in the House and drew only three opposing votes in the Senate.<sup>25</sup> After the Supreme Court struck down the Act as exceeding Congress's powers, many states passed their own laws to the same effect.<sup>26</sup> RFRA remains valid as applied to federal law.

Disestablishment, too, is based on a judgment that religion is especially valuable. One of its central purposes has always been protecting religion from corruption by the state.<sup>27</sup> James Madison, the principal author of the First Amendment, argued that

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<sup>22</sup> Sher, *Beyond Neutrality*, 73.

<sup>23</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985); *Rosenberger v. Rectors of University of Virginia*, 515 U.S. 819, 839-46 (1995); *McCreary County v. ACLU*, 545 U.S. 844, 860, 874-81 (2005).

<sup>24</sup> The description of American law that follows is adapted from my *Defending American Religious Neutrality* (Cambridge: Harvard University Press, 2013), where the claims herein are documented in greater detail.

<sup>25</sup> Michael W. McConnell, "Institutions and Interpretation: A Critique of *City of Boerne v. Flores*," *Harv. L. Rev.* 111 (1997): 160.

<sup>26</sup> For a survey, see Douglas Laycock, "Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty," *Harv. L. Rev.* 118 (2004): 211-12 & nn.368-73.

<sup>27</sup> See *Defending American Religious Neutrality*, 46-77; Andrew Koppelman, "Corruption of Religion and the Establishment Clause," *Wm. & Mary L. Rev.* 50 (2009): 1831-1935.

experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.<sup>28</sup>

The same theme turns up in numerous Supreme Court opinions. Just one example: the Court's declaration in *Engel v. Vitale*<sup>29</sup> that under the Establishment Clause, "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."<sup>30</sup>

It is, of course, possible to conceptualize disestablishment more abstractly than this. That is what the neutralitarians propose to do. But that more abstract understanding of disestablishment radically transforms its purpose. It also is the death of free exercise, which is predicated on an understanding of religion as distinctively valuable.

In short, if the state must be neutral toward all competing conceptions of the good, then the prevailing conceptions of both disestablishment and free exercise must be discarded. Both rest on the premise that religion as such is good.

#### 4. "Religion" as a proxy

Just what is it that the law is favoring? And why does it do that?

The concept of "religion" is fuzzy at its core. Religion is not a natural kind. Any definition will leave some instances out. American law once attempted to offer definitions. It has now given up. Two cautionary examples: In 1890, the Supreme Court declared that religion consisted in "one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."<sup>31</sup> In 1931, Chief Justice Hughes referred to "belief in a relation to God involving duties superior to those arising from any human relation."<sup>32</sup> The Court has abandoned these

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<sup>28</sup> James Madison, "Memorial and Remonstrance Against Religious Assessments" (1785), in *The Writings of James Madison*, ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1901), v. 2, 187.

<sup>29</sup> 370 U.S. 421 (1962).

<sup>30</sup> *Ibid.*, 431-32, quoting Madison, "Memorial and Remonstrance."

<sup>31</sup> *Davis v. Beason*, 133 U.S. 333, 342 (1890).

<sup>32</sup> *United States v. McIntosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting).



formulations, because they exclude nontheistic religions such as Buddhism.<sup>33</sup> As religious diversity has grown, the legal category of religion has become increasingly capacious.<sup>34</sup>

The closest the Court has come to defining the term is a pair of Vietnam draft exemption cases. Both involved claimants who conscientiously objected to war, but who would not avow belief in God. The Court responded with a functional account of religion, holding that the question a court must answer is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."<sup>35</sup> It explained that the pertinent objection "cannot be based on a 'merely personal' moral code," but it gave no example of the line that it was drawing. These were statutory interpretation cases, only tangentially related to the constitutional issue: two concurring opinions declared that if the statute were read less broadly, it would violate the establishment clause.<sup>36</sup> Since then the Court has offered no further clarification of what it means by "religion." Nor do any of the relevant statutes attempt a definition.

This vagueness is not inappropriate.

The best modern treatments of the definition problem have concluded - following Wittgenstein - that no dictionary definition of religion will do, because no single feature unites all the things that are indisputably religions. Religions just have a "family resemblance" to one another. In doubtful cases, one can only ask how close the analogy is between a putative instance of religion and the indisputable instances.<sup>37</sup> (Lest one think that the neo-Wittgensteinian approach advocated here is an artifact of academic preciousness, note that an analogical

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<sup>33</sup> See *Torcaso v. Watkins*, 367 U.S. 488 (1961).

<sup>34</sup> *Defending American Religious Neutrality*, 26-42.

<sup>35</sup> *United States v. Seeger*, 380 U.S. 163, 166 (1965).

<sup>36</sup> *Ibid.*, 188-93 (Douglas, J., concurring); *Welsh v. United States*, 398 U.S. 333, 344-67 (1970) (Harlan, J., concurring in the result).

<sup>37</sup> See, e.g., Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness*, v. 1 (Princeton: Princeton University Press, 2006), 124-156; William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (New York: Oxford University Press, 2009), 57-122. Courts in Europe have done no better in devising a definition. Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2d ed. (Oxford: Oxford University Press, 2013), 139-56. Indeed, no jurisdiction in the world has managed to solve this problem. See T. Jeremy Gunn, "The Complexity of Religion and the Definition of 'Religion' in International Law," *Harv. Hum. Rts. J.* 16 (2003): 189-215.

criterion is also used by that singularly hardheaded entity, the Internal Revenue Service.)<sup>38</sup>

This process need not yield indeterminacy. What in fact unites such disparate worldviews as Christianity, Buddhism, and Hinduism is a well-established and well-understood semantic practice of using the term "religion" to signify them and relevantly analogous beliefs and practices. Efforts to distill this practice into a definition have been unavailing. But the common understanding of how to use the word has turned out to be all that is needed. Courts almost never have any difficulty in determining whether something is a religion or not.<sup>39</sup> Even if theorists could converge upon a single definition, American law will not have relied upon that definition, and the definition may not be well suited to the law's purposes.<sup>40</sup>

Abstraction from the particulars of religious disagreement is part of the practice of American religious neutrality. As new minorities have emerged or immigrated, they have in time managed to renegotiate the terms of religious pluralism and disestablishment. One of the benefits of democratic contestation is that it makes relevant the size of any regime's remainder - the people who don't fit into the rules in place. The history of American disestablishment is a history of neutralities that shifted over time in order to cope with newly emergent remainders.<sup>41</sup> A constant, however, is the imperative to devise a level of abstraction that minimizes the remainder while continuing to treat religion as a good.

Why single out religion in this way?

Many distinguished legal theorists and philosophers have claimed that the proper object of the law's solicitude is not religion, but something else - something more consistent with neutralitarianism. Scholars have proposed many candidates for the replacement position, including individual autonomy, a source of meaning inaccessible to other people, psychologically urgent needs (treating religion as analogous to a disability that needs accommodation), comprehensive views, deep and

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<sup>38</sup> See *Defining "Religious Organization" and "Church,"* Est., Gifts & Tr. Portfolios (BNA) 868 (2007): ch. III, available at <http://taxandaccounting.bna.com/btac/>.

<sup>39</sup> *Defending American Religious Neutrality*, 7.

<sup>40</sup> Thus, for example, whatever the merits of Brian Leiter's proposed definition of religion, it cannot be used to attack the practice of religious accommodation, because that practice does not protect religion under that description. Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013), 25-53.

<sup>41</sup> *Defending American Religious Neutrality*, 27-28.

valuable human commitments, minority culture, and conscience.<sup>42</sup> Evidently, they regard American law as, at best, an imperfect anticipation of *real* disestablishment, the way that some Christians think of Judaism as an imperfect anticipation of real religious truth. The selectivity of American law's treatment of religion seems to them a mistake, in the same way that the selectivity of Gardener's weeding seemed like a mistake to Theorist.

Religion, however, is not a proxy for any other single value. None of the substitutes that are on offer capture our settled intuitions about accommodation. Consider conscience. It focuses on those cases in which the agent feels impelled by a duty that she is capable of performing without depending on external contingencies. Some major instances of religious liberty don't fit this description. *Lyng v. Northwest Indian Cemetery Protective Association*<sup>43</sup> was a widely criticized decision<sup>44</sup> in which Native Americans objected to a proposed logging road that would pass through an ancient worship site sacred to their tribe. The logging road, the Court conceded, would "virtually destroy" the ability of the Native Americans "to practice their religion."<sup>45</sup> Nonetheless, the Court, evidently persuaded that exemptions had to be based on conscience, held that there was no constitutionally cognizable burden, because the logging road had "no tendency to coerce individuals into acting contrary to their religious beliefs."<sup>46</sup> This result was quickly reversed by Congress, which evidently was not in the grip of this particular theory.<sup>47</sup> A paradigm case for religious exemption, for most proponents of such exemptions, is the ritual use of peyote by the Native American Church, which the Supreme Court declined to protect in *Employment Division v. Smith*,<sup>48</sup> but which received legislative accommodation shortly

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<sup>42</sup> Ibid., 131-65; also my "How Shall I Praise Thee? Brian Leiter on Respect for Religion," *San Diego L. Rev.* 47 (2010): 961-986.

<sup>43</sup> 485 U.S. 439 (1988).

<sup>44</sup> See, e.g., Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007), 91-92, 242-44; Greenawalt, *Religion and the Constitution: Free Exercise and Fairness*, 192-200; Michael W. McConnell, "Religious Freedom at a Crossroads," *U. Chi. L. Rev.* 59 (1992): 125-26.

<sup>45</sup> 485 U.S. at 451.

<sup>46</sup> Ibid., 450. Dworkin could dismiss the case even more easily: in merely constructing a road, the state wasn't pursuing any contestable idea of the good.

<sup>47</sup> Eisgruber and Sager, *Religious Freedom and the Constitution*, 243-44.

<sup>48</sup> 494 U.S. 872 (1990). This result was reversed, with respect to federal law, by statute, which the Court has willingly followed. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

thereafter.<sup>49</sup> Yet neither of the claimants in *Smith* was motivated to use peyote by religious conscience. Al Smith was motivated primarily by interest in exploring his Native American racial identity, and Galen Black was merely curious about the Church.<sup>50</sup>

Any single factor justification for singling out religion will be overinclusive and underinclusive. Any invocation of any factor X as a justification will logically entail substituting X for religion as a basis for special treatment, making "religion" disappear as a category of analysis. This substitution will be unsatisfactory. There will be settled intuitions about establishment and accommodation that it will be unable to account for. Any X will be an imperfect substitute for religion, but a theory of religious freedom that focuses on that X will not be able to say why religion, rather than X, should be the object of solicitude.

There are two ways around this difficulty. One is to say that these are not ends that the state can directly aim at, and that religion is a good proxy. This does justify some imprecision in the law. We want to give licenses to "safe drivers," but these are not directly detectable, so we use the somewhat overinclusive and underinclusive category of "those who have passed a driving test." This rationale doesn't work for at least some of the substitutes on offer. The state can aim directly at accommodating conscience, say, or autonomy.

The other way is to say that religion is an adequate (though somewhat overinclusive and underinclusive) proxy for multiple goods, some of which are not ones that can directly be aimed at.<sup>51</sup> "Religion" denotes salvation (if you think you need to be saved),<sup>52</sup> harmony with the transcendent origin of universal order (if it exists),<sup>53</sup> responding to the fundamentally imperfect character of human life (if it is imperfect),<sup>54</sup> courage in the face of the heartbreaking aspects of human existence (if that

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<sup>49</sup> Eisgruber and Sager, *Religious Freedom and the Constitution* 243.

<sup>50</sup> See Garrett Epps, "To an Unknown God: The Hidden History of Employment Division v. Smith," *Ariz. St. L. Rev.* 30 (1998): 959-65, 978-85.

<sup>51</sup> See Andrew Koppelman, *Proxy Wars: Religion, the Law, and Special Accommodation*, Commonweal (forthcoming 2015); Andrew Koppelman, "'Religion' as a Bundle of Legal Proxies: Reply to Micah Schwartzman," *San Diego L. Rev.* 51 (2014): 1079.

<sup>52</sup> Martin Riesebrodt, *The Promise of Salvation: A Theory of Religion* (Chicago: University of Chicago Press, 2010).

<sup>53</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 89-90.

<sup>54</sup> Keith E. Yandell, *Philosophy of Religion: A Contemporary Introduction* 17-34 (London: Routledge, 1999).

kind of encouragement helps),<sup>55</sup> a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps),<sup>56</sup> contact with that which is awesome and indescribable (if awe is something you feel),<sup>57</sup> and many others. Not all of these are cognizable within neutralitarianism, but all are recognized by multiple religious traditions. Each of those goods is, at least, more likely to be salient in religious than in nonreligious contexts. There is intense disagreement among religions as to which of these goods is most salient, and whether some of them are salient at all. Does "religion," or any particular religion, draw us toward some end that is not reducible to any secular, worldly good, but transcends them all? It would be better if the state did not attempt to answer these questions. That is why it will not do for the law to try to disaggregate religion into its component goods.<sup>58</sup> Because "religion" - or, at least, that subset of it that is likely to come before American courts - captures multiple goods, any substitute that aims at any one of them, or even all the ones that can be officially recognized, will be underinclusive.<sup>59</sup>

## 5. The Hobbesian Objection

The case for accommodation typically has something to do with the unhappy situation of the person who is requesting it.

On one possible reading, a reading determinedly neutral with respect to goods on which reasonable people differ, the demand would be to avoid a state of affairs in which some "experience their condition as so miserable, or their needs so unmet, that they reject society's conceptions of justice and are ready to resort to violence to improve their condition."<sup>60</sup> The most obvious response would be to guarantee the minimal income necessary for a decent life.<sup>61</sup> Unmet needs might however not be material. Some idiosyncratic disutility monsters - of whom religious conscientious objectors are only a subset - might need

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<sup>55</sup> Paul Tillich, *The Courage to Be* (New Haven: Yale University Press, 1952).

<sup>56</sup> Immanuel Kant, *Critique of Practical Reason* (1788; Cambridge: Cambridge University Press, 1997); *Religion Within the Limits of Reason Alone* (1794; New York: Harper, 1960).

<sup>57</sup> Rudolf Otto, *The Idea of the Holy*, 2d ed. (London: Oxford University Press, 1950).

<sup>58</sup> Cécile Laborde proposes this in "Three Approaches to the Study of Religion," *The Immanent Frame*, Feb. 5, 2014, <http://blogs.ssrc.org/tif/2014/02/05/three-approaches-to-the-study-of-religion/>.

<sup>59</sup> *Defending American Religious Neutrality*, 120-65.

<sup>60</sup> John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), 129.

<sup>61</sup> See *ibid.*, 122-30.

special accommodation. If they are *entirely* idiosyncratic, however, it is doubtful that their predicament can be remedied.

The standard answer to the familiar utility monster is that she can educate herself to have less expensive tastes. If the regime does not adapt to people's unintelligible and chaotic utility curves, most will learn to adapt to their situation. Welfare economics addresses such issues by offering each person a reasonable share of resources, protecting property, facilitating contracts, and letting each pursue happiness in their own way. The same response might reasonably be made to the disutility monsters. Special provision can be made for situations likely to cause distress for anyone, such as disability and disease, but unique personal disutilities are generally ignored by the polity and left for the individual to work out. Given the difficulty of interpersonal comparisons of utility, it is doubtful that, within a utilitarian framework, one can do much better than that.

Gerald Gaus and Kevin Vallier have proposed an entirely different basis for accommodation, one consistent with liberal neutrality. In other work, Gaus has argued that it is illegitimate to "make moral demands on others that as free and equal moral persons those others cannot see reason to acknowledge."<sup>62</sup> This constraint entails liberal neutrality.<sup>63</sup> It also, however, can entail exemptions:

this same liberal commitment to non-domination and sanctity of conscience implies that religious citizens must not have laws imposed upon them which they have no conclusive reason to accept. Even if a secular rationale is necessary in our society for a publicly justified law, it can be defeated by a reasonable religious conviction without any secular backing. If, given his or her reasonable religious beliefs, a religious citizen has weightier reason to reject a proposal than accept it, the proposal is not publicly justified. It is here that justificatory liberalism protects the integrity of citizens of faith, as it does all citizens. In a pluralist world, the only integrity that all citizens can simultaneously possess is to be free of coercive laws that violate one's reasonable values and understandings of the good.<sup>64</sup>

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<sup>62</sup> *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge: Cambridge University Press, 2011), 16.

<sup>63</sup> "Liberal Neutrality: A Compelling and Radical Principle," in Steven Wall & George Klosko, eds., *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham, Md.: Rowman & Littlefield, 2003), 137-165.

<sup>64</sup> Gerald F. Gaus & Kevin Vallier, "The Roles of Religious Conviction in a Publicly Justified Polity: The Implications of Convergence, Asymmetry, and Political Institutions," *Phil. & Soc. Criticism* 35 (2009): 63.

Religious conviction is not a good justification for a coercive law, but it may be a good defeater. "We cannot assume that the characteristics of an acceptable proposal for coercion are the same as a good reason to object."<sup>65</sup> This is the basis for "claims to integrity and freedom of conscience."<sup>66</sup>

Even stipulating these premises, it does not follow that any particular proposition is outside the set of reasons whose force is accessible to any particular person. Your evidentiary set is surely different from mine,<sup>67</sup> but my epistemic limitations just as surely prevent me from knowing the boundaries of what you can learn. Respect for other people demands that I recognize the stability and integrity of some of their judgments, but their evidentiary sets have neither stability nor integrity. Everyone's evidentiary set is, if they are sane, in constant flux. It is not disrespectful to know that.

In order to be sure that you are simply incapable of seeing the force of my view, I would need to know your entire epistemic history and all possible paths you could travel in the future.<sup>68</sup> Knowing Saul of Tarsus as I do, I feel sure that the views of Paul the Apostle are inaccessible and unjustifiable to him. (Have you *talked* to Saul about Christianity? Don't get him started.) Ordinary experience, however, shows that humans are sometimes capable of cognizing what is true. The fact that (I am persuaded that) X is true therefore gives me a powerful *prima facie* reason to think that X is accessible to you. A different kind of disrespect is manifested by the notion that your mind is so defective that it is irremediably incapable of cognizing some truths. There is no way to know, in any particular case, if this is true.

Similarly with the question of whether you have a conscientious objection that should defeat the application of a law to you. Our mutual opacity confounds Gaus and Vallier's proposed basis for conscientious objection. How can I know whether you really have such a defeater, or whether you simply would prefer not to obey the law?

The problem would be different if there were some reason to think that the goals that are blocked have some independent

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<sup>65</sup> Ibid., 64.

<sup>66</sup> Ibid. Gaus makes a similar argument more briefly in *The Order of Public Reason* 541.

<sup>67</sup> This is demonstrated with great care and rigor in Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford: Oxford University Press, 1996).

<sup>68</sup> This interpersonal epistemic gap is also emphasized in Nicholas Wolterstorff's critique of Gaus. See "The Justificatory Liberalism of Gerald Gaus," in Terence Cuneo, ed., *Understanding Liberal Democracy* (Oxford: Oxford University Press, 2012), 53-75, especially 65-66.

value. Then the frustration would have a weight that is both interpersonally intelligible and a valid basis for interpersonal claims. If what you are frustrating is not a blind brute urge of mine, but my access to something that is genuinely good, then you are harming me.

We are in our depths opaque to one another. But we are similar enough to know where the deep places are likely to be.

Those deep places consist, in large part, in goods toward which we are drawn. The valorization of choice itself makes sense only if the objects of choice have independent significance, so that some choices are especially weighty.<sup>69</sup> The goods are contestable. Some people reasonably reject them. Many are indifferent to religion. Some have never felt sexual desire. The exigency of these goods is nonetheless a general fact about human psychology, at least in our society. Around here, one locus of depth is the nebula of practices and longings that cluster around the loose term "religion."

We share recognition of the value of these goods, at least at an abstract level. That fact illuminates our individual perspectives on substantive religious beliefs that we find preposterous. Your specific religious beliefs and rituals strike me as weird and repellent. I am amazed that anyone can find transcendent meaning in *that*. But I know that religion falls within a field of human activity in which many of us deem our own beliefs and rituals good and worthy of respect, and in which our religious commitments are often unintelligible to one another. I can appreciate the urgency of your demand for a space in which to pursue your idiosyncratic religious needs.

This structure of argument supporting toleration and accommodation is not unique to conscience or religion. That is why the religion analogy is sometimes powerful. Consider sex. Your specific desires strike me as weird and repellent. I am amazed that anyone can be turned on by *that*. But I know that sex falls within a field of human activity in which many of us deem our own desires good and worthy of respect, and in which our desires are often unintelligible to one another. That is why the situation of gay Americans in the 1950s was so viciously unfair. I can - morally, I must - appreciate the urgency of your demand for a space in which to pursue your idiosyncratic needs.

In each of these categories, the case for toleration rests on a distinctive interlocking pattern of mutual transparency and opacity. Were there no transparency, we would not have devised these categories, which transcend our own specific orientations

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<sup>69</sup> Charles Taylor, *The Ethics of Authenticity* (Cambridge: Harvard University Press, 1991), 31-41.



toward the good as we apprehend it. Were there no opacity, we would not be impelled to institutionalize our appreciation of the good under such intentionally vague descriptions as "conscience" or "religion" or "sexuality."

Without shared conceptions of the good, it is hard to construct an intersubjective anchor for "conscience." Any account of liberty of conscience must confront what we may call the Hobbesian Objection, which holds that private conscience is too capricious to be an appropriate basis for exemption from legal obligations. Hobbes thought human beings were impenetrable, even to themselves, their happiness consisting in "a continuall progresse of the desire, from one object to another; the attaining of the former, being still but the way to the later;"<sup>70</sup> their agency consisting of (as Thomas Pfau puts it) "an agglomeration of disjointed volitional states (themselves the outward projection of so many random desires)."<sup>71</sup> Conscience, thus understood, is incommensurable with public reason - a term that Hobbes coined. No appeal to "such diversity, as there is of private Consciences"<sup>72</sup> is possible in public life for Hobbes.<sup>73</sup>

One might, perhaps, interrogate individual conscientious objectors, attempting to determine whether their claim is sufficiently deep to demand respect. That is what draft boards used to do.<sup>74</sup> But that is itself a highly fallible method of detection, and would rule out a lot of accommodations that are familiar and uncontroversial. Conscience is at best a complement, not a substitute, for teleologically loaded terms such as religion. During Prohibition, the Volstead Act exempted sacramental wine. No attempt was made to examine individual Catholic priests and parishioners to determine the depth of their conviction. If "religion" is not cognizable, it is hard to imagine how that could have been done.

Hobbes's skepticism can be avoided because our agency consists in the pursuit of ends outside ourselves. Those ends can provide the intersubjectively intelligible basis for singling out certain choices as especially important. That may approach the teleological conception of agency we find in

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<sup>70</sup> Thomas Hobbes, *Leviathan* (C.B. Macperson ed., Harmondsworth: Penguin, 1968), 160.

<sup>71</sup> Thomas Pfau, *Minding the Modern: Human Agency, Intellectual Traditions, and Responsible Knowledge* (Notre Dame: U. of Notre Dame Press, 2013), 189.

<sup>72</sup> *Leviathan*, 366.

<sup>73</sup> See Pfau, *Minding the Modern*, 194-95.

<sup>74</sup> See Andrew Koppelman, "The Story of *Welsh v. United States*: Elliott Welsh's Two Religious Tests," in Richard Garnett and Andrew Koppelman, eds., *First Amendment Stories* (New York: Foundation Press, 2012), 293-318.

Aristotle or Aquinas,<sup>75</sup> which, of course, accompanies a politics that is not particularly liberal. But in recognizing the value of religion, the liberalism in question here is not committed to the idea that a life with religion is better than one without it. Rather, it merely cognizes this as one of many distinctive goods whose value is not (experienced as) merely an artifact of human choice, and which therefore may legitimately be privileged over other choices.

The fundamental problem with neutralitarianism is that it does not permit the state to single out for special treatment aspects of human life that are unusually exigent and with respect to which our opacities are ineradicable. With respect to them, neutrality - a specific kind of neutrality,<sup>76</sup> neutrality among competing instantiations of the good in question - is sometimes appropriate.

The moral case for moving beyond "religion" to some broader set of exigencies is perhaps best captured by Christopher Eisgruber and Lawrence Sager, who argue that "religion does not exhaust the commitments and passions that move human beings in deep and valuable ways."<sup>77</sup> They claim that the state should "treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."<sup>78</sup> They go on to argue that the nonreligious have equally deep concerns. That is obviously correct. But "deep" is not an administrable legal category. Not only is it too vague for that; it is not directly detectable.<sup>79</sup> Even if we know what we mean, we can't know it when we see it. We are back in the realm of opacity.

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<sup>75</sup> Pfau, *Minding the Modern*, 90, contrasts Hobbes's chaotic conception of agency with that of Aristotle, for whom "[j]udgment and choice . . . are rational only because they unfold in an ontological framework of things and purposes hierarchically and teleologically ordered." Similarly in Aquinas, our ability to choose rationally depends on a vision of the ultimate end that "transcends the realm of finite, empirical praxis and cannot itself be chosen." *Ibid.*, 138.

<sup>76</sup> Neutrality as a political ideal is subject to multiple specifications. See my "The Fluidity of Neutrality," *Rev. Pol.* 66 (2004): 633-48, restated in revised and compressed form in *Defending American Religious Neutrality*, 15-26.

<sup>77</sup> Christopher L. Eisgruber & Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct," *U. Chi. L. Rev.* 61 (1994): 1245 n. ++. They use "deep" repeatedly to describe the claims that should be treated equally with religious ones. Eisgruber and Sager, *Religious Freedom and the Constitution*, 87, 89, 95, 101, 197, 241, 246, 252.

<sup>78</sup> "The Vulnerability of Conscience," 1285.

<sup>79</sup> It is also not evident that recourse to it would ameliorate much actual unfairness in the world. The cases of manifest injustice that motivate prominent attacks on singling out "religion" - secular soup kitchens, or

The same difficulty arises for any of the ubiquitous proposals to substitute "conscience" for "religion" as the object of accommodation. The Hobbesian Objection persists. Exigency as such, precisely because of its intensely private character, is not capable of accommodation. The best we can do is rely on imperfect proxies that tend to capture the general areas that are likely to be unfathomable.

## 6. Neutralitarianism in context

Neutralitarianism made a big splash in liberal political theory, even though almost no substantive arguments for it were developed. Dworkin offered a pure ipse dixit.<sup>80</sup> Ackerman gestured toward a cluster of arguments without carefully defending any of them.<sup>81</sup> More substantial efforts have been made lately, preeminently by Gaus,<sup>82</sup> but neutralitarianism didn't need these in order to generate a major literature.<sup>83</sup>

Peter Berger and his colleagues observe that modern social life necessarily involves the daily experience of encounter with a plurality of lifeworlds that reflect differing and inconsistent norms. Ideologies of liberalism have facilitated this phenomenon, but they are not its cause. It is "more persuasive sociologically to view the experience of plurality as prior to the various bodies of ideas that have served to legitimate it."<sup>84</sup> Institutional structures beget a consciousness of the importance of individual autonomy, which in turn begets legitimating ideologies.

The core motivator of neutralitarianism is the experience of the state as an imposer of alien norms. Religion and sex both had prominent places in the conversation from the beginning. All the early neutralitarians specifically criticized the criminal prohibition of homosexual sex, which was

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secular equivalents of Sikh boys carrying kirpans - are hypothetical ones. Eisgruber and Sager, *Religious Freedom and the Constitution*, 11-13, 54-55; Leiter, *Why Tolerate Religion?*, 2-3.

<sup>80</sup> Ronald Dworkin, "Liberalism," in *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 191.

<sup>81</sup> Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), 359-69.

<sup>82</sup> For a critique, see Andrew Koppelman, "Does Respect Require Antiperfectionism? Gaus on Liberal Neutrality," unpublished ms.

<sup>83</sup> See, e.g., Steven Wall & George Klosko, eds., *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham, Md.: Rowman & Littlefield, 2003); Robert E. Goodin and Andrew Reeve, eds., *Liberal Neutrality* (London: Routledge, 1989).

<sup>84</sup> Peter Berger, Brigitte Berger, & Hansfried Kellner, *The Homeless Mind: Modernization and Consciousness* (New York: Vintage, 1974), 68-69.

the law in most states.<sup>85</sup> That prohibition was understood to be somehow religiously based, and so to partake of the same wrong as the establishment of religion. If that case is foremost in your mind, then the idea of disabling the state from promoting ideas of the good will make intuitive sense. Arguments will be unnecessary. Neutralitarianism presents itself as a quasi-Kantian deduction from first principles, but its intuitive core is a bad inductive argument: because this departure from neutrality was oppressive, all departures from neutrality are oppressive.

That experience has also generated alienation from religion. The number of Americans who say that they have no religious affiliation has doubled in recent decades, from 8.2% in 1990 to 15.0% in 2008 to just under 20% in 2012. They are a third of adults under 30. Those with liberal views on homosexuality are more than twice as likely as their statistically similar peers to belong to this group.<sup>86</sup> Almost half (48%) of LGBT Americans say they have no religious affiliation.<sup>87</sup> Politics has become unusually polarized along religious lines. In the 2012 presidential election, for example, 59% of those attending church weekly or more voted for Romney, compared with 34% of those who never attend services. That pattern has persisted for years.<sup>88</sup>

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<sup>85</sup> See, e.g., Rawls, *A Theory of Justice*, 331/291 rev.; Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, rev. ed. 1978), 240-58. In the 1960s, the question of legal enforcement of morality (with special attention to homosexual sex) was "one of the primary topics being discussed - perhaps the main topic" in philosophy of law. Jeffrie G. Murphy, "Legal Moralism and Liberalism," *Ariz. L. Rev.* 37 (1995): 74. This theme remains prominent in more recent neutralitarian theory. See, e.g., Sonu Bedi, *Rejecting Rights* (Cambridge: Cambridge University Press, 2009), 89-90, 149-160.

<sup>86</sup> Self-described atheists and agnostics are far fewer, less than 6% of the public, but that is still more than 13 million people. Barry A. Kosmin and Ariela Keysar, *American Religious Identification Survey 2008, Summary Report* (2009); Pew Forum on Religion and Public Life, "Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation (2012); Robert D. Putnam & David E. Campbell, *American Grace: How Religion Divides and Unites Us* (New York: Simon & Schuster, 2010), 129.

<sup>87</sup> Pew Research Social and Demographic Trends, *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times*, June 13, 2013, ch. 6, <http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/7/#chapter-6-religion>. For further evidence that gay and lesbian issues have influenced young people's decisions to disaffiliate from their childhood religions, see Robert P. Jones et al., *A Shifting Landscape: A Decade of Change in American Attitudes about Same-sex Marriage and LGBT Issues* (2014), <http://publicreligion.org/research/2014/02/2014-lgbt-survey/>.

<sup>88</sup> Pew Forum on Religion and Public Life, *How the Faithful Voted: 2012 Preliminary Analysis*, Nov. 7, 2012, <http://www.pewforum.org/2012/11/07/how-the-faithful-voted-2012-preliminary-exit-poll-analysis/>.

But the unaffiliated do not regard religion as unambiguously bad. More than three fourths of them think that churches and other religious organizations bring people together and strengthen community bonds, and that they play an important role in helping the poor and needy. Even three-quarters of atheists and agnostics agree. More than half of the unaffiliated think that those institutions protect and strengthen morality.<sup>89</sup> Among the unaffiliated, 68% believe in God or a universal spirit; 21% pray daily, and 20% more monthly; 18% describe themselves as "religious," and 37% as "spiritual but not religious."<sup>90</sup> For a lot of the unaffiliated, alienation from religion is an ambivalent alienation.

The neutralitarian call to revolutionize our practice arises from recent political developments, but it overgeneralizes from that experience, confusing politically oppressive religion with religion as such. The practice of religious neutrality is not a partially failed attempt to achieve liberal neutralitarianism. This failure to understand the selectivity of the practice of disestablishment is, of course, the mistake Theorist made when he observed Gardener weeding. The better strategy, one that American law has already been pursuing, is to make the favored category of "religion" vague enough to accommodate the newer variants. Here, too, political theory needs to catch up with political practice.

The life of political theory has not been logic. It has been articulating the zeitgeist.

## Conclusion

It remains possible - I certainly have not rebutted the possibility - that the arguments for religious liberty lead toward neutralitarianism through a logic that was never imagined by their original or even their modern proponents. Rawls, in explaining Hegel's notion of the "cunning of reason," observes that this is part of the origin of modern religious liberty: "Ironically, Martin Luther, one of the most intolerant of men, turns out to be an agent of modern liberty."<sup>91</sup> The separation of church and state, initially accepted as a mere *modus vivendi*, turns out to be necessary to modern liberty.

Hegel thought that some practices turn out, upon analysis, to be based on concepts that undermine the practice itself. Slavery is an example: it manifests the master's freedom and

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<sup>89</sup> Pew Forum, "Nones" on the Rise, 58-59.

<sup>90</sup> Id., 22.

<sup>91</sup> *Lectures on the History of Moral Philosophy*, 348.

need for recognition, but that freedom and that need is shared by everyone, and so slavery is self-undermining.

If the neutralitarians are right, then religious liberty is another practice that demands its own transcendence. In order to show this, however, they would have to discover norms within the practice itself that imply this transcendence. That, too, would require a deeper engagement with the specifics of American religious liberty than the neutralitarians have thus far attempted.