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How Does "Equal Liberty" Fare in Relation to Other Approaches to the Religion Clauses?

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RELIGIOUS FREEDOM AND THE CONSTITUTION. By Christopher L. Eisgruber[†] and Lawrence G. Sager.[‡] Cambridge, MA: Harvard University Press, 2007. Pp. 333. $28.95.

Reviewed by Kent Greenawalt[*]

I. Introduction

As one of four contributors to an issue celebrating Christopher Eisgruber and Lawrence Sager's *Religious Freedom and the Constitution*,[1] I have chosen to write an Essay that differs from an ordinary review. I compare the authors' approach with two other reeent formulations of what should be central for the jurisprudence of the Religion Clauses. Since I have recently published my own treatment of the Free Exercise Clause,[2] and a second volume on the Establishment Clause is in the pipeline toward publication,[3] I do not here present my own positive views (though I provide references for interested readers). Those views might be capsulized as a broad defense of the Supreme Court's traditional "no hindrance–no aid" approach to the Free Exercise and Establishment Clauses—a defense that rejects a fair amount of what the Court has actually decided but also rejects the idea that some simplifying conceptual approach can best guide adjudication in this sensitive domain. Thus, although I believe we can learn much from the three approaches I discuss here, I resist claims that any of them would alone produce just decisions about the legal treatment of religion in the United States.

Before I undertake my main effort, I do want to offer a few "review" comments. *Religious Freedom and the Constitution* is beautifully written and consistently interesting. Building on earlier articles by Eisgruber and

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

2. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006) [hereinafter GREENAWALT, FREE EXERCISE].

3. 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: NONESTABLISHMENT AND FAIRNESS (forthcoming 2007) [hereinafter GREENAWALT, NONESTABLISHMENT].

Sager,[4] and on constitutional threads of equality, it offers the most detailed and sophisticated argument for treating religious claims similarly with analogous nonreligious claims. One of the joys of the book for any serious student of the Religion Clauses is its conscientious attempt to address objections to its central thesis. In this respect, the authors fulfill what I believe is a responsibility of careful scholars. Although I shall suggest that they are not always fully successful in facing and meeting criticisms, nevertheless their efforts are a model for others who wish to engage intellectual opponents.

This Essay appraises three comprehensive approaches to Religious Clause principles: (1) that, as Eisgruber and Sager contend, governments should respect Equal Liberty—comprised of principles of nondiscrimination, nonpreferentialism, and broad liberty; (2) that governments should avoid influencing choices about religion insofar as possible; and (3) that governments should be relatively free to engage in symbolic displays but should observe a strict institutional separation from religious organizations. Each of these approaches, proposed by prominent scholars of the Religion Clauses, deserves careful consideration. It is partly by identifying some strengths and weaknesses of these approaches that we can evaluate the efforts, sometimes stumbling, of the Supreme Court over the years. I shall treat the Eisgruber and Sager approach last and most extensively; it seems to me the most appealing outright competitor to the more eclectic approach I support.

II. No Influence or Substantive Neutrality

One approach to the Religion Clauses is that the government should aim to influence choices about religion as little as possible. Judge Michael McConnell has written that the government should aim for a "hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government."[5] Douglas Laycock has urged that "religion is to be left as wholly to private choices as anything can be. It should proceed as unaffected by government as possible."[6] The basic idea that government should not interfere with religious choices is attractive, and it could, depending on context, justify both particular exemptions and particular disabilities for religion. The exemptions

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4. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) [hereinafter Eisgruber & Sager, *Vulnerability*]; Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994).

5. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992) [hereinafter McConnell, *Crossroads*]. In a different article, McConnell says that "the ultimate purposes of the Religion Clauses [are] to ensure that religion, as nearly as possible, is free from government control or influence, whether favorable or unfavorable." Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000) [hereinafter McConnell, *Singling Out*].

6. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990).

would redress what would otherwise be negative effects on religious choices. The disabilities would counter what might amount to an undue preference for some religious perspectives or for religion in general. Thus, a state might be able to single out other educational fields, such as medicine or social work, for special financial aid, but it could not decide to fund education for the ministry alone. Such funding would push people toward choices in favor of organized religion and would inevitably favor some forms of ministry over others. For similar reasons, a state could not teach particular religious doctrines as true in its schools, though it could teach the truth of particular views in virtually every other domain of human concern.

This approach treats religion as special. Depending on just how it is developed, it could correspond well or poorly with present or past Supreme Court doctrine.[7] For example, in respect to free exercise, were an advocate of "no government influence" to place on legislatures the main burden of determining what exemptions to grant, his view could fit the Court's jurisprudence after *Employment Division v. Smith*,[8] the decision that (with qualifications) eliminates any constitutional right to be exempted on religious grounds from the application of general laws.[9] Were someone to follow McConnell and Laycock in regarding many exemptions as matters of constitutional right, to be enforced by courts,[10] his approach would resonate much better with pre-*Smith* law.[11]

Eisgruber and Sager criticize this approach as providing no genuine guidance—in light of all government does, "what could it mean for religion 'to proceed as unaffected by government as possible?'"—and as seeming to condemn desirable government policies, such as discouraging racism, that will influence religious understanding.[12] This "no guidance" critique is overstated, but it does require us to look carefully at alternatives that the general formulation of "no influence" tends to obscure.

Some years ago, a faculty colleague told me that parents should expose their children to the widest spectrum of views about religion so that the children could make their own choices about what to believe. Parents would not regularly take their children to their own houses of worship, if they have

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7. Similarly, it could or could not correspond fairly well with the approaches to particular issues that I embrace. *See* GREENAWALT, FREE EXERCISE, *supra* note 2; GREENAWALT, NONESTABLISHMENT, *supra* note 3.

8. 494 U.S. 872 (1990).

9. *Id.* at 890 (holding that an Oregon law prohibiting the use of peyote does not violate the Free Exercise Clause when applied to those whose religious practices require such use).

10. *See* Laycock, *supra* note 6, at 1016 ("If we take seriously the constitutional right to freely exercise religion, we must restore a judicially enforceable right to religious exemption in appropriate cases."); McConnell, *Crossroads*, *supra* note 5, at 2–3 (defending religious exemptions from generally applicable laws as a matter of constitutional right and arguing that religion should be "singled out" for special constitutional protection).

11. The approach would then better fit my own views, which are critical of *Smith*. *See* GREENAWALT, FREE EXERCISE, *supra* note 2, at 77–83.

12. EISGRUBER & SAGER, *supra* note 1, at 28.

one; rather, they would treat all perspectives equally. I regarded this view as naïve, and may now be stating it less sympathetically than would its proponent, but it was a proposal that parents should aim to have their children as unaffected by their own religious convictions and as free to make independent choices about religion as possible.

Of course, complete success in this endeavor would be unimaginable. Parents' behavior in many respects is related to their religious convictions, and even choices they may perceive as nonreligious, such as whether to treat sons and daughters equally, could affect the attractiveness of various religions for their children. Further, the very fact of growing up in a nuclear family with two parents could well influence a child's choice of religion. Nevertheless, the suggestion that parents should be neutral is starkly at odds with how most parents act, and we can see how acceptance of that view could affect parental behavior. In a roughly similar way, I think that the suggestion of no influence can, *to a degree*, guide government actions.

Clearly the basic notion cannot be attempting to create conditions of choice like those people would have were there no government whatsoever, any more than the guide to parents could be to attempt to create conditions like those that would exist were the children to have no parents.[13] Rather, the idea must be that basic functions of government would be taken for granted and that within that context the aspiration would be freedom of choice. Such an approach does require a degree of judgment about what is to be taken for granted, but that does not necessarily render the approach useless.

A general formulation about "no influence on religious choices" contains three ambiguities, at least two of which are important for our purposes. The first ambiguity concerns what count as religious choices—basic choices about what religion to practice or all choices motivated by religion. The answer of Laycock and McConnell, who discuss discrete religious acts as well as basic commitments, is that both are covered; people should be uninfluenced so far as possible in what religion to practice *and* they should be able, so far as possible, to carry out the actions their religious consciences call for.[14]

The second ambiguity is whether the state should avoid aiming to influence or should aim to minimize influence. The political branches of a

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13. Laycock writes that treating religion as if government did not exist would be a "conceivable mechanical standard" with nothing to recommend it other than "intellectual purity." Laycock, *supra* note 6, at 1005.

14. *See id.* at 1001 ("My basic formulation of substantive neutrality is this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."); McConnell, *Crossroads*, *supra* note 5, at 194 ("In the modern welfare-regulatory state, [a plurality approach] means that the state must not favor religion over nonreligion, nonreligion over religion, or one religion over another in distributing finaneial resources; that the state must create exceptions to laws of general applicability when these laws threaten the religious convictions or practices of religious institutions or individuals; and that the state should eschew both religious favoritism and secular bias in its own participation in the formation of public culture.").

government could adopt as one realistic aspiration not to *aim* to influence people's religious views and actions. And fulfillment of this aspiration might be enforced by judicial review. Were only this much required, a government, operating on objectives that had nothing to do with influencing religious choices, could proceed without worrying about unintended effects on those choices. Alternatively, governments could make an effort to avoid or counter unintended effects.[15] According to this view, governments should sometimes grant religious exemptions, such as allowing worshipers to use peyote, even though the restrictions for which the exemptions are needed were not adopted with an aim to affect religious choice. Laycock and McConnell definitely assume that governments should sometimes counter unintended effects.[16]

But how does one decide whether, in the circumstances, it is sufficient for a government not to aim to influence religious choice or whether it needs to counter unintended effects? Laycock draws an analogy to affirmative action; he comments that Americans agree that whether equal opportunity and equal treatment, on the one hand, or equal impact and equal outcomes, on the other, are appropriate depends on context, but people often disagree over which is the relevant measure.[17] He acknowledges that his position, which he labels "substantive neutrality," requires "judgments about the relative significance of various encouragements and discouragements to religion."[18] Thus, since few will join a religion for an occasional sip of wine, and sacramental use of wine is very important for some Jews and Christians, a ban on drinking alcohol should include an exemption.[19] On the other hand, the encouragement to religion created by a religious exemption from paying taxes would be great; thus, equal treatment in the sense of no exemption is the right approach.[20]

The third ambiguity involves the relation between the no influence standard and political and legal decisions about the relevance of the Religion Clauses. That standard could be *the key* to what decision to make; it could at least be a total account of Religion Clause values; it could be one side of a balance for final decision; or, most modestly, it could be only one important consideration suggested by the Religion Clauses.

If the only no influence requirement for the state was to *avoid aiming* to influence religious choices, one could claim that this standard should always

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15. I discuss this option in respect to public school education in KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 32–33 (2005).

16. *See* Laycock, *supra* note 6, at 1003 (explaining, for example, why a prohibition of alcohol should make an exemption for sacramental wine); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1137 (1990) (criticizing *Smith* for relying on principles of "facial neutrality" and "generally applicability" because the First Amendment "singles out [religious conduct] for particular protection").

17. Laycock, *supra* note 6, at 997.

18. *Id.* at 1004.

19. *Id.* at 1003–04.

20. *Id.* at 1016–17.

be followed. Decisions about laws and policies could be made on various grounds, but an aim to influence religion should never be among them. At least if one could divide concrete choices, like whether to forbid snake-handling, into permitted reduction of physical risk and prohibited aims to discourage a religion, one could think that no influence (in this limited sense) provides a full answer to whether the state's involvement offends the Religion Clauses.

Once one suggests that the state should also avoid unintended influence, the matter becomes much more complicated. Consider a law against handling snakes. The state says it doesn't want to interfere with religious choices; it just wants to protect people from dying. But the law, if enforced, will influence both what actions people undertake on religious grounds and what religions they accept. The same is true about laws that require parents to take very ill children to doctors and authorize punishment of parents whose children die because they fail to seek medical help, even if religious conviction leads them to oppose ordinary medical care. Given the incentives people have to not handle poisonous snakes and to seek medical care for their children, religiously based privileges to handle snakes and decline medical care would not provide much positive encouragement to join the religions such privileges would benefit. Laws supporting military endeavors and challenging racial discrimination also affect religious choices. (With respect to support of the military and laws against racial discrimination, it might be said that a failure to act would favor pacifist and segregationist religions.)

For these subjects, the caution about "no effect or influence" can only be one side of the balance, telling us whether or not something is being sacrificed in terms of the government's relation to religion, but not whether a law overall is justified. Once we understand that no influence in this sense is often only one side of a balance, we will see that it alone cannot resolve many controversies, which will turn on the strength of government justifications for restrictions that undeniably will have some influence on religious choices, and more of such influence than would removal of the restrictions.

Judge McConnell has at times proposed fairly libertarian answers to such issues—education ideally would be in private schools chosen by parents,[21] protecting adults from themselves would not be a legitimate basis to interfere with religiously motivated behavior,[22] economic considerations typically should not outweigh claims of religious freedom[23]—but the no

21. Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, *in* MORAL AND POLITICAL EDUCATION 87, 87–97 (Stephen Macedo & Yael Tamir eds., 2002).

22. *See* Michael W. McConnell, *Taking Religious Freedom Seriously*, FIRST THINGS, May 1990, at 30, 34 (stating that protecting religious minorities' First Amendment rights will sometimes require protection of practices society considers repugnant).

23. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 37–38, 54 (explaining that the legislature need not necessarily yield religious claims to economic needs and vice versa).

influence standard alone does not get us there. And Laycock has a more expansive understanding of government's proper role.[24]

Even if the no influence view does not purport to say when its injunction may be overridden by other considerations unrelated to religion, it does apparently claim to encapsulate relevant Religion Clause values. This, I believe, is mistaken. There are concerns about government interference with religion and religious intrusion on government that are not reducible to the desirability of avoiding influences on religious choice. The problem with churches making final decisions about liquor licenses in *Larkin v. Grendel's Den*[25] was not mainly about government influencing religious choice. And government drawing political lines on religious criteria[26] is troubling even if it arguably promotes rather than retards religious choice. Finally, although protecting free religious choice is one of the reasons why courts should refrain from deciding cases on the basis of determinations of religious doctrine, many other reasons also support the courts not entering into this particular thicket.[27]

In summary, the notion of no influence is often an uncertain guide, partly because officials must decide whether in context they should aim for equal treatment or equal result. Further, the criterion often captures only one side of a delicate balance of relevant considerations. Even more important, although it does loosely mark one significant factor under the Religion Clauses, that standard slights other factors that should be relevant to their interpretation.

III. Symbolic Feast and Institutional Famine

With a rich sense of early American history and with practical experience trying to help Iraq develop a constitution that would give special recognition to Islam, Noah Feldman has proposed a regime for the law of the Establishment Clause that is decidedly contrarian in light of recent developments.[28] The Court has moved toward acceptance of substantial public money flowing to religious institutions so long as the rationale for

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24. *See* Laycock, *supra* note 6, at 1001–06, 1011–18 (defining the "substantive neutrality" standard, and providing examples of its application).

25. 459 U.S. 116 (1982) (holding invalid a Massachusetts statute that vested churches and schools with the power to veto applications for liquor licenses within 500 feet of a church or school).

26. *See* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 690 (1994) (holding that the "allocation of political power on a religious criterion" violates the Establishment Clause). I should note that McConnell thinks the case was wrongly decided. Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 192 n.220 (1997).

27. *See* GREENAWALT, FREE EXERCISE, *supra* note 2, at 261–89 (considering the involvement of secular courts in settling disputes over church property and concluding that it is desirable to "keep courts out of determining ecclesiastical matters for which they are ill suited").

28. NOAH FELDMAN, DIVIDED BY GOD 9, 211–12, 237–38 (2005).

funding is a nonreligious secular benefit, such as education[29] or hospital care, and the criteria for funding do not make reference to religion.[30] Over the same period, the Court has been fairly strict in not allowing devotional practices in schools[31] and government-sponsored displays of religious symbols.[32] Feldman's proposal is to reverse these directions. He would permit more religious expressions by government, eliminating any requirement that a law or practice have a secular purpose and not endorse religion,[33] and he would require strict institutional separation.[34] He defends his proposal as consonant with the history of the Establishment Clause and as a healthy compromise given the split in our society between what he calls "legal secularists" and "values evangelicals."[35]

According to Feldman, liberty of conscience was the dominating concept underlying the Religion Clauses,[36] and people at the time of the founding regarded coercion to contribute money to religious endeavors as a serious violation of conscience.[37] With their overriding concern about direct coercion, they were not disturbed by the government's employment of religious imagery.[38] And when public schools developed in the early nineteenth century, no one supposed that "nonsectarian" devotional practices and teaching, which were effectively nonsectarian Protestant, offended some principle of nonestablishment.[39] Like many historical studies of the Religion Clauses, Feldman is comparatively neglectful of attitudes about establishment when the Fourteenth Amendment was adopted (the

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29. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 640–41 (2002) (holding that Ohio's school voucher program does not violate the Establishment Clause because it serves a valid secular purpose in promoting education and is neutral toward religion in that it provides aid to religious institutions only as a result of private choices).

30. *See id.* at 667 (O'Connor, J., concurring) (noting that the Medicare and Medicaid programs provide substantial aid to religiously affiliated medical facilities).

31. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587–99 (1992) (holding that a public school's inclusion of a "non-sectarian" prayer read by a clergyman during its graduation ceremony violates the Establishment Clause).

32. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 881 (2005) (holding that the display of the Ten Commandments at the county courthouse violated the Establishment Clause). *But see* Van Orden v. Perry, 545 U.S. 677, 681 (2005) (holding that the display of a Ten Commandments monument on the state capital grounds did not violate the Establishment Clause).

33. FELDMAN, *supra* note 28, at 237.

34. *Id.*

35. *Id.* at 237–38.

36. *Id.* at 12, 27–33.

37. Feldman writes at one point of the protection of religious dissenters "against compelled taxation to support teachings with which they disagreed." *Id.* at 12. But some influential objections were broader than that, covering all eompelled taxation to support religion. *Id.* at 32–37.

38. *Id.* at 50–51.

39. *Id.* at 61–65. The issue, of course, was not whether these practices within states violated the federal Establishment Clause, which at that stage did not apply against the states, but whether these practices were or were not regarded as establishments of religion. *See id.* at 66 (recounting Catholic arguments "that paying taxes to support religious teachings with which one disagrees violates the liberty of conscience").

constitutional act that made the Clauses applicable against the states), but his treatment of views about public schools and of opposition to financing parochial schools strongly suggest that he does not think attitudes about public expressions and financial aid had changed.[40]

The more serious question about his historical argument is about the nature of the funding that members of the founding generation believed would violate conscience. The funding to which they objected was aid given to support clergy and other religious purposes.[41] Contrary to what Justice Thomas claimed in the case requiring that the University of Virginia fund the printing of an evangelical Christian publication,[42] it is hardly apparent from James Madison's *Memorial and Remonstrance* that his concern was restricted to taxation and funding that was directed specifically to religious endeavors, but that is what Madison and others were thinking about.[43] One cannot be entirely confident what principles the early opponents of funding of religion would have embraced had they conceived a welfare state in which religious and nonreligious private organizations provide vital social services that might or might not be assisted by government.

In any event, Feldman's primary reliance is on the desirability of his approach in the modern context. Here we may distinguish an argument about political prudence from one about intrinsic wisdom. The country is now sharply split, he writes, between legal secularists and values evangelicals.[44] The former do not, like early secularists, condemn the practice of religion itself,[45] but they do want to remove it from legal and political life.[46] The values evangelicals do not, in the main, want public reliance on any particular religion, but they do want recognition of traditional values resting on a broad religious base.[47] Both groups are seeking a kind of unity in the religious

40. *See id.* at 71–85 (tracking the controversy over "the twin issues of Catholic education and the Bible in schools [that] resurface[d]" after the Civil War, and the debate over the Blaine Amendment).

41. Feldman asserts that "[t]he framers meant the Establishment Clause primarily to guard against the possibility that a citizen's tax dollars would be used to support religious teachings" even if those funds were generally available for other speech. *Id.* at 209. However, John Witte, Jr. has written that Madison and other Framers, though proposing a separationist ideal, "did not press this logic to absolutist conclusions—particularly when it came to 'adiaphora' or nonessentials of church-state relations." John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 383 (1996).

42. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 853–56 (1995) (Thomas, J., concurring). Feldman comments that the Court in *Rosenberger* adopted "a position almost squarely the opposite of the original intent of the Establishment Clause." FELDMAN, *supra* note 28, at 209.

43. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *in* JAMES MADISON, WRITINGS 29 (Jack N. Rakove ed., 1999).

44. FELDMAN, *supra* note 28, at 6–8.

45. *Id.* at 113–30.

46. *Id.* at 8.

47. *Id.* at 6–7, 13–14, 188, 194, 229.

diversity of modern society.[48] Allowing greater expressions of religion would grant the values evangelicals what they most care about, that is, cultural recognition of religion, whereas strong institutional separation would give the legal secularists what they most care about, avoiding a mixture of public authorities and religious groups.[49] Feldman presents his proposal as one which members of both competing factions might recognize as a reasonable compromise and which might find its way into constitutional doctrine.[50]

Feldman also provides reasons for his proposal that one can divorce from the present competition between legal secularists and values evangelicals. Funding of religious endeavors is particularly likely to be divisive in society.[51] Moderate religious expressions by government, such as crèches in public squares, are relatively innocuous.[52] While Feldman was growing up as a Jew, reminders that he lived in a Christian country did not make him feel uncomfortable;[53] the manner in which members of minority religions regard expressions of a majority faith is a question of their "interpretive choice" whether to feel excluded.[54]

Perhaps the omission is defensible in a broad proposal, as compared with a comprehensive plan, but Feldman is not very precise about which religious expressions by government he would allow and which he would not allow.[55] And, focusing mainly on the circumstance of religious schools, he sounds as if he would not permit any substantial funding of such schools, yet in a highly compressed treatment he draws back from such a conclusion about most religiously sponsored charities, suggesting rather that aid should not go to those "that rely on faith to accomplish their goals."[56] Certainly some religious schools could argue that they do not rely on faith to accomplish their goals. A stricter restriction on aid to schools than to other charities could be defended on the ground that the government needs to be especially careful about instruction in religion and that public schools have been such a unifying force in American life, but Feldman does not explain why he would be stricter about aid to schools than other social services (if, indeed, that is his position).

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48. *Id.* at 8, 220.

49. *See id.* at 218 (stating that "legal secularists have failed to hold the line on the ban of government funding for religion, the cornerstone of early legal secularism" while "[v]alues evangelicals have simultaneously found themselves frustrated in the symbolic sphere about which they care most").

50. *Id.* at 236–37.

51. *Id.* at 15, 238.

52. *Id.* at 240–42.

53. *Id.* at 16–17.

54. *Id.* at 242.

55. He would "allow public religion where it is inclusive, not exclusive, and . . . religious displays and prayers so long as they accommodate and honor religious diversity." *Id.* at 15–16.

56. *Id.* at 247.

Another blemish in Feldman's account is his suggestion that a voucher plan must (to be constitutional) allow the teaching of unacceptable values, such as racism and sexism.[57] Although Feldman is right that certain judgments about good and bad values would be constitutionally foreclosed as criteria for state aid, he exaggerates the scope of these limits. Courts will allow states to set some conditions on the ideas schools receiving financial support may teach, as Ohio required that schools receiving voucher money in Cleveland not teach hatred of groups classified by race, religion, nationality, or ethnic background.[58]

A more substantial flaw in Feldman's analysis is his conjoining of the question of public religious expressions *by government* with the question of whether citizens and officials may employ religious premises in deciding what laws to enact.[59] He overstates considerably when he generalizes that "legal secularists *are* in favor of a constitutional rule under which the fact that supporters have invoked religion in support of a bill in Congress could disqualify that bill from taking effect as law."[60] Feldman correctly says that *some* secularists have suggested that laws based dominantly on religious premises violate the Establishment Clause, and he points to the religious purpose prong of the *Lemon* test.[61] What he does not say is that few scholars think that a moderate degree of expressed support based on religious premises would make a law invalid, that the courts have been very hesitant to find religious purposes when nonreligious purposes are also present, *and* that the Supreme Court has never declared that every kind of reliance on religious premises constitutes a religious purpose.[62] In any event, because religious premises mix with nonreligious ones for, and among, individuals who support proposed laws, the likelihood is slim that courts will declare laws unconstitutional simply because people relied on religious convictions and expressed that reliance in public discourse.

To be clear, insofar as Feldman takes the view that reliance on religious convictions in political discourse and judgments is often appropriate, he and I

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57. *Id.* at 244–46.

58. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 644–45 (2002).

59. *See* FELDMAN, *supra* note 28, at 221–23 (arguing that legal secularists believe "decisions should be made on the basis of nonreligious reasoning, and the actions that . . . government takes should not reflect religious values").

60. *Id.* at 223.

61. *Id.*; *see also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (requiring under the purpose prong of the three-part establishment test that a "statute must have a secular legislative purpose").

62. I argue in Chapters 23 and 24 of GREENAWALT, NONESTABLISHMENT, *supra* note 3, that it makes a great deal of difference just *how* a religious conviction figures in the approval of a law or policy—that some crucial reliances on religious convictions should not be regarded as religious purposes, even were there no doubt that every legislator voting for a law relied on just the same religious conviction in just the same way.

are in agreement.[63] We are also in agreement that the Establishment Clause has little direct relevance to this problem, especially if one is thinking about judicial enforcement. What is confusing is his linking of this problem with expressions that are by the government as such. This linkage confuses in two respects. First, it obscures the possibility that someone might think constitutional law should lie close to the secularist end of the spectrum as far as *government expressions* about religion are concerned but also embrace a view that is far from that end of the spectrum in respect to reliance on religious premises. My own position for two decades has been that so long as the objective is not to *promote religion*, the Constitution permits wide use of religious premises by individual officials and citizens in support of proposed laws about subjects like welfare, treatment of animals, and capital punishment.[64]

The second confusion lies in the apparent benefits to each side of the compromise Feldman proposes. He would "give" to the values evangelicals constitutional acceptance of government expressions about religion *and* political use of religious premises in return for concessions to the legal secularists about funding and institutional separation.[65] He does not explain that although the present law about government expressions is not to the liking of the values evangelicals, they already have most of what they want (as far as constitutional law is concerned) regarding political use of religious convictions. In the main, when officials ask themselves whether to rely upon and express religious premises,[66] the primary reasons why they might hesitate involve their prudential judgments that a broader nonreligious appeal will be more effective and their sense of what the political culture deems appropriate,[67] *not* a worry that a court might declare a resulting law invalid. Especially if the kinds of religious expressions in which governments could engage would be limited ones that are fairly bland or widely inclusive (or bland *and* inclusive), the values evangelicals would be getting less out of the compromise than the legal secularists, who would be assured of serious limits on funding that the Supreme Court has now approved.

Once one cuts through these various complications, the wisdom of Feldman's proposal comes down to these three inquiries. Is there a plausible

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63. However, it does not appear that he accepts the modest limits I propose in GREENAWALT, NONESTABLISHMENT, *supra* note 3, chs. 23–24, as a matter of political philosophy and constitutional law.

64. In respect to reliance on religious grounds in politics, my fullest treatments are in KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995) and KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

65. FELDMAN, *supra* note 28, at 237.

66. Of course, *if* the expressed purpose of a law is to declare the government's support of a religious point of view, that purpose would now be invalid. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (stating that the government violates the Establishment Clause if its "actual purpose is to endorse or disapprove of religion"). However, it could be all right under Feldman's proposal.

67. I believe the main constraint is on *expressed* relevance.

constitutional theory to support greater permissiveness about religious expressions by government and greater restrictions on funding, even when the aid is supplied according to neutral criteria? Does funding promise to be as divisive as Feldman suggests and would the denial of funding to religious endeavors constitute an unjust discrimination? Are government expressions of religious views as unthreatening as Feldman asserts?

Feldman has provided us a plausible constitutional theory that is more than an ad hoc compromise between competing armies in a culture war. The dangers of discord are real in respect to the funding of schools.[68] For other social services (lacking an analogue to pervasive public schools), religious organizations have a substantial claim of justice to be treated like other private organizations, and the very significant funding they have already received has not been highly divisive. At least if these organizations do not discriminate in admissions or employment and secular alternatives are available, I would not expect continued funding to be *very* divisive in the future.[69] I do not think religious expressions by government are as innocuous as Feldman claims,[70] a point we can examine more fully as we turn to the approach of Professors Eisgruber and Sager.

IV. Equal Liberty

Eisgruber and Sager propose a basic approach to both Religion Clauses that they call Equal Liberty. They reject (in principle at least) the "dominant" view that religion should be privileged in some respects and disfavored in others, and they also reject as misleading and unhelpful the dominant metaphor of "separation of church and state."[71] The two guiding principles of their own approach are that (1) "no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects" and (2) "all members . . . ought to enjoy rights of free speech, personal autonomy, associative freedom and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow a broad range of religious beliefs and practices to flourish."[72] A crucial aspect of this approach is that the only basis to give religion special benefits or disabilities is a concern about inequality and discrimination.[73] "Equal Liberty . . . denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions."[74]

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68. *See* GREENAWALT, NONESTABLISHMENT, *supra* note 3, ch. 19.
69. *See id.* ch. 18.
70. *See id.* chs. 5–6.
71. EISGRUBER & SAGER, *supra* note 1, at 5–7.
72. *Id.* at 4.
73. *Id.* at 6–9.
74. *Id.* at 6.

Eisgruber and Sager, with important qualifications, thus approve the Court's movement toward neutrality, in the sense of same treatment, as the key to both the Free Exercise and Establishment Clauses. As the Supreme Court held in *Employment Division v. Smith*,[75] people with religious reasons to engage in forbidden behavior should, in general, have no special right to violate laws of general application.[76] For Eisgruber and Sager, statutes that provide such rights across a wide range of subjects, such as the Religious Freedom Restoration Act (RFRA)[77] and the Religious Land Use and Institutionalized Persons Act (RLUIPA),[78] are seriously misguided and indeed unconstitutional in whole or part.[79] When it comes to financial aid, religious groups may benefit if they fall within a larger category of beneficiaries and the legislature is not aiming particularly to assist some religious endeavors over others or religious endeavors over nonreligious ones.[80] Thus, the Supreme Court correctly accepted the principle that a state may grant substantial vouchers for parochial schools among others.[81] And, whatever may be true of education for the ministry in isolation, *Locke v. Davey*'s[82] approval of a state's refusal to fund religious education for the ministry should not be extended to broader constraints on aid to sectarian education.[83] The upshot would be that, across most of their coverage, state Blaine Amendments should be treated as unconstitutional because they discriminate against religion.[84]

In their fundamental concern that members of the political community not be devalued on account of their spiritual foundations and commitments, Eisgruber and Sager echo Justice O'Connor's rationale for her endorsement test.[85] They would be even less accepting than she was of government

75. 494 U.S. 872 (1990).

76. *Id.* at 885.

77. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

78. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

79. RFRA was fundamentally flawed, they argue, in relieving religious organizations and individuals of burdens others must share. EISGRUBER & SAGER, *supra* note 1, at 264. In its application to local zoning regulations, RLUIPA suffers from the same defect, but its treatment of prisoners' claims may be justified as a response to discrimination by prison officials. *Id.* at 269–70.

80. *Id.* at 200–16.

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

82. 540 U.S. 712 (2004).

83. Eisgruber and Sager consider and reject the appropriateness in this context of judicial reliance on a prophylactic theory that would allow a state to forbid all aid to religious education in order to prevent favoritism toward religion. EISGRUBER & SAGER, *supra* note 1, at 227–32.

84. Blaine Amendments typically prohibit state governments from providing financial support to religious worship, exercise, or instruction and mandate that schools receiving public support be free of sectarian control or influence. *See generally* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551 (2003).

85. Lynch v. Donnelley, 465 U.S. 668, 688, 690 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the

sponsorship of religious messages.[86] In respect both to religious expressions by government and financial aid to religious entities, Eisgruber and Sager sharply oppose Noah Feldman's positions.[87] We need to consider who is right, or whether each view captures a part of the truth.

Answering critics who have claimed that their view is inconsistent with the historical understanding of the Religion Clauses, Eisgruber and Sager note that members of the founding generation often spoke of equal liberty, and that "one purpose of the religion clauses was to protect religions from discrimination."[88] "Equal Liberty's historical pedigree is pretty good," they say.[89] Well, that depends on what one demands of a pedigree. The concern about discrimination against minority religions was one aspect of free exercise clauses in state constitutions and of the federal Religion Clauses, but that concern accompanied a view that religion was distinctive and specially important, just what Eisgruber and Sager deny. To take just two illustrations, some state constitutions, as well as Madison's *Memorial and Remonstrance*, spoke of a duty to worship God,[90] and although the idea of excusing religious pacifists from military duty had a wide appeal, few would have extended this privilege to those whose pacifism was based on nonreligious conscience.[91] The best that can be said for the historical pedigree of Equal Liberty is that it draws upon one historical strand and disregards others. Such an exercise can be justified only if the result well fits modern conditions and understandings, and that indeed is the authors' overarching claim of support.

Eisgruber and Sager urge that the dominant view, which recommends special privileges and special disabilities for religion, is "a surefire recipe for inconsistency."[92] The "distinction between removing a burden and conferring a benefit is vanishingly thin, if not purely semantic."[93] When it comes to

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political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.").

86. EISGRUBER & SAGER, *supra* note 1, at 134, 147–52.

87. *See, e.g.*, *id.* at 156 (dismissing Feldman's position on religious expression by government as "simply naïve"). *Compare id.* at 200–08 (taking the position that governmental funding may benefit religious groups without affront to principles of Equal Liberty, as long as the conditions of "genuine secular alternative" and "nonpreferentialism" are satisfied), *with* Feldman, *supra* note 28, at 247 (arguing that government funding of any social program that relies on faith to accomplish its goals amounts to governmental sponsorship of the religious mission of that church and a violation of the "tradition of institutional separation").

88. EISGRUBER & SAGER, *supra* note 1, at 72.

89. *Id.* at 71.

90. *See* GREENAWALT, FREE EXERCISE, *supra* note 2, at 17–18 (reprinting the provisions in the Maryland and Massachusetts constitutions); MADISON, *supra* note 43, at 30 ("It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.").

91. McConnell remarks that some members of Congress considering the possibility of a constitutional exemption did not want it to go to "those who are of no religion." McConnell, *Singling Out*, *supra* note 5, at 12–13 (internal quotation marks omitted). Probably, many people did not even imagine nonreligious pacifists.

92. EISGRUBER & SAGER, *supra* note 1, at 29.

93. *Id.* at 25.

privileges, courts must engage in an impossible balancing act. Equal Liberty, by contrast, provides a clear principle of decision, they assert. They recognize that some cases will be difficult and arguable under Equal Liberty, but they are far from retracting their claims that it is much more coherent and manageable than the no hindrance–no aid approach.[94]

Without here analyzing the coherence and difficulty of application of the no hindrance–no aid approach, I inquire whether Eisgruber and Sager manage to stick faithfully to their own claimed principles and whether these principles actually permit much more straightforward judgments than does the dominant view. The difficulties I identify cast strong doubt on whether Equal Liberty is a viable approach as *the* one controlling standard for adjudication under the Religion Clauses.

We begin by considering Equal Liberty as it relates to religious expressions by government in the form of public displays and teaching in public schools. Crucial questions are whether public displays of majority religious ideas and traditions do make members of minorities feel devalued, and whether Eisgruber and Sager can explain either why religion is distinctive in respect to government expression or what other subjects besides religion should receive similar treatment. Without doubt, Eisgruber and Sager's position follows more closely from the modern drift toward concern for disadvantaged members of society than does Feldman's.

Feldman is on to an important truth when he claims that non-Christians may have very different attitudes toward Christian symbolism.[95] Some, like himself, raised as an Orthodox Jew, may not find the occasional Christian symbol troubling. And, one might add that when non-Christians choose to immigrate to a country they know is dominantly Christian, they can hardly be surprised or dismayed about occasional public recognition of that fact. Similarly, immigrants who believe in no God or in many gods should not be surprised at symbolic recognitions of a single God. But different people react differently. Some, perhaps less self-confident and secure than Feldman, will feel more like outsiders when they come across government expressions of monotheism and Christianity. When Feldman asserts that it is an "interpretive choice" to feel excluded,[96] he makes this attitude more voluntary and more trivial than it is for many people, *especially children*. Eisgruber and Sager call the strategy of telling offended parties to react differently "naïve," because "[p]eople do feel excluded when the government endorses one or another religion, whether they ought to or not."[97] And the idea that people shouldn't complain if they get what they expect can carry us only so far. If I were working for an oil company and were sent to Saudi Arabia, I would not expect to be permitted to engage in Christian worship in

94. *Id.* at 87, 93, 119.

95. *See supra* notes 52–54 and accompanying text.

96. FELDMAN, *supra* note 28, at 242.

97. EISGRUBER & SAGER, *supra* note 1, at 156.

public, but I would certainly feel like an outsider and I would not think that country's approach to religious liberty was warranted. For as long as our country has existed, immigrants of various kinds could expect government discrimination according to race, gender, religion, ethnic origin, and sexual preference; but constitutional principles about equality should more nearly reflect the country's aspirations than its actual performance. If a dominant principle now is that people should be considered as equal regardless of race, gender, ethnic origin, sexual preference, or religious identity, the sense of exclusion engendered by government expressions of religious ideas is a cause for serious concern, whatever the intensity of the feelings of most outsiders.

The problem of whether and why religion might receive special treatment in regard to public displays and teaching in public school is raised by Eisgruber and Sager's claim that only concerns about discrimination can justify such treatment.[98] The authors accept the prevailing view that public schools cannot teach that particular religious ideas are true or false.[99] They square this position with their general thesis by pointing to characteristic features of religion and by suggesting other ideas that government would be barred from teaching,[100] but this twofold strategy is less than fully successful.

In their chapter on religious symbols, Eisgruber and Sager suggest that Americans are highly sensitive to their religious identities and that "public endorsements of religion carry a special charge or valence."[101] At the end of their chapter on public schools, they write that Equal Liberty does not deny that a ground may exist for treating religion specially; that ground is "the vulnerability of conscience to discrimination, mistreatment, and neglect."[102] In the same chapter they indicate other ideas that public schools could not teach, such as partisan political ideas. They generalize that "the Constitution protects schoolchildren from the imposition of orthodoxy, religious or not,"[103] and comment that "the restrictions on religion in the schools are not so unusual as people sometimes suppose."[104]

Although the Supreme Court has not decided such a case, were a public school teacher to continually express explicitly racist or sexist ideas, that would be one form of a violation of equal protection, and were such a teacher to praise the Republican Party as evidently superior to the Democrats, that might violate a principle of freedom of speech, or of our Constitution taken

98. *See. e.g., id.* at 197 ("Equal Liberty insists on the need for special constitutional solicitude toward religion in the name of equality; what it denies is that religion should suffer special constitutionally rooted disabilities or enjoy special constitutionally rooted advantages as against other deep human concerns and commitments.").

99. *Id.* at 180–81.

100. *Id.* at 182–83, 191–92.

101. *Id.* at 126.

102. *Id.* at 197.

103. *Id.* at 171.

104. *Id.* at 197.

more broadly in its assurance of free voting. But public schools are free to take positions on many controversial issues: that the war in Iraq is justified or not justified; that our early settlers, by and large, did or did not treat Native Americans fairly; that immigrants do or do not contribute to the overall vitality of the country; that all citizens should or should not have to learn to speak English; that abortions are or are not a tragedy in women's lives; that abstinence from sex is or is not desirable for teenagers; or that the national government should or should not be making much more strenuous efforts to protect the environment.[105] In brief, various organs of government, including public school teachers, may express positions on many issues in ways that would involve forbidden viewpoint discrimination were the same government to include and exclude private speakers from a public forum on similar grounds based on their positions about such issues.

How are we to square such freedom in respect to other subjects with much more severe restrictions on teaching religious ideas? One possibility is to deny that teaching on any of these other subjects is as likely to involve discrimination or to touch the core identities of students and their families. That strikes me as implausible, and Eisgruber and Sager do not quite claim otherwise. A second possibility is that our notions of what public schools may teach as true and sound need to be much more restrictive than they are now. Perhaps across a wide range of topics, schools should have to teach *about* various understandings as they may teach *about* religious understandings, eschewing claims of truth in favor of one position or its competitors. Such "neutral" teaching may often be desirable pedagogically, but it would be a huge stride to conclude that it is constitutionally required across the range of topics that touch important personal identities and raise serious concerns about discrimination. Eisgruber and Sager do not explicitly assert that position. Finally, one might conclude that the public schools should be able to do more teaching about religious truth, bringing their ability in respect to that subject in accord with what they may say on other sensitive topics. Eisgruber and Sager do not hint at recommending such a radical shift concerning religion.

Exactly how they mean to deal with this issue is less important than the more straightforward inference one might draw from the widely assumed asymmetry about government's role in regard to controversial topics. It is this: There are important reasons for the government to stay out of the realm of religious truth apart from a concern about discrimination. Notably, governments are woefully incompetent judges of truth in religion.[106] This provides some evidence that Equal Liberty should not be, cannot be, *all* there is to the Religion Clauses.

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105. *See* McConnell, *Singling Out*, *supra* note 5, at 9–10, 26–28 (noting that the government, including public schools, is free to join its voice in the public debate and take controversial positions on issues, while not being able to take such positions with respect to religion).

106. *Id.* at 23–24.

The Eisgruber–Sager approach to financial aid is, in its main outlines, much simpler, but it presents its own difficulties. The basic notion is that organizations need not be denied assistance, available to others, because they are religious.[107] Thus, if aid is being given to schools, hospitals, and addiction programs, religious groups may be treated like other private organizations. (The authors do indicate that a state *may* choose to prefer secular private schools, in the sense of schools not based on a religious or other exclusionary perspective, over schools that privilege religious, ideological, cultural, or ethnic subgroups.[108])

The perplexities with what Eisgruber and Sager say about financial aid concern the following issues: (1) Could aid go to religious groups explicitly for religious purposes?; (2) Must the state supply a secular alternative if only religious groups come forward to qualify for aid?; (3) What constraints, if any, may states place on the content of religious teaching in private schools receiving public funds?

The authors focus on aid for secular purposes such as education or health care. Suppose, instead, legislatures made a judgment that people's involvement in religious groups is particularly good for their personal and civic lives. Grants are made directly to religious groups to be used as parts of their general budgets. If the *only* worry about financial aid to religion is discrimination, and the program is well designed to treat all religious groups equally, say by keying assistance to the number of active members, it would create no substantial problem about discrimination among religions.[109] In answer to a concern about discrimination against nonreligious views, the grants might extend to atheist and agnostic groups and other groups dedicated to carrying out philosophies of life.[110] According to the present understanding of the Establishment Clause (and according to McConnell, Laycock, and Feldman), such aid definitely would not be all right,[111] but its

107. EISGRUBER & SAGER, *supra* note 1, at 200–04.

108. *Id.* at 219.

109. Of course any formula will have the effect of helping some religions more than others, and there could be divisive struggles over the right formula, but this would not mean that every formula raises a serious concern about discrimination.

110. Insofar as the concern about discrimination was connected back to the founding generation, most of its members were not worried about unfavorable treatment for atheists and agnostics. *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2093–94 (1996) (discussing the history of the Supreme Court's Establishment Clause jurisprudence, which has permitted certain government practices embracing religion from the time of the Founders' invocation of Divine guidance); Alesia Maltz, *Commentary on the Harris Superquarry Inquiry*, 11 J.L. & RELIGION 793, 814–15 (1994–1995) (discussing the pervasiveness of religion in eighteenth-century political discourse); Jonathan Belcher, Note, *Religion-Plus Speech: The Constitutionality of Juror Oaths and Affirmations under the First Amendment*, 34 WM. & MARY L. REV. 287, 293 (1992) (discussing the Founders' views that only Christians and others who believed in God were competent to serve as witnesses and jurors).

111. *See* Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion) (allowing aid to religious education, but only if the aid is "neutrally available" and at least "figuratively" passes through the hands of private citizens who could direct it elsewhere); *id.* at 836–913 (concurring and dissenting

status would seem much more doubtful under Equal Liberty. That Eisgruber and Sager omit treatment of this possibility may be further evidence that concerns about discrimination are not all that underlie the Religion Clauses. At the least, the omission obscures a potential objection to the proposal that Equal Liberty stands alone.

Eisgruber and Sager suggest that in *Zelman v. Simmons-Harris*[112] the Court rightly focused on whether the voucher plan treated "parents and children with different religious convictions equally,"[113] and, drawing on the work of Ira Lupu and Robert Tuttle, they conclude that the issue of an adequate secular alternative was more difficult than the Justices admitted.[114] The general public schools in Cleveland were of poor quality; parents had an adequate secular alternative only if the nonreligious private schools receiving vouchers, plus special programs in the public schools, sufficed.[115] Eisgruber and Sager comment that for Equal Liberty, "the existence of a genuine secular alternative is the heart of the issue."[116] Why they take this position about an adequate secular alternative is not entirely clear.

Let us assume that, as in the Ohio program, the government's criteria for assistance to private endeavors are nonpreferential, that none of the religious groups receiving assistance use discriminatory standards of admission to their programs, and that the state is also providing the service in question, however poorly. Initially, the state, with a drug rehabilitation program that is not very successful and has too many participants, offers to provide a substantial subsidy for any private group that proposes an effective program. Only two groups make proposals: one is evangelical Christian and the other is nondenominational liberal Christian. Both groups propose to make religion a significant feature of their programs. The state funds both programs, which are quickly recognized to be much more effective than the state-run one. Drug users who choose not to participate in a religious program are no worse off than they would have been if those programs had

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opinions) (arguing that "actual diversion" of government money to "religious indoctrination" violates the Establishment Clause); FELDMAN, *supra* note 28, at 209 (asserting that "[t]he framers meant the Establishment Clause primarily to guard against the possibility that a citizen's tax dollars would be used to support religious teachings with which he might possibly disagree" even if those funds were generally available for both religious and nonreligious activity); Laycock, *supra* note 6, at 1005 (explaining that under his principle of "substantive neutrality" government benefits to churches are permissible only if they are "incidental to a larger policy of neutrality" in which such benefits are provided universally to both religious and nonreligious activities); McConnell, *Crossroads*, *supra* note 5, at 184 (noting that when the government provides financial support only for churches, it aids religion in violation of the neutrality principle). One *might* think any favoritism of organized efforts to promote philosophies of life would discriminate against more informal, individual approaches.

112. 536 U.S. 639 (2002).

113. EISGRUBER & SAGER, *supra* note 1, at 213.

114. *Id.* at 215–16 (citing Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 577 (2002)).

115. *Id.* at 214.

116. *Id.* at 215.

not received funding. They can still use the (now somewhat less overburdened) state program. *If* the only concern is about likely discrimination in regard to religion, why is it not enough that the state has offered the funds according to nonpreferential criteria?[117] Of course, one might say, as Eisgruber and Sager do, that the absence of an adequate secular program will push some people toward religious programs whose ideas they do not embrace,[118] but that is not directly a matter of discrimination.[119] Eisgruber and Sager may believe that an adequate secular alternative is needed as a prophylactic against covert attempts to promote religion, or in order to avoid the impression that the state is promoting religion,[120] but they do not develop either of those points against possible challenges.[121]

My final point in regard to financial aid involves what restrictions states may place on what funded schools teach. As we have seen, Feldman suggests that if states fund religious schools, they must do so on an even basis and cannot refuse, according to the law as it has developed, to aid a school because it teaches "racism, or anti-Americanism, or sexism."[122] Recall that Ohio's voucher plan did preclude teaching of hostility based on religion or race.[123] Although a state cannot discriminate in dispensing aid on the basis of the theological propositions of a religion,[124] the condition of aid in Ohio's plan strongly suggests that a state may require that a school's ethical and political teachings not be wholly at odds with premises of our liberal democracy. Eisgruber and Sager do not discuss this issue. If the only concern is about discrimination, the inquiry should be whether state restrictions on forms of teaching constitute some kind of discrimination. Presumably more would need to be shown than that some religious groups actually do

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117. If the only group coming forward had a particular view about how recovering addicts should live—say telephoning a counselor and a family member every day after they leave the program—a program with an alternative approach would not be required.

118. EISGRUBER & SAGER, *supra* note 1, at 207–08.

119. If the government had never directly provided a certain kind of service and decided it should license private providers, the fact that in some areas the only private providers were religious would not make the government licensing discriminatory. Why should funding be different?

120. *See* EISGRUBER & SAGER, *supra* note 1, at 214–16 (noting that "[s]ome people might suspect that Cleveland's voucher program had been gerrymandered to benefit religious schools").

121. One assumes they would allow tax exemptions for churches even if these allow churches to put on attractive social events that would be more expensive when hosted by organizations paying taxes.

I agree with Lupu and Tuttle that the reasons for an adequate secular alternative are not wholly encompassed by concerns about discrimination; in particular, the government should not (even inadvertently and without apparent sponsorship) push people toward religious programs with its financial resources. *See* GREENAWALT, NONESTABLISHMENT, *supra* note 3, chs. 18–19; Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 596–97 (2002).

122. FELDMAN, *supra* note 28, at 246.

123. *See supra* note 58 and accompanying text.

124. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

want to engage in the kind of teaching that is disallowed. However, the concern here goes beyond discrimination to whether the government impedes religious liberty by setting up standards for instruction about morals and politics with which religious groups wanting state assistance for their schools must comply.[125]

The most significant test for Equal Liberty may be the question of accommodations of religious exercise.[126] Eisgruber and Sager squarely acknowledge that their approach will introduce difficult questions of evaluation;[127] nevertheless, by initially comparing their own basic principle against the complexities of the dominant alternative and then introducing nuances one by one, mainly as responses to actual and possible critiques, they tend to overstate the comparative clarity of their own approach. Their neglect of some of the hardest cases for their perspective has a similar effect.

The crucial issues about accommodation of religion come in three forms: (1) When, if ever, is accommodation constitutionally required?; (2) When may legislatures choose to afford an accommodation for people with religious reasons not to comply with laws?; and (3) When, if an accommodation is supplied for religious exercise, must it also be extended to other reasons not to comply, and what other reasons must enjoy similar treatment? Thus, to take the central facts of *Employment Division v. Smith*, must governments with laws prohibiting the use of peyote permit its use by members of a church for whom that is the central aspect of their worship service? The Supreme Court answered "no."[128] May states choose to create an exemption for members of a single church or for all religious groups engaging in similar use? The Court's opinion in *Smith* indicated clearly that was constitutionally permissible.[129] However, if a legislative accommodation imposes too severely on others, as did Connecticut's requirement that employers give leave to all their employees who wished a day off on their Sabbath, the law becomes an impermissible establishment of religion.[130] If religious use is protected directly by the Free Exercise Clause (contrary to what the *Smith* Court held) or may be protected by legislative action (in accord with what the Court said), what other uses, if any, must also be protected? Such a privilege cannot go to one church and be denied to otherwise similar churches.[131] Whether it could be denied to nonreligious groups that claim that peyote provides unique insights about life or to people who

125. GREENAWALT, NONESTABLISHMENT, *supra* note 3, ch. 19.

126. That subject forms a large part of GREENAWALT, FREE EXERCISE, *supra* note 2, and chapters 16 and 17 of GREENAWALT, NONESTABLISHMENT, *supra* note 3.

127. EISGRUBER & SAGER, *supra* note 1, at 119.

128. Employment Division v. Smith, 494 U.S. 872, 890 (1990).

129. *Id.*

130. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

131. *See supra* note 124 and accompanying text. I pass over here what should count as otherwise similar churches, whether for example, long continuity and a high retention of members could play a role as it seemed to do in *Wisconsin v. Yoder*, 406 U.S. 205, 219, 227 (1972).

use peyote to reduce acute physical pain is less certain, but the Supreme Court's opinions suggest that such distinctions are generally permissible. The most important of these opinions are in *Wisconsin v. Yoder*, which indicated that the constitutional privilege of the Amish to withdraw children from school did not extend to the Henry Thoreaus of the world,[132] and in cases upholding the favored treatment of religious exercise by federal statutes that cover religious claims in general but do not cover analogous nonreligious ones.[133]

A fourth question about accommodation that lies in the background of many cases and has occasionally been explicitly addressed by the Supreme Court is what distinguishes an accommodation of religious exercise (permitted if it does not impose too severely on others) from forbidden promotion or advancement of religion. In *Texas Monthly, Inc. v. Bullock*,[134] for example, the Court held that special tax privileges for religious periodicals were unjustified favoritism, not accommodation.[135]

The determination in *Smith* to deny constitutional protection to strong claims of religious exercise was highly controversial, and I believe it was misguided. Without endorsing the Court's ruling, Eisgruber and Sager strongly disagree with its scholarly critics. They claim that the only basis to exempt exercises of religion from generally valid laws is the concern about discrimination, a matter of "protection."[136] Scholars and others who believe that religion should enjoy a special "privilege" are mistaken.[137] For this reason, they also sharply oppose legislative choices to create privileges for religious exercise in general, as RFRA, RLUIPA, and state RFRAs do.[138]

In addition to this "in principle" objection, they argue that the privilege-balancing approach is defective, because it requires courts to assess the degree of impairment of religious exercise and the strength of state interests and to decide whether the interests are strong enough to warrant the impairments.[139] If courts really required that a state, in order to restrict religiously motivated behavior, must have an interest that is compelling, much too much religious action would be protected; states should, for example, be able to subject churches to ordinary zoning regulations without

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132. *Yoder*, 406 U.S. at 215–16.

133. *See* Gonzales v. O Centro Espirita Beneficente União do Vegetal, 126 S. Ct. 1211 (2006) (holding that the federal government's ban on the sacramental use of hoasca violated RFRA); Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that § 3 of RLUIPA, 42 U.S.C. § 2000cc-1 (2000), which provides protection of prisoners' religious rights, does not violate the Establishment Clause).

134. 489 U.S. 1 (1989).

135. *Id.* at 5 (plurality opinion).

136. EISGRUBER & SAGER, *supra* note 1, at 95.

137. *Id.* The distinction between privilege and protection is central in an earlier article of theirs. *See* Eisgruber & Sager, *Vulnerability*, *supra* note 4.

138. EISGRUBER & SAGER, *supra* note 1, at 246, 257–74.

139. *Id.* at 86.

having to show that their need to do so is genuinely compelling.[140] To be plausible, a balancing formula would have to contain a proportionality standard "sensitive to the nature and weight of the burden imposed on religious exercise as well as to the gravity of the state's interest," but as one moves away from a strict compelling interest test, "a good deal of indeterminacy and ad hockery enters the picture."[141] Without a clear standard, judges and other officials will be likely to favor familiar claims of conscience over unfamiliar ones. "These problems are symptoms of a deeper pathology: the balancing approach lacks a coherent normative foundation."[142]

Eisgruber and Sager offer an alternative that they believe is cleaner conceptually and more manageable judicially. Everything comes down to the concern about discrimination. Claims of religious exercise should enjoy constitutional protection if there is a serious risk that the claimants are suffering discrimination.[143] Legislatures properly grant exemptions when they are attempting to treat particular religious claims fairly in relation to other behavior that society allows, thus avoiding discrimination.[144] The central focus on discrimination both for problems typically classed as "aid" and for those conceived as "accommodation" would obviate the need for courts to use any independent criteria of when purported accommodation slides into impermissible promotion.[145] Fair treatment and avoidance of discrimination would also determine what analogous behavior must be treated like religiously motivated behavior that is exempted from ordinary standards of behavior.[146]

Whatever attractive simplicity this approach may appear to possess largely unravels when one comes to many practical applications. Try as hard as they do to face up to the difficult issues, Eisgruber and Sager do not always succeed. They do recognize that many religious activities are elective, not compulsory, and that some practices may be seen as substitutable for others.[147] But they tend to neglect these insights when they undertake most of their comparisons between religious and nonreligious reasons for action.

Although in fundamental sympathy with Justice Scalia's attack on the balancing approach of pre-*Smith* free exercise jurisprudence, Eisgruber and Sager adopt a position toward free exercise claims that is both more generous and more complex than *Smith*'s. In their view, for the legal prohibition of peyote to be validly applied against use in worship, it is not enough that the

140. *Id.* at 84–85.
141. *Id.* at 85.
142. *Id.*
143. *Id.* at 95.
144. *Id.* at 247.
145. *Id.* at 88–97.
146. *Id.* at 102.
147. *Id.* at 103.

law has a rational purpose, and is general and neutrally applicable[148]—the *Smith* standard. If the law would not have been adopted except for the insensitivity of legislators to their religious use of peyote, members of the Native American Church could succeed on a claim that they have been victims of a kind of discrimination. A crucial comparison would be with Prohibition laws that provide exemptions for use of wine for sacramental purposes.[149] The authors recognize that peyote might reasonably be regarded as more dangerous than alcohol,[150] and its use thereby more damaging to state interests, but the Constitution, they say, requires accommodation if the "failure to accommodate bespeaks a failure of equal regard."[151] It sounds as if the peyote users should succeed if they can show that the quantum of danger from the two substances is about equal, and at one point Eisgruber and Sager write that in the absence of a nonreligious analogue, a court can ask "the counterfactual question of whether more mainstream concerns would have been treated more favorably."[152]

What are we to make, from the standpoint of Equal Liberty, of failures to forbid firmly entrenched practices that are dangerous? Let us consider first a prohibition without exemption. All use of cocaine is forbidden. Someone says the law reflects a discrimination against cocaine users as compared with cigarette smokers, because tobacco cigarettes are more dangerous than cocaine. The comparison here is far from perfect, because the kinds of dangers are not comparable, but suppose the implicit answer from the legislators is, "Yes, we agree cigarettes are worse. If we were starting from scratch, we would outlaw all smoking of cigarettes, but largely ignorant of their danger, people in vast numbers started smoking. Even aware of the danger, many find it extremely hard to stop. Were we to prohibit all cigarette smoking, we would make a large proportion of our citizens into criminals, and enforcement problems like those during Prohibition would be severe. We are hoping that few enough people now use cocaine that a prohibition may work reasonably effectively." This is a plausible rationale for treating cocaine less favorably than cigarettes that does not depend on the comparative damage the two products will cause.

Legislators could adopt a similar rationale about exemptions: "We can't succeed with any prohibition that bars use of a substance called for by religions to which a high proportion of our citizens belong. If we could stamp out use of alcohol in worship services we would; we believe we can succeed in respect to peyote." What matters here is not the factual

148. *Id.* at 95–96 (stating that the *Smith* standard, though partly correct, fails because it lacks a more robust and articulate principle of equality).

149. *Id.* at 92.

150. *Id.* at 92–93. More precisely, alcohol might be less dangerous in the amounts used for sacramental purposes.

151. *Id.* at 93.

152. *Id.* at 106.

plausibility of this argument, but its structure. Some acts are legally accepted just because they have been a part of our culture for so long. A legislature might reasonably choose to forbid other acts that are no more dangerous, because they think the prohibition may work.

Does this show a failure of equal regard to those who want to engage in the forbidden acts? If it is a failure, it is one that may be justified in terms of effective laws. There is room in what Eisgruber and Sager say to conclude that it would not count as a failure of equal regard. The legislators are not treating those who worship with peyote worse because they are unfamiliar or unsympathetic with their commitments, or because they devalue those "commitments on the basis of their spiritual foundations."[153]

Whether or not one characterizes the legislative approach here as failing in equal regard, the crucial point of the example is that the relevant constitutional comparison cannot be exclusively in terms of relative danger. To be faithful to an Equal Liberty approach, judges might be able to estimate whether legislators did honestly adopt the rationale I have suggested (or would have if it had occurred to them). At one point Eisgruber and Sager say, "The question is whether a government that was alert and sympathetic in principle to the religiously inspired interests of a particular minority faith could have fashioned the contested disparity in accommodation."[154] That sounds less like a guess about what actual legislators did think about why to treat the uncommon religious practice less favorably than the common practice—a difficult surmise at best—than an inquiry about what reasonable legislators might have thought. But how can we know why reasonable legislators might have decided against an exemption if comparative danger is not the exclusive key? The obvious way would be to assess the infringement on religious exercise against the strength of the government's reasons to prohibit. That might tell us whether reasonable legislators would have been unsympathetic to the minority or prudently trying to stamp out a harmful practice despite sympathy for its practitioners. The problem is that this inquiry looks very much like the kind of balancing against which Eisgruber and Sager rail, a "benighted quest" that "Equal Liberty forsakes."[155]

Responding to a possible challenge that there are no secular analogues to religiously based noncompliance with dress codes, the authors agree that secular moral commitments will rarely be comparable to such religious duties, but Equal Liberty will "call for exemptions in most dress code cases" because the "burdens imposed in such cases are especially likely to result from neglect."[156] If legislatures or administrators fairly considered the imposition on members of minority religions of a uniform dress code, they would have made exceptions. Here we run into two significant complexities

153. *Id.* at 89.
154. *Id.* at 102.
155. *Id.* at 87.
156. *Id.* at 97.

to which Eisgruber and Sager do not advert. It might be that the reason *not* to make a particular exception—say for girls in school wearing head scarves—is that usage reflects and conveys (for some people) a prescribed role for women that does not correspond to liberal democratic values.[157] Does that constitute a failure of equal regard? The more powerful the state's reason not to grant an exemption, the less its unwillingness to do so will appear to deny equal regard; but this inquiry throws us back into the uncomfortable assessment of religious need against state interest.

The second complexity in regard to dress codes is that one needs to consider forms of dress that are motivated but not required by one's religion. In one case a prisoner wished to wear a cross despite a ban on all wearing of jewelry; he did not think he had to wear a cross but he regarded doing so as a valuable expression of his faith.[158] For many individuals who wish to deviate from prescribed dress, their chosen form of dress may reflect a strong sense of their personal identity (e.g., a nonconformist) and perhaps a political position (as long hair *once upon a time* reflected a rejection of militarism). When one reflects on these comparisons, it becomes difficult to say which failures to exempt religious claims to be excepted from dress codes should be matters of constitutional right. One might conclude that only forms of dress that are mandated by one's religion should receive constitutional protection, but that would require courts to discern whether individuals regarded standards of dress, such as wearing a beard, as mandatory or merely desirable.

The crucial comparison between religious and nonreligious reasons for exemptions comes up again when the issue is whether a nonreligious claim should receive the same treatment as a religious one. Here the question is not whether some religious claims are neglected; rather, it is whether a claim is favored because it is religious, something the principle of equal regard does not allow.[159] Eisgruber and Sager propose that nonreligious moral claims must be treated similarly to religious claims.[160] Thus, a nonreligious pacifist who objects to military service or work on armaments must be treated like a religious pacifist. However, a hypothetical Mother Sherbert, unwilling to work on Saturday because she cannot find adequate child care, would not be entitled to unemployment compensation that went to the actual Ms. Sherbert, a Seventh-Day Adventist who could not work on Saturday as a matter of

157. That the "meaning" of head scarves is highly variable and controversial is eloquently illustrated in ORHAN PAMUK, SNOW (Maureen Freely trans., Faber & Faber 2004) (2002).

158. Sasnett v. Sullivan, 908 F. Supp. 1429, 1436–37 (W.D. Wis. 1995), *aff'd*, 91 F.3d 1018 (7th Cir. 1996), *vacated*, 521 U.S. 1114 (1997).

159. Although their theory would seem to authorize it, Eisgruber and Sager do not discuss this possible argument for a nonreligious claim for exemption: There is a certain kind of religious claim that has not received a legislative exemption because of neglect. It must, therefore, receive an exemption (though no such claim has actually been made) and our analogous claim must be treated similarly.

160. EISGRUBER & SAGER, *supra* note 1, at 112–18.

religious conscience.[161] Mother Sherbert does not experience an inflexible obligation, and the state may permissibly judge that parents who try hard enough will find adequate child care.[162]

One crucial consideration when courts decide whether analogous nonreligious claims should receive an exemption that tracks that given to religious claims is whether a standard for decision is administrable. For dress code issues, it is usually simpler to trace a religious basis than to weigh the connection to personal identity and political conviction of an individual who wishes to violate the rules. Eisgruber and Sager appear to give little weight to this factor, although they do say that what counts is a rule-maker's "stance or attitude,"[163] and, as I have already suggested, legislators who vary their responses to different claims based on whether an exemption is reasonably workable might be thought to be acting with equal regard.

In respect to a person's unwillingness to work on Saturday, Eisgruber and Sager might profitably have considered the following variations. Mother Sherbert (R) and Mother Sherbert (S) deem it fundamentally important that *they* spend weekend days with their children.[164] Eisgruber and Sager write in footnotes comparing religious and secular moral requirements that some persons recognize "their duties to care for their children" are "binding moral strictures,"[165] and that "caring for loved ones" may well be a secular interest and commitment that is "serious" and "identity-defining."[166] For many of these people, paying someone else to do the job will not meet their perceived obligation. Eisgruber and Sager apparently acknowledge that a secular Mother Sherbert (S) might feel an obligation not to work on Saturday that compares in strength and sense of compulsion with that of the Seventh-day Adventist.[167]

In thinking about which women should have a constitutional right to be given unemployment compensation despite an unwillingness to meet the general requirement of being willing to work on Saturday, we begin with the

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161. *Id.* at 116–17 (comparing their hypothetical woman with the successful claimant in Sherbert v. Verner, 374 U.S. 398 (1963)).

162. *Id.* The authors say that a state's determination "does not . . . involve any imposition on religious freedom," *id.* at 117, but the issue here is whether the state is unfairly favoring religious freedom over moral freedom.

163. *Id.* at 300 n.37.

164. Against a possible critique that parents will not have this attitude, I can report that in the years after my wife Sanja died, I thought the most important responsibility in my life was being available for my children during evenings and at various school events. I was immensely fortunate to have a job that allowed this.

165. EISGRUBER & SAGER, *supra* note 1, at 301 n.39.

166. *Id.* at 300 n.37.

167. Their treatment of two women who feel a responsibility to operate soup kitchens is relevant here. One is "impelled by her religious commitments," the other by "what she describes as 'a deep and abiding concern for those who suffer the misfortunes of poverty and hunger.'" *Id.* at 54. The authors suppose that the two women could have a similar sincerity and depth of commitment and should be treated similarly, that their treatment should not turn on "the moral or religious content" of their commitments. *Id.* at 55.

assumption that the Seventh-day Adventist has such a right. For Eisgruber and Sager, that is not because she wins according to a balancing approach; it is because, when one considers the status of workers unwilling to work on Sunday and the force of other reasons legislators recognize as excusing one from ordinary requirements, the failure to treat the Seventh-day Adventist similarly shows a neglect of her (minority) religious commitments. Once those situated like the real Ms. Sherbert are to be protected, who else must be similarly protected? We can assume with Eisgruber and Sager that no one has a secular compulsion not to work on a particular day just because it is that day of the week. That leaves us with Mother Sherbert (R) and Mother Sherbert (S). Both feel very strongly that they should spend Saturday with their children, R because of a religious sense of family obligations, S because of a nonreligious sense that nothing in life is more important than personally caring for one's children. I shall oversimplify a bit and assume that neither thinks she has an absolute obligation to avoid work on Saturday—each would rather work than suffer the alternatives of dying, languishing in prison, or having her children taken away.[168] If the law exempted everyone who felt any responsibility to be with children on Saturday, it would punch a huge hole in any requirement that a person must be willing to work on Saturday to receive unemployment compensation.[169] One might draw the line by requiring an absolute commitment (thus excluding both Mother Sherberts), by requiring a religious commitment (thus excluding S), by requiring a commitment of a certain strength (thus treating R and S according to the degree of compulsion they feel to be with their children), or by requiring a commitment that is both religious and very strong (thus excluding S and leaving R's fate to the degree of compulsion she feels).

Eisgruber and Sager write as if the one line that should not be drawn is between similar religious and nonreligious commitments,[170] but that line might be supported by the argument that sincerity and depth of commitment to be with children are much easier to measure when there is a claimed religious base. And how should a court view the claim of Mother Sherbert (R) if legislators and administrators fail to grant her the exemption that goes to the actual Ms. Sherbert? One might think that requiring that the perceived obligation be unconditional and absolute, as was Ms. Sherbert's, does not show disrespect for those whose idea of what they can do is more flexible;

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168. The basic idea here is that the aim of being with one's children would be defeated by certain consequences. One *might* conceivably believe one should never voluntarily give up Saturdays with children—as one might believe one should never kill an innocent person—no matter what, but it would be a peculiar attitude.

169. I am not defending the view that a legislature should impose such a requirement.

170. In an earlier article, they suggested that the state could second-guess the "reasonability" of secular claims for special treatment. Eisgruber & Sager, *Vulnerability*, *supra* note 4, at 1293. Responding to a critique of McConnell, *Singling Out*, *supra* note 5, at 33–35, that uses the example of religious and nonreligious strike-breakers, Eisgruber and Sager abandon that position, grounded as it was on different epistemic bases for religious and nonreligious judgments. EISGRUBER & SAGER, *supra* note 1, at 301 n.37.

but one might, instead, believe that officials who do not grant R similar treatment are yielding to claims supported by standard religious groups and not treating with equal regard more nuanced, individual views of religious obligations.

It is not my aim to figure out just how Equal Liberty solves the puzzle of the various Sherberts, but two things are apparent. When Eisgruber and Sager write that from the secular perspective that courts must adopt, "the comparative force of religious and secular convictions is a matter for empirical, scientific inquiry"[171] and that "implausibly fine-grained comparisons are not required by equal regard,"[172] they fail to acknowledge how little may separate *some applications* of Equal Liberty from the balancing they reject.

To judge the comparative complexity of Equal Liberty and the dominant no hindrance–no aid approach, one would need to survey the wide range of potential applications. I have certainly not proved that, overall, Equal Liberty is as at least as complex in application as its rival.[173] What I have shown in this Essay is sufficient to suggest that simplicity of application should not be the main reason to select Equal Liberty. And a variety of the nuances we have explored go some distance to demonstrate that Equal Liberty disregards or downplays various considerations that should be relevant to decision under the Religion Clauses. My overall conclusion is that the factors Eisgruber and Sager make critical are indeed relevant for understanding the scope of both clauses, and they have enriched the ways in which judges and others may discern forms of explicit and implicit discrimination; but it would be a misfortune for their proposal to replace all other criteria for what government actions violate the Free Exercise and Establishment Clauses.

171. EISGRUBER & SAGER, *supra* note 1, at 103.

172. *Id.* at 300 n.37.

173. The two volumes of my study give a fair sense of how complex it is to apply the dominant approach in various contexts. *See* GREENAWALT, FREE EXERCISE, *supra* note 2; GREENAWALT, NONESTABLISHMENT, *supra* note 3.