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Accommodation and Equal Liberty

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How should legislatures respond to requests from religious individuals or institutions for exemptions to generally applicable laws? In *Employment Division v. Smith*,[1] the Supreme Court held that the Free Exercise Clause does not require legislatures (federal or state) to honor such requests.[2] The question remains whether they should do so on a voluntary basis. This is the problem of permissive accommodation—that is, accommodation of religious liberty as a matter of political discretion rather than constitutional compulsion. Put in the terms of this Symposium, it is the problem of accommodation in the public square.

It is not immediately apparent why permissive accommodation presents any problem at all. Because permissive accommodation is not mandatory, it does not raise the knotty issue of determining when legislatures *must* grant exemptions requests. Legislatures always may deny requests for permissive accommodation, but when they do grant such requests, they further a fundamental constitutional commitment to religious liberty by minimizing governmental interference with religious exercise. Why not simply encourage legislatures to grant requests for permissive accommodation to the greatest extent possible?

The problem occurs when legislatures protect religious liberty in a manner that compromises another fundamental constitutional

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1. 494 U.S. 872 (1990).

2. *See id.* at 888-90 (holding that the Free Exercise Clause does not require exemptions to generally applicable state drug laws for members of the Native American Church to smoke peyote in observance of their religion).

commitment—equality. If left to their own devices, legislatures might well grant exemptions for religious claimants while denying comparable treatment to nonreligious claimants. They might even grant an exemption to one religious sect while denying comparable treatment to other sects. In either case, the legislatures implicate themselves in the unconstitutional establishment of religion.

The most straightforward and compelling example of this phenomenon concerns the exemption for conscientious objectors to the federal military draft statute. Congress enacted the federal military draft statute decades ago with an exemption for those individuals who object to war based on their "religious training and belief."[3] It would have been an intolerable violation of the principle of equal treatment between religion and nonreligion for Congress to deny an exemption to those with nonreligious but deeply held moral or ethical objections to war. Those individuals, no less than their religious counterparts, confronted the gravest prospect of killing or being killed in contravention of their fundamental values. The Supreme Court avoided a violation of equal treatment by construing the essentially religious exemption to encompass individuals who object to war based on a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[4] In other words, the Court read the exemption to include those who object to war as a result of deeply held religious, moral, or ethical beliefs.[5]

Some legislatures have carried forward the lessons of the draft cases by writing "conscientious objector" provisions broadly in other laws. For example, several states have proposed or enacted

3. Universal Military Training and Service Act, 50 U.S.C. § 456(j)(1958). The statute defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* The practice of exempting religious objectors from the draft was long-standing. *See* United States v. Seeger, 380 U.S. 163, 169-70 (1965).

4. *Seeger*, 380 U.S. at 176.

5. *See, e.g.*, Welsh v. United States, 398 U.S. 333, 339-40 (1970) ("What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6 (j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.").

exemptions from the requirement of dissecting animals as part of the public elementary and high school science curriculum for students who oppose dissection on *any* grounds.[6] Like the conscientious objector exemption to the draft, these exemptions have religious roots.[7] Yet they cover students who resist dissection for both religious and nonreligious reasons. They apply to students who believe in the sanctity of all God's creatures as well as members of People for the Ethical Treatment of Animals (PETA) and other "dyed-in-the-wool animal lover[s]."[8]

But many legislatures fail to think broadly when they undertake to accommodate religious conscience. Consider some recent amendments to the federal Medicare and Medicaid Acts. These amendments do not represent typical accommodations because they lift a condition on the receipt of government benefits that conflicts with religious exercise rather than a government requirement or restriction that conflicts with religious exercise—for example, the draft or dissection requirements. Yet the same legal analysis applies. When legislatures voluntarily lift conditions on benefits that impede religion, they must abide by the same principle of equal treatment that guides them when they voluntarily lift restrictions or requirements that impede religion.[9]

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6. *See, e.g.*, CAL. [EDUC.] CODE § 32255.1(a) (West 1994) (allowing an exemption to dissection requirements for "any pupil with a moral objection to dissecting or otherwise harming or destroying animals, or any parts thereof"); FLA. STAT. ANN. § 233.0674(2)(a) (West 1998) (permitting students to be excused from dissection upon written request of a parent or guardian); 2000 Ill. Legis. Serv. 91-771 (West) (encouraging public and private elementary and high schools to "excuse a student enrolled in a course in which students are ordinarily expected to perform, participate in, or observe dissection *who objects for any reason* to performing, participating in, or observing that dissection and instead allow the student to complete an alternative project") (emphasis added); PA. STAT. ANN. tit. 24, § 15-1523(a) (West 2000) (allowing "[p]ublic or nonpublic school pupils from kindergarten through grade twelve" to "refuse to dissect" animals); R.I. GEN. LAWS § 16-22-20(a) (1999) (permitting a "parent(s) or legal guardian of any student in a public or nonpublic primary or secondary school [to] refuse to allow their child to dissect" any animal).

7. *See generally* Stephanie Banchero, *Dissection Debate Cuts at Curriculum*, CHI. TRI., Mar. 9, 2000, at 1, *available in* 2000 WL 3643932 (quoting Illinois State Representative Lauren Beth Gash, a co-sponsor of the Illinois Bill granting an exemption to dissection, as stating "[s]ome students have religious and moral problems with dissection").

8. *Id.*

9. This is not to deny the differences between "benefit" exemptions and traditional "burden" exemptions. Burden exemptions may present a stronger case for religious accommodation because they seek to ensure noninterference with religion rather than

The Medicare and Medicaid Acts provide reimbursement to poor and elderly patients for medical treatment they receive in a hospital or skilled nursing facility along with related nonmedical nursing care, such as bed pans and sponge baths.[10] When Congress enacted the Medicare and Medicaid Acts in 1965, it provided special exemptions for the Christian Scientists, who oppose medical treatment on religious grounds and object to paying into a system for which they could receive no benefit.[11] Congress allowed the Christian Scientists to receive reimbursement for the nonmedical nursing care normally incidental to medical treatment when received in connection with faith healing at a Christian Science sanatorium.[12] Thus, Congress effectively waived for the Christian

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distribution of monetary grants. *See infra* text accompanying note 24. Governmental noninterference is critically important to religious claimants and close to the core of the Free Exercise Clause and the Establishment Clause. *But see* Sherbert v. Verner, 374 U.S. 398 (1963) (sustaining Free Exercise challenge to condition on state unemployment benefits requiring plaintiff to accept work on Saturday in violation of her religion). For similar reasons, noninterference also may present a stronger case for equal treatment. Noninterference with respect to comparable nonreligious claimants is essential because of the governmental imposition on those claimants and the resulting effect on Establishment Clause values of any relief designed exclusively for religion. Admittedly, these differences tend to diminish the rhetorical force of the Medicare and Medicaid example (though not the legal principles applicable to it). Nonetheless, that example deserves attention because it is an actual accommodation recently considered by Congress and litigated in the courts.

10. *See* 42 U.S.C. § 1395(d) (1965) (defining the scope of benefits.)

11. *See, e.g., Health Services for the Aged Under the Social Security Insurance System: Hearings on H.R. 4222 Before the House Comm. on Ways and Means*, 87th Cong. 728-29 (1961) (statement of Dr. J. Buroughs Stokes, Christian Science Comm. on Publication) (advocating an exemption for Christian Scientists).

> Christan Science relies wholly on spiritial means for healing, as did Christ Jesus . . . . It respects the right of each individual to choose that mode of health care which seems to him most efficacious and most nearly in accord with God's will . . . . [W]hen in need of hospital care, a Christian Scientist goes to a Christian Science sanatorium rather than a medical hospital.
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> . . . We respectfully request that, should you decide to report favorably H.R. 4222, definite provision be made for those contributors who rely on prayer or spiritual means alone for healing . . . . In this and for these contributors, we ask that you consider the posibility of providing for an exemption from that portion of the social security and railroad retirement taxes which would be allotted to pay for such insurance.

Id.

12. *See* 42 U.S.C. § 1395x(e) ("The term 'hospital' also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist"); *see also id.* § 1395c (1982) (providing "basic protection against the costs of *hospital*, related post-

Scientists the medical treatment requirement applicable to all other patients. In 1996, a district court invalidated the Christian Science exemptions as a violation of the Establishment Clause.[13] The court held that the provisions could not survive the strict scrutiny test applicable to sect-specific provisions even if those provisions were intended to accommodate religion.[14] The court reasoned that, whatever the limits of permissive accommodation, such accommodation cannot discriminate among religious sects by expressly singling out one for favorable treatment.[15]

With uncharacteristic speed, Congress rewrote the provisions to eliminate the sect-specific references. It permitted any patient to receive reimbursement for nonmedical nursing care if that patient objects to medical treatment for *religious reasons* and receives such nonmedical care in a facility that also objects to medical treatment for *religious reasons*.[16] A district court upheld the reworded exemptions against an Establishment Clause challenge, and the Eighth Circuit affirmed.[17] The courts found that the provisions constitute permissive accommodation of religion because they relieve affected individuals of the choice between following their religious beliefs and receiving public health care benefits.[18]

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hospital, home health services, and hospice care") (emphasis added). The Act also exempted Christian Science sanatoria from certain medical oversight provisions applicable to nursing homes and skilled nursing facilities. *See id.* § 1396a(a) (1973) ("[T]he terms 'skilled nursing facility' and 'nursing home' do not include a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts.").

13. *See* Children's Healthcare is a Legal Duty, Inc. v. Vladeck, 938 F. Supp. 1466 (D. Minn. 1996).

14. *See id.* at 1485.

15. *See id.*

16. *See* 42 U.S.C. § 1395x(ss)(1) (1997) (authorizing reimbursement for nonmedical nursing services to any individual who receives such services at a "religious nonmedical health care institution," which is defined as an institution that "provides only nonmedical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs," and that "on the basis of its religious beliefs, does not provide . . . medical items and services . . . for its patients"). The provisions also exempt "religious nonmedical health care institutions" from certain medical oversight requirements applicable to hospitals and skilled nursing facilities. *See id.* § 1320c-11.

17. *See* Children's Healthcare is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000).

18. *See id.* at 1093-94 ("By extending nonmedical health care benefits to individuals who object for reasons of religion to medical treatment, section 4454 spares such individuals from being forced to choose between adhering to the tenets of their faith and receiving government

The problem with the Medicare and Medicaid exemptions is not that Congress wished to accommodate the Christian Scientists or religious objectors to medical treatment. Indeed, one might think it entirely appropriate for Congress to recognize and respond to the dilemma encountered by religious individuals like the Christian Scientists. Rather, the problem is that Congress failed simultaneously to consider the similar interests of nonreligious individuals. Initially, Congress also failed to consider the interests of other religious individuals. The district court condemned this defect, and Congress quickly repaired it. But just as it is possible to imagine individuals other than Christian Scientists who have religious objections to medical care, it also is possible to imagine individuals who have moral or ethical objections to medical care. Members of PETA might object to certain medical procedures or medications because they depend on extensive animal research and testing. These PETA members may seem less sympathetic than their student counterparts in the dissection example because their animal-rights-based objection to medical treatment seems less plausible than a similar objection to cutting up animals. They certainly seem less sympathetic than their nonreligious counterparts in the draft example because they seek to avoid denial of a relatively small monetary benefit rather than forced military service. Regardless, these PETA members face exactly the same dilemma that Congress sought to alleviate for their religious counterparts in *this* example—to accept medical treatment in order to qualify for the nonmedical nursing care benefit. Such differential treatment violates the principle of equality between religion and nonreligion.[19]

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aid, and in doing so removes a burden that the law would otherwise impose."). The dissent argued, among other things, that denial of benefits does not "burden" religion as required by traditional accommodation analysis. *See id.* at 1105 (Lay, J., dissenting). Otherwise, denial of a publicly funded education might be said to "burden" the religion of those who choose to attend parochial school for religious reasons and might support a legislative accommodation financing the secular aspects of a religious education. *See id.* at 1106.

19. The courts rejected the argument that such an accommodation violates the principle of equal treatment between religion and nonreligion. They determined that religious patients do not receive a greater benefit than nonreligious patients. *See id.* at 1096-98. In fact, the courts found that religious patients actually receive the smaller benefit because they receive only a "subset" of the benefits that nonreligious patients receive in connection with medical treatment. *See id.* at 1097. This analysis suffers from a logical error. It fails to understand

Equality violations may occur not only with respect to exemptions for individual conscience but with respect to exemptions for religious institutions or religious conduct. Suppose a state provides an exemption from its restrictive zoning laws for religious institutions that want to expand their facilities, but denies an exemption to comparable nonreligious institutions, such as nonprofit or community service-oriented institutions.[20] Suppose a state provides an exemption, as many do, from its drug laws for individuals to ingest peyote as part of a religious worship service,[21] but denies an exemption for nonreligious individuals to smoke peyote for equally weighty purposes, such as medical purposes.

As these examples demonstrate, the problem of permissive accommodation tracks a larger problem in the law: how to respond when efforts to promote one important constitutional value (religious liberty) interfere with another (equality).[22] One sensible answer is to devise a way to preserve both values to the maximum extent possible. Yet, as the Medicare and Medicaid example demonstrates, we cannot depend upon legislatures and courts to take this approach. Nor have many commentators advocated it, preferring instead simply to elevate religious liberty above equality.[23] Although some commentators have attempted to harmonize religious liberty and equality, even they have found themselves

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that nonreligious patients seek access to that important subset of benefits on the same stand-alone basis as religious patients. *See id.* at 1107-08.

20. *Cf.* Religious Land Use and Institutionalized Persons Act of 2000, S. 2869, 106th Cong. (2000) (requiring state and federal governments to demonstrate a compelling interest before imposing land use restrictions in a manner that substantially burdens religious institutions and assemblies).

21. *See* Employment Div. v. Smith, 494 U.S. 872, 890 ("It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.").

22. It is possible to view the problem in non-dichotomous terms as a failure to recognize that religious liberty reflects one instance of a more general constitutional commitment to prioritize certain values above generally applicable norms. On this understanding, claims of religious liberty are entitled to constitutional solicitude but no more so than analogous claims of nonreligious liberty. Thus, the problem of permissive accommodation is not the disregard of equality in favor of religious liberty, but the failure to recognize that equality is an inherent part of religious liberty (and vice versa). Despite the appeal of this characterization, I choose to frame the problem as a competition between religious liberty and equality because this is the way that legislatures, courts, and commentators most often see and describe it.

23. *See, e.g.*, Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

taking sides, generally discouraging legislatures from voluntarily accommodating religious liberty in order to safeguard equality.[24] Moreover, these commentators have fallen short of articulating an approach that addresses the precise issue of how legislatures may respond to religious exemption requests. After *Smith*, and to a large extent even before *Smith* was decided, discretionary legislative accommodation offers the most promising avenue for the protection of religious liberty.[25] For this reason, or for more self-interested political motives, legislators frequently *want* to grant religious accommodation requests. The issue is whether there is an approach that integrates this irrepressible and typically laudable legislative desire with equality theory.

In this Essay, I propose an approach that enables legislatures to respond affirmatively to religious requests for accommodation while maintaining equal treatment. In its most basic form, the approach permits legislatures to respond to religious requests for accommodation on a permissive basis as long as they are prepared to extend any such accommodation to similarly situated non-religious claimants. Put differently, legislatures may undertake to protect religious liberty if at the same time they demonstrate a willingness to provide a measure of equal liberty.

The real work comes in determining the meaning of equal liberty, given the inherent indeterminacy of that concept. Many things are alike and unlike in different respects. The relevant comparison requires an underlying substantive theory of equality.[26] For

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24. *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); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991) [hereinafter Lupu, *Reconstructing the Establishment Clause*]; Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992) [hereinafter Lupu, *The Trouble with Accommodation*].

25. *See* Eisgruber & Sager, *supra* note 24, at 1304 (arguing that legislatures may be better than courts at accommodating religious interests because they "have discretion to enhance the value they place upon accommodating fundamental personal commitments, including religious commitments"). For a discussion of the Supreme Court's treatment of Free Exercise claims before *Smith*, see John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567 (1992).

26. *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 548-56 (1982) (arguing that the concept of equality requires reference to underlying substantive judgments for determining relevant differences and similarities); *see also* Steven D. Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 IND. L.J. 61, 63-64 (2000) (discussing

permissive accommodation, the relevant comparison requires confronting some of the hardest questions in constitutional law: what constitutes religion and which secular values deserve comparable protection? There are a variety of possible answers, all contested and contestable. The difficulty is how to proceed in the absence of consensus on the underlying substantive theory of equal liberty.

Part I of this Essay defends the use of equality analysis in relation to permissive accommodation and describes the dominant equality-based approaches to the issue. Part II proposes the equal liberty approach and discusses the difficulty presented by its application. Part III identifies several objections to the approach. Part IV briefly considers the application of the approach to accommodations awarded not by legislatures but by administrative agencies.

I. ACCOMMODATION AND EQUALITY

Almost all agree that the Establishment Clause generally contains some principle of equal treatment (or "neutrality" or "nondiscrimination") between religion and nonreligion. But many disagree that the principle of equal treatment applies in its most basic, formal sense to permissive accommodation. There is common sense appeal to this position. It is not obvious why a principle designed to prevent governmental advancement or endorsement of religion should prohibit governmental *noninterference* with religion. Far from lending governmental support to religion, accommodation achieves distance from religion and merely facilitates preexisting religious choices.

The Supreme Court reflected this view in a leading permissive accommodation case, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*:

> "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." It is well established, too, that "[t]he limits of permissible state

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Professor Westen's observation in the context of the religious equality principle).

> accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." There is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."
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> Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.[27]

Michael McConnell makes a similar argument. Professor McConnell emphasizes the role of the Establishment Clause, together with the Free Exercise Clause, in minimizing governmental interference with religion.[28] He questions why a clause primarily intended to protect religion from governmental interference should require equal protection of nonreligion.[29] Because permissive accommodation achieves the central function of the Establishment Clause—that is, minimizing governmental interference with religion—it is valid without consideration of comparable secular values.[30]

In my view, this argument too easily dismisses the equal treatment principle contained in the Establishment Clause and its application to permissive accommodation.[31] I understand the Establishment Clause to prohibit the government from preferring religion to nonreligion for two basic reasons: to protect against government preference *among* religions and to recognize the importance of both religious and nonreligious values in a modern, pluralistic society. Both of these reasons apply to permissive

27. 483 U.S. 327, 334, 338 (1987) (citations omitted) (upholding an exemption for religious organizations from Title VII's prohibition against religious discrimination in employment).

28. *See* McConnell, *supra* note 23, at 688-90.

29. *See id.* at 689-90.

30. *See id.* at 692-93.

31. Many have criticized the pro-accommodation position articulated by McConnell. *See, e.g.*, Eisgruber & Sager, *supra* note 24, at 1254-56; Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 567; William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 237-42 (1995); Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123, 136-50.

accommodation, and they apply no differently than they do to other acts of political discretion that concern religion.

It often is said that religious liberty requires the government to remain evenhanded on all religious matters in the political process.[32] Such evenhandedness prevents religious sects from competing bitterly with each other for political dominance.[33] It also prevents the government from controlling the terms on which religious individuals or religious institutions must be religious in order to qualify for valuable benefits—even when those benefits take the form of exemptions from generally applicable laws.[34] In addition, it prohibits the government from using politics subtly to coerce nonbelievers and nonpractitioners to profess religion in order to qualify for valuable benefits or exemptions.

Evenhandedness not only prevents the government from preferring one religion to another but also from preferring generally religion to nonreligion. Whatever the Establishment Clause meant at the founding, it can no longer tolerate discrimination against nonreligious belief structures in the award of permissive accommodations, if for no other reason than that the distinction between religious and nonreligious conscience has become increasingly murky.[35] As the Supreme Court noted some years ago, nonreligious conscience often occupies the same place in the life of the believer

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32. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 313-14 (1996) ("[T]he core point of religious liberty is that the government does not take positions on religious questions—not in its daily administration, not in its laws, and not in its Constitution either."); Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407, 420-21 (1996) ("[T]here is simply *no practical need* for political bureaucracies, even democratic political bureaucracies, to have the power to discriminate in favor of religion."); *see also* Smith, *supra* note 26, at 62-63 (crediting James Madison with the notion that government must be neutral in all matters of religion).

33. *See* Laycock, *supra* note 32, at 317 (discussing history of conflict among religions for political dominance); William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243, 247 (1994) ("Removing the government from religious issues and removing religious issues from the government have been posited as necessary to avoid conflicts between religious groups and between church and state.").

34. *See* Laycock, *supra* note 32, at 347 ("Exemptions are also consistent with substantive neutrality so long as they do not encourage religious belief or practice. . . . Claims for exemptions that align with self-interest are problematic because they create incentives to join the exempted faith, and in practice such claims have not been recognized.").

35. It also can be argued that the later-enacted Fourteenth Amendment altered the meaning of the Establishment Clause, requiring equal protection of religion and nonreligion. *See* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1123-24 (1996).

as religious conscience.[36] In William Marshall's words, "religion and nonreligion simply present two alternative modes of ideology."[37] Similarly, nonreligious associations frequently serve the same social or civic functions as religious associations. As Ira Lupu has observed, nonreligious associations "may help individuals make the world smaller and more coherent, teach and help to preserve the continuity of values, proselytize, develop and maintain ritual, promote good or evil, provide support in times of trouble or sorrow, and facilitate commercial transactions among members who know and trust one another."[38] Because religion and nonreligion present alternative belief systems or modes of affiliation, they must receive comparable consideration in the political process.[39] Any permissive accommodation that departs from this principle by singling out religion for special treatment violates the Establishment Clause.

Although this approach to permissive accommodation diverges from Establishment Clause law as reflected in cases like *Amos* and *Smith*,[40] it finds general support in equal protection and free speech

36. *See* Welsh v. United States, 398 U.S. 333, 340 (1970); United States v. Seeger, 380 U.S. 163, 166 (1965).

37. William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 203 (2000); *see also* Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 31 (2000) (noting that the Supreme Court "appears to believe—perhaps with good reason—that the line between religion and nonreligion is increasingly thin in contemporary America," and surveying the possible reasons for such a belief); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 384 (1996) [hereinafter Lupu, *To Control Faction*] ("[I]n a culture as pervasively secular as ours, claims of secular conscience may be perfectly coincidental psychologically with claims of religious conscience."); Michael J. Perry, *Freedom of Religion in the United States:* Fin De Siecle *Sketches*, 75 IND. L.J. 295, 314 (2000) ("There is no relevant difference—no difference relevant to legitimate public policy concerns—between acts of conscience self-understood in religious terms and acts of conscience self-understood in nonreligious terms.").

38. Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 592.

39. I would like to bracket for now the issue of whether the Free Exercise Clause permits special treatment of religion. I take up the issue briefly in Part III.

40. The approach is more consistent with cases in which the Supreme Court invalidated religion-specific or sect-specific permissive accommodations. *See, e.g.*, Board of Educ. v. Grumet, 512 U.S. 687, 702 (1994) ("The fact that this school district was created by a special and unusual Act of the legislature also gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups."); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) ("Because Texas' sales tax exemption for periodicals promulgating the teaching of any religious sect lacks a secular objective that would justify this preference along with similar benefits for

law. As the Supreme Court repeatedly has said, "[t]he Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[41] This principle applies with particular force to governmental classifications based on certain suspect characteristics, most notably race, but also religion.[42] Consideration of religion alone, like race, rarely furnishes justification for differential treatment and almost always reflects invidious discrimination. It instead might reflect benign discrimination in favor of religion in the form of religious exemptions from generally applicable laws, but this is no more defensible on equal treatment grounds. Religious exemptions, though benign in purpose, violate the principle of equal treatment by according special treatment on the basis of a trait irrelevant to legitimate governmental purpose.[43]

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nonreligious publications or groups, and because it effectively endorses religious belief, the exemption manifestly fails [the Establishment Clause] test.").

41. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

42. The following cases are among those noting that religion is a suspect class subject to strict scrutiny: United States v. Armstrong, 517 U.S. 456, 464-65 (1996); Miller v. Johnson, 515 U.S. 900, 911 (1995); Burlington N. R.R. v. Ford, 504 U.S. 648, 651 (1992); Wade v. United States, 504 U.S. 181, 186 (1992); McCleskey v. Kemp, 481 U.S. 279, 291 n.8 (1987); Friedman v. Rogers, 440 U.S. 1, 17 (1979); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Oyler v. Boles, 368 U.S. 448, 456 (1962).

43. There is an argument that benign discrimination based solely on race—that is, race-based affirmative action stands on a different footing. *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). In any event, there might be reason to apply the equal treatment principle to religious accommodation regardless of whether it applies to race-based affirmative action. *See* Ira C. Lupu, *Uncovering the Village of* Kiryas Joel, 96 COLUM. L. REV. 104, 113-14 (1996) (arguing that the justifications for race-based affirmative action are stronger because it is intended to extinguish the effects of past enslavement and mistreatment of African Americans). *But see* Abner S. Greene, Kiryas Joel *and Two Mistakes about Equality*, 96 COLUM. L. REV. 1, 63-70 (1996) (arguing that affirmative action and religious accommodation are analogous and should be accorded judicial deference); David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77 (1991) (same). And there is no reason to apply a less stringent test. *See* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 100, 102-03 (2000) ("[I]t is unclear how traditional government toleration of religious exemptions distinguishes itself from the now-abandoned toleration of benign racial classifications. . . . [B]oth practices classify on the basis of a suspect trait—race, religion—in order to accomplish a socially desirable result—enhancing minority opportunities by correcting for the corrosive effects of past or present racism, enhancing religious freedom by insulating religious practices from

Free speech law contains a principle of equal treatment that compels a similar conclusion with respect to many religious exemptions. That principle prohibits the government from disparaging some speech relative to others on the basis of its content or viewpoint.[44] This principle applies to religious speech,[45] often with significant overlap to the equality principle underlying the Establishment Clause, because it forbids the government from suppressing religious speech simply because such speech is religious.[46] This principle, however, also bars the government from exempting religious speech from restrictions because such speech is religious.[47] Thus, the government may not voluntarily accommodate religious speech on an exclusive basis without violating the speech equality principle.[48]

Assuming that the government may not voluntarily accommodate religion on an exclusive basis, the next step is to determine on what basis the government may voluntarily accommodate religion. The place to start is with the works of commentators who have addressed the general relationship between permissive accommodation and equality. Articles by Professor Lupu and Professors Christopher Eisgruber and Lawrence Sager provide particularly

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burdensome laws.").

44. *See* United States v. Playboy Entertainment Group, Inc., 120 S. Ct. 1878, 1886 (2000) (noting that content-based speech restrictions are subject to strict scrutiny); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (stating that the First Amendment prohibits the government from proscribing speech or expressive conduct because it disapproves of the ideas expressed).

45. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

46. *See* William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 392-93 (1996).

47. *See id.*

48. Applying the equal treatment principle to permissive accommodation not only avoids any tension with free speech law (as well as equal protection law), it also avoids the need to distinguish between exemptions for religious speech and those for religious practice. It is often difficult to determine whether an exemption targets speech or practice. Does an exemption from a city zoning law for religious meetings concern speech (or association) on the grounds that what occurs at such meetings, including religious worship services, constitutes the spreading of religious ideas? Or do such meetings constitute religious practice or ritual? Under some analytical approaches, the answers to these questions determine the applicable legal rules—either general accommodation principles or more stringent speech standards. Applying the same set of rules to accommodation of religious ideas and religious conduct eliminates line-drawing problems as well as arbitrary legal distinctions among similar governmental actions.

valuable insights on integrating accommodation and equality.[49] Ultimately, however, neither article confronts the exact issue with which I am concerned. In particular, neither article offers legislators a theory or method for proactively accommodating religious requests for accommodation while simultaneously maintaining equal treatment.

Professor Lupu argues for a ban on permissive accommodation, which he defines as "religion-specific action not required by the Constitution."[50] His view rests on an acknowledgment of the equal treatment principle underlying the Establishment Clause and a distrust that legislatures will apply it faithfully or apply it at all.[51] Legislatures award permissive accommodations as a matter of discretion through the political process.[52] Professor Lupu notes, however, that the political process tends to discriminate against minority religions as well as nonreligious minorities who lack numbers, resources, and other means of political influence.[53] Thus, Professor Lupu maintains that accommodation should be reserved for cases in which the Free Exercise Clause requires it.[54] (He argues that, although the Establishment Clause contains a comparative right to equal treatment, the Free Exercise Clause contains a noncomparative right to religious liberty that permits exclusive religious accommodations.[55]) In addition to constitutional arguments, Lupu offers institutional justifications for this position.

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49. *See* sources cited *supra* note 24.

50. Lupu, *The Trouble with Accommodation*, *supra* note 24, at 779. For a more specific definition, see Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 559-60.

51. *See* Lupu, *The Trouble with Accommodation*, *supra* note 24, at 776-79.

52. *See id.* at 753.

53. *See* Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 600-01; Lupu, *The Trouble with Accommodation*, *supra* note 24, at 777-78.

54. *See* Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 560; Lupu, *The Trouble with Accommodation*, *supra* note 24, at 771-72, 779. Professor Lupu also argues for a reversal of *Smith*, which significantly restricted the circumstances under which the Free Exercise Clause requires accommodation. *See* Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 609.

55. *See* Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 567-70; Lupu, *The Trouble with Accommodation*, *supra* note 24, at 771-72. Professor Lupu later argues, however, that "[i]t seems constitutionally wise" to treat nonreligious exemption claims with the same respect as religious exemption claims under the Free Exercise Clause (as he understands and limits those claims). *See* Lupu, *To Control Faction*, *supra* note 37, at 384. He defends this position in part to avoid any Establishment Clause objections to exclusive religious accommodations. *See id.*

Unlike legislatures, courts must: consider accommodation requests from politically powerful and powerless religious claimants alike; issue written decisions justifying the basis and scope of particular accommodations in a way that ensures the intellectual honesty and consistency of such accommodations; rest their decisions on constitutional principles rather than on political favor; and award accommodations only to sincere and meritorious claimants.[56]

I share many of Professor Lupu's concerns about the potential for religious and nonreligious discrimination inherent in permissive accommodation.[57] Yet I remain unconvinced that a return to a regime of constitutionally required accommodations is the proper response or at least the only response. As a practical matter, this approach depends on an overruling of the *Smith* decision, and it appears unlikely that the Supreme Court is inclined to do so.[58] Moreover, the Supreme Court never has understood that regime as guaranteeing much protection for religious liberty. Even before *Smith*, the Court upheld Free Exercise claims only in a handful of cases.[59] The political process and permissive accommodation have produced more protection for religious liberty. For example, members of the Native American Church have had more success in obtaining voluntary, legislative exemptions to generally applicable state drug laws for peyote use than constitutionally mandated ones.[60] In my view, it is important to be realistic about the likely source of protection of religious liberty. Accordingly, it is important to offer legislatures a theory for voluntarily accommodating religious liberty that does not violate equality.

Professors Eisgruber and Sager begin to provide such a theory. They start from the premise that legislatures may not provide exemptions exclusively for religious claimants.[61] Such exemptions impermissibly "privilege" religious claimants—in the main, members

56. *See* Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 600-05.

57. I address some of those concerns more fully in Part III.

58. *See* City of Boerne v. Flores, 521 U.S. 507, 512-14 (1997) (declining invitation to revisit *Smith*).

59. *See* Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990) (noting that the Court rarely had granted Free Exercise claims).

60. *See id.* at 890 ("It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.").

61. *See* Eisgruber & Sager, *supra* note 24, at 1254-59.

of majority religions—over their nonreligious counterparts.[62] In these authors' view, the Religion Clauses forbid privileged treatment of religion. They argue, however, that the Religion Clauses do permit, and indeed require, legislatures to protect minority religions from discrimination, defined as unequal treatment relative to mainstream religions or nonreligion.[63] The Clauses compel legislatures to "treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[64]

According to Professors Eisgruber and Sager, legislatures may provide exemptions for religious claimants only when they already have provided exemptions for comparable nonreligious claimants—and indeed in this situation they must do so.[65] Suppose Congress had exempted members of PETA and other nonreligious objectors from the medical treatment requirement in the Medicare and Medicaid Acts. Or suppose a state already had provided an exemption from its drug laws for medical use of peyote. According to Eisgruber and Sager, the state must then grant the requests of religious objectors for a comparable exemption. Extending the formerly nonreligious accommodation to similarly situated religious claimants is necessary to protect them from discrimination relative to nonreligious claimants.[66] In short, it is necessary to ensure "equal regard."[67]

Professors Eisgruber and Sager also permit, indeed require, religious accommodations in a more awkward, hypothetical circumstance: when a legislature has granted no exemptions to a legal prohibition but plausibly would have done so for secular or

62. *See id.*

63. Professors Eisgruber and Sager primarily frame their theory in terms of judicial enforcement of accommodation claims. It is restated here in terms of legislative recognition of such claims. The restatement is consistent with the view of Professors Eisgruber and Sager that legislatures will take the lead in applying their theory to accommodate religion. *See id.* at 1301-06.

64. *Id.* at 1285.

65. *See id.* at 1285, 1287-88. Professors Eisgruber and Sager note two situations in which this might occur. A statute might authorize an exemption for a specific class or contain a functional standard for awarding individual exemptions, such as a "good cause" standard. *See id.* at 1287-88.

66. *See id.* at 1282-89.

67. *See id.* at 1282.

mainstream religious needs, if those needs had in fact existed.[68] In *Smith*, for example, Professors Eisgruber and Sager ask whether the state legislature would have granted an exemption to its generally applicable drug laws for peyote use *if* one had been necessary for nonreligious medical purposes or mainstream religious purposes.[69] Professors Eisgruber and Sager maintain that answers to such hypothetical questions will vary from case to case, depending on inferences about the "statutory scheme as a whole."[70] They note that in the *Smith* case itself, the Oregon legislature ultimately provided an exemption to its alcohol laws for sacramental wine use, an arguably analogous exemption request from a mainstream religion.[71] According to Professors Eisgruber and Sager, this analogy might be sufficient to demonstrate that Oregon would have granted a peyote exemption if a mainstream religion had needed it.[72] Put differently, this analogy might be sufficient to demonstrate legislative discrimination against Native Americans and thus trigger a peyote exemption for them.[73]

The Eisgruber/Sager "equal regard" theory offers a sound reconciliation of religious liberty and equality because it protects religious claimants from denial of exemptions either accorded to others, or that would hypothetically in rare cases have been accorded to others. It is not so clearly helpful, however, when religious claimants seek an accommodation in the political process solely because they need one, and not because they have been denied equal access to one. Furthermore, it is not so clearly helpful when religious claimants present themselves *first* for an accommodation in the legislative arena, in the absence of prior discrimination. Although the "equal regard" analysis invites this crucial next (or perhaps antecedent) step, it requires more in the way of a specific approach. Combining parts of the "equal regard" theory with some of Professor Lupu's institutional observations, I propose an approach that permits religious claimants to come first but ensures that they will not be last.

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68. *See id.* at 1285, 1288-89.
69. *See id.* at 1288-89.
70. *Id.* at 1290.
71. *See id.*
72. *See id.*
73. *See id.*

II. THE EQUAL LIBERTY APPROACH

The equal liberty approach permits religious claimants to request accommodations and legislatures to grant them, as long as those legislatures are prepared to extend such accommodations to similarly situated nonreligious claimants.[74] Legislatures may demonstrate their willingness to create an accommodation by writing a statutory exemption that contains a reasonably broad class of religious and nonreligious beneficiaries or establishes a reasonably inclusive functional standard. For example, state legislatures have extended the animal dissection exemption to students who oppose dissection for *any* reason.[75] So too, Congress might extend the Medicare and Medicaid exemptions to persons who object to medical treatment for any reason.[76] Or Congress might act more narrowly, extending the exemptions to "any person who objects to medical treatment for deeply held reasons of religious, moral or ethical conscience."[77] Alternatively, Congress might rewrite the exemptions to apply to "any person who

74. Legislatures also must comply with other Establishment Clause requirements. For example, they may not create accommodations that result in excessive entanglement of government and religion. *See* Board of Educ. v. Grumet, 512 U.S. 687 (1994) (invalidating a legislative accommodation that delegated governmental authority to a religious sect). Likewise, they may not enact accommodations that unduly burden third parties. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (invalidating a legislative accommodation that enabled private employees to miss work for religious needs even at substantial cost to their employers). These important limitations have generated their own body of scholarship. *See, e.g.*, Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1487 (1999) (noting with approval that state Religious Freedom Restoration Acts permit state legislatures to revise judicial accommodation awards when those legislatures strike a different balance between the conflicting rights of religious claimants and third parties).

75. *See supra* notes 6-8 and accompanying text.

76. *See supra* notes 9-18 and accompanying text.

77. A court might interpret the term "religion" to include some conscientious objectors. *See* United States v. Seeger, 380 U.S. 163, 166 (1965) (interpreting the religious conscientious objector provision of the Universal Military Training and Service Act to cover those individuals who object to war based on a "sincere and meaningful [belief which] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption"). But that might vary court by court and statute by statute. Moreover, as explained below, for democratic reasons legislatures should consider explicitly extending provisions to nonreligious conscientious objectors rather than relying on courts to do it for them.

demonstrates good cause for an exemption to the medical treatment requirement."[78]

Regardless of the particular extension selected, legislatures must make that extension on the face of the statute creating the accommodation. Legislatures may not choose to enact statutory exemptions for similarly situated claimants in a piecemeal fashion. They may not, for example, enact a specific statutory exemption for Christian Scientists or religious objectors now and one for nonreligious objectors later if and when they present themselves. The reason is straightforward. The political process provides no assurance that legislatures will enact an exemption for the nonreligious claimants if and when the time comes. Professor Lupu raised a similar concern in arguing for a ban on permissive accommodation.[79] Justice Souter raised exactly this concern in striking down a sect-specific accommodation in *Board of Education of Kiryas Joel Village School District v. Grumet*.[80]

In *Kiryas Joel*, New York exempted a group of orthodox Jews from general school zoning laws in order to create for them a special religious school district within the boundaries of an existing secular school district.[81] The Court invalidated the school district, reasoning in part that New York had failed to provide any assurance that the next requesting group—religious or not—would receive similar treatment.[82] New York left the next group to fight for comparable treatment in the political process, which was simply too discretionary to guarantee equality. Writing for the Court, Justice Souter explained:

> Because the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one; unlike an administrative agency's denial of an exemption from a generally

78. Part IV of this Essay discusses issues related to the administration of functional statutory standards like "good cause."

79. *See* Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 600-03.

80. 512 U.S. 687 (1994).

81. *See id.*

82. *See id.* at 696-710.

> applicable law, . . . a legislature's failure to enact a special law is itself unreviewable.[83]

The only way to ensure equal treatment is to require legislatures from the start to extend accommodations to a reasonable class of similarly situated claimants or their functional equivalent.

Herein lies the problem. The equal liberty approach requires legislatures to determine which potential beneficiaries are similarly situated before those beneficiaries identify themselves. In other words, legislatures must assess in the abstract which potential beneficiaries are entitled to equal treatment. But, as commentators have noted in this and more general contexts, the concept of equal treatment does not yield a particular beneficiary class.[84] It is not self-executing. Rather, it requires reference to some underlying substantive judgment for determining relevant similarities and differences among subjects.[85] A red car and a yellow car are similar or different depending on whether the relevant criterion for comparison is vehicle type or color. Selection between the two involves a substantive judgment that in turn defines the meaning of equal treatment for the cars.

Equal liberty involves a related but significantly more complicated judgment. Determining the relevant similarities and differences between religion and nonreligion asks legislatures and courts to determine the rationale for protecting religious liberty and the class of secular values to which that rationale also applies.[86] These determinations involve subjective judgments that are open to debate. There is no consensus for why we protect religious liberty.[87] For example, we might protect religious liberty to promote individual conscience,[88] personal autonomy,[89] civic

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83. *Id.* at 703 (footnote and citation omitted).

84. *See* Smith, *supra* note 26, at 63-70; Westen, *supra* note 23, at 546 ("Just as no categories of 'like' people exist in nature, neither do categories of 'like' treatment exist.").

85. *See* Westen, *supra* note 26, at 551-53.

86. In addition, it requires a definition of "religious" liberty.

87. *See* Laycock, *supra* note 32, at 314 ("Contemporary scholars have puzzled over why the Constitution would specially protect religious liberty, as distinguished from liberty in other domains.").

88. *See* McConnell, *supra* note 23, at 715.

89. *See* Frederick Mark Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1600-03 (1987) ("Because individuality is in many respects a social phenomenon . . . a religious

virtue,[90] or pluralism.[91] We might protect religious liberty simply because it is special.[92] Or we might vary the rationale with the accommodation and the claimant. For example, we might protect religious individuals in a particular case to ensure their freedom of conscience while protecting religious institutions in another to acknowledge their social contribution.

Likewise, there is no consensus on what is comparable to religion. The comparable secular class will depend as an initial matter on the rationale for protecting religious liberty. Suppose Congress exempts Christian Scientists from the medical treatment requirements in the Medicare and Medicare Act to relieve those individuals of the choice between their deeply held religious beliefs and their health. Congress might reasonably extend those exemptions to individuals who object to medical treatment for other deeply held religious, moral, or ethical beliefs in order to relieve those individuals of a comparable choice. In so doing, Congress would not only include religious individuals like Christian Scientists who oppose medical treatment because they prefer faith healing but other individuals with religious objections to medical treatment—perhaps those whose religion forbids practices involving animal research and testing.[93] Congress also would reach individuals who prefer holistic healing methods for nonreligious spiritual reasons, as well as those who hold moral or ethical objections to medical

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community committed to the autonomy, responsibility, and dignity of its members will enhance the unique personality development of each. . . . [H]ostility toward or ignorance of religious communities risks diminishing or altogether eliminating a critical context by which individuals choose their values and define the meaning of their existence.").

90. *See* Marshall, *supra* note 31, at 245 (stating that religion "imbues a sense of community obligation and virtue into the mind of the citizen-believer that is necessary to maintain a system of self-government").

91. *See* Abner S. Greene, *The Irreducible Constitution*, 7 J. CONTEMP. LEGAL ISSUES 293, 302 (1996) ("One might understand the core value of the clauses to be the promotion of religious pluralism."); Marshall, *supra* note 46, at 388 ("Religion is also central to the fostering of pluralism—itself an important part of the American experiment.").

92. *See* John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 283 (1996) ("The best reasons for protecting religious freedom rest on the assumption that religion is a good thing."); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 149-50 (1991) (arguing that protection for religious liberty cannot be understood in nonreligious terms).

93. *Cf.* Jenkins v. Angelone, 948 F. Supp. 543 (E.D. Va. 1996) (involving RFRA claim asserted by prison inmate claiming his religion required a vegan meal).

treatment because it involves animal research and testing—perhaps members of PETA.

But this hypothetical raises more questions than it answers: Why members of PETA? And why those who object to medical treatment for "other deeply held religious, moral or ethical beliefs" and not those who prefer nursing care for "shallow"[94] reasons or for beliefs unrelated to individual conscience—say, because they fear doctors or hospitals? State legislatures allow students to invoke the animal dissection exemption for any reason.[95] Why not require the same of Congress?

Consider another example. Suppose a state legislature exempts peyote use from its drug laws in order to accommodate the religious practices of Native Americans. At the same time, the legislature might recognize other important uses—such as medical use to avoid pain and suffering or to improve the quality of life. But in what sense is medical use really comparable to religious use? And what other uses should or should not qualify for an exemption? These questions come down to whether it is possible to determine the rationale for protecting religious liberty and the comparable nonreligious class, given the open-ended nature of both inquiries. Thus, the ultimate question is whether it is possible ever to ensure equal liberty in the absence of a concrete metric for its measure.

Some might claim that this question offers immediate reason to reject equal liberty as simply too indeterminate to produce a workable approach to permissive accommodation. But arguments about fatal indeterminacy in the law ought to be regarded with skepticism. Every interpretive approach—whether constitutional or statutory—involves a certain amount of indeterminacy. This is particularly true of approaches interpreting capacious concepts like religious liberty and equality. And it is equally true of approaches that rely on bright-line rules rather than discretionary standards. Michael McConnell has provided a seemingly bright-line approach in this context, requiring accommodation when it would minimize governmental interference with religion and neither induce religious practice nor unduly burden others.[96] Even putting aside

94. *See* Smith, *supra* note 26, at 68.

95. *See supra* note 6.

96. *See* McConnell, *supra* note 23, at 735-39.

issues raised by inducement and third-party burdens, his approach involves intractable questions about what constitutes "governmental interference" and "religion."[97] Indeterminacy is purely a matter of degree.

Moreover, the equal liberty approach is not nearly as indeterminate as it initially might appear. The equal liberty approach does not require a theoretical measure of equality between religion and nonreligion. With respect to selecting a rationale for protecting religious liberty, the equal liberty approach merely requires legislatures to choose a rationale for accommodating religious claimants and extrapolate from that rationale a reasonable class of similarly situated nonreligious beneficiaries. It merely requires legislatures to select *some* reason for protecting religious liberty that supports comparison to *some* class of nonreligious values *in a particular case.*

Of course, the equal liberty approach necessarily places off the table at least one theory for protecting religious liberty—namely, that religion is special—because that theory permits no comparison to another class and supports exclusive religious accommodations. We may well value religious liberty in certain circumstances because it is special. But for the government to treat religion as special *in the political process* because religion is presumptively special fundamentally disregards the basic structure of equality analysis. If legislatures are to make any sense of the Establishment Clause as containing an equality principle or, more emphatically, a prohibition on discretionary preference for religion, they must select a theory of religious liberty that permits comparison to nonreligious liberty.[98]

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97. Although the equal liberty approach introduces its own open issues, it may avoid these issues in a number of cases. Legislatures will not have to find "governmental interference" with religion if broadly benefiting both religion and nonreligion in the form of an exemption from a generally applicable law. Nor will legislatures have to define "religion" if they extend exemptions to both religious and nonreligious conscience. *Cf.* Marshall, *supra* note 37, at 213 ("Concerns with adjudicating religion as a distinct phenomenon mitigate in favor of the equality approach, because the equality approach necessarily avoids the intractable problems inherent in differentiating between religion and nonreligion.").

98. Steven Smith disagrees. He argues that rejection of "the distinctiveness of religion *as religion*" reflects a covert substantive judgment about religion that skews equality analysis from the outset. Smith, *supra* note 26, at 68. Nonetheless, this judgment is necessary for equality analysis to be anything more than a formalistic construct. Acceptance of the distinctiveness of religion *as religion* effectively forecloses equality analysis before it starts.

As for the scope of the comparable secular class, the equal liberty approach simply seeks to implement the Establishment Clause prohibition on religious preference. It, like the Establishment Clause, only requires legislatures to create a nonreligious class sufficiently broad to negate any inference of special treatment for religion.[99] This is not an unfamiliar standard. It is the one that legislatures routinely employ when including religion among other beneficiaries in governmental aid programs.[100] And they sometimes employ this standard when exempting religion among other beneficiaries from governmental regulations. The New York Constitution, like other state constitutions and laws, permits tax exemptions for "real or personal property used exclusively for *religious, educational or charitable purposes* as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."[101] In *Walz v. Tax Commission*, the Supreme Court upheld a tax exemption for a church property premised on this constitutional provision.[102] The Court remarked:

In other words, it renders the equality principle superfluous and endorses the alternative constitutional position that accommodation is permissible with respect to religion and only religion. That position must be independently justified. Note that equality analysis does not preclude all arguments that religion is special. Legislatures still may protect religion alone if it is specially or uniquely burdened by a generally applicable law. This might occur rarely because it is almost always possible that some similarly situated religious or nonreligious claimant will materialize.

99. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989); Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.) ("In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.").

100. *See* Mitchell v. Helms, 120 S. Ct. 2530, 2541 (2000) (plurality opinion) (upholding funding for computers to schools selected according to neutral criteria); Agostini v. Felton, 521 U.S. 203, 221 (1997) (upholding a federally funded remedial education program for schools selected according to neutral criteria); Bowen v. Kendrick, 487 U.S. 589, 608 (1988) (upholding a statute funding a "wide spectrum of organizations" in addressing adolescent sexuality because the law was "neutral with respect to the grantee's status as a sectarian or purely secular institution"); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, 487 (1986) (upholding a vocational tuition grant to students "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited"); *see also* Widmar v. Vincent, 454 U.S. 263, 274 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.").

101. *Walz*, 397 U.S. at 666-67 (emphasis added) (quoting article 16, section 1 of the New York Constitution).

102. *Id.* at 667.

> New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its moral or mental improvement, should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.[103]

While the New York constitutional provision does not necessarily create theoretical equality between religion and nonreligion, it does establish a kind of safe harbor from Establishment Clause challenge. It creates a class so broad that no one would think it advances religion, even though it expressly or implicitly encompasses religion. The same might be said of the Court's construction in *United States v. Seeger* of the religious conscientious objector provision of the federal military draft statute.[104] The Court interpreted the provision to include those individuals who object to war based on "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[105] Legislatures could include similar language or perhaps a short form (e.g., deeply held religious, moral, or ethical beliefs[106]) in other conscientious objector accommodations. Or they could move to broader, functional safe harbors, extending conscientious objector provisions to individuals who oppose generally applicable laws for "good cause" or even for "any reason" where appropriate.

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103. *Id.* at 672-73 (internal quotation omitted).

104. 380 U.S. 163 (1965).

105. *Id.* at 176 (interpreting § 456(j) of the Universal Military Training and Service Act, 50 U.S.C. § 456(j) (1958)).

106. *See* Welsh v. United States, 398 U.S. 333, 339-40 (1970) ("What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.").

Any equality issues that remain in defining the scope of an accommodation likely will not be theoretical but will turn, like many issues of statutory construction, on the legislative intent underlying the statutory exemption.[107] Suppose Congress extends its religious Medicare and Medicaid exemptions to those individuals who object to medical treatment for deeply held moral or ethical reasons, but denies relief to individuals who fear doctors or simply prefer nursing care. Whether the denial violates equal liberty will depend on an analysis of the substantive legislative rationale for the accommodation. The denial is consistent with equal treatment if, for example, Congress intended only to accommodate belief structures based on deeply held conscientious scruples. But the denial may be inconsistent with equal treatment if Congress intended broadly to accommodate personal autonomy in the selection of health care.[108]

Despite these clarifications, the equal liberty approach retains some indeterminacy. The proper reaction, however, is not to reject the equal liberty approach in favor of one that introduces its own indeterminacy *and* Establishment Clause problems, like Professor McConnell's.[109] The better tack is to explore the possibility of an institutional framework for focusing the inquiry. An institutional framework attempts to address the question of *how* to ensure equal liberty by considering *who* should ensure equal liberty—legislatures or courts. More particularly, it considers whether courts should accord legislatures deference in selecting a rationale for protecting religious liberty and in translating that rationale into an appropriate beneficiary class or functional standard.

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107. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) ("How expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State's secular aim in granting a tax exemption.").

108. *See id.* at 15-16 ("If the State chose to subsidize, by means of a tax exemption, all groups that contributed to the community's cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained, provided that the exemption swept as widely as the property tax exemption . . . upheld in *Walz*. By contrast, if Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life, then a tax exemption would have to be available to an extended range of associations whose publications were substantially devoted to such matters . . . .") (footnote omitted).

109. *See supra* notes 28-31 and accompanying text.

There is reason to allow legislatures significant deference in crafting permissive accommodations. As an institutional matter, legislatures are better able than courts to resolve the complex balancing of governmental interests and resources often involved in determining the proper scope of particular exemptions. Congress might decide that accommodating personal autonomy in the selection of health care might undermine its interest in creating the Medicare and Medicaid system by encouraging large numbers of patients to relinquish medical treatment. Accommodating personal autonomy also might increase costs by causing those patients who receive only nursing care to suffer prolonged or more serious illnesses. Conversely, Congress might determine that a broad accommodation actually would save costs by encouraging more patients to accept a "subset" of government benefits—nursing care but not medical care.[110] Furthermore, Congress might determine that most patients would not voluntarily surrender medical care in order to receive the stand-alone nursing care benefit. These are similar to and often precisely the kind of policy determinations from which the Supreme Court recoiled in *Smith*.[111]

Apart from institutional concerns, there are democratic reasons for allowing legislatures and not courts to make the primary judgments necessary to permissive accommodation. Given the lack of consensus in this area, legislatures ought to test proposed accommodations in the political process.[112] They also ought to get into the habit of thinking in principled terms about accommodating religious liberty rather than deflecting that responsibility to the courts. By thinking in this way, legislatures will generate better, more public-regarding exemptions rather than exemptions that

110. See Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084, 1095-96 (8th Cir. 2000).

111. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990); *see also* Lupu, *To Control Faction*, *supra* note 37, at 376 ("Recognizing the constitutional choice as one between majoritarian, political control [of the religion-exempting process] versus judicial control of the religion-exempting process, *Smith* opts for the former to save the judicial branch from the perceived difficulties such a task entails."); Eugene Volokh, *A Common-Law Model For Religious Exemptions*, 46 UCLA L. REV. 1465, 1487 (1999) (noting with approval that state religious freedom restoration acts permit state legislatures to revise judicial accommodation awards when contrary to state interests).

112. *See Texas Monthly, Inc.*, 489 U.S. at 16 ("It is not our responsibility to specify which permissible secular objectives, if any, the State should pursue to justify a tax exemption for religious periodicals. That charge rests with the Texas Legislature.").

merely serve narrow interests. But they also will produce better laws. If legislatures must deliberate and agree upon the principles for allocating special exemptions, they necessarily will have to confront the degree to which they are committed to general regulatory intervention in the first instance.[113]

Although there is reason to adopt a general posture of judicial deference to legislative judgments about the proper objective and scope of permissive accommodations, a posture of total deference is inadequate to prevent instances of religious favoritism. Religious favoritism occurs when accommodations explicitly single out religion or a particular religion for special treatment. A similar problem arises with respect to facially inclusive and facially neutral accommodations—those that provide exemptions to religious and nonreligious beneficiaries alike and those that contain a general, religion-neutral accommodation policy. Facially inclusive accommodations might contain a sham or token class of beneficiaries rather than one that reflects genuine breadth. Facially inclusive and facially neutral accommodations might contain restrictions on eligibility that fence out all but religious or only some religious claimants. Suppose Congress extended the Medicare and Medicaid exemptions to all individuals who object to medical treatment for reasons of conscience but required those individuals, as a condition of receiving stand-alone nursing care benefits, to seek nursing care in an institution that itself provides no medical treatment for reasons of conscience. Depending on the likely availability and accessibility of such nonmedical institutions, this condition might serve to ensure that only Christian Scientists receive stand-alone nursing care benefits.[114]

It is necessary then to craft a judicial mechanism for preventing religious favoritism, but one that operates in the absence of a

113. Legislatures frequently relieve themselves of the responsibility to consider the effect of generally applicable laws on religion and other interests by enacting flat prohibitions and delegating exemption authority to administrative agencies. *See* discussion *infra* Part IV. Delegation to administrative agencies is different from delegation to courts, however. Federal agencies, for example, are democratically accountable to the public through the President. In addition, they frequently are in a better institutional position than courts or legislatures to weigh the relative costs and benefits of awarding particular exemptions.

114. *See Mín De Parle*, 212 F.3d at 1103 (Lay, J., dissenting) ("Congress' incredibly narrow crafting of the new provisions leaves no doubt regarding their lack of neutrality and denominational preference for Christian Scientists.").

determinate definition of equality and acknowledges the legislative policy judgments that inhere accordingly. One possibility that suggests itself is a process-oriented tool for prodding legislatures themselves to demonstrate that their accommodations reflect fair consideration of the equal liberty principle. Such a tool would force legislatures to consider equal liberty when they undertake to protect religious liberty by requiring them openly to justify the scope of any permissive accommodation in equality terms. More specifically, it would call on courts to uphold a permissive accommodation if accompanied by plausible legislative reasons justifying its scope. And it would call on courts to invalidate any permissive accommodation that is unaccompanied by such reasons. Such reasons might appear in a legislative findings section on the face of the accommodation or in the legislative record supporting the accommodation. The idea is that requiring legislatures to articulate the reasons for making particular decisions will produce good decisions in the first instance. It also will expose bad ones to public and judicial scrutiny. But it will not invite courts to substitute their judgment for that of the legislature, at least not directly or immediately in most cases.[115]

While plausible in theory, the reason-giving requirement may seem difficult as applied because courts lack a standard for judging the legislative reasons offered in support of a particular accommodation. Courts, however, will not need a specific standard in many cases. Some reasons will be plainly inadequate—such as those premised on the theory that religion is special. And some will be plainly sufficient—such as those that incorporate a safe harbor or some equally generous class of beneficiaries. Others may be harder to evaluate because they defend novel or narrow classes. Courts might allow legislative judgments to prevail in such close cases. In other words, they might accord legislative findings a presumption of validity. That is not to say that courts would be unjustified in taking the opposite course, invalidating arguably underinclusive accommodations in order to overprotect equality. But the former course would be the wiser. Although less protective

115. In this sense, reason giving can be called a "minimalist" judicial strategy. For a general discussion of judicial minimalism, see CASS R. SUNSTEIN, ONE CASE AT A TIME (1999).

of equality, it would better reflect the often complex and essentially political nature of the legislative judgments involved.

This type of reason-giving requirement may seem institutionally odd as applied to legislatures. It fits more comfortably with administrative agencies, which long have been required to explain the factual and legal basis for their decisions.[116] Legislatures normally are not required to do the same. But asking legislatures to furnish reasons is less restrictive of permissive accommodation than the alternative for detecting and preventing impermissible religious favoritism. Courts instead could invalidate legislative actions that single out religion for special exemptions. As discussed above, there is general support for this approach in the law of equal protection and free speech. The reason-giving requirement creates more room for permissive accommodation, although not unlimited room. It tells courts to uphold permissive accommodations on condition that legislatures agree to supply reasons justifying those accommodations.

Furthermore, the requirement of legislative reason giving is not entirely unfamiliar to the law. The Supreme Court has articulated such a requirement in recent cases involving principles of federal constitutional power and structure. For example, in *United States v. Lopez*, the Court held that the federal Gun Free School Zones Act, which prohibited possession of a firearm within 1000 feet of a school, exceeded Congress's authority under the Commerce Clause in the absence, among other things, of congressional findings demonstrating that such possession substantially affects interstate commerce.[117] Although careful to note that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," the Court emphasized the role of such findings in confirming the "legislative judgment" that a federal statute operating in an area of traditional state concern has a substantial effect on interstate commerce when "no such substantial effect [i]s visible to the naked eye."[118]

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116. *See* Motor Vehicle Mfs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48-49 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner, and we affirm that principle again today.").

117. 514 U.S. 549, 562-63 (1995).

118. *Id.* at 563.

Similarly, in *City of Boerne v. Flores*, the Court held that the federal Religious Freedom Restoration Act (RFRA), which required federal and state governments to demonstrate a compelling interest for generally applicable laws that substantially burden religious exercise, exceeded Congress's power under Section 5 of the Fourteenth Amendment to remedy and prevent discrimination in the absence of a "legislative record" containing "examples of modern instances of generally applicable laws passed because of religious bigotry."[119] Again, careful to note that the deficient legislative record was not RFRA's only or even most serious shortcoming, the Court nonetheless suggested that a better record would have helped to support Congress's apparent determination that RFRA was an appropriate preventative or remedial measure.[120]

A better record also would aid courts in determining whether a particular permissive accommodation is an appropriate exemption. And there is an argument that imposing a reason-giving requirement is even more defensible in the permissive accommodation context than in the federalism context because it aids courts in protecting a particularly important set of interests—namely, equality and individual liberty interests.[121] Note, however, that for the reason-giving requirement to work in any case, it must be understood to reflect a considered judgment about the proper division of labor between legislatures and courts in particular contexts. The Court recently has raised a question whether it understands the reason-giving requirement in this way or whether it simply uses lack of findings as a convenient justification for striking down laws to which it is hostile. In *United States v. Morrison*, the Court indicated that the presence of congressional

119. 521 U.S. 507, 530-31 (1997).

120. *See id.*

121. In this regard, consider other cases involving individual rights in which the Court has employed a process-oriented approach similar to the requirement of reason giving. In *United States v. Virginia*, 518 U.S. 515, 541-42 (1996), the Court took a "hard look" at a state policy designed to remedy discrimination against women seeking a military education at the all-male Virginia Military Institute (VMI). Specifically, the Court required the state to supply an adequate basis for its judgment that providing a separate military education for women equaled the military education it provided for men at VMI. *See id.* The Court ultimately found such as basis lacking. *See id.* at 551. In *Kent v. Dulles*, 357 U.S. 116, 130 (1958), the Court required a clear statement from Congress before concluding that Congress intended to confer discretion on the INS to deny passports to communists.

findings would not automatically insulate a federal law from invalidation.[122] And despite the presence of findings, it invalidated the Violence Against Women Act as beyond Congress's reach under the Commerce Clause.[123] The reason-giving requirement offers little practical benefit and fails to justify its costs unless courts honor the institutional arrangement it implicitly contains by, as suggested above, according a presumption of validity to legislative findings.

To summarize, the equal liberty approach seeks to mediate the fundamental tension between religious liberty and equality. Not surprisingly, the approach introduces certain difficulties of its own. It requires legislatures to confront hard questions and make contestable judgments in order to provide a measure of equal liberty when they endeavor to protect religious liberty. In particular, it requires legislatures to determine why they protect religious liberty in a given case and which secular values deserve comparable protection. The approach acknowledges the discretion involved in this task and the potential for religious favoritism that lurks within it by seeking an implementation that allows legislatures latitude in formulating permissive accommodations as long as they offer credible equality-based justifications for their choices.

III. OBJECTIONS TO THE EQUAL LIBERTY APPROACH

There are three objections to the equal liberty approach that merit consideration and response. The first objection concerns the administrative and financial burden that equal liberty will impose on permissive accommodation. The contention is that equal liberty will increase the complexity and cost of awarding accommodations, at times to a prohibitive level. The result is that, occasionally and perhaps frequently, neither the religious claimants nor their nonreligious counterparts will receive an accommodation in the political process. Equal liberty will choke off permissive accommodation and provide insufficient protection for religious liberty.

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122. 120 S. Ct. 1740, 1752 (2000) ("But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. [T]he constitutional power of Congress to regulate . . . is ultimately a judicial rather than a legislative question.").

123. *See id.*

This objection incorrectly assumes that some relief is better than no relief, even if that relief is unconstitutional. Assume that a state does not have enough money to educate all of its children, so it decides to send just the boys to school. No liberal government should handle the issue of scarce or limited resources in such an arbitrary and discriminatory fashion—and indeed, the Equal Protection Clause would not tolerate such action. It is unclear why the conclusion should be any different with respect to exemptions and religion rather than benefits and gender, whether under the Establishment Clause or the Equal Protection Clause or both. The costs imposed by the equal liberty approach are the costs of a regime committed not only to religious liberty of some but to equal treatment of all.[124]

The second objection concerns the delay that the equal liberty approach will impose on permissive accommodation. The approach directs courts to invalidate statutory exemptions that lack legislative reasons justifying their scope or that contain reasons failing at least arguably to ensure equality. Pending reenactment, the exemptions remain invalid. Furthermore, some exemptions may never be reenacted because they may not survive the legislative process anew or overcome the financial and administrative burdens highlighted in the first objection.[125] In either case, religious liberty is made to wait.

This objection does not target the equal liberty approach as much as its choice of implementation or of remedy. The objection arises because the equal liberty approach instructs courts to invalidate accommodations rather than extend them. Sometimes courts are willing to repair problematic statutes by effectively rewriting them.[126] Indeed, courts have been willing, at least prior to *Smith*, to

124. Put differently, they are the costs of a regime that recognizes religious liberty in this context as a specific example of a greater constitutional commitment to liberty generally and that perceives equal liberty, like equality generally, as a constitutional imperative.

125. *See* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1419 (2000) ("A new bill (even one that revives a prior law) first must compete with a slew of others for legislative attention, and then must [in the context of federal legislation] survive the constitutional requirements of bicameralism and presentment. These obstacles reduce the likelihood that an invalidated statute will be reenacted or reenacted promptly.").

126. *See, e.g.*, Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (severing an unconstitutional provision from a federal statute); Regan v. Time, Inc., 468 U.S. 641, 653

read some generally applicable laws to contain exemptions for religious claimants when the Free Exercise Clause so requires.[127] The equal liberty approach could follow a similar course, directing courts to extend preferential or underinclusive accommodations to an appropriate, judicially determined beneficiary class rather than remanding the accommodation for legislative extension or explanation.[128]

Although legislative remand injects delay and uncertainty into the permissive accommodation process, it is preferable to judicial reconstruction. As noted above, it is beneficial from an institutional perspective for courts to avoid the policy judgments about governmental interests and resources inherent in permissive accommodation. Of course, not every accommodation involves complex policy judgments. For example, courts might extend exemptions for religious conscience with relative ease to nonreligious conscience. The analogy between religious conscience and nonreligious conscience has become so well embedded in our constitutional tradition and contemporary culture that courts might make it as reflexively as legislatures.[129] Courts, however, cannot make analogies as simply in other cases, most notably those involving religious institutions rather than individuals.[130] Nor can they make the individual-conscience analogy reliably in every case involving individuals. Extending an exemption to individuals who object to the draft or dissection for reasons of individual conscience is one thing. Extending an exemption to individuals who object to peyote

(1984) (same); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (supplying a particular regulatory standard in a federal statute to avoid a nondelegation problem).

127. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972) (creating an exemption to mandatory school attendance law for Amish children over the age of 15).

128. *Cf.* Marshall, *supra note* 37, at 202-11 (arguing that courts should extend exemptions won by religious claimants under the Free Exercise Clause to similarly situated nonreligious claimants).

129. *Cf.* Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 961 (1995) (arguing that the concept of religious freedom in constitutional law should "focus . . . on the protection of individual conscience" rather than religious conscience).

130. Some exemptions for religious institutions can be said to protect the "conscience" of those institutions—for example, an exemption for churches to choose their own clergy or to restrict the membership of their clergy based on sex or ethnicity. *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334-35, 338 (1987).

bans for "religious, moral, or ethical" reasons is another. It is not obvious why conscience ought to limit the relevant class of would-be peyote smokers. Individuals who wish to smoke peyote for medical reasons (i.e., to alleviate pain and suffering or to improve quality of life) also have a logical and weighty claim to an exemption. Whether they have an *equally* logical and weighty claim is a policy judgment that in the first instance requires legislative deliberation.

Furthermore, it is valuable from a democratic standpoint for legislatures to consider the proper scope of exemptions from laws they create. As noted above, legislatures ought to subject controversial exemptions to public scrutiny. More generally, they ought to consider in disciplined fashion the need for an exemption rather than deflecting this responsibility to the judiciary. Forcing them to do so may cause them to reflect on the propriety of the overarching regulatory law, improving accountability on the whole.

Finally, it may even be better from a religious liberty vantage for courts to avoid extending exemptions in certain cases. When a court extends an exemption by selecting a particular beneficiary class or functional standard, it runs the risk of imposing administrative or financial costs that might have been avoided by picking a different class or standard. The legislature might oppose those costs, but nonetheless hesitate to question whether the judicial selection is necessary or merely sufficient for constitutional purposes. The legislature instead might opt to repeal the accommodation entirely. In such a case, religious liberty is not just made to wait; it is denied altogether.

The third objection to the equal liberty approach concerns minority religions. The claim is that the political process provides insufficient protection for the religious liberty of minority religions. Minority religions receive accommodations only if majority religions (or a nonreligious majority) seek the same treatment. While equal access to majority accommodations is of some benefit, it is not enough. Minority religions often lack the political support to obtain the accommodations that they, and they alone, need.

Although quite powerful, this objection does not apply exclusively to the equal liberty approach but to any theory of permissive accommodation. As the Court aptly noted in *Smith*, "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are

not widely engaged in . . . ."[131] It is important to note, however, that regularizing the permissive accommodation process, as the equal liberty approach does, may go some distance toward protecting religious minorities from the insensitive or hostile treatment that gives rise to convincing claims of mandatory accommodation. Legislatures accustomed to making careful and systematic judgments about the kinds of exemptions they can and should offer as a permissive matter, may be less likely to make the kinds of mistakes that call for exemptions as a mandatory matter. For example, a legislature thinking conscientiously about accommodation might choose to exempt religious and certain other peyote use from its drug laws, thereby eliminating the need for a mandatory exemption to protect Native Americans. In this way, the equal liberty approach may reduce the objection acknowledged in *Smith*, and may take considerable pressure off of the result in the *Smith* case as well.

To the extent the equal liberty approach does not adequately protect religious minorities, there is a forceful argument for restoring the pre-*Smith* regime of constitutionally mandated accommodation with respect to generally applicable laws.[132] A return to that regime would ensure compulsory consideration of the exemption claims of minority and majority religions alike under the Free Exercise Clause. It becomes necessary, then, to consider the viability of the constitutional regime.

The constitutional accommodation regime has foundered on its own limitations, however. The Supreme Court rejected it as "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[133] Of course, there is ample room for debate

131. Employment Div. v. Smith, 494 U.S. 872, 890 (1990). For critiques of Smith along these lines, see Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1014-15 (1990), and Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1130-32 (1990).

132. *See* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1613, 1643-44 (1993); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 61-63, 68 (arguing that the Free Exercise Clause ought to protect the beliefs and practices of those religious individuals unable to protect themselves in the political process); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 139 (1992).

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

about whether such a system is worse for democracy than one in which religious liberty depends upon political courtesy.[134]

In any event, as explained above, the constitutional system never provided robust protection even for members of majority religions. Members of minority religions—particularly as they diverged further from the mainstream—did not fare better and most likely fared far worse. Moreover, minority claimants have not always fared poorly in the political process. Witness members of the Native American Church who successfully obtained legislative exemptions to generally applicable state drug laws allowing them to smoke peyote in observance of their religion. Consider also the members of the orthodox Jewish community in *Kiryas Joel*, as well as the Christian Scientists. Minority religious groups frequently possess enough political power, either alone or with the backing of other religious groups, or engender enough political compassion to achieve their goals.

But even if a return to constitutional accommodation would increase the liberty of minority religions at the margins, such a return would be imprudent in the absence of some procedural or institutional means for ensuring equality between religion and nonreligion. Of course, many argue as a theoretical matter that the Free Exercise Clause does not require equality between religion and nonreligion. They claim that the Free Exercise Clause permits exclusive religious accommodations. Professor Lupu has tendered a version of this argument, as indicated above.[135] Others disagree, contending that the Free Exercise Clause, like the Establishment Clause, forbids exclusive religious accommodation.[136] In my view,

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134. For criticism of *Smith*, see James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991). *See also* Laycock, *supra* note 132, at 3-4; Lupu, *Reconstructing the Establishment Clause*, *supra* note 24, at 570-74; McConnell, *supra* note 131, at 1145-46 (1990); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231-37 (1991). For a defense of *Smith*, see Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 749 (1993) (arguing that *Smith* is consistent with prior case law); Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619 (1998) (arguing in favor of *Smith* as against the Religious Freedom Restoration Act); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (defending the result in *Smith* but not the reasoning).

135. *See supra* notes 50-56 and accompanying text.

136. For example, Professors Eisgruber and Sager understand the Constitution to prohibit

"[i]t seems constitutionally wise" to treat nonreligious exemption claims with the same respect as religious exemption claims under the Free Exercise Clause.[137] Doing so avoids any tension with the Establishment Clause, and, more importantly, acknowledges that mandatory accommodation raises many of the same equality concerns as permissive accommodation. Thus, it is constitutionally prudent to reconcile religious liberty and equality with respect to both mandatory and permissive accommodation.

There are two procedural arrangements for maintaining equality under a pre-*Smith* approach to mandatory accommodation. The first option is to allow nonreligious claimants to assert their own exemption claims under the Free Exercise Clause on the same basis as religious claimants. The second option is to extend exemptions secured by religious claimants under the Free Exercise Clause to nonreligious claimants. As framed, both options are institutionally problematic because they ask courts to engage in precisely the same type of open-ended comparability analysis that the equal liberty approach implores them to avoid. Specifically, they compel courts to determine which nonreligious claimants are similarly situated to religious claimants and thereby entitled either to seek their own exemptions or to seek the benefits of religious exemptions under the Free Exercise Clause.

There is a way around these difficulties that bears mentioning. It is possible to limit Free Exercise claims to claims of individual religious conscience. Not only are these claims at the core of the Free Exercise Clause, they also are easy for courts to make available to nonreligious claimants—at least in those cases that fit the well-established conscientious objector paradigm.[138] As noted

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any accommodation, regardless of its asserted source, that flows only to religion. *See* Eisgruber & Sager, *supra* note 24. They read the Free Exercise Clause and the Establishment Clause to contain a principle of "equal regard" for all citizens that is violated by special treatment of some citizens solely on the grounds of their religiosity. *See id.* at 1282-83. Professor Marshall also reads both clauses to contain the principle of equal treatment. *See* Marshall, *supra* note 37, at 194-96. In his view, this equality principle requires courts to extend all Free Exercise accommodations to similarly situated nonreligious individuals. *See id.* at 204-06.

137. Lupu, *To Control Faction*, *supra* note 37, at 384.

138. This is different from the issue of whether courts should extend permissive accommodations to nonreligious conscience. Legislatures ought to make this judgment in the first instance for democratic reasons, even if courts find themselves capable of doing so as an institutional matter.

above, it is not always easy for courts to determine whether a particular exemption fits the conscientious objector paradigm. Accordingly, courts would have to be restrained in their application of this proposal even to claims involving individuals. Furthermore, they would be disabled entirely from entertaining other Free Exercise claims, including most claims raised by religious institutions. This limitation represents a significant departure from pre-*Smith* law and is not entirely satisfying as a means for ensuring religious liberty. But, one might argue, it is better than the *Smith* regime at protecting religious liberty (especially the liberty of minority religions) and better than the pre-*Smith* regime at protecting equality.

Although permissive accommodation encounters significant objections, it remains preferable to the alternatives. It remains preferable to a system of inequality between religion and nonreligion, even if the result is fewer accommodations overall. It also remains preferable to a scheme of court-imposed remedies for inequality between religion and nonreligion, even if the result is delay and uncertainty. Finally, it remains preferable to a regime of constitutionally mandated exemptions, even if the result is fewer exemptions for minority religions at the margins. The approach is consistent, however, both as a theoretical and practical matter, with a limited constitutional right to an exemption for individual conscientious objection.

IV. ADMINISTRATIVE AGENCIES AND THE EQUAL LIBERTY APPROACH

In an effort to cover all the bases, a final issue to consider briefly is the effect of the equal liberty approach on accommodations implemented by administrative agencies or officials. Frequently, legislatures do not grant exemptions to particular beneficiaries but instead delegate discretion to agencies to award such exemptions.[139]

139. Indeed, the possibility of delegation diminishes any concern about forcing legislatures to think ahead too much when formulating permissive accommodations. Legislatures do not have to think ahead much at all if they write accommodations in general terms and leave the specific application to an agency. Of course, that simply defers the problem to the agency. But agencies may be more familiar with—or at least have better access to information about—potential beneficiaries, workable accommodation policies, and

Agencies sometimes receive express statutory authority to confer exemptions to generally applicable policies.[140] At other times, they simply infer such authority from their greater statutory power to enforce generally applicable norms. In either case, agencies possess the potential to distribute exemptions in a discriminatory fashion, singling out religion—or worse, only mainstream religions–for advantageous or disadvantageous treatment.

The problem of administrative discretion is not unique to permissive accommodation. It exists whenever agencies distribute scarce governmental benefits. Nor is the problem of administrative discretion and discrimination–either for or against religion–unique to permissive accommodation. Agencies may engage in religious discrimination when selecting organizations to receive grants pursuant to a facially neutral social services program.[141] Agencies also may engage in religious discrimination when awarding licenses for building expansions or awarding permits for meeting places.[142]

The potential for religious discrimination occurs in these contexts as well as in the exemption context for a variety of reasons. First, agencies commonly award benefits and exemptions under vague statutory standards like "in the public interest" or "for good cause," or without any statutory standards at all. In the absence of concrete standards, agencies lack direction and limitation concerning the particular attributes that trigger a benefit or exemption and the permissible range of reasons for denying a benefit or exemption. In short, there is little to constrain agencies from exercising their

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resources available to support accommodations.

140. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

141. *Cf.* Bowen v. Kendrick, 487 U.S. 589, 608 (1988) (allowing for the possibility of an as-applied challenge to a government-funded adolescent sexuality program that included religious organizations among its participants).

142. Members of Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 partly in response to claims of discrimination against religion in the adoption or implementation of land use regulations. Pub. L. 106-274, § 2(a), 2000 U.S.C.C.A.N. (114 Stat.) 803 (forbidding government from imposing land use regulations in a manner that substantially burdens religious exercise in the absence of a compelling interest).

> As was seen during congressional hearings in both the House and Senate, land use regulations, either by design or neutral application, often prevent religious assemblies and institutions from obtaining access to a place of worship.... The land use section of the bill prohibits discrimination against religious assemblies and institutions, and prohibits the total exclusion of religious assemblies from a jurisdiction.

106 CONG. REC. S6687-88 (daily ed. July 13, 2000) (statement of Sen. Orrin Hatch).

discretion in an arbitrary or discriminatory fashion. Second, agencies typically make benefit and exemption decisions on an ad hoc or case-by-case basis, which creates opportunities for disparate treatment across claimants. Third, agencies often make benefit and exemption decisions with less accountability than legislatures and less visibility than courts.[143]

While little can be done to alter the essential nature of administrative decision making, something can be done to compensate for the lack of standards that frequently attends it. In particular, agencies can be required to supply standards guiding their benefit and exemption decisions. Standards, generally important in administrative law for limiting the exercise of agency discretion, seem particularly important under the Establishment Clause with respect to individualized decisions that risk discrimination among religions and between religion and nonreligion. Furthermore, some courts have mandated administrative standards under the Due Process Clause in analogous cases involving administrative distribution of scarce governmental benefits.[144] Thus, there is an argument that either the Establishment Clause or the Due Process Clause, or both, obligate agencies to step in and promulgate their own standards when they receive benefit or exemption authority without statutory standards narrowing their discretion. In any event, providing administrative standards under these circumstances is a constitutionally prudent course because it promotes consistent, fair, and accountable administrative decisions.

To adequately confine administrative discretion with respect to exemptions, administrative standards must contain at least two components. First, they must define the general qualifications for the exemption. They might list a specific class of eligible beneficiaries or specify the functional category that triggers the exemption. Second, the standards must describe the range of

143. *See* Lupu, *The Trouble with Accommodation, supra* note 24, at 778 ("Administrative accommodations are typically ad hoc and less visible [than legislative accommodations], and thus tend to suffer even more from the likelihood of invidious . . . discrimination.").

144. *See* Morton v. Ruiz, 415 U.S. 199, 232-36 (1974) (holding that the BIA failed to comply with the Administrative Procedure Act by not publishing its general assistance eligibility requirments); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (holding that due process requires an agency to use "ascertainable standards"); Hornsby v. Allen, 326 F.2d 605, 608-09 (5th Cir. 1964) (holding that due process requirements apply to licensing).

reasons available to the agency for denying individual exemptions. Such reasons might include unusual burdens imposed on third parties or extraordinary financial or administrative costs imposed on the agency. To ensure their validity and visibility, the reasons and the eligibility qualifications must be well defended and documented. To ensure their effectiveness, they must be capable of binding the agency in future cases (until officially changed).

Although administrative standards will reduce the potential for discrimination, they will not completely eliminate it. Administrators still will possess the ability to discriminate, for example, in determining whether an individual claimant satisfies the eligibility criteria. Certain procedures, however, already exist to prevent or remedy instances of discrimination. Agencies must consider all claims for equal treatment, and their denials are subject to review, as Justice Souter noted in *Kiryas Joel*.[145] In addition, agencies typically must issue explanations for their denial decisions in one format or another. Nevertheless, these procedures cannot entirely restrict the discretion—and the potential for discrimination—inevitable in any system of individualized exemptions, particularly one involving disputed categories like "religion" and "comparable to religion." The hope is that these procedures, combined with the additional requirement of administrative standards, will minimize that amount and that potential to the greatest extent possible.

CONCLUSION

The legislative impulse to accommodate religious liberty is both noble and necessary. It is noble for legislatures to show solicitude for the religious values of its citizens by exempting certain citizens from the burdens of generally applicable laws. Furthermore, it is necessary, in light of *Smith*, for legislatures to do so through the political process rather than by simply relying on courts to award individual exemptions as of right under the Free Exercise Clause. In any event, the political process always has afforded legislatures more discretion to accommodate religious liberty than the judicial process has afforded courts.

145. *See* Board of Educ. v. Grumet, 512 U.S. 687, 703 (1994).

The legislative impulse to accommodate religious liberty is not an unmitigated good, however, when it extends no further than religion (or only mainstream religions). Minimizing governmental interference only with respect to religion amounts to preference for religion over nonreligion. When accomplished through an act of ordinary politics, such preference violates the principle of equal treatment underlying the Establishment Clause. Thus, permissive accommodation presents a paradox—it contains the seeds of benevolence toward some and discrimination toward others.

The equal liberty approach provides a solution to this paradox. It supports benevolence toward religion by permitting legislatures to grant the requests of religious claimants. But it thwarts discrimination between religion and nonreligion and among religions by requiring legislatures to show a willingness to extend protection to similarly situated nonreligious, and religious, claimants. It asks legislatures to demonstrate that willingness on the face of the statute conferring the exemption—by creating a beneficiary class that includes both religion and nonreligion or writing a religion-neutral accommodation policy—because the political process simply provides no other assurance of equal treatment.

The difficulty for the equal liberty approach comes in determining the appropriate nonreligious class or functional equivalent. This determination requires legislatures to confront some of the most perplexing questions in religion law: Why do we protect religious liberty and which nonreligious values deserve comparable protection? It also calls on courts to evaluate the answers without a definitive standard for assessing equality between religion and nonreligion. Religion and nonreligion might be similar or different in any number of ways. The relevant comparison requires an underlying substantive judgment about the public purpose underlying particular legislative acts, as well as the nature of religion and comparable secular values in particular cases.

The most important issue is whether legislatures or courts should make that judgment in the first instance—that is, whether courts should respect legislative accommodation judgments or supply independent judgments of their own. Because of the undeniable policy discretion involved, the equal liberty approach directs courts to defer to legislatures in selecting a rationale for protecting

religious liberty and in adapting that rationale to nonreligious liberty in particular cases. At the same time, it recognizes that deference is inadequate to prevent instances of religious favoritism, which might occur, for example, if an accommodation contained an unreasonably narrow nonreligious beneficiary class or an eligibility condition that fenced out all but religious or only some religious beneficiaries. The equal liberty approach instructs courts to examine permissive accommodations to ensure that they genuinely reflect equality but in a minimally intrusive fashion. It instructs courts to uphold permissive accommodations if accompanied by legislative reasons justifying the scope of the accommodation in equality terms.

The equal liberty approach stakes no claim to the perfect solution from either a religious liberty standpoint or an equality standpoint. It will provide insufficient protection for religious liberty if it makes legislative exemptions too complex or expensive. It will provide insufficient protection for equality *among religions* if it makes exemptions only available to, and at the behest of, politically popular religions. But no one said it would be easy, at least no one who squarely confronts the paradoxical nature of permissive accommodation. The equal liberty approach furnishes a better solution, enabling legislatures affirmatively to protect religious liberty while providing a measure of equality.