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THE POSSIBILITY OF A SECULAR FIRST AMENDMENT

*Chad Flanders**

INTRODUCTION

In a decade-old review of two books on constitutional law and religion, Christopher Eisgruber and Lawrence Sager forthrightly made a call for more (and better) theorizing about the purpose and point of the religion clauses of the First Amendment of the Constitution.¹ The two books under review, one by Jessie Choper and the other by Steven Smith, had failed in this regard; Eisgruber and Sager were especially hostile to Smith's suggestion that theorizing of any sort about the religion clauses was (in Smith's phrase) a "foreordained failure."² The Supreme Court's religious jurisprudence, as well, clearly demonstrated to Eisgruber and Sager that "[p]recisely what is missing is an understanding of what values the Constitution comprehends in its commitment to religious liberty; what is missing, in other words, is a theory of religious liberty."³ In that review, Eisgruber and Sager presented a truncated version of their own theory on the purpose and point of the establishment clauses, a theory they had spelled out in more detail in several important articles.⁴ Now, with the publication of their

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1. Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577 (1996).

2. STEPHEN D. SMITH, FOREORDAINED FAILURE (1995).

3. Eisgruber & Sager, *supra* note 1, at 578.

4. Earlier versions of Eisgruber and Sager's argument can be found in Christopher L. Eisgruber & Lawrence G. Sager, *Protecting Without Favoring Religiously Motivated Conduct*, 2 NEXUS 103 (1997); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) [hereinafter *Religious Freedom Restoration Act*]. But their definitive statement—prior to the book—is surely Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) [hereinafter *Vulnerability of Conscience*].

book, *Religious Freedom and the Constitution*,⁵ we have the most comprehensive statement yet of their perspective on the religion clauses of the United States Constitution.⁶ It is an important statement, beyond their merely practical proposals for cleaning up a notoriously messy area of doctrine.

Upon studying the book, however, readers might justifiably feel that they have been given an interpretation of *Hamlet* that leaves out the Prince. The central thesis of *Religious Freedom* might be articulated as follows: religious belief is to be afforded no more or no less protection than any other deep spiritual (or equally fundamental) commitment of any other citizen. Religion, in other words, gets equal *protection*, but should not be singled out, either for privilege or for persecution.⁷ Earlier calling this principle one of “equal regard,”⁸ Eisgruber and Sager now prefer the phrase “equal liberty.”⁹ In their words, the principle of equal liberty “denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions.”¹⁰ Religion is to be protected along with any other human pursuit, sacred or profane, to which citizens can reasonably put their minds.

This Article is not a book review in the traditional sense; it will not evaluate (certainly not chapter by chapter) the particular claims and policy recommendations that Eisgruber and Sager have made. Rather, it attempts to diagnose how we arrived at this state, that is, the state in which it is considered plausible to give an interpretation of the religion clauses of the Constitution that, by Eisgruber and Sager’s own admission, renders them redundant with other parts of the Constitution. In other words, could one consider it a plausible interpretation of the free exercise and nonestablishment of *religion* that these clauses merely reinforce the more general constitutional principle of “equal liberty”? How could the First Amendment not be seen by its words to privilege and even to elevate the practice of “religion”? In a sense, therefore, Eisgruber and Sager’s book is more of a foil rather than a target of this Article.

5. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007) [hereinafter *RELIGIOUS FREEDOM*].

6. See *supra* note 4 for earlier versions of their perspective.

7. *RELIGIOUS FREEDOM*, *supra* note 5, at 13.

8. See Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY 200* (Stephen M. Feldman ed., 2000).

9. *RELIGIOUS FREEDOM*, *supra* note 5, at 6.

10. *Id.*

This Article proceeds in three parts. Part I, taking the “long view” theoretically, looks at contemporary liberal political theory in order to understand why it might be a desideratum of contemporary constitutional interpretation that the religion clauses of the First Amendment be read as embodying merely the principle of equal regard. Contemporary political philosophy, especially contemporary liberal political philosophy, defends not the constitutional version of the antiestablishment principle, but a broader principle that does not privilege or denigrate any of the “comprehensive conceptions” of its citizens.¹¹ If we feel, at some level, that our Constitution should embody (as much as possible, consistent with the text) our best theories of political society, then it should follow that we would want to (again, consistent with the text) read this broader nonestablishment principle into the Constitution. Similarly, we would wish to extend “free exercise” to cover the activities of all citizens pursuing their own diverse conceptions of the good.

Part II of this Article describes Eisgruber and Sager’s project as essentially of this politically liberal sort. Unfortunately, the two authors are incredibly weak in addressing a *prima facie* objection to their projects, which is that the *text* of the Constitution proclaims that religion is to be “singled out” in respect to both its exercise and whether the state can establish a religion.¹² Eisgruber and Sager gesture, fitfully, at the early drafting of the First Amendment, which they concede points rather ambiguously, if it points at all, in the direction of “equal liberty.” At the same time, Eisgruber and Sager clearly wish to rest their defense of “equal liberty” not on an originalist theory of interpretation, but on a broader “moral” reading of the Constitution. They do not present such an argument, however, and this Article attempts to devise one based in part on Eisgruber’s work on constitutional interpretation and Ronald Dworkin’s idea of the “moral” reading of the Constitution.¹³

Part III of this Article presents the beginnings—but only the beginnings—of a theory opposed to the one defended by Eisgruber and Sager. According to Dworkin’s theory of interpretation, the best

11. I take the term “comprehensive conception” (or “comprehensive doctrine”) from John Rawls. See RAWLS, *POLITICAL LIBERALISM* 58-66 (2d ed. 1996).

12. “Congress shall make no law,” the First Amendment reads in relevant part, “respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. CONST. amend. I.

13. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

interpretation of a constitutional word or phrase is that which best accords it with the *fit* and the *value* of the concept behind the word or phrase. The key argument in Part II is that the best interpretation of “religion” construes the word in a way which deems all “comprehensive doctrines” more or less “religious,” and so religion *qua* religion (in the sense that this denotes a practice involving belief in a god or gods, rather than, for example, in simply any belief system) is not specially privileged. The burden of Part III, however, is to suggest that this act of abstraction is too abstract, and that the final move, from “religion” to “comprehensive doctrine” does not give the best interpretation of religion, not in terms of fit with the text of the Constitution, but more important, in terms of capturing the unique *value* of religion. Of course, this defense of the value of religion can only be provisional, but it gives us a better research program than the one Eisgruber and Sager have devised. My goal is to give a sense of the theoretical space that must be filled before we can obtain a satisfactory theory of the constitutional value of religion; the goal is not to fully defend my candidate for the unique value of religion.

I. LIBERALISM AND RELIGION

This Part sets the stage for Eisgruber and Sager’s interpretation of the religion clauses, my reconstruction of one argument in opposition to Eisgruber and Sager’s conclusion (Part II), and my own proposed “best” interpretation of the religion clauses (Part III). Setting this stage requires us to step back and abstract from the text of the Constitution and the particular challenges presented in interpreting it. What I want to do, instead, is get a grip on the larger theoretical framework that might animate any particular reading of the Constitution—to highlight those theoretical commitments that might incline one to read the Constitution in one way or another, even before confronting its history and the text. People bring, wittingly or not, certain theoretical ideals to any interpretive task. People can be more or less conscious of those theoretical commitments, and the more we become aware of such commitments, the more we can see how they have influenced our interpretation of texts.

In the case of Eisgruber and Sager and, I would hazard to add, many other contemporary constitutional theorists, those theoretical

commitments are identifiably “liberal.”¹⁴ Eisgruber and Sager’s project fits well into a further specification of the “liberal” program, one which Charles Larmore and John Rawls have called “political liberalism.”¹⁵ We can observe this fit by juxtaposing a quote from Eisgruber and Sager with two quotes from Rawls. In the first chapter of their book, Eisgruber and Sager write, “[the] goal in [their] book is to return to the project of religious freedom, the project of finding fair terms of cooperation for a religiously diverse people.”¹⁶ This is their theoretical program in a compressed form, and it offers insight into the principles that motivated Eisgruber and Sager before they reached their self-assigned job of constitutional interpretation.

Now compare Eisgruber and Sager’s principles to what Rawls calls the key question of political liberalism: “How is it possible for there to exist over time a just and stable society of free and equal citizens who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”¹⁷ Later, in the same paragraph, Rawls rephrases the question in a way that brings his project into even closer alignment with Eisgruber and Sager: “How is it possible for those affirming a religious doctrine that is based on religious authority, for example, the Church or the Bible, also to hold a reasonable political conception that supports a just democratic regime?”¹⁸ The answer to this question, Rawls writes in the first introduction to *Political Liberalism*, will involve specifying “the fair terms of social cooperation between citizens characterized as free and equal yet divided by profound doctrinal conflict.”¹⁹

This Part goes on to tell a story of how Rawls and other political liberals have come to ask this particular question, the question of providing “fair terms of cooperation” for people who fundamentally disagree on religious and philosophical matters. I give one version of the story that should be highly congenial to political liberals. Then I give a contrasting narrative that highlights the importance of religion in political society, but this narrative will be less to the liking of political liberals. This will set the stage for Part II and Part III of this Article,

14. Ronald Dworkin best identifies the brand of constitutional theorist I am describing. See DWORKIN, *supra* note 13.

15. See JOHN RAWLS, *POLITICAL LIBERALISM* (2d ed. 1996); CHARLES E. LARMORE, *MORALS OF MODERNITY* (1996).

16. RELIGIOUS FREEDOM, *supra* note 5, at 4.

17. RAWLS, *supra* note 15, at xxxix (2d ed. 1996).

18. *Id.*

19. *Id.* at xxvii.

which consider the argument that our Constitution, contra the ideal of political liberals, puts religion on a “special” footing.

A. *A (Very) Short History of Liberalism and Religion*

Rawls writes in his famous “Reply to Habermas” that he knows of no liberals of an earlier generation “who have clearly put forward the doctrine of political liberalism.”²⁰ He cites several contemporaries who have developed the doctrine alongside of him, but again notes that “it is a great puzzle . . . why political liberalism was not worked out much earlier” because “it seems such a natural way to present the idea of liberalism, given the fact of reasonable pluralism [among competing visions of the good] in political life.”²¹ With characteristic modesty, Rawls questions whether political liberalism “has deep faults that preceding writers may have found in it that [he had] not seen.”²²

In fact, I think there is an obvious story we can give about why political liberalism has only emerged in the way that Rawls and others have defended it (for example, Ackerman, Larmore, and to some extent Judith Shklar). I can only give a sketch of this story here, though in its broad outlines it should be familiar. Rawls even suggests some of it in his introduction to *Political Liberalism*, but much of the detail is not present.

Begin with, as Rawls does in the introduction to *Political Liberalism*, the idea that the problem of political liberalism first comes about as a problem of *religious* tolerance, rather than tolerance among religious and non-religious views of the world.²³ The question, in other words, is not about achieving fair terms of cooperation among competing views of the world, sacred and secular, but about constructing articles of peace among people of differing religions, and in particular, people of different *sects*. As Rawls puts this (early) view of the question, “How is society even possible between those of different faiths? What can conceivably be the basis of religious toleration?”²⁴ The problem here seems especially intractable because the ideal is to be in *society* with other people of different faiths, not merely in a grudging

20. The “Reply to Habermas” appears in the second edition of *POLITICAL LIBERALISM*. *Id.* at 374 n.1.

21. RAWLS, *supra* note 15, at 374.

22. *Id.*

23. *Id.* at xxiv.

24. *Id.* at xxvi.

association that Rawls calls a “modus vivendi,” (a temporary peace treaty between warring factions).²⁵ How could anyone form a society based on respect for other people whom they believe might be on their way to hell?²⁶

According to Rawls, when we have this problem properly in perspective, we will see that there are really only two options.²⁷ We are dealing with people who disagree profoundly, not merely about the appropriate distribution of goods, but with questions of saving peoples’ souls. So either we are faced with “mortal conflict moderated only by circumstances and exhaustion,” says Rawls, or some agreement on “liberty of conscience and freedom of thought.”²⁸ Political liberalism attempts to explain how society might be based on the latter principles, rather than the domination of one religion over all other religions. Political liberalism attempts, as best as it can, to accommodate the conflicts among those who disagree about the true religion, while never denying “the absolute depth of that irreconcilable latent conflict.”²⁹

Recall, again, that we are not yet at the stage of *contemporary* political liberalism, where we tolerate differing “comprehensive conceptions.”³⁰ Rather, we are only at the stage where we tolerate differing religious views, or even different religious sects (i.e., divisions within a single religion). At this stage, we might hold up John Locke as a sort of proto-political liberal, a critical stop on the way to the more fully developed view of Rawls, the view that for Rawls and for others has “seem[ed] such a natural way to present the idea of liberalism.”³¹ Although Locke does not include *all* differing, reasonable viewpoints as part of the commonwealth, he provides a good statement of some ideas upon which political liberals will go on to elaborate and expand. The question of whether they can elaborate on Locke’s views without fundamentally distorting them will be the subject of the next Section.

25. RAWLS, *supra* note 15, at 147.

26. Rousseau noted a similar problem in his book, *The Social Contract*. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, at Book IV, Chapter VIII 122 (G. D. H. Cole trans., E. P. Dutton & Co., Inc. 1950) (1762) (“It is impossible to live at peace with those we regard as damned; to love them would be to hate God who punishes them: we positively must either reclaim or torment them.”).

27. RAWLS, *supra* note 15, at xxvi.

28. *Id.*

29. *Id.* at xxviii.

30. *See id.* at 58-66.

31. *See* RAWLS, *supra* note 15, at 374 n.1.

Locke remains a proto-political liberal in two respects, according to this story. First, he presents his *Letter Concerning Toleration* as his “[t]houghts about the mutual [t]oleration of Christians in their different Professions of Religion.”³² This marks the scope of toleration too narrowly because it only extends toleration among those who profess Christianity. Locke seemingly extends tolerance to Muslims and, perhaps, to Catholics, though there is some controversy about this point.³³ Nevertheless, this makes toleration overly tied to one “comprehensive doctrine”; it looks to toleration within a particular community (the Christian community) rather than among all people who hold “reasonable” comprehensive doctrines. So straightaway, in the first few sentences of the *Letter Concerning Toleration*, we realize that Locke is not yet completely a “political liberal,” but only a more tolerant version of a comprehensive liberal. It is no longer an advance to say that only *one* sect is the correct one, and instead proclaim that those who agree on Christianity but who disagree on particulars are bound to tolerate one another. From the perspective of political liberalism, however, this advance has not yet reached its true terminus. As Andrew Koppelman puts the point, Locke’s neutrality “applies only to different varieties of Protestant Christianity, not to religion in general.”³⁴

Indeed, for Locke, toleration is not simply a political virtue; it is instead the “Characteristical Mark of the True Church.”³⁵ This brings us to the second way in which Locke is not yet a political liberal, a way that seems less harmful than Locke’s first failure. Locke rests his argument for toleration on a specifically *theological* premise, viz. that true faith cannot be coerced, but can only be brought about by the free assent of the believer.³⁶ Thus, toleration is in order *if conversion to the true faith is our goal*, because it is only by tolerance, and not by force, that we can hope to convert others to the true way, in a way that is authentic rather than coerced.³⁷ This is a less severe failure for the political liberal, because the political liberal will allow that Locke’s account of free faith is indeed one way to affirm the values of the liberal state, including

32. JOHN LOCKE, A LETTER CONCERNING TOLERATION 23 (James H. Tully ed., Hackett Publishing Co., 1983) (1689).

33. See the helpful discussion in JEREMY WALDRON, GOD, LOCKE & EQUALITY 218-23 (2002).

34. Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633, 641 (2004).

35. LOCKE, *supra* note 32, at 23.

36. *Id.* at 27.

37. *Id.* (“[T]rue and saving Religion consists in the inward perswasion of the Mind, without which nothing can be acceptable to God.”).

tolerance for those with whom we fundamentally disagree.³⁸ It is, however, only one way to affirm the values of a liberal state. Others include an ideal of respect for the autonomy of persons, or skepticism about whether we can know what the good is.³⁹ Political liberalism thus is more capacious in its possible justifications as well as its scope than Locke makes it out to be.

Now, on the story I am telling, there are two ways that political liberals could go wrong at this point, preventing Locke's proto-political liberalism from developing into a Rawlsian political liberalism. The first way is simply to remain Lockean, never realizing that the proper scope of tolerance includes all reasonable people, rather than the adherents of one particular faith. Locke was wrong because tolerance should extend to all faiths and indeed to those of no faith at all.

The second way one could go wrong is more subtle, and it involves replacing the religious comprehensive doctrine with one that emphasizes the free human person rather than the believing Christian (as Locke's did). One might make this mistake if she believed that the problem with Locke's version of tolerance was its reliance on the *wrong* comprehensive doctrine, and that the solution to this problem was to find a better, *secular* comprehensive doctrine that would be neither as divisive nor exclusive as the Christian religious one. But this would be a mistake as well, because it would similarly exclude those who were *religious* and yet *reasonable*. It simply would introduce another sectarian faith as the basis of the political order, the same problem that infected Locke's program of tolerance.

One might equate this second way of going wrong to the way in which Rawls believes he erred in *A Theory of Justice*.⁴⁰ There, Rawls seemed to develop a view of liberalism centered on the idea of the autonomous subject: the Kantian person who, in Michael Sandel's famous characterization, had no allegiance to a particular conception of the good, and who valued himself as a free chooser, unencumbered by any previous ties to his community or the good.⁴¹ Perhaps this was a mistake Rawls needed to make (if he indeed made it⁴²) before he

38. Rawls cites Locke specifically in this regard. See RAWLS, *supra* note 15, at 145, 145 n.12.

39. This is something emphasized by Charles Larmore in his defensive of liberalism. See CHARLES E. LARMORE, *MORALS OF MODERNITY* (1996).

40. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

41. See MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998); RAWLS, *supra* note 40, § 40 (defining the "Kantian Interpretation" of his theory of justice).

42. I am dubious that Rawls is guilty of this mistake.

corrected himself in *Political Liberalism*, and realized that both the religious version of tolerance *and* a comprehensive liberalism misconstrue the fact of “reasonable pluralism.”⁴³ Even liberalism, then, if it is comprehensive and devoted to an idea of autonomy or self-development, can itself become oppressive over time.⁴⁴ Even liberalism cannot ignore the fact of reasonable pluralism.⁴⁵ There are many different ways of viewing the world, some religious, and some not. We should seek to form a political society that wins adherents from both religious and secular people insofar as those people are *reasonable*. We go wrong if we seek to base our society on religious grounds or on secular grounds that are implicitly or explicitly hostile to those religions that are reasonable.

On the story I have just told, the key move away from Locke is to realize how his principle of tolerance should extend to disagreement more generally, beyond tolerance for those disagreements within a religion, so that it includes disagreements between religion and irreligion, between the values of individuals and the values of tradition.⁴⁶ We can explain why it took so long to develop this insight by recognizing, first, that we had to reach the point where we could see members of different religious sects as being reasonable, and then we had to move beyond this to see how members of different *religions* can be reasonable as well. Next, we had to reach the point where we could see others who subscribe to no religious faith as being reasonable and worthy of respect.

Finally, and I take this to be the point we have reached with Rawls’s *Political Liberalism*, we had to see how we might go *too far* in asserting the secular basis of the state, because even a secular state can exclude those religious conceptions that are reasonable. *Political Liberalism*, in this way, is a correction over a liberalism that has become hegemonic. Thus, we have Rawls’s question in *Political Liberalism*, which asks not how a religious state can tolerate atheists (which in a way was Locke’s question, even though he answered it in the negative), but

43. See Rawls’s important admission in *Political Liberalism* that even a liberal comprehensive doctrine will become oppressive over time if enforced by the state. RAWLS, *supra* note 15, at 37.

44. *Id.* at 37-38, 38 n.39.

45. *Id.*

46. This latter point (about the value of tradition) is an important theme in CHARLES LARMORE, *THE ROMANTIC LEGACY* (1996).

how a secular state can be constructed in a way that does not require religious believers to abandon the tenets of their faith.⁴⁷

Bruce Ackerman does an excellent job of capturing this “mature” political liberal sensibility in his article, *Should Opera Be Subsidized?*⁴⁸ There, Ackerman announces a principle of “antiestablishment” that is broader than the establishment clause of the First Amendment; it does not favor religion, but likewise does not favor opera.⁴⁹ Ackerman writes, “As much as possible, the liberal state should be neutral on such matters, leaving it to each citizen freely to determine whether he or she should give financial support to the Church of Rome or the one at Bayreuth.”⁵⁰ Ackerman here describes political liberalism in, I think, its most developed form.

In sum, political liberalism reaches its purest form when it does not presuppose a religious foundation, or a secular one, but leaves citizens free to adopt and pursue their own conception of what gives value to life. In doing so, however, Ackerman self-consciously goes beyond the original establishment clause, making the “correction” that Rawls made in *Political Liberalism*, so that not even secular goods (such as opera) can be the object of endorsement by the state. He would presumably also extend the other prong of the establishment clause, broadening it to include not merely the free exercise of *religion*, but any reasonable exercise of a citizen’s power of choice. Religion, on this view, no longer has a special status, a status that the religion clauses seem to give it (both negative and positive in its valence). Religion becomes one comprehensive doctrine among many, which may be religious or irreligious. Part II of this Article will consider whether this is a possible and plausible interpretation of the religion clauses.

B. Locke Revisited

The version of the story I have just told regards Locke as a “proto” political liberal. That is, he is a step toward contemporary political liberalism, which tolerates atheists and believers of other religions in addition to those who believe in Christianity.⁵¹ The next step, once one has realized that she can no more establish a Kantian or Millian state

47. RAWLS, *supra* note 15, at xxvi.

48. Bruce Ackerman, *Should Opera Be Subsidized?*, *DISSENT*, Summer 1999, at 89.

49. *Id.*

50. *Id.*

51. *See supra* Part I.A.

than one can establish a Christian state, is to broaden the scope of people to whom tolerance is owed. Contemporary political liberalism thus represents the full flowering of liberalism. Locke's mistake was not disbelieving in tolerance (indeed, in this he was a key innovator), but in artificially limiting the scope of tolerance. In doing so, Locke was perhaps simply a product of his time: he saw the task as managing toleration between competing religious sects, and took it for granted that any consensus—if consensus was possible—would have to be among religious believers, and perhaps only among Christian believers.

Thus far, however, I have omitted a key line and theme in Locke's *A Letter Concerning Toleration*,⁵² which makes it a difficult document for contemporary political liberals to endorse wholeheartedly. For Locke did not simply overlook atheists in constructing a regime of tolerance; he positively excluded them: "Those are not at all to be tolerated who deny the Being of a God. Promises, Covenants, and Oaths, which are the Bonds of Humane Society, can have no hold upon an Atheist."⁵³ Locke ominously concluded, "The taking away of God, tho but even in thought, dissolves all."⁵⁴ Jeremy Waldron writes in his study of Locke's religious thought that Locke is unclear or evasive when it comes to whether Muslims or Roman Catholics should be tolerated, but he is highly explicit when it comes to the fact that atheists are *not* to be tolerated.⁵⁵ Again, it is not that Locke merely fails to consider atheists as objects of toleration; he does consider them, and argues that they are not to be tolerated at all.⁵⁶

This is no place to detail Locke's reasons for not tolerating atheists.⁵⁷ On its face, however, Locke's reason is that atheists cannot be trusted to keep promises or oaths, something that is at the very foundation of civil society.⁵⁸ If the atheists cannot be trusted in this way, then they should not be tolerated.⁵⁹ More recently, Waldron argued (in an admittedly speculative vein) that Locke refused to tolerate atheists because he believed they could not truly believe in the equality of all

52. See LOCKE, *supra* note 32.

53. *Id.* at 51.

54. *Id.*

55. WALDRON, *supra* note 33, at 223.

56. *Id.* at 225.

57. There is a large body of conflicting scholarship on this subject. See *id.* at 218-223.

58. LOCKE, *supra* note 32, at 51.

59. *Id.*

citizens.⁶⁰ That is, they do not have good grounds for believing that all are equal in God's eyes, because they disbelieve in God.⁶¹ As Waldron writes, "Locke's particular worry about atheists may have less to do with their day-to-day involvement in social and commercial life, and more with the attitude they are likely to take to the very foundations of the social order."⁶²

Whatever the correct interpretation, my main interest in introducing this key part of Locke's text is to show how it troubles the political liberal narrative recited in the last Section. According to the contemporary political liberal story, the problem with Locke is that he simply failed to extend the scope of toleration to atheists; this is an oversight that can be remedied.⁶³ This, however, is not how Locke saw matters; for him, there was a *reason* that atheists could not be tolerated. Especially if we accept Waldron's account of Locke's deeper reason for this exclusion, Locke cannot be accommodated easily into the triumphalist of political liberalism's rise; in fact, he positively resists being written into that story. For Locke, the decision to extend the regime of tolerance to atheists is a mistake because atheists question premises that are at the very foundation of the social order.

The point of presenting this alternative interpretation of Locke and liberalism is to reveal a tendency to ignore the way in which religion might be special, and the complementary tendency to view religion on par with other ways of viewing the world. For Locke, the difference between belief and nonbelief is stark and decisive; it is the difference between a view that is reasonable and tolerable, and a view that "dissolves all."⁶⁴ Parts II and III of this Article argue that something similar occurs in Eisgruber and Sager's interpretation of the religion clauses of the Constitution. The Constitution, in its own way, can be construed as Lockean in its treatment of religion. To be sure, it can be read so that atheists are not excluded from the regime of tolerance (at least I hope one can plausibly read it in this way!). At the same time, the Constitution, in its own way, treats religion as special in the sense that the state cannot establish a religion, and that a person's ability to

60. WALDRON, *supra* note 33, at 218-23. Waldron had earlier emphasized Locke's usefulness for modern liberals. See JEREMY WALDRON, *Locke, Toleration, and the Rationality of Persecution*, in LIBERAL RIGHTS 88 (1993).

61. WALDRON, *supra* note 33, at 218-223.

62. WALDRON, *supra* note 33, at 225.

63. See *supra* Part I.A.

64. LOCKE, *supra* note 32, at 51.

exercise her religious freedom is given a status that other ways of pursuing one's beliefs are not given.⁶⁵

II. RELIGION AND THE CONSTITUTION

Part I of this Article briefly looked at the history of political liberalism, starting (somewhat arbitrarily) with the figure of Locke as a proto-liberal and then discussing Rawls. One version of that story viewed Locke as a weigh-station to Rawls, because Locke grasped correctly the idea of tolerance, but artificially restricted its scope to only faithful Christians, or perhaps to all religious believers generally, but left out atheists. The contemporary political liberal, however, tends to see religion as one more comprehensive doctrine that is on par with other secular views of the world. Of course, this means that religion, for the political liberal, is not to be disparaged *more* than other doctrines, nor considered *privileged* or "special" in a way that other doctrines are not. For the political liberal, both "free exercise" and "antiestablishment" extend beyond religion to the protection of every comprehensive doctrine, so long as they are, in Rawls's master word, "reasonable."⁶⁶

In this Part, the Article shifts away from high political theory and toward constitutional law, probing the extent to which one can read into the text of the First Amendment the sort of contemporary political liberalism described in the last Section. The challenge here is both historical and theoretical, though this Part (and indeed the rest of the Article) stresses more the theoretical aspect. Can we have a theory of the text and purpose of the First Amendment that coheres with the ideals of political liberalism, and not merely the proto-political liberalism of Locke? This Part closely examines Eisgruber and Sager's *Religious Freedom and the Constitution*.⁶⁷ The effort by Eisgruber and Sager is the best effort by anyone to join the interpretation of the First Amendment with the ambitions of political liberalism, and to recognize that an interpretation of the First Amendment that privileges religion is a "constitutional mistake of sectarianism or partisanship."⁶⁸ This Part also attempts to extend and amplify Eisgruber and Sager's argument in ways that they suggest but do not develop. So, in the process, and in this Part, I try to make their argument stronger.

65. At least this will be the burden of Part III of this Article.

66. See RAWLS, *supra* note 15, at 48.

67. RELIGIOUS FREEDOM, *supra* note 5.

68. *Vulnerability of Conscience*, *supra* note 4, at 1291.

We should also be mindful, however, of the counter-narrative mentioned in Part I. With Locke, we saw that his exclusion of atheists—his effort, in his own way, to privilege religion and to give it a special status—was not done out of ignorance or indifference, but because he felt that religion is indeed special, deserves to be at the center of society, and is the basis for toleration in a way that atheism could never be.⁶⁹ The Lockean side of the politically liberal story finds its complement in our discussion of the American Constitution. We might wish to make our Constitution one that embodies political liberal ideals, and one in which religious liberty stands not for the privileging of religion but rather for toleration simpliciter.⁷⁰ As mentioned in Part I, if we agree substantively with these ideals, it might be positively a mistake to avoid fully reading them into the Constitution. But in doing so, we might not simply be ignoring the text, which on its face seems to emphasize religion by giving it a status different from that of other ways of looking at the world. We might be ignoring something of *value* that the Constitution is meant to protect, much in the same way that Locke, by excluding atheists, was commenting on political society rather than exhibiting a bias toward one comprehensive doctrine.

A. *Eisgruber and Sager's Religious Freedom and the Constitution*

Christopher L. Eisgruber and Lawrence G. Sager's recent book, *Religious Freedom and the Constitution*, is, in the end, a book that is deeply indebted to contemporary political liberalism. As we saw above, Eisgruber and Sager, like Rawls, take as their task specifying the "fair terms of cooperation"⁷¹ between those who will disagree, and disagree profoundly, about religious matters. Eisgruber and Sager summarize their motivations in their book's concluding paragraph:

For many Americans spiritual commitment and metaphysical truth matter enormously. Surely we should be able to understand that the things that matter so deeply to us have their analogue in the very different beliefs, commitments,

69. See *supra* Part I.B.

70. See *Vulnerability of Conscience*, *supra* note 4, at 1315 ("At its core, religious liberty is about the toleration—the celebration—of the divergent ways that members of our society come to understand the foundational coordinates of a well-formed life.").

71. This term belongs to Rawls. See RAWLS, *supra* note 15, at xxvii.

and projects of others. Justice and empathy alike ought to draw us toward *fair terms of cooperation*.⁷²

Eisgruber and Sager elsewhere make explicit their intent to read “[r]eligious liberty [as a] moral ideal [and] an important part of our understanding of political justice.”⁷³ Even though this intent is not as explicit in their book, Eisgruber and Sager unmistakably develop an understanding of religious freedom that exists within the realm of political philosophy, and not just within the realm of constitutional law.

Eisgruber and Sager, however, state that they are not merely theorizing out of the blue in the way that Rawls did;⁷⁴ rather, they are offering an *interpretation* of the religion clauses of the First Amendment.⁷⁵ The fact that they claim to be laboring under this constraint makes their book at once very important and extremely strange. It is important because, if successful, it shows us how the considerable theoretical resources of Rawlsian liberalism might be brought to bear on accommodating religious diversity. Rawls, strangely, is not even mentioned in the book, despite the fact that his influence seems evident throughout. This may only prove that, for lawyers and philosophers alike, Rawls is now part of the current climate of opinion.

Eisgruber and Sager’s liberal attitude toward the constitutional status of religion is well captured in an example they give to prime our intuitions regarding religious liberty. We can begin with this thought experiment that Eisgruber and Sager offer, and then move on to a more formulaic recitation of their position. They have us imagine two “Ms. Campbells” who are neighbors, each running a soup kitchen out of her home.⁷⁶ One is motivated by her religious beliefs, and the other is motivated out of a secular concern to help the less fortunate.⁷⁷ It turns out, however, that a neutrally worded zoning ordinance prohibits the operation of a soup kitchen out of one’s home.⁷⁸ The question Eisgruber and Sager pose is whether we should treat these two cases differently. If our position is that religious motivations should be praised or given special protection, then we would treat the two cases differently, “the

72. RELIGIOUS FREEDOM, *supra* note 5, at 285 (emphasis added).

73. Eisgruber & Sager, *supra* note 1, at 590.

74. *See supra* Part I.A.

75. Rawls does seem to be offering an interpretation of the American liberal ethos, but he nowhere contends that he is interpreting the United States Constitution.

76. RELIGIOUS FREEDOM, *supra* note 5, at 11, 54-55.

77. *Id.* at 11.

78. *Id.*

rights of the two Ms. Campbells, in other words, would vary according to the spiritual foundations of their beliefs.”⁷⁹ Eisgruber and Sager take this result to be bizarre because, they reason, both Ms. Campbells should be treated equally. To treat them differently based on their differing motivations “seems unjust on its face, and it also seems at odds with the essence of religious freedom in that such treatment imposes a test of religious orthodoxy as a condition of constitutional entitlement.”⁸⁰

The philosophical heart of *Religious Freedom and the Constitution*—the theory that justifies the same treatment of the two Ms. Campbells—is the principle that Eisgruber and Sager call “equal liberty.”⁸¹ It is in their defense of this principle that Eisgruber and Sager’s Rawlsian (and, more generally, politically liberal) roots become apparent. The principle of equal liberty has two major parts that equally deflate any ambition of finding religion “special” enough to merit extra protection. First, Eisgruber and Sager state that equal liberty means “no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects.”⁸² The term “spiritual projects” is left deliberately vague here and elsewhere in the book, although Eisgruber and Sager offer an interesting and revealing gloss when they say, “[r]eligious faith [as opposed to “spiritual commitments”] receives special constitutional solicitude . . . but only because of its vulnerability to hostility and neglect.”⁸³ The context of the passage seems to make clear that this “vulnerability” is one that is historical and contingent; in other words, Eisgruber and Sager give no privilege to religion based on its intrinsic “specialness” or worth, only due to its (traditional) susceptibility to abuse and disregard.⁸⁴

The second principle is even more deflationary of the religion clauses, if indeed it is directly relevant to religious freedom at all. The second principle reads, “all members of our political community ought to enjoy rights of free speech, personal autonomy, associative freedom, and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow a broad range of religious beliefs and practices to flourish.”⁸⁵

79. *Id.*

80. RELIGIOUS FREEDOM, *supra* note 5, at 11. *See also id.* at 54-55.

81. *Id.* at 4.

82. *Id.* at 4.

83. RELIGIOUS FREEDOM, *supra* note 5, at 52.

84. *Id.*

85. *Id.* at 4.

Eisgruber and Sager seem to offer a third component to their principle of equal liberty. Apart from religion's historical vulnerability to "hostility and neglect," they write, "*we have no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities.*"⁸⁶ This third component, however, merely reinforces their project of denying religion any special constitutional standing, and this project is evident from the second principle described above.

We might get a better grip on Eisgruber and Sager's position by considering how it could apply to free speech. Does freedom of speech exist as an object of special constitutional solicitude, or does it exist merely because speech has historically been the subject of hostility and neglect? The clear answer seems to be the former: freedom of speech exists as a separate constitutional value, one of intrinsic worth, protected as more than a prophylactic matter based on any historical hostility or neglect. Consider how Eisgruber and Sager make this point explicitly: "Constitutional privileging [of free speech] requires as its justification an understanding that the activity in question brings with it some special virtue or priority in our political life."⁸⁷ By contrast, they see religion only as *derivatively* worthy of constitutional protection—if religion historically had not been neglected and abused, the constitutional principle would be unnecessary. As Eisgruber and Sager state in an earlier article, "We need to abandon the idea that it is the unique value of religious practices that sometimes entitles them to constitutional attention."⁸⁸ Rather, "the only sound conception of religious liberty is founded upon protecting religious exercise against persecution, discrimination, insensitivity, or hostility."⁸⁹

This standpoint, which denies any intrinsic uniqueness or "specialness" to religion, becomes clearest when Eisgruber and Sager essentially concede that their view renders the religion clauses redundant when compared with other parts of the Constitution:

Would it be a problem if the religion clauses turned out to be nothing more than specific versions of the more general norms included with the Equal Protection Clause?

86. *Id.* at 52 (emphasis added).

87. *Religious Freedom Restoration Act*, *supra* note 4, at 448.

88. *Vulnerability of Conscience*, *supra* note 4, at 1248.

89. Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Borne v. Flores*, 1997 SUP. CT. REV. 79, 104 (1997).

Not at all. . . . It is entirely sensible to think of the religion clauses as one of the Constitution's first encounters with concerns over the equal status of members of our political community.⁹⁰

According to Eisgruber and Sager, the principle of equal liberty receives its fullest expression in the Fourteenth Amendment (guaranteeing equal protection of the law)⁹¹ and the free speech clause of the First Amendment (guaranteeing freedom of speech and expression more broadly).⁹² It is in this light that we should interpret the religion clauses today.

Eisgruber and Sager attempt to create a wholly secular First Amendment that, while not leaving religion entirely unprotected, ensures that religion does not receive any *special* protection.⁹³ Religion is not "special" in the sense that it signifies something of separate constitutional value, such as free speech or even the right to bear arms. If we protect religious believers *as much as, but no more than*, those who have other broad "spiritual" beliefs, then we have satisfied equal liberty. Again, this would allow temporary privileging of religion, given religion's history of being abused and neglected. It does not allow, however, any permanent privileging, as if religion deserves promotion or privilege based on its own merits. If Eisgruber and Sager are correct, the Constitution, or at least the First Amendment, is wholly consistent with the philosophical doctrine of political liberalism.

B. An Objection (and Reply) to Eisgruber and Sager

If we were approaching the problem of the two Ms. Campbells from a purely theoretical (Rawlsian) standpoint, Eisgruber and Sager's sentiment would be fitting, viz. that favoring religious over non-religious motivations would be "unjust."⁹⁴ But this, of course, is not the baseline, at least if we believe Eisgruber and Sager in their stated project. They are trying to give us an interpretation of the religion clauses in the First Amendment, so they are at least nominally constrained by that text. The text, however, does not speak in terms of what is just or unjust on its face, but apparently carves out a special place for religion. This is

90. RELIGIOUS FREEDOM, *supra* note 5, at 70.

91. See *Vulnerability of Conscience*, *supra* note 4, at 1297 ("As we flesh out the idea of equal regard, it may seem to resemble a robust jurisprudence of equal protection.").

92. RELIGIOUS FREEDOM, *supra* note 5, at 70.

93. *Id.* at 13.

94. See *supra* Part I.A.

precisely what requires an explanation because it can seem especially problematic for the Rawlsian. Why is religion special, as opposed to other comprehensive visions of the good life (or even non-comprehensive ones)? This is the unique challenge that presents itself to the constitutional scholar as opposed to the theoretician.

Let us consider the “simple textual” point that the Constitution *seems* to privilege religion by virtue of the fact that the First Amendment contains the word “religion” rather than a vague term or phrase like “freedom of conscience.” If the idea was really equal liberty, then why is the word “religion” used at all? Even if this simple textual point is not dispositive of Eisgruber and Sager, it still provides a presumption and starting point to argue against Eisgruber and Sager. As George Freeman stated in an article predating Eisgruber and Sager’s major articles, “any argument for treating the believer and the nonbeliever equally under the religion clauses must be accompanied by an argument for why the Founders’ views on the subject should be ignored.”⁹⁵ For Freeman, the Founders’ views are especially disclosed by their choice of protecting *religion* over protecting *freedom of conscience*.⁹⁶

Eisgruber and Sager have a response to this objection, but it is unsatisfactory. They write that their favored principle of “equal liberty” is not itself written into the Constitution.⁹⁷ This does not matter, however, because they are no better or worse off than “other theorists who are trying to interpret the religion clauses. The First Amendment does not say ‘separation of church and state,’ for example. Nor does it say ‘neutrality’ or ‘compelling state interest.’”⁹⁸ This is a weak reply. The terms that Eisgruber and Sager cite are not in the Constitution, but are terms used when explicating the special importance of religion, for instance in separating church from state, or in framing the balance between the independent value of religion and state interests (“neutrality” and “compelling state interest” can also be understood in this way).⁹⁹ Eisgruber and Sager deny that religion has any special importance, and this is a different burden than the one carried by those who seek to *interpret* religion in the First Amendment.

95. George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519, 1524 (1983).

96. *Id.* at 1522.

97. RELIGIOUS FREEDOM, *supra* note 5, at 68.

98. *Id.*

99. *Id.*

Eisgruber and Sager can reframe their point in a way that makes it more compelling. They correctly point out that history can never be entirely decisive in matters of constitutional interpretation.¹⁰⁰ After discussing the work of Michael McConnell, they write of commentators who insist on following the text and history wherever it leads.¹⁰¹ Eisgruber and Sager suspect that these commentators' "normative convictions are doing the real work here—that their interpretation of ambiguous text and multivocal history depends on, rather than constrains, their convictions about what counts as a satisfactory conception of religious freedom."¹⁰² In short, even with history on either side, we must make an interpretive decision.

With this in mind, let us return to the example of the Founders' choice to protect "religion" instead of "freedom of conscience." There is one piece of evidence that favors treating religion as a special constitutional category. In drafting the First Amendment, the Founders had a choice between protecting religion and protecting religion *along with* the exercise of conscience.¹⁰³ If the Founders had chosen the latter, one could meritoriously argue that religion is not *per se* special, but is just one example of the broader category of exercises of conscience. Furthermore, we might also agree with Eisgruber and Sager that religion should be treated equally with other "conscientious" efforts made by citizens (which would, presumably, include even secular acts of conscience). The Founders, however, rejected this phrasing, so it follows that Eisgruber and Sager are incorrect in slighting religion.

This is, however, far too quick of an argument to conclude that Eisgruber and Sager are wrong (even though their casualness with the history of the Amendment might lead us to jump to such a conclusion). It is unclear which way the choice of one phrasing cuts when compared to other possible choices by the Framers. Perhaps they felt that "religion" was an adequately capacious term to include acts of conscience made by citizens. On the other hand, they might have thought that *all* exercises of conscience were religious, so that the

100. *Id.* at 73.

101. RELIGIOUS FREEDOM, *supra* note 5, at 73.

102. *Id.*

103. For a thorough discussion of the Congressional debate over framing the First Amendment, see MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: THE ATTACK ON AMERICA'S TRADITION OF RELIGIOUS EQUALITY (forthcoming 2008) (manuscript at ch. 3) (on file with author). Nussbaum concludes, "it seems clear . . . that the text the framers chose does make religion special for the purposes of the free exercise clause, fair or unfair." *Id.* (manuscript at 30).

inclusion of “acts of conscience” in the First Amendment would be redundant. It seems that both of these readings are plausible construals of the choice made by the Founders in crafting the First Amendment. In sum, the text underdetermines the best interpretation that we might have expected, given the nature of the concept of “religion.” Or, as Eisgruber and Sager put it, “[t]he text of the Constitution is seldom if ever dispositive of interesting constitutional questions. Neither is the history. It is conceptually impossible that the complex social and legal events surrounding the founding could answer hard questions without a normative view to guide the interpretive enterprise.”¹⁰⁴

At this point, we need more than history to decide the debate. In fact, we need a theory of interpretation,¹⁰⁵ a way of thinking about the interpretation of religion that might help us develop a better sense of which possibility is more consistent with the text and meaning of the Constitution: the idea that religion is not special or that religion has some special constitutional status. The fact that the First Amendment actually singles out religious belief as deserving of special protection speaks strongly in favor of the “specialness” of religion. The text here functions, however, as a weak constraint rather than an absolute one. It is not obvious that this is the *best* reading of constitutional text, if we think that the best reading is one that aligns the Constitution with the ambitions of political liberalism. Again, to settle this, we need a theory.

One theory of religion’s place in the First Amendment, as we have seen, is that religion deserves special consideration because of its history, viz. that it has been the historical object of abuse and neglect.¹⁰⁶ This is the prophylactic theory, which sees nothing special about religion, but recognizes that it has been historically targeted for particular sanctions or impositions.¹⁰⁷ As a result, it singles out “religion” as an area of special concern. This is the theory that, at most, Eisgruber and Sager are willing to embrace vis-à-vis religion.

Religion’s claim to *equal regard* is not a claim for privilege but rather for *protection*: constitutional concern is prompted by vulnerability of some religious believers to unfair and damaging forms of discrimination, not the

104. *Vulnerability of Conscience*, *supra* note 4, at 1270.

105. This is scarcely the place to give a fully worked out theory of constitutional interpretation, nor is it clear that we really need one to get a better grip on the religion clauses.

106. *See supra* Parts I and II.A.

107. *See supra* Parts I and II.A.

perception that religious motivation is more noble or deserving than the other serious pursuits in life.¹⁰⁸

The prophylactic theory is attractive and would be worth embracing but for the fact that it does not quite explain why *religion* is singled out in the Constitution. In fact, this theory has a hard time fitting religion with the other values protected in the First Amendment. No one, as I offered above, should say that we protect free speech only because people have historically been tempted to suppress speech; we would assume (I think rightly) that speech has some independent value that the Framers sought to protect. We should only rest content with the prophylactic theory if in the end nothing makes sense of what I have been calling the “constitutional value” of religion.

There is an explanation of the term “religion” in the First Amendment that is better than the prophylactic theory, yet is still consistent with Eisgruber and Sager’s broader theory of religious liberty. This explanation, call it the “moral reading” of the religion clauses, looks for the aspect of religion that best captures the moral value of religion.¹⁰⁹ The Framers likely viewed “religion” as coextensive with theism.¹¹⁰ Today, however, we have come to understand “religion” more expansively, recognizing that it includes non-theistic faiths.¹¹¹ *But in fact, the best understanding of religion’s value is to see it as including even non-religious ways of life.* The value of having a “religion,” in other words, is simply the value of having a “comprehensive” view of the world, in the sense of having a picture of the world that “includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships.”¹¹²

The burden of the moral reading is to show that the value of “religion” is captured not merely by theistic religions and their close

108. *Religious Freedom Restoration Act*, *supra* note 4, at 449 (emphasis added) (citation omitted). See also William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 325 (1991) (“That the text of the First Amendment explicitly references religion and not other belief systems does not support the conclusion that religion is the preferred value. Rather, the explicit reference to religion reflects the fact that religious groups had often been persecuted and therefore needed special protection.”).

109. See *infra* Part II.C.

110. See DAVID C. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* (2006); see also JOHN MEACHAM, *AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION* (2007).

111. See *infra* Part II.C.

112. RAWLS, *supra* note 15, at 13.

analogues, but is in fact present in every comprehensive doctrine. If this can be done, then we have a convincing account of religious freedom that, while extending to other doctrines not explicitly religious, does not depart from or deny the force of the constitutional text. It only argues that the *best* reading of that text points to an expansive reading of the word “religion.” But if this is the case, it also shows how the simple textual argument may be strengthened beyond the point at which the word religion figures in the First Amendment, and not freedom of conscience. The claim of the simple textualist, now really a *moralist*, is that religion’s special value belongs to a narrower class than that captured by the value of having a comprehensive doctrine. The burden on the textualist/moralist is to distinguish the value of religious comprehensive doctrines from secular ones.

The plan for the remainder of Part II is as follows. Section C elaborates on the methodology of the “moral reading” of the Constitution, with special reference to the work of Ronald Dworkin.¹¹³ Section D applies this methodology to the religion clauses, and discusses the work of Andrew Koppelman, who I think offers a moral reading of the religion clauses without explicitly saying so. In these two Sections, I hope to achieve something that Eisgruber and Sager promise, but ultimately do not deliver: a reading of the Constitution that is not only plausible and coherent, *and* consistent with the text, but *also* shows that our best understanding of religion does not give any special status to practices traditionally deemed “religious.” Part III of this Article will then argue that, indeed, we do err when we deny the “specialness” of religion.

C. The Moral Reading of the Constitution

In the previous Section, I agreed with Eisgruber and Sager’s implicit slighting of constitutional history in interpreting the religion clauses of the amendments. I also began sketching an argument for Eisgruber and Sager that justifies placing religion on par with the comprehensive doctrine. Again, we can construe religion broadly to understand it as encompassing both secular and religious ways of life. But I stopped short of fully endorsing this argument because we need a theory of constitutional interpretation to underwrite this move. It is not

113. Eisgruber and Sager indicate their sympathy with Dworkin’s methods in *Vulnerability of Conscience*, *supra* note 4, at 1270 n.40.

enough to assert that religion *might* be interpreted in a way that makes the First Amendment consistent with the ideals of political liberalism; we need a theory supporting that this is the *best* way of interpreting the First Amendment. We need a theory because, I think, we cannot look to history alone to decide the matter. As I suggested in my example of “rights of conscience,”¹¹⁴ history tends to underdetermine which interpretation is the best interpretation of a text. This Section makes a brief excursus into theory; it is enough, I hope, to show why some attempts at defining religion are not simply mistaken, but misguided.

The theory I propose is a version of Ronald Dworkin’s “moral reading” of the Constitution,¹¹⁵ which resembles a theory that Christopher Eisgruber has also offered.¹¹⁶ For the sake of simplicity and clarity, I will use Dworkin’s theory primarily and make occasional reference to Eisgruber. According to Dworkin’s method of interpretation, we can look at the Constitution as a document containing both particular instructions and statements that are more abstract.¹¹⁷ When it comes to particular instructions, such as the Third Amendment’s ban on quartering soldiers,¹¹⁸ very little interpretation is required.¹¹⁹ The text gives very specific instructions, and we are bound (insofar as we are bound by the text at all) to follow them.¹²⁰

Things are very different when we come to the more abstract clauses of the Constitution, such as those guaranteeing free speech or the equal protection of the laws. According to Dworkin, we cannot read these clauses merely as instructions directing us to a particular action or result. They speak more broadly, and they speak beyond the intentions of the Framers of those particular amendments, those who chose the particular words and phrases of those clauses.¹²¹ Or, to put it a different way, those amendments should be read as if the Founders had purposely chosen broad and abstract language with the goal that *their* particular intentions and understanding would give way to future, better understanding. They did not intend to embody their ideas of due

114. See *supra* Part II.B.

115. I rely most directly on DWORKIN, *supra* note 13.

116. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001).

117. See especially the introduction to DWORKIN, *supra* note 13.

118. This is Dworkin’s example, see *id.* at 8.

119. It is an interesting question—far outside of the scope of this Article—of how we decide *when* a text should be given a moral reading, and when we should give it a much more straightforward, literal reading.

120. DWORKIN, *supra* note 13, at 8.

121. *Id.* at 8-9.

process, equality, or free speech, but instead the best ideas that we could come up with, consistent with the text and our own unique history.

The above method of interpretation does not work without constraint—we are still bound by the historical interpretation of the document and by the plain words of the document itself. As Eisgruber usefully puts this point, “the Constitution requires Supreme Court justices to construct the American people’s best judgment about justice; either philosophical argument or historical reflection might aid that task”¹²² In a similar vein, Ronald Dworkin says that judges should be bound not only by considerations of value (asking, for example, how one can interpret an amendment to best capture the value that lies behind it), but also by considerations of “fit,” that is, how well the interpretation fits with the text and with the past history of interpreting the relevant word or phrase.¹²³

What I urge in the next Section and in Part III is that such a moral interpretation of the Constitution should also apply when we look to the religion clauses of the First Amendment. This may seem peculiar, but only if we ignore how religion is inherently a normative term, something I discuss in more detail in the next Part. Statements about protecting the free exercise of religion and avoiding religious establishment are certainly different from bans on quartering soldiers. But does this difference place religion on par with equal protection or due process? I maintain that it does, but I can only discharge this burden by showing that religion is best seen as a value term, rather than simply a descriptive one. As a preliminary observation, we can see that “religion” surely shares with terms such as “due process” and “equal protection” a level of *abstraction* that a ban on quartering of soldiers lacks. It would be wrong, at least to a first approximation, simply to read the religion clauses as if they were protecting religion, in the same way that we read the word “soldier” or “quartering.” Although this is a possible reading, it is not the most compelling one, and it is not the one that we should accept.

It is important to see what follows from a moral reading of the religion clauses of the First Amendment, in the same way that free

122. EISGRUBER, *supra* note 116, at 8. Eisgruber goes on to say that whether justices use historical argument or philosophical theory, “which works best is probably a matter of personal style and preference.” *Id.* He allows that history will sometimes be useful; more important, however, he articulates the broader constraint that the interpretation of the text should seek to embody the “people’s best judgment” about what justice requires. *Id.*

123. See RONALD DWORKIN, *LAW’S EMPIRE*, ch. 7 (1986).

speech or equal protection could be given a moral reading. It follows that certain attempts to define “religion” descriptively are misguided, if not altogether unhelpful. For example, Kent Greenawalt’s proposal to look at religion “analogically” does not get us very far, unless it also tells us what is *of value* in all of those indisputable instances of religion.¹²⁴ Similarly, Eduardo Peñalver’s suggestion that we look at religion as an “evolving” concept, relying on ordinary language, is less than satisfactory.¹²⁵ Again, this will not be useful according to the moral reading, unless we also see the value that is preserved as religion “evolves” over time. Of course, it simply may be impossible to identify religion analogically, or by looking at ordinary language, without appeals to value. That is, it may be impossible to “pick out” that which is religious unless we are also working—implicitly or explicitly—with a conception of what is valuable about religion. Although this conception is likely present, what the moral reading puts to the fore is not merely the inevitability of appeals to value, but their primacy in picking out the proper meaning of religion.¹²⁶

The next Section defends Eisgruber and Sager by arguing that the best interpretation of religion is one that does not view religion as involving certain practices of worship or belief in a deity, but simply views religion as coextensive with what Rawls means by a “comprehensive doctrine.”¹²⁷ If such an argument is successful, it would show—in a way that Eisgruber and Sager do not show in an especially effective way, if at all—that the best interpretation of the First Amendment is one that is consistent with the theory of contemporary political liberalism. That this argument is not entirely persuasive is the burden of Part III, which suggests an alternative to the moral reading that interprets religion in the same manner as the comprehensive doctrine.

124. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 762 (1984) (defending the view that religion is not a concept that can be defined directly, but only analogously, by beginning with established cases of religious belief).

125. Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 810 (1997) (arguing that religion is a concept that evolves through time).

126. John Finnis puts religion as “one of the basic human values,” and so comes closest to the approach I am advocating here. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 89 (1980).

127. Eisgruber and Sager at one point contemplate this move, but then go on to reject it, calling it a “definitional gambit.” See *Vulnerability of Conscience*, *supra* note 4, at 1270.

D. *The Moral Reading of the Religion Clauses*

This Section begins by constructing a defense for Eisgruber and Sager's implicit view that "religion" is no more or less worthy of protection than any other comprehensive doctrine—accomplished by reading "religion" in the First Amendment as broadly as possible—by looking first at a case in which the problem of defining religion is especially salient. This case, known as one of the "draft" cases in the leading casebook,¹²⁸ highlights how the line between religion and irreligion is becoming exceedingly hard to draw. This case shows, internally, that the concept of religion may be inherently problematic: it is fuzzy around the edges, so that any definition of religion may have to be extended to cover some cases where it may not be immediately obvious that the conduct in question is "religious." This idea will lead us toward the argument that the category of religion should be broadened, but it does not get us all the way there. The claim that the category of religion is fuzzy does not get us to the claim that "religion" is best interpreted as meaning "comprehensive doctrine." It stays at the level of a description. For, if we are to go along with the "moral reading" of the Constitution, we still have to show that the *value* of religion is best captured by this expansive reading. A draft case will also provide us with some guidance on this point.

The case, *United States v. Seeger*,¹²⁹ deals not with an explication of the Constitution, but of a statute involving the right of conscientious objection. The statute provided an exemption for those who, because of their "religious training and belief," were opposed to war.¹³⁰ The statute went on to define "religious training and belief" as "an individual's belief in 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."¹³¹ The issue in the case was whether the plaintiff's "religious" belief, given that it did not involve a Supreme Being, qualified him for the exemption. The Supreme Court held that it did qualify him for the exemption.¹³² Even though a statute was at issue rather than the Constitution's religion

128. See MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 870 (2002).

129. *United States v. Seeger*, 380 U.S. 163 (1965).

130. *Id.* at 165.

131. *Id.*

132. *Id.* at 163.

clauses, the Court began to develop a concept of “religion” expansive enough to include people’s comprehensive doctrines, and not narrowly construed to their religious beliefs.

Seeger shows us two things. First, it reveals the possibility of an arguably “liminal” case in which, according to the Court, there is a sincere belief that casts itself in spiritual terms. At the same time, the content of the plaintiff’s belief did not contain any reference to a Supreme Being.¹³³ The Court was faced with deciding whether a belief of such intensity and sincerity rose to the level of religion, and was thus a legitimate reason to exempt the plaintiff from fighting in wars. One can understand the Court’s reluctance to draw a line that would exclude the plaintiff from the exemption; such a holding would seem on its face *unfair* to the plaintiff in *Seeger*, denigrating the sincerity and intensity of his beliefs, even if they do not fit perfectly within the statute. The Court could have held that the plaintiff’s belief was not religious, but still deserved to be classified under the statute anyway. Instead, the Court determined that his belief *should* be considered religious. The Court was on its way to extending the traditional concept of religion so that it would not have to encompass a belief in a Supreme Being. What follows is “the ever-broadening understanding of the modern religious community.”¹³⁴

The Court did more; it insisted on the *value* of giving the plaintiff in *Seeger* the exemption. It is not that this was merely a close case or that it would have been churlish to not extend the exemption to the plaintiff given how near he was to traditional religious belief. In fact, it is arguable that he was not at all near traditional religious belief. The Court makes a point of saying that religious belief should be construed broadly. But it does this in terms which make clear that beliefs, other than religious beliefs, have real value, and that there is value in a sincere and intense commitment which does not refer to a Supreme Being.¹³⁵ The Court finds this value by referring to the works of Paul Tillich. The majority quotes Tillich as saying that one does not need to use the word “God” to indicate a deep spiritual dimension to her life, all one needs to do is “translate it, and speak of the depths of your life, of the source of your being, or your ultimate concern, of what you take seriously without

133. *Seeger*, 380 U.S. at 165-66.

134. *Id.* at 180.

135. *Id.* at 187.

any reservation.”¹³⁶ For the majority in *Seeger*, the value of religion is the value of having deep commitments of this sort. This is both a description of what the majority takes to be the proper extension of the term religion, and an implicit understanding of what makes religion *valuable*.

This approach to identifying the value of religion is similar to the one recently proposed by Andrew Koppelman.¹³⁷ Koppelman, borrowing from the work of Charles Taylor, states that “religion” in this broad sense involves “strong evaluation”—evaluations dealing in right or wrong, higher and lower—and typically will involve reference to a “hypergood.”¹³⁸ A “hypergood,” Koppelman explains, again glossing the work of Charles Taylor, is shorthand for a “higher good,” one that will normally trump lower goods.¹³⁹ Such hypergoods can be religious, such as service to God, but they can also involve secular ends, such as benevolence and respect.¹⁴⁰ In Koppelman’s telling, belief in a “hypergood” resembles an “ultimate concern,” and, therefore, deserves protection under the religion clauses of the First Amendment.¹⁴¹ Essentially, if one is passionately and sincerely devoted to something “higher” that, in some moments at least, can trump other worldly matters, the state should do its best to respect that devotion and to avoid interfering with it. The state is also obliged to avoid substituting its favored candidate for a hypergood, to avoid imposing it upon others coercively, or even to prefer it.

Koppelman, incidentally, offers the hypergood analysis as a way of cashing out Eisgruber and Sager’s theory of religious accommodation.¹⁴² But, in fact, Koppelman’s reconstruction is better than that of Eisgruber and Sager. Eisgruber and Sager were not afraid of the implication that their reading of the religion clauses made the First Amendment redundant with other protections of the Constitution. With Koppelman’s interpretation and the interpretation of the *Seeger* Court, however, we

136. *Id.* (quoting PAUL TILlich, *SHAKING OF THE FOUNDATIONS* 57 (1948)). *Cf.* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978) (urging a functional definition of religion which involves each person’s “ultimate concern”).

137. *See especially* Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571 (2006).

138. *Id.* at 588, 594. *See* CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 4 (1989).

139. Koppelman, *supra* note 137, at 594.

140. *Id.*

141. *Id.*

142. *Id.* at 583.

can say that the First Amendment religion clauses protect intense devotion to ideals, “deep commitments,”¹⁴³ and this does not necessarily overlap with guarantees found elsewhere in the Constitution. It does not overlap, for instance, with the guarantees of freedom of expression or association because these things do not necessarily require devotion to ideals, or a comprehensive doctrine. We can be protected in our expression even if what we say is vulgar (so long as it is not obscene). Our associations may be free-floating, temporary, and not for the promotion of any “higher good.”

In short, *Seeger* shows that, by looking at cases at the boundary of what it means to be religious, we will find something of value. This value is worth protecting in the religion clauses, and it justifies treating “religion” as special. It would be *unfair* to exclude those beliefs and belief systems that have this special value (passionate devotion to an ideal) from the protection we give religion, as the term is traditionally understood. We may not be strictly following the text of the Constitution, but this method provides the best way of interpreting the text. And the best way is achieved when the ideals of the Constitution match the ideals of our best political theory, viz. contemporary political liberalism. As Eisgruber and Sager conclude their book, “[s]urely we should be able to understand that the things that matter so deeply to us have their analogue in the very different beliefs, commitments, and projects of others.”¹⁴⁴ My interpretation of the religion clauses offered in this Part allows us to reconcile this theoretical ambition with the words of the Constitution.

It is helpful to contrast the argument for interpreting religion in this deflationary way (so that there is nothing necessarily *special* about “religion” which makes it deserving of heightened protection), with an argument that Brian Leiter has recently presented.¹⁴⁵ Leiter searches for some rationale, based on some special feature of religion (i.e., that religion depends on faith to reach its conclusions), to tolerate religion. Leiter finds no distinguishing feature of religion, so he concludes that the case for toleration of religion is the same as the case for toleration

143. See *Religious Freedom Restoration Act*, *supra* note 4, at 452. Eisgruber and Sager’s use of the term “deep commitments” suggests that sometimes they are in agreement with Koppelman on this point; at other points, however, Eisgruber and Sager analogize religion to disability: deserving of special protection, but not necessarily intrinsically valuable or in any sense “deep.”

144. RELIGIOUS FREEDOM, *supra* note 5, at 285.

145. Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. (forthcoming Winter 2008), available at <http://ssrn.com/abstract=1012910>.

more generally.¹⁴⁶ This conclusion fits with the argument I have given in this Part.¹⁴⁷ There is nothing unique about religion that separates it from other comprehensive doctrines. It follows that our reason for tolerating religion is the same as our reason for tolerating other comprehensive doctrines: they are exercises of the human capacity for choice, and they represent an ordering of values and preferences. The best way to read the Constitution is to see it as protecting peoples' free exercise of their comprehensive doctrines, rather than their free exercise of religion. So too, we might say, that the liberal state should not establish any one comprehensive doctrine, rather than simply refraining from establishing a *religion*.

III. THE MEANING OF RELIGION

Part II argued that "religion" might apply, on the best interpretation of the constitutional text, to those things for which people have a passionate commitment, "higher" things, but not necessarily religious things. These commitments roughly correspond to Rawls's understanding of the "comprehensive doctrine." In *Political Liberalism*, Rawls defines the "comprehensive doctrine" as including "conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familiar and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole."¹⁴⁸ Such a doctrine roughly corresponds to Paul Tillich's notion of an "ultimate concern," and which the *Seeger* Court identified as the essence of religion.¹⁴⁹ The terms do not overlap completely, but there is at least a familial resemblance between all of them, to employ the Wittgensteinian idiom.¹⁵⁰

This Part offers the beginnings of an alternative account of the value of religion, one which is narrower than the *Seeger*/Koppelman definition but which is still rather broad. It does a better job of capturing the value of religious belief, and indicates why a state might want to give special protection to *religious* belief, rather than simply to those ideals to which we are passionately committed, whether these ideals are secular

146. *Id.* (manuscript at 32-33, on file with author).

147. *See supra* Part II.D.

148. RAWLS, *supra* note 15, at 13.

149. *United States v. Seeger*, 380 U.S. 163, 180 (1965) (quoting 2 PAUL TILLICH, *SYSTEMATIC THEOLOGY* 12 (1957)).

150. *See* Greenawalt, *supra* note 124, at 762-64 (using Wittgenstein as the basis for his "analogical" proposal).

or religious. To be sure, and acknowledging one of the points from *Seeger*, there will be “hard calls” and borderline cases. But there is a difference between allowing borderline cases to transform our understanding of the core of religion (as arguably the *Seeger* Court proceeded), and establishing a clear “core,” and then going on to deem some borderline cases “religious”—not because they are genuinely religious, but because to do otherwise might be unfair. In any case, line-drawing issues are unavoidable, even if we draw the line as broadly as the *Seeger* Court did. Thus, Eisgruber and Sager are mistaken when they suggest avoiding a model of the religion clauses that requires us to “categorize” religion.¹⁵¹ Such categorization is inevitable, so we should rather take care to ensure that we have the right categorization (i.e., the one that best captures the value of religion).

I divide the value of religion into two components that are not strictly separable, but can be kept analytically distinct. The first component goes to the fact that religion requires obedience to a higher authority; in other words, religion shows believers (and people in general) that they are accountable to a non-temporal judge, and that there may be extra-temporal consequences to their actions. This shows us, to a first approximation, why it might be valuable to protect religious belief and practice, namely because we do not want to force a conflict in the believer between her secular loyalty and her religious loyalty. The state should avoid forcing such a choice as far as possible.

But this point only goes to why the state should protect religion. It looks to the value of protecting religion, rather than directly to the value of religion itself. Why is allegiance to a religious “higher authority” valuable in itself, prompting us to avoid forcing believers to choose between loyalties? This is the second component of the value of religion, one that says directly *why* religion is valuable, as opposed to why it is something that the state should protect. Here, it is essential to “categorize” and to get at the “basis of the substance and structure” of religious belief, which Eisgruber and Sager caution against.¹⁵² The answer, which I try to develop, but only in a cursory way, has some resonance with Taylor’s (and Koppelman’s) idea of a hypergood, but goes beyond that idea. It is the idea that the religious viewpoint

151. RELIGIOUS FREEDOM, *supra* note 5, at 55. At the same time, as I concede later, the limited competence of courts may lead us to categorize religion broadly rather than narrowly. But this has its costs as well, as I urge in my conclusion.

152. *Id.*

encourages us to see life itself (rather than the particular goods within our lives) as a “gift”; it is this viewpoint that makes religion distinctive.

A. *The Problem of Scope*

Before getting to my explication of the value of religion, however, we first must confront a question that we did not squarely confront in Part II, where I argued that “religion” might best be understood as coextensive with Rawls’s idea of a “comprehensive doctrine.”¹⁵³ This is the question of *scope*. In Part II, I bracketed the problem of scope, because the goal, it seemed, was simply to extend the scope of the term “religion” as far as possible: we wanted, somehow, to extend religion to include secular conceptions of what makes life worth living. But even there, in providing that account, we ran into the problem of scope. We did not broaden religion so that it included *any* of one’s preferences. Rather, we restricted it to those preferences that are of one’s “ultimate concern,” and argued that these commitments sufficiently capture the value of religion.

In the definition I am about to offer, however, the problem of scope is even more evident. If religion is limited to simply those things which are *religious*, in a sense more narrow than a conception of the good, we might ask: why not restrict the value of religion to the value of simply *one* religion? For instance, why not restrict “religion” to only Christianity? One might be tempted to answer this with a recourse to history, arguing that the Founders never intended for “religion” in the First Amendment to have such narrow meaning. If the Founders wanted to refer to Christianity only, they would have put free exercise of “Christianity” in the First Amendment, rather than the catch-all term “religion.” But we know this argument has its limits. We are looking for the morally best construal of religion, and this will dictate, at least in part, the proper scope. It is thus an open question of whether the best reading of “religion” is *one* religion.

In *Tom Jones*, the character Parson Thwackum said, “[w]hen I mention religion, . . . I mean the Christian religion; and not only the Christian religion, but the Protestant religion; and not only the Protestant religion, but the Church of England.”¹⁵⁴ For Thwackum, the value of

153. See *supra* Part II.B.

154. Paul Griffiths, *The Very Idea of Religion*, FIRST THINGS, May 2000, at 30, 31 (quoting HENRY FIELDING, TOM JONES, A FOUNDLING (1749), and defending Parson

religion is in the value of *one particular* religion, and, not to put too fine a point on it, the *true* religion. It is certainly a valid claim that the value of religion is the value of the true religion.¹⁵⁵ Or, to put it another way, the proper scope of the term “religion” is the one true religion.

We should resist this reading, while at the same time acknowledge that it has some significance. It is correct in treating religion as a normative term, one that we can only define with reference to its value. Where this reading goes wrong, however, is treating value as only *true* value, or in other words, that the only value in religion is to be found in the true religion. Still, this is a serious position, and we can only rebut it by showing that the value of religion can be found even in religious practices and beliefs that are not true. And we have to do this while marking the scope of religion as something less than simply one’s ultimate commitments. Either way, we miss something of value. If we define religion too narrowly, we miss the value of even false religious commitments; and if we define religion too broadly, we risk missing what is unique and uniquely valuable about religion, thus giving religion a value that is not true to its nature.¹⁵⁶

B. The Value of Religion: Obedience to a Higher Sovereign

Conceptualizing the “value of religion” can begin with the familiar idea that believers in a religion are members of two kingdoms: conventionally understood as the heavenly kingdom and the earthly kingdom. It follows then that a central problem for such believers is determining how to negotiate the demands of the two kingdoms when they conflict. Of course, there are various ways to deal with this problem. One might think that the demands of the heavenly kingdom always correspond to what the earthly kingdom demands—thus one is

Thwackum’s view of religion). See also CHRISTOPHER WOLFE, *NATURAL LAW LIBERALISM* 218-19 (2006) (sympathetic discussion of Griffiths).

155. See especially Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 *DRAKE L. REV.* 35 (1998). Parson Thwackum’s view might have been shared by Joseph Story. See Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 *NW. U. L. REV.* 1097, 1133 (2006) (quoting Story as saying, “the general, if not the universal sentiment in America was, that christianity ought to receive encouragement from the state”).

156. The same thing, I think, would apply to interpreting the value of religion as only encompassing theistic religions, as Justice Scalia has recently suggested in the establishment context. This, again, makes the circle too small. For a discussion of Scalia’s position, see Colby, *supra* note 155.

relieved of any tension between the two positions, because the commands of one kingdom simply collapse into the commands of the other. Or, by contrast, one could simply always uphold the commands of the heavenly kingdom, disregarding the commands of the earthly kingdom. But in all likelihood, there will be some tension between the two kingdoms. Which kingdom one should obey in any given circumstance is an open question; sometimes, it will be a matter of following different commands in different areas of life.

One can already see, here, why the state might be interested in giving the believer freedom to negotiate these conflicting demands. On its face, it seems to be a simple matter of prudence. If one's state has citizens of this type, then one would not want to put them repeatedly in the position of having to choose between loyalties. One would want to try, as best as possible, to secure a domain in which she can practice her religion unimpeded, unhindered by the state's demands. Of course, one cannot always eliminate conflict, but she can reduce it. The position of the state in this case would be, as Michael McConnell has put it, to come as close as possible to a "world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government."¹⁵⁷ Again, this will always be an imperfect accommodation, with the government and the believer constantly having to renegotiate the proper boundaries.

However, we are looking for more than simply a good, prudential reason for the state to protect religion.¹⁵⁸ We are looking for the *value* of religion. And in the idea that religion's obligations are *commands*, obligations from the sovereign of another kingdom, we can find some understanding of the value in protecting religion. Religious commands, insofar as they are commands, can have an "imperative" force—that is, they can make a claim on the believer that overrides or trumps all of her other earthly concerns. Religious obligations make a claim on the believer, and the state should respect even the erring conscience in what it seeks out, because it is believed to come from a higher source of authority. The state should not confront, without good reason, the

157. Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992).

158. Eisgruber and Sager are correct to note that we might protect religion without necessarily valuing it; this, I think, is what the prudential argument does. We might want to avoid conflicts between the state and citizens' deepest beliefs. We might view this protection using an analogy to physical disability: we want to accommodate people's disabilities, but this does not imply necessarily that we *value* people having certain disabilities. See *Vulnerability of Conscience*, *supra* note 4, at 1267.

believer on these grounds, not because the state does not want to anger the believer, but because the state respects the believer's conscience.

This is where Michael McConnell, for instance, finds the strongest ground for the believer to claim special protection. In McConnell's words, religious freedom is special because "no other freedom is a duty to a higher authority";¹⁵⁹ or, as William P. Marshall summarizes the argument, "humanity's relationship with God should be understood to transcend all other allegiances or activities."¹⁶⁰ But I confess, following Koppelman, that this sketch of religion does not uniquely single out what is most valuable in religion.¹⁶¹ Conflicts between conscience and religion can certainly occur outside "religion" as it is traditionally conceived, and so McConnell's insistence that religion (as traditionally conceived) deserves protection on *these* grounds seems arbitrary. The force of conscience, and the respect it is owed, can be the force of a purely secular conscience. The "specialness" of religion eludes us if we base it only on these grounds.

We must look deeper into the content of religion, which I do in the next Section after going into more detail on why the "authority defense" of religion's value is mistaken. The stress on the imperatival force that some religious commands have is a *formal* point. It is a point about how one might feel religion internally—how religion's commands can feel unlike anything we have thought up and imposed on ourselves, and more like external commands over which we have no control. But this feature is not unique to religion. Moreover, if we were to protect only those religious claims that are commands from a Supreme Being, then we would exclude those religions that are not theistic, such as Buddhism. I side with the *Seeger* Court in believing that religion does not require obedience to a Supreme Being,¹⁶² but I oppose the Court when it comes to reducing religion to one's ultimate concerns. I believe that those ultimate concerns must be of a specific type, and we cannot merely rest on the formality of the religious claim to discern this type, but must go deeper into its *content*.

159. Michael McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L.R. 1, 30 (2000).

160. 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, 206 (2000).

161. Koppelman, *supra* note 137, at 593.

162. *United States v. Seeger*, 380 U.S. 163, 163 (1965). *See also supra* Part II.D.

C. The Value of Religion: Seeing the World as a Gift

The last Section rejected a “specialness” of religion that focused on religious believers as members of two kingdoms, the heavenly kingdom, and the earthly kingdom. There, the point of securing religious liberty was to avoid placing citizens in situations where they would have to obey either their temporal sovereign or their heavenly sovereign. This might have a simple prudent justification: we do not want to place people in these situations because if we did, they might choose to disobey earthly laws, or resent such laws should they choose to obey them. But such a justification might also pay respect to the religious beliefs of citizens, by crediting them with the possibility that they are answering to a higher calling. In that sense, the state should give them the freedom to pursue this higher calling.

There are two problems with this justification, however, and they point us to a better conception of what is special about religion. The first problem is that this justification is arbitrarily underinclusive, excluding those citizens who feel bound by a moral commitment that is not tied to religion at all. The state might also want to avoid putting people in a situation where they have to choose between obeying the state and violating their core moral convictions. The state may even want to show respect to people who feel bound by their moral principle in this way.¹⁶³ In short, we still lack any arguments for why *religious convictions* in particular merit special treatment. We can say why we want to protect people who feel bound by their consciences the same way we protect people who feel compelled by their religious convictions. Michael McConnell’s argument that religious claims differ from secular claims because the state “cannot categorically deny the authority on which such a claim rests”¹⁶⁴ seems either false or equally applicable to secular moral claims.¹⁶⁵

163. Marshall, *supra* note 108, at 321 (noting that violation of deeply held secular beliefs may cause psychic harm to the believer).

164. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15 (1985).

165. Andrew Koppelman’s proposed definition of religion-in-general also, I think, suffers from overinclusiveness. Koppelman says that religion identifies humans as flawed and offers up a solution. But this is so vague as to include, inter alia, Marxism and Freudianism. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 133 (2002) (“If there is a universal human problem, then it is a matter of some urgency to identify this problem and its cure. Religion-in-general is the set of activities that seek to address this universal human problem.”).

The second problem is related to the first. It is that religious commands seem to bind us, and the state should respect this sense of obligation. But why is this obligation to a higher authority especially valuable? Is the mere fact of feeling obligated a good thing? Either the value is being bound by *true* obligations,¹⁶⁶ or there is some mysterious value merely in being bound by commitments which one thinks are mandated by a higher authority. In other words, either the value of obligation is left unexplained, or its explanation has to go to the truth of a particular religious vision. But this presents an unacceptable dilemma. On the one hand, the risk in assigning a value to a feeling of obligation is that it does not give us any purchase on exactly what *value* is served by protecting people who feel bound. On the other hand, if we say that the value of obeying commands is that they are *true* commands, then we risk collapsing the value of religion into the value of obedience to the true religion. This is something we would want to avoid, until we are forced to accept it. The idea is to explicate what value *religion* has, rather than what value a particular religion has.

The failures of the previous view give us a good sense of the conceptual space we need to fill. We want to find something that does not arbitrarily draw lines between religious and non-religious ways of looking at the world. The idea that we are under commands from an authority other than the state does not sufficiently distinguish between those who feel bound by religious commands and those who feel bound by an ordinary moral obligation to disagree with the state. We thus have an understanding of religion that captures what is unique to religion. Furthermore, we also want an understanding of religion that speaks to religion's *value*. For instance, we might have a definition of religion that specifies religion's need for a Supreme Being, and we might worry that this definition is underinclusive because there are religions that do not have a Supreme Being. But we might also want to know more about why a belief in a Supreme Being is valuable—assuming that there is a Supreme Being, in which case the value of religion would be the value of having true beliefs.

The idea I propose is that religion is special and has value because it perceives human existence as a gift.¹⁶⁷ Perceiving existence as a gift is not to say it was brutally *given* to us as a platform or starting point to

166. Cf. Alexander, *supra* note 155, at 41 (“*True* religion is good.”). See also Stanley Fish, Op-Ed, *Religion Without Truth*, N.Y. TIMES, Mar. 31, 2007, at A15.

167. For a meditation on the idea of a gift to which I am greatly indebted, see ANTHONY KRONMAN, *REFLECTIONS OF A BORN AGAIN PAGAN* (forthcoming).

which we owe no particular response. Those who see existence as a gift are oriented to the universe in such a way that they see it as something to which we owe gratitude, respect, and maybe even awe. This view is expressed in the Book of Psalms, that “it is he that hath made us, and not we ourselves.”¹⁶⁸ This viewpoint is distinguishable from one that sees our only debt of gratitude as one owed to other humans who have procured a benefit for us. From this perspective, one sees the idea that the universe is a gift as anthropomorphizing our relationship to the world, at best, and engaging in dangerous fantasy at worst.

It is perhaps hard to grasp the idea of existence as a gift in the abstract, but it is a familiar idea in terms that are more tangible. For instance, the idea that we should treat existence as a gift frequently appears in bioethics debates, where one side often argues against genetic manipulation or cloning on the basis that life is a gift, something which is not our own creation and which we should not attempt to manipulate. Michael Sandel is a recent example of someone subscribing to this idea: “The problem with eugenics and genetic engineering is that they represent the one-sided triumph of willfulness over giftedness, of dominion over reverence, of molding over beholding.”¹⁶⁹ Sandel comes close to equating this idea of giftedness with religion by describing the rise of efforts at genetic enhancement as jeopardizing “a habit of mind and way of being.”¹⁷⁰ This is similar to what I have been calling an “orientation” to the world.¹⁷¹ This idea, that existence is a gift, is what is special about religion. Religion cultivates and expresses the idea that we should orient ourselves to the world as we might orient ourselves to something we received as a gift.

Sandel is of the opinion that this sense of giftedness is not necessarily religious, but I disagree. It is hard to see how we can view the universe as a gift while simultaneously holding that there is no sense in which it was given to us, that it is by accident or luck that we exist. It seems impossible to hold these two thoughts at the same time. The idea that existence is a gift suggests that we have an obligation to be grateful for this gift. But such a thought is not prompted by the idea that something exists by luck, rather than nothing. The thought that we are the products of chance does not seem to dictate that we respond to our fortune in any way, whether positive or negative. It does not suggest

168. *Psalms* 100:3.

169. MICHAEL SANDEL, *THE CASE AGAINST PERFECTION* 85 (2007).

170. *Id.* at 96 (citation omitted).

171. *See supra* Part II.B.

that to fritter our lives away would be a waste. By contrast, the idea that our existence has been given as a gift inspires the thought that we have a special responsibility toward life.

I should expand on this idea, for it shows that there is more to giftedness than merely an orientation toward the world, one that sees the world as a gift rather than as simply where we start. The idea that we have been given a gift leads us to a certain responsiveness and care for the universe and our place in it: gratitude, as intimated in the previous paragraph. Further, that the universe is a gift implies that we are to act in a way that preserves this gift, and acknowledge our indebtedness to it. Compare this to the idea that value exists only in those things which we have created, and that the universe is simply a supply of raw materials which we can dispose of at our will. This is the view of John Milton's Satan (to be contrasted with the perspective of the Psalmist, above), that he is "self-begot and self-raised/ By our own quick'ning power,"¹⁷² owing no debt to anything or anyone because he is his own creation.

Sandel makes a useful point about the value of seeing the world as a gift: "One of the blessings of seeing ourselves as creatures of nature [or] God . . . is that we are not wholly responsible for the way we are."¹⁷³ Sandel makes this point in the context of advances in genetic engineering. It is a relief to see the world as a gift, because it is not wholly up to us to change it and make it better; there may be value in leaving it be and accepting it as is. Sandel seems to suggest that a secular world will tend to ignore this perspective in a boundless quest for perfection. It tends to see the world as something that can be altered and endlessly improved by the exercise of human will and intellect—a view solely in terms of costs and benefits. The idea of the world as a gift, an idea that I suggest is the basis of religion's value, may check this restless impulse.¹⁷⁴

The idea that existence is a gift to which we are not entitled captures the value of religion. We should test, again, whether this definition singles out religion uniquely. I have already addressed this

172. JOHN MILTON, *PARADISE LOST*, BOOK 5, at ¶¶ 860-61 (Merritt Y. Hughes ed., The Odyssey Press, Inc. 1962) (1667).

173. SANDEL, *supra* note 169, at 87.

174. Martin Heidegger is probably the best contemporary diagnostician of this "restless" impulse. See, e.g., MARTIN HEIDEGGER, *The Question Concerning Technology*, in *BASIC WRITINGS* 311, 320 (David Farrell Krell ed., 1993) ("The earth now reveals itself as a coal mining district, the soil as a mineral deposit. The field that the peasant formerly cultivated and set in order appears differently than it did when to set in order still meant to take care of and maintain.").

concern to some extent by declaring that a secular view could not capture this sense of giftedness. How can those who believe the world is a product of chance be grateful for existence? While it first appears that such people would be indifferent, a secular argument for gratitude might exist.

Consider the idea that we should be grateful to our tradition, as something that has constituted us, and from which we benefit. Would this not be something that also has the value I am ascribing to religion?¹⁷⁵ It is different, and it will be useful to explain why. Tradition is still the work of human hands, and so to be grateful for it is to be grateful to something that is human. What I want to focus on, however, and what I am claiming is unique to religion, is gratitude for *being*, something that is not human, and is not given to us by another human. This gratitude is not ordinary gratitude toward a person or persons who have given us a benefit, but is gratitude for the fact of existing, the condition of all other future benefits. This is the uniquely religious orientation toward the world. It is an orientation toward the whole of existence, and it sees existence as a priceless and undeserved gift.

If there is any serious worry on this level, it is that the idea of giftedness is overly tied to religious sensibility and the idea of a Supreme Being.¹⁷⁶ In other words, how can a gift exist without someone who has offered that gift? And if the gift is existence itself, then who could that giver be other than God? I am not sure how to answer these questions. Can there be a theory that views existence as a gift but does not see that gift as coming from *someone*? Can the universe exist *qua* gift? To say such a thing seems perilously close to embracing the thought that one could see the universe as a product of fortune, and yet still treat it as a gift—a thought that I encourage we reject. But might there be a space between treating the world as a product of chance and treating it as a gift, such that one might see the world as a gift (yet without supposing a giver) without thinking it *merely* the result of

175. See Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

176. Robert George pressed this objection against Sandel when Sandel presented an earlier version of his book to The President's Council on Bioethics. See The President's Council on Bioethics: Transcripts, December 12, 2002, Session 4, available at <http://www.bioethics.gov/transcripts/dec02/session4.html> (statement of Robert George) ("Is there an inference that is invited from the understanding of giftedness to the reality of a giver, and would it be less than fully reasonable to stop short of drawing that inference?").

chance?¹⁷⁷ I am not sure. Perhaps the idea of the universe as a gift is indebted to theology as much as (if not more than) the idea of being obedient to a higher sovereign.

D. Judicial Competency and Religious Meaning

I leave aside these questions for the remainder of this Article, not because they are unimportant, but because they are sufficient to show the kind of questions we should be asking when considering the unique value of religion. But we might now have a different type of worry about these questions, and it is considering this worry that I want to end this Section. This kind of worry will bring us back to the level of constitutional theory and away from theology and anthropology. We should consider not only whether we have the right definition of religion (viz. one that captures religion's unique value), but also whether this value makes sense as a constitutional value. The moral reading of the Constitution tends to blur these two things: it seems to suggest that, in certain amendments, the vague language gives interpreters license to insert moral philosophy. For instance, in interpreting what is "cruel and unusual"¹⁷⁸ we are to consider what is *truly* cruel rather than attempt to discern what the Founders thought was cruel.

But there is another consideration waiting just off the wings, which is not that it would be impossible to find these constitutional values, but that courts lack the competence to deal with questions of value. Regardless of whether this is true in the case of "cruel and unusual," we might think that it applies with even more force in the case of religion. Can courts be relied upon to find the value of religion? To say that such an investigation is probably rendered inevitable by the structure of the Constitution may be correct, but it misses the deeper point. It misses the point that as part of finding the best interpretation of the *constitutional* value of religion, we should also take into account whether or not courts will be able to discern and apply this value in cases that reach them. And in this way, we might have a strong second-best argument for the liberal reading of religion developed in Part II. William P. Marshall

177. Interestingly, John Locke is a good example of one who views the world as a gift (which creates certain obligations in us), but also sees this as essentially tied to a Supreme Being. See especially his discussion of property in JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, in *POLITICAL WRITINGS OF JOHN LOCKE* 261, 273-74 (David Wooten ed., 1993).

178. U.S. CONST. amend. VIII.

makes this second-best argument explicitly when he writes, “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.”¹⁷⁹

In other words, courts, given their relative competence, may be better off with an expansive definition of religion, even if religion *does* have a unique value that is not captured in secular ways of viewing the world. Thus, the liberal would have the better interpretation of religion, but not because he has correctly shown that the value of religion is also contained in secular ways of viewing world. The liberal would have the better interpretation because of the constraints of the Constitution, and the role of the courts within the structure outlined by the Constitution. Again, this would be a second-best argument; it does not necessarily speak to the ideal of what we would want our Constitution and our courts to be.

CONCLUSION

Much of this Article concentrated on the theoretical roots of Eisgruber and Sager’s proposal to read the First Amendment in a secular way. I tried to trace the impulse behind this proposal—which seemingly conflicts with the plain text of the First Amendment—to liberalism’s core idea that the state should neutrally treat all forms of beliefs, including religious beliefs. I implicitly suggested that one cannot look at Eisgruber and Sager’s proposal as simply an exercise in constitutional law; to understand it, we need to look at it from the broader perspective of intellectual history. But from this perspective, we see the obvious appeal of a secular First Amendment, and we should interpret it in a way that understands “religion” to mean “conceptions of the good” or, to use the Rawlsian idiom, “comprehensive conceptions.”¹⁸⁰

Indeed, the idea that the First Amendment should be read in a wholly secular way gives an appealing and unifying vision of the First Amendment. On this reading, each of the various parts of the First Amendment (e.g., free speech, free press, association), when added to the idea of “religion” as comprehensive doctrine, creates a First Amendment that treats the individual’s view of the world as important,

179. Marshall, *supra* note 160, at 213.

180. RAWLS, *supra* note 15, at 13.

and does not give priority to any one way of looking at the world. There is no competing push in the First Amendment requiring one way of looking at the world to receive greater protection than other ways of looking at the world.¹⁸¹ On this picture we might not, *pace* Eisgruber and Sager, merely find the First Amendment to be redundant with other parts of the Constitution, but even redundant with other parts of the First Amendment itself. Free speech is important because it allows us to express ourselves; free exercise is likewise important for this reason (although exercise may also include more than just speech, but constitutional “speech” also includes more than just speech).¹⁸²

In the final Part of this Article, I argued, with some hesitation, for a more pluralistic view that sees the First Amendment as containing more than simply secular values. On this alternative picture, the First Amendment gives a special place to a particular way of looking at the world, the religious point of view, because this way has a special value that other ways do not have. Accordingly, we try to give that (religious) value a certain priority, giving it *more* protection than other ways of looking at the world. This particular value is the perception of the world as a gift, not simply existing for our own use, but something that we have an obligation to acknowledge and appreciate. Even if this is not the right value, however, it still subscribes to a version of the First Amendment that is distinct from a wholly liberal version, without giving preference to a uniquely religious way of conceiving the world. The reading I proffered is different from what Eisgruber and Sager poorly describe as a “secular value at the core of religious liberty.”¹⁸³ Instead, I maintain that there is a religious value at the core of religious liberty—although there may be other secular values that make up the First Amendment. That religious value, the one protected by the free exercise clause, is the value of seeing the world as a gift, as not simply the backdrop for our projects but a positive benefit to us, and which creates certain obligations of gratitude and response.

At the same time, I claimed in a second best argument that it might be better to embrace the liberal ideal because it is easier for courts to

181. *Cf.* Marshall, *supra* note 108, at 320 (“Most obviously, a constitutional preference for religious belief cuts at the heart of the central principle of the Free Speech Clause—that every idea is of equal dignity and status in the marketplace of ideas.”).

182. *See id.* at 327 (arguing that religion should be treated as a product of man’s freedom rather than his external obligation, and finding this view “more consistent with the commitment to freedom expressed in the First Amendment itself”).

183. Eisgruber & Sager, *supra* note 1, at 609.

interpret religion expansively rather than narrowly, rather than leaving it to the courts to decide whether existence is a gift.¹⁸⁴ It seems better to conclude the Article with the picture of two competing ideals, and to leave open the question of which of the two ideals is more attainable. It is important to recognize the idea of religion having a special constitutional value, even if we concede that courts are in no position to identify that value. We should at least wrestle with the irony that a document dedicated to secular governance nonetheless carves out a place for religion. If for reasons of expediency or principle, we should choose, in the end, to replace the unique status of religion in the Constitution with something more general and encompassing, and recognize the possibility that something—some vision of politics and of life—will be lost.

What is this vision that is at risk of being lost? Consider how the secular First Amendment recognizes no deliberate distinctions between ways of looking at the world. All are equal, but in a kind of leveling manner; no one deserves any privilege that is denied to all other points of view. If it is egalitarian and neutral, it is also somewhat one-dimensional and, for that reason, uninspiring. By contrast, the pluralistic First Amendment, while not diminishing other points of view (at least not intentionally), seems to place one particular set of views at its center, namely, religious ways of looking at the world. On this reading, the First Amendment is not flat, but tiered, with its hidden foundation being religion. The foundation is hidden because religion cannot be established by the state. Religion, however, is an animating presence in the pluralistic First Amendment, recognized as both vital in the lives of individual citizens, and as a necessary correction to the secularizing trend of government, which considers the world as the object of organization and manipulation rather than as a gift.

Eisgruber and Sager's book displays a possibly admirable urge to refashion the First Amendment as a wholly secular amendment, redundant with other amendments of the Constitution. I have suggested, in the course of this Article, how Eisgruber and Sager can do this while remaining faithful to the Constitution's text. They can make the First Amendment secular by broadening the meaning of religion. Even though this may not have a textual cost, however, it may have a different and more significant cost. In other words, even though we might construe religion this broadly while talking meaningfully about

184. See *supra* Part III.

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“religion,” it may lead us to miss the tension between the heart of the First Amendment and the heart of modern life: the tension between the secular and the sacred ways of viewing the world. This is a tension we may never want to resolve entirely; in any case, we should not be in too much of a hurry to resolve it.