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NO TEARS FOR CREON

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This essay critiques Professor Martha Nussbaum's book, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (2008). Nussbaum's thesis is that the entire tradition of religious liberty in America can be both best understood (as a historical exercise) and justified (as a philosophical one) by recourse to the overarching principle of *equal respect*—that "[a]ll citizens have equal rights and deserve equal respect from the government under which they live." Nussbaum insists that equal respect pervades the tradition and that all other values of religious liberty are subordinate to it. She examines various free-exercise and establishment issues in light of this principle, concluding that the tradition of religious equality is under threat and calling for renewed vigilance in its defense. This essay criticizes Nussbaum's elevation of the principle of equal respect to supreme normative status. It claims that Nussbaum's single-minded focus on equal respect distorts and misunderstands the conflicts actually at issue in many religious liberty disputes. The essay focuses specifically on the inadequacies of her assessment of two prominent religious liberty cases, one in the free exercise and the other in the established context. This essay concludes that there are reasons for deep skepticism about Nussbaum's approach as a comprehensive theory of the religion clauses.

I. INTRODUCTION

There is a fleeting moment toward the end of Sophocles' *Antigone*, just before Creon relents and races off to make amends, when Creon is genuinely torn between competing convictions. The Chorus beseeches him to release Antigone and give her brother a proper burial. Creon had refused to accede on the ground that Antigone disobeyed Theban law and that her brother was an enemy of the city. But at this late point in the play, Creon is all but persuaded. And yet he hesitates still: "My heart misgives me; it is better to keep the established laws, even to life's end."[1] It is a tipping point of sorts. Creon at long last recognizes that he is in the wrong but he still believes that his choices, though on balance unwise, are not utterly without merit. There is something of value in steadfast faithfulness to the equal application of the law that is lost when Creon yields. Certainly it may be a value worth sacrificing, given the alternative; yet it is a loss nonetheless.

1. SOPHOCLES, ANTIGONE ll. 1105–1112 (R.C. Jebb trans.) (the Fifth Episode) (Cambridge University Press, 1900), *available at* http://classics.mit.edu/Sophocles/antigone.html.

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Soon enough the moment of tension has passed, washed away by the blood of a triple suicide and the folly of Creon's pride. But if one resists the facile impulse to heap self-righteous scorn on Creon, one can sense something of the strain of Creon's choices and the concerns that animate his indecision.

In her book, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*,[2] Professor Martha Nussbaum reflects on the relationship of the ideal of equality to the constitutional right to religious liberty. The breadth of Nussbaum's knowledge—philosophical, historical, and legal—is so large and her writing so accessible that it lulls one into a false sense of understanding all three spheres of learning as well as she does. But for all its impassioned forcefulness, Nussbaum's book evinces an extraordinary lack of sympathy and understanding for the choices of both Creon and his subjects—the metaphorical Creon who must protect the state and manage and judge among the clashing and often incompatible interests that swirl about it.[3]

Nussbaum mounts an ambitious and spirited defense of the American "tradition of religious equality," drawing a nice, suspiciously straight line in the history of the ideas of equality from the Stoic philosophers through Roger Williams, John Locke, James Madison, and straight on to Immanuel Kant and John Rawls.[4] "America's tradition of religious equality" is said to include an eclectically international group: Cicero, Marcus Aurelius, Seneca, Adam Smith,[5] Locke, Williams, Madison, Kant, and Rawls all fall neatly into place.[6] Yet even if one is persuaded that this creative reconstruction is suggestive of the importance of equality as a component of religious liberty, it is unconvincing as a unified theory, because Nussbaum insists on something that she calls "equal respect" as the overriding value of religious liberty—the supreme value that takes precedence over any other value with which it conflicts and that can only be violated if by that violation its realization would be more generally served.[7]

2. MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008).

3. Nussbaum, a renowned classicist, likewise has little compassion for Creon himself. *See* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS 51–82 (1986).

4. NUSSBAUM, LIBERTY, *supra* note 2, at 56–57.

5. *Id.* at 73, 83–84, 95.

6. John Courtney Murray once quipped that when theorizing about religious liberty, "Scylla is archaism; Charybdis is anachronism." JOHN COURTNEY MURRAY, RELIGIOUS LIBERTY: STRUGGLES WITH PLURALISM 188 (J. Leon Hooper ed., 1993).

7. JOHN KEKES, THE MORALITY OF PLURALISM 19 (1993). Sophisticated advocates of overriding values may resist the ascription of a desire to order values hierarchically, as Ronald Dworkin does, but their views invariably demand the prioritizing of a particular value as central or focal, around which all other values neatly arrange themselves. *See* Ronald Dworkin, *Equality, Luck, and Hierarchy*, 31 PHIL. & PUB. AFF. 190, 196–197 (2003) (stating that his own view does not rest on "selecting one political value as fundamental so that others are subordinate . . . but through an interpretive method that emphasizes interrelations and interdependencies among all the political values, *supposing them to come together in an overall account of a society of equals*"; emphasis added).

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This essay considers equal respect as a general theory of religious liberty and criticizes Nussbaum's elevation of equality and consequent subordination of all other values. It begins by setting out Nussbaum's general theoretical claims for equal respect. It then critiques the application of equal respect to two well-known Supreme Court decisions: *Wisconsin v. Yoder*[8] (a Free Exercise Clause case) and *Wallace v. Jaffree*[9] (an Establishment Clause case). It argues that Nussbaum's approach to these cases is unsatisfying precisely as a result of her overriding egalitarian methodology. Last, the essay claims that the failure of equal respect derives in part from Nussbaum's selection of "conscience" as the core essence of religion—that universal human function which the state must equalize. It may come as a surprise to see Nussbaum's account of religious liberty characterized in this fashion, since she is well known for her contributions to pluralist political theory.[10] Nevertheless, this essay claims that with *Liberty of Conscience*, Nussbaum breaks from value pluralism in favor of something else entirely.

II. "OBSESSED WITH EQUALITY"[11]

The egalitarian theorist approaching the question of religious liberty is apt to ask herself the equality-of-what? question; that is, using what normative framework or dimensions should she evaluate the good of religious liberty? In the past, Nussbaum has claimed that the human capacity for religious belief is included in or derivative of certain other essential human faculties, including "senses, imagination, and thought," "affiliation,"[12] and "practical reason."[13] And it is the ability to choose autonomously in matters of religion (within the lower limits set by other functions) that answers the equality-of-what? question.[14]

Thus Nussbaum's conception of religious liberty contains two features: (1) it involves a threshold minimal human capacity to select autonomously

8. Wisconsin v. Yoder, 406 U.S. 205 (1972).

9. Wallace v. Jaffree, 472 U.S. 38 (1985).

10. *See generally* MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS (1986); MARTHA NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006); *see also* WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 5 (2002) (listing Nussbaum as one of the "leading contributors" to a "full-fledged value-pluralist movement").

11. NUSSBAUM, LIBERTY, *supra* note 2, at 226.

12. MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 179 (2001). Nussbaum is well known for her contributions to "capabilities" theory—the view that egalitarian political theory ought to concern itself with a person's "'basic capabilities': a person being able to do certain things." Amartya Sen, *Equality of What?*, *in* EQUALITY 175 (David Johnston ed., 2000), originally published as THE TANNER LECTURES ON HUMAN VALUES (1980). Over the years, Nussbaum has made various lists of these human capabilities. Because *Liberty of Conscience* is only peripherally concerned with capabilities theory, however, this essay does not examine it in detail.

13. Martha Nussbaum, *Capabilities as Fundamental Entitlements*, *in* CAPABILITIES EQUALITY: BASIC ISSUES AND PROBLEMS 52 (Alexander Kaufman ed. 2005).

14. NUSSBAUM, WOMEN, *supra* note 12, at 274.

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what an individual believes to be "appropriate [religious] relations" of "love and care" or whatever the other "central functions" constitutive of religious experience may require[15]—that is, "conscience," "the faculty in human beings with which they search for life's ultimate meaning";[16] and (2) it demands the equal distribution of the ability to pursue "conscience," which entails negative and positive obligations on the state.[17]

Liberty of Conscience is Nussbaum's extended argument that this vision of religious liberty is both a historically accurate synthesis of the First Amendment's religion clauses and a philosophically appealing account of them.[18] The book's thesis is that "a key thread holding all the key concepts together is the idea of equality, understood as nondomination or nonsubordination" and epitomized in what Nussbaum calls the principle of "equal respect": "All citizens have equal rights and deserve equal respect from the government under which they live."[19] Every other principle or value that might relate to the idea of religious liberty is itself dominated by and subordinated to the idea of equal respect. Thus "conscience" itself is important as a feature of religious liberty only inasmuch as and to the extent that it demands that "equal respect should be given to high and low, male and female, to members of religions one likes and also to members of religions one hates."[20] "Liberty of conscience is *worth nothing*," Nussbaum claims, "if it is not equal liberty,"[21] for "we want not just *enough* freedom, but a freedom that is itself *equal*, and that is compatible with all citizens being fully equal and being equally respected by the society in which they live."[22] "Accommodation"—"giving religious people a 'break' in some area, for reasons of conscience"—is a worthwhile practice even though it is a form of nonneutrality only if and when it "seems required by equality."[23] "Liberty" "is only fair if it is truly equal liberty" and is worth protecting only insofar as it enables individuals to satisfy the urgings of their "consciences" equally.[24] "Separation of church and state" is valuable only insofar as it serves the principle of equal respect.[25]

If Nussbaum's introductory chapter does not make it abundantly plain that she supports an overriding egalitarian account of religious

15. *Id.*
16. NUSSBAUM, LIBERTY, *supra* note 2, at 19.
17. *Id.* at 1.
18. The discussion here focuses on the theoretical claims of LIBERTY OF CONSCIENCE and leaves to the side both the ascription by Nussbaum of her own views to the American founders ("If there was anything that all the framers agreed strongly about, and never questioned, it was the idea of equality"; *id.* at 103) and the plausibility of the historical connections that Nussbaum draws among authors separated sometimes by ages, sometimes by millennia, of temporal and cultural distance.
19. *Id.* at 21–22.
20. *Id.* at 19.
21. *Id.* at 2 (emphasis added).
22. *Id.* at 19.
23. *Id.* at 22.
24. *Id.* at 22, 24.
25. *Id.* at 12, 25.

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liberty, later statements leave no doubt. The fundamental problem with establishmentarian regimes is their inherently hierarchical structure, and hierarchy of any kind is the gravest offense against equal respect.[26] The fostering of religious sentiments by the government and the financial support of religion by the state is altogether objectionable principally, if not solely, because it betrays equal respect.[27] The United States—or at the least the agglomeration of individuals who happen to have lived here from the late eighteenth century to the present—has been nothing less than "obsessed with equality," and in the area of religious liberty, equality is "the idea is that people are of equal worth as citizens, and are therefore to be treated *as equals* by laws and institutions."[28] "[R]eligious liberty is not a very significant constitutional value in a democracy if it is the sort of thing that can be granted hierarchically, rather than being granted to all on terms of equality."[29] "[H]istory shows us that constant vigilance is required lest [equal respect] be narrowly and partially construed, or misapplied in ways that favor hierarchy."[30] Americans have "forg[ed] a political order that exemplifies equal liberty of conscience," but "we always need wise citizens—including judges—who can think well about how to realize this value in changing circumstances."[31] And the very source of the obligation to respect religious liberty lies in the common egalitarian ties that bind all people as "citizens of the world" (and emphatically not merely as citizens of the United States) and the "ethical commitments (to equal respect and the value of liberty)" that are shared by the global confraternity of cosmopolites.[32] In sum, "[e]quality provides an orienting account" of religious liberty, and "we make progress" in the area of free exercise or establishment by asking:

> "How does the policy in question affect the equality of citizens in the public realm? What statement does it make concerning the equality of citizens who differ in religion and/or nonreligion?" This idea runs like a thread through all cases.[33]

Nussbaum once richly earned her reputation as a value pluralist in *The Fragility of Goodness*, a pathbreaking work that blends learned literary interpretation and deft philosophical sensitivity for the conflict of incompatible

26. *Id.* at 74–76 ("establishments, however benign, create ranks and orders of citizens, defining the status of some as unequal to others"); *see also id.* at 225 ("What is wrong with religious establishment? . . . [A]bove all, the tradition sees in establishment a threat to equality").

27. *Id.* at 76.

28. *Id.* at 226.

29. *Id.* at 124–125.

30. *Id.* at 360.

31. *Id.* at 362.

32. *Id.* at 82 ("One more influential Stoic idea that will play an influential role, ultimately, in constructing our First Amendment is that of human beings as 'citizens of the world' or 'cosmopolitans'"). John Gray acutely describes this brand of liberalism as envisaging a "universal convergence on a cosmopolitan and rationalist civilization." JOHN GRAY, ENLIGHTENMENT'S WAKE: POLITICS AND CULTURE AND THE CLOSE OF THE MODERN AGE 121 (1995).

33. NUSSBAUM, LIBERTY, *supra* note 2, at 229.

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and incommensurable values in moral and political life.[34] Her previous writings notwithstanding, however, it is plain that at least in the area of religious liberty, Nussbaum, by her own admission, rejects value pluralism.[35]

Nussbaum writes that equal respect, in addition to its numerous intrinsic virtues, also brings about important instrumental side effects that reinforce the human capacity to choose that religion which will best sate the dictates of "conscience":

> [O]nce a religion gets hooked up with state power, it becomes much more difficult for its members to innovate, creating new sects or departing from an old one that has lost its vigor. . . . This entrenchment retards dynamism and creative challenges to the past.[36]

Equal respect is a useful catalyst for those who yearn to "unleash" "all sorts of theological and organizational creativity."[37] Equal respect strengthens and is strengthened by one's ability to realize one's conscience autonomously—the individual "faculty" of "reason[ing], search[ing], and experience[ing] emotions of longing connected to that search," a search whose object necessitates perpetual "creative" innovations and improvements in one's understanding of "ultimate questions, questions of ultimate meaning."[38] This conception of religion, which Nussbaum elsewhere clarifies is what she means by "conscience," is "thin and inclusive"; and it is the only type of religious understanding that is consistent with Nussbaum's overriding value of equal respect.[39] The empowerment of individuals to achieve this human function and to change and improve it at will within the limits imposed by the ultimate principle of equal respect is, for Nussbaum, the core purpose of religious liberty.

III. EQUAL RESPECT APPLIED

As a general matter, Nussbaum's theory of equal respect favors the ancien régime of free exercise represented by *Sherbert v. Verner*[40] (and in part

34. NUSSBAUM, FRAGILITY, *supra* note 10. *See especially* ch. 2, *Aeschylus and Practical Conflict*, *in id.* at 25–50.

35. *See* NUSSBAUM, LIBERTY, *supra* note 2, at 376–377 n.4 ("On the whole, [Kent] Greenawalt's analysis is broadly consistent with mine, although it is more open-ended and plural-valued, focusing less on equality as a central goal, and suggesting that different approaches may be justified in different areas of the law"). One might argue that Nussbaum is still a value pluralist because she believes that there are many conflicting and incommensurable values but that they are only truly or fully valuable, from a political perspective, if they are provided equally. But Nussbaum insists that these values are, in effect, *valueless* unless equally distributed—that is, they gain their political value only when married to the principle of equal respect. She therefore seems to be appealing to equality as a sort of master value. Thanks to Matt Lister for clarification on this point.

36. *Id.* at 95.

37. *Id.*

38. *Id.* at 169.

39. *See id.* at 226–227.

40. Sherbert v. Verner, 374 U.S. 398 (1963).

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resurrected by the Religious Freedom Restoration Act[41] and the Religious Land Use and Institutionalized Persons Act)[42] and not *Employment Division v. Smith*;[43] she supports generous religious accommodations, particularly when they benefit minority religions, and she is critical of supporters of *Smith* as being insufficiently attuned to the "unfairness" generated by its uniform rule.[44] Yet it is useful to consider in detail the two particular cases raised earlier, *Wisconsin v. Yoder* and *Wallace v. Jaffree*, in order to see how Nussbaum's overriding egalitarianism leads to mischaracterization and misunderstanding of the full range of values encompassed in the idea of religious liberty in those cases.

A. *Wisconsin v. Yoder*

In *Yoder*, the state of Wisconsin prosecuted several members of the Old Order Amish and the Conservative Amish Mennonite Church for failing to comply with Wisconsin's compulsory school-attendance law, which required that all children attend public or private school until the age of sixteen.[45] The Yoders and two other parents had withdrawn their children from school at the ages of fifteen, fifteen, and fourteen, respectively, and they argued that the compulsory-attendance rule violated their free exercise rights.[46] The Amish[47] claimed that "their children's attendance at high school, public or private, was contrary to the Amish religion and way of life";[48] their children's continued school attendance would "endanger their own salvation and that of their children."[49]

Various experts corroborated the Amish claim that compulsory education until the age of sixteen would damage, perhaps irreparably, the Amish way of life.[50] Relying on their testimony, the Court characterized the Amish core claim as a "fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence" and "devotion to a life in harmony with nature and the soil . . . to make their living by farming or closely related activities."[51] Chief Justice Burger, writing for the Court, then offered this apt summary of the conflict of values in the respective ways of life of the Amish and the state:

41. 42 U.S.C. §§2000bb to bb-4 (2005).
42. 42 U.S.C. §§2000cc to cc-5 (2005).
43. Employment Division v. Smith, 494 U.S. 872 (1990).
44. *See* NUSSBAUM, LIBERTY, *supra* note 2, ch. 4.
45. *Yoder*, *supra* note 8, at 207 (citing WIS. STAT. §118.15 (1969)).
46. *Id.*
47. There are important historical differences between the Old Order Amish and the Mennonite Church, but for simplicity, the claims of the *Yoder* plaintiffs are referred to here simply as those of "the Amish."
48. *Id.* at 209.
49. *Id.*
50. *Id.* at 209–210.
51. *Id.* at 210.

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> [The Amish] object to the high school, and higher education generally, because the values they teach are in marked variance with the Amish values and the Amish way of life. . . . The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning—learning through doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society. . . . In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.[52]

The incompatibility of their values with the state's, together with the physical and emotional distance from the Amish way of life that would result from additional years in school (precisely at a time when proximity was most important in forming lasting connections to the Amish community),[53] combined to form a powerful free exercise challenge to the state's compulsory-education law.[54]

It was also important to the Court that the Amish way of life was historically conducive to a productive, law-abiding, and self-sufficient existence.[55] According to an expert credited by the Court, the learning of specific skills and practices emphasized by the Amish educational system—skills that were "directly relevant to their adult roles"—prepared Amish children for productive adult lives in a fashion "perhaps superior to ordinary high-school education."[56]

Both the majority and the dissent perceived the values and obligations reflected in the state's compulsory-education law, as well as the multiplicity of ways in which that set of commitments may conflict with others of incommensurable weight. The government's duty to ensure that all of its citizens are sufficiently educated to meet the vocational needs of a career may conflict with parents' rights to provide their children with an education of their choosing (religious or otherwise), provided that the alternative education also "prepare[s] [them] for additional obligations,"[57] which may or may not involve a traditional career.

52. *Id.* at 210–212.

53. *Id.* at 211–212. Public school education through the eighth grade was not objectionable to the Amish because it enabled their children to "read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of their daily affairs." *Id.* at 212.

54. *See* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 93 (2006) ("Advanced education [for the Amish] is triply harmful. It draws children away from the community at a stage vital for their integration into Amish society; it involves activity directly opposed to the simplicity of Amish life, attracting—tempting, one might say—young people to alternative styles of living; and it may make more difficult someone's faithful adherence to the Amish community.").

55. *Yoder*, *supra* note 8, at 212–213.

56. *Id.* at 212.

57. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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The government's rightful interest in creating opportunities and exposing its budding citizens to the "unparalleled progress in human knowledge"[58] and the "new and amazing world of diversity"[59]—opportunities to be "a pianist or an astronaut or an oceanographer"[60]—may conflict with the parents' and the local community's interest in fostering in children a respect for and attachment to local customs, traditions, and practices, one of whose crucial features is often their durability and resistance to easy change and innovation.[61]

The government's interest in cultivating an inquisitive, questioning, and critical sensibility,[62] so that a child may be better equipped to participate as a citizen in democratic government,[63] may conflict with the parents' or the community's interest in cultivating an unreflective and intuitive decency, learned not by reading books or developing the skills of intellectual inquiry and deft argumentation but by observing and modeling the habits and manners of admired fellows or teachers deeply committed to a particular practice or way of life (much as courage, perseverance, and effort may be learned by observing the behavior of participants in an athletic contest).

The government's interest in developing a materialistic or consumerist ethos in children, as well as, perhaps more benignly, simply in cultivating their cultural tastes and sensitivities[64]—so that children might eventually contribute both as producers and consumers in the dominant sociocultural milieu—may conflict with the parents' or the community's interest in developing in children the sense that a materialistic or even an excessively aesthetic outlook can be damaging to one's spiritual and psychological well-being.[65]

And then there are the interests of the child, which are in the process of developing and may partake at once of all of these conflicting values and commitments in a host of unpredictable ways.

Nussbaum's view is that *Yoder* was "[o]n balance . . . probably rightly decided" but that the only legitimate grounds for assessing it are those of "conscience" and the specific sense in which the opinion advances conscience through equal respect.[66] Nussbaum believes that *Yoder* is "less clear-cut than

58. *Yoder*, *supra* note 8, at 216.

59. *Id.* at 245 (Douglas, J., dissenting).

60. *Id.* at 244–245.

61. *Id.* at 217.

62. *See* Marc O. DeGirolami, *The Problem of Religious Learning*, 49 B.C. L. Rev. 1213, 1224 (2008).

63. *See* Greenawalt, *supra* note 54, at 91–92.

64. *Id.* at 91 ("Education assists people to enjoy forms of culture; cutting their education short restricts development of that capacity in students").

65. Josh Chafetz, *Social Reproduction and Religious Reproduction: A Democratic-Communitarian Analysis of the Yoder Problem*, 15 Wm. & Mary Bill Rts. J. 263, 264 (2006). (describing both "symbolic and practical" value in the Amish rejection of technological comforts).

66. Nussbaum, Liberty, *supra* note 2, at 144–146.

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Sherbert,"[67] but only because it was clearer that "fairness"—the way in which conscience must be distributed in order to achieve equal respect—was offended in *Sherbert* than it was in *Yoder*. She reframes the fairness inquiry "at a higher level of generality," arguing that it is nevertheless the selfsame egalitarian principle: does the "majority get[] to abide by and preserve their religious way of life [while] the Amish (arguably) don't[?]"[68] She then proceeds to detail the ways in which the decision is flawed because insufficiently attentive to the principle of equal respect:

> The Court never considers the possibility that the children may choose to leave the community, and thus might need an education that enables them to participate knowledgeably and respectfully in democratic politics, rather than simply to avoid it. . . . One can't help feeling that the status of the Amish as a kind of "model minority"—wealthy, orderly, no problem to anyone—influences the reasoning of the majority more than it really should, given that what we're dealing with is the education of children for a life in which they may be part of that community, but also may not. Given the Court's uneven track record in dealing with strange, minority religions . . . the favorable treatment meted out to the Amish seems a little unfair: they get a break in part because they are wealthy and established, and don't pose any big challenge to majority Protestant values of thrift and virtue.
>
> People have also disagreed about how crucial the two years in question are to the interests mentioned by Wisconsin (personal well-being and democratic citizenship): do children in the first two years of high school learn skills of autonomy and democracy that they would be unable to learn at a younger age? Or are these years primarily taken up with dating and peer pressure?[69]

In the end, however, Nussbaum sides uneasily with the *Yoder* majority because "the burden involved [on the Amish] was an extremely severe one" and because "the State certainly did not show a compelling interest that would be served by denying the exemption and that could not be served in some other non-burden-inflicting way."[70]

What is most striking in these claims is Nussbaum's cursory and dismissive analysis of the state's interests. Nussbaum claims that the state "certainly" did not demonstrate a compelling interest in denying the exemption because one really doesn't know whether the first two years of high school are "primarily taken up with dating or peer pressure" rather than "learn[ing] the skills of autonomy and democracy."[71] But schooling,

67. *Id.* at 144. In *Sherbert*, the Court held that the government could not deny unemployment benefits where the plaintiff claimed that she could not work on the Sabbath for religious reasons. *Sherbert*, *supra* note 40, at 398.

68. NUSSBAUM, LIBERTY, *supra* note 2, at 144.

69. *Id.* at 145.

70. *Id.*

71. *Id.*

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at any age and especially as one grows toward adulthood, is invariably about much more than "learning the skills of autonomy and democracy," let alone "dating [and] peer pressure" (though it is about those things as well). Kent Greenawalt identifies at least five functions that would be served by continued schooling at the ages of fifteen and sixteen, only some of which are strictly related to one's democratic "skills" or may be squeezed into the rubric of "autonomy."[72] And there are doubtless many others.[73]

Yet even if one sets all of this aside and narrowly focuses exclusively on public schools as a bludgeon for inculcating democratic norms, the quality of being law-abiding, appropriately respectful of authority, and attentive to legal and social rules is surely an important set of those norms, and one in which the state has at least a legitimate—if not a compelling—interest. So, too, is the quality of being independent (economically and otherwise), hard-working, and resourceful, if only to mitigate the unhappy possibility of grinding poverty and its devastating consequences. If the state's interest in ensuring that its citizens are educated—which *Yoder* calls "the very apex of the functioning of a State"[74]—is to be overcome by a competing interest, it is entirely reasonable for the Court to point out that the life that will replace two years of school is one that historically has been law-abiding, productive, and appropriately respectful of authority.[75] The alternative life is, then, one that is at least partially compatible with the state's interests. Law-abidingness, a respect for democratic rules and procedures, personal resourcefulness, industry, conscientiousness, perseverance, and the willingness to work hard are surely values of liberal states—or at the least values that make liberal states possible.

But for Nussbaum, this is not an appropriate consideration because it might be "unfair"—that is, it conceivably violates the distributional component of her principle of equal respect[76] inasmuch as it suggests that a religious group that sought an exemption from two years of compulsory education might not succeed in court if there was evidence that the group's

72. GREENAWALT, *supra* note 54, at 90–91 ((1) "increas[ing] the skills a child needs for a career"; (2) "enhanc[ing] an individual's ability to choose how to live"; (3) "assist[ing] people to enjoy forms of culture" (especially literature); (4) "help[ing] students understand principles of American government and learn to participate actively in democratic institutions"; and (5) "assist[ing] moral development beyond those aspects of morality that involve citizenship").

73. *See* DeGirolami, *supra* note 62, at 1223–1225 . My own view is that it is a mistake to think about the aims of a liberal education in these civic instrumentalist terms.

74. *Yoder*, *supra* note 8, at 213.

75. Notwithstanding what Nussbaum says about the financial condition of the Amish, the Court nowhere suggests that the Amish should receive an exemption because they are "wealthy." NUSSBAUM, LIBERTY, *supra* note 2, at 145. The Court does point out that the Amish "reject public welfare in any of its usual modern forms." *Yoder*, *supra* note 8, at 222. If one lives modestly within a community, one might be far from "wealthy" and still "reject public welfare" for any number of reasons.

76. One can only speculate whether Nussbaum would have opposed the result in *Yoder* had it been more directly at odds with her equal-respect principle.

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religion demanded that its children spend those two years wasting away in a drug-induced haze, preparing for a polygamous marriage, or living in a commune in compelled and complete isolation from their families. In a similarly unwarranted swipe at the *Yoder* majority, Stephen Macedo observes that the "law-abidingness and hard-work" of the Amish were only "so impress[ive]" to Chief Justice Burger because the Amish posed no "threat to the larger society."[77]

Yet why are social threats, especially grave ones, not legitimately countenanced if one is interested in a thorough account of the state's interest in public schooling? In fairness, Nussbaum admits that equal respect should not apply in a handful of "extreme" cases, but these seem to be limited to those situations where "people seek to torture children, or to enslave minorities," and like conduct that, as she herself emphasizes, threatens "the equality of citizens."[78] One sees clearly in this statement that equal respect holds the status of an overriding value for Nussbaum: equal respect can be violated in a specific instance only if equal respect is more generally served or advanced.

What would Nussbaum have of Creon and his obligation to govern and manage conflict? Nussbaum is insufficiently sensitive to the nature and importance of the state's values and interests as well as their potential to conflict with other deeply cherished commitments. This failing stems from Nussbaum's incapacity to perceive that equal respect is necessarily liable to problems of compatibility and commensurability with a vast array of other values that swirl about religious liberty conflicts. Given the overriding status that Nussbaum ascribes to equal respect, she does not appreciate—indeed, she is methodologically committed to denying—this state of affairs. For her, state interests that speak to law-abidingness or obligation to the national or local community (to say nothing of patriotism) trigger a reflexive suspicion and concomitant accusation of an overweening hegemonic willfulness or "fear[] [of] strangers."[79] When the state articulates its interests in cultivating loyalty, or at the very least a well-founded respect for authority, among its citizens, Nussbaum is quick to deride these values as a "panic over patriotism,"[80] or as the "shameful blot" of "conservative traditionalism,"[81] or as a kind of all-in-one vice of "fear of the strange, a love of hierarchy, [and] a desire to lord it over others," or simply as out-and-out "sheer selfishness."[82] And the state's concern for the values of personal prudence, economy, prosperity, diligence, and individual resourcefulness is brusquely dismissed as out of order because these values happen to be consistent with "majority Protestant[ism]"[83] but may not dovetail with other religious beliefs.

77. Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God vs. John Rawls?*, 105 ETHICS 468, 488 (1995).
78. NUSSBAUM, LIBERTY, *supra* note 2, at 24.
79. *Id.* at 175–223.
80. *Id.* at 357.
81. *Id.* at 357–358.
82. *Id.* at 359; *id.* at 28.
83. *Id.* at 145.

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Nussbaum's overheated rhetoric about the government's dark obloquy is unfair. It threatens to obscure the important point that the government is not some nightmarishly oppressive alien force but a collection of generally well-meaning legislators and administrators whose aim is to enact laws for perfectly proper and necessary reasons. There is nothing odious about "demonization"[84] when one is faced with demons.

Equally important is that Nussbaum's intransigence in analyzing every issue of religious liberty by processing it through the equal respect machine flattens the conflicts in *Yoder* to such an extent that they are nearly unrecognizable. Nowhere in her analysis of the *Yoder* conflicts does Nussbaum even comment on the claims of the parents or those of the Amish community.[85] She says nothing about the value of parental or familial associations, nor about the value of a life unencumbered by the easy conveniences of modern life, nor about the importance of a connection to nature and an agrarian life, nor about the happiness and sense of belonging that ties to local communities and traditions can offer, nor about the spiritual structure and meaning that they may provide.

Instead, Nussbaum suggests that *Yoder* ought to be boiled down to an inquiry about children's educational rights (that is, after all, "what we're dealing with"),[86] but not as Amish children or children who are part of a particular cultural community. Rather, education to be "self-reliant and productive" within a community structure of other cultural values and traditions—the type of education that the Amish felt (and the Court agreed) was served by their way of life—was, according to Nussbaum, interpreted by the Court "with unfortunate narrowness."[87] Nussbaum would have preferred an interpretation of these educational values "in terms of the child's own development of capacities and skills relevant to citizenship and the conduct of life in general."[88]

Education was certainly an important and contested value in *Yoder*, but neither the Amish nor the state claimed that they had an interest in educating children for "the conduct of life in general," whatever it may be that a life scrubbed clean of any human being's actual lived experience might demand. To the contrary: both parties insisted that their respective educational systems and approaches prepared children for a specific way of life, each instantiating particular commitments and beliefs about what was a good and worthwhile manner of living.

Had the Court assessed the competing claims about education by reference to "the conduct of life in general," it is worth noting that the Amish in *Yoder* probably would have wanted no part of the type of educational upbringing entailed by this vision. They would have in all likelihood rejected an education that demanded the type of muscular, positive government

84. *Id.* at 8.
85. Nussbaum articulates the Amish position in *Yoder* but says virtually nothing about it.
86. *Id.* at 145.
87. *Id.* at 144.
88. *Id.*

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guarantees and interventions that Nussbaum champions. They would have dissented emphatically from Nussbaum's claim that it is the state's obligation to empower all children to develop and exercise an autonomous, self-directed "conscience" (in the way that Nussbaum intends the term) untouched by parental and community influence. They would have resisted as undesirable what Nussbaum argues is one of conscience's most appealing and important features: the capacity of individuals to "creat[e] new sects or depart[] from an old one that has lost its vigor" or to generate "creative challenges to the past"[89] and slough off tired traditions felt to have little contemporary purchase. And it need hardly be said that the Amish are not the only religious group that would regard this last virtue of conscience with suspicion.

Nevertheless, even if the Amish would not have assented to Nussbaum's educational program, one still might argue that they *should* have assented, by compulsion if necessary. There are some theorists who advance this position, finding the prevailing legal view of education and religious tolerance intolerable.[90] Mercifully, Nussbaum is not one of them. Instead, notwithstanding her reservations about the case, she sides weakly with the *Yoder* majority because equal respect concerns were acute and the state "certainly did not show" a compelling interest in the education of children aged fourteen and fifteen.[91] Yet framing the resolution of the case in these stark, dichotomous terms is entirely unsatisfactory: it does not do justice to the views of *anyone* actually involved in the dispute. It is an intrinsic feature of Nussbaum's overriding egalitarianism that it ignores or mischaracterizes precisely what is at the heart of *Yoder*—a host of legitimate, understandable, even admirable values incapable of reconciliation by recourse to Nussbaum's equal respect rule or any other master principle.

B. *Wallace v. Jaffree*

James Fitzjames Stephen long ago remarked that equality is "at once the most emphatic and the least distinct" of the values of modernity.[92] This is a fitting description of Nussbaum's treatment of *Wallace v. Jaffree*, in

89. *Id.* at 95.

90. *See, e.g.*, James Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1375, 1447 (1994) (arguing that parents have only a "privilege" and not a "right" to direct their children's education—a privilege that can never measure up to the state's right of intervention on behalf of the child—and that the Supreme Court ought to overrule *Yoder*); MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 131 (2005); Martha Albertson Fineman, *Taking Children's Interests Seriously*, *in* WHAT IS RIGHT FOR CHILDREN: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 237 (M.A. Fineman & K. Worthington eds., 2009) (arguing that "public education should be mandatory and universal" and that all alternatives ought to be outlawed).

91. NUSSBAUM, LIBERTY, *supra* note 2, at 144–145.

92. JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 179 (University of Chicago Press 1990) (1874).

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which the Supreme Court considered the constitutionality of a law authorizing public schools to observe a moment of silence "for meditation or voluntary prayer."[93] Justice O'Connor's influential concurring opinion joined the majority in striking down the law but on the separate grounds that the law impermissibly "endorsed" religion.[94] Justice O'Connor's view was that government action that "sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community,"[95] violates the Establishment Clause. Her concurrence was an early statement of an Establishment Clause standard—the "endorsement test"—that now commands a majority for certain establishment issues.

The question arises as to just how the endorsement test relates to equal respect. Nussbaum's argument that equal respect is the best reading of equality must entail a rejection of the idea that the principle of equality as strict equal application of the law, or formal equality, is an appropriate basis for decision-making. This is a sensible way to assess the question of equality at issue in *Yoder*, just as it is in *Sherbert*[96] and in other cases where a law of general application imposes a substantial burden on a religious believer or community. But there is no denying that equal respect may be directly at odds with the idea of formal equality. Something of lasting value may well be lost—just as Creon sensed—when agents of power do not honor the written laws.

Yet Nussbaum does deny it. She argues that that these understandings of equality—that is, equal respect and formal equality—are perfectly consistent. She subscribes to the idea that "neutrality," another name for formal equality, is a central concept in the "tradition of religious equality," defining it as "the idea that the state does not take a stand on [religious] matters, or takes a stand that is studiously neutral, favoring or disfavoring no particular conception, not even religion over nonreligion" and including it in her list of critical concepts.[97]

But she also asserts that though the two ideas are not quite the same, the idea of neutrality "is closely related to the idea that all citizens are equal and should be shown equal respect."[98] She claims that the respective positions on religious accommodation espoused by John Locke and Roger Williams are only "subtly different" from each other—the former favoring "the exceptionless rule of law, provided that the laws themselves are neutral";

93. *Jaffree*, *supra* note 9, at 40.

94. *Id.* at 69 (O'Connor, J., concurring). For O'Connor, as for the Court, the outcome of the case turned on the fact that there were statements in the legislative history by the law's sponsor that the law was "an effort to return voluntary prayer to our public schools." *Id.* at 77.

95. *Id.* at 69 (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668 (1985)).

96. *Sherbert*, *supra* note 40, at 398.

97. NUSSBAUM, LIBERTY, *supra* note 2, at 18–20.

98. *Id.* at 20.

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the latter preferring "exceptions to general laws for conscience's sake."[99] For Nussbaum, "[s]ameness of treatment is not always enough for substantive equality," suggesting that equal respect is only a slightly more stringent version of the selfsame conception of equality represented by "sameness of treatment."

Yet nothing could be further from the truth. Not only do these conceptions of equality differ; they may be mutually exclusive. To opt for Creon's obduracy is to choose Antigone's death; to spare Antigone's life is to damage profoundly—perhaps irreparably—Creon's system of values. Choices are wise when they are guided by an awareness of the complexities of the specific situation, not by an overarching "orienting account" if that account insists on a hard-and-fast principle that is essentially inviolable.

And it becomes clear that Nussbaum herself is not fully committed in practice to equal respect in contradistinction to formal equality—and that she recognizes that the two can lead to wildly incompatible outcomes—when she discusses approvingly Justice O'Connor's concurrence in *Jaffree*.[100] Nussbaum claims that the endorsement test favors an approach to equality akin to equal respect as opposed to formal equality, but she explicitly adopts Justice O'Connor's view that "the relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement."[101] Nussbaum writes that the "objective observer" standard:

> is a helpful elaboration of the endorsement test. Obviously litigants will differ in their subjective perceptions, especially when their personal interests are at stake. O'Connor's insistence on objectivity (in the sense of freedom from bias or favor), and her further requirement of historical knowledge, flesh out the standard in a way that gives it bite and clarity—although wise practical reason will still be required to apply it in a particular case.[102]

But if the fairness of equal respect must be judged by an "objective observer" because the sentiments of claimants are inherently unreliable and biased, then equal respect and formal equality begin to look exactly the same. An "objective observer"—that is an objective judge—who is "free[] from bias or favor" might quite plausibly conclude that the law in *Jaffree*, as written, did not endorse religion at all. It merely established a moment of silence with the possibility of voluntary prayer. Nussbaum might reply that the observer could not be truly objective about the law without examining its history; and here, that history indicates that the government intended an endorsement. Yet the importance of legislative history is relevant insofar as it speaks to the formal equality of the law; an objective observer would

99. *Id.* at 67.
100. *Id.* at 247 (quoting *Jaffree, supra* note 9, at 69 (O'Connor, J., concurring)).
101. *Id.* at 247–248 (quoting *Jaffree, supra* note 9, at 76 (O'Connor, J., concurring)).
102. *Id.* at 248.

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not be worthy of the name—not "free[] from bias or favor"—if he ignored or suppressed this history.

Indeed, the law's history in *Jaffree* showed that the legislature very much wanted to encourage and institutionalize school prayer but recognized that doing so explicitly in the law's text would be patently unconstitutional. The "moment of silence" language was therefore intended as a fig leaf. Having reviewed the text and that history, the "objective observer" would surely claim that the law violates formal equality because it was intended *sub silentio* to favor the religious. But the judge is still assessing the law "objectively.". The views of those who claim to be outsiders are irrelevant.

Equal respect, however, would almost certainly require much more. Equal respect would insist that the outsiders' views about government endorsement be considered as part of the test. Equal respect demands not merely "formally similar treatment" but "the removal or prevention of hierarchies"[103] and the protection of "individual conscience,"[104] informed by the point (not infrequently emphasized by Nussbaum) that government is often subconsciously biased because it fears and loathes what it does not understand. "In asking about religious equality," explains Nussbaum, "we need to keep our eye on the more substantive idea of equality, as an absence of hierarchy, of domination on one side and subordination on the other."[105] Since an unbiased judge and an unbiased religious outsider may legitimately reach opposing conclusions about whether a particular government practice constitutes an endorsement, equal respect (as opposed to formal equality) would reject the position that only the views of the unbiased judge are relevant.[106]

It may be that the "objective observer" standard is the best elaboration of the endorsement test, though there are reasons for skepticism about that as well.[107] That point aside, however, this is a clear instance—but only one among many—where equal respect differs crucially from formal equality and where Nussbaum plainly favors the latter. Equal respect and formal equality are not different points on the same egalitarian line. They are not conceptions with slight differences elided by the breezy assurance that

103. *Id.* at 20.
104. *Id.* at 69.
105. *Id.* at 229.
106. *See* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 185 (2008). Greenawalt explains:

> If it is the feeling that one is an outsider that is particularly detrimental, perhaps the sentiments of nonadherents should be given special consideration. . . . The "objective observer" approach may seem to avoid this problem. *If* it does so, it fails to give special regard to minority sentiments without an explanation of why that makes sense.

Id. at 185.
107. For plausible criticisms, *see id.* at 183–188.

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one is "not always enough" to satisfy the other.[108] They are entirely distinct visions about what equality ought to mean. Both are conceptions valued as intrinsically worthwhile, both may be impossible to realize at the same time, and neither is susceptible of measurement according to an overarching scale of worth. And they may well result in diametrically opposed policies.

Nussbaum's overriding egalitarianism prevents her from acknowledging this conflict and requires her to insist on near equivalence where none exists. Worse still, in analyzing *Jaffree*, Nussbaum's flawed methodology demands the conflation of distinct meanings of equality, resulting in a misunderstanding about what it is that equal respect actually demands. While *Yoder* demonstrates Nussbaum's insensitivity to the values of religious liberty that might compete against equal respect, *Jaffree* illustrates the fragmentation of equality itself into two rivalrous values—values that Nussbaum erroneously fuses and confuses.

IV. "CONSCIENCE IS A MOTHER-IN-LAW WHOSE VISIT NEVER ENDS"[109]

The failure of equal respect as a theory of religious liberty is exacerbated by Nussbaum's unrelenting emphasis on its object: to wit, "conscience"—a "thin and inclusive" individual human faculty, which is characterized by:

> reason[ing], search[ing], experienc[ing] emotions of longing connected to that search—and in part by its subject matter—[conscience] deals with ultimate questions, questions of ultimate meaning. It is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudging the question whether there is a meaning to be found, or what it might be like.[110]

Since the capacity for conscience exists in every human being,[111] equal respect requires that the "idiosyncratic and highly individualized searches" of "antinomian and unaffiliated 'seeker[s]'" receive positive and negative guarantees from the government, just as do the "searches" of other spiritually interested persons.[112]

As an initial matter, an exclusive focus on equalizing the individual capacity to "reason, search, and experience emotions of longing connected to that search" is grossly overinclusive as an object of state protection. "Conscience," as Andrew Koppelman has observed, "can generate exorbitant demands."[113] Conscience is simply not worthy of equal respect in all cases.

108. NUSSBAUM, LIBERTY, *supra* note 2, at 229.
109. H.L. MENCKEN, A MENCKEN CHRESTOMATHY 626 (1949).
110. NUSSBAUM, LIBERTY, *supra* note 2, at 171.
111. *Id.* at 19.
112. *Id.* at 170.
113. Andrew Koppelman, *Is It Fair To Give Religion Special Treatment?*, 2006 ILL. L. REV. 571, 585 (2006); *see also* Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*,

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The reasons for protecting the right of the Amish to withdraw their children from two years of public schooling are far more respect-worthy than the reasons for protecting the right of a prison inmate who belongs to the "Church of the New Song" to "experience[] emotions of longing connected to" the search for ultimate meaning by dining on filet mignon and sherry every Friday evening.[114]

But more important, it would seem that Nussbaum's "antinomian and unaffiliated seekers" are not merely accorded equal respect; they represent the core and possibly exclusive constituency for an approach that concentrates single-mindedly on the equal distribution of conscience.[115] Their solitary, culturally untethered, ever-innovating and self-propelled spiritual quests mirror all too neatly what Nussbaum elsewhere identifies as the core attributes of religious experience:

- "Senses, imagination, and thought" (using the senses to "imagine, think, and reason" in "a way informed and cultivated by an adequate education. . . . Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice: religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of . . . freedom of religious exercise. Being able to have pleasurable experiences");[116]
- "Affiliation" ("Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. . . . Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others");[117] and
- "Practical reason" ("Being able to form a conception of the good and to engage in critical reflection about the planning of one's life," which "entails respect for the liberty of conscience and religious observance").[118]

It is worthwhile at this point to ground the discussion in an actual case, and *Yoder* is more than adequate to the purpose; however much these are generic human functionalities that a hypothetical "idiosyncratic seeker" would value in her conception of religious liberty, it seems plain enough that the Amish

15 LEGAL THEORY 215, 215–216 (2009) ("'conscience' is not a good explanation for the core exemption cases; it is present in cases that almost no one would want to accommodate, and it fails to justify exemption in many cases where the claim for exemption seems strong").

114. Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974); Goff v. Graves, 362 F.3d 543 (8th Cir. 2004).

115. Something might be said about the inconsistency of Nussbaum's rejection of thrift or economic responsibility as a "Protestant" value while simultaneously subordinating the claims of tradition to "conscience." This latter move is more protestant than Protestantism—practically Quaker or Unitarian in its approach, perhaps two of the only traditional religious constituencies that might find Nussbaum's view of conscience remotely satisfying. Thanks to Samuel Bray for this point.

116. Nussbaum, *Capabilities*, *supra* note 13, at 52.

117. *Id.* at 52–53.

118. *Id.* at 52; *see also* NUSSBAUM, WOMEN, *supra* note 12, at 180 ("When we tell people that they cannot define the ultimate meaning of life in their own way—even if we are sure we are right, and that their way is not a very good way—we do not show full respect for them as persons").

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in *Yoder* might well dissent from nearly all of them. Precisely what Nussbaum means by requiring that the government guarantee that all people "imagine, think, and reason" after "adequate education" would matter a great deal to the Amish, since it was precisely this type of governmentally compelled activity, and its invasion of their religious liberty, that brought them to court in the first place.

Whether having "pleasurable experiences" is a crucial component of the Amish conception of religious liberty is questionable, but at all events, the phrase is too vague to understand what types of activities are included. Appreciating and creating great works of art—such as one might find, for example, at the Metropolitan Museum of Art[119]—was almost certainly something that the Amish did not value as part of their religious liberty. Some of the goods of "affiliation"—the ability to live with others in particular social arrangements—likely did matter to them, but an insistence on the exercise of empathetic imagination may or may not have.

As for "form[ing] a conception of the good" and "engag[ing] in critical reflection about the planning of one's life," it is again doubtful that the Amish valued this understanding of religious liberty, at least insofar as it would require each individual member of their community to exercise this capacity in a critical, self-directed, autonomous fashion, and without any deference to or regard for Amish cultural and communal traditions. While it may be true that "[n]o religious tradition consists simply of authority and sheeplike subservience,"[120] authority and obedience by committed, believing non-ovines are, in fact, frequently crucial components of thriving religious traditions, though ones that seemingly merit little space in Nussbaum's religious universe. That is because "conscience" is ultimately a rigorously individualistic understanding of the value of religion, an "organic good" feeding on its inner self for sustenance: "as with politics and the family, so here: an organic good for the group as group is unacceptable if it does not do good for the members taken one by one."[121]

Nussbaum has argued that concepts such as conscience naturally emerge after one undertakes a kind of megasurvey of the "myths and stories that situate the human being in some way in the universe" and intuits from this variegated plurality a unitary, convergent narrative that tells the tale of the cross-cultural, transtemporal human being.[122] This ahistorical convergence is therefore strengthened or synthesized by Nussbaum's reflective intuitions about the essence of "truly human functioning and what it entails"[123]—what

119. If "experiencing and producing" literary or artistic "works and events" is meant in some other way, then it becomes difficult to know precisely how to assess it.

120. NUSSBAUM, WOMEN, *supra* note 12, at 182.

121. *Id.* at 188.

122. *See* Martha C. Nussbaum, *Human Capabilities*, *in* WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 73–74 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

123. NUSSBAUM, WOMEN, *supra* note 12, at 76.

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might be called a process of reflective equilibrium of the kind made famous by John Rawls. Her latest view of conscience, among other human faculties:

> represents the result of years of cross-cultural discussion, and comparisons between earlier and later versions will show that the input of other voices has shaped its content in many ways. Thus it already represents what it proposes: a type of *overlapping consensus* on the part of people with otherwise very different views of human life . . . although the primary weight of justification remains with the intuitive conception of truly human functioning and what that entails.[124]

Nussbaum devotes an entire chapter in *Liberty of Conscience* to the idea of an overlapping consensus,[125] and it directly shapes her view that conscience is the critical essence of religious liberty and must be distributed fairly if we are to achieve equal respect. Yet if that is so, it remains a mystery exactly what place the Amish "myths and stories" have in deriving and developing her conception of conscience or whether they have yet had an opportunity to contribute to the purportedly consensual pastiche. Their "myths and stories" do not seem to be given pride of place in the convergent, intuited, idealized narrative. Much the same might be said of many other venerable religious traditions, all of which appear to be summarily relegated to the dustbin of reactionary hierarchy and hidebound retrogression.

V. CONCLUSION

I should emphasize in concluding that none of these criticisms is intended to denigrate the ideal of equality (whether understood as equal respect, equal application of the law, or in some other fashion) or the value of conscience (however understood).[126] Equality, at least, is an important value of religious liberty; more precisely, it is many values among many others. Nussbaum's methodological error is to elevate equality to overriding normative status, thereby creating a regime for resolving disputes that does an enormous disservice to the nature of the conflicts, sometimes requiring a sustained misunderstanding in order to force them into an artificial and truncated view of religious liberty. It is a singular and regrettable irony that Nussbaum herself at one time eloquently described, in a beautifully critical depiction of Sophocles' Creon, the flawed view that she now so vigorously champions:

> Creon has, then, made himself a deliberative world into which tragedy cannot enter. Insoluble conflicts cannot arise, because there is only a single supreme

124. *Id.*
125. NUSSBAUM, LIBERTY, *supra* note 2, ch. 9.
126. For an interesting and critical taxonomy of conscience, *see* Koppelman, *Conscience*, *supra* note 113, at 225–233.

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> good, and all other values are functions of that good. . . . The apparent presence of a contingent conflict is an indication that we have not been working hard enough at correct vision.[127]

Liberty of Conscience is a book by a learned philosopher and legal scholar. Its prose is passionate and its arguments about the importance of equality and conscience are undoubtedly deeply felt. But the reductive and unidimensional quality of its advocacy in the end chokes off its sensitivity—and so its capacity to understand, let alone explain, the true nature of the conflicts of religious liberty.

127. NUSSBAUM, FRAGILITY, *supra* note 10, at 58.

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