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EQUAL LIBERTY, NONESTABLISHMENT, AND RELIGIOUS FREEDOM

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Egalitarian theories of religious freedom deny that religion is entitled to special treatment in law above and beyond that granted to comparable beliefs and practices. The most detailed and influential defense of such an approach is Christopher Eisgruber and Lawrence Sager's *Religious Freedom and the Constitution* (2007). In this essay I develop, elucidate, and show the limits of the "reductionist" strategy adopted by Eisgruber and Sager. The strategy requires that religion be analogized with other beliefs and practices according to a robust metric of comparison. I argue that Eisgruber and Sager fail to develop a consistent and coherent metric and I further suggest that this failure is symptomatic of the broader difficulty encountered by liberal theory in fitting the concept of religious freedom into a broadly egalitarian framework.

In South Carolina in the early 1960s, a member of the Seventh-Day Adventist Church, Adell Sherbert, was denied unemployment compensation on the grounds that no "good cause" justified her unwillingness to comply with her employer's demand that she, like other employees, accept Saturday work. The U.S. Supreme Court reversed the lower court's decision and found that denying Sherbert's compensation claim violated her rights to religious freedom. *Sherbert v. Verner*[1] became a landmark case in the constitutionalization of religious freedom. Consider, however, two different ways in which Sherbert's religious freedom claim could be justified. On the one

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

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hand, one could say (as the Court in fact said) that to condition Sherbert's access to benefit on her willingness to violate a cardinal principle of her faith would be unduly to penalize and burden her rights of religious freedom. On this view, Sherbert has a *pro tanto* claim to practice her religion freely (absent a compelling state interest). On the other hand, one could say that denying compensation would entail unjustly discriminating against Sherbert, who, *unlike similarly situated workers*, faces an unfair dilemma: either complying with the job's requirements or obeying the demands of her faith (and losing her claim to compensation). On this view, Sherbert has a *comparative* claim to be treated on fair, equal terms with others. This second justification draws on what I propose to call an egalitarian theory of religious freedom. It is the coherence and plausibility of egalitarian theories of religious freedom that this essay puts to the test.

The essay is divided into three sections. The first section lays out the rationale and structure of egalitarian theories of religious freedom and explains their initial appeal in light of progressive norms of nondiscrimination and equality—between majority and minority religions on the one hand, and between religious and nonreligious moral commitments on the other. The second section offers a detailed account of the most developed egalitarian theory of religious freedom so far, that proposed by constitutional theorists Christopher Eisgruber and Lawrence Sager in their 2007 book, *Religious Freedom and the Constitution*.[2] Their theory of "equal liberty" explicitly denies that religion is entitled to special and unique treatment in law above and beyond that granted to comparable commitments and practices. The third and last section demonstrates that their theory fails on its own terms. It further suggests that this failure is symptomatic not only of the narrow First Amendment constitutional constraints within which the authors operate but, more widely and more interestingly, of the difficulty encountered by liberal theory in fitting the concept of religious freedom into a broadly egalitarian framework. This essay is part of a larger project that attempts to set out the precise (if limited) sense in which egalitarian political philosophy should treat religion as special, or uniquely special.

I. EGALITARIAN THEORIES OF RELIGIOUS FREEDOM

Theories of religious freedom ask what the status of religious freedom, qua religious, is in the liberal state. Should religious believers be exempted from the application of laws that burden their conscience? Which forms of state support or endorsement of religion, if any, are permissible? Schematically, we might say that the first question relates to the Free Exercise Clause of the First Amendment of the U.S. Constitution ("Congress shall make no law . . . prohibiting the free exercise" of religion) and the second question

2. CHRISTOPHER EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

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relates to the Establishment Clause ("Congress shall make no law respecting an establishment of religion"). Not surprisingly, doctrinal and political disagreements about these clauses have fuelled a long-standing and vibrant—if somewhat narrowly self-referential—tradition of scholarly commentary about religious freedom among U.S. constitutional theorists. In this article, I draw liberally upon this rich tradition, both in its free exercise and in its nonestablishment dimensions, as well as pointing to the broader relevance of the questions it asks. In particular, I use the U.S. constitutional debates to distill and explicate a distinctive new approach, which I call an egalitarian theory of religious freedom.[3]

Egalitarian theories of religious freedom describe a family of views that hold that religious freedom is not a distinctive freedom and that it should be treated under a more general equality-based regime. The special and unique place of religion is indefensible in light of the ideal of equality between citizens. Religious beliefs and activities might be *specially* protected, but not *uniquely* so: if and when they are, it is as a subset of a broader category of respect-worthy beliefs and activities. Egalitarian theories of religious freedom are based on three main premises. As I show below, each premise breaks with well-established traditional views about the special and unique nature of religion (either from an "accommodationist" or from a "separationist" perspective)[4] and tallies with broader recent developments in egalitarian legal and political theory. I now explicate these points in relation to each of the three premises.

A. Religious Freedom Is a Subcategory of a More General Set of Freedoms and Does Not Deserve Uniquely Special Treatment

Egalitarians deny the basic starting point of accommodationists such as Michael McConnell, for whom religious freedom is basic and distinctive; it is the "first freedom" in the liberal state.[5] Religious freedom cannot be analogized with or reduced to other freedoms, as it serves to protect a uniquely special human good, an autonomous sphere of conscience, ritual,

3. The idea of an egalitarian theory of religious freedom is insightfully adduced (though not fully explicated) in Abner S. Greene, *Three Theories of Religious Equality . . . and of Exemptions*, 87 TEX. L. REV. 963–1007 (2009). *See also* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673–731 (2002).

4. Accommodationists focus on the Free Exercise Clause and argue that religious freedom should be specially protected by the state; separationists focus on the Establishment Clause and argue that there should be a "wall of separation" between state and religion. The two positions are neither mutually incompatible nor exclusive of other interpretations of the two clauses, but they provide a useful focus for my discussion here. For comprehensive literature reviews and classifications, *see* KENT GREENAWALT, RELIGION AND THE CONSTITUTION (2008); Micah Schwartzman, *What If Religion Is Not Special?* (University of Virginia Public Law and Legal Theory Research Paper No. 2012–03, 2012).

5. Michael W. McConnell, *Accommodation of Religion*, SUP. CT. REV. 1–59 (1985); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 9–12 (2000).

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and community, from state interference and regulation.[6] Egalitarian theorists of religious freedom concede that religion may be paradigmatic of beliefs, identifications, and practices that people have a particular interest in pursuing in their own way, individually or collectively. But they insist that while religion is a paradigm of those valuable concerns, it does not uniquely capture them.

As leading political philosophers argue, it is the human capacity for moral or spiritual agency, not for leading good lives with a determinate, perhaps religious, content, that should ground the respect that the state owes to persons qua persons. John Rawls, for example, treats free religious exercise as part of a broader notion of "equal liberty of conscience" that extends both to "moral and religious claims."[7] More recently, Ronald Dworkin suggests that religious freedom is not sui generis and is only one implication of a right to "ethical independence in foundational matters."[8] Nor is ethical independence, or moral agency, the only value that religion can be analogized with or "reduced" to. Other such "reductionist" approaches to religion show that for purposes of constitutional protection, religion is not relevantly different from other categories such as speech and association or—in equal protection and antidiscrimination cases—race and other "suspect" classifications.[9]

B. Religious Believers May Be Exempted from Some General Laws on the Basis of Nondiscrimination But Not on the Grounds that Religion Must Be Protected qua Religion

Here again, egalitarians challenge a basic accommodationist premise according to which governments need strong reasons, or "compelling interests," to justify infringing religious freedom. In the absence of such reasons, religious believers have a presumptive right to be exempted from the application of general, neutral laws when these unreasonably burden their conscience. Egalitarians deny that religious believers have such a presumptive right. What they are entitled to is a fair scheme of "equal liberties" guaranteed by the state: they must not be treated differently from similarly situated citizens. They can benefit from specific exemptions from the law

6. For similar views of the special and unique nature of religious freedom, *see* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Thomas Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEX. L. REV. 1–49 (2007); Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571 (2006); Steven D. Smith, *Non-Establishment under God? The Nonsectarian Principle* (University of San Diego Public Law Research Paper No. 04–08, 2004); Greene, *supra* note 3. More generally, and in a European context, *see* REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE (2005).

7. JOHN RAWLS, A THEORY OF JUSTICE (2nd ed. 1971), at 206.

8. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011), at 376.

9. William Marshall. *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986), at 317.

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when not granting those exemptions would constitute unfair discrimination against them. For example, minority religious citizens might be indirectly discriminated if, because of a facially neutral regulation, they do not have the same set of opportunities as majority religious citizens.

Egalitarian theories, then, invite systemic comparisons between the terms of accommodation of majority and minority religions. This is in line with the rise of norms of equality and nondiscrimination as unifying norms in national, international, and human rights law. These norms provide a language to challenge structural patterns of cultural, gender, sexual, and racial discrimination in Euro-Atlantic societies, notably by bringing to light the hidden, invidious effects of facially neutral yet culturally biased institutions, practices, and laws. A range of minority religious claims have been redescribed as protests of unfair discrimination against practices that—had they been engaged in by majority groups—would presumptively have been tolerated or accommodated.

The Canadian legal norm of "reasonable accommodation," for example, allows special exemptions from workplace regulations (uniform, days of rest) to members of minority religions, often with explicit recognition that members of majority religions already benefit from built-in advantage.[10] The Danish cartoon controversy brought to light the double standards that permeate free speech doctrine and practice in Europe, with heightened cultural sensitivity toward offense against Christian (and Jewish) feelings unmatched by corresponding empathy toward the harm caused by anti-Muslim speech.[11] And analogies have been drawn between demands for the recognition of minority faiths in the public sphere and the de facto public role of Christian churches in many European states.[12]

10. Gérard Bouchard & Charles Taylor, *Fonder l'avenir. Le temps de la conciliation*. Commission de consultation sur les pratiques d'accommodements reliées aux différences culturelles. Archives nationales du Québec, 2008 [*Building the future. A time for reconciliation*. Available at: http://red.pucp.edu.pe/wp-content/uploads/biblioteca/buildingthefutureGerardBouchardycharlestaylor.pdf]; Cécile Laborde, *Républicanisme critique, républicanisme conservateur: repenser les "accommodements raisonnables*," CRITIQUE INTERNATIONALE, July–Sept. 2009, at 19–33.

11. *See* Erik Bleich, Tariq Modood, Randall Hansen, Brendan O'Leary & Joseph H. Carens, *The Danish Cartoon Affair: Free Speech Racism, Islamism and Integration*, 44 INT'L MIGRATION 3–62 (2006); Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 CONSTELLATIONS 72–90 (2007); Sune Lægaard, *The Cartoon Controversy: Offence, Identity, Oppression?*, 55 POL. STUD. 481–498 (2007); TALAL ASAD, JUDITH BUTLER, WENDY BROWN & SABA MAHMOOD, IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH (2009); Cécile Laborde, *Rights, Wrongs and the Right to Do Wrong. Jytte Klausen and the Political Theory of the Danish Cartoon Controversy*, PERSP. ON POL., September 2011, at 603–605.

12. SECULARISM, RELIGION AND MULTICULTURAL CITIZENSHIP (Geoffrey Brahm Levey & Tariq Modood eds., 2009); CÉCILE LABORDE, CRITICAL REPUBLICANISM. THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY (2008).

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C. The State Must Guarantee the Equal Civic Status of All Citizens, Regardless of the Particular Beliefs and Values They Endorse and Pursue

In relation to the Establishment Clause of the First Amendment, egalitarian theories endorse a stance of neutrality toward religious and nonreligious citizens. This has different implications for state funding and for state speech. Regarding state funding, egalitarians argue that religious groups pursuing public-interest activities must not be treated differently from nonreligious groups merely because they are religious. Here egalitarians depart from traditional separationist views that object on principle to any channeling of public money to religious groups. Instead of no funding, egalitarians advocate "even-handed" funding. This evenhanded approach, however, cannot be extended to state speech. The state cannot symbolically endorse the symbols and rituals of all religions, but it must decide whether to attach itself to the traditional majority religion—typically Christianity. For egalitarians, the state should generally avoid any endorsement of religion in order not to convey messages of second-class citizenship or disparagement to minority believers or nonbelievers.

Against the accommodationist view that the Establishment Clause only prohibits coercive entanglement of government with religion, egalitarians point to the unavoidably expressive dimension of law and the state—the fact that noncoercive messages and actions can have an impact on the democratic status of citizens.[13] The state should not endorse—even noncoercively or symbolically—the rituals and beliefs of particular religious traditions so that it can genuinely be the state of all. Such a perspective has emerged in U.S. jurisprudence with Justice Sandra O'Connor's "endorsement test," which postulates that the state's symbolic entanglement with religion is wrong insofar as it undermines the equal civic status of citizens,[14] in political philosophy with Martha Nussbaum's civic and egalitarian interpretation of the Establishment Clause,[15] and through growing awareness within European constitutional and human rights law that equal citizenship demands greater religious neutrality of traditionally Christian European public spheres.[16]

13. Daniel Brudney, *On Non-Coercive Establishment*, 33 POL. THEORY 812–839 (2005); Cécile Laborde, *Political Liberalism and Religion: On Separation and Establishment*, 21 J. POL. PHIL. 67–86 (2013); Joshua Cohen, *Establishment, Exclusion, and Democracy's Public Reason*, *in* REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON (R. Jay Wallace, Rahul Kumar & Samuel Freeman eds., 2011).

14. GREENAWALT, *supra* note 4, at 2:182–191; MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE:IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008), at 229, 253, 265–266, 270.

15. NUSSBAUM, *supra* note 14.

16. Ian Leigh, *The European Court of Human Rights and Religious Neutrality*, *in* RELIGION IN A LIBERAL STATE: CROSS-DISCIPLINARY REFLECTIONS (Gavin D'Costa, Malcolm Evans, Tariq Modood & Julian Rivers eds., 2013); Peter Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. (2011); RONAN MCCREA, RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION (2010).

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In sum, egalitarian theories of religious freedom seek to advance equality between minority and majority religions (by challenging the discriminatory prevalence of majority religious norms and symbols within existing states) and between religious and nonreligious beliefs, practices, and identities, be they spiritual, sexual, ethical, or racial (by comparing religion with analogous practices and beliefs).[17] In the rest of this paper, I examine in detail how the three premises of the theory are interpreted and combined in an early, groundbreaking work of constitutional jurisprudence by Christopher Eisgruber and Lawrence Sager.

II. EISGRUBER AND SAGER'S THEORY OF "EQUAL LIBERTY"

Religious Freedom and the Constitution is a book-length commentary on recent jurisprudence of the U.S. Supreme Court regarding the religion clauses. Eisgruber and Sager's basic intuition is that religious believers should enjoy "equal not special liberty." They start from the reductionist premise that religion should not be seen as "a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions."[18] Instead, religious commitments should be treated as part of a broader class of "deep" and "important" commitments and projects that people care about, whether religious or not. Next, Eisgruber and Sager deny that such commitments and projects, however morally weighty and significant, generate pro tanto rights against the state. The relevant political question is whether the government, in coordinating different life projects, shares burdens fairly among people.[19] This allows the formulation of a discrimination-centered account of religious freedom: "persons [should] not be treated unequally on account of the spiritual foundations of their deep commitments." Contra egalitarian critics of exemptions,[20] they argue that exemptions might be demanded by the ideal of equality, insofar as a government enacting generally applicable laws "may be hostile or insensitive to the needs and interests of minority faiths."[21] It is as members of discriminated or disparaged groups, not as holders of intrinsically valuable religious beliefs and practices, that minority religious believers deserve special consideration under the theory of equal liberty.

This concern for equality extends to the establishment question of whether the state can permissibly provide either financial or expressive support to religious groups. Eisgruber and Sager insist that the clause should

17. More recent egalitarian theories of religious freedom include CHARLES TAYLOR & JOCELYN MACLURE, SECULARISM AND FREEDOM OF CONSCIENCE (2011); Schwartzman, *supra* note 4; RONALD DWORKIN, RELIGION WITHOUT GOD (2013).

18. EISGRUBER & SAGER, *supra* note 2, at 6.

19. *Id.* at 202–203.

20. *See, e.g.*, BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM (2001); William Marshall, *The Case against the Constitutionally Compelled Free Exercise Exemption*, 7 J.L. & RELIGION 363–414 (1989).

21. EISGRUBER & SAGER, *supra* note 2, at 202–203.

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be interpreted as prohibiting the "advantaging or disadvantaging [of] persons or groups because of the spiritual foundations of their deeply held beliefs and commitments."[22] This entails evenhanded financial support to religious and nonreligious groups providing comparable services, as well as the strenuous avoidance of expressive endorsement by the state of majoritarian beliefs, rituals, or symbols in its own displays, ceremonies, and institutions.

The theory of equal liberty fits neatly within a broader trend within First Amendment jurisprudence, which tends to deconstitutionalize religion and seek standards of neutrality between religion and nonreligion. This trend is exemplified in the free-exercise context by the 1990 *Employment Division v. Smith* decision (which claimed, contra *Sherbert*, that there is no presumptive right of religious exemption from generally applicable laws) and in the Establishment Clause context by the "equal access to government places and money" principle that motivated the 2002 *Zelman v. Simmons-Harris* decision[23] authorizing the provision of tuition vouchers channeled to religious as well as secular public schools.[24] In the next two subsections, I show that equal liberty provides a prima facie plausible analysis of recent free-exercise and nonestablishment cases, respectively.

Eisgruber and Sager disagree with accommodationists who hold that religion is a uniquely valuable human good that deserves special protection. To treat religion more favorably than comparably deep secular interests would be to discriminate unfairly against the latter on sectarian grounds. Religious freedom, they claim, will legitimately flourish in a society where all members benefit from general rights of free speech, personal autonomy, associative freedom, and private property.[25] To be sure, the freedoms that such rights protect can be regulated by legitimate state legislation, provided its burdens are shared fairly. For example, taxation and zoning regulations are general burdens that should fall on all, including churches.[26] However, Eisgruber and Sager suggest that other, more specific laws might have been designed with insufficient regard for their unfairly disproportionate impact on religious interests. Such interests should not be privileged as religious but instead protected on similar terms to comparably serious nonreligious interests.[27]

Three different cases of application of this principle in Eisgruber and Sager's discussion can be distinguished. In the first set of cases, the contested law already provides for exemptions for nonreligious interests, to

22. *Id.*, at 52.
23. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
24. On the idea of neutrality between "religion" and "nonreligion," *see* William 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 (2000).
25. EISGRUBER & SAGER, *supra* note 2, at 4.
26. *Id.* at 88. This is where their egalitarian theory of religious freedom departs most sharply from accommodationist theories: Eisgruber and Sager have no objection to the evenhanded enforcement of such regulatory frameworks even when they override religious concerns.
27. *Id.* at 90.

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which minority religious interests can easily be analogized. Eisgruber and Sager use the example of Muslim policemen who challenged the Newark Police Department's requirement that officers be clean-shaven, on the ground that their faith demanded that they wore a beard.[28] Given that the Newark department already exempted officers with skin disorders such as folliculitis that made shaving painful or promoted infection, its refusal to accommodate the Muslims' request constituted a failure of equal regard.[29] In the second set of cases, the contested law does not directly provide exemptions but is applied against a broader regulatory background that advantages mainstream or majoritarian interests. The *Sherbert* decision falls into this category. The state of South Carolina had strict Sunday closing laws, which meant that mainstream Christians were not forced to choose between exercising their religious rights and performing the demands of their job. So Adell Sherbert was discriminated against when her unemployment benefit claim was denied.[30]

In the third and most complicated set of cases, the contested law is facially neutral and generally applicable. Here Eisgruber and Sager suggest that government may be held to a standard that measures a claim for a religious exemption against hypothetical exemptions. For example, in the 1988 *Lyng* case, the Supreme Court considered Native American claims that construction of a logging road on federal land would disrupt vision quests, sacred rituals that depend on isolation and immersion in wilderness. There were no ready-made comparisons, but Eisgruber and Sager speculate that the Forest Service would not have constructed the road had mainstream religious ("a site sacred to a small but well-acknowledged group of Catholics or Orthodox Jews") or secular ("killing off some of the last great redwood trees") interests been at stake. In light of that hypothetical comparison, they say, the case is revealed as a problem of unjust inequality that should have been decided in favor of the plaintiffs.[31]

In sum, through a creative use of analogical and hypothetical reasoning Eisgruber and Sager suggest that even though religious interests are not presumptively entitled to unique constitutional immunity from otherwise valid laws, they deserve robust constitutional protection on the basis of equality. It is because minority religious interests are "vulnerable to hostility and neglect" that they should receive special solicitude.[32] The underlying value of such an antidiscrimination approach is "parity, not advantage."[33]

A similar approach, rooted in the value of equal protection, is further applied by Eisgruber and Sager to the Establishment Clause. They deny that the ban on the establishment of religion should be interpreted as

28. Fraternal Order of Police Newark Lodge No. 12 et al. v. City of Newark et al., 170 F.3d 359 (3d Cir. 1999).
29. EISGRUBER & SAGER, *supra* note 2, at 89.
30. *Id.* at 14–15.
31. *Id.* at 92.
32. *Id.* at 52.
33. *Id.* at 59.

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singling out religion for special treatment. Instead, as shown, they claim that establishment is wrong insofar as it means treating people differentially on grounds of their beliefs and commitments.[34] Regarding state funding, Eisgruber and Sager reject both the separationist blanket ban on state support of religious activities and services and the accommodationist partiality toward faith-based, religiously motivated teaching and charity.[35] They argue that if two organizations, one religious and one nonreligious, provide public goods on an equal basis, it would be discriminatory for the state to fund the former and not the latter. For example, they broadly agree with the Court's reasoning in the landmark *Zelman* decision,[36] which authorized the Cleveland school authorities to distribute educational vouchers to parents, who can use them either in religious or in public (secular) schools.[37]

Next, the issue of state speech is found to raise "a different kind of equality-concern: the worry that by sponsoring religious displays or ceremonies, the government affiliates itself with or endorses a particular theological perspective and implicitly disparages other ones."[38] While the state may fund religious and nonreligious organizations on an equal basis, it cannot be similarly evenhanded in the choice of the symbols, rituals, and ceremonies it promotes in its institutions. Eisgruber and Sager follow O'Connor's endorsement test, arguing that governmental expressive action is impermissible if it creates a perception in the mind of a "reasonable observer" that the government is either endorsing or disapproving of religion.[39] For example, they object to the phrase "under God" in the Pledge of Allegiance, arguing that nondenominational references to God are alienating not only for agnostics and atheists but also for polytheists and nondeistic believers.[40]

What is wrong, however, with governmental endorsement of religion as opposed to other views and symbols with equally controversial expressive content? The state, after all, is not barred from promoting patriotic rituals, teaching Hegel and sexual education in its schools, or sponsoring the causes of antiracism, antisocialism, feminism, or the death penalty. Eisgruber and Sager recognize that the singling out of religion for nonestablishment purposes is a challenge to their egalitarian theory of religious freedom. To address it, they explain that the suspect constitutional status of religious practices and beliefs must be related to their "social meaning" in American culture, where "important constituents of identity—most notably, race and religion— . . . function as especially significant markers of social division."[41] It is because of the sociological and cultural features of religions—"their

34. *Id.* at 70.
35. *Id.* at 17.
36. Zelman v. Simmons-Harris, *supra* note 23.
37. *Id.* at 212–215. In the particular case of Cleveland, however, they note that the absence of good-quality public schools provided insufficient options for parents and generated an unfair advantage for the religious schools.
38. *Id.* at 19.
39. *Id.* at 122.
40. *Id.* at 150–152.
41. *Id.* at 128.

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comprehensiveness; their tendency to treat people as either 'in' or 'out'; their use of symbol and rituals to signal who is 'in'; and, finally, the profound stakes they attach to the status of 'in' or 'out'"[42]—that they are especially vulnerable to invidious discrimination or neglect by majorities. Religions are especially vulnerable, but not uniquely so.

Consistent with their egalitarian, reductionist approach to religion, Eisgruber and Sager find themselves disposed to extend the ban on state endorsement of religion to patriotic pledges, proheterosexual slogans,[43] and, more generally, the teaching of controversial partisan "orthodoxies" in schools, insofar as they might convey a disparaging or exclusionary message to those who do not share them.[44] For them, the Establishment Clause should be read in light of the Equal Protection paradigm: just as the officially sanctioned separation between the races carried a message of inferiority and disparagement to African Americans, likewise, the public endorsement of religion carries a special charge or valence given the role of religion in defining civic identity in the United States.[45]

This brief synopsis of the main arguments put forward in *Religious Freedom and the Constitution* should suffice to suggest that the text opens up intriguing theoretical avenues of reflection about the normative foundation of religious freedom. Here is a theory that promises nonnegligible levels of protection for minority religious interests while denying the need to grant any special privilege to religion as such. This is an attractive proposition for egalitarians, who worry that formal legal equality leaves minority interests at the mercy of majoritarian preferences yet see little justification for a McConnell-style privileging of religious interests qua religious. Does the theory work, however? In the next section, I show that it does not—and I ask what the implications are of this failure for the broader ambitions of egalitarian theories of religious freedom.

III. EQUALITY OF WHAT?

If equality is not to be an empty notion, as Peter Westen and Joseph Raz suspect it is,[46] theories of equality and nondiscrimination must specify what people must be treated equally in respect of. Such theories, that is, are not self-standing they rely on a prior account of which relevant features of existing state of affairs are to be the proper object of comparative evaluations of unfair treatment. For example, it would be implausible to assert that

42. *Id.* at 164.
43. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L. REV. 1273, 1274 (2007). They argue that a municipal sign such as "Finneville—a Town for Straight Folks" would be unconstitutional on this ground: "race, sex and sexual orientation should all be constitutionally protected against disparagement."
44. EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 2, at 170, 192.
45. *Id.* at 126.
46. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537–596 (1982); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986), at 240.

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marriage laws unfairly discriminate against business associates or frequent tennis partners just by virtue of those couples being excluded from its benefits. By contrast, such laws can be said to discriminate against same-sex couples insofar as the latter exhibit the valued features (intimacy, stability, commitment) that marriage is supposed to protect. Alternatively, marriage laws can be said to be indefensible in the first place because they arbitrarily single out, protect, and privilege values associated with the traditional family and a conservative social order and therefore discriminate against nonconventional families and single-person households. In sum, to be able to claim that tennis partners, same-sex couples, or single parents are discriminated against by marriage laws, we need to provide both (i) an account of the features singled out and promoted by those laws, and (ii) an account of what it means to be "similarly situated" in relation to these features.

Unfortunately, Eisgruber and Sager fail to appreciate the depth of this problem, and this, as I show below, proves fatal to their theory. It is relatively easy for them to build a formally egalitarian case for the extension of existing benefits of protection from religious majorities to religious minorities. Yet, ultimately, they cannot avoid engaging in a more speculative inquiry: that of specifying the relevant features or criteria that are protection-worthy in the first place. Their valiant reductionist search for nonreligious analogies to the treatment of religion ultimately fails, as they end up reaffirming precisely what they seek to deny: namely, the uniquely special nature of religion. This failure should not be surprising in light of the narrow remit of their constitutional project. For the most part, they are content to analyze and reconstruct the coherence of U.S. First Amendment jurisprudence, which itself assumes (rather than explicates or justifies) the special status of religion. This doctrinal straightjacket limits constitutional lawyers' imagination of what a genuinely egalitarian, "postsecular"[47] state might look like. In particular, Eisgruber and Sager underestimate the radical implication of their own normative commitment that no person should be disvalued on account of the spiritual foundations of their important principles.

In what follows, I argue that their analysis fails to explain, or takes for granted, or implicitly smuggles in assumptions about the specialness and uniqueness of religion. And insofar as much liberal political philosophy also implicitly relies on what we could call the First Amendment paradigm, it is, similarly, partly defective in articulating the normative grounds of its egalitarian commitments. My detailed engagement with Eisgruber and Sager, therefore, is intended to challenge egalitarian political philosophers (with whom I am happy to associate myself) to think harder about the "equality of what?" problem. While egalitarian critics of marriage engage with the prior question of the value of marriage, egalitarian theorists of religious freedom still have work to do to account for what, exactly, the

47. I use *postsecular* here in a specific sense: to refer to a state that deconstitutionalizes religion and does not apply special and unique legal standards to it.

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"religion" is in religious freedom. In what follows I explicate these points in relation to the two main areas of controversy discussed by Eisgruber and Sager: exemptions from general laws, and the ban on state endorsement of religion.

A. Free Exercise and Accommodation

Eisgruber and Sager's general argumentative strategy is simple. They identify a priori plausible minority religious interests and then look for reasons to accommodate them. This nonsystematic, case-driven strategy partly explains the ad hoc nature of some of their conclusions. Admittedly, when majority interests but not minority interests are exempted by the law, and there is a clear analogy between the opportunity set granted or denied their members, the argument for accommodation is relatively straightforward. This is the case when the law specifically makes provisions for members of majorities both to practice their religion and to meet professional demands yet denies minority members the same opportunity set.[48] Thus it may be defensible to grant Sherbert compensation benefits given that mainstream Christians are advantaged by Sunday trading laws. More complicated, however, are "flat rule" laws, which do not entail built-in advantages for any particular group yet substantially burden minority religious practices. Eisgruber and Sager interpret *Lyng*, the case of the logging road, as a case of discrimination by referring to hypothetical alternative interests ("conservationist" or "Catholic or Orthodox Jews") that would, they speculate, have been better protected than Native American traditional rituals were.

One may dispute the pertinence of the proposed hypothetical analogies. But more interesting is the authors' strategy. In all cases, they presumptively analogize minority religious claims with interests that are, or should be, exempted. This means that they assume from the outset that religious practices are worth protecting and they look for already protected (or hypothetically protection-worthy) comparable interests.[49] But what is the criterion of a comparable or protection-worthy interest? Why, for example, are religiously mandated beards analogized with folliculitis—an exempted medical condition—rather than with a nonexempted aesthetic or merely cultural preference? Eisgruber and Sager's answer is that for Free Exercise purposes, religious interests are protected in virtue of being "deep," "serious," "spiritual," "moral" commitments held by individuals.

48. For a similar account of equal opportunities and religious exemptions, *see* Jonathan Quong, *Cultural Exemptions, Expensive Tastes, and Equal Opportunities*, 23 J. APPLIED PHIL. 53–71 (2006).

49. For critiques of Eisgruber and Sager along similar lines, *see* Jeremy Webber, *Understanding the Religion in Freedom of Religion*, *in* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 26–43 (Peter Cane, Carolyn Evans & Zöe Robinson eds., 2008), at 35; Berg, *supra* note 6; McConnell, *supra* note 5; Greene, *supra* note 3, at 1006.

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Although those terms are nowhere clearly defined, they are pivotal to the theory. They allow the authors to draw a wedge between religious freedom and the protection of "frivolous" interests such as fashion or aesthetic preferences.[50] Religious interests are explicitly analogized with disabilities and other "comparably serious"[51] or "sufficiently compelling"[52] interests or convictions. Such judgments involve what Charles Taylor calls "strong evaluations"[53] about the central importance and value of certain beliefs, practices, and purposes.[54] This strong evaluation is primarily made by the individuals or groups concerned (Eisgruber and Sager explicitly endorse a subjective definition of religion for Free Exercise purposes)[55] but is also checked against wider moral standards (they reject the idea of respect for individual conscience as such, regardless of the content of its injunctions).[56]

One virtue of their account of the normative grounds of religious freedom is that it sidesteps the sterile debate about whether religious commitments are to be seen as products of "chance" or "choice."[57] On the strong evaluation view that they favor, religious commitments are neither analogous to unchosen disabilities nor should they be treated as contingent, negotiable personal preferences. Rather, their normative status merely derives from the fact that individuals closely identify with them, recognize them as theirs, on grounds of their "deep," "serious," "spiritual" nature.[58] Call this the depth criterion (DC). It is because religious commitments are deep that they (sometimes) deserve special protection in law; and this protection extends to nonreligious, comparably deep commitments.[59] The DC,

50. EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 2, at 101.
51. *Id.* at 101.
52. *Id.* at 104.
53. Charles Tayor. *What's Wrong with Negative Liberty?*, *in* PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 211–219. (1985).
54. For a thoughtful interpretation of Eisgruber and Sager's theory by appeal to Taylor's notion of "strong evaluation," *see* Koppelman, *supra* note 6.
55. Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807–836 (2009).
56. Christopher Eisgruber and Lawrence Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).
57. *See, e.g.*, the essays in MULTICULTURALISM RECONSIDERED: *Culture and Equality* AND ITS CRITICS (Paul Kelly ed., 2002). For an attempt to explore the two dimensions of religion as "ideas" and as "identity," *see* William Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES, 385 (1996).
58. But one question Eisgruber and Sager do not address is whether, if people identify with their beliefs, they should take some responsibility for them. In other words, this formulation does not quite get to the heart of the luck egalitarian problem, namely, that people must be compensated for things they cannot change or control but must take responsibility for their own preferences and beliefs, however these were acquired. The analogy between a medically required and a religious required beard, therefore, is not as straightforward as Eisgruber and Sager assume.
59. The DC is in fact a compound of a number of different features associated with religious beliefs, such as the following: they are particularly weighty and serious; they invoke demanding duties of observance; they are rooted in conscience; they are of "ultimate concern" to individuals; they address profound moral questions; they are comprehensive and cover the whole of life; they are central to individual identity; they are key to personal integrity. Eisgruber and Sager deny that they need to provide a definition of religion, but their understanding of what

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therefore, is offered as the standard in relation to which a range of commitments and practices, religious and nonreligious, are to be treated equally. Adopting a version of reflective legal interpretation, Eisgruber and Sager's method is to go back and forth between existing case law and the value it is supposed to promote (DC), and to seek coherence between the two.

There are, however, fundamental problems with DC as a coherentist standard of interpretation. To start with, DC does not provide a plausible account of the features in virtue of which religion is protected in existing case law. Many religious practices and rituals are performed out of habitual devotion, customary adherence, and fidelity to tradition and do not necessarily exhibit the "deep, serious, moral" features characteristic of paradigmatic religious freedom cases, such as conscientious objection to military service. Many important rituals—for example, the consumption of the peyote drug in Native American ceremonies—when they are protected, benefit from categorical, not activity-specific, protection. That is, it is because they are categorically described as religious—required by a comprehensive tradition and set of beliefs and practices presumptively described as such—that they are protected, not because they directly and singly exhibit the features (depth and seriousness of commitment) that make religion itself worthy of protection.[60]

Perhaps it can be said that the ritual-based dimensions of religious observance benefit from special protection insofar as they are embedded within significant practices that themselves, qua religions, meet DC. If this is correct, however, there appears to be an important asymmetry between religious and nonreligious commitments. It is difficult to think of comparable nonreligious practices that while not serious, deep, or moral in themselves, would benefit from protection in virtue of their connection to a broader, comprehensive set of beliefs and practices that would itself meet DC.

it means for a belief to be "deep," "serious," or "moral" appeals to one or more of the features that are traditionally associated with religion yet are also present in secular worldviews. Note that the implicit definition of religion used is not uncontroversial. To get off the ground, the reductionist approach needs to deny that whatever it is that makes religious beliefs "deep" in the relevant sense (the sense that matters to equality) cannot exclusively lie in their appeal to a divine authority or to the prospects of an afterlife. But how do reductionist theorists answer the charge that they are able to analogize religious with secular beliefs only at the cost of denying precisely what makes religious beliefs religious? Reductionists have two answers to this challenge: conceptual (the singled-out features do not in fact apply to all commonly recognized religions—many religions are this-worldly and/or nontheistic—and therefore assume an unacceptably sectarian view of what a religion is) and substantive (there is no reason to think that belief in God is what gives moral weight to otherwise deep, respectable, foundational ethical views).

60. I explore a version of this problem in another egalitarian theory of religious freedom, that of Taylor and McLure, in Cécile Laborde, *The Politics of Religious Freedom: Protecting Freedom of Religion in the Secular Age*, THE IMMANENT FRAME (Apr. 23, 2012, 12:06 PM), http://blogs.ssrc.org/tif/2012/04/23/protecting-freedom-of-religion-in-the-secular-age/, reprinted as *Protecting Religious Freedom in the Secular Age*, *in*, AFTER RELIGIOUS FREEDOM (Saba Mahmood, Elizabeth Sharkman Hurd & Winnifred Sullivan eds.,2014).

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This suspicion of asymmetry is confirmed when we examine more closely how Eisgruber and Sager deal with the cases of what they call "secular claimants" who demand exemptions from generally applicable laws on nonreligious grounds. The plausibility of the theory of equal liberty crucially depends on demonstrating that exemptions can be applied to deep and serious nonreligious claims. Unfortunately, Eisgruber and Sager provide only two examples of such claims, which are very different and importantly limited. The first is that of medical conditions, such as folliculitis in the Newark police case. The example illustrates how religious claims may be treated for some purposes by analogy with medical conditions (in some cases, it is useful to analogize burdens on religion with a kind of undue hardship). But it is also meant to illustrate how exemptions on medical grounds can themselves be justified by analogy with existing religious exemptions. To make their case, Eisgruber and Sager are forced to narrow down their original benchmark of comparison—the "spiritual" foundations of deep "moral" commitments—into a vaguer and broader benchmark—a "nontrivial" and "comparably serious" condition. The upshot is that folliculitis sufferers should be accommodated because their condition is serious and nontrivial.

Here Eisgruber and Sager trade on the ambiguity of their compound definition of DC. This ambiguity—between different senses of "serious"—allows them to elude the crucial question as to whether it makes a moral difference whether people would (by and large) prefer not to suffer from a disability, whereas they do (by and large) positively endorse and embrace their religious convictions.[61] The former is serious in that it can negatively affect rightful access to opportunity and advantage but is not serious in the moralized sense that the multicriterial definition of DC embraces. The Newark police case, therefore, cannot serve as an illustration of how DC can be extended from religious to nonreligious cases.

Eisgruber and Sager see the problem yet do not adequately solve it. Suppose, they say, that the Newark Police Department had allowed exemptions for religiously motivated but not medically mandated beards, and imagine a police officer—whom they call Officer Beard—who alleges discriminatory treatment. While they concede that Officer Beard's claim would most likely fall under a law giving protection from discrimination against disabled people, they still consider the possibility that he might have been discriminated against on religious grounds because the Newark Police Department displayed a culpable preference for religiously motivated obligations.[62] But note how the argument shifts the ground of justification. Instead of showing that both religiously motivated and medically required beards are relevantly

61. For the view that taking seriously beliefs people's implies asking them to take (at least some) responsibility for them, *see* Peter Jones, *Bearing the Consequences of Belief*, 2 J. POL. PHIL. 24–43 (1994).

62. EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 2, at 117–118.

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similar in relation to the DC standard, the authors now merely postulate, without argument, that dissimilar treatment is—culpably—discriminatory.

The second, more plausible illustration of a nonreligious application of DC concerns cases of conscientious objection to military service on secular pacifist grounds. Here Eisgruber and Sager are on firmer footing. In two important Vietnam War decisions, *Seeger* and *Welsh*,[63] the U.S. Supreme Court exempted secular pacifists from military service on the ground that they had "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[64] Unsurprisingly, the *Seeger* jurisprudence has become a point of reference for egalitarian theories of religious freedom as a paradigmatic case of conscientious objection extended from religious to nonreligious moral commitments by appeal to DC. Unfortunately, the case is exceptional rather than paradigmatic. In *Seeger*, the Court was interpreting the narrow terms of a statute rather than addressing the constitutional question of what should count as protected belief for purposes of the Free Exercise Clause of the First Amendment. As a result, unsurprisingly, the *Seeger* jurisprudence has had few applications outside the exceptional circumstances of war. Free Exercise jurisprudence provides for a "limited island of exemptions in a world of legal obligations,"[65] and judges have been reluctant to extend the constitutional protection of nonreligious deep, serious, moral commitments beyond narrowly circumscribed cases of conscientious objection to military service.[66]

Tellingly, Eisgruber and Sager's own attempt to provide a less religion-centered account of DC runs into considerable and ultimately fatal difficulties. In an instructive discussion, they consider the hypothetical case of Mother Sherbert, a single mother whose deep commitment to her children

63. United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970).
64. EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 2, at 113–114.
65. Perry Dane, *Constitutional Law and Religion*, *in* BLACKWELL COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson ed., 2010).
66. Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990),—the landmark Supreme Court decision of 1990 that overturned *Sherbert*, *supra* note 1, by positing that there is no constitutional requirement to allow religious exemptions from general laws—did not significantly alter this situation. It was overturned by Congress through the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993) (RFRA), and only partly reinstated in City of Boerne v. Flores 521 U.S. 507 (1997). The current situation is that RFRA still has constitutional status at the federal level. Furthermore, even when exemptions are not constitutionally required, they often are constitutionally permitted. There are an estimated two thousand statutory exemptions from general laws in the United States (from compulsory vaccinations to prison diets). Out of these, only a few have been successfully extended to nonreligious convictions (parents can object to compulsory vaccinations for their children on secular grounds in twenty U.S. states, for example). There is, however, an area of potential growth for secular conscientious claims concerning medical research and controversial medical procedures, such as assisted suicide and stem cell research (where claimants appeal to a secularized view of the inherent dignity of human life). In Canada, where religion formally has no special constitutional status, ecocentric vegetarianism has been recognized as entitled to "reasonable accommodation" on the same grounds as comprehensive, categorical religious belief systems. Maurice v. Canada (Attorney General), 2002 FCT 69, [2002] 2 F.C. D-47. *Cf.* TAYLOR & MACLURE, *supra* note 17.

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prevents her from accepting Saturday work. If she is denied unemployment compensation, has Mother Sherbert been treated unfairly by comparison to religiously motivated Adell Sherbert? Eisgruber and Sager answer that there is "no reason to suppose that the state is rejecting Mother Sherbert's claims because of their relation to religion."[67] It only makes a judgement about "childcare needs," without any "hostility or neglect toward either religion or irreligion." The state would only treat Mother Sherbert unfairly if it treated her differentially depending on whether she was herself "thoroughly irreligious" or whether her commitments to her children "grow out of secular convictions" or "as part of her duties to God." In other words, Mother Sherbert is not discriminated against on religious grounds because her religious commitments play no role in the state's decision. But this begs the question. The point of the hypothetical analogy was to inquire whether deep, serious, moral commitments are sufficiently similar to religion (even if not derived from a traditional religious belief) to ground a claim for accommodation. That is, it was to inquire whether Mother Sherbert's commitment to her children is in itself sufficiently "religious-like" to justify that she be treated on a par with Adell Sherbert. Eisgruber and Sager offer no clear answer to this particular question.

Eisgruber and Sager then go on to consider the particular case where Mother Sherbert views her commitment to her children as itself a matter of religious duty.[68] If she is denied compensation, is she not treated less favorably than Adell Sherbert? This is a different kind of inquiry that leads them to speculation about whether prima facie secular duties of care to loved ones can ever be interpreted as "inflexible religious obligations." Their answer is that "the two religiously motivated duties are importantly different." Sabbatarian convictions yield "inflexible obligations" not to work on Saturday, whereas Mother Sherbert could work on Saturday if she could obtain child care.

In the end, then, Mother Sherbert's commitment to her children turns out not to be comparable to Adell Sherbert's religious duties for two connected reasons. First, the question of discriminatory treatment arises only in the specific case where her commitment to her children itself has a traditionally religious or "religious-like"[69] cause. So a prima facie secular claim is eligible for accommodation only if it is inscribed within a holistic, comprehensive, religious worldview, of which traditional religions are the paradigm. Second, even if her commitment to her children is construed as religious in the relevant sense, it does not automatically trigger the same protection as "inflexible God-given obligations." This implies that secular claims, even when they meet a cluster of DC criteria, turn out not to meet

67. EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 2, at 116.
68. *Id.* at 116.
69. This is how I interpret Eisgruber and Sager's reference to the possibility that Mother Sherbert has "secular moral convictions."

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the specific criteria necessary to ground accommodation—namely, what we may call the *comprehensive worldview* and the c*ategoricity* criteria, respectively.

Whereas in Officer Beard's case, Eisgruber and Sager narrow DC down to a minimalist criterion of "seriousness," in Mother Sherbert's case they expand it to a maximalist criterion of "categoricity" and "comprehensiveness." Although this conceptual flexibility allows them to account for existing law, which accommodates disability but not the pursuit of all valuable ethical pursuits, it does not provide a coherent interpretive criterion for it. And it confirms the suspicion that secular claimants, even under their egalitarian theory, face an unreasonably high burden of proof. Secular pacifist Daniel Seeger fits the bill because (arguably) his pacifist convictions had the same scope, categoricity, and depth as familiar religious convictions. But it is difficult to find similar cases, and tellingly, Eisgruber and Sager have not found any.[70] They conclude their section on hypothetical secular claimants, such as Officer Beard and Mother Sherbert, by conceding that they are hard cases for their theory of equal liberty. Yet as the grounds for accommodation of the former are unclear and the latter's claim is rejected outright, they might well be fatal cases for the theory.

Seeger aside, Eisgruber and Sager have not demonstrated that secular claimants have valid claims of exemptions from generally applicable laws on DC grounds. As a baseline for equal treatment, DC works well to extend existing protections from majority to minority religions but it does not provide a standard with which to analogize religious and nonreligious claims. Either nonreligious claims are deep but lack scope and categoricity (Mother Sherbert), or they are not deep in the sense singled out by DC, and something else grounds the claim of discrimination (Officer Beard). In the end, Eisgruber and Sager fall back on the First Amendment paradigm, which grants a categorical protection to something called religion—and this categorical protection turns out to encompass more than the reductionist standard DC.

In light of these difficulties, it is not surprising that Eisgruber and Sager struggle to reconcile their theory of equal liberty with another key feature of the First Amendment paradigm: the existence of sui generis religious exemptions. Sui generis religious exemptions are exorbitant exemptions

70. They do consider a hypothetical case of unemployment benefit for a pacifist who objects to working in armaments. This is in fact a version of *Seeger* applied to the workplace (EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 2, at 114–116). Tellingly, Eisgruber and Sager distinguish this worker from Mother Sherbert by suggesting that his claim, unlike hers but like Seeger's, bears "a relation to religion," which again begs the question by reintroducing a maximalist definition of religion. Intriguingly, they do not consider prima facie hard cases of real-world, secular conscientious objection, such as possible secular parallels to Wisconsin v. Yoder, 406 U.S. 205 (1972). *Yoder* allowed Amish parents to withdraw their children from school at the age of fourteen as an exemption from laws making education compulsory until the age of sixteen, and did so by appeal to freedom of religion. The Court insisted that such exemptions could be granted only to religious groups, presumably preempting demands for school exemptions from (inter alia) radical anarchists. It is not clear whether and on which grounds Eisgruber and Sager would disagree, and it is unfortunate that they do not discuss *Yoder*.

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tailored exclusively for religious organizations. Consider the so-called "ministerial exception." It allows religious organizations to be exempted from virtually all regulation of their employment relations (including nondiscrimination norms) with clergy. In line with their coherentist project, Eisgruber and Sager endorse what they take to be a "widely-held view"—but they do so by appeal to generic rights of privacy and associational autonomy. To make their case, they draw on a Supreme Court decision, Boy Scouts of America et al. v. Dale, that allowed the Boy Scouts of America to be exempt from a New Jersey law prohibiting discrimination against homosexuals.[71]

Unfortunately, as legal scholars have commented, this analogy is doctrinally unsound. Boy Scouts and other nonreligious organizations have no *pro tanto* right to discriminate in employment: the onus is on them to demonstrate that general antidiscrimination regulation conflicts with their expressive purpose (they rarely succeed, and *Dale* was rightly controversial). No such demand, by contrast, is made of religious organizations, which benefit from a sui generis, presumptive right to autonomy in the appointment of their leaders.[72] Try as they might, Eisgruber and Sager struggle to account for this special treatment of religion in U.S. law.[73] Similar difficulties, I now show, plague their interpretation of the nonestablishment clause.

B. Nonestablishment and the Endorsement of Religion

We have seen that the benchmark for equal treatment in Free Exercise cases was the "deep commitments," religious or not, held by individuals. This benchmark also does some work in Eisgruber and Sager's interpretation of the Establishment Clause in relation to state funding of different organizations providing equivalent public services. Insofar as associations are free to organize to promote the deep commitments of their members, be they religious or secular in nature, and insofar as government is permitted to offer financial support for the provision of public services (education, welfare, etc.) by nonprofit associations, it would seem discriminatory to deny funding to a religious organization providing a public service on the same terms as a nonreligious one.

71. *Id.* at 64–65. Boy Scouts of America et al. v. Dale, 530 U.S. 640 (2000).

72. Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. 1–36 (2007) (book review), at 29–33. A strong doctrine of ministerial exception was recently asserted by the Supreme Court in Hosanna-Tabor Evangelical Lutheran Church and School, Petitioner v. Equal Employment Opportunity Commission, 132 S. Ct. 694; 181 L. Ed. 2d 650; 2012 U.S. LEXIS 578.

73. They suggest, however, that there might be a strategic rationale for carving more extensive protections for churches than would be allowed by the strict demands of equal liberty: because judges are prone to prejudicial determinations about the risk of discrimination by religious groups and undue interference with employment relationships that are essential to associational autonomy. EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 2, at 249–252. I am grateful to Chris Eisgruber for directing me to this important passage.

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Arguably, it is in relation to such cases of fair distribution of public benefits that the theory of equal liberty between "religion" and "nonreligion" is most plausible.[74] It is in line with recent analyses of the rise of a "new establishment" characterized by a blurring of the distinction between religious and nonreligious services, particularly in the area of the provision of health care, which is increasingly construed in spiritual as well as in narrowly medical terms (for example, in U.S. prisons).[75] Moving from funding to speech issues, however, Eisgruber and Sager are faced with a problem. According to standard constitutional doctrine, the state cannot directly endorse religious commitments in its teachings, symbols, and rituals yet it can permissibly take a position on a range of other deep commitments held by individuals. The special treatment granted to religious statements, therefore, cannot be explained by their intrinsically "deep," "moral," or "serious" nature. Something other than DC must be doing the work here.

Indeed, when looking for a standard able to shed light on the constitutional prohibition of state religious speech, Eisgruber and Sager point to a different analogy: racial categories and other "socially divisive markers of identity." On their interpretation, the reason the state should not endorse (or disparage) religion, even symbolically, is because religion has historically functioned, like race, as a social category structurally vulnerable to hostility, discrimination, disparagement, and neglect. Call this the vulnerability criterion (VC). Even though Eisgruber and Sager do not seem to distinguish between the two, VC and DC are importantly different. We could say that they serve to protect different dimensions of the culturally protean and legally elusive phenomenon of religion. For some purposes, religion is treated like race in law: it is defined in relation to the historically sedimented social meanings associated with certain practices and rituals, whereby dominant groups use state power to affirm and entrench hegemonic identities (Protestant, white, male) as normal and to construe and disparage minority identities as deviant. Witness the process of structural racialization of religious minorities—Jews, Mormons, Catholics, Muslims—in U.S. history. The analogy between race and religion allows Eisgruber and Sager to construe from an egalitarian standpoint the wrong of state religious endorsement as an expressive wrong—a wrong connected to the communication of messages of disparagement or exclusion of minorities.

From a VC perspective, religion functions as a third-person, externally defined category of social classification—by contrast with DC, which picks out the first-person, subjective dimensions of religious experience. So from a VC perspective, a state that proudly proclaims its Christian identity commits

74. Much more remains to be said, however, about what it means for a religious organization to provide a public service "on the same terms" as a nonreligious one. The issue of direct public funding for faith-based initiatives is a complex and controversial one and is underexamined by Eisgruber and Sager.

75. Winnifred Sullivan, After Secularization: Governing through Spiritual Care, unpublished manuscript (2011), on file with author.

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an "expressive wrong" by signifying to minorities that they are outsiders, that they do not belong on the same terms to the political community. Regardless of whether members of those minorities themselves see their religion as a source of deep, serious, moral commitments, official endorsement of the majority religion makes their non-Christian identity relevant—negatively—to their civic status. So it is exclusionary for a state school to adorn classrooms with Christian crucifixes *even if* members of non-Christian groups do not see membership in such groups as a source of deep ethical commitment for them. By analogy, U.S. segregation laws disparaged African-Americans not because they denigrated African-American culture and ways of life but because they construed blackness as a negative ascriptive identity, a marker of subordination and inferiority. So what VC picks out, by contrast with DC, are those dimensions of the socially constructed meanings of religion that structurally resemble other suspect categories of oppression and domination, such as race and gender.

It seems, therefore, that Eisgruber and Sager's theory contains two intriguingly different answers to the "equality of what?" question. On the one hand, people's ability to act in accordance with their deep beliefs should not be subjected to unequal state burdens (DC), and on the other hand, the state should not endorse the symbols and rituals of dominant religions for fear of disparaging racial-like minorities (VC). The difference between the two conceptions is obscured by the authors' equal liberty principle: "no-one should be disparaged on grounds of the spiritual foundations of their deep commitments."[76] Yet DC and VC point to different benchmarks for the fair treatment of religion: for some purposes religious beliefs, identities, and rituals should be treated like racial and gender identities from a collective, structural, contextual, and third-person perspective, while for other purposes they should be treated like deep moral, comprehensive commitments from an individualized, case-by-case, and first-person perspective. Does this dual-track egalitarian reductionist theory tell the whole story of the constitutional treatment of religion? There are reasons to doubt this is the case: Eisgruber and Sager's coherentist project—to demonstrate that for legal purposes, religion is not sui generis and can be analogized with other social phenomena—is doomed to fail.

Consider the teaching of religion in public schools. On Eisgruber and Sager's interpretation, it is problematic because of the risk of disparagement of nonadherents to the favored religion in a context of compulsory and state-funded education. However, many controversial topics are taught in schools that a range of different groups may find objectionable, yet First Amendment strictures against endorsement apply only to religion.[77] One possible explanation for this is that state-run schools—and more generally,

76. Eisgruber & Sager, Religious Freedom, *supra* note 2, at 52.
77. Lupu & Tuttle, *supra* note 72; Greene, *supra* note 3.

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political authorities—are deemed incompetent judges of truth in religion, in a way in which they are not in relation to other controversial topics.[78]

Eisgruber and Sager reject this plausible "epistemic" explanation of the ban on religious teaching in school. They suggest that there is little reason to suppose that political authorities are better qualified to teach Plato's *Republic* and Hegel's *Phenomenology of Spirit* than they are to teach the New Testament. The reason they can teach the former but not the latter, is, in their view, because of the profound equality-based issues—concerns about the disparagement of minorities and the like—raised by sectarian teaching in a public school. What are we to make of this argument? Eisgruber and Sager are right to point out that the question of expertise arises in the same way for (what are standardly considered to be) philosophical as opposed to theological topics. However, what is in question is which experts the state is permitted to entrust with its authority to teach in classrooms. And here it is doubtful that the reason theological expertise is not on a par with philosophical expertise is because of the exclusionary and disparaging nature of religious teachings.

For consider the range of topics that may be normally taught or discussed in schools: antiracism, sex education, the legitimacy of foreign wars, environmentalism, the death penalty, the historical treatment of Native Americans, Marxist philosophy, and so forth. No doubt many citizens feel excluded and offended by such teachings, and no doubt it would be discriminatory for the state to include or exclude private speakers from a public forum based on their positions about these issues. Yet it is not a priori impermissible for the state to inculcate political "orthodoxies" (such as gender equality and antiracism) nor to let teachers debate controversial topics (such as Marxism or the death penalty) with their students. But it is impermissible for state teachers to teach or discuss theological topics. Creedal beliefs, in particular, may not be presented as statements about the truth (religious instruction), nor can they generally be subjects of critical discussion (whether secular or theologically based) within schools.[79]

Why not? What the ban on state teaching of religion refers to is a kind of *epistemic integrity* that has (historically) prevented the state from interfering in matters that are not within its remit. This, as Steven Smith reminds us, is the original meaning of the separation between state and church, which assumed the existence of two separate jurisdictions competing for sovereign power over and across their allocated "this-worldly" and "other-worldly" spheres of competence.[80] Such a two-realm conception of religious freedom is precisely what the egalitarian theory of religious freedom seeks

78. Greenawalt, *supra* note 4, at 2:466–467. For an extended and subtle discussion, *see also* KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? (2005).

79. However, state-run schools can permissibly teach about religion in two ways: they can present it as historical and sociological objects of study; and they can criticize religiously inspired commitments when these openly contradict basic rights and democratic principles.

80. STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE (2010), ch. 4.

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to dispense with. But, fascinatingly, Eisgruber and Sager's heroic attempt does not succeed in displacing this older, sui generis view of religion in favor of their own reductionist, individualistic, and egalitarian approach. Neither the ban on the teaching of religion in U.S. public schools nor religious exemptions from employment laws (and notably the ministerial exception) can be accounted for by the authors' theory of equal liberty. Religious associations, qua religious, suffer burdens under the Establishment Clause and enjoy benefits under the Free Exercise Clause that no comparable association has at its disposal (because there is no comparable association). Only they can claim a kind of epistemic integrity that regulates their relationship qua collective agents with the collective agent of the state. Call this the integrity criterion (IC). For some (admittedly limited) purposes, religion seems to be singled out and treated in U.S. law in a sui generis way as an autonomous sphere of human life and action regulated by specific doctrines and standards.

Note that IC, by contrast with VC and DC, does not provide a benchmark for comparison; rather, it is one criterion that picks out the special and unique—nonreducible—features of the legal treatment of religion. A theory such as Eisgruber and Sager's, which provides no plausible justification of its own for this singling out nor considers the possibility that it is irreconcilable with the theory's far-reaching egalitarianism, is at best an incomplete and at worst a self-contradictory theory of religious freedom. Eisgruber and Sager simply cannot hold onto both their project of constitutional coherence and their reductionist interpretation of religion. The U.S. Constitution does give a special place to religion, and this cannot be accounted for by drawing analogies, however creative, between religion and other social beliefs and practices. Neither the depth criterion nor the vulnerability criterion succeeds in providing a plausible currency of equality between religious and nonreligious claims; and the integrity criterion puts the very possibility of comparability between them into question.

IV. CONCLUSION

In this essay I argue that Eisgruber and Sager's theory fails on its own terms. This failure, I further suggest, is symptomatic of the difficulties encountered by liberal theory in fitting the concept of religious freedom into an egalitarian framework. At this point, a legitimate objection may be formulated. Could a more philosophically ambitious, less narrowly legalist, liberal egalitarian theory avoid the pitfalls of Eisgruber and Sager's narrowly coherentist project? After all, why should liberal egalitarian philosophers be constrained by the limitations of U.S. constitutional theory? The answer to this question is that something like the First Amendment paradigm—namely, the view that religion must be uniquely protected and contained—also shapes, albeit

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in more subtle and discrete ways, much of contemporary liberal egalitarian theory.

There are two desiderata that egalitarian theories of religious freedom must meet if they are not to run into the insuperable problems encountered by Eisgruber and Sager. First, they must *not be doctrinally coherentist*. If religion really is only a subset of a broader class of beliefs, identities, or practices and should be treated on a par with them, then large areas of existing law (which carve out special protections or special prohibitions for religion) become normatively indefensible. Fortunately, normative philosophers, by contrast with legal scholars, are not beholden to constitutional coherence. So they can bite the bullet and argue that the special treatment afforded religion qua religion in the law has lost any normative purchase in contemporary society. This would allow them to explain away constitutional tenets such as the special ban on state aid to religion and the ministerial exception as archaic remnants of the discredited "two-realm" theory. Instead, they would start from the idea that the liberal state must be decidedly postsecular and take account of the deep pluralism of values, ideas, and identities, both religious and nonreligious, in contemporary societies.

Second, egalitarian theories of religious freedom must be *more complexly egalitarian*. We see that Eisgruber and Sager struggle to answer the "equality of what?" question and alternate between different standards—depth and vulnerability, for example—in their search for appropriate benchmarks of egalitarian comparison. Ultimately, their theory seems too ad hoc, because it fails to include factors such as depth and vulnerability into a more complex metric of equality and into a broader theory of justice.

At least two liberal egalitarian theories, those of Rawls and Dworkin, prima facie meet both desiderata. Although they differ in important ways, they both avoid many of the problems that plague Eisgruber and Sager's approach. Liberalism, for them, is not a coherentist project and is not textually bound by U.S. First Amendment jurisprudence. The liberal state should be committed to showing equal respect to all individuals, regardless of the particular conceptions of the good or ethical views, religious and secular, which they hold dear. Rawls's and Dworkin's liberalism, therefore, is more radically reductionist than Eisgruber and Sager's constitutional theory. It is also more complexly egalitarian: it combines an account of equal basic rights and liberties (including freedom of conscience) with a commitment to socioeconomic equality of opportunity. It further asks which instances of bad luck or "morally arbitrary features" (such as disability, race, and other markers of vulnerability) unfairly prevent individuals from accessing equal opportunities. This more complex egalitarianism offers a promising framework for integrating DC and VC by disaggregating the concept of religion into distinct values within an overarching theory of justice.

Such a complex egalitarian theory, embedded in a broader theory of liberal justice, is a more cogent way of defending the postsecular state than

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Eisgruber and Sager's constitutional theory. What remains to be assessed is whether normative postsecular liberalism entirely succeeds in displacing the traditional liberal commitment to a uniquely special separation between state and religion. There is little doubt that something called religion—a complex notion involving faith and belief, conscientious duty, a sense of the sacred, valued communal practices, comprehensive scope, ultimate moral concern, the pursuit of extratemporal goods, a divine authority, totalizing social institutions, historically salient collective identities, divisive and controversial belief systems, and so forth[81]—has provided the structural template out of which liberal political philosophers, from John Locke onwards, have conceptualized and justified the liberal state. As a result, the Euro-Atlantic conception of the secular state, as Amy Gutmann acutely notes, is grounded in an ideal of "two-way protection"—protection of religion from the state, and protection of the state from religion.[82]

Postsecular egalitarian liberalism attempts to dispense radically with two-way protection. But does it succeed in this radical endeavor, and should it? My hunch is that much like Eisgruber and Sager, normative liberal philosophers yet have to consider the full implications of the (still embryonic) postsecular political theory. In particular, they need to reflect further on questions such as: Is anything of value lost in the reduction of religion to "conceptions of the good" or "ethical views"? Can the liberal norm of religious nonestablishment be subsumed under a general principle of liberal neutrality? In what sense, if any, are liberal justification and public reason secular? In the end, I suspect, political philosophers, not only constitutional lawyers, will have to grapple with the complex epistemological, historical, and ethical questions raised by the legal-political construction of religion in the Euro-Atlantic liberal tradition.

81. In this paper, I deliberately avoid providing a precise definition of religion. What should be apparent is that while many authors work with a commonsense, "you-know-it-when-you-see-it" understanding of the notion,, they select very different features of it for purposes of analysis. In future work, I aim to reformulate a viable egalitarian project that dispenses with the category of religion altogether and instead pursues a strategy of disaggregation of the compound concept of religion.

82. Amy Gutmann, Identity in Democracy (2003), at 158–159.

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