

ESTABLISHING INEQUALITY

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LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY. By *Martha C. Nussbaum*. New York: Basic Books, 2008. Pp. 406. \$28.95.

INTRODUCTION

Understanding and crafting an American jurisprudence of religious freedom is tough sledding. The religion clauses of the First Amendment—addressing establishment and free exercise—can seem to point in opposing directions. Any ascertainable wall of separation between church and state is thin, and uneven, and evolving, and permeable. We have embraced practices, historically, that seem difficult to square with meaningful interpretations of our asserted strictures. Many bemoan efforts to limit religious discourse and symbolism in a democratic public sphere, and the standards we employ are conceded to be “in nearly total disarray.”¹ Some of our most thoughtful scholars despair of doctrinal improvement.² The merger of public and religious power has become an increasing focus of our electoral and political contests. Our populace, meantime, grows dramatically more religiously diverse. And, in the broader world, the clash of sectarian combatants continues to blossom, as the appearance of effective solutions subsides.

Given such circumstances, the decision by one of the nation's leading intellectuals to turn her perceptive attentions to our constitutive standards of religious liberty is beyond welcome. Martha Nussbaum's³ hugely prolific, and often path-breaking, body of scholarship⁴ moves with grace and fire

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1. Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 323.

2. See, e.g., Steven D. Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 IND. L.J. 61, 61–66 (2000) (“[T]here is something approaching unanimity on the proposition that the prevailing *discourse* of religious freedom . . . is deeply incoherent.”).

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4. Nussbaum's remarkable list of publications includes *ARISTOTLE'S DE MOTU ANIMALIUM* (1978); *THE CLASH WITHIN: DEMOCRACY, RELIGIOUS VIOLENCE, AND INDIA'S FUTURE* (2007); *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* (1997); *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* (1996); *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (rev. ed. 2001); *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006); *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004); *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990); *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995); *SEX AND SOCIAL*

from Aristotle to feminism, sex, social justice, shame, desire, tragedy, law, liberal education, capability deprivation, and modern India—and back again. Her work often also evinces a profound respect for human dignity.⁵ Unsurprisingly perhaps, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* employs the tools of philosophy, religion, history, cultural study, politics, and law in an important reexamination of our First Amendment landscape. It is crafted with power, passion, perspective, predisposition, and, often, a surprising moderation—though I think it fair to say that she seeks a stouter and more prohibitive interpretation of both religion clauses than they presently enjoy. She also carries, in this venture, the modest advantage of the outsider—at least when compared to veteran authors who tread the more deeply worn paths of much of our best church-state scholarship.⁶ It is my sense that Nussbaum's contribution may well change the way we see the core of freedom of conscience.

Nussbaum makes much of the potent and, for her, defining link between religious liberty and the cause of equal human dignity. For Nussbaum, “equal rights of religious conscience” assure that citizens “enter the polity ‘on equal conditions’ . . . want[ing] not just *enough* freedom, but a freedom that is itself *equal*, . . . being equally respected by the society in which they live” (p. 19). The term, of course, also embraces a liberty component—“a special respect for the faculty in human beings with which they search for life's ultimate meaning” (p. 19). Largely casting aside the traditional driving metaphor of separation,⁷ she locates an equal respect for individual conscience at the heart of religion jurisprudence. The press of equality, understood as “nondomination or nonsubordination” (p. 21), she claims, “is the glue that holds the two clauses together” (p. 104). The assurance that no

JUSTICE (1999); *THE THERAPY OF DESIRE: THEORY AND PRACTICE IN HELLENISTIC ETHICS* (1994); *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001); and *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000).

5. See Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007) (arguing that the key task of the Constitution, as interpreted, is to secure for all citizens the prerequisites of a life worthy of human dignity).

6. See, for example, such excellent efforts as CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L. J. 1 (2000); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555 (1998); Andrew Koppleman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007); Kent Greenawalt, *How Does “Equal Liberty” Fare in Relation to Other Approaches to the Religion Clauses?*, 85 TEX. L. REV. 1217 (2007) (reviewing EISGRUBER & SAGER, *supra*); and Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. 1247 (2007) (reviewing EISGRUBER & SAGER, *supra*).

7. P. 12 (noting that the religion clauses must be interpreted through “values other than the bare value of separation”); see also EISGRUBER & SAGER, *supra* note 6, at 5–7 (arguing that separation alone is misleading and unhelpful).

religion will be set up as orthodox, “defining some citizens as dominant members of the political community and others as second-class citizens” (p. 5), is the lodestar of constitutionally mandated religious protection. A society affording full and equal membership is obliged to assure a corresponding respect for equal rights of religious conscience—“the faculty in human beings with which they search for life’s ultimate meaning” (p. 19). So understood, “an equal liberty of conscience” both explains religion’s preeminence in the American Bill of Rights and its centrality to a constitutional scheme designed primarily to protect members of the minority from inappropriate overreaching by the majority (pp. 21–24).

My purpose here is fourfold. Part I outlines Nussbaum’s thesis and her similarly interesting, if perhaps not always completely consistent, applications of it. Part II touches on some challenges and potential shortcomings her theory presents—for clearly there are such. But, in Part III, I argue that her wide-ranging study of the work of the religion clauses nonetheless touches something residing at the core of American citizenship. No bosses. No masters. No insiders. None outcast. Finally, and far more idiosyncratically, in Part IV I explore and expand on Nussbaum’s thesis in light of a modestly serious and rather public dispute over religious equality that occurred at the College of William and Mary during my presidency there.⁸ A disagreement over the display of religious symbols in a public university, to my surprise, echoed more in traditional claims of equality and privilege than I would have assumed. I am candid in claiming that my own experiences suggest, perhaps unfortunately, that Nussbaum is rather acutely on to something when it comes to the central meaning of the protection of religious liberty in a diverse and democratic culture. A respect for the equal status of dissenters animates the religion clauses and highlights the crucial nature of their implementation. It suggests, as well, that the road ahead may be as controversial as the one behind.

I. EQUAL RIGHTS OF RELIGIOUS CONSCIENCE

A. *Nussbaum’s Theory of Equality*

Drawing pointedly on the work of Roger Williams, the founder of Rhode Island and a staunch advocate of religious freedom, Nussbaum emphasizes the paramount role that respect for religious conscience plays in a society committed to the equal dignity and respect of its members. She dismisses out of hand the constraining interpretations of the religion clauses offered by Justices Thomas and Scalia—as well as those of less-strident accommodationists.⁹ She also confesses her overarching wariness of the

8. For a description of the dispute, see Ira C. Lupu & Robert W. Tuttle, *The Cross at College: Accommodation and Acknowledgment of Religion at Public Universities*, 16 WM. & MARY BILL RTS. J. 939 (2008).

9. Pp. 5, 7, 268. For a critique of Justice Breyer’s theories, see pp. 263–64 (“Justice Breyer’s theory [demanding ‘divisiveness’ as a touchstone of Establishment Clause jurisprudence in *Van Orden v. Perry*, 545 U.S. 677, 703–705 (2005)] seems ill considered and unconvincing.”).

“organized, highly funded, and widespread political movement [that] wants the values of a particular brand of conservative evangelical Christianity to define the United States” (p. 4). Williams sought, in her view, not merely to “protect religion from the impurity of state power” (p. 41)—but to temper the exercise of public authority with the recognition of “the preciousness and dignity of the individual human conscience” (p. 51). The Rhode Island Charter itself asserted that “[n]oe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted or call[ed] in[to] question, for any differences in opinione in matters of religion, and . . . [shall] freely . . . enjoye his . . . owne judgments and consciences, in matters of religious concernments” (p. 49). Williams’s opposition to coercion reflected an indignation that those who speak “‘so tenderly for [their] owne, hath yet so little respect, mercie, or pitie to the like consciencious perswasions of other Men.’”¹⁰ “‘I commend,’” he wrote, “‘that Man whether Jew or Turke, or Papist, or who ever that steeres no otherwise then his Conscience dares . . . [f]or . . . you shall find it rare, to meete with Men of Conscience.’”¹¹

For Nussbaum, Williams’s dictates reflect the Framers’ sense that life’s search for meaning, for ultimacy, is the defining quest of the human condition (p. 37). Each equal member of a commonwealth, accordingly, must be allowed to conduct his exploration without interference from his neighbors or his government (p. 37). Presaging James Madison’s subsequent demand in the famed *Memorial and Remonstrance* for “an equal title to the free exercise of Religion according to the dictates of conscience” (p. 72; internal quotation marks omitted), Williams built on the Stoic ideal that merely by virtue of being human, we share in a portion of the divine (p. 78). As a result, we can claim equal worth in virtue and capacity for moral striving (p. 45). And we can demand an equal respect from the state in carrying out the defining effort.

Religious freedom, therefore, is intimately tied to an equality of standing in the public realm. The Establishment Clause and the Free Exercise Clause further that pointed mission. “[E]qual rights,” Nussbaum writes, “are at the bottom of both” clauses (p. 104). “[E]stablishments, however [purportedly] benign, create ranks and orders of citizens, defining the status of some as unequal to that of others” (p. 75). The metaphor of separation of church and state, then, is, “fundamentally, about equality, . . . the idea that no religion will be set up as [orthodox], an act that immediately [creates] outsiders” (p. 12)—elevating the status of some and diminishing that of others. Such “in-group favoritism,” the Constitution “utterly reject[s].”¹² This mirrors, of course, Justice O’Connor’s much later claim in *Lynch v.*

10. P. 53 (quoting 1 ROGER WILLIAMS, *THE CORRESPONDENCE OF ROGER WILLIAMS* 338 (Glenn W. LaFantasie ed., 1988)).

11. P. 52 (quoting 2 WILLIAMS, *supra* note 10, at 586).

12. P. 2. Eisgruber and Sager make analogous claims. See EISGRUBER & SAGER, *supra* note 6, at 52–53 (“‘Equal liberty’ . . . insists . . . that no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects.”).

Donnelly that “[e]ndorsement 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. Disapproval sends the opposite message.”¹³

Nussbaum argues, therefore, that the tough work of interpreting the strictures of the religion clauses must be accomplished through the lens of equality. Separation of church and state will not get us there. None believe that a city fire department should be barred from saving a burning church, and almost all agree that government should not subsidize sectarian religious instruction (p. 12). A bare demand that they occupy distinctive realms is unhelpful. The “key thread” of religion inquiry, instead, is a right to equality of religious conscience (p. 21). This will not, of course, eliminate the varied arenas that require careful examination and evolving, perhaps tentative, exercises of judgment. But the judiciary should not abandon the obligation to the elected branches of assuring an equal freedom of conscience. The “current threat to religious fairness,” she claims, “is not local, and it is not likely to be short-lived” (p. 4).

History teaches that “our Constitution is . . . threatened—by people’s fear of the different, and their desire to keep the different at bay” (p. 28). Religion, in particular, has presented the temptation to use the public power of endorsement to demonstrate dominance and superiority, in violation of an asserted equal status before the law. Our fundamental charter does many things—but none are so crucial as “protect[ing] . . . groups and people from the tyranny of majorities” (p. 33). The assurance of equal rights of conscience is, thus, “not a way of belittling religion, [but] a way of respecting human beings” (p. 114). The call of equality demands a bolstered concern over the use of state power to favor religious majorities; it requires a more ready availability of exemptions to foster dissenting religious practice; and it should allow religious groups to participate on an equal basis in programs that assist nongovernmental providers of social services. There is much to consider in exploring the appropriate relationship between government and religion. In Nussbaum’s view, though, “the idea of equality will have to do most of the work” (p. 221).

B. *Equality Applied*

Unsurprisingly, perhaps, *Liberty of Conscience* embraces heartily the Supreme Court’s foundational decisions giving teeth to the Establishment Clause. The school-prayer cases rejected state and local efforts at piety that may have feigned “inclusiveness” but reflected “no intention of being fair to everybody” (p. 241). The moment-of-silence cases were rooted in appropriate concern over the “the painful exclusion of non-conforming children” (p. 248). And the Allegheny County Christmas crèche decision correctly concluded that the display “create[d] a clear and strong impression that the

13. P. 224 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

local government tacitly endorses Christianity” (p. 256; internal quotation marks omitted).

She would go farther as well. The phrase “under God” inevitably excludes religious and nonreligious dissenters alike. “[T]here are traditional references to religion in our public life that should not be pruned away and that pose no constitutional problem” (p. 314). The pledge of allegiance “is [not] among them” (p. 314). “Intelligent design” statutes governing public school curricula impermissibly provide state “endorsement to the religious doctrine of a single group” (p. 327).

Still, there are limits. Nussbaum argues that *Aguilar v. Felton*, the earlier Supreme Court decision invalidating public support for low-income math and reading programs in religious schools, reflected an “extreme point of separationism” (p. 291) violating “equal respect” for sectarian school children (pp. 291–97). And she is apparently untroubled by much of the seemingly silly muddle of the Court’s public religious display cases.¹⁴ The line of demarcation between improper endorsement and acceptable accommodation can be fuzzy and contextual. Nonetheless, an aggressive implementation of establishment norms recognizes the “threat to equality” resulting from government steps to “throw[] its support behind [a religious] orthodoxy” (p. 225).

Nor is Nussbaum satisfied with the present modest standards of enforcement under the Free Exercise Clause. Accepting the constitutional propriety of laws of “general applicability” so long as they do not target religious practice leaves insufficient breathing room for constitutional rights of conscience (pp. 147–58). Dissenting believers “have suffered greatly all over the world from laws made by and for the majority” (p. 173). The demand for equal dignity animates both sides of religion jurisprudence. Simply put:

Mutual respect imposes duties that are themselves mutual: the duty for each and every person to allow each and every person, majority and minority, a space for conscience to unfold itself, even in ways that are strange and surprising—so long as they violate no compelling state interest and respect the equal rights of others. (p. 353)

II. THE CHALLENGES OF EQUALITY

As I have hinted, I think *Liberty of Conscience* brings important thrust to our understanding of the religion clauses. I attempt to explain why more fully below in Part III. But I should begin by conceding that Nussbaum’s path presents its challenges.

First, the success of her focus on Williams is unclear. In a sense, of course, Williams gives Nussbaum’s story a hero—and an interesting one at

14. P. 256 (“[W]hat message a display intends to convey and does convey is a complicated contextual matter. Wise practical reason will focus on details, and disagreement about how to understand details of context does not mean that the overall analytical framework is defective.”).

that.¹⁵ His references to “soule rape” (p. 81) in *The Bloody Tenent of Persecution*¹⁶ paint the threat imposed orthodoxy poses to equal dignity in vivid and literally instructive terms. Nussbaum’s reading of Williams may, or may not,¹⁷ represent the standard view. And I understand that she rejects originalism as the touchstone of her, or any, advisable theory of constitutional interpretation (pp. 6–12). But the extent of her attention to Williams, in a vibrant exegesis of the meaning of the First Amendment, at least implies that his theories of religious freedom were, in some manner, dominant or pervasive ones for the founding generation. The implication is perhaps heightened by her efforts to link Williams’s principles of equal conscience to the Stoics before him, and to Madison (pp. 91, 225–27), Rawls,¹⁸ and perhaps even O’Connor (p. 224), after. It is no extravagant leap to see these steps as aimed at convincing us that we are, in some persistent measure, the intellectual, political, and philosophical, even if not the religious, children of Williams.

Perhaps Nussbaum’s detailed focus on Williams is intended to offer nothing more than “an attractive normative argument for religious liberty and equality, with which [she is] largely in agreement.”¹⁹ But constitutionalism usually suggests more—not just that this is my way of reading a provision, but that it was meant to be, or it has become, *our* way of reading it as well. It is not coincidence that we so frequently seek to bolster our claims by tying them to the lips or the pens of our predecessors—particularly our predecessors of the seventeenth and eighteenth centuries. If Timothy Hall is at all close to the truth in his assessment that Williams had “no apparent influence”²⁰ in the revolutionary and founding eras, then the traditionally demanded justificatory coupling to publicly embraced norms

15. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 149 (1965) (“[G]overnment [according to Williams] must have nothing to do with religion lest in its clumsy desire to favor the churches or its savage effort to injure religion it bring the corruptions of the wilderness into the holiness of the garden.”).

16. Pp. 36–53; ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION FOR CAUSE OF CONSCIENCE* (Richard Groves ed., Mercer Univ. Press 2001) (1644).

17. See TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* (1998) (disparaging Williams’s influence in the century after his death in 1683); Kent Greenawalt, *Where Shall the Preaching Stop?*, N.Y. REV. BOOKS, May 15, 2008, at 24 (reviewing LIBERTY OF CONSCIENCE) (“Contrary to the standard view, built on Williams’s extensive use of theological language and his unremitting opinion that true Christians . . . should separate their religious practices from the unregenerate masses, Nussbaum suggests that his conclusions about conscience did not rest heavily on his own theological understandings.”); Kent Greenawalt et al., *‘Liberty of Conscience’: An Exchange*, N.Y. REV. BOOKS, June 12, 2008, at 82; Steven D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213 (1999) (reviewing HALL, *supra*).

18. P. 361 (“Like Williams, Rawls starts from the idea of equal respect and shows that only a political conception that separates certain key moral/political values from religious ideas will appropriately preserve that all-important value.”).

19. Greenawalt et al., *supra* note 17.

20. HALL, *supra* note 17, at 116.

may be impossible to sustain.²¹ I would be surprised if Nussbaum's overarching portrayal of Williams's thought is designed merely to say that one fellow had a terrific idea three and a half centuries ago.

It also seems possible, secondly, that some of the intractable problems of religious jurisprudence are more stubbornly "messy" than Nussbaum assumes.²² The most obvious example of this, perhaps, is the book's treatment of the free exercise exemption cases. In the name of equality, Professor Nussbaum lodges powerful objection to the cornerstone of free exercise jurisprudence, *Employment Division v. Smith*.²³ There, as is well known, the Supreme Court significantly curtailed the reach of the Free Exercise Clause—upholding Oregon's power to "include religiously inspired peyote use within the reach of its general criminal prohibition."²⁴ Nussbaum rejects the opinion's "legal reasoning, its treatment of precedent, and its attitude [toward] the place of religious minorities in majority society" (p. 153)—for they "put a dagger into the heart of minority religious freedom."²⁵ Without the protection of more readily available accommodation for religious actors, she claims, "in the process of pursuing fairness, we will be committing a deep sort of unfairness" (p. 173). The pre-*Smith* cases, like *Sherbert v. Verner*²⁶ and *Wisconsin v. Yoder*,²⁷ she asserts, "highlight[ed] the harsh impact of majority rule" on dissenters (p. 156), "'preserving religious liberty to the fullest extent possible in a pluralistic society.'"²⁸ She concludes that "*Smith* was wrongly decided and that a return to the *Sherbert* regime," requiring the heady justification of the compelling-state-interest standard, is necessary to cure our constitutional shortcomings (p. 173).

For most scholars, though, the religious-accommodation cases before *Smith* revealed no such beauty, and no such consistency. William Marshall has written that "*Sherbert*'s compelling interest test had never been given much vitality by the Court."²⁹ A wide array of general restrictions, not sup-

21. That makes Nussbaum's Williams move like much of our social and constitutional history—we draw on it for understanding and light. We help create our traditions and aspirations, in no small measure, because we come to believe that this is the best way to see and define ourselves.

22. See p. 173 ("The messy way seems the best way, all things considered, although we should grant that it is a pragmatic solution and not ideal theory.").

23. 494 U.S. 872 (1990); see also p. 173; GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL (2001); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

24. *Smith*, 494 U.S. at 874.

25. P. 159; see also RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 71 (2004) ("[T]he Clause does nothing to ameliorate the 'cruel choice' that arises when a neutral, generally applicable statute forbids conduct . . . that some citizens think it their religious duty to perform.").

26. 374 U.S. 398 (1963) (requiring compelling justification for effective restrictions on the free exercise of religion).

27. 406 U.S. 205 (1972).

28. P. 156 (quoting *Smith*, 494 U.S. at 903 (O'Connor, J., concurring)).

29. Marshall, *supra* note 6, at 195; see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1248 (3d ed. 2006) ("For the next 27 years [after *Sherbert*], the Court

ported by clearly imperative governmental interests, passed constitutional muster with seeming ease. Sunday closing laws,³⁰ military apparel regulations,³¹ uniform social-security standards,³² minimum-wage laws,³³ prison restrictions,³⁴ mandated identification cards,³⁵ land-use regulations,³⁶ and other broad taxing schemes³⁷ triggered no demand for religious exemption.³⁸ Accordingly, pundits have characterized *Sherbert's* vaunted compelling-state-interest test as “strict in theory, feeble in fact.”³⁹

If, however, a searching and intensive judicial scrutiny were actually to be applied in free exercise cases, it is likely that too strong a regime of religious exemption would follow. Churches could regularly escape the strictures of local zoning laws; various traffic, health, and safety standards; electronic broadcast regulations; prison restrictions; and the like.⁴⁰ All told then, courts embarked, even before *Smith*, on an ad hoc and frequently sub rosa balance of competing interests. Unmitigated cheers for *Sherbert*, then, can mask the difficulty of weighing proffered, often almost idiosyncratic, religious hardships against far broader public concerns.⁴¹ And, of course, the more readily courts stray from the rigors, and apparent presumptions, of the strictest scrutiny, the larger the perils of indeterminacy become.⁴² A generous and driving sense of equality will not eliminate, or even reduce, the quagmire. It might also raise the specter of an exemptions regime so pronounced that it threatens the entire enterprise.

That does not mean, of course, that *Smith* is right. Courts are likely appropriate bastions to measure the limits of majority prerogative—recognizing

usually purported to apply strict scrutiny to religion clause claims but, nonetheless, generally sided with the government when individuals claimed that laws infringed their free exercise of religion.”)

30. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

31. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

32. *United States v. Lee*, 455 U.S. 252 (1982).

33. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985).

34. *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (rejecting the claim by Muslim prisoners that regulations preventing them from attending services were unconstitutional).

35. *Bowen v. Roy*, 476 U.S. 693 (1986) (social security cards).

36. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (upholding timber harvesting in a national forest despite Native American religious objections).

37. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990).

38. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (allowing the enforcement of racial nondiscrimination policy by the Internal Revenue Service over religious objection).

39. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994) (playing off, of course, Gerald Gunther’s quip, in *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972), that the compelling-interest test in the equal protection context was “‘strict’ in theory and fatal in fact”).

40. *See Greenawalt*, *supra* note 6, at 1239 (“[M]uch too much religious action would be protected . . .”).

41. *See EISGRUBER & SAGER*, *supra* note 6, at 29 (arguing that a strong regime of exemptions is a “surefire recipe for inconsistency”).

42. *See id.* at 41.

the understandable tendency to fashion our public undertakings in accord with the private orderings of the many. But it does not help to meet the perils by calling on an asserted golden era that, perhaps, did not shine so brightly.

The third, and by far the largest, challenge in implementing Nussbaum's call to equality as the foundation for interpreting the religion clauses is the nature of the term itself. "Equality" does not leave its vagueness and circularity behind by traveling from the Fourteenth Amendment to the First. Peter Westen famously tagged the concept "empty."⁴³ And it is likely true that claims for equality more frequently represent conclusions to be urged rather than premises to be argued from.⁴⁴ Most of us agree that like cases should be treated alike. We have a much harder time concluding which cases fall into that category.⁴⁵ And, in religious disputes, equality frequently surfaces on both sides of the controversy.

My own favorite example, as my colleague Steve Smith has highlighted,⁴⁶ comes directly from the most distinguished of sources—Madison's *Memorial and Remonstrance*.⁴⁷ The proffered Virginia "Bill Establishing a Provision for Teachers of the Christian Religion" exempted Quakers and Mennonites, apparently because these sects employed no professional ministry. No doubt the exemption was fashioned in the name of equality. Madison, however, seized on it as an example of special privilege:

As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their Religions unnecessary and unwarrantable? Can their piety alone be entrusted with the care of public worship? Ought their Religions to be endowed above all others with extraordinary privileges by which proselytes may be enticed from all others?⁴⁸

Equality claims have been ubiquitous, and often contradictory, from the beginning of our religious jurisprudence.

To make the same point, Nussbaum's book is not the only terrific new academic offering emphasizing the centrality of equality to claims of religious freedom. Christopher Eisgruber and Lawrence Sager's *Religious Freedom and the Constitution* would make the notion of "equal liberty" the cornerstone of the jurisprudence of the religion clauses.⁴⁹ "[I]n the name of

43. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) (arguing that the principle of equality is parasitic on independent substantive norms).

44. Smith, *supra* note 2, at 64.

45. *Id.*

46. *Id.* at 65–66.

47. Letter from James Madison to the Honorable General Assembly of the Commonwealth of Virginia (June 20, 1785), reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 55–60 (Robert S. Alley ed., 1985).

48. *Id.* at 57.

49. EISGRUBER & SAGER, *supra* note 6. Like Nussbaum, Eisgruber and Sager are less accepting than the present Supreme Court of government endorsement of religious messages. See *id.* at

equality,” they write, none should “be devalued on account of the spiritual foundations of their important commitments and projects.”⁵⁰ And only a robust nondiscrimination theory—protecting religious conduct from hostility or neglect—would generate appropriate schemes of security under the religion clauses.⁵¹ This sounds, of course, positively Nussbaumian. (Or maybe it is the other way around.) But as I have indicated, Nussbaum reads the challenge of equality to denounce *Smith* and to sing the praises of the Religious Freedom Restoration Act.⁵² Eisgruber and Sager, on the other hand, launched their project “a dozen years ago with attacks on the idea, embodied in the Religious Freedom Restoration Act of 1993 (RFRA), that religiously motivated practices should be exempted from generally applicable legal restrictions in order to preserve a distinctive substantive freedom for religious exercise.”⁵³ They argue that showing such special concern for religious practice privileges religion over other belief—in violation of a constitutional demand for equal regard.⁵⁴ They raise the flag of equality to praise *Smith*⁵⁵—Nussbaum to bury it.

So equality is no talisman. It is also likely that the religion clauses are designed to serve values beyond an equal footing for the rights of conscience. Madison focused handily, no doubt, on the equal rank of citizens in his famous *Remonstrance*.⁵⁶ But he also railed against the proffered bill because it implied, contrary to our national understanding, that the “Civil Magistrate is a competent Judge of Religious Truth.”⁵⁷ History and a common sense, he urged, taught otherwise. Natural right meant, as well, that “[r]eligion [is] exempt from the authority of the Society at large.”⁵⁸ Still less

147–52; Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEX. L. REV. 1185, 1186 (2007) (reviewing EISGRUBER & SAGER, *supra* note 6) (“[Eisgruber and Sager] are the most sophisticated proponents of an equality or nondiscrimination approach to the Religion Clauses.”).

50. EISGRUBER & SAGER, *supra* note 6, at 52.

51. *Id.* at 96, 100; *see also* Berg, *supra* note 49, at 1188.

52. *See supra* text accompanying notes 22–28.

53. Berg, *supra* note 49, at 1186–87 (footnotes omitted).

54. *Id.* at 1187; *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L. REV. 1273, 1276 (2007) (“These and many, many others are all regulatory regimes that could collide with the religious commandments of some groups, and they are all regulatory regimes that society could get along without. But Equal Liberty, unlike an autonomy-based view, has no objection to their even-handed enforcement.”); Eisgruber & Sager, *supra* note 39, at 1283.

55. However, Eisgruber and Sager would seek a more robust theory of equality than that put forward by Justice Scalia in *Smith*. EISGRUBER & SAGER, *supra* note 6, at 95–96.

56. Letter from James Madison to the Honorable General Assembly of the Commonwealth of Virginia, *supra* note 47, at 57 (noting the right of every citizen “to the free exercise of Religion according to the dictates of Conscience”).

57. *Id.* Greenawalt makes the same argument. Greenawalt, *supra* note 6, at 1234 (“There are important reasons for the government to stay out of the realm of religious truth apart from a concern about discrimination. Notably, governments are woefully incompetent judges of truth in religion.”).

58. Letter from James Madison to the Honorable General Assembly of the Commonwealth of Virginia, *supra* note 47, at 56.

can “it be subject to that of the Legislative Body.”⁵⁹ And, speaking pragmatically, Madison complained that government establishments, “instead of maintaining the purity and efficacy of Religion, have had a contrary operation”—resulting in “pride and indolence in the Clergy, ignorance and servility in the laity, [and] in both superstition, bigotry and persecution.”⁶⁰ As for civil society, establishments “ha[ve] been seen upholding the thrones of political tyranny,” in whose name “[t]orrents of blood have been spilt,” and which have “enervate[d] the laws in general, and . . . slacken[ed] the bands of Society.”⁶¹

By its terms, the First Amendment suggests a zone of autonomy that is personal to citizens, free from reach of the state.⁶² It is a frank reminder that our government is one of limited jurisdiction, of constrained authority.⁶³ It is denied entry into certain realms, even should it venture, somehow, evenhandedly, in their direction. The ultimacy of religious claims also triggers unique possibilities of both inspiration and vulnerability. Its premier listing in the Bill of Rights is not happenstance. Its facets and purposes are likely too complex and multiple to fall under a single mantle—particularly one as malleable and dependent as equality. It is unsurprising, then, that thoughtful commentators have believed that equal concern can do much, but that it cannot do all, of the work of the religion clauses.⁶⁴

III. EQUALITY AND DOMINANCE

Even with such caveats, Nussbaum brings a good deal of power and brilliance to our understanding of religion jurisprudence. She plumbs the foundations of religious freedom in a way that instructs and recasts our efforts. And, unlike many academics, she manages to do so in a way that is

59. *Id.*

60. *Id.* at 58.

61. *Id.* at 58–59; *see also* Letter from James Madison to Edward Livingston (July 10, 1822), reprinted in *THE COMPLETE MADISON: HIS BASIC WRITINGS* 308, 309 (Saul Padover ed., 1953) (“We are teaching the world the great truth that Governments do better without Kings & Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of Government.”).

62. *See* Berg, *supra* note 49, at 1185 (“[D]o [the religion clauses] primarily guarantee decisions about religious matters and religious life a zone of liberty or autonomy against state restriction, or a degree of separation from state involvement?”).

63. Lupu & Tuttle, *supra* note 6, at 1271 (“A full conception of religious freedom . . . limits the state’s authority to profess, endorse, or support a religious conception—however [it] might be articulated—because of religion’s distinctive quality. . . . [R]eligious practice and doctrine tends to be marked by the comprehensiveness and ultimacy of the claims made on adherents. . . . [D]eployed by the government, the power can threaten the most basic principle of a liberal polity: that the government is one of limited competence and authority. . . . [R]eligious freedom finds its basic justification in liberalism’s opposition to totalitarian pretensions of civil government . . .”).

64. *See, e.g.,* Berg, *supra* note 49, at 1215 (“Unsurprisingly, religious liberty must ultimately rest on a theory of liberty, not just equality.”); Greenawalt, *supra* note 6, at 1246 (focusing on equality of value, but concluding “it would be a misfortune for [the] proposal to replace all other criteria for what government actions violate the Free Exercise and Establishment Clauses”); Lupu & Tuttle, *supra* note 6, at 1272 (arguing that equality is an “attractive but ultimately insufficient recipe”).

faithful to constitutional inquiry as a public medium, tapping values and rhetoric that are accessible to, and perhaps shared by, many beyond the halls of our graduate schools and intellectual journals.

Nussbaum's call to equality begins where constitutionalism begins—in a commitment to individual human dignity. Following Williams, she writes of “life as a risky and lonely quest,” of “solitary travelers, searching for light in a dark wilderness” (p. 37). “[T]his striving of conscience[] is what is most precious” about human existence (p. 37). This search for fulfillment inexorably demands respect for others' undertaking of the venture. Each person must be “permitted to conduct” (p. 37) the journey in her own way—unburdened by the state or by her fellows. An asserted orthodoxy “says that we do not all enter the public square on the same basis: one religion is the American religion and others are not” (p. 2). Minority beliefs are “subordinate,” allowed “at the sufferance of [tolerant] majorit[ies]” (p. 2), creating, as Nussbaum characterizes Madison's view, “ranks and orders of citizens,” some “unequal” to the rest (p. 75).

Nussbaum would pour content into equality through a focus on “hierarchy” and “domination,” on the one hand, and “subordination,” on the other.⁶⁵ She echoes Phillip Pettit's claim that “‘nondomination’ is the key to American revolutionary politics.”⁶⁶ The founders were, in Nussbaum's view, determined to create a polity that “undid these hierarchies” (p. 82). “[T]he mixture of civil with religious jurisdictions threatened an equality of standing in the public realm that was enormously precious to all Americans” (p. 114). An “equal respect for conscience” was demanded for fellow citizens—“who may be in error, but who are . . . free and equal members of the political community” nonetheless (pp. 332–33). It is designed not to disparage religion, but to elevate, and pay tribute to, human dignity.⁶⁷

Of course such mutuality is hardly the habitual position of mankind. Though we typically consider the predilections of our own consciences sacrosanct, it has proven easy to afford, in Williams's view, little corresponding respect for the defining “persuasions of other men.”⁶⁸ “We have seen,” Nussbaum writes, “that people are very fond of establishing orthodoxies that favor themselves, and attempting to enforce those orthodoxies by law” (p. 340). This unfortunate tendency can be made all the more troubling by a “common human failing[]”—our “fear of the different” (p. 28). As a result, in matters of conscience, “the equality of citizens is always deeply at risk” (p. 231).

And motivations to enforce majority sentiment, Nussbaum writes, can be even more direct and unpleasant—coming “from sheer selfishness,” the

65. P. 229; *see also* p. 21 (focusing on “the idea of equality, understood as nondomination or nonsubordination”).

66. P. 80 (citing PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997)).

67. P. 114 (“Separation, to the extent that the framers urged it, was not a way of belittling religion, it was a way of respecting human beings.”).

68. P. 53 (quoting 1 WILLIAMS, *supra* note 10, at 338).

“desire to lord it over others and establish [our] own superiority” (p. 28). In the most powerful sentence of the book, she describes the nature of the sin against equality resulting from such projects: “What Madison saw . . . is that [it] is like an insult, a slap in the face, and, moreover, it is the sort of slap in the face that a noble gives to a vassal, one that both expresses and constitutes a hierarchy of ranks” (p. 227). One guesses that the slap is no less painful when delivered in the name of God.

Nussbaum’s focus on equal dignity as the core of religious freedom hardly answers all the questions of constitutional establishment and free exercise. Contradictions remain. Guideposts are fuzzy. Even fans of her analysis, like me, will not agree with all of her applications.⁶⁹ And no single notion can serve the many purposes, and the varied features, of religious liberty. But Nussbaum’s portrait of the religion clauses as the adversary of hierarchy and dominance has resonance. It gives a purpose to the provisions that lie at the core of constitutionalism. It is lodged in a profound respect for the ultimate search for human meaning. It recognizes that if our own explorations can be potently self-defining, so can those of our fellows. By extending a majority orthodoxy through the use of public power, we step beyond the foundational premise of our democratic experiment—and violate the terms of equal citizenship.

IV. LESSONS FROM A PUBLIC UNIVERSITY CHAPEL

I should concede, perhaps, that at least some of my attraction to Nussbaum’s embrace of religious equality—especially her particular version of religious equality—may be tied to my own rather recent experiences. As is better known than I might wish,⁷⁰ in late 2006, as president of the College

69. I, for example, find it difficult to square Nussbaum’s apparent assertion that the Pledge of Allegiance is unconstitutional, pp. 314–16, with her conclusion that the Texas Ten Commandments case was rightly decided, pp. 260, 262–65 (discussing *Van Orden v. Perry*, 545 U.S. 677 (2005)). It is hard for me to buy the notion that placing the tenets of one religious tradition on prominent display at a state capitol is not an endorsement of them. I think, rather, that a statement of “endorsement” is the principal, or maybe the only, reason for the display. Nor am I convinced that an aggressively employed regime of free exercise exemptions is consistent with an ascendant notion of equal standing before the law—especially if we are to extend “the account of religion as far as we can, compatibly with administrability.” P. 173; see also *infra* Part IV. A swarm of exceptions presents an unlikely path to broader belief that we are all equal citizens in the eyes of the state. Nor do I warm to Nussbaum’s enthusiastic conclusion that the Court’s decision in *Locke v. Davey*, 540 U.S. 712 (2004), is not only wrong, but “disturbing”—a public “punishment” for pursuing theology. Pp. 302–05. But perhaps this represents my own sense that there is more to religion jurisprudence than equality, or that my version of equality would not include using my tax dollars to pay for someone’s seminary training.

70. See Natasha Altamirano, *Bow to diversity leaves altar empty: William & Mary removes cross from ‘equally open’ Wren Chapel*, WASH. TIMES, Jan. 29, 2007, at A1; Shawn Day, *Wren Cross Feud Waged on Web*, DAILY PRESS (Newport News, Va.), June 21, 2007, at A1; Marc Fisher, *College Got What It Signed Up For*, WASH. POST, Feb. 17 2008, at C1; Bill Geroux, *Nichol leaving W&M for UNC; Ex-President’s departure would mark the final chapter in his stormy tenure*, RICHMOND TIMES-DISPATCH, Mar. 14, 2008, at A1; Newt Gingrich & Christopher Levenick, *Laus Deo: Crossing the line at William & Mary*, NAT’L REV. ONLINE, Jan. 31, 2007, <http://article.nationalreview.com/?q=OWNkZWJlYThlZGMzMzRhZTQwNDYwMGQ1ZGQyODJmNDg=>; Fredrick Kunkle, *Cross Returns to Chapel—But Not on the Altar*, WASH. POST, Mar. 7,

of William and Mary, I altered the way a Christian cross was displayed in the college's Wren Chapel. William and Mary is a public university, and its ancient chapel, cornerstone of the campus, is used regularly for important secular college events—both voluntary and mandatory. I determined that an eighteen inch brass cross should no longer be permanently placed on the altar, but, rather, displayed only during requested religious services.⁷¹ I did so believing the step necessary to help Jews, Muslims, Hindus, non-believers, and other religious minorities feel more meaningfully included as members of the broad college community.⁷² I was convinced that an effective notion of separation of church and state required the decision.⁷³ And I hoped to extend the college's welcome more generously to all. We are charged, I concluded, as state actors, to respect and accommodate all religions, but to endorse none.

No small number disagreed. Though the decision was supported by the faculty and student assemblies, great turmoil arose beyond the campus walls. Ample numbers of alumni, donors,⁷⁴ legislators, editorialists, television commentators, religious activists, political organizers, and ordinary citizens expressed a spirited and voluminous disapproval.⁷⁵ To my sadness, many characterized the decision as antireligious, or anti-Christian. Others saw it as liberal secularism or political correctness gone amok.⁷⁶ Both the William and Mary Board of Visitors and the Virginia General Assembly turned their attentions to the controversy. After I appointed a university-wide committee to study the question,⁷⁷ a compromise was reached. The cross

2007, at B6; Fredrick Kunkle, *School's Move Toward Inclusion Creates a Rift*, WASH. POST, Dec. 26, 2006, at B1; Andrew R. McRoberts & Constance B. McRoberts, Op-Ed, *At William & Mary, A Cross Becomes a Lightning Rod*, WASH. POST, Feb. 18, 2007, at B8; *Presidential Ouster at William & Mary*, INSIDE HIGHER EDUC., Feb. 13, 2008, <http://www.insidehighered.com/news/2008/02/13/Nichol>; David G. Savage, *Where religion, ideology and the Web cross*, L.A. TIMES, Feb. 17, 2008, at A16. As one who takes his own Christianity seriously, I found it a delight to be lectured on religious virtue by the likes of Newt Gingrich, Bill O'Reilly, and William Bennett.

71. See Gene R. Nichol, *Balancing tradition and inclusion: Behind William & Mary's cross controversy*, THE VIRGINIAN-PILOT (Norfolk, Va.), Dec. 24, 2006, at J1 [hereinafter Nichol, *Balancing tradition*]; Gene Nichol, President, The College of William & Mary, Statement to the William & Mary Board of Visitors (Nov. 16, 2006) [hereinafter Nichol Statement] (transcript available at <http://web.wm.edu/news/archive/index.php?id=7026>).

72. See Nichol Statement, *supra* note 71.

73. For articles by three of the nation's leading church-state scholars examining the Wren Cross controversy and its constitutional implications, see Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 WM. & MARY L. REV. 2193 (2008), and Lupu & Tuttle, *supra* note 8.

74. One revoked a pledge in excess of ten million dollars. See Andrew Petkofsky, *W&M donor cancels pledge, cites Wren cross; Loss of \$10 million donation sets back college fundraising campaign*, RICHMOND TIMES-DISPATCH, Mar. 1, 2007, at A1.

75. See, for a beginning, Bill Geroux, *W&M will revisit debate about cross: Nichol wants group to study role of religion in public universities*, RICHMOND TIMES-DISPATCH, Jan. 26, 2007, at B2; articles referred to by Lupu and Tuttle, *supra* note 8; and articles cited in *supra* note 70.

76. See Altamirano, *supra* note 70; Will Coggin, Op-Ed, *Does President Nichol's Agenda Call for Secularizing College?*, RICHMOND TIMES-DISPATCH, Dec. 18, 2006, at A9; George Harris, *The Bishop, the Statesman, and the Wren Cross: A Lesson in American Secularism*, HUMANIST, July-Aug. 2007, at 37.

77. Geroux, *supra* note 75.

would be displayed on the altar during Christian religious services. At all other times, it would appear in a permanent glass case along the sidewall of the chapel, accompanied by a plaque describing its historical significance. This purported middle ground satisfied many, including me.⁷⁸ But a staunch, if diminished, opposition continued—in print and cyberspace.⁷⁹ Ultimately, it led, some months later, to the ending of my presidency.⁸⁰ Enough said.

It is not my purpose here to rehash those decisions and determinations. Enough ink, actual and electronic, has been dedicated to that effort. I have long since rediscovered the blessings of life as an actual academic. And there are, surely, wiser and far less self-interested students of the saga than I. My hope, instead, is to conclude by exploring what my chapel experience might have to say about Nussbaum's most emphasized theme—the role of equality in the interpretation of the religion clauses. If I entered into the controversy as perhaps an amateur separationist, I think it fair to say that I exited as a more thoroughly instructed egalitarian. I have come to believe that Nussbaum is closer to the core of religion jurisprudence, especially that of the Establishment Clause, than I previously understood.

It is not the case, of course, that I was unfamiliar with the claims and the language of religious discrimination before the heat and, one hopes, the light, of the Wren decision. It was, after all, the telling stories of religious minorities—faculty, students, staff, alumni, and others—that had led me to change the way the cross was displayed in the first place. They related that some had chosen not to attend, or not to stay, or not to believe that they enjoyed full membership at the college, because of this public and central endorsement of one particular religious tradition.⁸¹ They experienced its message as a declaration that the chapel and the college itself were designed more fundamentally for the benefit of some than others. There were, in fact, William and Mary insiders, and William and Mary outsiders—demarcated on a basis, religion, that they found more than surprising at a public university.

But these statements came from the victims of the state-embraced religious display. What surprised me more was how frequently and how powerfully so much of the discussion and correspondence I had with opponents of my decision also tracked the rhetoric of equality disputes—echoing

78. Natasha Altamirano, *Return of cross quiets debate at William & Mary*, WASH. TIMES, Mar. 8, 2007, at B1.

79. See Save the Wren Cross, www.savethewrencross.org/petition.php (last visited Oct. 18, 2008) (petition critical of decision); Should W&M Renew Gene Nichol as President?, <http://shouldnicholberenewed.org> (last visited Oct. 18, 2008).

80. Letter from Gene Nichol, President, The College of William & Mary, to the William & Mary Community (Feb. 12, 2008), <http://web.wm.edu/news/archive/index.php?id=8672>; see also Tamara Dietrich, *W&M's Halls Quaking After Nichol's Ouster*, DAILY PRESS (Newport News, Va.), Feb. 15, 2008, at A3; Susan Kinzie, *William & Mary President Resigns: College Had Said It Wouldn't Renew Nichol's Contract*, WASH. POST, Feb. 13, 2008, at B1; Michael Paul Williams, *Outrage and Loss at W&M*, RICHMOND TIMES-DISPATCH, Feb. 15, 2008, at B1; Statement from the William & Mary Board of Visitors to the William & Mary Community (Feb. 12, 2008), <http://web.wm.edu/news/archive/index.php?id=8675>.

81. See, e.g., Nichol, *Balancing tradition*, *supra* note 71.

not only the rejection of the different, of the stranger, but pressing claims of status, of entitlement, of expectation, of privilege and ownership.⁸² Williams might well have complained that those who spoke “‘so tenderly for [their] owne’” beliefs, symbols and practices had “‘yet so little respect, mercie, or pitie to the like . . . perswasions of other[s].’”⁸³

A significant element of the proffered objection castigated (after me, of course)⁸⁴ members of religious minorities who had the temerity to raise questions about the cross’s placement. They were, apparently, “cry babies,” “spoiled school boys,” “absurdly thin skinned,” “misguided complainers,” overly “sensitive malcontents,” who needed simply “to grow up.” They were “too fragile” to “exist at the college” or “take up space in such a revered institution.” They needed to be made to understand that the college, the Commonwealth of Virginia, and the United States “are overwhelmingly Christian”; that the university itself had “been brought into existence by Christians”; and that “democracy is the rule of the majority.” Numbers “prevail.” Minority student rights “end where the rights of Christian students begin.” We “cannot cringe in fear to those who object to our Christian traditions”—giving in to the “spiritually egalitarian crowd,” the “great secular god of diversity,” or the worship of “multiculturalism.”

Jewish, Muslim, and Hindu students admitted to the college “understood that they were attending a Christian school”; they knew that Christian symbols would be “a fact of life.” If they “had a problem with that,” they should “change [their] venue,” “pick another” university, “return to their own country,” or simply “leave.” There were different “places on the campus where people of ‘other religions’ [could] have their thin skins massaged to make them feel included.”

Most surprising to me, as an officer of a state university, was a frequent refrain that “if I had gone to Cardozo Law School . . . I would not have bridled or balked at seeing a Jewish symbol”; if I had attended Notre Dame, I would not mind Catholic icons; if I were to go to “college in Saudi Arabia,” I would not “expect people to remove symbols of Islam.” I would not “attempt to empty the Vatican” or “clear out the Taj Mahal.” Why, then, do they not give the same deference “to OUR schools”? When I “go to the Jewish community center, I don’t expect them to change.” If “Muslims, Jews, Buddhists, or atheists are offended by this, then, frankly, that’s too bad.”

“People of faith” have “given up too much.” We have yielded “too many of our founding sacrifices and histor[ies].” “I am offended” that outsiders

82. I refer here to a great volume of conversations, disagreements, phone messages, emails, letters, and other communications I had over the course of fourteen months with committed opponents of the cross decision—Board of Visitors members, alumni, legislators, politicians, religious activists, disgruntled citizens, and a handful of students and faculty. Principally the discussions were oral rather than written. But I received a healthy volume of emails as well. Essentially all the points I would make about the discussions, more broadly, seem to be reflected in various emails—so I cite, generally, from some of them below. Copies are on file with the author.

83. P. 53 (quoting 1 WILLIAMS, *supra* note 10, at 338).

84. I am, apparently, a “Nazi,” a “Stalin[ist],” a “Taliban,” an “asshole,” “retarded,” “sick and depraved,” “un-American,” “an ACLU religion hater,” and, well, a good deal worse.

would “accept an invitation into my culture and then demand that we change it.”⁸⁵ It is okay, perhaps, if they come. But they should not ask that we alter our way of doing things.⁸⁶

It is true, no doubt, that on matters of public controversy, you can find someone, or even a substantial group of someones, to say most anything. So comments like these ought to be understood in context. But I have seen firsthand, in ways that I wish I had not, that efforts to insist on the governmental display of majority religious symbols can “create ranks and orders of citizens, defining the status of some as unequal to . . . others” (p. 75). They are rarely, as advertised, actually disputes over the importance of religion in a democratic society. They turn instead, necessarily, on whose religion should be given ascendancy. The dominant group, as always, provides the only suggested candidate for anointment.

Such moves deliver, as Nussbaum writes, a “public statement that the majority is . . . who ‘we’ are, and that the minority are outsiders” (p. 15). They seek, unapologetically, to “set up” (p. 12) one tradition as orthodox, as official—rejecting an equal deference for the “striving[s] of conscience” (p. 37) in others. Saying, at bottom, who counts and who does not. They also stake a visible claim of ownership, identifying an institution, or a locale, or a government, as their own. They can move, as Nussbaum notes, beyond reverence to “selfishness,” to the “desire to lord it over others and establish . . . superiority” (p. 28)—like “an insult, a slap in the face . . . the sort of slap a noble gives to a vassal, one that both expresses and constitutes a hierarchy of ranks” (p. 227). A hierarchy the Constitution “utterly reject[s]” (p. 2).

Nussbaum concludes that steps such as banning school prayer, or Bible reading, or the state display of religious symbols are driven by “the search for equality . . . not an arrogant conviction that religion is unimportant or marginal. Religious people [have] often felt, and feel, aggrieved at such changes, but they should not: such changes respect each person’s equal conscience space, a value that religious people can join Roger Williams in enthusiastically endorsing” (p. 230).

An equal religious liberty embraces the full status of the sacred and the full status of the citizen. Perhaps Williams and Madison and Nussbaum got it right.

85. “Ignoring the feelings of native Christian Virginians” and failing to understand that people of faith will “take back America.”

86. During the height of the Wren controversy, a group of black leaders from the Hampton Roads area asked to meet with me about the dispute. They indicated that they had a great deal of experience with the claim—“it’s alright if you come, just don’t ask us to change anything.”