

2012

Justice Stevens, Religious Enthusiast

Andrew M. Koppelman

Northwestern University School of Law, akoppelman@law.northwestern.edu

Repository Citation

Koppelman, Andrew M., "Justice Stevens, Religious Enthusiast" (2012). *Faculty Working Papers*. Paper 216.
<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/216>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Working Papers by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Draft: Dec. 7, 2011.

Justice Stevens, Religious Enthusiast

Andrew Koppelman*

The often-repeated allegation that Justice John Paul Stevens is hostile to religion¹ has been authoritatively debunked in a pair of fine essays by Eduardo Peñalver and Christopher Eisgruber.² Here, I supplement their analyses in three ways. First, I will push their analyses even further, and show that Justice Stevens espouses a position that, in its own way, has religious roots and enthusiastically embraces a distinct conception of religion. Second, I will argue that Stevens's religion-friendliness casts doubt on their conclusion that his fundamental concern is equality. At least as important to him is protecting religion from corruption by the state. Finally, I will argue that his position, in order to be consistent, ought to acknowledge, more forthrightly than he does, that it treats religion as a distinctive human good.

I. Hostility to Religion?

Begin by contrasting Stevens with his colleague Justice Anthony Kennedy, who worries about the hostility claim and so reveals its assumptions. In his first Establishment Clause opinion, conspicuously parting company with Stevens, Kennedy claimed that strict separation of church and state "would require government in all its

* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Diane Amann and Thomas Berg for helpful comments, and to Marcia Lehr for research assistance. This is the first piece I've written closely reading Justice Stevens's work, but I have also written a book that defends and elaborates upon one of his dissenting opinions. See Andrew Koppelman with Tobias Barrington Wolff, *A Right to Discriminate? How the Case of Boy Scouts of America v. James Dale Warped the Law of Free Association* (2009).

¹ See the sources collected in Bill Barnhart & Gene Schlickman, *John Paul Stevens: An Independent Life* 245-48 (2010).

² Eduardo Moises Peñalver, *Treating Religion as Speech: Justice Stevens's Religion Clause Jurisprudence*, 74 *Fordham L. Rev.* 2241 (2006); Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 *Fordham L. Rev.* 2177 (2006).

multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious."³ If this is right, then neutrality between Protestantism and Catholicism is detrimental to Protestantism; neutrality between Presbyterianism and Episcopalianism is detrimental to Presbyterianism, and so forth. Religion yearns for, and suffers detriment if it is denied, the state's embrace.⁴ Kennedy shifted to a less relaxed reading of the Establishment Clause in *Lee v. Weisman*,⁵ but there was careful to leave unresolved "questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens."⁶ In a memo to Justice Harry Blackmun explaining his refusal to delete that language from his opinion, he emphasized the importance of showing that the Court "is not expressing any hostility to religion or religious persons."⁷

Justice Kennedy's vision of the harms of secularity is coupled with a deeply individualistic vision of disestablishment. Its purpose, he thinks, is to prevent coercion of individuals - understood broadly, as evidenced by his invalidation of a graduation prayer in *Lee v. Weisman*, but harm to individuals nonetheless.⁸ Thus his

³ *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Similarly, Chief Justice William Rehnquist in *Santa Fe School District v. Doe*, 530 U.S. 290 (2000), dissenting from an opinion for the Court written by Justice Stevens, declared: "The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life."

⁴ Attorney General Edwin Meese, in his influential manifesto for originalism, took a similar view. See Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 Nw. U. L. Rev. 727, 729-30 (2009).

⁵ 505 U.S. 577 (1992).

⁶ *Id.* at 586.

⁷ Quoted in Jan Crawford Greenberg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* 150 (rev. ed. 2008).

⁸ The same point has been made about Justice Sandra Day O'Connor's interpretation of the Establishment Clause, which, she thinks, "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). O'Connor's reading transforms the clause from a prescription about institutional arrangements into a kind of individual right, a right not to feel like an "outsider." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 Mich. L. Rev. 266, 300 (1987).

recent majority opinion narrowly confining standing to challenge Establishment Clause violations in *Arizona Christian School Tuition Organization v. Winn*.⁹ Unless individuals are demonstrably being hurt, no violation of the Clause demands a judicial remedy.¹⁰

This vision of disestablishment is blind to a central purpose of this constitutional provision. That purpose also evades some of Justice Stevens's most sympathetic interpreters. But it has not evaded Justice Stevens.

II. "Religious Beliefs Worthy of Respect"

A major impetus for strict separation was the religion-protective idea that religion can be corrupted by state support. This idea is friendly to religion but, precisely for that reason, is determined to keep the state away from religion. It is associated with the most prominent early proponents of toleration and disestablishment, including Milton, Roger Williams, Locke, Pufendorf, Elisha Williams, Backus, Jefferson, Paine, Leland, and Madison.¹¹ It is prominent, for example, in Justice Hugo Black's 1962 declaration in *Engel v. Vitale*¹² that the Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."¹³ Black claims that there is something fundamentally impious about establishment. It breaches the "sacred" and the "holy." It is remarkable to find such prophetic language in the U.S. Reports, but it has appeared there repeatedly,¹⁴

⁹ 131 S.Ct. 1436 (2011). See, to the same effect, *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007) (Kennedy in majority, Stevens in dissent).

¹⁰ There is a counterstrand within Kennedy's thinking, which emphasizes the corruption of religion. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 589 (1992) ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."). But the individualistic theme swamps this in Kennedy's overall conception and judicial practice.

¹¹ For a survey, see Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 Wm. & Mary L. Rev. 1831 (2009).

¹² 370 U.S. 421 (1962).

¹³ *Id.* at 431-32, quoting Madison, Memorial and Remonstrance Against Religious Assessments (1785).

¹⁴ See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting) (stating that one "purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government"); *Sch. Dist. of Abingdon v. Schempp*, 374 U.S. 203, 259 (1963) (Brennan, J., concurring) ("It is not

often in opinions written by Justice Black, the principal architect of modern Establishment Clause theory.¹⁵

Black retired from the Court in 1971. Justice Stevens was not appointed until 1975. But the same themes can be seen in the opinions of Justice Stevens.¹⁶

only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 59 (1947) (Rutledge, J., dissenting) ("[W]e have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.").

¹⁵ See Koppelman, *Corruption of Religion and the Establishment Clause*, at 1888-92.

¹⁶ And in opinions that Stevens joined. See *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 643 (2007) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (quoting with approval Justice Black's statement in *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947), that the framers thought "individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions."); *Zelman v. Simmons-Harris*, 536 U.S. 639, 711-12 (2002) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (Establishment Clause aims "to save religion from its own corruption," and "the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith"); *Mitchell v. Helms*, 530 U.S. 793, 871-72 (2000) (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting) ("government aid corrupts religion"); *Agostini v. Felton*, 521 U.S. 203, 243 (1997) (Souter, J., joined in this part of his opinion by Stevens and Ginsburg, JJ., dissenting) ("religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion."); *Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 891 (1995) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("the Establishment Clause . . . was meant not only to protect individuals and their republics from the destructive consequences of mixing government and religion, but to protect religion from a corrupting dependence on support from the Government"); *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring) ("The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation."); *id.* at 615 (Souter, J., joined by Stevens and O'Connor, JJ., concurring) (quoting with approval Madison's statement that "religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), in 5 *The Founders' Constitution* 105, 106 (P. Kurland & R. Lerner eds. 1987); *id.* at 627 (quoting the same passage again, and citing the importance of "protecting religion from the demeaning effects of any governmental embrace."); *County of Allegheny v. ACLU*, 492 U.S. 573, 645 (1989) (Brennan, J., joined by Marshall and Stevens, JJ., concurring in part and dissenting in part) ("The government-sponsored display of the menorah alongside a Christmas tree also works a distortion of the Jewish religious calendar.... [T]he

In *Wallace v. Jaffree*,¹⁷ his first majority opinion in a religion case, Justice Stevens declares that "the Court has identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment."¹⁸ He analogizes state interference with religion with the unconstitutional compulsion of speech. He invokes the ideas of "individual freedom of mind" and "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."¹⁹ Here is the analogy: "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority."²⁰

Here Stevens makes a noteworthy move, one that distances him from the tendency of some other separationists to rest their position on an abstract invocation of "conscience."²¹ (Or, to anticipate Part III of this Essay, the invocation of equality.) The right created by the First Amendment "to select any religious faith or none at all," he writes, "derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful."²² He even goes so far as to quote expressly religious arguments made by Madison: "It is the duty of every man to render to the Creator such

city's erection alongside the Christmas tree of the symbol of a relatively minor Jewish religious holiday ... has the effect of promoting a Christianized version of Judaism."); *Bowen v. Kendrick*, 487 U.S. 589, 640 n.10 (1988) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) ("The First Amendment protects not only the State from being captured by the Church, but also protects the Church from being corrupted by the State and adopted for its purposes."); *Aguilar v. Felton*, 473 U.S. 402, 409-10 (1985) (Stevens in majority) ("When the state becomes enmeshed with a given denomination in matters of religious significance ... the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters."); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) (Stevens in majority) (favored religions may be "taint[ed] ... with a corrosive secularism").

¹⁷ 472 U.S. 38 (1985).

¹⁸ *Id.* at 50.

¹⁹ *Id.* at 51-52, quoting *West Va. v. Barnette*, 319 U.S. 624, 637, 642 (1943), as quoted in *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977).

²⁰ *Id.* at 52.

²¹ See Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 *Legal Theory* 215, 215 n.1, 232-33 (2009).

²² *Wallace*, 472 U.S. at 53.

homage, and such only, as he believes to be acceptable to him."²³

This language, with its emphasis on the inner light rather than the outward form, reflects that Stevens is the last Protestant on the Supreme Court. Uncorrupted religion, for Stevens as much as for Backus or Leland, consists in the liberty of the individual seeker after God unimpeded by the state. Only beliefs generated by the exercise of that liberty are "worthy of respect." This is not an uncontroversial religious view, although it is pervasive in American law.²⁴

Thus, although he is suspicious of *some* religious accommodations, he was part of the majority in *Thomas v. Review Board*,²⁵ which found a constitutionally significant burden on religion when the denial of unemployment benefits puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs."²⁶ But Stevens's individualism is not Kennedy's: he understands that the protection of this individualistic understanding of religion requires structural limitations on the state. He has twice quoted with approval the following statement by Clarence Darrow:

The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve.²⁷

The theme appears in other Stevens opinions. His dissent in *Roemer v. Bd. of Pub. Works*²⁸ emphasized "the pernicious tendency of a state subsidy to tempt religious

²³ Id. at 53 n.38, quoting Madison, Memorial and Remonstrance Against Religious Assessments (1785).

²⁴ Winnifred Fallers Sullivan observes that the individualistic conception excludes quite a lot of religion: "for most religious people everywhere at most times, religious leadership, and the form of government of one's religious community, is, in some sense, given, not chosen, and related in explicit ways to government. Those are aspects of religion that gives it its authority and its comfort." *Requiem for the Establishment Clause*, 25 Const. Comm. 309, 310 (2008).

²⁵ 450 U.S. 707 (1981).

²⁶ Id. at 717-18. See also *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Frazee v. Illinois Dept. of Social Security*, 489 U.S. 829 (1989)(both with Stevens in majority).

²⁷ Tr. of Oral Arg. 7, *Scopes v. State*, 154 Tenn. 105, 289 S. W. 363 (1927) (on file with Clarence Darrow Papers, Library of Congress) (punctuation corrected); quoted in *Wolman v. Walter*, 433 U.S. 229, 264 (1977)(Stevens, J., dissenting), and *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 812 n.19 (1995)(Stevens, J., dissenting).

²⁸ 426 U.S. 736, 775 (1976).

schools to compromise their religious mission without wholly abandoning it."²⁹ In *Wolman v. Walter*,³⁰ he was concerned that "sectarian schools will be under pressure to avoid textbooks which present a religious perspective on secular subjects, so as to obtain the free textbooks provided by the State."³¹ In *Kiryas Joel v. Grumet*,³² he declared that the state had impermissibly "provided official support to cement the attachment of young adherents to a particular faith."³³ The basis for his suspicion of judicially imposed free exercise exemptions, he explained, was his concern that it would place courts in "the business of evaluating the relative merits of differing religious claims."³⁴

In *County of Allegheny v. American Civil Liberties Union*,³⁵ he advocated "a strong presumption against the display of religious symbols on public property,"³⁶ noting the "risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful."³⁷ He cited opponents of a state-funded crèche who "do not countenance its use as an aid to commercialization of Christ's birthday."³⁸ He quoted with approval Justice Black's declaration in *Engel* that "[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."³⁹

His admiring view of religion is also apparent in his opinion for the Court in *Watchtower Bible and Tract Society*

²⁹ Id. at 775 (Stevens, J., dissenting).

³⁰ 433 U.S. 229 (1977).

³¹ Id. at 266 n.7 (Stevens, J., dissenting).

³² 512 U.S. 687 (1994).

³³ Id. at 711 (Stevens, J., concurring).

³⁴ *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982)(Stevens, J., concurring in the judgment); he quotes this passage and repeats the point in *Goldman v. Weinberger*, 475 U.S. 503, 513 & n.6 (1986)(Stevens, J., concurring).

³⁵ 492 U.S. 573 (1989).

³⁶ Id. at 650 (Stevens, J., concurring in part and dissenting in part); accord *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 797, 806-07 (1995)(Stevens, J., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 708 (2005)(Stevens, J., dissenting).

³⁷ *Allegheny*, 492 U.S. at 651 (Stevens, J., concurring in part and dissenting in part); quoted in part in *Van Orden*, 545 U.S. at 708, 718 n.17 (Stevens, J., dissenting).

³⁸ Id.; the sentence is repeated in *Pinette*, 515 U.S. at 812 n.19.

³⁹ *Allegheny*, 492 U.S. at 653 n. 14 (Stevens, J., concurring in part and dissenting in part), quoting *Engel v. Vitale*, 370 U.S. 421, 435 (1962).

v. Village of Stratton,⁴⁰ in which he declared, while protecting door-to-door religious canvassing, that "[t]his form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits."⁴¹ Stevens demands a high wall of separation because he wants to protect religion from the state. As he put it in *Van Orden v. Perry*,⁴² quoting Madison, "religion & [Government] will both exist in greater purity, the less they are mixed together."⁴³

The same religion-protective impulse animates his advocacy of strict separation to prevent government funding of religious activities. From his earliest opinions to *Zelman v. Simmons-Harris*,⁴⁴ in which he denounced "the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths,"⁴⁵ he argued that state funding of religion would violate the Establishment Clause. Yet in *Witters v. Wash. Dep't of Servs. for the Blind*,⁴⁶ he joined the majority opinion's holding that the use of public funds for a blind student studying for the ministry was permissible, because any aid "that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."⁴⁷ Evidently the problem is not state funding as such. It is the potential of selective funding to distort religious decisions.

III. The Equality Interpretation

Peñalver has shown that the pattern of Stevens's religion clause decisions - siding with the liberals on Establishment Clause questions, invalidating public funding of religion and public religious expression, while voting with the conservatives in rejecting free exercise-based

⁴⁰ 536 U.S. 150 (2002).

⁴¹ *Id.* at 156.

⁴² 545 U.S. 677 (2005).

⁴³ *Id.* at 725 n. 25 (Stevens, J., dissenting)(quoting Letter from James Madison to Edward Livingston (July 10, 1822), in 5 *The Founders' Constitution* 106 (P. Kurland & R. Lerner eds. 1987); see also *id.* (quoting same letter, noting the strong tendency to "some sort of alliance or coalition between [Government] & Religion, which has such a "corrupting influence on both the parties, that the danger cannot be too carefully guarded [against]"); *id.* at 725 n. 26 (quoting same letter: "Religion flourishes in greater purity, without than with the aid of [government]").

⁴⁴ 536 U.S. 639 (2002).

⁴⁵ *Id.* at 684 (Stevens, J., dissenting).

⁴⁶ 474 U.S. 481 (1986).

⁴⁷ *Id.* at 488.

exemption claims - is animated, not (as some have claimed) by hostility to religion, but by a distinctive perspective that holds that religious majorities are uniquely dangerous, and religious minorities are uniquely vulnerable. "Judicial intervention in defense of religion is . . . appropriate, on Justice Stevens's view, principally in situations in which the Court thinks it likely that a religious group (or believer) is being unfairly singled out for unequal treatment or where some sub-category of religious groups (or believers) are particularly vulnerable to state coercion."⁴⁸ Special benefits for religion raise his suspicions when they benefit majorities, but such benefits for unusually vulnerable groups do not violate the Establishment Clause.

Eisgruber similarly observes that Stevens is most likely to intervene on behalf of free exercise claims when a religious minority has received unusually unfavorable treatment at the hands of the state, and from this infers that his central concern is equal membership in society.⁴⁹ The central problem with establishment, according to Eisgruber, is that it signifies second-class citizenship for members of minority religions. He is more enthusiastic than Peñalver about this theme in Stevens, but both are confident that it is Stevens's predominant concern in religion clause adjudication.

Peñalver and Eisgruber are, I believe, correct in thinking that equality is one central concern of Stevens.⁵⁰ But neither of them recognizes the difficulties of putting this concern directly into practice. Both neglect the importance, to Stevens and to Establishment Clause law more generally, of the corruption concern.

It is true that the pattern of Stevens's decisions is one of protecting religious minorities. But is that the result he is aiming for, and should lower courts try to replicate this pattern? A major theme in Stevens's religion jurisprudence, from the beginning, is the need for

⁴⁸ Peñalver, *supra*, at 2247.

⁴⁹ Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, *supra*, passim.

⁵⁰ See also Diane Marie Amann, John Paul Stevens and Equally Impartial Government, 43 U.C. Davis L. Rev. 885, 916-17 (2010). Amann notes Stevens's early encounters with anti-Jewish prejudice. When he took his first law firm job, he wrote to his old boss, Justice Wiley Rutledge, that the firm included several Jews, "contrary to the practice of most of the successful outfits in Chicago." He later cofounded a small firm that included a Jewish partner. *Id.*

simple, workable rules.⁵¹ Thomas Berg has shown that any attempt by courts to specifically protect religious minorities presents intractable difficulties: "Because of America's complex patterns of religious identities, who is a minority will often vary depending on the geographical location, on the institutional setting in which a particular legal issue arises, and on how one chooses the key religious differences that sort groups into different categories."⁵² The best way to protect minorities, he argues, is to "follow rules structurally designed to protect whoever happens to be the minority."⁵³ This is, in fact, what Stevens has been doing.

The most thorough attempt to work out a theory of the religion clauses that directly operationalizes a concern with equality is the collaborative work of Eisgruber and Lawrence Sager, who claim Stevens as their champion on the Court.⁵⁴ Like Stevens, they think religion is valuable, but argue that it is unfair to privilege it over other, equally valuable human activities. They do not always object to the legal singling out of religion. Rather, their central claim is that such singling out is only justifiable in order to protect religion from discrimination. Among their proof-texts is Justice Stevens's declaration that "[a] paramount purpose of the Establishment Clause is to protect . . . a person from being made to feel like an outsider in matters of faith, and a stranger in the political community,"⁵⁵ and his declaration that constitutionally mandatory exemptions "could be viewed as a protection

⁵¹ See Robert Judd Sickels, John Paul Stevens and the Constitution: The Search for Balance 44-47 (1988).

⁵² Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L. Q. 919, 923 (2004).

⁵³ *Id.* A similar point can be made about religious division, which is also a persistent concern of Stevens. See Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 Geo. L. J. 1667 (2006).

⁵⁴ "Lawrence G. Sager and I have . . . shown how a Stevens-like equality-based exemptions jurisprudence could lead to more robust protection for religious conduct than the Court has ever provided." Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, *supra*, at 2180. The theory is worked out at fullest length in their book, Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* (2007), which elaborates claims made in earlier articles. (It discusses Stevens with approval at 264, 266.) Because some details of the argument are stated more fully in those articles, which aim at a more specialized readership, I will draw upon them as well as the book.

⁵⁵ *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 799 (1995)(Stevens, J., dissenting), quoted in Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, at 2179.

against unequal treatment rather than a grant of favored treatment for the members of the religious sect."⁵⁶

Instead of privilege, they propose a principle that they call equal liberty.⁵⁷ Equal liberty has three components: (1) "no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects;"⁵⁸ (2) "aside from this deep and important concern with discrimination, we have no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities;"⁵⁹ (3) "citizens in general enjoy broad space within which to pursue and act upon their most valued commitments and projects, whether these be religious or not."⁶⁰ This "broad understanding of constitutional liberty generally" will "allow religious practice to flourish."⁶¹

Privileging and protection however are not analytically distinct, but rather are logically continuous with one another. The question is not whether, but rather what, to privilege. Once this is understood, it becomes clear that, just like a minority-protection principle, Eisgruber and Sager's equal liberty principle is empty and unhelpful in resolving any actual legal question. It is not a principle at all, but a worry about unfairness that can at best play a useful role in influencing judgment about inescapably discretionary decisions.

They reject claims "that religious convictions are more important or in some way more valuable than all others, that religious divisions are more dangerous than all others, or that religion is uniquely immune to political

⁵⁶ *United States v. Lee*, 455 U.S. 252, 264 n.3 (1982)(Stevens, J., concurring), quoted in Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, at 2179, who also cites a similar statement in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 147 (1987)(Stevens, J., concurring). See also Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1290 (1994), citing Stevens's similar statement in *Bowen v. Roy*, 476 U.S. 693, 716-23 (1986) (Stevens, J., concurring).

⁵⁷ In earlier work, they referred to the same principle as "equal regard." "Equal regard requires that the state treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally." *The Vulnerability of Conscience* at 1285. In their book, they occasionally revert to the earlier term. See *Religious Freedom and the Constitution* at 13, 89, 90-93, 96, 102, 120, 256.

⁵⁸ *Religious Freedom and the Constitution* at 52.

⁵⁹ *Id.*

⁶⁰ *Id.* at 245.

⁶¹ *Id.* at 52-53.

judgment and regulation."⁶² But they are not Benthamite utilitarians who think that all preferences ought to be treated the same.⁶³ Some concerns have special urgency, religion is one of these, and it ought not to be privileged *relative to the others*: "religion does not exhaust the commitments and passions that move human beings in deep and valuable ways."⁶⁴ They offer several different formulations of the criteria for admission into this set of particularly important concerns: these are "deep" commitments;⁶⁵ religion should not be privileged "by comparison to comparably serious secular commitments;"⁶⁶ other concerns are equally "important;"⁶⁷ "religious practices enjoy a dignity equal to other deep human convictions (such as the love parents feel for their children)."⁶⁸ Eisgruber and Sager deny "that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions."⁶⁹ However, they have their own special class. It just happens to be larger than "religion."

Once it is stipulated that some human wants have a stronger claim than others, the distinction between the two models, of privilege and protection, disappears. What Eisgruber and Sager really advocate is that deep commitments be privileged relative to shallow ones, but protected from discrimination relative to one another.

To see how privilege and protection are intertwined, consider a familiar rule of law: all adults and no infants may vote in elections. Under this rule, adults A and B may vote, while infant C may not. A and B are thus privileged relative to C. If someone proposes to deny A the right to vote—say, because A is black, or female—this is

⁶² Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 Tex. L. Rev. 1273, 1275 (2007).

⁶³ The contrast between their views and Bentham's is more fully developed in Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. of Ill. L. Rev. 571.

⁶⁴ *The Vulnerability of Conscience* at 1245 n.††.

⁶⁵ Religious Freedom and the Constitution at 87, 89, 95, 101, 197, 241, 246, 252.

⁶⁶ Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note, at 1271; see also Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 104 (referring to "other, comparably serious commitments"); Religious Freedom and the Constitution at 90, 101, 103, 108, 300 ("serious").

⁶⁷ Religious Freedom and the Constitution at 6, 9, 15, 52, 95, 96.

⁶⁸ Eisgruber & Sager, *Congressional Power*, *supra* note, at 114.

⁶⁹ Religious Freedom and the Constitution at 6.

discriminatory, and A is entitled to be protected from such a discriminatory rule. That rule would be wrong because it would impose an equality of the wrong sort: it would treat A as if she were (equal to) an infant. Guaranteeing the right to vote to both A and B protects each from discrimination relative to one another, but it also privileges both relative to C.

Thus, Eisgruber and Sager are too confident when they say, for example, that the Religious Freedom Restoration Act is unconstitutional because it singles out religion and treats it as more valuable than some other human activities, or relieves religious people from burdens others must bear.⁷⁰

How can we know that the legislative regime of which RFRA is a part is giving unduly little weight to nonreligious concerns? RFRA alone cannot tell us that. We would have to know how those other concerns are in fact treated.

Eisgruber and Sager respond that all discrimination claims face a similar evidentiary problem: one always must find a comparator to show that discrimination is occurring.⁷¹ But the real question is whether there is an intelligible analytic distinction between privileging and protection in this context. The difficulty is not merely evidentiary. It is that without further specification, we do not know what we are looking for evidence of.

Professor Eisgruber declares that this vagueness is "deliberate, because I mean the proposition to be neutral among various ways of filling out the concept—though I do mean to insist that there exist some 'comparably serious and fundamental' non-religious commitments."⁷² But in order for the principle to have any bite, it is necessary to specify what those commitments are. Unless that is done, one cannot possibly tell whether they are unfairly being treated less favorably than comparable religious commitments.

Berg has shown that this is an intractable problem for Eisgruber and Sager. "In any case involving accommodation of a religious interest, numerous other personal commitments and interests arguably are comparable, and the government typically accommodates some and not others."⁷³

⁷⁰ Id. at 264-67.

⁷¹ Id. at 100-08 (responding to earlier criticisms of mine).

⁷² E-mail from Christopher L. Eisgruber to Andrew Koppelman (July 10, 2005).

⁷³ Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 Tex. L. Rev. 1185, 1194 (2007).

Eisgruber and Sager argue, for example, that, where a police department allowed an officer to wear a beard for medical reasons, it also was appropriately required to allow a beard for religious reasons. But the same police department did not allow beards "to mark an ethnic identity or follow the model of an honored father."⁷⁴ So the requirement of equal regard is incoherent: "When some deeply-felt interests are accommodated and others are not, it is logically impossible to treat religion equally with all of them."⁷⁵

A similar difficulty is presented by the Eisgruber and Sager-like position that Stevens takes in *City of Boerne v. Flores*,⁷⁶ in which he declared that the Religious Freedom Restoration Act was unconstitutional as applied to the states because it violated the Establishment Clause. Stevens's argument here is brief but dense and, I will argue, combines two different arguments. The first is like that of Eisgruber and Sager: other equally valuable commitments are being slighted in favor of religion.

If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law.⁷⁷

Here the trouble is that some concerns that are just as valuable as religious ones are being discriminated against. But, as with Eisgruber and Sager, how can we tell whether RFRA is part of a regime of unfair privilege? Stevens once cited the "overriding interest in keeping the government-whether it be the legislature or the courts-out of the business of evaluating the relative merits of differing religious claims" as a reason for denying religious accommodations: "The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude."⁷⁸ If it is never permissible to single out religion for special treatment, no specifically religious

⁷⁴ Id.

⁷⁵ Id. at 1195.

⁷⁶ 521 U.S. 507 (1997).

⁷⁷ Id. at 537.

⁷⁸ *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982)(Stevens, J., concurring in the judgment).

accommodation could ever be permitted. Yet this is not Stevens's view. In *Cutter v. Wilkinson*⁷⁹ he joined a unanimous Court in upholding the The Religious Land Use and Institutionalized Persons Act (RLUIPA) against Establishment Clause challenge. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,⁸⁰ he joined a unanimous Court in applying RFRA to limit the reach of federal law, without a whisper about the Establishment Clause. Perhaps he eventually was persuaded that facial neutrality does not preclude religious discrimination. (He does not defer to facial neutrality in the school funding cases.)⁸¹ So he has Establishment Clause worries, but they don't preclude every religious accommodation. Eisgruber and Sager, defending Stevens, explain this pattern by saying that accommodation is permissible when it aims at preventing discrimination. Thus, "the Court's analysis in *O Centro* was dominated by concerns that could easily be rephrased in the language of equality."⁸² As we have seen, however, that standard is so malleable as to be meaningless.

The rest of his *Boerne* concurrence raises a very different concern:

Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.⁸³

Here the problem is not treating religion as a distinctive human good. It is that the state is again interfering with religion, here by favoring theism over nontheism.⁸⁴ "[T]he Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith."⁸⁵ There is a tension between this

⁷⁹ 544 U.S. 709 (2005).

⁸⁰ 546 U.S. 418 (2006).

⁸¹ I owe this point to Tom Berg.

⁸² Religious Freedom and the Constitution at 266.

⁸³ *Boerne*, 521 U.S. at 537.

⁸⁴ "A government practice violates the Establishment Clause if it 'either has the purpose or effect of "endorsing" religion.'" *Salazar v. Buono*, 130 S.Ct. 1803, 1832 (Stevens, J., dissenting), quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).

⁸⁵ *Van Orden v. Perry*, 545 U.S. 677, 711 (2005)(Stevens, J., dissenting). For a symmetrical concern, see *Widmar v. Vincent*, 454 U.S. 263, 281 (1981)(Stevens, J., concurring): "If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted."

argument and the one about singling out religion, because the protection of religion from state interference itself singles out religion for special treatment.

This concern could be addressed by understanding "religion" at such a high level of abstraction that it is not conflated with theism. That is, in fact, what the Court has done in other contexts.⁸⁶ Stevens never takes up this possibility, but, I will argue in the next section, it is the approach most consistent with his general religion clause jurisprudence.

The deepest difference between the Eisgruber-Sager approach and Stevens's jurisprudence is that the former focuses on civil status, and thus on harm to individuals, to the complete exclusion of any distinctive concern about protecting religion as such from state control. As with Kennedy, this can weaken the force of disestablishment.

Consider *Van Orden v. Perry*,⁸⁷ a Ten Commandments display case, in which Stevens objected that the display impermissibly "places the State at the center of a serious sectarian dispute."⁸⁸ This is because "[t]here are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance."⁸⁹ Scalia (here joined by Rehnquist, Kennedy, and Thomas) retorted that "The sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not)."⁹⁰

Justice Scalia envisions a role for the Court in which it decides which articles of faith are sufficiently widely

⁸⁶ *Torcaso v. Watkins*, 367 U.S. 488 (1961); *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); Andrew Koppelman, *The Story of Welsh v. United States: Elliott Welsh's Two Religious Tests*, in Richard Garnett and Andrew Koppelman, eds., *First Amendment Stories* (forthcoming 2011).

⁸⁷ 545 U.S. 677 (2005).

⁸⁸ *Van Orden v. Perry*, 545 U.S. 677, 718-19 (2005) (Stevens, J., dissenting).

⁸⁹ *Id.* at 717-18, citing Steven Lubet, *The Ten Commandments in Alabama*, 15 *Const. Commentary* 471, 474-476 (1998). Similarly in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), he would have invalidated a state law declaring that human life begins at conception, because he regarded this as "endorsement of a particular religious tenet." *Id.* at 568 (Stevens, J., concurring in part and dissenting in part).

⁹⁰ *McCreary County v. ACLU*, 545 U.S. 844, 909 n. 12 (2005) (Scalia, J., joined by Rehnquist, C.J., Kennedy, J., and Thomas, J., dissenting). *McCreary* was a companion case to *Van Orden*, decided the same day.

shared to be eligible for state endorsement (and in which determinedly uneducable judicial ignorance is a source of law). Evidently, the state may endorse any religious proposition so long as that proposition is (or is believed by a judge unacquainted with doctrinal niceties to be) a matter of agreement between Judaism, Christianity, and Islam.

Justice Stevens, of course, was having none of this. But if, as Eisgruber and Sager think, Stevens's jurisprudence is only about equal public status, then Scalia is right and Stevens should have been persuaded. Most citizens are not sufficiently well schooled in theology to know or care that the state is adjudicating a religious question. If they don't know about it, then it can't adversely affect anyone's public status. But evidently Stevens cares about more than public status.⁹¹

If the underlying concern is the protection of religion from corruption, then equality remains a pressing concern: discrimination among religious views is likely to produce a degraded form of public religion. But equality does not exhaust the concerns of disestablishment. The central concern is structural, having to do with the proper relations between the state and religion. It is neither about coercion of individuals nor second-class status for groups.

IV. The Good of Religion?

⁹¹ Eisgruber emphasizes that Stevens has quoted with approval Justice O'Connor's declaration that "[t]he Establishment Clause 'prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.'" Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, supra, quoting *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 799 (1995)(Stevens, J., dissenting), quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989), quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984)(O'Connor, J., concurring). But Stevens in fact writes that this is what the Clause requires "at the very least." *Pinette* at 799, quoting *Allegheny* at 594. This is no more his entire theory of the Clause than his declaration that the Clause, "if nothing else, prohibits government from 'specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ.'" *Van Orden v. Perry*, 545 U.S. 677, 718 (2005)(Stevens, J., dissenting), quoting *Lee v. Weisman*, 505 U.S. 577, 641 (1992)(Scalia, J., dissenting); Stevens repeats this sentence in *Salazar v. Buono*, 130 S.Ct. 1803, 1828 (Stevens, J., dissenting). In both cases, he is accusing his colleagues of violating even their own cramped interpretations of the Clause. He is not embracing those interpretations.

One of the impulses that drives Scalia away from Stevens is the suspicion that Stevens's views are incoherent: he opposes special treatment of religion, yet sometimes supports free exercise accommodations. "We have not yet come close to reconciling [the requirement that government not advance religion] and our Free Exercise cases, and typically we do not really try."⁹² The solution Scalia and others have proposed would impose dramatic limits upon the Establishment Clause. They would read the Clause only to prohibit favoritism among monotheistic sects, while permitting states to favor monotheistic religion over its rivals, religious and nonreligious.⁹³ As we just saw in our discussion of the Ten Commandments case, Justice Kennedy, who joined Scalia's opinion in pertinent part, is tempted by this solution.

Scalia has a point. It is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection. Some justices and many commentators have therefore regarded the First Amendment as in tension with itself.

This apparent tension can be resolved in the following way. Begin with an axiom: The Establishment Clause forbids the state from declaring religious truth. A number of considerations support this requirement that the government keep its hands off religious doctrine. One reason why it is so forbidden is because the state is incompetent to determine the nature of this truth. Another, a bitter lesson of the history that produced the Establishment Clause, is that the use of state power to resolve religious controversies is terribly divisive and does not really resolve anything. State involvement in religious matters has tended to oppress religious minorities. Finally, there is the consideration that, I have shown, is a major concern for Stevens: the idea that establishment tends to corrupt religion.

These considerations mandate a kind of neutrality. The state may not favor one religion over another.⁹⁴ It also may not take a position on contested theological propositions. The scope of neutrality that the Establishment Clause demands has become broader as the range of contested theological positions has increased over

⁹² *Edwards v. Aguillard*, 482 U.S. 578, 617 (1987)(Scalia, J., dissenting).

⁹³ See Koppelman, *Corruption of Religion and the Establishment Clause*, at 1899-1901.

⁹⁴ See *Marsh v. Chambers*, 463 U.S. 783, 822-24 (1983)(Stevens, J., dissenting).

time. Stevens understands this. American society's "enviable hallmark over the course of two centuries has been the continuing expansion of religious pluralism and tolerance."⁹⁵ The core principle, Stevens has argued, is that "the principle that government must remain neutral between valid systems of belief. As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems."⁹⁶

It is, however, possible, without declaring religious truth, for the state to favor religion at a very abstract level. The Court noticed this in *Texas Monthly v. Bullock*⁹⁷ when it invalidated a law that granted a tax exemption to theistic publications, but not atheistic or agnostic publications. Justice Brennan's plurality opinion, which Stevens joined, said that a targeted exemption would be appropriate for publications that "sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life."⁹⁸ Justice Blackmun thought it permissible for the state to favor human activity that is specially concerned with "such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong."⁹⁹ What is impermissible is for the state to decide that one set of answers to these questions is the correct set.

But the state can abstain from endorsing any specification of the best or truest religion while treating religion as such, understood very abstractly, as valuable. That is what the state in fact does. That is how it can accommodate religion as such while remaining religiously neutral. In *Boerne*, Stevens construed RFRA to discriminate in favor of theism, but this was not the only way in which the statute could be read.¹⁰⁰ The key to understanding the coherence of First Amendment religion doctrine is to grasp the specific, vaguely delimited level of abstraction at which "religion" is understood.

⁹⁵ *Van Orden v. Perry*, 545 U.S. 677, 730 (2005) (Stevens, J., dissenting).

⁹⁶ *Id.* at 734.

⁹⁷ 489 U.S. 1 (1989).

⁹⁸ *Id.* at 16 (plurality opinion by Brennan, J., joined by Marshall and Stevens, JJ.).

⁹⁹ *Id.* at 27-28 (Blackmun, J., joined by O'Connor, J., concurring in the judgment).

¹⁰⁰ Compare *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970). As noted above, he evidently did not read RFRA this way when he joined the unanimous Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

What in fact unites such disparate worldviews as Christianity, Buddhism, and Hinduism is a well-established and well-understood semantic practice of using the term "religion" to signify them and relevantly analogous beliefs and practices. Efforts to distill this practice into a definition have been unavailing.¹⁰¹ But the common understanding of how to use the word has turned out to be all that is needed. Courts almost never have any difficulty in determining whether something is a religion or not.

The list of reported cases that have had to determine a definition of "religion" is a remarkably short one. The reference I rely on here, *Words and Phrases*, is one of the standard works of American legal research, a 132 volume set collecting brief annotations of cases from 1658 to the present. Each case discusses the contested definition of a word whose meaning determines rights, duties, obligations, and liabilities of the parties.¹⁰² Some words have received an enormous amount of attention from the courts. Two examples, *Abandonment* and *Abuse of Discretion*, drawn at random from the first volume of this immense compilation, each exceed 100 pages.¹⁰³ Religion, on the other hand, takes up less than five pages.¹⁰⁴ The question of what "religion" means is theoretically intractable but, as a practical matter, barely relevant. We know it when we see it. And when we see it, we treat it as something good.

Strong separationism is a strategy for protecting this good from corruption by the state. To call it hostile to religion is confused to the point of perversity.

Stevens has never squarely embraced this answer to the dilemma. Before he could be expected to do so, it would have to be elaborated in considerably more detail than I can attempt here. But that is another story.¹⁰⁵

¹⁰¹ See Koppelman, *Corruption of Religion and the Establishment Clause*, at 1905-11.

¹⁰² See *Words and Phrases*, in West's Encyclopedia of American Law (2d ed. 2008).

¹⁰³ *Abandonment*, 1 *Words and Phrases* 37-147 (2007); *Abuse of Discretion*, *id.* at 323-462 and, in the 2008 supplement, 8-25.

¹⁰⁴ *Religion*, 36C *Words and Phrases* 153-57 (2002 & supp. 2008).

¹⁰⁵ See Andrew Koppelman, *Religious Neutrality in American Law: An Analysis and Defense* (forthcoming, Harvard U. Press 2012).