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Introduction

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INTRODUCTION

IN 2003, John F. Scarpa endowed a Chair in Catholic Legal Studies at Villanova University. The Scarpa Chair is the first of its kind in American legal education, and one of its principal aims is to support and stimulate scholarly research and reflection that defy the usual borders that segregate law and religion. The annual John F. Scarpa Conference on Law, Politics, and Culture seeks to bring scholars of varied perspectives into conversation on social questions that are both timely and enduring, with a special emphasis on the often ignored questions that lurk in the background and often silently dictate the outcomes in the sexier debates that dominate the headlines. The late Avery Cardinal Dulles, S.J., and Justice Antonin Scalia of the Supreme Court of the United States delivered the keynote addresses at the first two Scarpa Conferences, and were devoted, respectively, to the nature of the state/government and to the terms of the judicial office.

The third annual Scarpa Conference was held at Villanova University on February 19, 2009, and we at Villanova hope that this issue of the *Villanova Law Review* will be of value to readers interested in religious liberty and freedom of conscience. Professor Martha Nussbaum, the Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago, delivered the keynote address, which summarized the spirited arguments of her recent and much-discussed book *Liberty of Conscience: In Defense of America's Tradition of Religious Equality.* The seven papers collected here were presented at the Conference. All but one are responses to various arguments developed in Nussbaum's book. The one exception is Professor Nussbaum's own response, on the occasion of the Conference, to all the other papers presented that day. Read together, Professor Nussbaum's response and the other papers present a model of how academic discourse can advance mutual understanding.

The sometimes deadly fallout from differences in religion are a scandal to believers and nonbelievers alike. Such differences are not likely to go away. Meanwhile, should some consciences sometimes be coerced? Alternatively, should conscience be respected? Or, when it is formed on the

basis of religious belief, should conscience be merely tolerated? Should churches be recognized? Or should only consciences be respected or tolerated? These are just some of the questions addressed in the papers that follow. I would like to thank Professor Nussbaum for sharing her time and talent with us at Villanova and, through this issue, with the larger community that cares about such questions. For all of those who have made Villanova a place where such conversation can go forward, and for all those who worked to see this volume into print (above all the *Villanova Law Review* editors), I also offer my thanks.

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RELIGION, CONSCIENCE, AND EQUALITY*

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THIS essay reflects my response to Martha Nussbaum's striking and powerful book *Liberty of Conscience.*[1] Most but not all of what I say touches in one-way or another on the basic theme of equality. Some of my points may seem narrow or picky, but I believe in the main they bear on how strongly the historical tradition supports Nussbaum's approach or, more important, on how we now should view the values of liberty of conscience and equality in respect to religion.

How should religious beliefs and organizations figure in our political life? At no time in recent memory has this question aroused the passion it has in the beginning of this century. Former President George W. Bush reiterated the centrality of his evangelical Christian beliefs throughout his term in office, and the Supreme Court radically altered the law of the free exercise and establishment of religion.

We can distinguish roughly four related questions about religion and government, each with constitutional and nonconstitutional dimensions. The first question is: What accommodations should government make to the exercise of religion? Should it exempt religious pacifists from military duty, permit Amish parents to withdraw their children from school after the eighth grade, or allow the Native American Church to use peyote during worship? Should any such privileges from ordinary legal requirements be extended to individuals with strong nonreligious reasons? How far should legislators decide these matters? How far should courts go as part of enforcing the Constitution?

The second question concerns the government's sponsoring or endorsing particular understandings of religious truth. Should public school teachers lead prayers or complement the teaching of evolution with ideas of intelligent design? Should winter holiday displays in public parks include crèches? Should the Pledge of Allegiance contain the words "under God"? Do these practices amount to forbidden establishments of religion? Related questions arise about the discourse of high officials. Should they, as President George W. Bush did, keep referring to their own religious convictions and employ rhetorical tropes that appeal to co-believers?

The third question involves financial assistance. Religious groups offer a wide range of social services, including hospitals, adoption agencies, food kitchens, drug rehabilitation programs, and schools. Should public money assist these endeavors, so long as the state does not favor any partic-

* This essay is a modestly revised version of a piece that appeared in THE NEW YORK REVIEW OF BOOKS May 15, 2008, under the title of *Where Shall the Preaching Stop?*.

1. MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE (2008).

ular religion or favor religious efforts over nonreligious ones? If the government can, consistent with the Establishment Clause, pay for these services, should it? If so, what conditions should it set regarding those who receive and provide the services? More particularly, when it pays the bill, should it bar religious discrimination and should it ensure that none of its money goes to proselytizing or other religious efforts? Parallel to questions about direct government aid are ones about when religious organizations and individuals who contribute to them should receive relief from property, sales, and income taxes.

The fourth question, although a staple of political philosophy during the last few decades, is the least understood. It concerns inputs into the political processes—bases for decisions and explanations that citizens and officials offer for their positions. The view that everyone should rely on "public reasons" in politics stands opposed to the claim that people should rely on whatever premises they find most convincing. Any initial thought that people relying on religious bases necessarily promote their religion is mistaken. Consider the impoverished lives of animals subjected to factory farming: if a person supports a law to create a more tolerable existence for animals raised for human consumption, because she believes God made other animals, not purely for human benefit but as independently valuable creatures deserving a modicum of care from us, she does not sponsor her religion. Instead, she uses her deep understanding of reality to protect entities that deserve protection. The idea that people should rely on public reasons does not simply follow from the principle that government should not promote religion.

In *Liberty of Conscience*, Professor Nussbaum offers answers to these questions. Governments should make accommodations to the concerns of religious conscience and should extend these to the expressions of nonreligious conscience as well.[2] Governments should not engage in any genuine endorsement of religion, however inclusive.[3] Religious groups and individuals should participate on an equal basis in programs that aid nongovernmental providers of social services. In fleeting passages, Nussbaum indicates her adherence to the position favoring reliance on "public reasons" in our political life.

Lying at the heart of Professor Nussbaum's approach is her claim that shielding religious conscience is supremely important for any society that respects individuals and treats them with dignity. For her, conscience is not limited to convictions about how people should act. It is "the faculty in human beings with which they search for life's ultimate meaning."[4] Any society that acknowledges the equality of citizens should respect their consciences equally—a respect extending to nonbelievers. According to Nussbaum, the Free Exercise and Establishment Clauses should be under-

2. *See id.* at Ch. 4.
3. *See id.* at 259.
4. *Id.* at 19.

stood mainly to guarantee equal liberty of conscience. This overarching approach does not eliminate many difficult exercises in judgment, and courts rightly leave some issues to legislative resolution. She argues, however, that courts should not abdicate the task of protecting liberty of conscience to the legislative and executive branches.

Much of *Liberty of Conscience* displays various applications of Nussbaum's general theory, but we can better see why this theory matters if we understand some of the rejected alternatives. She opposes the Supreme Court's present doctrine that the Free Exercise Clause does not protect religious practice against reasonable general laws. A general law against the use of peyote should not bar a constitutional claim to use it in worship services. She also opposes a focus on a person's degree of religious liberty that is inattentive to how that liberty compares with the liberty of others. If religious conscientious objectors are exempted from military service, nonreligious conscientious objectors should receive the same treatment

In respect to the Establishment Clause, Nussbaum rejects the narrow interpretation that it forbids only the promotion of particular religious faiths, or only coercive government practices, or reaches only the federal government (not the states). She does not altogether rule out broad separationist theories that close ties between government and religion that are bad for religion and bad for government (quite apart from concerns about equality). She assigns those considerations a decidedly subordinate place in her general theory.

Nussbaum defends her thesis by weaving together philosophy, legal doctrine, and history. Because she does not suppose that judges should be wedded either to the original understanding of various constitutional clauses or the precise reasoning of earlier cases, her fundamental argument—made with force, eloquence, and occasional oversimplification—need not rest on any specific account of history or prior decisions. Partly to persuade those whose views about constitutional adjudication differ, Nussbaum lines up historical and judicial sources in support. I shall suggest that some important aspects of these accounts are one-sided in various ways.

In ably rendering complex constitutional issues comprehensible to nonlawyers, Nussbaum recognizes nuances about legal issues that advocates on both sides often miss. An Episcopalian who converted to Reform Judaism, and remains seriously religious, she shows that not only skeptics but also deeply religious citizens can welcome a political order in which governments refrain from promoting religion. On this subject, she offers many appealing proposals for resolutions of highly contested issues.

Recognizing strong counter-movements, Nussbaum nevertheless asserts that the dominant ideal in American history has been respect for an equal liberty of conscience. Early on, she asserts that the country "respects

people's committed search for a way of life."[5] It "has long understood that liberty of conscience is worth nothing if it is not equal."[6]

We may assume that the "worth nothing" phrase is not Professor Nussbaum's considered view. She rightly contends that any country with an established religion does not respect various religious consciences equally. A country with a weak establishment that grants generous liberty of conscience, such as Great Britain, is surely preferable to outright oppression of all but the favored faith.

This rhetorical slip is of little moment, but as someone who is not a historian, I was troubled by some historical assertions Nussbaum offers. She writes that the Pilgrims crossed the ocean to recover a space of "liberty and equality" denied them in England, but that the settlers forgot the lesson of equality implicit in their first Thanksgiving.[7] The early Pilgrims, seeking a haven for their own faith, were tolerant of diverse religious outlooks but hardly had a developed philosophy of equal respect for conscience. The more numerous Puritans who soon followed explicitly rejected such notions, less because of the harsh conditions Nussbaum emphasizes than a conviction that their "City upon a Hill" should be constructed according to their religious premises.

Professor Nussbaum devotes a substantial chapter to Roger Williams, whose Rhode Island society practiced religious toleration and who defended broad liberty of conscience in *The Bloudy Tenent of Persecution*,[8] well before John Locke's influential *A Letter Concerning Toleration*.[9] Williams believed that people of diverse religious understandings, capable of morally virtuous lives, could build a common life together. Unlike Locke, he perceived the vulnerability of conscience, regarding persecution as "soul rape."

Contrary to a typical view premised on Williams's extensive use of theological language and his unremitting opinion that true Christians—a small number—should separate their religious practices from the unregenerate mass, Nussbaum suggests that Williams's conclusions about conscience did not rest heavily on his own theological understandings.[10] She goes further in treating John Rawls's work as articulating and developing Williams's ideas. Rawls prominently claimed that members of a liberal democracy should not rely on their own religious perspectives and other

5. *Id.* at 2.

6. *Id.*

7. *See id.* at 34-37.

8. ROGER WILLIAMS, THE BLOUDY TENET OF PERSECUTION (1644).

9. JOHN LOCKE, A LETTER CONCERNING TOLERATION (Prometheus 1990)(1689).

10. *See generally* TIMOTHY HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY (1998); PEREZ ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST (2003).

"comprehensive" views to decide fundamental political issues, but rather seek shared premises and common ways of discovering facts.[11]

Nussbaum frequently refers to Williams as a paradigm for our traditions. Unfortunately, his systematic writings failed to exercise significant influence in the colonies and early republic. When Nussbaum speaks of "the success of his arguments," it is unclear whether the reader is to infer that outsiders were much affected by Rhode Island practices or independently came to embrace ideas similar to his.[12]

In respect to Williams, we can inquire into the foundation of his positions, his influence, and his relevance for modern understandings of religion and the state. Nussbaum quotes some passages that, read in isolation, could be taken as making claims that do not rest on religious grounds. For me, few, if any, of these passages strongly indicate that Williams's moral notions of religious liberty and impartiality were genuinely detached from his religious views, which I assume were the mainspring of his life. I doubt that the occasional passages that do not directly rely on religious premises show those premises have faded into insignificance in respect to the claims the passages make.[13] If one asks what Williams actually believed or how his readers understood him, I am skeptical one would have discovered him to be making arguments wholly detached from his religious premises. Even if this skeptical view reflects probable reality, it certainly does not mean we are unable to draw from him such detached arguments. Were we to accept a form of historical interpretation that relates the past to our present concerns, along the lines of Hans-Georg Gadamer, we might consider these as a historical interpretation of his work.[14]

In any event, the crucial relevance for Nussbaum's overall project is what we can draw from the ideas Williams expressed, not the relation of one idea to the other. For that purpose, we can certainly take these passages as independent from religious premises. Somewhat ironically, if they were genuinely inseparable from the religious premises, that might actually increase the appeal of separationist arguments for conservative Christians. Nothing in the chapter on Williams leads me to think he be-

11. *See* NUSSBAUM, *supra* note 1, at 57.

12. *See id.* at 44. One scholar writes of Williams having "no apparent influence" in the century after his death in 1683, and of Rhode Island as a "despised outcast," regarded by most Americans "as a kind of social outhouse." HALL, *supra* note 10, at 116. Nevertheless, he sees the positions of Williams as representing a cogent defense from a stance of dogmatic religious separationism for religious liberty and disestablishment. *See id.* at 117.

13. Although, as David Little asserts, Williams may have understood the foundation of political authority as not religious, this does not entail that the perspective for making this judgment is not religious. *See* David Little, *"Liberty of Conscience": An Exchange*, NEW YORK REVIEW OF BOOKS, June 12, 2008, at 82, *available at* http://www.nybooks.com/articles/21518.

14. HANS-GEORG GADAMER, TRUTH AND METHOD (2nd Rev. ed. 1989). One might think of a similar exercise with regard to certain passages in ST. AUGUSTINE'S, CITY OF GOD (1984).

lieved citizens should put aside their Christian understandings in deciding whether their governments should aid the poor or protect seriously impaired infants.

The exact extent of Williams's influence is irrelevant for Nussbaum's main concern, which is to sketch an appealing account of religious liberty rooted in our traditions. In this effort, her sketch of the history of anti-Catholic bias relates more directly to her interpretation of the Establishment Clause. That history is relevant to whether concern about state support of institutional religion has a solid ground, apart from concerns about equality.[15]

In a chapter called "Fearing Strangers," which also describes the appalling treatment of Mormons and Jehovah's Witnesses, Nussbaum's theme is that anti-Catholic bias in the mid-nineteenth century, directed against immigrants from southern and eastern Europe, generated an emphasis on separation of church and state by nativists who, all the while, were entirely comfortable with Protestant public schools.[16] Intellectual liberals in the mid-twentieth century, fueling the modern opposition to aid for parochial schools, were also biased against Catholics—failing to recognize the Church's long history of rational, natural law approaches to morality and politics. Moreover, they were unaware of the rigorous, thoughtful education provided in leading Catholic schools and neglectful of liberal Catholic thinkers, such as Jacques Maritain and John Courtney Murray.

Nussbaum disregards or underemphasizes other important facts regarding anti-Catholic bias. Centuries earlier, within dominantly Protestant colonies, anti-Catholic sentiment was extremely powerful. No stranger to the colonists, Catholicism was the widely perceived enemy of true belief. Jonathan Edwards, the leader of the Great Awakening, expressed a common view when he spoke of the Pope as the Antichrist and regarded the Catholic Church as representing evil in the cosmic struggle against good.[17] Later nineteenth-century prejudice built on the long, rich history of hostility. Opponents of aid to Catholic schools did not, as Nussbaum implies, lack evidence about the church's hostility toward political liberalism. An 1832 Papal Encyclical condemned the "absurd . . . proposition which claims that liberty of conscience must be maintained for everyone. It spreads ruin in sacred and civil affairs . . . ."[18] Only through the Second

15. For a recent book that is more relaxed about government expression than Nussbaum and stricter about aid to institutional religion, *see* NOAH FELDMAN, DIVIDED BY GOD (2005).

16. *See* NUSSBAUM, *supra* note 1, at 175.

17. *See* GEORGE M. MARSDEN, JONATHAN EDWARDS: A LIFE (2003).

18. POPE GREGORY XVI, MIRANI VOS: ON LIBERALISM AND RELIGIOUS INDIFFERENTISM (1832). Three decades later, Pope Pius IX endorsed Gregory's view that the idea of liberty of conscience as a personal right was an "insanity." *See* POPE PIUS IX, QUANTA CARA: CONDEMNING CURRENT ERRORS (1864).

Vatican Council in 1965 did the Church embrace a robust liberty of religious conscience.

Various leading separationists grossly overstated any Roman Catholic threat to American democracy, but their misgivings about aid to Catholic schools had some ground in authoritative church teachings and actual school practices. Although the church's rich philosophic traditions permeated its best schools, run by Jesuits and other religious orders, parish school education, which provided the bulk of Catholic schooling in the United States during most of the twentieth century, was usually more narrow and dogmatic. These practices have shifted significantly, with the great influence of Vatican II and with the increasing replacement of nuns and priests with lay teachers. When Nussbaum writes, "[m]ost Americans can see by now that Roman Catholicism . . . favors and teaches independence of mind," she does not remark that this altered perception is partly the consequence of a changed underlying reality.[19]

The modern issue for which it matters most whether someone sees equality or institutional separation as the heart of nonestablishment is government aid to religious education. Governments, uncontroversially, help finance religious groups providing other social services, such as hospitals and adoption agencies, so long as nonreligious providers are treated equally. It is widely agreed that public money should not pay for religious practices directly. Moreover, most agree that organizations receiving public funds must make their services available to all regardless of their religion.

The sticking point—not discussed by Nussbaum—is discrimination in employment. The Bush administration consistently maintained that religious providers relying on public money should be able to use religious criteria in choosing staff. Congressional resistance to this feature of the administration's legislative proposals for broad Charitable Choice resulted in a stalemate, allowing the administration to do most of what it wanted by executive order.[20] Although allowing religious groups to choose like-minded workers may serve the members' religious aspirations, the use of religious criteria creates an obvious inequality among those seeking work—one that is unjustified for positions not central to religious practice and education.

This national and local controversy over aid to religious activities has been centered on religious education. In the late nineteenth century, Congress nearly approved a constitutional amendment to bar such aid. Many states then adopted similar amendments to their own constitutions. In 1947, the Supreme Court, in *Everson v. Board of Education*,[21] allowed New Jersey to pay bus transportation costs for children attending parochial

19. *See* NUSSBAUM, *supra* note 1, at 298.

20. At the time of this writing, the Obama administration had not determined just how far to alter the guidelines of its predecessor.

21. 330 U.S. 1 (1947).

schools, but Justice Black's opinion for the Court contained strong separationist language. For Nussbaum, the theme of equality dominated his discussion, but the opinion emphasized outright separation of church and government. The fact that equality was not Justice Black's central idea was confirmed by his later dissent in *Board of Education v. Allen*,[22] when the Court confirmed New York's provision of textbooks for parochial school students. If Justice Black were mainly guided by equality considerations, textbooks would not have seemed so different from bus transportation. Instead, Justice Black thought books involved the state in "the heart" of religious education.[23]

In 2002, the Supreme Court approved Cleveland's voucher program, which granted substantial reimbursement to parents of children in private schools.[24] The great majority of schools qualifying for this aid were religious. Acknowledging the role of public schools in integrating our heterogeneous population, Nussbaum calls the case "genuinely difficult"—one instance of her refreshing recognition that in many Supreme Court cases both sides have strong arguments.[25] She recognizes that law's complexity is largely responsive to variations among circumstances, rather than a device of lawyers to befuddle others. Cleveland's program set reimbursement at a level likely to prove more attractive for use at religious schools than other private schools, which expend more per pupil. Of course, the financial aid involved the government deeply in education by religious institutions. If one concentrates on the state's assisting parents toward an equal chance to realize their educational aspirations, however, the Court's approval is sound.

Judicial resolution of the voucher issue—unlikely to be overruled—has shifted the focus from courts to legislatures. Thus far, concern that public schools will suffer if private education receives substantial subsidies, pressure by teachers' organizations, and, perhaps, a worry about the increasing number of strongly evangelical Protestant schools have proved formidable obstacles to the enactment of broad statewide voucher programs. Yet, an interesting constitutional issue remains: do state constitutions that forbid aid to parochial education violate the federal Free Exercise Clause by treating religion unfavorably? In 2004, the Supreme Court decided by a 7-2 margin that despite a general program to aid college students, a state may leave out those who plan to earn a "degree in theology," one "devotional in nature or designed to induce religious faith."[26] Treating such studies as preparation for the ministry, the Court concluded that a state could choose not to support them. Although this decision points toward the Court's acceptance of broader state restrictions

22. 392 U.S. 236 (1968) (Black, J., dissenting). In her book, Nussbaum did not discuss *Allen*.

23. *See id.* at 253.

24. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

25. *See* NUSSBAUM, *supra* note 1, at 302.

26. Locke v. Davey, 540 U.S. 712 (2004).

on aid to religious education, Chief Justice Rehnquist's opinion is too opaque to allow a confident prediction. Nussbaum's view considering the Court's decision as mistaken may suggest that her emphasis on equality leads her to underrate the value of keeping government out of the core functions of institutional religion.[27]

When it comes to governments themselves engaging in religious practices or teaching religious ideas, the Supreme Court has been fairly strict, forbidding them to sponsor oral prayers, bible reading, and instruction in creationism within public schools. Additionally, the Court forbade displays of crèches and the Ten Commandments that convey a religious message. Building on a prior test requiring that a practice is unconstitutional if its purpose or effect aids religion, the crucial swing vote in many religion cases, Justice O'Connor, created a test. This test asks whether a state is endorsing or promoting a religious view by its actions. Nussbaum agrees with this approach, which is designed to prevent members of minority religions or nonbelievers from feeling like outsiders. She thinks that a faithful application of that approach would accept "In God We Trust" on coins, but would not countenance "under God" in the Pledge of Allegiance recited by public school students. She, thus, disagrees with O'Connor's own unpersuasive conclusion, in a case in which the Court's majority sidestepped the constitutional issue and held that "under God" does not really endorse a religious view, but has been transformed into an exercise of ceremonial deism.[28] The recent Presidential Inauguration, with its lengthy invocation and benediction, certainly reminds us that religion has yet to fade from our most important public ceremonies.

In 1990, the Supreme Court's decision in *Employment Division v. Smith*[29] radically altered the constitutional doctrine about accommodations to religious exercise. A quarter of a century earlier, the Court had determined that a state could not bar a woman from receiving unemployment compensation because she was unwilling to accept employment requiring Saturday work, when her unwillingness rested on her conviction as a Seventh-day Adventist that she should not work on that day.[30] The Court announced that the state could not justify this impairment of her religious liberty without a compelling interest in doing so. Providing a rich account of Mrs. Sherbert, the plaintiff, and of the employment practices in her locale, Nussbaum approves the decision's standard of judgment as affording due respect to religious conscience.[31] In stressing that the state treated Saturday worshippers worse than those who worship on Sunday, Nussbaum transforms what was a supplementary ground into the opinion's major theme. She resists, however, any theory that the Free Ex-

27. *See* NUSSBAUM, *supra* note 1, at 303.

28. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

29. 494 U.S. 872 (1990).

30. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

31. *See* NUSSBAUM, *supra* note 1, at 136-37.

ercise Clause is only about unequal treatment, claiming instead that it calls for significant protection of religious conscience.

Most scholars agree with Nussbaum's judgment that the Constitution should be understood to require that governments accommodate religious conviction, though when she speaks of "a very workable and clear-edged doctrine," she understates the difficulty of assessing burdens on religion and the weight of state interests.[32] Suppose, for example, it is left to judges to determine whether the government should be able to recover money that a debtor filing for bankruptcy recently has tithed to his church. It is no simple exercise to decide how much this interferes with religious practices and how important is the government's interest in retrieving the money.

The Supreme Court's other major case protecting free exercise allowed a group of Old Order Amish to withdraw their children from school after eighth grade despite a state law requiring they stay in school, or receive comparable schooling at home, until the age of sixteen.[33] As Nussbaum recognizes, because withdrawal from school may well stunt the future development and vocational opportunities of some Amish children, this case, with powerful competing arguments, was hard.

Subsequently, the Court rejected the claim of a Jewish psychologist in the Air Force to wear his yarmulke indoors.[34] The Court said that the military deserved extraordinary deference to decide what promotes healthy discipline. The Supreme Court also ruled against the claims of Native Americans to prevent a development of government land that would destroy the quiet of a sacred locale.[35] Government development of its own land is not a "prohibition" of free exercise covered by the First Amendment. Nussbaum suggests that the Court in this case regarded the relevant burden as not substantial, but the opinion says that the government could build its road even if it "virtually destroy[ed] the . . . Indians' ability to practice their religion."[36]

Few observers realized that the majorities in both cases were poised to abandon the compelling interest test in situations in which people violate laws not specifically directed against religion. This happened in *Smith*, which rejected the constitutional claim of members of the Native American Church to use peyote in their worship services.[37] As Professor Nussbaum recounts, Justice Scalia's opinion for the Court manipulated the substance of the prior cases in astonishing ways in a vain effort to demonstrate continuity—not an uncommon strategy when the Court shifts constitutional doctrine. Few readers were fooled. Outrage was the response

32. *See id.* at 145.

33. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

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

35. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

36. *Compare id.* at 464 *with* NUSSBAUM, *supra* note 1, at 140.

37. *See* Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990).

of many scholars and the vast majority of significant religious organizations and groups devoted to civil liberties.

The upshot has been two important pieces of federal legislation. Additionally, similar laws in at least thirteen states and judicial decisions in others have sought to address this issue. All reimpose the language of the substantial burden-compelling interest approach. The Congressional response was accepted by a unanimous Court.[38] Even Justice Scalia, who has a strong distaste for standards whose application is unclear, signed onto the opinion.

As a caution about what I have written here, I should note that I never regarded this free exercise test as a strict compelling interest test.[39] This is unlike the one that applies to racial classifications and outright restraints on expression. The free exercise test has been, and should be, one that involves intermediate scrutiny.

The more difficult question about accommodation is what to do about analogous nonreligious conscience. Nussbaum spends considerable time on two conscientious objector cases, agreeing with the Court that genuine pacifists who are not religious in any ordinary sense should be treated like religious pacifists.[40] The Court tortured the language of the federal statute to reach this result, rather than stating a constitutional requirement. But what should be done about nonreligious drug users and a nonreligious right to spend Saturdays with children? One might defend a limitation to religious claims if analogous, powerful nonreligious claims are unlikely—e.g., the right to withdraw children from school—or the granting of nonreligious claims would create great dangers of fraud, such as claims for the use of illegal drugs. Nussbaum expresses herself as "somewhat nervous" with the suggestion of an author (myself) along these lines and is hesitant to differentiate drug cases from exemptions from military service.[41] She also suggests that claims to stay home with one's family on Saturday lack constitutional status.

I believe this precise combination of positions is difficult to defend. With any psychedelic drug, such as LSD, a user can plausibly assert a search for meaning in life. If potential protection extends to nonreligious users, any threshold requirement that a user show he is suffering a "substantial burden" will disappear, because we have no way to decide when a prohibition on nonreligious use imposes a substantial burden. The state, of course, could still prohibit use by everyone if it has a strong enough interest in doing so. Moreover, why does Nussbaum rule out the possibility that the desire of parents to spend time with their children may raise a serious issue of conscience? The search for meaning in the lives of many

38. *See* Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal, 546 U.S. 418 (2006).

39. *See generally* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FAIRNESS AND FREE EXERCISE (2006).

40. *See* NUSSBAUM, *supra* note 1, at 170-73.

41. *See id.* at 381 n.109.

parents depends on involvement with loved family members, and they take their care of their children as their highest moral responsibility. It is not simple to distinguish the (potentially protected) nonreligious drug user from the (unprotected) parent with a nonreligious reason to spend precious weekend days with children.

Nussbaum reverts to the last of our four questions about the place of religion in political life near her book's end. She draws upon Rawls's notion of an overlapping consensus, implying that, at least on fundamental issues, citizens and officials alike should rely on nonreligious grounds for political judgments.[42] Nussbaum's valid concern about equality of citizens provides a strong basis to conclude that officials should not run for office on the basis of their religious understandings and should engage in political discourse that does not rely on particular religious outlooks or disregard nonbelievers. It hardly follows that ordinary citizens should try to shed their religious convictions in politics or even that legislators should attempt to do so when they resolve troubling issues like the protection of animals. Such a conclusion would require arguments beyond those Nussbaum makes here.[43] On this issue, there are significant arguments of equality on both sides—one side against being compelled on bases they cannot be expected to accept, the other side against being told not to rely on reasons they find most convincing. My own conviction is that the balance of considerations regarding religious conscience points to a less drastic exclusion of religious convictions from political judgment.[44]

Martha Nussbaum's *Liberty of Conscience* offers powerful arguments in favor of protecting conscience and treating citizens equally. I believe there is greater scope for granting exemptions based explicitly on religion than she does. I also assign greater importance to values of institutional autonomy and nonentanglement (even apart from their contributions to conscience and equality). Moreover, my sense of a desirable constraint of public reasons is substantially more modest than hers. Nonetheless, I believe she has eloquently captured a great deal about how we should view relations between individual conscience and government authority.

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42. *See id.* at 361-62.

43. For other relevant discussion by her, see MARTHA NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, AND SPECIES MEMBERSHIP (2006).

44. My views are most fully developed in PRIVATE CONSCIENCES AND PUBLIC REASONS (1995) and RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988). A summary is in 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS Ch. 23 (2008).