The Equality Principle of Religious Freedom

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1. A New Principle of Religious Freedom?

Covid-19 killed more than 765,000 Americans in 2020 and 2021. During the most intense outbreaks, public authorities sought to slow the spread of the illness through a variety of "lockdown" measures that regulated schools, government offices, businesses, and private associations. In many instances, religious gatherings were not exempted from restrictive measures. Houses of worship were shuttered or forced to reduce capacity, and gatherings for religious worship in other settings faced strict limits.

Many of the restrictions affecting religion were challenged in court on the grounds that they violated the Constitution's guarantee of free exercise of religion. In *Tandon* (2021),[1] the Supreme Court granted an injunction against an executive order in California that had the effect of limiting religious gatherings in private homes, holding that the applicants were likely to succeed in their free exercise claim.

The Court justified its decision in a particularly interesting way. In an earlier era, it might have applied a *liberty* principle, which asks whether a law imposes too great a burden on religious exercise to be justified by the government's objectives. But this form of analysis was foreclosed by the Court's decision in *Smith* (1990), which found no right against burdens on religion that are incidental to a law that is neutral and generally applicable.[2] Instead, *Tandon* brought into focus a newer free exercise doctrine centered on *equality*. According to the majority opinion, there is a presumptive violation of religious freedom whenever government regulations

[1] *Tandon v. Newsom*, 141 U.S. 1294 (2021).
[2] *Employment Division v. Smith* 494 U.S. 872 (1990).

"treat *any* comparable secular activity more favorably than religious exercise". The central question was not whether religion was excessively burdened given the aims of the government measures but whether those measures treated religion less favorably than secular comparators. In the majority's view, California's policies did indeed treat certain comparable secular activities less restrictively than they treated private gatherings for religious worship.

The free exercise clause simply says that "Congress shall make no law…prohibiting the free exercise" of religion. The Constitution offers no explicit guidance about when precisely a law can be said to prohibit religious exercise. *Tandon* proposes a partial answer: it is a sufficient condition for a law to count as "prohibiting…free exercise" that, in imposing a burden on religious activity, it treats the activity in question less favorably than secular comparators. This answer is comparative: whether the law "prohibits" religion depends on how it treats non-religion. And, more specifically, it is egalitarian: it insists that religion be treated no less favorably than comparable secular commitments.

Tandon is not the only recent Supreme Court case to apply an equality principle to free exercise. The key question in a number of the pandemic-related cases that made it to the Court in 2020-22 was whether government policies treated religion worse than non-religion.[3] Did policies permit people to gather for secular purposes even while limiting them from gathering for religious purposes? Were individuals being granted exemptions from vaccine mandates for medical contraindications but not for religious objections? Similar reasoning could be found in non-pandemic cases. The city of Philadelphia had policies for contracting with foster-care agencies that prohibited agencies from rejecting prospective foster parents on the basis of sexual

[3] *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 U.S. 63, 72-75 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 U.S. 716, 717-20 (2021); *John Does 1-3 v. Mills*, 142 U.S. 17, 19-20 (2021), *Dr. A v. Hochul*, 142 U.S. 552, 556-57 (2021), *Austin v. U.S. Navy Seals*, 142 U.S. 1301, 1306-07 (2022).

orientation. But, in *Fulton* (2021), the Court reasoned that, because the city's policies left open the *possibility* of an exemption from this prohibition, the city was *required* to give such an exemption to foster-care agencies objecting to same-sex parents on religious grounds.[4] Otherwise, theoretically, the city could find itself giving an exemption to an agency with secular objections to same-sex parenting without having given one to an agency with comparable religious objections. In another line of cases, running from *Trinity Lutheran* (2017) to *Carson* (2022), the Court found that state programs offering a benefit to a broad class of organizations (e.g. private schools) would violate the free exercise clause if they disqualified religious members of that class from eligibility.[5] The free exercise clause, the Court asserted, "protects religious observers against unequal treatment."[6]

Two early and influential cases helping to establish equality as a principle of free exercise were decided in the 1990s in the aftermath of *Smith*. In *Lukumi* (1993), the Court overturned municipal ordinances in Hialeah, Florida that sought to prevent the unnecessary killing and cruel treatment of animals.[7] Observing that exceptions were made for many non-religious reasons for killing animals (e.g. food, pest control, hunting), but not to accommodate the Santeria religion's practice of animal sacrifice, the Court found that the resulting pattern of selective enforcement created an "inequality": the burden of the law was borne by religion but not by various secular counterparts.[8] In a second case, *Fraternal Order* (1999), the Newark police department enforced a regulation requiring its officers to be clean shaven.[9] It offered medical exemptions to

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[4] *Fulton v. City of Philadelphia*, 141 U.S. 1868 (2021).
[5] *Trinity Lutheran Church of Columbia Inc. v Comer* 582 U.S.__(2017); *Espinoza v. Montana, Department of Revenue* 591 U.S.__(2020); *Carson v. Makin* 596 U.S.__(2022).
[6] *Trinity*, 6.
[7] *Lukumi v. Hialeah,* 508 U.S. 520 (1993)
[8] *Lukumi*, 542-3.
[9] *Fraternal Order of Police v. Newark*, 170 F.3d 359 (3dCir. 1999).

individuals suffering from folliculitis but refused exemptions to Muslim officers claiming religious reasons to maintain a beard. For the appeal court that heard the case, this disparity was enough to establish an infringement of free exercise rights.

While the equality principle is part of a conservative Court's growing jurisprudence on religious freedom, it has also found favor among legal and political theorists, including liberal theorists. Normative theories have traditionally favored the liberty principle in formulating the meaning and justification of religious freedom.[10] The assumption is that it represents a serious setback to the legitimate interests of believers when the law imposes a burden on their efforts to follow their religion. Religious freedom is constituted, in part, by a weighty presumption against legal burdens on religious conduct, and it is justified by the weighty interest of religious believers in being able to act on their convictions. A number of theorists have objected to this account on several grounds. The account threatens to undermine democratic authority by allowing religious believers to claim an exemption whenever they have a religiously inspired disagreement with the law. It allows the religious to shift burdens onto others just because of what they happen to value or believe. And the account seems to elevate religion above other forms of belief and practice, and endow it with a privileged status.[11]

These critics of the liberty principle have sought to develop the equality principle as an alternative. One prominent liberal version of the principle is elaborated by Christopher Eisgruber

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[10] Versions of this principle are defended by Kent Greenawalt, *Religion and the Constitution*, 2 vols (Princeton, 2006-08); Martha Nussbaum, *Liberty of Conscience* (Basic Books, 2008); Cécile Laborde, *Liberalism's Religion* (Harvard, 2017) 221-9. In the same book, Laborde also develops a version of the equality principle, at 229-38. For discussion of Laborde's views, see my "Religious Exemptions and Disproportionate Burden," *Criminal Law and Philosophy* (2020).

[11] All three objections are developed by Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Harvard, 2007), especially at 41-44, 81-8, and in "The Vulnerability of Conscience," *University of Chicago Law Review* (1994).

and Lawrence Sager.[12] According to these authors, a crucial but neglected principle of religious freedom holds that "no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects".[13] For this reason, "minority religious practices, needs, and interests must be as well and as favorably accommodated by government as are more familiar and mainstream interests."[14] Other liberal theorists, including Cass Sunstein[15] and Nelson Tebbe,[16] have also offered sympathetic accounts of the equality principle. In Tebbe's view, equality (which he calls "equal value") belongs to a liberal tradition reaching back to Locke's principle that any activity that the law allows people to do for non-religious reasons (e.g. slaughtering a calf for feasting) it ought to allow them to do for religious reasons (e.g. slaughtering a calf for a religious ritual).[17] Ronald Dworkin also defended an egalitarian account.[18] Rejecting the view that religious freedom is a special right based on a liberty principle, Dworkin instead frames religious freedom as part of a general right to "ethical independence." There is no general presumption against substantial burdens on religion, but religion, like its secular counterparts, should not be legally burdened because officials judge it to be inferior to other ways of life.

What should we make of this egalitarian turn in the theory of religious freedom? The present paper explores this question. While it draws on examples from legal cases, the main focus is on the normative issues rather than the legal ones. The paper asks whether, as a matter of political morality, the equality principle offers a defensible framework for characterizing the

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[12] *Religious Freedom*.
[13] *Ibid*., 4.
[14] *Ibid.*, 13.
[15] "Our Anti-Korematsu", *American Journal of Law and Equality* (2021).
[16] "The Principle and Politics of Equal Value," *Columbia Law Review*, (2021) 91.
[17] John Locke, *Political Writings* (Penguin, 1993 [1689]) 414-15.
[18] *Religion Without God* (Harvard, 2013).

freedom that is owed to religious believers to act on their religion. The appeal to equality comes in stronger and weaker forms. The strong claim is that equality alone represents the fundamental principle of religious freedom, such that inequality of the appropriate kind is both necessary and sufficient for a legal burden on religious conduct to count as an infringement of religious freedom. The weak claim holds that equality is one of the fundamental principles determining the shape of religious freedom, but not necessarily the only such principle. On this view, inequality of the appropriate kind is sufficient for an infringement on religious freedom but not necessary.

Prior to assessing the equality principle in either its strong or weak form we need to better understand the principle. Discussions of the equality principle typically proceed as if the meaning of the principle is straightforward, but this is far from being the case. Of course, equality is a heavily contested concept in political philosophy, with a vast literature devoted to exploring questions about the concept's meaning, application, and justification. But my point is a narrower one about the equality principle of religious freedom. The principle that the law should treat religious activities just as favorably as comparable secular activities is less straightforward than it might initially appear. One question is whether the principle is best understood as normatively fundamental or as a heuristic. Considered as normatively fundamental, the principle holds that inequality of the appropriate kind is what makes a legal burden on religion a violation of religious freedom. Where the principle operates as a heuristic, the liberty principle is normatively fundamental, and the equality principle provides evidence as to whether the government has a sufficiently strong justification for enacting a law burdening religion. If the law is accommodating non-religion, then this suggests the justification of the law is not especially compelling or urgent and so would be insufficient to justify the burden on religion. I

return briefly to the heuristic variant in Sec. 3, but the main focus will be on exploring the equality principle as a principle about what is normatively fundamental to religious freedom.[19]

The paper highlights two further questions about the equality principle. The first concerns what exactly is to be treated equally: the object of equality. As formulated earlier, the principle says that religious "activities" should be treated as favorably as secular "activities." Other versions of the principle call for the equal treatment of religious "commitments" and "facilities." But what exactly makes an "activity", "commitment," or "facility" religious or secular? Is it the different kinds of reasons that people act on or the different types of ends that they have? The second question surrounds the meaning of equal treatment. Is it to be understood as solely a matter of the attitudes of lawmakers, or as also entailing further conditions? I shall contrast an "attitudes-only" answer to this question with one that also attends to whether people have been provided a fair opportunity to pursue the different ends that they have.

I argue that it makes a significant difference how these questions are answered. Equalizing with respect to ends rather than reasons produces a version of the equality principle that is more consonant with a liberal view of government and that is better equipped to withstand objections from commentators who advocate a general rejection of the principle. But, if the object of equality is ends rather than reasons, then many of the conclusions about particular cases that have been associated with the equality principle would have to be revised or jettisoned. How equal treatment itself is understood is also consequential for particular cases. Understood solely in terms of attitudes, the equality principle is rather modest in its implications for particular

[19] For the view that the equality principle's usefulness is "evidentiary," see Andrew Koppelman, "The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty," *Iowa Law Review*, 108 (2023). Koppelman observes that construing the principle in this way would mean "overruling *Smith* and directly balancing the interests" (2256) – i.e. reverting to what I am calling the liberty principle. My interest is in exploring whether there is a defensible formulation of the equality principle that is independent of the liberty principle.

cases. But if the meaning of equal treatment is understood in terms of both attitudes and opportunity, then the equality principle has a rich and interesting set of implications that underscores the importance of equality to religious freedom.

2. A Closer Look at the Equality Principle

Consider a law that imposes a burden on a person's sincere efforts to observe or practice her religion. The burden could take the form of a legal restriction, or it could consist of a cost applied to the religious conduct in question such as a tax, or disqualification from receipt of a public benefit. One principle of religious freedom – what I called the *liberty* principle – holds that the mere fact of the burden on religion is sufficient to justify the assertion that the law infringes religious freedom. A variation on this principle requires the burden on religion to be "substantial" to count as an infringement. On either version, the only remaining question is whether the infringement represents an all things considered violation of the individual's right to religious freedom. This depends on the character of the government's reasons for making the law in the first place – the strength and urgency of those reasons – and on how well-tailored the law is to advancing those reasons – whether it does so in a minimally restrictive fashion. Where the government has the right kind of reasons, and the law burdening religion is well-tailored, the law infringes religious freedom but does not violate anybody's right to religious freedom.

For our topic, the important point about the liberty principle is its non-comparative character. Whether a particular law violates an individual's right to religious freedom does not depend on how that particular law, or related laws, treat other religious or non-religious commitments. By contrast, the view that we are exploring, the equality principle, is comparative in character. A particular law burdening religious conduct infringes religious freedom if that law

treats the conduct in question less favorably than it, or related laws, treat other types of religious or non-religious conduct. For the equality principle, as for the liberty principle, whether an infringement of religious freedom constitutes a violation of the right to religious freedom depends additionally on facts about the government's reasons for adopting the burdensome law.

An argument under the equality principle that a burdensome law infringes religious freedom has two main steps. As we will see, each of these steps involves a distinct kind of comparison. One comparison centers on the law's *treatment* of various commitments: Is it more accommodating of some than of others? The second comparison focuses on the applicability of the *justification* of the burdensome law to favored and disfavored commitments. Do the concerns highlighted by the justification apply equally to both commitments? A third comparison is also lurking in the background and becomes salient as part of the response to an objection to the equality principle to be considered later in this section. This comparison concerns the *importance* of the favored and disfavored commitments in the lives of the people who hold them.

The first step focuses, then, on how the law treats different commitments. How the law treats the burdened religious commitment is compared with how the same law, or related laws, treat other commitments. The key question is whether the treatment of the burdened commitment is less favorable than the treatment of one or more of the others. A law might treat one commitment less favorably than others because it *targets* that commitment by singling it out for unfavorable treatment. Alternatively, a particular law might treat a commitment unfavorably through *selective accommodation*. In such a case, the particular law imposing the burden, or a related law, offer an exemption to other commitments, or the scope, or range of applicability, of the law is defined in such a way that other commitments do not bear the burden of the law.

In the legal cases mentioned earlier, one can find both forms of unequal treatment. In *Lukumi*, there was evidence that the municipal ordinances in question targeted Santeria religion by singling out "ritual" killing of animals for unfavorable treatment. The ordinances also made various exceptions – e.g. for food purposes, pest control, and hunting – without offering comparable accommodations for religious slaughter. In some of the pandemic lockdown cases, gatherings for religious worship were explicitly placed in a less favorably treated category. In other cases, the unequal treatment of religion was implicit in the selective accommodation of certain secular activities.

This first comparison is not the end of the analysis, however. The law treats different commitments in a disparate manner all the time, and nobody thinks to describe the discrepancy as an infringement of a right or suggests that it is objectionable. The law cracks down on motorists who speed on actual roadways but has nothing to say about gamers who speed in video games. The reason, of course, is that the rationale for the regulation (e.g. public safety) applies to the first situation (actual driving) but not to the second (virtual driving). The example points to the second step of the argument, which compares the burdened commitment and more favorably treated commitments according to whether the justification of the law that imposes the burden – what lawyers call the "government interest" – applies equally in both situations. The reasons for adopting the law imposing the burden are identified, and then the applicability of these reasons in the situation where religion is burdened is compared with their applicability in other situations in which commitments are treated more favorably.

How to identify the reasons justifying a law is a tricky issue that I will mostly bracket. One approach is broadly psychological. The justifying reasons are the reasons that actually motivated the decision-makers who made the law. Given the opacity of motivation, the plurality

of decision-makers in a democracy, and the complexity of the law-making process, this approach faces numerous obstacles. An alternative approach involves idealizing. The reasons are reconstructed retrospectively by asking what reasons would most plausibly justify the law in the contexts where it is applied, but bracketing whether these reasons would also justify the law in other contexts. This approach also raises questions, e.g. about what standards apply in identifying justifications as most plausible. My hunch is that both approaches are potentially relevant to egalitarian accounts of religious freedom. Egalitarians should be concerned when decision-makers act with actual animus towards a religion that is burdened by a law. And they should also be concerned when the most plausible reconstruction of the justification for a law burdening religious commitments appeals to the idea that the commitments in question have lesser value than other commitments. The arguments to follow should be evaluated with reference to both possible approaches.

This second step of the argument is also found in the legal cases discussed earlier. When the *Tandon* court writes that there is a presumptive violation of religious freedom whenever government regulations "treat *any* comparable secular activity more favorably than religious exercise," the term "comparable" refers to the applicability of the "government's interest."[20] The secular and religious activities are comparable because and to the extent that the government's interest in containing the spread of Covid-19 is equally relevant in the more and less regulated settings (perhaps after due precautions are taken). The Newark police department case presupposes that the rationale for the no-beard policy invokes the values realized when the police force maintains a uniform appearance. It seems reasonable to suppose that the setback to these values would be just as great when the departure from uniformity is for medical reasons as it is

[20] *Tandon*, 2

when the departure is for reasons of religious observance, and thus the religious and medical commitments are comparable in the sense required for this step of the argument.

Under the equality principle, then, a successful argument for a religious freedom claim requires a conjunction of unequal (or non-comparable) treatment with comparable applicability of the government's justification or interest. In the context of a law burdening a particular religion, there is another religious or secular commitment to which the law's justification is equally applicable, but that other commitment is treated in a more favorable manner either by the same law or by a related law. The logic echoes that of a discrimination claim, and it is not uncommon for infringements of religious freedom, under the equality principle, to be described as instances of discrimination.[21] In a typical discrimination claim, a person or group (the discriminatee) claims to be less favorably treated than members of an actual or counterfactual reference group even though the discriminatee's entitlement to favorable treatment is at least as strong as the members of the reference group. In these cases, there is a conjunction of comparability (e.g. the candidates all possess the qualities that are deemed sufficient to merit an employment offer) and unequal treatment (e.g. members of a protected class are denied employment while candidates belonging to the reference group are offered it).

In addition to this two-step analysis, proponents of the equality principle have a distinctive view about why an infringement of religious freedom is *pro tanto* morally objectionable. The root objection is not to the direct harms to the religious believer arising from burdens on religious conduct. This objection would justify adopting the non-comparative liberty

[21] For example, Eisgruber and Sager write, "Religion is one important source of commitment and fulfillment among many, and the Constitution's goal is to protect members of our political community from discrimination on account of their spiritual commitments." *Religious Freedom*, 62; see also 9, 14. Court opinions applying the equality principle routinely refer to violations of the principle as a form of discrimination. See, e.g., *Lukumi*, 532; *Trinity Lutheran*, 9, 11; *Roman Catholic Diocese*, J. Gorsuch concurrence, 2, and J. Kavanaugh concurrence, 2.

principle, rather than the equality principle. Instead, the objection is to what proponents of the principle call the "devaluing" of the burdened religious commitment, and by extension the believers who hold those commitments, that is revealed by the inequality. As we saw earlier, Eisgruber and Sager start from the premise that "no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects".[22] Tebbe's claim is similar: when the law regulates a "basic freedom," while exempting other activities, "the government implicitly judges the former to be less valuable than the latter".[23] And Cass Sunstein suggests that "the very distinction between "essential" and "nonessential" services and businesses, and including places of worship in the latter category, might be taken as a kind of insult."[24] The court opinions appealing to equality are full of similar statements: treating religion worse than a comparable secular activity seems to demean religion by regarding it as less valuable in individual lives – less essential – than the secular activity.[25]

A common response to arguments invoking the equality principle focuses on the second step of the analysis. Whether two commitments are comparable in the sense at issue in this step is partly a factual matter. Consider how the Supreme Court divided in *Tandon*. The justices agreed that the rationale for California's lockdown policies was to control the spread of Covid-19, but they disagreed about whether this government interest was equally implicated in the fully regulated activities (including religious worship in private homes) and the activities that were exempted or partly exempted (e.g. gatherings in commercial facilities). The dissent pointed to various reasons for supposing that gatherings in commercial contexts might reasonably be judged by public authorities to pose a lesser risk of transmitting COVID-19 than in-home religious

[22] *Ibid.*, 4
[23] "Equal Value," 2401
[24] "Anti-Korematsu," 226.
[25] E.g. *Fraternal Order*, 366; *Roman Catholic Diocese*, J. Gorsuch concurrence, 2

gatherings.[26] Beyond this factual question, there is a partly theoretical question about whether the state could have regulated private homes to make the transmission risk roughly equivalent to the risk in commercial facilities. If such regulation is possible in principle, but would be unfeasible given the state's current enforcement capacities or objectionable on privacy grounds, should it be concluded for the purposes of assessing the religious freedom claim that religious and secular commitments are comparable? Another point of disagreement relating to this comparison concerns how to characterize the rationale for the burdensome law. In the Covid vaccine mandate cases, the justices disagreed about whether the rationale for the mandate was to control the spread of Covid or also more broadly to promote the health of citizens.[27] If it is the former, neither medical nor religious exceptions are mandated by the logic of the rationale, and thus they are comparable with one another. By contrast, if health is part of the rationale, then making an exception for medical contraindications is internal to the logic of the justification and thus the medical and religious exceptions are not comparable.

While these factual and theoretical disputes concerning the second step of the argument are important, they risk obscuring a deeper set of questions for the equality principle arising in the first step. It is these questions that I want to focus on here. As we saw, the first step compares how a particular law treats a religious commitment that it burdens with how it, or a related law, treats other commitments. Occasionally, the comparison is between how commitments associated with different religious faiths are treated. In Sec 4, we will briefly consider a case in which the law accommodates Sunday-worshippers without equally accommodating Saturday-worshippers. Typically, however, the comparison is between the treatment of religious and

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[26] *Tandon*, 1298.

[27] *John Does*, Gorsuch dissent. For discussion, see Koppelman, "Increasingly Dangerous Variants," and Zalman Rothschild, "The Impossibility of Religious Equality," *Columbia Law Review*, forthcoming.

secular commitments. And this leads to the question of how exactly the distinction between religious and secular commitments should be understood. This is a question about the *object of equality* – about *what* exactly it is that the law should treat equally. The first step of the argument also refers to various conditions and activities as being *treated* more or less favorably. This leads to another question, which concerns when precisely the law can be said to treat one activity or condition more favorably than another. As noted earlier, this is a problem about the *meaning of equal treatment*.

Before tackling these questions in the next two sections respectively, we should more briefly consider two other issues that sometimes arise in discussions of the equality principle. First, it might seem that the equality principle is vulnerable to obvious counterexamples. Consider a law that prohibits intentional killing but makes an exception for killing in self-defense (provided various conditions are met). At first glance, this seems to be a secular exemption from an otherwise general law. Does it then follow that the law would be treating religious activities less favorably than secular ones if it refuses to grant an equivalent exemption for religiously motivated killing? Or, to take a less extreme example, consider speed limits. Since the law makes an exemption for emergency vehicles, does it follow that there would be an infringement of religious liberty if an exemption was not also extended to people who are in a hurry for religious reasons (e.g. Orthodox Jews rushing home by sundown on Fridays)?[28]

These cases are not really counterexamples to the equality principle, however, but instead highlight some of the subtleties involved in the argument. In neither case is it clear that the

[28] Zalman Rothschild, "Free Exercise in a Pandemic," *University of Chicago Law Review Online Archive*, June 2020; and Rothschild, "Impossibility of Religious Equality." For a different emergency-vehicle hypothetical, see Vikram David Aram and Alan Brownstein, "Exploring the Meaning of and Problems With the Supreme Court's (Apparent) Adoption of a "Most Favored Nation" Approach to Protecting Religious Liberty Under the Free Exercise Clause," *Verdict* (April 30, 2021).

secular and religious activities really are comparable in the sense required by the second step of the analysis. Suppose that the rationale for the laws in the two cases is roughly the protection and promotion of security and safety. Arguably, making exceptions for self-defense and emergency vehicles conform with that rationale, whereas nothing in such a rationale would justify exceptions for religious activities.[29] Even if the secular and religious activities in question are regarded as comparable, at most the argument would show that there is an infringement of religious liberty. There would be strong and urgent reasons both for the general regulation (no killing, no speeding) and for the specific exemptions for self-defense and emergency vehicles, and thus these would be cases of infringement in which there is no violation of rights.

This is not to deny that the equality principle would seem to have some counter-intuitive implications. Consider a variation on the speed limits example in which a local regulation prohibits cars in the downtown core for environmental reasons but makes an exception for emergency vehicles. Would it follow that an exception should also be made for religiously motivated drivers? In this case, the activities do seem comparable: they both disrupt the law's attempt to establish a pedestrian-friendly, pollution-free zone of town. And one could doubt whether the reasons justifying the prohibition would be sufficiently strong and urgent to overcome the presumption against unequal treatment of secular and religious activities. The discussion in the next section is relevant to cases of this sort. Cases like this should motivate a reconsideration of the object of equality but not a total rejection of the equality principle.

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[29] As Rothschild ("Impossibility of Religious Equality") points out, there is a problem lurking here concerning the appropriate level of abstraction in describing the government interest. If the interest is characterized as "traffic safety," instead of "safety," then the case does become a counterexample. In the version of the equality principle that is ultimately defended in the next section, this level-of-abstraction problem disappears: even if the government's interest is narrowly described as "traffic safety," there is no devaluing of religion when the government makes an exception for emergency vehicles, since the government would be securing an important generic good rather than acting as if some ends are more valuable than others.

The second preliminary issue concerns the characterization of the principle in terms of equality. The claim in *Tandon* is that, if religious commitments burdened by a law are not treated at least as well as *any* secular comparators, then there is an infringement of religious freedom. There is a troubling asymmetry in this formulation. The principle holds that religion should be treated as least as well as secular counterparts; it does not say that secular commitments should be treated as well as religious ones. Some commentators have drawn an analogy between the equality principle of religious freedom and the most favored nation principle in international trade.[30] Religious activities have a special status such that they must always be treated at least as favorably as all other comparable activities. But this might lead one to wonder whether the principle is an *equality* principle at all. Liberal proponents of the equality principle complain that the alternative – which I called the liberty principle – elevates religion above other forms of belief and practice, and endows it with a privileged status. But it seems as if the equality principle might be vulnerable to the same objection.[31]

It is true that many formulations of the equality principle do not claim that secular activities must be treated at least as well as religious ones. But it is also true that they do not *deny* such a claim. There is no contradiction with standard formulations of the equality principle (such as in *Tandon*) in *also* holding that there are conscientious, or integrity-related, secular concerns that ought to be treated at least as well as other concerns, just as there is no contradiction in granting several trading partners "most favored" status. Granted, some proponents of the principle would not extend most favored status to secular concerns, perhaps because they see

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[30] The analogy is introduced in Douglas Laycock, "The Remnants of Free Exercise," *Supreme Court Review* (1990), 49.

[31] This suspicion is articulated in Rothschild, "Impossibility of Religious Equality," and in Mark Greenberg and Larry Sager, "Religious Freedom: A Moral Theory of Mandatory Exemptions," this volume (in Conclusion).

nothing wrong with privileging religion, or because they think that such privileging is required (as a legal matter) by the Religion Clauses of the U.S. Constitution. For the purposes of the present discussion, however, I will assume an egalitarian version of the principle, which allows that, in principle at least, there could be some secular concerns that are on a par with religious ones and thus should enjoy the same presumption of equal treatment.

How precisely to define the category of secular concerns that are on a par with religious ones for the purposes of the equality principle is a vexed question, and I will not try to resolve it here.[32] This is the third problem of comparison I alluded to earlier. It involves comparing the importance that certain secular commitments have in the lives of some persons with the importance that religious commitments have in the lives of others. In my view, it would be problematic to reserve special status for religious concerns alone. But it would also be problematic to see no difference between the person who objects to eating a meal containing meat for ethical reasons (whether religious or secular in nature) and the person who simply does not like what is being served.[33] If only so many vegetarian alternatives remain, it would be acceptable to prioritize the former over the latter. I shall assume, then, that the special status granted religion by the equality principle extends to some secular activities and conditions but not to all such activities and conditions.

3. The object of equality

[32] For illuminating discussions, see Andrew Koppelman, "Is It Fair to Give Religion Special Treatment?" *University of Illinois Law Review* 571 (2006); Laborde, *Liberalism's Religion*; Micah Schwartzman, "What If Religion Isn't Special?", *University of Chicago Law Review*, 79:4 (2013).
[33] For a related argument, see Eisgruber and Sager's discussion of Budweiser caps, *Religious Freedom*, 100-1 and 300n37.

What exactly is to be treated equally when it is demanded that religious and secular commitments be treated equally? At first glance, this sounds like a version of a problem familiar to scholars of religion, namely, how to distinguish the religious and the secular. But it turns out that the equality principle does not require close scrutiny of this thorny question. One reason is that both religious and secular commitments can serve as comparators for claims of unequal treatment, and nothing hangs on whether the comparator is classified as religious or secular. The other reason is the one we saw at the end of the previous section. In principle, at least, unfavorable treatment of a secular commitment could ground a claim under the equality principle, and so again it should not matter whether a commitment is considered religious or secular to be eligible for a claim.

Even if, in general, we could distinguish the religious and the secular, there would still be a further question that arises in categorizing particular beliefs or activities (what I shall call "commitments") as religious or secular. What feature of a commitment should we focus on in deciding whether to put it in the religious bucket or the secular bucket? I shall distinguish two main answers to this question. According to the first, a religious commitment is one that a person affirms for religious *reasons*, while a secular commitment is one that is affirmed for non-religious reasons. Call this the *reasons conception*. According to the second answer, a religious commitment involves the pursuit of religious *ends*, while a secular commitment involves the pursuit of non-religious ends. This is the *ends conception*. These conceptions might sound similar to some ears, and indeed they can be rendered trivially equivalent in several different ways. But there is a way of understanding the two conceptions that keeps them distinct, and it is instructive to explore the distinction.

Two conceptions of the object of equality

The equality principle is often formulated in terms of the reasons conception. The Supreme Court, in *Lukumi*, maintained that the municipal ordinances in question had "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[34] Likewise, in *Fraternal Order*, a key claim is that "the medical exemption raises concern because it indicates that the Department has made a value judgment that secular…motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not…"[35] In this analysis, the police department treats religion and the secular unequally because it treats unequally conduct engaged in because of religious reasons and the same conduct when it is engaged in for secular reasons. Eisgruber and Sager's discussion of the case uses slightly different terminology but rests on essentially the same analysis: they say that, by accommodating the "health needs" of officers but not their "religious needs," the police force treats secular "interests" more favorably than the "comparably serious interests" of a minority religious group.[36] In a 2016 review of the "general applicability" standard in free exercise jurisprudence, Laycock and Collis repeatedly use the language of "reasons" to describe the religious and secular commitments that ought to be treated equally under the standard.[37] And the appeal to reasons continues into the pandemic-era cases, such as when a distinction is drawn between religious and medical reasons for seeking to be exempted from a vaccine mandate.[38]

How, then, should religious and secular reasons be distinguished? One possible answer is that religious reasons are reasons that individuals have in virtue of pursuing religious ends. When

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[34] 537-8
[35] 366
[36] *Religious Freedom,* 90-1.
[37] Douglas Laycock and Steven T. Collis, "Generally Applicable Law and the Free Exercise of Religion," *Nebraska Law Review,* 95:1 (2016)
[38] *John Does*. Gorsuch dissent.

people affirm a particular set of religious beliefs, or value a particular community or specific religious practices, this grounds a set of reasons that they would not otherwise have except for those ends. Likewise, when people have non-religious ends, then these ends give rise to a distinct set of reasons. We will consider this view below when we turn to the ends conception of what makes a commitment religious or secular. For now, let us consider a different view.

A second way in which religious reasons might be distinguished from non-religious ones is according to the character of the concepts and assumptions on which those reasons depend. The idea is that some reasons rest on concepts or assumptions of a religious nature while others do not. Reasons in the former category depend on ideas of a deity, or of the sacred or the holy, or would lose their meaning or force without reference to particular religious figures, or to values and narratives derived from particular religious beliefs and traditions.[39] Non-religious reasons are distinguished, on this view, by the absence of any such dependence on the religious. It might seem that this way of drawing the distinction sends us back to the problem of distinguishing the religious and the secular. Relatedly, some concepts – marriage for instance – figure in both religious and non-religious narratives. As we shall see shortly, however, it turns out that establishing a precise boundary between religion and the secular is not relevant to the main difficulty with the reasons conception.

Before considering this difficulty, let us put the alternative view, the ends conception, on the table. Just as reasons can be defined in terms of ends, making the two conceptions trivially identical, it would be possible to define ends in terms of reasons. The end of someone's action could just be the state of affairs that they have reason to bring about. But there is another way of

[39] On this account, the bare use of religious language is not sufficient to give a reason a religious character. People sometimes use religious language in contexts where they could just as easily use non-religious language, such as when elected politicians describe their responsibilities as representatives as "sacred." What is sufficient is that a reason *depend* on religious concepts, assumptions, and narratives.

understanding ends that both distinguishes them analytically from reasons and tracks some of the discussion of the equality principle by its defenders.

In a formulation that they repeat in several places in their book, Eisgruber and Sager announce that "What is critical from the vantage of Equal Liberty is that no members of our political community be disadvantaged in the pursuit of their important commitments and projects on account of the spiritual foundations of those commitments and projects".[40] The suggestion is that commitments can be grounded in different "spiritual foundations," or, as they put it elsewhere, in different "systems of belief" or "life-plans".[41] From an egalitarian standpoint, it is objectionable when one commitment is treated less favorably than others because of the character of the ethical foundations, belief system, or life-plan on which it is based. Dworkin sketches a similar picture. He assumes that people pursue their ends and projects on the basis of an ethical judgment about "what lives are most worth living just in themselves".[42] The principle of ethical independence forbids government from second-guessing or usurping these basic judgments about what counts as a worthwhile life.

These remarks point to a formulation of the ends conception that differentiates it from the reasons conception. They suggest that a commitment can be considered religious if it is based on a foundational ethical judgment about what counts as a worthwhile life that has a religious character, while a commitment is secular if it is based on a foundational ethical judgment that has a secular character. On this proposal, an action might be performed for a secular reason – a reason that does not depend on religious values or assumptions for its force – without deriving from a secular end, that is, from an ethical judgment about what is worthwhile in life possessing

[40] *Religious Freedom*, 15; see also 4, 18, 87, 95.
[41] At 62 and 88 respectively.
[42] *Religion Without God*, 130

a secular character. When I head to the grocery store on a Thursday evening, I am acting on a secular reason: to feed myself and my family. There may be a trivial sense in which I am acting on a secular end: in acting on this reason, I seek to bring about the acquisition of groceries. The key point, however, is that I am not necessarily acting on the basis of a secular ethical judgment about a worthwhile life. Someone whose foundational judgment about value in life is religious in character would also have reasons to shop for groceries.

By focusing on foundational ethical judgments about a worthwhile life, the ends conception locates the object of equality at a point of underlying social and political controversy. When conservatives say that a policy "devalues" religion they mean that it is willfully or unthinkingly grounded in secular value assumptions and fails to appropriately value foundational ethical judgments that are religious in character. Likewise, liberals who disapprove of "devaluing" religion start from the observation that liberal societies are characterized by what Rawls terms "a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines".[43] Devaluing religion is objectionable, for liberals, because it involves a failure to realize appropriate neutrality between different views of a worthwhile life.

Difficulties with the reasons conception

So which of these two conceptions offers a better formulation of the object of equality for the purposes of applying the equality principle? The grocery-shopping example should alert us to a difficulty with the reasons conception, which lies in the heterogeneity of the category of secular reasons. Some secular reasons arise for individuals because they have a secular idea of a worthwhile life. Consider a woman whose idea of a worthwhile life centrally involves the pursuit

[43] John Rawls, *Political Liberalism* (Columbia, 1993) 3-4.

of self-realization. She would have reasons to pursue projects that seek to fully develop an intellectual, or artistic, or athletic potential in some area. Given her athletic capacities, for instance, she might seek to compete in marathons, which would generate, in turn, various specific reasons to train, to maintain a particular diet, and so on. Or consider a man whose idea of the good life involves spending time with family, giving back to the community, and not having to answer to a boss. This outlook might lead him to seek early retirement, which would in turn generate reasons to work long hours at a younger age, and to save and invest his earnings aggressively.

Some reasons, however, have a secular character but arise independently of any particular secular vision of a worthwhile life. I shall call these *generic* reasons. Consider the reasons that people have to meet their own basic needs, e.g. needs for food, sleep, health, social contact, and so on. These reasons are secular in character in that they do not depend for their validity on religious ideas, narratives, or traditions. Despite having a secular character, however, people do not have these reasons in virtue of pursuing any particular secular idea of the good. Persons with both religious and secular ends alike have reasons grounded in their basic needs.

Another example of a generic reason is the reason individuals have to develop the various capacities involved in forming, pursuing, and revising their ends – through education and more generally through participation in, and exposure to, a supportive social environment. Rawls calls this set of capacities the capacity for a conception of the good. Like basic needs, the capacity for a conception of the good does not derive its value from affirming some particular conception of the good, but rather serves as a precondition for being in a position to form and pursue a particular conception, whether religious or non-religious. Generic reasons are not always self-regarding but also arise from the needs and claims of other people and the claims that people

face as citizens and as participants in various institutions. For instance, the reasons we have to assist others in need, or to support and participate in democratic institutions, do not turn on having a particular conception of a worthwhile life. They have a secular character insofar as they do not depend on religious ideas or assumptions, but they do not rest on affirming a secular view of what conduces to a worthwhile life. Individuals with secular *and* religious ends share in common certain reasons for affirming duties of assistance and democratic citizenship.

So the category of secular reasons contains two sub-categories: reasons with a secular character based on secular ends; and generic reasons with a secular character. This heterogeneity implies a fundamental difficulty for the equality principle applied on the basis of the reasons conception. According to the reasons conception, there is an inequality when the law burdens efforts to act on religious reasons but accommodates certain efforts to act on secular reasons, even though the government's interest is equally implicated in both contexts. This claim is quite cogent for the case of secular reasons based on secular ends. In that case, the law could reasonably be described as favoring secular ends over religion ones, and more broadly the secular over the religious. Given this favoritism, it is plausible to say that the law is "devaluing" religion.

However, if the secular reasons receiving an accommodation are generic, then the implications are quite different. The accommodation of generic reasons does not introduce any relevant inequality between the religious and the secular at all. As we have seen, generic reasons are not associated with any particular view of the good life. Individuals have generic reasons whether they have secular ends or religious ends. Thus, when the law accommodates secular reasons that are generic, it is neither favoring secular ends nor disfavoring religious ends. Since there is no favoritism, there is also no devaluing of religion.

It is a mistake, therefore, to suppose that the accommodation of secular reasons necessarily implies any unequal treatment or devaluation of religion. The government could be accommodating generic reasons and thus implying no value judgment about the particular conceptions of a good life that people endorse. If anything, accommodating religion to counterbalance the accommodation of a generic reason would *introduce* an objectionable inequality. If accommodating religion means accommodating a religious view of a worthwhile life, the government would be acting as if it valued religious ends more than secular ones. For example, when states limited gatherings for religious worship, but permitted people to gather in grocery stores, this was obviously *not* because they formed a judgment that a life devoted to grocery shopping was superior to a life devoted to the worship of God. Rather, it is much more plausible that states, in this situation, judged that keeping grocery stores open would facilitate people meeting their basic needs, a judgment that does not presuppose the value of any particular way of life (even religious people have reasons based on their particular needs) and thus does not devalue religion. If states were to accommodate religious gatherings in this situation (out of a mistaken application of the equality principle) this would introduce an inequality that would license people with secular views of the good that require gathering (e.g. theater-lovers) to complain that the law is devaluing their ends.

A related difficulty is that the reasons conception makes the equality principle inconsistent with a liberal view of government. Such a view might be reasonably thought to impose certain limits on what government is permitted do in the way of favoring or disfavoring particular ideas of the good life, or valuing or disvaluing those ideas. However, a liberal view of government also acknowledges a set of generic goods and reasons. Liberals hold that government sometimes ought to promote these goods and reasons, and they believe that

government can do so without running afoul of the limits on favoring or disfavoring particular ends. Once these liberal commitments are acknowledged, the idea that equality requires the law to extend an accommodation to religious reasons whenever comparable secular reasons are accommodated is discredited. Consider as an analogy a liberal view of free speech. Such a view typically encompasses both, (a), a strong commitment to viewpoint neutrality and, (b), a permission for the government to impose various non-viewpoint-based restrictions on speech (relating to time, manner, and place) under some conditions. If, under (b), some speech is permitted but other speech is restricted this does not imply an objectionable inequality, so long as the government maintains its allegiance to (a). In other words, on a liberal view, government may end up treating different instances of speech in a disparate fashion on the basis of (b), without compromising its commitment to (a), and without raising any questions about its overall attachment to equality.

I shall consider some possible rejoinders to this critique of the reasons conception shortly. Before doing so, it is worth asking why that conception has seemed so natural to proponents of the equality principle. A conjecture is that people start with a picture of religious reasons in which, plausibly enough, individuals who have religious reasons do so because they have religious ends. The proponents further assume that secular reasons are a mirror image of religious reasons. Putting these assumptions together, the accommodation of secular reasons would imply unequal treatment of religion. My objection consists, then, in denying the symmetry of religious and secular reasons. There is an asymmetry between religious and secular ends to the extent that, while religious reasons normally arise for persons with religious viewpoints, some secular reasons apply more generally, *both* for persons with non-religious ends *and* for those with religious ends.

Implications of adopting the ends conception

The basic problem with the reasons conception, then, is that it does not reliably track a concern of underlying normative importance. What matters is that the law not devalue certain conceptions of the good, or ways of life. But the reasons conception leads the equality principle to register inequalities even when there is no such devaluing. By contrast, the ends conception is perfectly aligned with the underlying normative concern. It judges there to be an inequality only when different "spiritual foundations"– different ethical judgments about a worthwhile life – are treated less favorably by the law than other such foundational judgments.

Many of the counterexamples offered against the equality principle assume the reasons conception and can be avoided by shifting to the ends conception.[44] Adopting the ends conception would also entail, however, that many of the positive claims made on the basis of the equality principle would have to be revised or jettisoned. As we have seen, secular ends form a more limited category than secular reasons. The ends conception can thus be expected to supply a smaller set of comparators for substantiating religious freedom claims under the equality principle than would be the case with the reasons conception.

Consider once again *Fraternal Order*, the case involving the Newark police force that has served as a touchstone for proponents of the equality principle. The usual analysis of this case is framed in terms of the reasons conception. The departure from equality consists in exempting people who need to wear a beard for medical reasons but not exempting people who need to

[44] See, for example, footnote 29 above and the accompanying text. Some people might regard vaccine exemptions derived from the equality principle as a *reductio* of that principle. I explain in the text below why a version of the equality principle that assumes the ends conception would not support such exemptions.

wear one for religious reasons. The case looks quite different, however, if one instead considers it in terms of the ends conception. Preventing folliculitis (a skin problem exacerbated by shaving) is not based on an ethical judgment about the good life. Being folliculitis-free is a condition that individuals have reasons to value no matter what their particular ends are. From the police force's point of view, exempting officers with folliculitis from grooming requirements serves the generic good of employee health and does not side with any particular ends that its employees might have. Officers free of folliculitis can perform their duties and comfortably pursue their secular *or* religious ends. There is thus no reason to think that the exemption for folliculitis devalues religious ways of life, and so there is no case under the equality principle for a religious exemption when the ends conception is adopted.

Eisgruber and Sager reach a different view of *Fraternal Order* because they equivocate concerning the object of equality. As we have seen, some of their general statements call for equal treatment of commitments based on different "spiritual foundations"; these statements align with the ends conception. But when they come to apply their theory to particular cases they slide over to the reasons conception. They argue that, in cases like *Fraternal Order*, secular "needs," "interests" and "concerns" are being more favorably treated by the law than religion, and thus that religious needs should be accommodated as well.[45] We have seen, however, that secular needs do not presuppose secular ends and thus illustrate the idea that reasons do not necessarily correspond to particular spiritual foundations. The same is true of a person's interests and concerns: some depend on a person's judgments about the good, but others are generic in character.

[45] *Religious Freedom*, 89-91, 101-4.

A possible rejoinder would be that the physical itch or discomfort associated with folliculitis should not be assumed to be worse than the religious harm associated with requiring observant officers to break a religious norm or command.[46] But this way of putting the argument betrays a confusion. The reason why the medical exemption does not justify a parallel religious exemption is not based on a judgment that physical harms are worse than religious harms. Instead, the point is that the medical exemption is responsive to generic reasons rather than secular ends and thus generates no inequality in the treatment of ends that would demand a religious exemption as a remedy. We see further evidence for this analysis by considering a hypothetical variation on the Newark case in which, instead of exempting folliculitis-sufferers, the police force gives an exemption to members of a male social club who historically had signified their membership by wearing a beard. This case seems quite different. Rather than accommodating a generic reason, the police force is accommodating a particular secular end. It would be hard to blame the Muslim officers for thinking that their religious ends were being devalued by such an accommodation. When secular ends are privileged in this way, the appropriate remedy is either to remove the privilege or equally accommodate religion.

Adopting the ends conception has revisionary implications for other religious freedom cases decided on equality grounds. Consider cases like *Trinity Lutheran* and *Carson* where the government provides subsidies or vouchers to secular private schools but not to religious private schools. Suppose that the secular schools in question are not secular in the sense that they promote a particular secular view of the good but instead are secular in that they aim, among other things, to educate children to develop various generic capacities having a secular character, such as knowledge of math and science, democratic citizenship, and the capacity for a

[46] Eisgruber and Sager, *Religious Freedom*, 102, say that the view that a breach of religious obligation is less important than avoiding a nasty rash is one "that [they] feel comfortable in dismissing."

conception of the good. Under these assumptions, it seems that there is no equality-based reason to extend the subsidies or vouchers to the religious schools. The schools receiving support would have a generic orientation and thus there would be no favoritism towards secular ends that would call out for remedy.

The ends conception also has implications for *Lukumi*. In that case, the Court pointed to exemptions for food purposes, pest control, and hunting as accommodations for secular activities that would anchor a comparative claim for accommodating Santeria practices of ritual animal slaughter. However, the first two of these comparators do not involve particular secular ends, and thus involve no favoritism towards secular ends over religious ones. They introduce no inequality of treatment that would justify exempting Santeria practices as a remedy. The accommodation for hunting seems different and does lend credence to the argument that the municipal ordinances in question were especially indulgent to certain secular ends involving the killing and cruel treatment of animals and, in that sense, devalued comparable religious ends.

The pandemic cases also become something of a mixed bag when the ends conception is adopted. Many of the secular activities that religious claimants pointed to could plausibly be construed as generic in character rather than as geared around the pursuit of particular secular ends. Allowing grocery stores, hardware stores and transit stations to remain open, while imposing restrictions on other kinds of gatherings, does not establish an inequality in the treatment of secular and religious ends, even if those exempted activities and facilities have a broadly secular character. On the other hand, one could imagine secular accommodations that do give favorable treatment to secular ends – e.g. exemptions for theaters, musical performances, or sports events – and thus would, in principle, make apt comparators for religious gatherings. An interesting case to think about is exemptions from gatherings restrictions for casinos. Gambling

and the other forms of entertainment offered by casinos certainly qualify as secular ends. At the same time, casinos have a very significant role in some local economies, and one could argue that the avoidance of major disruptions to the economy is a reasonable generic aim of government. The discussion of "formatting" in the next section offers a fruitful framework for thinking about this example. Protecting the economy from major disruptions is a goal that could potentially be pursued in a number of different ways, and there may be questions of fairness that arise when the government chooses an approach that limits benefits to just one industry or sector.

Finally, the ends conception helps with thinking about claims, on equality grounds, for religious exemptions from vaccine mandates. As we saw previously, these claims have been thought to turn on how the justification for the mandates – the government interest – is characterized.[47] If the government interest is in preventing the spread of a communicable disease, then that interest is equally set back by medical and religious claims for exemptions. If the government interest is in health, however, then this is no longer true, since presumably a medical exemption, but not a religious one, is protective of health. Adopting the ends conception renders moot this question about the government's justification for the mandate. Even if the justification were narrowly focused on controlling the spread of a particular illness, a government that decided to offer exemptions for medical contraindications would not be accommodating a secular conception of the good, and thus would not be creating an inequality requiring remedy through a religious exemption.

Let us conclude this part of the discussion by considering a possible objection. Under the ends conception, I have argued, the equality principle does not require a religious accommodation when the secular comparator is based on a generic reason rather than a secular

[47] Koppelman, "Increasingly Dangerous," 2260-1; Rothschild, "Impossibility of Religious Equality," 41-44.

end. This argument is not based on the assumption that generic reasons are more important than religious reasons, nor is it presumed that they are important in some non-comparative sense. Rather, the claim is that accommodating a generic reason does not introduce any inequality between religious and secular ends that would justify a religious accommodation as a remedy. But, to test this, suppose that the accommodation is for a relatively minor or even trivial generic reason. Imagine, for instance, that a state exempts stationers from its lockdown policies but not religious gatherings, even though the danger to the government interest is equivalent in the two contexts. Assume for the sake of argument that the reasons people have to shop in stationary stores are generic in character. Individuals with all sorts of different ends – both secular and religious – have reasons to shop in such stores on occasion. I take it that a situation in which a state is prohibiting religious gatherings, but permitting stationers to remain open (despite an equivalent threat to the government's interest), would strike most people as seriously objectionable. So perhaps the reasons conception is vindicated after all?

In response, there is a different way of understanding why this pattern of selective accommodation would be objectionable that does not require reverting to the reasons conception. The mere fact that some reason is generic does not imply that it is owed an accommodation. Whether a government should accommodate generic reasons depends on striking a defensible balance between the reasons for the general regulation and the reasons why it is valuable for people to be able to act on the generic reasons. If the latter reasons – the reasons for accommodating – are fairly weak, and still the government chooses to accommodate, then the implication must be that the reasons for the general regulation are also quite weak. But if the reasons for the general regulation are weak, then that supports the view that the burden it places

on religion is excessive. Religion is important in individual lives and so it should take more than a weak reason to justify a regulation that burdens it.

This response appeals to the liberty principle, the principle that there is a presumption against burdens on religion. Whether and in what precise form the liberty principle can be defended is a question for another paper, but there is little doubt that many people have pre-theoretical intuitions that are shaped by the principle. These intuitions account for the judgment that there is a violation of religious freedom in the stationers example. The accommodation of stationers *reveals* that the government's justification for its lockdown measures is very weak, and this in turn fuels the thought that there is no way the presumption against burdens on religion could possibly be defeated. On this diagnosis, the equality principle does not play a normatively fundamental role in explaining our judgments but rather plays what I called earlier a *heuristic* role. We get further confirmation of this analysis by holding the weak rationale for the general regulation constant while eliminating the stationers' exemption. My guess is that most people would still think there is a violation of religious freedom.

The upshot is that cases like that of the stationer do not show that the equality principle – when it is taken as normatively fundamental – should be interpreted through the lens of the reasons conception. The arguments for preferring the ends conception, with its more modest set of implications for the shape of religious freedom, remain intact.

4. The Meaning of Equal Treatment

Let us turn now to a second question regarding the equality principle, which concerns the meaning of equal treatment. The question here is when, exactly, two commitments enjoy equal treatment under the law. A starting point is to observe that legal burdens on a commitment that

are purely incidental to a general law with some other valid purpose do not, on their own, imply unequal treatment. This observation is the basis for distinguishing the equality and liberty principles. For the equality principle, a burden on religion infringes religious freedom only if, *in addition*, there is unequal treatment. Assuming this additional requirement is not redundant, the mere fact of a burden is not enough to establish unequal treatment.

So what more is needed for unequal treatment? Since the normative concern animating the equality principle is with devaluing, the additional factor we are looking for presumably has something to do with this concept. We can distinguish two different ways in which devaluing might figure in an elaboration of this additional factor.

According to the first, devaluing should primarily be thought of as an attitude that is presumed to explain and justify the adoption of the law in question. As we saw earlier, this attitude could be actually (psychologically) present in the minds of lawmakers or it could be imputed to them through an idealized reconstruction of the rationale for the law. In the latter case, it might help to think of the attitude in question as the *purpose* of the law. A *devaluing attitude* is one that expresses or implies a disparaging judgment about the value of an end. The proposal, then, is that unequal treatment is burdensome treatment that is based on a devaluing attitude: the law treats some commitment C unequally if it burdens C and the rationale for the law invokes a disparaging judgment about the value of C.

The second way in which devaluing might figure in an account of unequal treatment is as a way of characterizing a denial of fair opportunity. A particular end is devalued when unfair obstacles are established to the pursuit of that end, so that people who value the end are denied a fair opportunity to pursue and fulfill it. Suppose that laws and regulations are tailored in a way that privileges C’ over C, or resources are provided in a form that suits the pursuit of C’ but not

the pursuit of C. If these advantages for C' over C are unfair, then C-lovers can complain of unequal treatment on the grounds that they are denied a fair opportunity to pursue C. Such a complaint need not rest on any assumptions about the attitudes of lawmakers, although it would be sensitive to considerations adduced to demonstrate that C' is not really privileged over C (perhaps C has compensating advantages in some other context) or that the advantages given C' over C are not in fact unfair (perhaps because C is more harmful or less beneficial to third parties).

I shall call these *attitudinal* and *opportunity* conceptions of equal treatment. The attitudinal conception requires the avoidance of devaluing attitudes on the part of lawmakers, and the opportunity conception requires the securing of fair opportunity. In what follows I take a closer look at each conception. The aim is not to argue for one over the other but to show that supplementing the attitudinal conception with the opportunity one gives the equality principle a rich and fruitful set of implications.

Ethical independence

The most prominent statement of the attitudinal conception is Ronald Dworkin's account of "ethical independence" in his book *Religion Without God*. Like a number of other proponents of the equality principle, Dworkin is highly critical of arguments that turn religious freedom into a special right against burdens on religious conduct.[48] Those accounts wrongly elevate religion above other kinds of commitments and allow individuals to offload the costs of their ends onto others. Instead, Dworkin insists that a general right to ethical independence offers sufficient protection for religious freedom. As noted earlier, Dworkin's account is a version of the equality

[48] *Religion Without God*, ch. 3

principle. It holds that religious and other forms of conduct should not be legally burdened because decision-makers disapprove of the ends of people who engage in such conduct. Formulated this way, the object of equality in Dworkin's account is ends: he says that "government must never restrict freedom just because it assumes that one way to live one's life…is intrinsically better than another".[49] And unequal treatment consists in a legal burden motivated by a rationale for the burden that cites a value judgment about the intrinsic merits of the burdened end. For instance, "government may not forbid drug use just because it deems drug use shameful".[50]

On one reading, the protection offered by Dworkin's principle is quite limited. In *Lukumi*, the municipal authorities premised the ordinances on a negative judgment about the Santeria religion, but in other cases we discussed – e.g. *Fraternal Order, Tandon* – it is harder to discern or impute such a judgment. The limited bite of ethical independence is consistent with the maximal scope that Dworkin seeks to give it: the right to ethical independence applies to a capacious conception of religion (including "religion without God") as well as to non-religious ends. If the right were to justify numerous exemptions, it might be difficult to extend its scope so universally.

A different reading of Dworkin's account takes seriously the claim that government must not base decisions on the judgment that one way of life is intrinsically "better" than others. It is not just disparaging judgments aimed directly at the burdened commitment that are forbidden by the right to ethical independence, but any kind of judgment that there is a hierarchy in the value of different ends. On this interpretation, positively accommodating one end but not doing so for another comparable end would infringe the right to ethical independence if the best rationale (or

[49] Ibid, 130
[50] Ibid, 130

the actual motivation) for the discrepancy is premised on a judgment that the accommodated end is particularly valuable.

This second interpretation brings Dworkin's position very close to the view of the equality principle that we ended up with in the previous section. That view has interesting implications in some of the cases we have discussed, but, mainly because of its concern with ends rather than reasons, it does not go as far as many proponents of the equality principle would want in protecting religious freedom. For instance, it cannot explain why the Muslim police officers should be accommodated in *Fraternal Order*. By contrast, as we shall see shortly, the opportunity conception does offer some purchase on this and other cases. One other note about Dworkin's position, on this second interpretation, is that it reintroduces a tension between the "bite" and the scope of the argument. If ethical independence objects to *any* kind of hierarchy of ends in government reasons, then people with common secular views of living well will have a complaint of ethical independence whenever the government gives an exemption to any end, so long as that exemption can best be explained for by imputing a value hierarchy to the government's reasons. (Imagine a government employer that allows employees short breaks for religious prayer or secular meditation but not to check sports scores). Perhaps Dworkin would be comfortable with this implication, but if he is not then he would be dragged into the business of distinguishing important ends and commitments from less important ones. It would not be an advantage of his account that it avoids all such distinctions.

Fair opportunity

One of the most famous court cases in the religious freedom canon is *Sherbert* (1963), which concerned a Seventh-Day Adventist who was denied unemployment benefits after being fired

when she refused to work on Saturdays.[51] *Sherbert* is most famous for its forthright formulation of the liberty principle. But, as Eisgruber and Sager observe, there is a secondary argument in the majority decision that is closer to the equality principle.[52] The unconstitutionality of the denial of benefits is "compounded," the decision argues, by "religious discrimination" arising from the fact that the law accommodates Sunday-worshippers but not Saturday-worshippers.[53]

The attitudinal conception has trouble accounting for this equality strand in *Sherbert.* There may have been a general atmosphere of contempt and disdain towards Seventh-Day Adventists in South Carolina in the 1950s,[54] but the Court does not suggest that these attitudes accounted for the unequal or discriminatory character of the law. In addition, if we seek to impute a reasonable rationale to lawmakers, there would be no need to invoke the assumption of a hierarchy of ends. It would be enough to say that having a weekly day-off is valuable, and that the vast majority of people in the state at the time would prefer that day to be Sunday. One can reconstruct why officials would establish a calendar based around a schedule that is most convenient and advantageous to the majority without attributing to them any value judgment about different ways of life.

To understand *Sherbert* in terms of the equality principle, an alternative to the attitudinal conception is needed. What the Court seems to be appealing to is an idea that South Carolina's laws were unfair.[55] They expressly protected Sunday-worshippers from the consequences of refusing to work on Sundays, even when factories were open as part of a national emergency, while denying an equivalent protection to Saturday-worshippers. It is true that there are some

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[51] *Sherbert v. Verner* 374 U.S. 398
[52] *Religious Freedom,* 14-5, 40.
[53] *Sherbert,* 406
[54] For a discussion positing such an atmosphere, see Greenberg and Sager, "Religious Freedom," 51.
[55] Laborde, *Liberalism's Religion,* 229-30.

coordinated social activities that are optimally facilitated when everyone in the community shares a common day-off. But this point seems insufficient to counter the impression that the laws were unfair. For one thing, the laws applied even in a national emergency when factories remain open all week and a common day-off is impossible. For another, even if it is true that Saturday-worshippers would lose access to the goods of the common day-off (if they worked Sunday instead) arguably they should be allowed to balance for themselves these goods against their religious obligations. Finally, even if the common day-off is of general overriding importance, this does not entail that there was no unfairness to Saturday-worshippers if Sunday was the designated day. On the contrary, such a resolution could reasonably be described as unfair treatment of a minority justified by the greater good.

So the proposal is that *Sherbert* describes a form of unequal treatment of Saturday-worshippers that consists in two elements: (a) a legal burden on Saturday worship (loss of benefits), and (b) a claim that this burden denies Saturday-worshippers a fair opportunity to pursue their ends. The unfairness in this analysis takes a form that is understudied but quite common. The government has a benefit it seeks to provide, or a burden it seeks to impose in order to produce some benefit. But the benefit or the burden can be structured or formatted in a variety of ways, and this formatting decision is consequential for different ends pursued by citizens.[56] Some formats will suit one set of ends, while others will suit different ends. Perhaps there are formats that suit nobody's ends or, more appealingly, that are generic or flexible enough that they can suit various different ends. In *Sherbert*, the government is trying to provide a genuine good – protected time-off from work – but it does so in a format (protected Sundays) that suits the majority's ends but not the minority's. The unfairness, if there is unfairness, hinges

[56] On formatting, see the works cited in fn 57 below

on the possibility of more generic or flexible ways of formatting the good, such as allowing minorities to select a different day-off with no penalty.

The opportunity conception of equal treatment has potentially significant implications for the reach of the equality principle. Consider *Fraternal Order* one more time. The way that case is usually understood involves a comparison between religious and medical needs. We have seen that that comparison fails to justify an accommodation for the Muslim plaintiffs. The opportunity conception offers a distinct and more promising strategy for defending that result. Suppose, as was suggested earlier, that the government interest in enforcing a no-beard policy lies in the value of the police having a uniform appearance. By itself, the interest in uniformity is indeterminate as to what exactly the uniform and grooming requirements should be. The usual pattern is for the majority to format the standard of uniformity according to its own cultural traditions and religious beliefs.[57] Uniformity standards in Muslim-majority societies would likely not require officers to be clean-shaven. When the majority adopts a format that suits its own ends, then this raises the question of whether the burdens placed on the minority are fair. As with the calendar case considered above, this depends on whether an alternative format could be designated that is approximately as effective in realizing the government's interest, and that is either flexible or generic enough to fit with different ends. If there is such an alternative format, then the minority (in this case the Muslim plaintiffs) could reasonably maintain that they are denied a fair opportunity to follow their religion. Together with the burdensome nature of the

[57] Alan Patten, *Equal Recognition: The Moral Foundations of Minority Rights*, (Princeton, 2014) 158, 169-71; Laborde, *Liberalism's Religion*, 229-38. For a related but more general discussion, see Sophia Moreau on "structural accommodations" in *Faces of Inequality* (Oxford, 2020), 42-3, 55-61. Moreau emphasizes that such accommodations, which cater to the needs and interests of the majority and overlook those of others, are not necessarily grounded in a failure of consideration (what I am calling the attitudinal conception) toward disadvantaged groups. She characterizes one example of a structural accommodation – architectural choices that exclude or burden people with certain disabilities – as reflecting "a quite neutral, pragmatic effort to build in a way that is efficient and in demand" (57).

grooming policies, this unfairness would be enough to demonstrate an infringement of their religious freedom.

Arguments of this form are potentially available in other cases as well. To get a flavor of possible applications consider the case of vaccine mandates. Assume that the rationale for such mandates is controlling the transmission of disease. Suppose also that there is a non-vaccine measure (such as quarantining after exposure) that is approximately as effective as vaccines from the perspective of the stated rationale. Under these assumptions, someone with strong religious objections to vaccines could complain that a vaccine mandate treats their ends unequally. The rationale for regulating is to control transmission, but the way in which the regulation is formatted (vaccine rather than quarantine) unnecessarily, and therefore unfairly, favors some ends over others. Or consider the venerable question of whether sincere pacifists have a right to claim an exemption from being conscripted into combat service. Imagine that combat is but one of several roles that the state needs its citizens to fulfill in order to protect itself in a time of war. A conscription law that simply assigned people to a combat role regardless of their ends would be unfairly formatted if there is some alternative way of sorting people into combat and non-combat roles that both secures enough conscripts into each type of role and is sensitive to the different ends of the citizens being conscripted.[58]

My point in mentioning these examples is not to resolve complex and longstanding controversies over religious freedom. It is simply to suggest that the equality principle, understood through the opportunity conception, is a promising framework for analyzing them. Adopting the ends conception over the reasons conception has the effect of shrinking the protection of religious freedom that can be justified on equality grounds. The attitudinal

[58] For a proposal, see Greenawalt, *Religion and the Constitution*, vol 1, 53-4.

conception of equal treatment does not change this basic picture. But the opportunity conception offers a plausible pathway, worthy of further exploration, to re-expanding the protection of religious freedom offered by the equality principle.

5. Conclusion

My aim has been neither to provide a general defense of the equality principle, nor a general argument for the principle's rejection. While proponents of the equality principle confidently apply it in various cases (as do critics formulating counterexamples), the principle is less straightforward than it initially appears. There are questions about what exactly it is that the principle supposes should be treated equally, and also about what exactly it would mean to treat secular and religious commitments equally. By considering several possible answers to these questions, the paper seeks to arrive at a formulation of the equality principle that is as strong as possible. That formulation privileges ends over reasons as the object of equality. And it understands equal treatment not just as a matter of avoiding certain attitudes but also as a matter of securing fair opportunity.

The upshot is a view of the shape of religious freedom that diverges in significant ways from the one normally associated with the equality principle. The account defended here should lead to different kinds of questions being asked about religious freedom claims, and to a different pattern of judgments about the merits of such claims.