No Tears For Creon

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Abstract

This essay critiques Professor Martha Nussbaum’s recent book, Liberty of Conscience: In Defense of America’s Tradition of Religious Equality (Basic Books 2008). Nussbaum’s thesis is that the entire tradition of religious liberty in America can be both best understood (as a historical exercise) and justified (as a philosophical one) by recourse to the overarching principle of “Equal Respect” – that “[a]ll citizens have equal rights and deserve equal respect from the government under which they live.” Nussbaum insists that Equal Respect runs like a thread throughout the tradition and that all other conceivable values of religious liberty are subordinate to it. After setting out her theoretical claims, Nussbaum considers the views of several historical figures and argues that each of these luminaries argued, at bottom, for something very much akin to her ultimate principle. Nussbaum also examines a host of free exercise and establishment issues in light of this principle, concluding that the tradition of religious equality in this country is under threat and calling for renewed vigilance in its defense.

This piece takes issue with Nussbaum’s methodology. Elevating the principle of Equal Respect to supreme normative status distorts and misunderstands the conflicts actually at issue in many religious liberty disputes. In order to mount a satisfying methodological challenge to a thinker of Nussbaum’s stature and influence, the essay considers a number of Nussbaum’s previous writings – especially her writings about basic capabilities theory and equality – in order to make better sense of Nussbaum’s claims in Liberty of Conscience and to locate them within her overall contributions to political theory. Thereafter, the essay focuses specifically on the inadequacies of her assessment of one case in particular – Wisconsin v. Yoder. It traces these failings back to her previous writings, concluding that there are reasons for skepticism about Nussbaum’s approach as a comprehensive theory of the religion clauses.
NO TEARS FOR CREON

Marc O. DeGirolami

There is a fleeting moment toward the end of Sophocles’ Antigone, just before Creon relents and races off to make amends, when Creon is genuinely torn between competing convictions. The Chorus beseeches him to release Antigone and give her brother a proper burial. Creon had steadfastly, hubristically, refused to accede on the ground that Antigone had disobeyed Theban law and that her brother was an enemy of the city. But at this late point in the play, Creon is all but persuaded. And yet he hesitates still: “My heart misgives me; it is better to keep the established laws, even to life’s end.”

It is a tipping point of sorts. Creon at long last recognizes that he is profoundly in the wrong but he still believes that his choices, though on balance unwise, are not utterly without merit. There is something of value in steadfast, even obdurate, faithfulness to the equal application of the law that is lost when Creon yields to the urgings of the Chorus. Certainly it may be a value worth sacrificing, given the alternative; yet it is a loss nonetheless. Soon enough the moment of tension has passed, washed away by the blood of a triple suicide and the folly of Creon’s pride. But if one resists the facile impulse to heap self-righteous scorn on Creon, one can sense something of the strain of Creon’s choices and the understandable concerns that animate his indecision.

In her recent book, Liberty of Conscience: In Defense of America’s Tradition of Religious Equality, Professor Martha Nussbaum offers an acute meditation on the relationship of the ideal of equality to the constitutional commitment to religious liberty. The breadth of her knowledge – philosophical, historical, legal, and religious – is so immense and her writing so accessible that it lulls one into a false sense of understanding all four spheres of learning as well as she does. But for all its impassioned forcefulness, Nussbaum’s book evinces an extraordinary lack of sympathy and understanding for the choices of Creon – the metaphorical Creon, whose role it is to protect the state and to manage and judge among the clashing and often incompatible interests that swirl about it. Nussbaum mounts an ambitious and spirited defense of the American “tradition of religious equality,” drawing a nice, suspiciously straight line in the history of the ideas of equality and “human dignity” from the Stoic philosophers through Roger Williams, John Locke, James Madison, and straight on to Immanuel Kant and John

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3 Nussbaum, a renowned classicist, likewise has little compassion for Creon himself. See Martha C. Nussbaum, The Fragility of Goodness 51-82 (1986).

4 LC, supra note __, at 80.
“America’s tradition of religious equality” is said to include, putting it mildly, an eclectically international group of thinkers: Cicero, Marcus Aurelius, Seneca, Adam Smith, Williams, Madison, Kant, and Rawls all fall neatly into place. Yet the main difficulty is that even if one is persuaded that this creative reconstruction is interesting and suggestive of the profound importance of equality as a component of religious liberty, it is ultimately unconvincing as a unified theory of religious liberty. And it is unsatisfying because Nussbaum insists on something that she calls “Equal Respect” as the overriding value of religious liberty – the single super-value that (1) always takes precedence over any other value with which it conflicts; and (2) can only be violated if by that violation its realization would be more generally served.

It may come as a surprise to see Professor Nussbaum’s account of religious liberty characterized as an overriding egalitarian account, since she is well-known for her contributions to pluralist political theory. My characterization of her view of religious liberty as an overriding egalitarian account responds to the arguments that she makes in *Liberty of Conscience*, as well as what she has said about religion in selected other work, and it is not my intention in this review essay to compare in detail her position in this book with her previous oeuvre. Nevertheless, in order to evaluate Nussbaum’s claims about religious equality as the single paramount value of religious liberty, it is worthwhile to take stock, in necessarily cursory fashion, of a distinctive portion of the rich

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5 See id. at 56-57 (“[Roger] Williams is an emotional writer . . . . Nonetheless, it is not implausible to compare his core ideas to those that will animate the philosophy of Immanuel Kant a century later.”).

6 Id. at 73, 83-84, 95.

7 John Courtney Murray once quipped that when theorizing about religious liberty: “Scylla is archaism; Charybdis is anachronism.” JOHN COURTNEY MURRAY, RELIGIOUS LIBERTY: STRUGGLES WITH PLURALISM 188 (J. Leon Hooper ed. 1993).

8 JOHN KEKES, THE MORALITY OF PLURALISM 19 (1993). Kekes explains, “For instance, if life were an overriding value, then in conflicts with freedom or justice, life would always take precedence; furthermore, the only justification for taking a life would be to preserve other lives.” Id. The second feature of overriding values distinguishes them from absolute values. Id. at 20 (“Overriding values need not be absolute, because monists could agree that in any particular situation an overriding value may be justifiably violated in the interest of the overriding value in general.”).

9 Sophisticated advocates of overriding values may resist the ascription of a desire to order values hierarchically, as Ronald Dworkin has, but their views invariably demand the prioritizing of a particular value as central or focal, and around which all other values neatly and holistically coalesce. *See* Ronald Dworkin, *Equality, Luck, and Hierarchy*, 31 PHILOSOPHY & PUB. AFFAIRS 190, 196-97 (2003) (stating that his own egalitarian view does not rest on “selecting one political value as fundamental so that others are subordinate . . . but through an interpretive method that emphasizes interrelations and interdependencies among all the political values, supposing them to come together in an overall account of a society of equals”) (emphasis added). For further evidence of Dworkin’s overriding egalitarianism, see his *Sovereign Virtue*, especially Chapter 3 in which Dworkin claims that the values of liberty and equality “are not independent virtues, but aspects of the same ideal of political association.” RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 182 (2000).

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See generally MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS (1986); MARTHA NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONLITY, SPECIES MEMBERSHIP (2006); see also WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 5 (2002) (listing Nussbaum as one of the “leading contributors” to a “full-fledged value-pluralist movement”).
tradition of egalitarian thought – some of it of her own creation – out of which Nussbaum’s theory emerges.

Part I of this essay is devoted to that task. Part II considers the specific theory of religious liberty that Nussbaum articulates in *Liberty of Conscience* in light of this vital theoretical background. Finally, Part III critiques her approach with special emphasis on one of the crucial religious liberty cases in the Supreme Court’s First Amendment jurisprudence, *Wisconsin v. Yoder*.10 *Yoder* is used as a test case for Nussbaum’s theory: if her approach does not deal adequately with a case of *Yoder’s* importance,11 there is reason for skepticism.

I. Capabilities and Conflict

The back-story against which *Liberty of Conscience* is set and on which many of its claims depend begins somewhat *in medias res*, with an influential account of equality called the “basic capabilities approach” first developed by Amartya Sen in response to John Rawls’s important theory of equality in *A Theory of Justice*.12 Sen argued that egalitarian theory ought to concern itself with a person’s “‘basic capabilities’: a person being able to do certain things.”13 According to Sen, it is this freedom to achieve some kind of capability – a concern with what “good things do to human beings”14 – that answers the question of what egalitarian theory ought to seek to equalize. Sen was responding critically to Rawls’s emphasis on equalizing what Rawls had called the “social primary goods,” including wealth and income, as such.15 “Sen’s critique of primary goods boils down to the fact that primary goods cannot adequately account for inter-individual differences in people’s ability to convert these primary goods into what people are able to be and to do in their lives.”16 Sen acknowledged, however, that in its application the capabilities theory “must be rather culture-dependent” but nevertheless counted it an improvement over Rawls’s approach, which he described as “both culture-dependent and fetishistic.”17 Yet Sen

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11 Steven Smith has called *Yoder* “arguably the most important free exercise case between” *Sherbert v. Verner* and *Employment Division v. Smith*. STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 93 (2001).
13 Sen, supra note __[EoW], at 175.
14 Id.
15 See RAWLS, supra note __[TJ], at 365-368 (describing the social primary goods as including wealth, income, and other basic types of means that anyone would want in order to satisfy “a sufficiently wide range of ends”).
17 Sen, supra note __ at 176. By “fetishistic,” Sen meant that Rawlsian equality was overly concerned with the question of equality of distribution of the social primary goods themselves, and insufficiently attentive to any interest in those goods’ effect on people’s capabilities. Id.
conceded that the process of listing or specifying the basic capabilities was one of the chief difficulties for his theory.18

Sen’s basic capabilities theory has generated numerous developments and refinements. Two are particularly worth noting here.19 The first, developed by Harry Frankfurt, is an argument that egalitarians ought to be concerned with whether individuals are capable of leading minimally good lives according to some type of baseline objective measurement or quantum of “sufficiency,” rather than with the notion of equalization as such above that threshold.20 The second – Derek Parfit’s challenge to Rawls’s difference principle21 – posits that while the claims of the “least advantaged” ought to have a kind of presumptive priority as against the claims of those in a better position, their claims do not invariably carry greater weight and may, under some circumstances, be outweighed by the claims of others.22

But it is the difficulty of specifying the basic capabilities that has proven most nettlesome for capabilities theorists.23 Professor Jonathan Wolff explains:

[Political philosophy has found it hard[1] to incorporate Sen’s theory, for two main reasons. First, Sen has always refrained from setting out a definitive list of human functionings. Second, on a pluralist view it is very hard to understand what equality means. Equality seems to require a way of measuring functionings against each other, but the essence of a pluralist view is that this is not, in general, possible. Solving the first problem, as Martha Nussbaum has attempted to do in laying out an account of essential human functionings, simply brings out the difficulty of the second.24

It is here that Professor Nussbaum enters the picture, for her considerable efforts in respect of the basic capabilities approach are

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18 Id. (“There are many difficulties with the notion of ‘basic capabilities equality.’ In particular, the problem of indexing the basic capability bundles is a serious one.”).
19 These points are brought out by Jonathan Wolff in Equality: The Recent History of an Idea, 4 J. MORAL PHILOS., at 12-13 (2007).
21 See Rawls, supra note __[TJ], at 266 (“2. Social and economic inequalities are to be arranged so that they are both: to be attached to offices and positions open to all under conditions of fair equality of opportunity; and to be to the greatest benefit of the least advantaged members of society.”).
23 See Robeyns, supra note __ (“It is well known that Sen has refused to endorse one particular list of capabilities[,]”).
24 Wolff, supra note __[ERHI], at 13. Wolff uses the term “functionings” as synonymous with “capabilities” and this equivalence has been challenged. See Thom Brooks, The Capabilities Approach, Religious Practices, and the Importance of Recognition, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1137931, at 2 (“Functionings reflect the actual achievements of persons, whereas capabilities capture the freedom of persons to achieve.”). To illustrate, Brooks offers the example of a person who is fasting and another who is starving. Their “functionings” are the same, but their “capabilities” are entirely different. Id.
noteworthy in their attempt to create a list of the basic capabilities, and further in her bold claim, as Professor Ingrid Robeyns has paraphrased it, that “her list can become the object of an overlapping consensus of people as citizens who have otherwise diverse views.”

Drawing implicitly on Frankfurt’s insight about “sufficiency,” Nussbaum “defends a capabilities approach which provides us with a ‘basic social minimum’ that is universal in scope” and which represents, in her view, the minimum that any person requires in order to remain “worthy of the dignity of a human being.” She asks herself the question, “What are the characteristic activities of the human being? What does the human being do, characteristically, as such – and not, say, as a member of a particular group, or a particular local community.” According to Nussbaum, the answers to these questions (beyond those that concern basic biological needs such as adequate food, not being tortured and maimed, and so on) can often be found in a “convergence” achieved by the great variety of “myths and stories that situate the human being in some way in the universe, between the ‘beasts’ on the one hand and the ‘gods’ on the other.” Thus, the procedure for arriving at the list of capabilities is intuitive and arm-chair empirical, attempting to distill “a very general record of broadly shared experiences of human beings within history,” but it is also “tentative and open-ended,” allowing for the possibility that the list of capabilities can be modified (which, as a practical matter, usually means increased) at need. And it is the government’s obligation to see to it that these capabilities – the answers to Nussbaum’s questions – are distributed equally.

Here is Nussbaum’s list: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one’s political and material environment. Professor Thom Brooks accurately identifies one critical feature of Nussbaum’s capabilities – the capacity for autonomous choice:

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26 Robeyns, supra note __, at __; see NUSSBAUM, supra note __[W&HD], at 5, 74 (“I believe that we can arrive at an enumeration of central elements of truly human functioning that can command a broad cross-cultural consensus’’); NUSSBAUM, LC, supra note __, at Chapter 9 and 361-62 (“Toward an ‘Overlapping Consensus’?”).
27 Brooks, supra note __, at 4.
28 NUSSBAUM, supra note __[W&HD], at 5-6.
30 Id. at 73-74.
31 Id. at 74.
32 The list has changed substantially over time. See Martha Nussbaum, Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan, 111 ETHICS 102, 102-03 (2000) (“In general, my strategy has been to publish versions of my capabilities view as records of works in progress . . . .”). This list of ten capabilities represents one of the latest and is reflected in several of Nussbaum’s relatively recent publications.
33 See NUSSBAUM, supra note __[W&HD], at 78-80; see also MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT 416-18 (2001).
Our power of choice is central to the capabilities approach. If we lacked the capability to pursue any capability up to a social minimum, then measures should be taken to ensure that we can . . . For Nussbaum, we should never be permitted to fall below this threshold even if we would consent to it.34

Yet for Nussbaum it is not unadulterated “choice” pure and simple. “[T]he capability view insists that choice is not pure spontaneity, flourishing independent of material and social conditions. If one cares about autonomy, then one must care about the rest of the form of life that supports it.”35 Thus, Nussbaum claims that, for example, the practice of genital mutilation should be categorically forbidden, even if a person knowingly consents to or opts for it, because it “deprives individuals of the opportunity to choose sexual functioning,” thereby permanently injuring the capability of bodily integrity, which in turn protects “having opportunities for sexual satisfaction.”36 A “choice” for genital mutilation is not really a choice, or a choice of the right sort, because it ignores or does not “care about the rest of the form of life” that supports one’s autonomy, properly understood. As for the capability of “life,” there should be equally distributed “constitutional guarantees” ensuring that all people are “able to live to the end of a human life of normal length; of not dying prematurely”37 even if they themselves would oppose those universal and equally distributed impositions. Each of Nussbaum’s capabilities entails similarly exacting obligations on the government or community – both not to interfere with the ability of its people to exercise the capabilities and affirmatively to guarantee opportunities for their doing so, whether the guarantees are desired or not.38 As Brooks notes, one wonders precisely what communal or governmental activities are demanded in order to secure such goods as “having opportunities for sexual satisfaction” or “being able to laugh,” which Nussbaum claims is included in the capability of “play.”39

Setting these concerns aside, however, the more important question for present purposes is what happens when Nussbaum’s capabilities conflict, or when there are internal conflicts within one capability. Nussbaum insists that the capabilities never conflict and are

34 Brooks, supra note __, at 5-6.
35 Nussbaum, supra note __[W.C&D], at 95.
36 Nussbaum, supra note __[W&HD], at 78, 87.
37 Nussbaum, supra note __[UoT], at 416.
38 See Nussbaum, supra note __[UoT], at 418-419 (“If institutions do not provide . . . citizens with recourse and support [to achieve all the capabilities], the institutions . . . are defective.”).
39 Brooks, supra note __, at 7-8 (quoting Nussbaum, supra note __[W&HD], at 80); see also Robeyns, supra note __, at ___[cite] (“Nussbaum passionately advocates that all people over the world should be entitled, as a matter of justice, to threshold levels of all the capabilities on her list; but apart from mentioning that it is the duty of governments to guarantee these entitlements, she remains silent on precisely who should bear the burden and responsibility for realizing these capabilities.”); JOHN KEKES, THE ILLUSIONS OF Egalitarianism 102 (2003) (speculating that Nussbaum’s approach would probably require the government to “establish tax-supported satisfaction centers in which well-trained social workers can alleviate the suffering” of the sexually frustrated).
interdependent and mutually reinforcing. No capability, she claims, should be traded off to satisfy or achieve another capability; all are equally necessary. Moreover, Nussbaum is clear that an overriding commitment to the value of equality provides the ultimate normative grounding for adopting the capabilities approach in the first place:

A commitment to bringing all human beings across a certain threshold of capability to choose represents a certain sort of commitment to equality: for the view treats all persons as equal bearers of human claims, no matter where they are starting from in terms of circumstances, special talents, wealth, gender, or race.

But what of dissent, or disagreement about the priority of one or another capability in any given concrete situation? What of dissent about the desirability of achieving Nussbaum’s “threshold” or minimum – especially since Nussbaum has intimated that reaching that threshold might require some set of affirmative policies considerably more exacting than a bare minimum – with respect to one or more of the capabilities? Nussbaum demurs, maintaining that if one exercises the capability of “practical reason” correctly, “choice is not only not incompatible with, but actually requires, the kind of government reflection about the good, and the kind of interference with laissez-faire, that we find in Aristotelian social democracy.” So it seems that “choice,” for Nussbaum, is only worthwhile within a fairly limited range that will not produce conflicts in the capabilities, at least as Nussbaum envisions them.

This is the beginning of trouble for Nussbaum’s approach, because as a practical matter it seems likely that the basic capabilities of, for example, “practical reason” and “the emotions” will conflict in more than a few situations, and that the capabilities internal to “affiliation” are likely to conflict frequently (for example, the affiliation of sex or gender may conflict with the affiliations of religion or ethnicity). “Control over one’s . . . material environment” is likely to conflict with “bodily integrity” – at least insofar as the latter includes “having opportunities for sexual satisfaction” – as when one person’s capability to achieve a sense of security while riding on the subway or watching a movie conflicts with someone else’s “opportunity to achieve sexual satisfaction” in the adjacent seat. Stating flatly that the capabilities are

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40 Martha Nussbaum, Aristotle, Politics, and Human Capabilities, 138 [need specific cite].
41 NUSSBAUM, supra note __[W&HD], at 81.
42 Nussbaum, supra note __[W,C&D], at 86.
43 See id. (arguing that there still would be “capabilities failure” in affluent societies such as the United States and Japan even if there were substantial educational and health reforms in both countries).
45 Nussbaum writes that “affiliation” “entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin.” NUSSBAUM, supra note __[W&HD], at 79.
inherently or naturally consilient, or that we are only interested in some minimum threshold of choice, does nothing to address the reality that the possibilities for practical conflict – both inter- and intra-personal – are endlessly more complex than Nussbaum admits. And at least as to inter-personal conflicts, many will need to be resolved by the state, the body charged by Nussbaum with the daunting responsibility to guarantee all of the capabilities and to distribute them equally. Moreover, and against Brooks, the difficulty is not primarily one of scarce resources. While it is true that “no community has infinite wealth and scarce resources must be spent wisely,” the question of resources is secondary to the problem of the coherence of a vision that denies the incompatibility and incommensurability of the capabilities themselves. And if, as Brooks observes, Nussbaum’s basic capabilities seem ever to spawn new or “derivative” capabilities, offering capabilities of greater and greater specificity, then the problem of compatibility and commensurability is only exacerbated over time. The longer and more specific the list – the less “open-ended and humble" – the greater the opportunity for and likelihood of conflict.

II. “Obsessed with Equality”

What of religious liberty as a capability? The egalitarian theorist approaching the question of religious liberty is apt to begin by asking herself Sen’s “equality-of-what” question: that is, using what normative framework or dimensions should she evaluate the good of religious liberty. For Nussbaum, “religion” is not a self-standing capability

See Nussbaum, supra note [W,C&D], at 85 (“The list is, emphatically, a list of separate components. We cannot satisfy the need for one of them by giving a larger amount of another. All are of central importance and all are distinct in quality . . . . At the same time, the items on the list are related to one another in complex ways.”).

In fact, the minimum does not seem very minimal at all. Elsewhere Nussbaum writes:

[W]e want to describe two distinct thresholds: a threshold of capability to function beneath which a life will be so impoverished that it will not be human at all; and a somewhat higher threshold, beneath which those characteristic functions are available in such a reduced way that, though we may judge the form of life a human life, we will not think it a good human life. The latter question is the one that will eventually concern us when we turn to public policy: for we don’t want societies to make their citizens capable of the bare minimum . . . . One may be alive without being well nourished.

Nussbaum, supra note [W,C&D], at 81.

Brooks, supra note __, at 9.

Id.

Id.

NUSSBAUM, supra note __[W&HD], at 77.

This is precisely why Nussbaum, in earlier work, insisted that the capabilities were “general, and in a sense vague[.]” Nussbaum, supra note __[W,C&D], at 93. Yet as time has gone on, she has specified greater and more precise capabilities. The following discussion is limited to Nussbaum’s articulation of the basic capabilities approach as respects the question of religious liberty, and leaves to the side both her and others’ capabilities theories with respect to other issues.

(neither, for that matter, is liberty), but is instead included in or
derivative of the basic capabilities of “senses, imagination, and thought,”
“affiliation,”55 and “practical reason.”56 And it is the threshold ability to
choose autonomously in matters of religion (but always within the lower
limit set by the other capabilities), thereby satisfying the three basic
capabilities of senses/imagination/thought, affiliation, and practical
reason, that answers the equality-of-what question:

With the family as with religion, we must observe the principle of
each person’s capability. We must, that is, ask at every point not
just whether love is preserved but whether the capability of each
person to select appropriate relations of love and care (and other
central functions) is preserved.57

Thus, Nussbaum’s derivative capability of religious liberty emerges with
two essential features:

(1) it involves a threshold, minimal and rather unassuming
capability to select autonomously what an individual believes to
be “appropriate [religious] relations” of “love and care” or
whatever the other “central functions” of religious liberty
require, always bounded by the stringent requirements of the
other capabilities;58 and

(2) it demands the equal distribution of the ability to achieve that
capability, which entails negative and positive obligations on the
state.59

Liberty of Conscience is Nussbaum’s extended argument that this
vision of religious liberty is both a historically accurate synthesis of the
First Amendment’s religion clauses and a philosophically appealing
account of it.60 The book’s thesis is that “a key thread holding all the key
concepts together is the idea of equality, understood as nondomination or
nonsubordination” and epitomized in what Nussbaum calls “The
Equality Principle” or the principle of “Equal Respect”: “All citizens
have equal rights and deserve equal respect from the government under

55 NUSBAUM, supra note __[W&HD], at 179.
56 Martha Nussbaum, Capabilities as Fundamental Entitlements, in KAUFMAN, supra
note __[CE], at 52. In Women and Human Development, Nussbaum refers to “liberty of
religious belief, membership, and activity” as “among the central human capabilities” but
ultimately she considers these attributes to be “within” other more fundamental
capabilities. NUSBAUM, supra note __[W&HD], at 179.
57 NUSBAUM, supra note __[W&HD], at 274.
58 Id.
59 LC, supra note __, at 1.
60 The discussion here focuses on the overriding egalitarian aspects of LC and leaves to
the side both the ascription by Nussbaum of her own views to the American founders (“If
there was anything that all the framers agreed strongly about, and never questioned, it
was the idea of equality.” Id. at 103) and the plausibility of the historical and thematic
connections that Nussbaum draws between and among authors sometimes separated by
ages, sometimes by millennia, of temporal and cultural distance.
which they live.” Every other principle or value that might relate to the idea of religious liberty, including those that Nussbaum recognizes as legitimate and admirable, is itself dominated by and subordinated to the idea of Equal Respect. Thus, “conscience” – “the faculty in human beings with which they search for life’s ultimate meaning” – is important as a feature of religious liberty only inasmuch as it demands that “equal respect should be given to high and low, male and female, to members of religions one likes and also to members of religion one hates.” “Liberty of conscience is worth nothing if it is not equal liberty.” “Accommodation” – “giving religious people a ‘break’ in some area, for reasons of conscience” – is a worthwhile practice even though it is a form of ‘nonneutrality’ only if and when it “seems required by equality.” “Liberty” “is only fair if it is truly equal liberty” and is worth protecting only insofar as it enables individuals to satisfy the needs of their ‘consciences’ equally. “Separation of church and state” is valuable only insofar as it serves the principle of Equal Respect. At one time, Nussbaum richly earned the reputation as a value pluralist in The Fragility of Goodness, a pathbreaking work that blended learned literary interpretation and an acute philosophical sensitivity. Her previous writings notwithstanding, however, it is plain that at present, and at least in the area of religious liberty, Nussbaum, by her own admission, withdraws considerably from value pluralism.

If Nussbaum’s introductory chapter does not make it abundantly plain that she supports an overriding egalitarian account of religious liberty, later statements leave no doubt. The fundamental problem with establishmentarian regimes is their inherently hierarchical structure, and hierarchy of any kind is the gravest offense against Equal Respect. The fostering of religious sentiments by the government and the financial support of religion by the state is altogether objectionable principally, if not solely, because it betrays Equal Respect. The United States – or at

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61 Id. at 21-22.
62 Id. at 21.
63 Id. at 19.
64 Id. at 2 (emphasis added).
65 Id. at 22.
66 Id. at 22, 24.
67 Id. at 12, 25.
68 Nussbaum, supra note [FG]. See especially Chapter 2, “Aeschylus and Practical Conflict.” Id. at 25-50.
69 See LC, at 376-77 n.4 (“On the whole, [Kent] Greenawalt’s analysis is broadly consistent with mine, although it is more open-ended and plural-valued, focusing less on equality as a central goal, and suggesting that different approaches may be justified in different areas of the law.”).
70 See id. at 74-76 (“[E]stablishments, however benign, create ranks and orders of citizens, defining the status of some as unequal to others.”); see also id. at 225 (“What is wrong with religious establishment? . . . . [A]bove all, the tradition sees in establishment a threat to equality.”).
71 Id. at 76.
the least the agglomeration of individuals who happen to have lived here from the late 18th century to the present – has been nothing less than “obsessed with equality” and in the area of religious liberty, equality is “the idea is that people are of equal worth as citizens, and are therefore to be treated as equals by laws and institutions.”72 “[R]eligious liberty is not a very significant constitutional value in a democracy if it is the sort of thing that can be granted hierarchically, rather than being granted to all on terms of equality.”73 “[H]istory shows us that constant vigilance is required lest this value [Equal Respect] be narrowly and partially construed, or misapplied in ways that favor hierarchy.”74 Americans have admirably “forg[ed] a political order that exemplifies equal liberty of conscience” but “we always need wise citizens – including judges – who can think well about how to realize this value in changing circumstances[.]”75 And the very source of the obligation to respect religious liberty lies in the common egalitarian ties that bind all people as “citizens of the world” (and emphatically not only as citizens of the United States) and by the “ethical commitments (to equal respect and the value of liberty)” that are necessarily shared by the global confraternity of cosmolites.76 In sum, “[e]quality provides an orienting account” of religious liberty, and “we make progress” in the area of free exercise or establishment by asking:

‘How does the policy in question affect the equality of citizens in the public realm? What statement does it make concerning the equality of citizens who differ in religion and/or nonreligion?’ This idea runs like a thread through all cases[.].77

In addition to its numerous intrinsic virtues, Nussbaum writes that her overriding value of Equal Respect also brings about important instrumental side-effects that mutually reinforce the capability to choose that religion which will best sate the individual urgings of “conscience”:

[O]nce a religion gets hooked up with state power, it becomes much more difficult for its members to innovate, creating new sects or departing from an old one that has lost its vigor . . . . This entrenchment retards dynamism and creative challenges to the past.78

72 Id. at 226 (emphasis in original).
73 Id. at 124-25.
74 Id. at 360.
75 Id. at 362.
76 Id. at 82 (“One more influential Stoic idea that will play an influential role, ultimately, in constructing our First Amendment is that of human beings as ‘citizens of the world’ or ‘cosmopolitans.’”). John Gray has acutely described this genre of liberalism as envisaging a “universal convergence on a cosmopolitan and rationalist civilization.” JOHN GRAY, ENLIGHTENMENT’S WAKE: POLITICS AND CULTURE AND THE CLOSE OF THE MODERN AGE 121 (1995).
77 Id. at 229; see also NUSBAUM, supra note ___[W&HD], at 86 (“A focus on capabilities as social goals is closely related to a focus on human equality[.]”).
78 Id. at 95.
Equal Respect is a useful tool or catalyst for those who yearn to “unleash[]” “all sorts of theological and organizational creativity.” Equal Respect strengthens and is strengthened by one’s ability to achieve autonomously the derivative capability of conscience – the individual “faculty” of “reason[ing], search[ing], and experience[ing] emotions of longing connected to that search,” a search whose object necessitates perpetual “creative” innovations and improvements in one’s understanding of “ultimate questions, questions of ultimate meaning.” This conception of religion, which Nussbaum elsewhere clarifies is what she means by “conscience,” is “thin and inclusive”; and it is the only type of religious understanding that is consistent with Nussbaum’s overriding value of Equal Respect. The empowerment of individuals to achieve this capability for themselves, and to change and improve it at will within the limits imposed by the ultimate principle of Equal Respect is, for Nussbaum, the core purpose of religious liberty.

III. Religious Liberty and the Illusions of Theory

As a general matter, Nussbaum’s theory of Equal Respect favors the ancien régime of free exercise represented by Sherbert v. Verner (and in part resurrected by the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act) and not Employment Division v. Smith: she supports generous judicial accommodations, particularly when they benefit minority religions, and she is critical of supporters of Smith as insufficiently sensitive to the “unfairness” generated by its uniform rule. But it is useful to consider in detail one case in particular, Wisconsin v. Yoder, and Nussbaum’s comments about it, in order to see how Nussbaum’s overriding egalitarianism leads to mischaracterization and misunderstanding of the full range of values encompassed in the idea of religious liberty as developed in that case.

In Yoder, the State of Wisconsin prosecuted several members of the Old Order Amish and the Conservative Amish Mennonite Church for failing to comply with Wisconsin’s compulsory school-attendance law, which required that all children attend public or private school until the age of 16. The Yoders and two other parents had withdrawn their children from school at ages 15, 15, and 14 respectively, and they argued that the compulsory attendance rule violated their free exercise rights.

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79 Id.
80 Id. at 169.
81 See id. at 226-27.
86 See generally id. at Chapter 4.
87 406 U.S. 205 (1972).
88 Id. at 207 (citing Wis. Stat. § 118.15 (1969)).
89 Id.
The Amish\textsuperscript{90} claimed that “their children’s attendance at high school, public or private, was contrary to the Amish religion and way of life\textsuperscript{91}; their children’s continued school attendance would, in their view, “endanger their own salvation and that of their children.”\textsuperscript{92} Various experts corroborated the Amish claim that compulsory education until the age of 16 would damage, perhaps irreparably, the Amish way of life.\textsuperscript{93} Relying on their testimony and several secondary sources, the Court characterized the core beliefs of the Amish as a “fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence” and “devotion to a life in harmony with nature and the soil . . . to make their living by farming or closely related activities.”\textsuperscript{94} Chief Justice Burger, writing for the Court, then offered this apt summary of the conflict of values in the respective ways of life of the Amish and the State:

[The Amish] object to the high school, and higher education generally, because the values they teach are in marked variance with the Amish values and the Amish way of life . . . . The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning – learning through doing; a life of ‘goodness,’ rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society . . . . In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.\textsuperscript{95}

The incompatibility of their values with the State’s, together with the physical and emotional distance from the Amish way of life that would result from additional years in school (precisely at a time where physical and emotional proximity was most important in forming lasting connections to the Amish community),\textsuperscript{96} combined to form a powerful free exercise challenge to the State’s compulsory education law.\textsuperscript{97}

\textsuperscript{90} There are important historical differences between the Old Order Amish and the Mennonite Church, but for purposes of simplicity the claims of the Yoder plaintiffs are occasionally referred to here simply as those of “the Amish.”
\textsuperscript{91} Id. at 209.
\textsuperscript{92} Id. Apparently the State rejected a possible compromise solution which would have required the children to attend an Amish vocational program three days a week, in which they would have been taught English, mathematics, health, and social studies, as well as agriculture and homemaking, by an Amish teacher. The State felt that this program would not offer the Amish children “substantially equivalent education” to that provided in public or private school. Id. at 209 n.3.
\textsuperscript{93} Id. at 209-10.
\textsuperscript{94} Id. at 210.
\textsuperscript{95} Id. at 210-12.
\textsuperscript{96} Id. at 211-12. Public school education through the eighth grade was not objectionable to the Amish because it enabled their children to “read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of their daily affairs.” Id. at 212.
\textsuperscript{97} See 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 93 (2006) (“Advanced education [for the Amish] is triply harmful. It draws children away from the community at a stage vital for their integration into Amish
It was also important to the Court that the Amish way of life was conducive to a productive, law-abiding, and self-sufficient existence. According to an expert credited by the Court, the learning of specific skills and practices emphasized by the Amish educational system—skills that were “directly relevant to their adult roles”—prepared Amish children for productive adult lives in a fashion “perhaps superior to ordinary high-school education.”

Both the Court and the dissent were sensitive to the values and obligations reflected in the State’s compulsory education law beyond the eighth grade, as well as the multiplicity of ways in which that set of commitments may conflict with others of similar, if not greater, weight. The government’s duty to ensure that all of its citizens are sufficiently educated to meet the vocational needs of a career may conflict with parents’ rights to provide their children with an education of their choosing (religious or otherwise), provided that the alternative education also “prepare[s] [them] for additional obligations,” which may or may not involve a traditional career. The government’s rightful interest in creating opportunities and exposing its budding citizens to the “unparalleled progress in human knowledge” and the “new and amazing world of diversity”—to opportunities to be “a pianist or an astronaut or an oceanographer”—may conflict with the parents’, and the local community’s, interest in fostering in children a respect for and attachment to local customs, traditions, and practices, one of whose crucial features often is their durability and resistance to easy change and innovation. The government’s interest in cultivating an inquisitive, questioning, and critical sensibility so that a child may be better equipped to participate as a citizen in democratic government may conflict with the parents’ or the community’s interest in cultivating an unreflective and intuitive decency, learned not by reading books or developing the skills of intellectual inquiry and deft argumentation, but by observing and modeling less critically the habits and manners of admired fellows or teachers deeply committed to a particular practice or way of life (much as courage, perseverance, and effort may be learned by observing the behavior of participants in an athletic contest). The government’s interest in developing a materialistic or consumerist ethos in children, as well as, perhaps more benignly, simply in cultivating their

98 Yoder, at 212-13.
99 Id. at 212.
101 Yoder, 406 U.S. at 216.
102 Yoder, 406 U.S. at 245 (Douglas, J., dissenting).
103 Id. at 244-45.
104 Id. at 217.
106 See GREENAWALT, supra note __ [R&C I], at 91-92.
cultural tastes and sensitivities\textsuperscript{107} – so that children might eventually contribute both as producers and consumers in the dominant socio-cultural milieu\textsuperscript{108} – may conflict with the parents’ or the community’s interest in developing in children the sense that a materialistic or even an excessively aesthetic outlook can be damaging to one’s spiritual and psychological well-being.\textsuperscript{109} And then there are the interests of the child, which are in the process of developing and may partake at once of all of these conflicting values and commitments in a host of unpredictable ways.\textsuperscript{110}

Nussbaum’s view of \textit{Yoder} is that the case is “[o]n balance . . . probably rightly decided” but that the only legitimate grounds for assessing its persuasiveness are those of “conscience,” and the specific sense in which the opinion advances conscience through Equal Respect.\textsuperscript{111} Nussbaum believes that \textit{Yoder} is “less clear-cut than \textit{Sherbert},” but only because it was clearer that “fairness” – the way in which “conscience” must be distributed according to the principle of Equal Respect – was offended in \textit{Sherbert} than in \textit{Yoder}.\textsuperscript{112} She reframes the “fairness” question “at a higher level of generality,” arguing that it is nevertheless the self-same principle: does the “majority get[] to abide by and preserve their religious way of life [while] the Amish (arguably) don’t[?]”\textsuperscript{113} She then proceeds to detail the ways in which the decision is flawed because insufficiently attentive to the principle of Equal Respect:

Several aspects of the Court’s analysis are disturbing. The Court never considers the possibility that the children may choose to leave the community, and thus might need an education that enables them to participate knowledgeably and respectfully in

\textsuperscript{107} Id. at 91 (“Education assists people to enjoy forms of culture; cutting their education short restricts development of that capacity in students.”).


\textsuperscript{109} Id. (describing both “symbolic and practical” value in the Amish rejection of technological comforts); \textit{see also} Kent Greenawalt, \textit{Private Consciences and Public Reasons} 3 (1995) (“In cultures pervaded by a concern for material welfare and the pursuit of advantage for oneself and one’s family, the sense of belonging to a community is weak. Those who are self-conscious enough to worry about the absence of community have sharply different diagnoses of the problem and have proposed different correctives.”).

\textsuperscript{110} To say this is not to say, as Justice Douglas does \textit{tout court} in his dissent, that “[r]eligion is an individual experience.” \textit{Yoder}, 406 U.S. at 243 (Douglas, J., dissenting). Whatever this statement might mean, it cannot mean that for any person, let alone for a child, one’s view of the worth of religion and one’s own religious traditions are capable of being understood in a vacuum, deracinated from the influences (positive or negative) of family, culture, and community and examined in isolation. This is not to deny that the feelings of the children Vernon Yutzy and Barbara Miller (and, again contra Justice Douglas, of Frieda Yoder as well, notwithstanding her brief testimony) about their religion may have been complicated and well worth exploring within the overall context of the opposing claims.

\textsuperscript{111} NUSSBAUM, supra note __ at 144-46.

\textsuperscript{112} Id. at 144. In \textit{Sherbert}, the Court held that the government could not deny unemployment benefits where the plaintiff claimed that she could not work on the Sabbath for religious reasons. \textit{Sherbert v. Verner}, 374 U.S. 398 (1963).

\textsuperscript{113} Id. at 144.
democratic politics, rather than simply to avoid it. . . . One can’t help feeling that the status of the Amish as a kind of “model minority” – wealthy, orderly, no problem to anyone – influences the reasoning of the majority more than it really should, given that what we’re dealing with is the education of children for a life in which they may be part of that community, but also may not. Given the Court’s uneven track record in dealing with strange, minority religions . . . the favorable treatment meted out to the Amish seems a little unfair: they get a break in part because they are wealthy and established, and don’t pose any big challenge to majority Protestant values of thrift and virtue.

People have also disagreed about how crucial the two years in question are to the interests mentioned by Wisconsin (personal well-being and democratic citizenship): do children in the first two years of high school learn skills of autonomy and democracy that they would be unable to learn at a younger age? Or are these years primarily taken up with dating and peer pressure?114

In the end, however, Nussbaum sides uneasily with the Yoder majority because “the burden involved [on the Amish] was an extremely severe one” – one, however, based principally on the value of Equal Respect – and because “the State certainly did not show a compelling interest that would be served by denying the exemption and that could not be served in some other non-burden-inflicting way.”115 Five criticisms of Nussbaum’s analysis of Yoder and of her general approach to religious liberty follow.

The first thing to observe is how cursory and dismissive is Nussbaum’s analysis of the State’s interests in Yoder. Nussbaum claims that the State “certainly” did not demonstrate a compelling interest in denying the exemption because one really doesn’t know whether the first two years of high school are “primarily taken up with dating or peer pressure” rather than “learn[ing] the skills of autonomy and democracy.”116 But schooling, at any age and especially as one grows toward adulthood, is invariably about much more than “learning the skills of autonomy and democracy,” let alone “dating [and] peer pressure” though of course it is about those things as well. Greenawalt identifies at least five functions that would be served by continued schooling at the ages of 15 and 16, only some of which are strictly related to one’s democratic “skills” or may be pigeonholed neatly into the rubric of “autonomy.”117 And there are surely many others.118

114 Id. at 145.
115 Id.
116 Id.
117 GREENAWALT, supra note __[R&C I], at 90-91 (listing the purposes of education beyond the eight grade as (1) “increase[ing] the skills a child needs for a career,” (2) “enhanc[ing] an individual’s ability to choose how to live,” (3) “assist[ing] people to enjoy forms of culture” (especially literature), (4) “help[ing] students understand principles of American government and learn to participate actively in democratic institutions,” and (5) “assist[ing] moral development beyond those aspects of morality that involve citizenship”); see also KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? Chapter 2 (2005).
Yet even if one sets all of this aside and narrowly focuses exclusively on public schools as an instrument for inculcating democratic norms, the quality of being law-abiding, appropriately respectful of authority, and attentive to legal and social rules is surely an important set of those norms, and one in which the State has at least a legitimate — if not a compelling — interest. So, too, is the quality of being independent (economically and otherwise), hard-working, and resourceful, if only to mitigate the unhappy possibility of grinding poverty and its devastating consequences. If the State’s interest in ensuring that its citizens are educated — which Yoder calls “the very apex of the functioning of a State” — is to be overcome by a competing interest, it is entirely reasonable for the Court to point out that the life that will replace two years of school is one that historically has been law-abiding, productive, and appropriately respectful of authority. The “alternative” life is then one that is at least partially compatible with the state’s interests. Law-abidingness, a respect for democratic rules and procedures, personal resourcefulness, industry, conscientiousness, perseverance, and the willingness to work hard are surely values of liberal states — or at the least values which make liberal states possible — and ones which public schools are intended to foster and cultivate.

But for Nussbaum, this is not an appropriate consideration because it might be “unfair” — that is, it conceivably (not actually) violates the distributional component of her principle of Equal Respect, inasmuch as it suggests that a religious group that sought an exemption from two years of compulsory education might not succeed in court if there was evidence that the group’s religion demanded that its children spend those two years engaging in violent criminal activity, taking heroin, playing the roulette wheel in Las Vegas, or sitting on a couch watching re-runs of Oprah. In a similarly unwarranted swipe at the Yoder majority, Stephen Macedo observes that the “law-abidingness and hard-work” of the Amish were only “so impress[ive]” to Chief Justice Burger because

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118 See DeGirolami, supra note __[PRL], at __ [listing a wide variety of “moral” values that are properly cultivated by public schools].
119 My own view is that it is a mistake to think about the aims of a liberal education in these civic instrumentalist terms. See generally DeGirolami, supra note __[PRL].
120 Not “prostrate before” but “attentive to” legal and social rules.
121 If a citation is needed for this intuitively obvious point and the connection of Protestantism to these workaday civic values, see generally MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1905).
122 Yoder, 406 U.S. at 213.
123 Notwithstanding what Nussbaum says about the financial condition of the Amish, Yoder nowhere states that the Amish should receive an exemption because they are “wealthy.” The Court does point out that the Amish “reject public welfare in any of its usual modern forms,” which might be consistent with not needing welfare assistance or needing it yet rejecting it anyway. Id. at 222.
124 One can only speculate whether Nussbaum would have opposed the result in Yoder had it been more directly at odds with her Equal Respect principle.
125 I am not suggesting that all of these are equivalently objectionable activities, so far as the state is concerned.
the Amish posed no “threat to the larger society.””126 Yet why are social threats, especially grave ones, not legitimately countenanced, if what one is interested in is a thorough account of the state’s interest in public schooling and whether it can be considered “compelling”?127 In fairness to Nussbaum, she does admit that Equal Respect should not apply in a handful of “extreme” cases, but these seem to be limited to those situations where “people seek to torture children, or to enslave minorities,” and like conduct that, as she herself emphasizes, threatens “the equality of citizens.”128 One sees clearly in this statement that Equal Respect holds the status of an overriding value for Nussbaum: Equal Respect can be violated in a specific instance only if Equal Respect is more generally served or advanced.

Nussbaum’s difficulty in part derives from her elevation of the “thin” capability of conscience to the high status of the single object that represents the substance of religious liberty. But as Andrew Koppelman has observed, “conscience, like religion or welfare, can generate exorbitant demands.”129 Even within the parameters of Nussbaum’s approach, a single-minded focus on equalizing the individual capacity to “reason, search, and experience emotions of longing connected to that search,” is both overinclusive and underinclusive as an object of state protection. It is overinclusive because, at least from the state’s point of view, “conscience” is not worthy of Equal Respect in all cases: the reasons for protecting the right of the Amish to withdraw their children from two years of public schooling are not on equal footing, so far as the state is concerned, with the reasons for protecting the right of a heroin addict to “experience[] emotions of longing connected to” the search for ultimate meaning by remaining in a drug-induced daze. Nor should they be. “Conscience” is underinclusive because:

[m]any religious claims that are uncontroversially weighty, and which nearly everyone would want to accommodate, are neither conscientious nor intensely felt . . . . Many and perhaps most people engage in religious practice out of habit, adherence to custom, or happy religious enthusiasm[.]130

What would Nussbaum have of Creon and his obligation to govern and manage conflict? Presumably even Nussbaum’s own core capability of “control over one’s political and material environment”131 demands that citizens incorporate and internalize some sense of obligation (corresponding to their power of “control”) toward their fellow citizens and the state, a knowledge and respect for the law of the land, and an understanding of its democratic procedures. Nussbaum is insufficiently sensitive to the nature and importance of the State’s values and interests,

127 [Citation here to Devlin.]
128 Id. at 24.
130 Koppelman, supra note __ [IFGRST], at 586.
131 NUSSBAUM, supra note __ [W&HD], at 78-80.
as well as to their potential to conflict with other deeply cherished commitments. This is in large part because Nussbaum does not appreciate that Equal Respect, even if it may be one among many important values of religious liberty, is always liable to problems of compatibility and commensurability with a vast array of other values that swirl about religious liberty conflicts. Given the overriding status that Nussbaum ascribes to Equal Respect, she is incapable of appreciating – indeed, she is methodologically committed to denying – this state of affairs. For her, State interests that speak to law-abidingness or obligation and responsibility to the national or local community (to say nothing of patriotism) trigger a reflexive suspicion, and concomitant accusation, of an overweening hegemonic willfulness or “fear[,] [of] strangers.”

When the State articulates its interests in cultivating loyalty, or at the very least a well-founded respect for authority, among its citizens, Nussbaum is quick to deride these values as a “panic over patriotism,” or as the “shameful blot” of “conservative traditionalism,” or as a kind of all-in-one vice of “fear of the strange, a love of hierarchy, [and] a desire to lord it over others,” or simply as out-and-out “sheer selfishness.” And the state’s concern for the values of personal prudence, economy, prosperity, diligence, and individual resourcefulness is brusquely dismissed as out of order because these values happen to overlap with “majority Protestant[ism],” but may not overlap with other religious or other cultural values. Nussbaum’s overheated rhetoric about the government’s dark obloquy is unfair. It threatens to obscure the important point that:

> [o]ur laws do not descend arbitrarily from an alien entity called ‘government.’ They are the product of legislative and administrative concerns, enacted by our representatives in service of what those representatives deem good and sufficient reasons. And very often those reasons are indeed good and sufficient.

There is nothing odious about “demonization” when one is faced with demons.

Second, and equally importantly, Nussbaum’s intransigence about analyzing every issue of religious liberty by processing it through the Equal Respect machine flattens the conflicts in Yoder to such an extent that they are nearly unrecognizable. Nowhere in her analysis of the Yoder conflicts does Nussbaum even comment on the claims of the parents or those of the Amish community. She says nothing about the value of parental or familial associations, or about the value of a life unencumbered by the easy conveniences of modern life, or about the

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132 Id. at 175-223.
133 Id. at 357.
134 Id. at 357-58.
135 Id. at 359; id. at 28.
136 Id. at 145.
138 Id. at 8 (decrying the state’s “demonization of those who are different”).
139 Nussbaum articulates the Amish position in Yoder, but says virtually nothing about it.
importance of a connection to nature and an agrarian life, or about the happiness and sense of belonging that ties to local communities and traditions can offer, or about the spiritual structure and meaning that they may provide. Indeed, Nussbaum suggests that \textit{Yoder} ought to be reduced to an inquiry about children’s educational rights (that is, after all, “what we’re dealing with”).\textsuperscript{140} Her analysis of the rival claims is framed exclusively in terms of what is in the children’s interests – but not as Amish children, or children who are part of a particular cultural community. Rather, education to be “self-reliant and productive” within a community structure of other cultural values and traditions – the type of education that the Amish felt (and the Court agreed) was served by their way of life – is, according to Nussbaum, interpreted by the Court “with unfortunate narrowness.”\textsuperscript{141} In an application of her capabilities approach, Nussbaum states that she would have preferred an interpretation of these educational values “in terms of the child’s own development of capacities and skills relevant to citizenship and the conduct of life in general.”\textsuperscript{142} Education was certainly an important and contested value in \textit{Yoder}, but neither the Amish nor the State claimed that they had an interest in educating children for “the conduct of life in general,” whatever it may be that a life scrubbed clean of any human being’s actual lived experience might demand.\textsuperscript{143} To the contrary: both parties insisted that their respective educational systems and approaches prepared children for a specific way of life, each instantiating particular commitments and beliefs about what was a good and worthwhile manner of living.\textsuperscript{144}

If Nussbaum means that the Court should have assessed the competing claims about education by reference to something like her capabilities theory (a plausible interpretation of her comments, since she mentions “capacities and skills” in this context),\textsuperscript{145} it is again worth noting that the Amish in \textit{Yoder} probably would have wanted no part of the type of educational upbringing that is entailed by Nussbaum’s capabilities theory. They would have, in all likelihood, rejected an education that demanded the type of muscular, positive government guarantees and interventions that Nussbaum champions. They would have dissented emphatically from Nussbaum’s claim that it is the state’s obligation to empower all children to develop and exercise an autonomous, self-directed “conscience” (in the way that Nussbaum intends the term) entirely untouched by parental and community influence. They would have resisted as undesirable what Nussbaum argues is one of “conscience’s” most appealing and important features:

\textsuperscript{140} \textit{Id.} at 145.
\textsuperscript{141} \textit{Id.} at 144.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} One is put in mind of Augustine’s description of the search for the “blessed life” not as one of perpetually unfulfilled seeking for a hidden, abstracted, and idealized existence, but rather as the recovery of the memory of former joy. \textsc{Augustine}, \textit{The Confessions} \textbf{235} (Book X, Chapter 21, \S\S 28-31) (Philip Burton trans., Knopf ed. 2001).
\textsuperscript{144} See supra notes \_ and accompanying text [\textit{Yoder} discussion].
\textsuperscript{145} Elsewhere, Nussbaum makes specific mention of the capabilities approach as both similar to Roger Williams’s views of religious liberty (which she praises), and more generally as the approach within which “conscience” best fits. \textit{Id.} at 380 n.100.
the capacity of individuals to “create new sects or depart[] from an old one that has lost its vigor[,]” or to generate “creative challenges to the past” and slough off tired traditions with little contemporary purchase. And it need hardly be said that the Amish are not the only religious group that would regard this last and greatest virtue of “conscience” with trepidation, if not outright suspicion.

Nevertheless, even if the Amish would not have assented to Nussbaum’s educational program, one still might argue that they should have assented, by compulsion if necessary. There are theorists that have advanced something like this position, finding the prevailing legal view of education and religious accommodation intolerable. Mercifully, Nussbaum is not one of them. Instead, notwithstanding her reservations about the case, she sides weakly with the Yoder majority because Equal Respect concerns were acute and the state “certainly did not show” a compelling interest in the education of children ages 15 and 16. Yet framing the resolution of the case in these stark, dichotomous terms is entirely unsatisfactory: it does not do justice to the views of anyone actually involved in the dispute. It is an intrinsic feature of Nussbaum’s overriding egalitarianism that it ignores or mischaracterizes precisely what was at the heart of Yoder – a host of legitimate, admirable values, asserted by both sides, incapable of reconciliation by recourse to Nussbaum’s Equal Respect rule or any other overriding principle.

Third, Nussbaum’s argument that the principle of Equal Respect is the best reading of equality and justifies the result in Yoder is a rejection of the idea that the principle of equality as strict equal application of the law is an appropriate basis for deciding Yoder. This is a sensible way to assess the question of equality at issue in Yoder, just as it is in Sherbert v. Verner and so many other cases in which a law of general application imposes a unique and substantial burden on a particular religious believer or believing community. But there is no denying that Nussbaum’s Equal Respect is a conception of equality that may well be, depending on the nature of the conflict, incompatible and incommensurable with the idea of equality as “equality before the law” – that is, neutrality. Something of lasting value may well have been lost – just as Creon sensed – when agents of power do not honor the written laws.

Yet Nussbaum denies that these understandings of equality – that is, Equal Respect and impartial application of the law – may be inconsistent, at least if understood rightly. She subscribes to the idea that “neutrality”

146 Id. at 95.
147 See, e.g., James Dwyer, Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights, 82 CAL. L. REV. 1371, 1375, 1447 (1994) (arguing in Hohfeldian terms that parents only have a “privilege” and not a “right” to direct their children’s education – a privilege that can never measure up to the state’s right of intervention on behalf of the child – and that the Supreme Court ought to overrule cases like Yoder and Pierce v. Society of Sisters, 268 U.S. 510 (1925)); MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 131 (2005).
148 NUSSBAUM, supra note ___ at 144-45 (”[Ought the] majority get[] to abide by and preserve their religious way of life [while] the Amish (arguably) don’t[?]”).
is a central concept of the “tradition of religious equality,” defining neutrality as “the idea that the state does not take a stand on [religious] matters, or takes a stand that is studiously neutral, favoring or disfavoring no particular conception, not even religion over nonreligion” and including it in her list of critical “concepts.” But she also asserts that though the two ideas are not quite “the same,” the idea of neutrality “is closely related to the idea that all citizens are equal and should be shown equal respect.” She claims that the positions on religious exemptions set out by John Locke and Roger Williams are only “subtly different” – the former favoring “the exceptionless rule of law, provided that the laws themselves are neutral”; the latter, like James Madison (according to Nussbaum) preferring “exceptions to general laws for conscience’s sake.” For Nussbaum, “[s]ameness of treatment is not always enough for substantive equality,” suggesting that Equal Respect is only a slightly more stringent version of the self-same conception of equality instantiated in “sameness of treatment.” Yet nothing could be further from the truth. These conceptions of equality not only differ; they may be mutually exclusive, depending on the circumstances and the law in question. To opt for Creon’s obduracy is to choose Antigone’s death; to spare Antigone’s life is to damage profoundly – perhaps irreparably – Creon’s system of values. Choices are wise when they are guided by an awareness of the complexities of the specific situation, not by an overarching “orienting account” if that account insists on a hard-and-fast principle that can never be violated unless by its violation it is more broadly promoted.

And it becomes clear that Nussbaum herself is not fully committed in practice to Equal Respect in contradistinction to “neutrality” – and that she recognizes that the two can lead to wildly incompatible outcomes – when she discusses (approvingly) Justice O’Connor’s concurrence in Wallace v. Jaffree. In Jaffree, which dealt with the constitutionality of a law authorizing public schools to observe a moment of silence “for meditation or voluntary prayer,” Justice O’Connor sided with the majority striking down the law but on the separate grounds that the law impermissibly “endorsed” religion. According to Justice O’Connor, government action that “sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored

150 Nussbaum, supra note __, at 18-20.
151 Id. at 20.
152 Id. at 67; see also id. at 229 (“The Madisonian idea of equality is closely linked to the idea of ‘neutrality’ – which typically means that the state does not take sides – between one religion and another, or between religion and nonreligion. There are, however, subtle conceptual differences,[1]”).
153 Id. at 247 (quoting Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring)).
154 Jaffree, 472 U.S. at 40.
155 Id. at 69 (O’Connor, J., concurring). For O’Connor, as for the Court, the outcome of the case turned on the fact that there were statements in the legislative history by the law’s sponsor that the law was “an effort to return voluntary prayer to our public schools.” Id. at 77.
members of the political community” is a violation of the Establishment Clause. Nussbaum claims that this test favors an approach to equality akin to Equal Respect, as opposed to neutrality, but she explicitly adopts Justice O’Connor’s view that “the relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement[.].” Nussbaum writes that the “objective observer” standard:

is a helpful elaboration of the endorsement test. Obviously litigants will differ in their subjective perceptions, especially when their personal interests are at stake. O’Connor’s insistence on objectivity (in the sense of freedom from bias or favor), and her further requirement of historical knowledge, flesh out the standard in a way that gives it bite and clarity – although wise practical reason will still be required to apply it in a particular case.

But if the standard by which Equal Respect is to be distributed – that is, its “fairness” – in this context must be judged by an “objective observer,” because the feelings of the claimants are inherently unreliable and biased, the standard begins to appear similar to what Nussbaum decries as “neutrality.” An “objective observer” – that is an objective judge – who is “free[] from bias or favor” might quite plausibly conclude that the law in Jaffree, as written, did not make a religious endorsement. It merely established a moment of silence with the possibility of voluntary prayer. Nussbaum might reply that the observer could not be truly objective about the law without examining its history; and here, that history indicates that the government intended an endorsement. Yet this observation about the importance of legislative history is relevant insofar as it speaks to the neutrality of the law: an objective observer would not be worthy of the name – not “free[] from bias or favor” – if he ignored or intentionally suppressed this history. Suppose (as was more or less the case in Jaffree) that the law’s history showed that the legislature very much wanted to encourage and institutionalize school prayer, but it recognized that doing so explicitly in the law’s text would be patently unconstitutional. The “moment of silence” language was therefore intended precisely as a fig leaf. Having reviewed the text and that history, the “objective observer” might reasonably claim that the law violates the principle of “sameness of treatment,” or neutrality, because it was intended to favor the religious. In such a case, the law is still being assessed from his “objective,” “neutral” point of view. The views of those who are claiming to be outsiders, even if they are objectively reasonable from the outsider’s point of view, are not relevant.

The criticism is not merely semantic, however, because Equal Respect seemingly would require that the outsider’s views about

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156 Id. at 69 (O’Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668 (1985)).
157 NUSSBAUM, supra note ___, at 247-48 (quoting Jaffree, 472 U.S. at 76 (O’Connor, J., concurring)).
158 Id. at 248.
government endorsement at least ought to be considered as part of the test. Equal Respect, as Nussbaum explains it, demands not merely “formally similar treatment” but “the removal or prevention of hierarchies”\textsuperscript{159} and the protection of “individual conscience,”\textsuperscript{160} informed by the point (not infrequently emphasized by Nussbaum) that government is often subconsciously biased because it fears and loathes what it does not understand. An unbiased judge and an unbiased religious outsider legitimately may reach opposing conclusions about whether a particular government practice constitutes an endorsement, and it seems plain that Equal Respect (as opposed to neutrality, at least in the form presented by Nussbaum) would reject the position that only the views of the unbiased judge are relevant.\textsuperscript{161}

It may be that the “objective observer” standard is the best elaboration of the “endorsement” test, though there are reasons for skepticism about that as well.\textsuperscript{162} Even if we set this point aside, however, this is a clear instance – but only one among many – where Equal Respect differs crucially from neutrality, and where despite her thesis Nussbaum appears to favor the latter. Equal Respect and neutrality are not different points on the same egalitarian line. They are not conceptions with slight differences elided by the breezy assurance that one may be but is “not always enough” to satisfy the other.\textsuperscript{163} They are incompatible and incommensurable visions about what equality ought to mean. Both are conceptions valued as intrinsically worthwhile, both are impossible to realize at the same time, and neither is susceptible of measurement according to an overarching scale of worth. And they may well result in diametrically opposed policies. Nussbaum’s overriding egalitarian position prevents her from acknowledging this conflict, and requires her to insist on near equivalence where none exists. Moreover, in analyzing Jaffree, Nussbaum’s overriding egalitarianism actually results in confusion about what it is that Equal Respect demands.

Fourth, though it is not the principal focus of the book, it is worthwhile to consider the relationship of her assessment of Yoder to her

\textsuperscript{159} Id. at 20.
\textsuperscript{160} Id. at 69; see also id. at 229 (“In asking about religious equality, we need to keep our eye on the more substantive idea of equality, as an absence of hierarchy, of domination on one side and subordination on the other.”).
\textsuperscript{161} See 2 Kent Greenawalt, Religion and the Constitution: Establishment and Fairness 185 (2008). Greenawalt explains:

\begin{quote}
Were judges to inquire about the actual reactions of real people, they would have to decide how much to count the perceptions of nonadherents and adherents . . . . If it is the feeling that one is an outsider that is particularly detrimental, perhaps the sentiments of nonadherents should be given special consideration . . . . The “objective observer” approach may seem to avoid this problem. If it does so, it fails to give special regard to minority sentiments without an explanation of why that makes sense.
\end{quote}

\textsuperscript{162} Id. at 85.
\textsuperscript{163} For further detailed and plausible criticisms of the “objective observer” standard with respect to the endorsement test, see Greenawalt, supra note \_\_\_[R&C II], at 183-88.
\textsuperscript{164} LC, supra note \_\_\_, at 229.
general capabilities approach.\textsuperscript{164} It is in Nussbaum’s conception of “conscience” that she most directly assimilates religious liberty to the capabilities approach. “Conscience” is a “thin and inclusive” individual capability, with the following characteristics:

The faculty [of conscience] is identified in part by what it does – it reasons, searches, experiences emotions of longing connected to that search – and in part by its subject matter – it deals with ultimate questions, questions of ultimate meaning. It is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudging the question whether there is a meaning to be found, or what it might be like . . . . Political respect is addressed, in the first instance, to a “capability” of people, one that demands both development and exercise[.]\textsuperscript{165}

Since this capability exists in every human being,\textsuperscript{166} Equal Respect requires that the “idiosyncratic and highly individualized searches” of “antinomian and unaffiliated ‘seeker[s]’” receive government positive and negative guarantees, just as other spiritually interested persons do.\textsuperscript{167}

Indeed, it would seem that such “seekers” are tailor-made for Nussbaum’s approach. They are not merely included; they represent the core and possibly exclusive constituency for an approach that focuses single-mindedly on the fair distribution of the capability of “conscience.”\textsuperscript{168} Their solitary, culturally untethered, ever-innovating and self-propelled spiritual quests dovetail all too neatly with the capabilities that Nussbaum elsewhere associates with “religion” and “conscience”:

- “Senses, imagination, and thought” (using the senses to “imagine, think, and reason” in “a way informed and cultivated by an adequate education . . . . Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice: religious, literary, musical, and so forth. Being able to use

\footnotesize{\textsuperscript{164} Nussbaum is clear in other recent work that she thinks that the capabilities approach supplies a “framework for understanding the foundations of political entitlements and constitutional law,” explicitly including the religion clauses of the First Amendment in the entitlements that she considers. Martha C. Nussbaum, \textit{Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism}, 121 \textit{Harv. L. Rev.} 4, 7, 60-64 (2007). Yet it is also clear that Nussbaum holds out the capabilities approach as the ideal for law. Where the capabilities approach is not already “clearly entrenched in our legal traditions,” she believes that it “provides a norm against which to assess what we have neglected and failed to protect.” \textit{Id.} at 8.}

\footnotesize{\textsuperscript{165} \textit{NUSSBAUM, supra} note \textsuperscript{[LC]}, at 171.}

\footnotesize{\textsuperscript{166} \textit{Id. at 19.}}

\footnotesize{\textsuperscript{167} \textit{Id. at 170.}}

\footnotesize{\textsuperscript{168} Something might be said about the inconsistency of Nussbaum’s rejection of thrift or economic responsibility as a “Protestant” value while simultaneously subordinating the claims of tradition to “conscience.” This latter move is more protestant than Protestantism – practically Quaker or Unitarian in its approach, perhaps two of the only traditional religious constituencies that might find Nussbaum’s view of conscience remotely satisfying. Thanks to Sam Bray for this point.}
one’s mind in ways protected by guarantees of . . . freedom of religious exercise. Being able to have pleasurable experiences[.]”\textsuperscript{169}

- “Affiliation” (“Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another . . . . Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others[.]”\textsuperscript{170} and

- “Practical reason” (“Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life,” which “entails respect for the liberty of conscience and religious observance.”).\textsuperscript{171}

Yet however much these are capabilities that a hypothetical “idiosyncratic” “seeker” would value in her conception of religious liberty, it seems plain enough that the Amish in \textit{Yoder} might well dissent from nearly all of them. Precisely what Nussbaum means by requiring that the government guarantee that all people “imagin[e], think[,] and reason[]” after “adequate education” will matter a great deal to the Amish, since it was precisely this type of governmentally compelled activity, and its invasion of their religious liberty, that brought them to court in the first place. Whether having “pleasurable experiences” is a crucial component of the Amish conception of religious liberty is questionable, but at all events the phrase is too vague to understand what types of activities are included. The capability to appreciate and create great works of art – such as one might find, for example, at the Metropolitan Museum of Art\textsuperscript{172} – was almost certainly something that the Amish did not value as part of their religious liberty. Some of the goods of “affiliation” – the ability to live with others in particular social arrangements – likely did matter to them, but an insistence on the exercise of empathetic imagination perhaps did not. As for “form[ing] a conception of the good” and “engag[ing] in critical reflection about the planning of one’s life,” it is again doubtful that the Amish valued this understanding of religious liberty, insofar as it would require each individual member of their community to exercise this capacity in a critical, self-directed, autonomous fashion, and without any deference to or regard for Amish cultural and communal traditions. While it may be true that “[n]o religious tradition consists simply of authority and sheeplike subservience,”\textsuperscript{173} authority and obedience by committed,

\textsuperscript{169} Nussbaum, \textit{supra} note \_[Kaufman, CE], at 52.
\textsuperscript{170} \textit{Id.} at 52-53.
\textsuperscript{171} \textit{Id.} at 52; see also \textit{NUSSBAUM, supra} note \_[W&HD], at 180 (“When we tell people that they cannot define the ultimate meaning of life in their own way – even if we are sure we are right, and that their way is not a very good way – we do not show full respect for them as persons.”).
\textsuperscript{172} Again, if “experiencing and producing” literary or artistic “works and events” is meant in some other way, then it becomes difficult to know precisely what Nussbaum intends by this capability.
\textsuperscript{173} \textit{NUSSBAUM, supra} note \_[W&HD], at 182.
believing non-ovines are, in fact, frequently crucial components of thriving religious traditions, though ones that seemingly merit little space in Nussbaum’s religious universe. That is because Nussbaum’s is ultimately an exclusively individualistic understanding of the value of religion as “conscience”:

[T]he capabilities involved [with respect to religion] are important for each, and it is each person who should be allowed access to these capabilities. As with politics and the family, so here: an organic good for the group as group is unacceptable if it does not do good for the members taken one by one.\(^{174}\)

Nussbaum, as noted earlier, claims that she arrived at her list of capabilities and derivative capabilities by examining the “myths and stories that situate the human being in some way in the universe” and intuiting from this variegated plurality a unitary, convergent narrative that tells the tale of the cross-cultural, trans-temporal human being.\(^{175}\) This convergence is therefore strengthened or synthesized by Nussbaum’s reflective intuitions about the essence of “truly human functioning and what it entails”\(^{176}\) – what might be called a process of reflective equilibrium of the kind made famous by John Rawls.\(^{177}\) She writes:

The list represents the result of years of cross-cultural discussion, and comparisons between earlier and later versions will show that the input of other voices has shaped its content in many ways. Thus it already represents what it proposes: a type of overlapping consensus on the part of people with otherwise very different views of human life . . . although the primary weight of justification remains with the intuitive conception of truly human functioning and what that entails.\(^{178}\)

Presumably, this was also the process by which Nussbaum arrived at the derivative capability of “conscience” as the critical essence of religious liberty – as that sub-capability which must be distributed fairly if we are to achieve Equal Respect. Yet if that is so, it remains a mystery exactly what place the Amish “myths and stories” have in deriving and developing the sub-capability of “conscience” or whether they have yet had an opportunity to contribute to the purportedly consensual pastiche. Their “myths and stories” do not seem to be given pride of place in the convergent, intuited, idealized narrative. Much the same might be said of a host of other venerable religious traditions. But perhaps by this

\(^{174}\) Nussbaum, supra note \([W&HD]\), at 188.

\(^{175}\) See Nussbaum, supra note \([W, C&D]\), at 73-74.

\(^{176}\) Nussbaum, supra note \([W&HD]\), at 76.

\(^{177}\) [Chapter in Kaufman’s book on Nussbaum and feminism]; John Rawls, A Theory of Justice 18-19 (1972) (“It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation. At the moment, everything is in order. But this equilibrium is not necessarily stable.”).

\(^{178}\) Nussbaum, supra note \([W&HD]\), at 76.
point Nussbaum’s powers of intuitive cultural assimilation are so refined that it would have been superfluous to consult the Amish. 179

Another vexing question about the capabilities approach and its relationship to Yoder concerns Nussbaum’s claim that no capability may ever be chosen against for the sake of another; any diminution in a single capability will fail the threshold of “sufficiency.” 180 Yet suppose, as is likely, that the Amish in Yoder were prepared to give up a substantial quantum of the capability of “control over [their] political and material environment” or the capability of “play” to gain a significant quantum of the capability of “affiliation,” as they understood and valued it. They did not value or they did not place great value in the power to vote, or to serve on juries, or to run for political office, or to go to the movies or to rock concerts, because they preferred to live a life committed to agrarian work, apart from the dominant society, among like-minded religious believers. One need not deem them kill-joys or morose and gloomy types to make these assumptions. One could suppose that the Amish simply “play” differently, but that in the main “affiliation” was more important to them than political control or opportunities for recreation. Or suppose that the Amish did not share Nussbaum’s view of what the capability of “other species” requires of human beings: that is, some fairly demanding obligations of justice to the animal kingdom simply in virtue of animals’ capability of “locomotion,” among other physical abilities. 181 For the Amish the capability of “affiliation” might, let us plausibly imagine, take precedence over the types of rigorous duties to animals proposed by Nussbaum. Even on Nussbaum’s view of the capabilities, provided that the sum total of the capabilities – the total well-being – to which the Amish had access did not fall below the

179 Samuel Freeman has expressed considerable skepticism about the feasibility of achieving an overlapping consensus as to the capabilities, even from a distinctly liberal point of view:

[T]he idea that widespread agreement upon a list of central capabilities, especially a liberal list, could be achieved worldwide, as Nussbaum contends, is controversial . . . . There are potentially an enormous number of capabilities – one or more for most any human activity. In deciding the primary social goods, Rawls relies upon a conception of free and equal moral persons with moral powers which he believes is implicit in democratic culture. But Nussbaum relies upon a more inchoate idea of human dignity to decide which capabilities are central. She contends that the ability to vote is one of the central capabilities “necessary for a decent and dignified human life.” Some would say it depends upon historical circumstances and the kind of society people live in, their self-conceptions and stage of cultural development. Perhaps she is right; but can others in well-ordered, nonliberal, nondemocratic cultures agree in the “overlapping consensus” she envisions?


180 See Nussbaum, supra note ___[W&HD], at 84; see also Martha Nussbaum, Capabilities as Fundamental Entitlements, in KAUFMANN, supra note ___[CE], at 51 (“[A] society that neglects one of [the capabilities] to promote the others has shortchanged its citizens, and there is a failure of justice in the shortchanging.”).

“sufficiency” threshold, why should the Amish be prevented, as a matter of morality, from making this choice? Yet Nussbaum’s view is that they must be prevented from voluntarily ceding any given capability – they should be forbidden from making these choices – because a government that allows any human being to slip below the threshold of any of the capabilities is unjust and is not treating everyone with Equal Respect.

But are not such sacrifices made all the time, if only to accommodate the realities of economic scarcity? More to the point, is it not often precisely part of living a good life to make such sacrifices, and to recognize their tragic quality? Elsewhere, Nussbaum comes close to acknowledging this idea, suggesting that there is a tragic aspect to the loss of any capability because each capability is a “distinctive good.” Yet she then rapidly retreats to the view that because the capabilities are all “related to one another in complex ways,” we must “avoid promoting one at the expense of others.” And in the same book, she later leaves no doubt about the matter, stating flatly that there is no “tragic aspect” of her approach because “nothing of value is lost when we tell people that they cannot lord it over other people in immoral and harmful ways.” Richard Arneson puts a formidable challenge to this view in the following examples:

Suppose I give up some good level of health security in order to pursue other goals that matter to me more. I continue doing scientific research, for example, even though by eschewing stressful work I could reduce the probability of suffering a devastating heart attack . . . . Or I continue to pursue a dangerous sport, even though with increasing age and steady participation in the sport the dangers of suffering serious debilitating injury increase beyond acceptable levels . . . . Or I insist on fulfilling a lifelong dream of completing a pilgrimage to Mecca or paying for my child’s wedding even though undertaking either of these expenses precludes payment for extra cancer therapy in ways that would prolong my life . . . .

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182 I am assuming that this “total” could be quantified in some way. For similar criticisms of Nussbaum’s “sufficienarianism,” see Richard Arneson, ‘Good Enough’ Is Not Good Enough, in KAUFMAN, supra note __[CE], at 25-26.
183 Nussbaum, supra note __[W,C&D], at 85.
184 Nussbaum, supra note __[W&HD], at 81. The concept of the tragedy of moral choice played a central role in The Fragility of Goodness, but Nussbaum seems clearly to have abandoned it in more recent writing.
185 Id.
186 Id. at 235; see also Martha C. Nussbaum, The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis, J. LEGAL STUD. 1005, 1014 (2000) (“Many people in many places have thought that a harmonious accommodation between religion and the state is just impossible . . . . Modern liberal states – grappling with the even thornier problem of the plurality of religions, and of secular views of the good – all in their own ways try to prove them wrong. To a great extent, a political regime like ours does enable citizens to avoid Antigone-like tragedies . . . . [W]e proclaim that we do our best to keep tragedy at bay.”).
187 Arneson, supra note __[Kaufman volume], at 25.
Why is it “lord[ing] it over other people in immoral” ways to make such choices because one is committed, for example, to the Amish way of life, and one would like one’s children to be so committed? Why ought the state not care about which such choices are made? Deciding which is best among these incompatible and incommensurable options, and which, though valuable, ought to be sacrificed in a particular case, is not only inevitable; it is part of what living a worthwhile life, and negotiating the dooming quality of life’s choices, demands.

Fifth, and finally, I should emphasize that none of these criticisms is intended to denigrate the ideal of equality (whether understood as equal respect, equal application of the law, or in some other fashion), or to exclude it as a value of religious liberty. Equality is surely an important value of religious liberty; more precisely it is many values among many others. Nussbaum’s methodological error is to elevate equality to overriding normative status, thereby creating a regime for resolving disputes that does an enormous disservice to the nature of the conflicts, sometimes requiring a sustained misunderstanding in order to force them into an artificial and truncated view of religious liberty. It is a singular and regrettable irony that Nussbaum herself at one time eloquently described the flawed position that she now so vigorously champions, in a beautifully critical depiction of Sophocles’s Creon:

Creon has, then, made himself a deliberative world into which tragedy cannot enter. Insoluble conflicts cannot arise, because there is only a single supreme good, and all other values are functions of that good . . . . The apparent presence of a contingent conflict is an indication that we have not been working hard enough at correct vision.188

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188 NUSBAUM, supra note __[FG], at 58.