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Equality, Conscience, and the Liberty of the Church: Justifying the Controversiale per Controversialius

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Abstract

This paper considers the central normative claim of Martha Nussbaum's Liberty of Conscience: In Defense of America's Tradition of Religious Equality, viz., that the U.S. Constitution's religion clauses should be construed to provide equal (and extensive) protection to the vulnerable human faculty called conscience. The paper argues that Nussbaum's argument from Rawlsian political liberalism that leads to her normative constitutional claim amounts, perversely, to an attempt to justify the controversial by the more controversial. The paper goes on to argue that while equality and conscience are concepts that are reasonably contested, Nussbaum illegitimately gives them priority over the also reasonably contested concept of the liberty of the church(es). The paper concludes by arguing, with the help of Jacques Maritain and William Galston, that the political sphere is better shaped (and limited) by robust respect for the equality of humans, freedom of conscience, and the liberty of the churches (and certain other groups), but without our either pretending that any of them is not reasonably contestable or attempting to mold churches (and certain other groups) in the image of the state. Along the way, the paper evaluates Nussbaum's claim that Maritain was perhaps the first political liberal.

Equality, Conscience, and the Liberty of the Church:
Justifying the *Controversiale per Controversialius*

Patrick McKinley Brennan[1]

"[I]f I affirm that without genuine and vital reconciliation between democratic inspiration and evangelical inspiration our hopes for the democratic culture of the future will be frustrated, I do not appeal to police force to obtain such reconciliation; I only state what I hold to be true. It would be foolish intolerance to label as intolerance any affirmation of the truth which is not watered down with doubt, even if it does not please some of our democratic fellow-citizens."

-- Jacques Maritain, "The Pluralist Principle in Democracy"[2]

I.

The disappearance of what unity in religion (and morals) characterized Europe before the Reformation is now the stuff of almost ancient history, but figuring out what to make of the resulting situation, known in the literature as "pluralism," has today become something of a cottage industry. "Pluralism" as I mean it here is shorthand for the fact that people hold and seek to live by all different kinds of doctrines, religious and nonreligious, liberal and illiberal.[3] At one end of the spectrum, the view proffered is that such pluralism is a *modus vivendi* that is necessary if we are to avoid such horribles as rekindling the wars of religion and compelling false professions of faith; it is, in other words, no more than a prudent if honorable compromise. The opposing view on offer is ambitious rather than acquiescent. It seeks to *justify* this pluralism on the basis of basic principles about human nature, that is, on the basis of judgments that might not be acceptable, on metaphysical or epistemological grounds, to all concerned. One thinks here of John Locke and Immanuel Kant. Pursuers of a third way, known as "political liberalism," also seek to justify pluralism, but this time on grounds that, it is said, should be acceptable to all.[4] It is

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[1] John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University School of Law. This paper was prepared for the third annual John F. Scarpa Conference on Law, Politics, and Culture, which was held at Villanova University on February 19, 2009. The Conference was dedicated to a consideration of Martha Nussbaum's work on religion and freedom of conscience, and I am singularly grateful to Professor Nussbaum for her presentation at the conference and her response to this paper. I am happy to thank Michael Moreland and Kent Greenawalt for their helpful comments on a draft of the paper. William Weiss and Lindsay Bish also have my thanks for their assistance with the research, as does Mira Baric for her expert secretarial assistance. Villanova Law Dean Mark Sargent deserves credit and gratitude for robust support of the annual Scarpa Conference, a forum for discussions that are unfortunately uncommon in today's academy.

[2] JACQUES MARITAIN, THE RANGE OF REASON 165, 170 (1942).

[3] The pluralism I have in mind is sometimes elaborated as "values pluralism." This form of pluralism stands in contrast to a pluralism of authorities, which is discussed (and defended) infra text at note <>.

[4] "The problem of political liberalism is to work out a political conception of political justice for a constitutional democratic regime that a plurality of reasonable doctrines, both religious and nonreligious, liberal and nonliberal, may freely endorse, and so freely live by and come to understand its virtues." JOHN RAWLS, POLITICAL LIBERALISM xl (updated ed. 1996) (1993). Getting such agreement may take a long time. *See id.* at 227.

a version of the third, and uniquely ambitious, possibility that Martha Nussbaum pursues in *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*. "The hope," she explains, "is that public institutions can be founded on principles that all can share, no matter what their religion."[5]

Nussbuam refers to "the hope," but hope is always someone's (or no one's). A question that occurs, then, is: Whose is "[t]he hope" to which Nussbaum refers? A related question follows: Who is it that will "found[]" these institutions? Taking the second question first, *our* institutions, the American political institutions that are Nussbaum's concern in the book, have already been founded -- the builders have already executed what the architects designed here in Philadelphia in the summer of 1787, the states have duly ratified that design, and said design has been amply amended. As a result, rather than merely hope that -- or speculate about whether -- such institutions *can* be founded, one can ask whether the institutions that our Framers in fact founded embody "[t]he hope." Is Nussbaum correct that they do "not have a religious content," but instead only an "ethical content,"[6] and one with which everyone can agree?

Starting with the obvious, the First Amendment's religion clauses (as they are commonly called) single out "religion" for special treatment, and the historical record reveals that they do so because the amenders understood that "religion" involves our duties to God.[7] Yet not everyone can agree that religion deserves the special treatment the Constitution gives it. Nussbaum seeks to eliminate the problem by arguing that what the First Amendment religion clauses protect should be interpreted to extend beyond religion as it was traditionally, and is usually, understood, to cover (almost) all claims couched in terms of "conscience," regardless of whether they or it (i.e., conscience) have anything to do with God, the sacred, or the transcendent.[8]

I return to Nussbaum's account of the rights of conscience below. The present point is that the religion clauses of *our* Constitution are premised on God's asking something of us, and this assuredly is a premise that not all will share. To take another example of a claim that not all will embrace, there is our Constitution's statement of its position vis-a-vis the Almighty. Professor Nussbaum reports that the U.S. Constitution makes no reference whatever to God[9], but of course the document is dated "in the Year of Our Lord." Our constituent instrument's being thus situated within what Christians believe to be salvation history is a fact of record "Done in Convention by the Unanimous Consent of the States present," a fact that I recently heard an eminent scholar of U.S. constitutional law bestir himself to regret. Such expression of regret belies what Nussbaum denies or overlooks.

But perhaps this line of inquiry, into what the Constitution says, is too crude. After all, whatever the Framers' and amenders' views as they got embodied in the U.S. Constitution, there exists an authoritative tradition of constitutional interpretation in which the spare words of the parchment barrier have been given ever new effect according to changing principles. Saying what this tradition is, is critical to Nussbaum's project: "This book traces a distinctively American tradition of thought about religious matters, and words like 'our tradition' and 'the American tradition' will show up often in it."[10] Following upon this, I would add, first, that our

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[5] Martha C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 23 (2008).

[6] *Id.* at 23.

[7] "Religion is special and is accorded special protection in the Constitution. '[W]e cannot repudiate that decision without rejecting an essential feature of constitutionalism, rendering all constitutional rights vulnerable to repudiation if they go out of favor.'" JOHN WITTE, JR. RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 250 (2d ed. 2005) (quoting Douglas Laycock) .

[8] "We mitigate the unfairness to nonreligious searchers as much as we possibly can, by extending the account of religion as far as we can, compatibly with administrability." NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 173. *See also id.* at 12-13, 19-20, 22-23, 164-74, 359.

[9] "The Constitution as a whole makes no reference to God." *Id.* at 3.

[10] *Id.* at 31.

tradition is not *dispositive* of where we shall go next; second, history has not been *stopped* by what we have achieved so far; third, *decisions* must be taken concerning a world that none of us has ever seen before. Everyone can indeed agree to these three propositions, I should think. Nussbaum goes further, however: "[M]any aspects of our own tradition," she judges, ". . . are wrong-headed and unjust."[11]

What to do? Criticize and reform our tradition from the resources of another? No, there is, we are told, a solution closer to home. Nussbaum's project is to measure our tradition against certain "general goals and concepts" that are, she notes, "conveniently enough" "also embodied within it."[12] It turns out, then, that the project is one of cherry-picking from our own tradition, work Nussbaum summarizes in these terms: "[W]e can only say what is good about [our tradition] if we hold it up at every point against some general goals and conceptions that *we* are seeking to embody in concrete laws and institutions."[13] The question I would raise about this statement concerns its pregnancy -- the identity of the third (and italicized) "we." Who are the "we?" Not all of us are trying to embody and entrench in the tradition the same subset of the tradition's "general goals and concepts."

Prescinding from my unanswered question, one can go on to inquire as to the substance and the merits of these general goals and concepts that, we are told, this partial "we" are seeking thus to embody. The quoted language, about "the hope," occurs in Professor Nussbaum's initial explication and defense of the catalogue of six "principles" that are, she seeks to demonstrate throughout the book, not only "conveniently" but "amply recognized in our constitutional tradition and in the philosophical works related to it."[14] The principles she identifies can indeed be found in various "philosophical works," in the genre known as political liberalism, and they do purport to be acceptable to all concerned.[15]

This question follows, however: Does the authoritative tradition of interpretation of the U.S. Constitution postulate and give effect only to "principles that all can share?" Can one say *simpliciter* that those charged with the authoritative interpretation of our Constitution are working it pure of principles that not all can embrace? The answer is plainly no, as Nussbaum's own indictments of the ongoing tradition confirm. My concern in this paper is not with this descriptive question, but with the normative question that ensues: *Should* they be? *Should* those charged with the authoritative implementation of our Constitution be giving it effect according to principles that all can share? The answer, I shall argue, is also no. "The hope" should not be your hope.

Some will find this very disappointing, for, admittedly, "[f]inding a *tertium quid*" – that is, neither, on the one hand, justifying the status quo based on fundamental and potentially controversial principle about human nature nor, on the other, merely accepting the status quo as a

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[11] *Id.* at 32.

[12] *Id.*

[13] *Id.* (emphasis added). I agree with Nussbaum: "[A]ny national narrative is an interpretation. Some past events are made salient and others are not. Some aspects of founding documents are brought forward and others are left behind." Martha C. Nussbaum, *Toward a Globally Sensitive Patriotism*, 137.3 DAEDALUS 73, 83 (Summer 2008).

[14] NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 22.

[15] "The hope is that this idea [justice as fairness], with its index of primary goods arrived at from within, can be the focus of a reasonable overlapping consensus. We leave aside comprehensive doctrines that exist now, that have existed, or that might exist." *Id.* at 40. Nussbaum's debts to John Rawls, from a *Theory of Justice* through *Political Liberalism* and *The Law of Peoples*, are vast and frequently acknowledged. *E.g.*, *id.* at 57-58. She is also sometimes critical of Rawls. *See*, *e.g.*, MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP ix (2008).

prudent *modus videndi* -- "seems to be quite imperative for the political liberal."[16] Indeed, it is, as philosopher Michael White has also observed, their "Great Hope."[17] A principal difficulty with the "Great Hope," aka "the hope," however, is that "[i]t is," perversely, "a matter of "justifying . . . the *controversiale per controversialius*,"[18] the controversial by the even more controversial. The political liberal's project of justifying pluralism on grounds on which all can agree founders, I shall argue, inasmuch as it depends upon concepts that are in fact contested, and reasonably so.

Furthermore, I shall argue, the reasons some of us have for disputing the grounds on which the political liberal would build and bound politics spring from sources that the political liberal systematically undervalues. In developing this objection, I will rely on the work of the Thomist Catholic philosopher Jacques Maritain, whose thought provided a major background influence on the social teachings of the Second Vatican Council.[19] I am warranted in doing so, among other reasons, because Nussbaum not only draws on Maritain for support for her project, but even goes so far as to denominate him "probably" the first "political liberal[],"[20] something of a precursor of Rawls.[21] Nussbaum is surely right to raise Maritain up as a liberal, as someone who champions individual human rights and human equality. I welcome Nussbaum's reintroducing Maritain's ideas into mainstream discourse, for in recent years Maritain has become unfortunately neglected on American campuses where his name was common a generation ago. And, perhaps one reason for this neglect is that Jacques Maritain is emphatically not a political liberal. Jacques Maritain does not share "the hope" to limit the political sphere according to principles that all can be expected to embrace.[22]

On the contrary, Maritain hoped and strove for, as he explained, "a new Christianly inspired civilization" in which "the leaven of the Gospel quicken[s] the depths of temporal existence." Finished and "done with neutrality," such a civilization through its society and civil authority (the state) "would be conscious of the faith that inspired it, and it would express this faith publicly."[23] Maritain continues: "As for the citizens who were unbelievers, they would have only to realize that the body politic as a whole was just as free with regard to the public expression of its own faith as they, as individuals, were free with regard to the private expression of their own non-religious convictions."[24] Maritian's is not the charter of the political liberal; it is, however, I shall argue, a charter correlative to the claims faithful Catholics must make on

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[16] MICHAEL J. WHITE, PARTISAN OR NEUTRAL? THE FUTILITY OF PUBLIC POLITICAL THEORY 94 (1997). *See also* Patrick McKinley Brennan, *Political Liberalism's Tertium Quiddity: Neutral "Public Reason,"* 43 AM. J. JURIS. 239 (1998) (reviewing White's book).

[17] WHITE, *supra* note <>, at 94.

[18] *Id.* at 9.

[19] Patrick McKinley Brennan, *Jacques Maritain: Philosopher of Law, Politics and All That Is*, *in* THE TEACHINGS OF MODERN CATHOLICISM ON LAW, POLITICS, AND HUMAN NATURE 106, 107 (John Witte, Jr. & Frank S. Alexander eds., 2006).

[20] "[I]t is worthy of note that the first example of political liberalism in the Western tradition is probably the neo-Aristotelian Thomism of Jacques Maritain." Martha C. Nussbaum, *Political Objectivity*, 32 NEW LITERARY HISTORY 883, 892 (2001).

[21] NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 276.

[22] "For all his earlier attacks on liberalism, Maritain is thus a liberal and opposed to restrictions on freedoms of religion and expression. . . . There is an important difference from contemporary liberalism, however, in Maritain's philosophy of natural law and natural rights." Paul Sigmund, *Maritain on Politics, in* UNDERSTANDING MARITAIN 153, 162 (Deal W. Hudson & Matthew J. Mancini, eds., 1987). On other qualifications on Martitain's liberalism, see *Michelle Watkins and Ralph Watkins, Jacques Maritain and the Rapprochement of Liberalism and Communitarianism, in* CATHOLICISM, LIBERALISM, & COMMUNITARIANISM: THE CATHOLIC INTELLECTUAL TRADITION AND THE MORAL FOUNDATIONS OF DEMOCRACY 151-72 (1995).

[23] JACQUES MARITAIN, MAN AND THE STATE 159 (1951).

[24] *Id.* at 173.

behalf of, among other things, a necessary component of any *true* religious liberty, viz., the liberty of the Church, *libertas ecclesiae*. A fact about the political liberalism of the sort Nussbaum pursues is that it cannot adequately accommodate the Catholic Church, a disability that Catholics should regard as a *reductio*. But, for reasons to which I shall come at the end, it is not just Catholics or other religious believers who have ample reason to respect the groups, such as the Catholic Church, that vex the political liberal's hope to eliminate societal differences, on the basis of allegedly uncontroversial principles.

II.

"The hope," as we have heard, "is that public institutions can be founded on principles that all can share, no matter what their religion." The first such principle Nussbaum discerns in the American constitutional tradition is this: "The Equality Principle: All citizens have equal rights and deserve equal respect from the government under which they live."[25] Conceding that "separation [of church and state] does have some ancillary purposes (protecting religion from government and government from religion)," Nussbaum goes on to assert that such separation "is valued primarily on account of the equality it protects."[26] Acknowledging that "[o]ur commitment to religious equality did not emerge immediately or easily," Nussbaum declares: "Citizens, we believe, are in fact all equal. We have not just rights, but equal rights." The hope, says Nussbaum, is that "all citizens . . . can live together in full equality."[27] According to Nussbaum, "[t]he philosophical tradition is very keen on this idea" of equality and equal respect, "and it is a linchpin of the relevant notion of religious freedom: we want not just *enough* freedom, but a freedom that is itself *equal*, and that is compatible with all citizens being fully equal and being equally respected by the society in which they live."[28]

I have strung together these several quotations involving equality -- "the linchpin" -- in order to provide a snapshot of the *range* of ways in which Nussbaum deploys the concept in *Liberty of Conscience*. Later, we will follow Nussbaum as she "supplement[s]" the principle of equality "by an independent idea of the worth of liberty of conscience."[29] With respect to the principle of equality standing alone, though, there are several things to notice. First, frequently the equality is said to be one (of rights) of "citizens," and elsewhere we read: "Closely linked to the idea of liberty is the idea that all citizens are equal, or, in Madison's words, that they all enter the polity 'on equal conditions.'"[30] The obvious trouble with this is that people are not "citizens" before they "enter the polity," and are we to imagine that Nussbaum means to limit our government's constitutional obligations to those who have "entered" and officially become citizens? It would be uncharitable to read Nussbaum as arguing that the religion clauses – and other rights-conferring clauses -- of our Constitution should now be interpreted not to extend to yesterday's immigrants and today's aliens and visitors. But on what basis are such protections to be extended? Pure favor or gratuitous privilege? Such persons have not "enter[ed] [our] polity as citizens; they are, at least many of them, citizens elsewhere. I am confident that this a problem to which Professor Nussbaum has a solution, and I suspect it involves people's receiving benefits on

[25] NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 22.
[26] *Id.*
[27] *Id.* at 3-5.
[28] *Id.* at 19.
[29] The reason is that "we might have been equal by all (equally) lacking religious liberty (as philosopher Thomas Hobbes urged, in the seventeenth century"). *Id.* at 21-22.
[30] Id. at 19.

some basis other than their being U.S. citizens.[31] An equality based on the accident of citizenship leaves the unlucky out.

Second, and more important here, Nussbaum's claims on behalf of *normative* equality – that is, that people should be treated equally or (what is not necessarily the same thing) as equals[32] – bear an uncertain relationship to the (possible) claim(s) of *descriptive* equality. Is Nussbaum's (implicit) claim that equal treatment is called for *because* human persons *are* all descriptively – metaphysically, if you will -- one another's equals? While I do not find in the book a statement of the proposition that all *people* are in fact (that is, metaphysically) equal, it seems everywhere to be the subtext. But is the claim -- that all people are one another's equals -- one with which we can all be expected to agree?

The name we associate above all with the political liberal's project of justifying pluralism on terms that all concerned can agree upon is John Rawls, and Nussbaum reports that Rawls did for the twentieth century what Roger Williams did for his own.[33] "Like Williams," Nussbaum explains, "Rawls starts from the idea of equal respect and shows that only a political conception that separates certain key moral/political values from religious ideas will appropriately preserve that all-important value. Separation is not a starting point. It is a conclusion of an argument that begins elsewhere.[34] But does Rawls in fact, as Nussbaum reports, "start[] from the idea of equal respect?"

In *A Theory of Justice*, in a part toward the end of the book that almost nobody ever discusses, Rawls confessed that "[w]e still need a natural basis of equality."[35] *Need*, in other words, a starting point? It would seem so. But, on Rawls's own judgment, that confession turned out not to be fatal to his project, for "it is not the case," he explains immediately, "that founding equality on natural capacities is incompatible with an egalitarian view. All we have to do is to select a range property (as I shall say) and to give equal justice to those meeting its conditions."[36]

But what is a "range property?" This device that is basic to Rawls's justifying normative equality has not to my knowledge received much attention in the extensive literature on Rawls.[37] Recently, however, Jeremy Waldron took it up in his paper "Basic Equality,"[38] where the aim, as

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[31] Perhaps it is this: "I do not, however, endorse cosmopolitanism as a correct comprehensive doctrine. Further thought about Stoic cosmopolitanism, and particularly the strict form of it developed by Marcus Aurelius, persuaded me that the denial of particular attachments leaves life empty of meaning. . . . . It should be, instead, an uneven dialectical oscillation within ourselves, as we accept the constraints of some strong duties to humanity, and then ask ourselves how far we are entitled to devote ourselves to the particular people and places whom we love." Nussbaum, *Toward a Globally Sensitive Patriotism*, *supra* note <>, at 80. *Cf.* Martha C. Nussbaum, *In Defense of Universal Values*, 36 IDAHO L. REV. 379, 408-18 (2000).

[32] "Sometimes treating people equally is the only way to treat them as equals; but sometimes not." RONALD DWORKIN, A MATTER OF PRINCIPLE 190 (1985).

[33] "Roger Williams issued a challenge to the new colonies: that they find, and learn to inhabit, a shared moral space, without turning that space into a sectarian space that privileges some views over others. This same challenge was issue in the late twentieth century by John Rawls, when he argued that people who hold different religious and secular 'comprehensive doctrines' can live together on terms of equal respect only if they can form an 'overlapping consensus,' agreeing to share a 'freestanding' ethical conception in the political realm, and agreeing, at the same time, to forgo the search for the dominance of any one comprehensive doctrine over the others." NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 361.

[34] NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 361.

[35] JOHN RAWLS, A THEORY OF JUSTICE 508 (1971).

[36] Id.

[37] It is discussed in JOHN E. COONS & PATRICK MCKINLEY BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT 31-33 (1999).

[38] Jeremy Waldron, *Basic Equality*, 31-33 (New York Univ. Sch. of Law, Pub. Law Research Paper, No. 08-61, 2008). For citations to other places at which Rawls's "range property" has been discussed, see *id.* at 32 n.100.

Waldron states, is "not" "discussion of equality as an economic or social aim" but, instead, "discussion of the basic equality of all humans as a premise or assumption of moral and political thought."[39] Waldron begins by defining (as Rawls does not) a range property in the following terms: "R is a range property if it is binary or non-scalar property (one either has it or one does not) which applies to a class of items that may also be understood in a scalar way, i.e., in terms of a scale measuring the degree to which an item possesses the associated scalar property S." He then refines the definition as follows: "R is *a range property with respect to S* if R is binary and there is a scalar property, S, such that R applies to individual items in virtue of their being with a certain range on the scale connoted by S."[40] Rawls's own "range property" for justifying normative equality turns out to be, as Waldron reports, the "capacity for moral personality." In Rawls's own words (quoted by Waldron):

> It should be stressed that the sufficient condition for equal justice, the capacity for moral personality, is not at all stringent. . . . Furthermore, while individuals presumably have varying capacities for a sense of justice, this fact is not a reason for depriving those with a lesser capacity of the full protection of justice. Once a certain minimum is met, a person is entitled to equal liberty on a par with everyone else.[41]

In sum, then, Rawls's proposed natural basis for grounding normative equality is the capacity for moral personality that most – though not all persons – share to a similar – though not a uniform – degree.[42]

Waldron finds the range-property strategy sound, but warns that we must be careful lest we identify a range property that is not "important" enough to do the yeoman's work for which it devised and called into service. He writes: "[I]f we are to single out a basis on which all humans are fundamentally alike, we have to be careful how we go about it."[43] Admittedly; but even such care may be too little too late. Is it enough to single out a property that humans possess unevenly? To be specific, is being "fundamentally alike" a sufficient basis for natural *equality*? Whence the bootstrapping? The passage from similarity to equality is not unproblematic.[44]

Equality, like liberty and justice, and perhaps fraternity, is the familiar stuff of our public political discourse.[45] But equality, unlike its confederates, enters political life from a career in mathematics. No one imagines that three sides of a triangle might enjoy liberty or justice or fraternity, but we many people do claims that people on opposite sides of the globe are *equal* to one another. Of the idea of human equality, it is a salient but often overlooked aspect that it is first of all an idea of *equality*. No hero has fought the good fight and offered himself on what he regards as the altar of human *similarit*y. With human equality, the revolutionaries and now the rest of us have in mind more than the ways in which we resemble one another more or less. But neither do we have in mind total human sameness, a relation of the sort that in mathematics would be called *identity*; we grasp that difference makes us exactly who we are. Equality, in

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[39] *Id.* at 1.
[40] *Id.* at 33-34.
[41] *Id.* at 32 (quoting Rawls).
[42] Indeed, this quietly becomes the basis of Rawls's (later-abandoned) theory of natural human rights. *See* NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS 15-17 (2008).
[43] Waldron, *supra* note <>, at 44.
[44] "Rawls makes it clear – and I think quite rightly – that the idea of a range property is not supposed to solve problems (in the theory of equality) posed by marginal cases such as humans who are so severely intellectually disabled as to be incapable of many of the forms of functioning we regard as human." *Id.* at 33.
[45] Patrick McKinley Brennan, *Arguing for Human Equality*, 18 J.L. & RELIGION 99, 106-08 (2002) (the next several paragraphs are adapted from this argument).

contrast to similarity, confirms a sameness among two or more objects; but that sameness co-exists with differences among those objects, thereby not slipping into simple identity. Equality, if it does not lose its essence in the case where the objects related are not mathematical quantities but instead *human subjects*, is the idea that there is to humans sameness among difference. In the case of flesh and blood humans, equality is the *sane* halfway-house between mere similarity and complete identity.

What that sameness is, however, bald assertions of equality do not reveal and cannot. Simple assertions of that sort that "x' and 'y' are equal" have something of what the logicians would call an enthymemic quality; they hide or do not explicate a premise. What remains unspecified is the specific something -- call it "z"-- in virtue of which "x" and "y" are equal. Any equality is equality *in respect of some property or quality* - some "z" in virtue of which the two or more objects are the same. Two stones, or two people, might be equal in respect of their weight, but different in, say, color, kind, or quality. Two people, or two million people, might be equal in respect of their I.Q., but different in level of curiosity and creativity.

When we come to the specific equality we call *human equality*, however, the putative equality obtains not just between some "x" and some "y." It is not just between Scalia and Stevens, or among all Athenians or Astors, that equality is said to obtain; it holds, we are told, *among* "*all men*." And neither I.Q. or weight, nor anything like them, seems available to generate an equality among all or even nearly all humans. We are so very different from one another. Some of us have two arms, others just one; a few are fast, the rest move more slowly. In numbers of chromosomes (of one kind), as of freckles, we are not the same as one another.

Despite all the differences and legion others, it might be possible, I suppose, to identify some empirical ability or property that humans share uniformly and thereby to make sense of the legion assertions that humans are equal; the abundant equality literature teems with suggestions of this kind. The search for a universal sameness in respect of such a property, however, would be misguided, at least for present purposes. The question *I am asking* is about the equality of humans that is said -- and believed -- decisively to supervene undeniable difference; and even if we were to identify some empirical something possessed by all humans in uniform measure, it is doubtful that we could have identified such an equality. What I am after is that in respect of which humans are *importantly* equal -- equal in the sense that women and men declare, declaim, and even die for, and neither protein nor plasma nor anything like them, if possessed uniformly, would seem to fit that bill.

This is simply an instance of a more general point. An equality in respect of something trivial will itself be trivial, absent particular circumstances.[46] An equality of bodyweight, for example, ordinarily is unimportant, and this is so because possessing a specific body weight is itself rather unimportant, except for contingent purposes (such as passing a physical to enlist in the Marines). The equality among humans that I am inquiring into is *important*, however -- and not just contingently so. It must be important enough, more specifically, to justify normative political equality. And if human equality is non-contingently important, it must depend for its importance on the non-contingent importance of what generates it.[47] Human equality, if it is important, will have to imbibe such importance from its generative source -- some "z" that is *important*, sameness in respect of which makes humans *importantly* equal.

To sum up, it is a feature of all judgments of equality that, as Michael White notes, they "abstract or prescind from the features with respect to which we are not equal."[48] To posit an

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[46] For a fuller discussion of this analytic point, *see* COONS & BRENNAN, *supra* note <>, at 11-13.

[47] Human equality, like any other putatively important equality, derives its importance from its basis, its "z." However, *assertions* of human equality, argument on behalf of human equality, *declaration*s of human equality – these owe their importance both to their content and to their context, and specifically to their saying is not yet evident to all, let alone self-evident.

[48] WHITE, *supra* note <>, at 62.

existent equality is itself exactly to identify sameness amidst difference. The assertion of that sameness, however, does not itself deny the difference *sub rosa*, but affirms that, amidst the difference, there obtains a sameness. This is a nail Lincoln hit squarely on its head in his encounter with Douglas (in refuting Douglas's claim that the assertion of equality in the Declaration of Independence referred only to whites): "I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity…."[49] Lincoln grasped with signal clarity the formal structure of equality: sameness among difference --nothing more, nothing less.[50]

Many of the minds that set out to find an important sameness among multiform human difference do so, as Lincoln did, to supply the platform for an equalizing project. This worries Michael White, and for good reason. Those who are eager for egalitarianism may fudge the facts about what exists.[51] And, as history amply demonstrates, a similar temptation to mendacity holds for those who are anti-egalitarian in their normative aspirations. White's worry goes deeper, however. He argues that the project of precission by which a judgment of equality is reached can ineluctably deliver no more than "an analytic and fairly trivial"[52] equality, with the result that all putative discoverers of an important human equality are inevitably charlatans and spin-doctors.

For reasons I have developed elsewhere and will not repeat here, I do not agree with White that we do not have sufficient reason to affirm that humans are importantly equal. I believe we do. The freight is in the verb "believe." I believe that the Christian revelation gives us good and sufficient reasons to believe that all humans are created equal and importantly so; I would note that Maritain shares this view.[53] Furthermore, and again for reasons I have developed elsewhere and will not repeat here, I regard all of the other efforts with which I am familiar to establish an important human equality as unsuccessful; above all, I follow Bernard Williams in considering a failure the range of the specifically Kantian projects of equalizing by locating the source of personal/moral worth beyond the empirically conditioned self.[54] I also find unpersuasive, for reasons I lack space to develop here, the Rawlsian project recently picked up by Jeremy Waldron, of basing normative equality on a descriptive basis that is a "range property." Inasmuch as a range property is an affirmation of similarity with respect to x, it is perforce an implicit denial of an equality with respect to x.

What all this means, however, is that equality ends up depending upon facts that not all will acknowledge. Normative equality ends up depending upon an essentially contestable descriptive equality. The result, as I suggested in beginning, is one of justifying the *controversiale per controversialius*.

III.

Justifying normative equality on the basis of metaphysical equality, the *controversiale per controversialius*, is the trap that ensnares many political liberals; but not Nussbaum. What

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[49] SANFORD A. LAKOFF, EQUALITY IN POLITICAL PHILOSOPHY 2 (1964) (quoting Abraham Lincoln, Address at Springfield, Ill. (July 17, 1858)) *in* CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 43, 82 (Paul M. Angle ed., 1958).

[50] Jacques Maritain also had firm grasp on this at once analytic and metaphysical point. *See* COONS & BRENNAN, *supra* note <>, at 36-37.

[51] WHITE, *supra* note <>, at 52-75.

[52] WHITE, *supra* note <>, at 62.

[53] For my own reasons, *see* COONS AND BRENNAN, supra note <>, at191-214; Brennan, *Arguing for Human Equality*, *supra* note <>, at 136-49. Maritain's account is different (but compatible). *See* JACQUES MARITAIN, REDEEMING THE TIME 15-28 (1943).

[54] *See* Brennan, *Arguing for Human Equality*, *supra* note <>, at 129-36.

she leaves unclear, at least to this reader, in *Liberty of Conscience*, she made perfectly clear in (among other places) a 2001 essay titled "Political Objectivity." In stating and defending the political liberal's limits on the bases for politics, she explains:

> The U.S. Declaration of Independence uses a notion of self-evident truth, as well as a reference to the Creator, to ground its claim of inalienable rights. Political liberalism must reject this sort of language as inappropriate for the political sphere. . . . [I]t must reject as well, the inclusive Deism of the founders. Nor can it say, even without reference to God, that all human beings are really metaphysically equal, or created equal. It must simply say, they are equal as citizens and have equal entitlements within the political conception.[55]

Admitting that this can seem like "pretty thin gruel for someone who cares about equality,"[56] Nussbaum goes on to explain that it is what "respect" requires.[57]

Nussbaum professes that, for her own part, "I do believe that men and women are truly metaphysically equal, that the equality of black and white is a *fact*, and so on," but she rejects the path of "comprehensive" liberals, such as Kant, who "see nothing wrong with basing politics on a whole series of metaphysical claims."[58] Noting that such thinkers believe that human beings will be treated with due respect only if we use such comprehensive theories in politics, Nussbaum asserts that respect cuts the other way. "[T]he many metaphysical and epistemological views attached to religious and other comprehensive doctrines deserve respect," which we show, Nussbaum explains, by not making truth claims in politics that would "impinge on matters that the religions (and other doctrines) settle for themselves, in a variety of different ways." She continues:

> I believe that the equality of male and female is a metaphysical fact, but if someone says otherwise, I believe that this view should be respected, *provided* that this person is prepared to sign on to (and genuinely, not just grudgingly affirm) the political doctrine that men and women are fully equal as citizens – with all that follows from that, including fully fair equality of opportunity, guarantees of nondiscrimination even in private employment, equal access to the basic goods of life, and so forth.[59]

Respect, then, runs out surprisingly soon. Beliefs may be held, but certain among them may not acted upon in political life nor even -- and this a point I would underline -- in "private employment."

Now, *no one* thinks that respect requires that all beliefs must be respected no matter what harm they cause to others through the conduct they dictate. Nussbaum, however, does not wait until impact with the Millean harm principle to curtail respect. According to Nussbaum, "[the equality] principle does not imply that all religions and view of life must be (equally) respected by government: for some extreme views might contradict, or even threaten, the very foundations of the constitutional order and the equality of citizens within it." When, then, the Constitution forbids slavery and the criminal law punishes torture, to stick with the examples Nussbaum adduces, "*people* are all respected as equals, but actions that threaten the rights of others may still be reasonably opposed, and positions that teach the political inequality of others, while they will

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[55] Nussbaum, *Political Objectivity*, supra note <>, at 896.
[56] *Id.* at 899.
[57] *Id.* at 901.
[58] *Id.*
[59] *Id.*

not be suppressed, will still be at a disadvantage in the community, since their advocates would have to amend the Constitution to realize their program."[60] As we have just seen, however, it is Nussbaum's view that the principle of full equality as citizens, a principle she finds embedded in the better part of our constitutional tradition, outlaws discrimination in "private employment."

"We have the great good luck to live in a nation that has taken the principle of equal liberty of conscience to heart in its founding document," Nussbaum opines, but something that is essential to the structure and life of the Catholic Church turns out to be unconstitutional.[61] No plausible reading of the harm principle reaches the Catholic Church's refusal to ordain women to the ministerial priesthood, yet Nussbaum's understanding of the demands of political equality would seem to require the Church to ordain women to the priesthood (on the same terms as men). *Pressed for all it is worth*, Nussbaum's constitutional principle of equality would require the Church to do what, by the Church's own profession, she cannot do.[62]

Sometimes Nussbaum is ready to press the principle for much that it is worth, as she makes unmistakably clear in her essay, "Religion and Women's Human Rights:" "The liberty to treat your co-religionists unequally is simply not a legitimate prerogative of religious freedom."[63] She mentions the Catholic Church by name and outlines litigation strategies. At other times she is more measured, as in this reply to Susan Okin: "[I]t seems illiberal to hold that practices internal to the conduct of the religious body itself – the choice of priests, the regulations concerning articles of clothing – must always be brought into line with a secular liberal understanding of the ultimate good."[64] But what about sometimes?

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[60] NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 24.

[61] *Id.* at 360.

[62] On the Church's profession that she lacks the power to ordain women to the ministerial priesthood, see *Ordinatio sacerdotalis*, *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_letters/ documents/ hf_jp-ii_apl_22051994_ordinatio-sacerdotalis_en.html.

[63] Martha C. Nussbaum, *Religion and Women's Human Rights*, *in* RELIGION AND CONTEMPORARY LIBERALISM 93, 125 (Paul Weithman, ed.,1997). "Religious bodies have also claimed exemption from certain laws of general applicability, including anti-discrimination laws. A (sic) Catholic Church may refuse to accept a Jew as a member because she is a Jew; such action, usually unconstitutional, seems perfectly legitimate here. More contentious is the demand of religious groups to be exempted from the reach of other non-discrimination statutes – for example, those dealing with gender and sexual orientation. The state does not require the Roman Catholic Church to admit women to the priesthood on equal terms, although in almost all other occupations a denial on the basis of sex would be illegal. Some local non-discrimination laws on sexual orientation, for example that of the city of Denver, have exempted religious institutions. These are borderline cases, difficult to distinguish from those of private clubs and educational institutions, whose liberty to discriminate on grounds of religion and gender has steadily eroded. Again, the legal questions are complex; we can only gesture in the direction of a recommendation. But a promising approach would be to insist that any form of discrimination on the basis of gender, race, or sexual orientation should face heightened scrutiny under the Equal Protection Clause – or the analogue of this in the legal system in question: Only a compelling state interest can justify such restrictions. On the other hand, it should be possible to hold in some cases that the protection of religious liberty may supply such a compelling interest, so long as the law in question is narrowly tailored to protect that particular interest." *Id.* at 129-30.

[64] Martha C. Nussbaum, *A Plea for Difficulty*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 114 (Susan Moller Okin, ed., 1999). She continues: "I don't like the idea of an all-male priesthood any more than Okin does. Nor do I like many of the practices of Orthodox Judaism with respect to sex equality. That is why I am a Reform Jew – and why I feel strong solidarity with Roman Catholics, male and female, who are trying to open the Church more fully to women through internal reform. But I view these attitudes as part of my own comprehensive conception of the good, which happens to be that of a Kantian Jew; I do not view that comprehensive conception as offering good reasons for state action. Such reasons can be rightly sought only from within the core of a political conception that religious and non-religious citizens can endorse as respectful of their differing commitments. I think it is not wildly optimistic to suppose that such

IV.

A "political conception" of equality that could lead to the Church's being compelled to ordain women – a potential knife in the heart of the Church's freedom to be what she believes she is. Because these dire results are said to be the wages of the required non-tepid embrace of political liberalism, and because Nussbaum says he is "probably" "the first example of political liberalism in the Western tradition," and because he was a faithful Catholic with a keen sense of the importance both of individual human rights, including of religious liberty, as well as of the liberty of the Church, *libertas ecclesiae* -- for all of these and other reasons, one cannot but wonder what Jacques Maritain would say about the argument that points to a constitutional compulsion for the Catholic Church to ordain women. Again, Maritain here does double-duty as a something of an unofficial spokesman for the contemporary socio-political teachings of the Catholic Church.

In the essay "Political Objectivity"(mentioned earlier), Nussbaum enlists Maritain in the Rawlsian project as follows:

> In *Man and the State* he argues that a certain sort of respect for the dignity of the human person, and a corresponding recognition of a core set of human rights, should be at the heart of the modern state – *and* that this view can be affirmed both by Catholics and other Christians, who derive it from their religious doctrines of the soul, and also by secular citizens, as many who believe that human beings are dignified creatures worthy of respect and who are averse to treating human beings as mere commodities. Although Maritain clearly himself prefers a theistic grounding for the ideas of human rights, he refrains from endorsing this grounding, because he is aware that it will not be shared by all his fellow citizens; respect for pluralism, together with the awareness of a substantial political common ground, calls for restraint.[65]

To claim that Maritain "refrains from endorsing" a "theistic grounding" for human rights is to overlook and contradict much that Maritain said in print. What Maritain *wrote* in *Man and the State* (and over and over elsewhere) is that "the same natural law which lays down our most fundamental duties, and by virtue of which every law is binding, is the very law which assigns to us our fundamental rights. . . . Natural law is law only because it is a participation in Eternal Law," the "*Divine Reason*."[66] To be sure, Maritain does hold -- and the claim has great practical import -- that people can commit themselves and their polity to respecting natural rights for reasons other than the natural law reasons,[67] as happened in the drafting of the Universal

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a core can be found, and that it will go far to protect women's vulnerability, while also protecting both men and women in their choice to worship in their own way." *Id.* at 114.

[65] Nussbaum, *Political Objectivity*, *supra* note <>, at 893.

[66] MARITAIN, MAN AND THE STATE, *supra* note <> at 95-96. For other texts of Maritain to the same effect *see*, Patrick McKinley Brennan, *The Contributions of Catholics to the Socio-Political Order*, 56 CATH. U. L. REV. 1221, 1228-29 (2007).

[67] As the material in *Man and the Stat*e cited by Nussbaum demonstrates. Nussbaum, *Political Objectivity*, *supra* note <>, at 905 n.1. However, those pages in no way support the claim that Maritain does not endorse the "theistic grounding" of natural rights. He simply concedes the fairly obvious point that others can reach (roughly) the same place by a different metaphysical route.

Declaration of Human Rights,[68] but Maritain does not himself "refrain from" saying why he thinks the bases of human rights are true, and his reasons are not a mere "prefer[ence]."

Nor does Maritain shrink from concluding that the natural rights people receive from the natural law cannot in turn be used to defeat the natural law's demands, including its being implemented through prudent creation and enforcement of human law.[69] Maritain seeks, and bids us all seek, a polity in which the natural law is given temporal effect. And, we should be clear: the conclusions of the natural law Maritain has in mind are not propositions on which all can be expected to agree, either now or in the remote future. Again, Maritain does indeed hold that people who disagree with one another at the level of theory or metaphysics can come to important practical agreements (as about human rights) that allow them to get on with the business of building society and state, but Maritain does not limit the state's jurisdiction to matters on which all can be expected to agree. To be specific, Maritain anticipates the state's enforcing (in a prudentially informed way, to be sure) the breadth of traditional Judeo-Christian morality, no doubt limiting marriage to the union of man and woman. For Maritain, the source and criterion of human law is traditional morality,[70] granting that progress in moral insight remains both possible and exigent. Along the way of history, a requirement of (at least potential) agreement of the sort nursed by the political liberal is no friend of Maritain's aspirations on behalf of the body politic.[71]

There will be more to say about this, but first I must introduce another alliance, or rather a qualified alliance, that Nussbaum negotiates with Maritain, in *Liberty of Conscience*. It is based on her admiration of this passage from Maritain's essay "Truth and Human Fellowship":

> There is real and genuine tolerance only when a man is firmly and absolutely convinced of a truth, or of what he holds to be a truth, and when he at the same time recognizes the right of those who deny this truth to exist, and to contradict him, and to speak their own mind, not because they are free from truth but because they seek truth in their own way, and because he respects in them human nature and human dignity and those very resources and living springs of the intellect and of conscience which make them potentially capable of attaining the truth he loves.[72]

The admiration is "qualified" because, though Nussbaum follows the quotation with the generous admission that "[t]hat is the view of respect that animates this book," she is constrained, by her substitution of "respect" for Maritain's "tolerance," to add: "I prefer the term 'respect' to

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[68] Nussbaum credits Maritain with "participat[ing] in the framing of the Universal Declaration . . . ." NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 53. She also notes Maritain was "one of the architects of the Universal Declaration" NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note <>, at 305. Maritain was involved in the work preparatory to the drafting. *See* MARY ANN GLENDON, TRADITIONS IN TURMOIL 317-19, 331-32 (2006).

[69] "The right of the people to govern themselves proceeds from Natural Law: consequently, the very exercise of their right is subject to the Natural Law. If Natural Law is sufficiently valid to give this basic right to the people, it is valid also to impose its unwritten precepts on the exercise of this same right." MARITAIN, MAN AND THE STATE, *supra* note <> at 48.

[70] "The function of law is to constrain the *protervi*, the perverse and the hardened, to a behavior of which they are not themselves capable, and also to educate men so that in the end they may cease to be under the law – since they themselves will voluntarily and freely do what the law enjoins, a condition reached only by the wise." JACQUES MARITAIN, INTEGRAL HUMANISM 268 (1996).

[71] Russell Hittinger makes the important point that Catholic teaching on the basis of the natural law is not properly understood as anticipating consensus. RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD 16-18 (2003). Consensus is not, on the Catholic view, a necessary condition of political legitimacy.

[72] NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 23, 333.

Maritain's 'tolerance,' which seems too grudging and weak."[73] With the passage thus emended, Nussbaum explains that "what Maritain is after" is

> a society that extends liberty to all its citizens' consciences – not on the grounds that their view are correct, since many believe that their neighbors' views are incorrect, and we need to show respect for their convictions, but on the grounds that we respect them as human beings and beings whose consciences are striving after understanding. . . . [T]oleration in a liberal democracy . . . is based on respect for their consciences.[74]

But again, this is demonstrably not what Maritain says or means to say – and the difference runs deep.

What Nussbaum does not mention is that in the essay from which she quotes, Maritain himself struggles at length with his own dissatisfaction with how the terms "toleration" or "tolerance" describe one's relationship with those one believes to be mistaken. Maritain explains there: "I prefer the word 'fellowship' to 'tolerance' for a number of reasons."[75] He prefers it, he elaborates, because it "connotes something positive . . . in human relationships." That something, is human personality.

> [W]e are each men, each containing within himself the ontological mystery of personality and freedom: and it is in this very mystery of freedom and personality that genuine tolerance or fellowship takes root. For the basis of good fellowship among men of different creeds is not of the order of the intellect and of ideas, but of the heart and of love. It is friendship, natural friendship, but first and foremost mutual love in God and for God. Love does not go out to essence nor to qualities nor to ideas, but to persons; and it is the mystery of persons and of the divine presence within them which is here in play. This fellowship, then, is not a fellowship of beliefs but the fellowship of men who believe.[76]

And if that is not enough to establish this is not, for Maritain, about brute respect *for a faculty* called conscience, Maritain takes things up a notch further in what he says next:

> The conviction each of us has, rightly or wrongly, regarding the limitations, deficiencies, errors of others does not prevent friendship between minds. In such a fraternal dialogue, there must be a kind of forgiveness and remission, not with regard to ideas – ideas deserve no forgiveness if they are false – but with regard to the condition of him who travels the road at our side. . . . I distrust any easy and comfortable friendship between believers of all denominations. I mean a friendship that is not accompanied, as it were, by a kind of compunction or soul's sorrow; just as I distrust any universalism which claims to unite in one and the same service of God, and in one and the same transcendental piety – as in some World's Fair Temple – all forms of belief and all forms of worship.[77]

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[73] *Id.* at 24.
[74] *Id.* at 333.
[75] JACQUES MARITAIN, ON THE USE OF PHILOSOPHY 32 (1961).
[76] *Id.* at 35.
[77] *Id.* at 35, 38

It hardly needs mentioning that these are not principles with which all can be expected to agree (for example, I do not suppose Nussbaum will find them reasonable), no matter how much time we allow for reaching such agreement.

To be clear, Maritain does not deny that conscience should be respected; indeed, he explicitly, repeatedly, and insistently calls for it to be respected.[78] Furthermore, it needs to be added that Maritain decisively repudiated his early argument in favor of a privileged place for the Catholic Church in the state, and came to hold the view, which he never retracted, that the state should not establish or otherwise privilege a particular church, for to do so would be to injure the temporal common good by disrespecting some citizens.[79] But it is also true that in the same book, *Man and the State*, Maritain took the following position, which he likewise never retracted: The U.S. Constitution, which Maritain regards as a "peerless" achievement,

> can be described as an outstanding lay Christian document tinged with the philosophy of the day. The spirit and inspiration of this great political Christian document is basically repugnant to the idea of making human society stand aloof from God and from any religious faith. Thanksgiving and public prayer, the invocation of the name of God at the occasion of any major official gathering, are, in the practical behavior of the nation, a token of this very same spirit and inspiration.[80]

One may abjure these views, but one cannot correctly deny that they are Maritain's: "Democracy can only live on Gospel inspiration."[81] In Paul Sigmund's opinion, "Maritain seems to think that

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[78] According to Maritain, the human person's first natural right "is that of the human person to make its way toward its eternal destiny along the path which its conscience has recognized as the path indicated by God. *With respect to God and the truth*, one has not the right to choose according to his own whim any path whatsoever, he must choose the true path, in so far as it is in his power to know it. *But with respect to the state*, to the temporal community, and to the temporal power, he is free to choose his religious path at his own risk, his freedom of conscience is a natural, inviolable right." JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL 81-82 (1971). *See also, e.g.*, MARITAIN, MAN AND THE STATE, *supra* note <>, at150. On conscience's duties, *see id.* at 73-74.

[79] "Once the political society has been fully differentiated in its secular type, the fact of inserting into the body politic a particular or partial common good, the temporal common good of the faithful of one religion, even though it were the true religion, and of claiming for them, accordingly, a privileged juridical position in the body politic, would be inserting into the latter a divisive principle and, to that extent, interfering with the temporal common good." *Id.* at 175-76. *See also* Brennan, *Jacques Maritain*, *in* THE TEACHING OF MODERN CHRISTIANITY ON LAW, POLITICS AND HUMAN NATURE, supra note <>, at 135-36. "Maritain is at pains to emphasize the primacy of the spiritual. From the religious point of view, the common good of the body politic implies an intrinsic though indirect ordination to something which transcends it. In its own order the state is under the command of no superior authority, but the order of eternal life is superior in itself to the order of temporal life. The two orders need not create a conflict . . . Maritain's genius lies in his appropriation of a tradition that has its roots in the Gospels but one which has developed through twenty centuries in the West. It is a tradition which recognizes two orders, a natural hierarchy between them, and the need for the common good of society to prevail when inevitable tensions arise. While political contexts vary, man is by nature a citizen of two cities. That government is best which recognizes this fact and impedes growth in neither domain." JUDE P. DOUGHTERTY, JACQUES MARITAIN: AN INTELLECTUAL PROFILE 17, 25 (2003). "The common good may require the toleration of a good deal of vice rather than radical attempts to eradicate evil by measures for which the citizenship is note prepared." *Louis Dupre ,The Common Good and the Open Society, in* CATHOLICISM AND LIBERALISM 172, 192 (R. Bruce Douglass and David Hollenbach, eds., 1994).

[80] MARITAIN, MAN AND THE STATE, *supra* note <> at 183-84.

[81] *Id.* at 61.

theism is necessary to the maintenance of a free society, but he never makes a convincing argument for this proposition."[82]

For Maritain, respect for conscience is demanded by -- indeed, is derivative of -- his understanding of human personality or personhood, not by political conceptions with which all supposedly can agree. According to Maritain, "personality is [a] mystery . . . a participat[ion] in the very life of God."[83] As Maritain understands things, *this mystery* – including, specifically, our natural law participation in the eternal law – is the foundation of the political realm; *this* is the foundation of the equality among humans Maritain articulated and championed.[84] The distance from "the hope" is impassable.[85] To repeat, Maritain does concede that people can and do come together in political society and cooperate therein on bases that are less than those Maritain regards as the true basis, but, out of fairness to Maritain and to the practical truth of the matter, it is important to highlight the *particular content* of the deeply shared beliefs that Maritain believes are necessary if rights are to be recognized and respected. Maritain avers that politics, if not based in shared, deep Gospel commitments, of a kind thoroughly inimical to political liberalism, will become degraded:

> Thus it is that men possessing quite different, even opposite metaphysical or religious outlooks, can converge, not by virtue of any identity of doctrine, but by virtue of an analogical similitude in practical principles, toward the same practical conclusions, and can share in the same practical secular faith, provided that they similarly revere, perhaps for quite diverse reasons, truth and intelligence, human dignity, freedom, brotherly love, and the absolute value of moral good. . . . The important thing for the body politic is that the democratic sense be in fact kept alive by the adherence of minds, however diverse, to this moral charter.[86]

This – broad and deep commitment to "truth and intelligence, human dignity, freedom, brotherly love, and the absolute value of moral good" -- is not the wellspring of a political liberal, not the simple result of an overlapping consensus. It amounts to an insistence on specifically Christian motivation and content, which in turn will lead, as we have seen, to human law shaped (prudentially, of course) to give effect to the contents of the natural law (and derivative natural rights). If I have belabored the point, this is because I regard Maritain's positions as worthy of careful study. While I greatly admire Nussbaum's recovery of Maritain, I find her attempt to colonize his commitments especially puzzling in light of the man's unwavering insistence, manifest on every page he ever wrote, upon living, even in the political sphere, by *the (Christian) truth*, not just what people(s) can be expected to agree upon.[87]

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[82] Paul E. Sigmund, *Maritain on Politics*, *in* UNDERSTANDING MARITAIN: PHILOSOPHER AND FRIEND 153, 169 (Deal Hudson & Matthew Mancini eds., 1988).

[83] JACQUES MARITAIN, SCHOLASTICISM AND POLITICS, 50, 52 (1940).

[84] JACQUES MARITAIN, REDEEMING THE TIME, 15-19 (1946). On Maritain's natural-law liberalism, *see* Brennan, *Jacques Maritain*, *in* THE TEACHING OF MODERN CHRISTIANITY ON LAW, POLITICS AND HUMAN NATURE, supra note <>, at 113-38; Sigmund, *Maritain on Politics*, *in* UNDERSTANDING MARITAIN: PHILOSOPHER AND FRIEND, *supra* note <>, at 161-64, 168-69.

[85] According to Maritain, the distinction between person and individual is "the fundamental subject of all social and political philosophy." JACQUES MARITAIN, SCHOLASTICISM AND POLITICS 56 (1940).

[86] MARITAIN, MAN AND THE STATE, *supra* note <>, at 111, 112.

[87] Nussbaum writes: "Maritain defends democracy against Platonism not by retreating to skepticism about the good – for he agrees with Aristotle that we can present cogent arguments for preferring one picture of the human good to another – but by appealing to the worth of personal reflection and its relation to the dignity of persons. This is a basically Aristotelian thought, even if we may doubt how far Aristotle would agree with Maritain's institutional argument. For Maritain, democratic choice, even when it produces

And so, to return to my main theme, while Nussbaum is scrupulous about avoiding metaphysical equality for use in the political sphere, but she lets down her guard against metaphysics when it comes to conscience. It is a foundational claim of *Liberty of Conscience* that toleration in a politically liberal democracy is based on respect for conscience, and, as with equality, conscience can do the work required of it by the political liberal only by being something all can be expected to agree about. *Equality*, for its part, became allegedly uncontroversial by being only among citizens (as opposed to among persons, metaphysically, so to speak). But what about conscience? Nussbaum, drawing on Roger Williams, regards conscience as our human "faculty of inquiring and searching"[88] "for life's ultimate meaning."[89] "Conscience is precious, worthy of respect, but it is also vulnerable, capable of being wounded and imprisoned."[90]

Are these claims with which all can be expected to agree? Is the imputation of such a "faculty" called conscience not destined to be controversial? Is the existence of a faculty called conscience no less reasonably contestable than metaphysical equality? Interestingly, notwithstanding conscience's foundational place in the argument of *Liberty of Conscience*, Nussbaum says very little about conscience in the book.[91] We are almost assumed to know what it is all about. I submit, however, that conscience, that which Nussbaum teaches we must respect and respect equally, is not something about which all can be expected to agree.

To be sure, there exists a long tradition of postulating the existence of a faculty called conscience, and Nussbaum relies on some of it.[92] Some Thomists, however, to pick one counterexample, outright deny that conscience is a "faculty," regarding it instead as only the particular judgments of practical reason.[93] And others, without taking a position on what conscience is, if it "is" at all, raise serious questions that ensure that we cannot make claims about conscience that avoid the possibility of being contested, and reasonably so:

> What *is* "conscience" anyway? Is it some discrete faculty or cognitive power – a sort of sublime Jiminy Cricket chirping truth into our souls? Or, alternatively, is "conscience" merely a label we attach to the conclusions of our moral reasoning? -- or perhaps to our opinions (however come by) on moral questions? When we discuss, say, the question of conscientious objection from military service, can we even be confident that we are all referring to the same thing? Or that we

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mistaken outcomes, and enacts the disesased preferences of those who have made a mistake about the good, espresses a value that is itself essential to human flourishing, and indeed a sine qua non of all other values – namely, the value of choice." MARTHA NUSSBAUM, PLATO'S REPUBLIC: THE GOOD SOCIETY AND THE DEFORMATION OF DESIRE 28 (Bradley Lecture Series Publication, Library of Congress 1997). However, if "choice" is used to enact a "law" that violates the moral law, Maritain's response is decisive: "It is *essential* to a philosophy such as that of St. Thomas to regard an unjust law as not obligatory. It is the counterpart of this truth that the just law binds in conscience because it binds by virtue of the Natural Law. If we forget one, we forget the other." Jacques Maritain, *Natural Law and Moral Law*, *in* MORAL PRINCIPLES OF ACTION: MAN'S ETHICAL IMPERATIVE 67, 76 (Ruth Anshen ed., 1971) (emphasis added).

[88] NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 169.

[89] *Id.* at 19.

[90] *Id.*

[91] "Conscience has been much neglected by philosophers." TIMOTHY C. POTTS, CONSCIENCE IN MEDIEVAL PHILOSOPHY 1 (1980).

[92] Nussbaum invokes the Stoic account but rejects that part of that renders conscience invulnerable. NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 53, 81.

[93] For St. Thomas's view, *see* ERIC D'ARCY, CONSCIENCE AND ITS RIGHT TO FREEDOM (1961): "Properly speaking, conscience is neither a faculty nor a habit, but an act: the act of applying knowledge to conduct." *Id.* at 45. *See also* Patrick McKinley Brennan, *The "Right" of Religious Liberty of the Child: Its Meaning, Measure, and Justification*, 20 EMORY INT'L L. REV. 129, 139-49 (2006) (criticizing the "faculty" version of conscience and suggesting an alternative based on the unrestricted desire to know).

> mean the same thing that more historically removed figures such as [Thomas] More (or Madison, or Locke, or Roger Williams) mean when they uttered the word?[94]

Furthermore, even if one grant *arguendo* the existence of a faculty called conscience, what of the further claim, crucial to Nussbaum's argument, that this faculty is fragile and "vulnerable"[95], so much so that states and politics must show it *no* disrespect?[96]

I do not approve coercion by observing that the claims about conscience's existence and its fragility are *not uncontroversial*. I believe, with Maritain and the Catholic Church, that conscience – or, better, persons' judgments of practical reason about ultimate things -- should be respected, up to a point[97], and, for my part, I am not unsympathetic to the claim that reaching such judgments is a process fraught with risk of intimidation, and so forth. Nor do I deny that some of the Founders' held these or very similar views about "conscience." My point is to deny that they are any less controversial than claims that, say, theistic religion deserves special protection.

V.

If any doubt remains about whether Jacques Maritain is a political liberal, an ally in the project to limit the political sphere to what all can agree on, it should vaporize as one listens to what Maritain has to say about *libertas ecclesiae*, the liberty of the Church. The Church, he says, is a "true and genuine society" with a right to "the freedom of developing her own institutions and governing herself without interference by the body politic."[98] Maritain anticipates that the Christian believer will affirm this because she or he believes that "the Church is a supernatural society, both divine and human . . . . which unites in itself men as co-citizens of the Kingdom of God and leads them to eternal life . . . ."[99] According to Maritain, the Christian will also share the reasons he (Maritain) anticipates the unbeliever will have for acknowledging the freedom of the Church:

> In his [the unbeliever's] eyes the Church, or the Churches, are in the social community particular bodies which must enjoy that *right to freedom* which is but one, not only with the right to free association naturally belonging to the human person, but with the right freely to believe the truth recognized by one's conscience, that is, with the most basic and inalienable of all human rights. Thus, the unbeliever, from his own point of

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[94] Steven Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS. L.J. 580, 586 (2003). *See also* Brennan, *The "Right" of the Child to Religious Liberty: Its Meaning, Measure, and Justification*, *supra* note <>, at 129.

[95] NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 19.

[96] Like the Stoics whom Nussbaum castigates for not appreciating conscience's vulnerability, the author of this verse of the hymn "Faith of Our Fathers," sung at the funeral of President Franklin Roosevelt, is at pains to extol conscience's potential fortitude :

> Our fathers, chained in prisons dark,
> Were still in heart and conscience free:
> And truly blest would be our fate,
> If we, like them, should die for thee

HENRI F. HEMY, FAITH OF OUR FATHERS (1684, 1849, 1940).

[97] Again, no one is of the view that every action is acceptable if couched in terms of conscience's demands. *See supra* text at note <>. *See* MARITAIN, MAN AND THE STATE, *supra* note <>.

[98] *Id.* at 152.

[99] *Id.* at 151.

> view – I mean, of course, the unbeliever who, at least, is not an unbeliever in reason, and, furthermore, who is a democratically-mind unbeliever, acknowledges as a normal and necessary thing the freedom of the Church, or of the Churches.[100]

The right of the individual to form and follow conscience is tied up with the *libertas ecclesiae* because, first, it sometimes leads to the individual's associating himself with other believers in the society that is the Church and, second, the Church has a God-given mission to attract people to herself by preaching the Gospel and sharing the sacraments. The individual Catholic, to be specific, cannot follow or form his conscience without being associated with others in the Church, and the Church cannot be herself – and cannot minister to her members or evangelize others – unless she is treated as a rights-bearing society free from (unwarranted) interference.

Broadening the perspective, the landscape Maritain sketches and encourages is one he refers to as "pluralism." Here, pluralism refers not to diversity of comprehensive doctrines but to a plurality of authorities. It refers to multiple groups, each under its respective authority, co-existing, sometimes in tension, but consistently respected, as a matter of right, by the state, by one another, and by individuals. "As opposed to the various totalitarian conceptions of political society in vogue today," Maritain wrote in 1938, "the conception here is of a pluralist body politic bringing together in its organic unity a diversity of social groupings and structures, each of them embodying positive liberties."[101] Within these groupings, individuals form their consciences and make themselves who they are to be (in the face of divine judgment). To be sure, there are limits (for example, as mentioned above in connection with "establishment," the Church is limited by the state's just claims on behalf of social order), but, as Maritain sees it, such associations are presumptively free to govern themselves and to attract and discipline members.

Liberalism need not slight associations[102], but, as a matter of fact, groups (as associations tend to be called when sociality is not considered essential to human nature) come in for mixed treatment in Nussbaum's work. In replying to Professor Okin, for example, Nussbaum puts in a plea for a measure of respect for groups.[103] Elsewhere, however, Nussbaum asks: "What is a 'group' anyway? As Joyce's Leopold Bloom said of that equally overrated concept 'nation,' it is neither more nor less than 'the same people living in the same place' (or, as the case may be, not in the same place)."[104] This is not a promising start for a healthy respect of pluralism as a form of respect for groups and their rights.

In the modern world that is Nussbaum's concern and project, a lot rides on the success of claims made solely in the name of individual conscience. To be specific, the principle of liberty of conscience has been raised to the task that used to be accomplished by the principle of *libertas ecclesiae*. Two generations ago John Courtney Murray, S.J., summarized in the following terms the project Nussbaum champions today: "The freedom of the Church was discarded. . . . . The key to the whole new political edifice was the freedom of individual conscience. . . . The freedom of the individual conscience, constitutionally guaranteed, would supply the armature of immunity to the sacred order, which now became, by modern definition, precisely the order of private conscience."[105] Murray continues, anticipating Nussbaum with ominous exactitude:

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[100] *Id.* at 150-51.

[101] JACQUES MARITAIN, INTEGRAL HUMANISM 163 (Notre Dame Univ. Press 1973).

[102] Nicolas Wolterstorff, *Why We Should Reject What Liberalism Tells Us about Speaking and Acting in Public for Religious Reasons*, *in* RELIGION AND CONTEMPORARY LIBERALISM, *supra* note <>, at 162, 164.

[103] Nussbaum, *A Plea for Difficulty*, *in* IS MULTICULTURALISM BAD FOR WOMEN? *supra* note <>, at 113-14.

[104] Martha C. Nussbaum, *Religion and Women's Human Rights*, *in* RELIGION AND CONTEMPORARY LIBERALISM, *supra* note <>, at 127.

[105] JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS, 206 (1960). "The superiority of the Church, her end, her constitution are the ultimate basis for [the *libertas ecclesiae*], though in our times the *libertas*

> It was an essential part of modernity's hope that the moral consensus upon which every society depends for its stability and progress could be sustained and mobilized simply in terms of a fortunate coincidence of individual judgments, apart from all reference to a visibly constituted spiritual and moral authority. Has this hope proved valid?[106]

"The hope" springs eternal, as we have seen. But with Nussbaum and most (though by no means all) political liberalism, the coercive power of the state is poised to act on groups to bring them into alignment or "congruence,"[107] "transform[ing] every institution of civil society" in political liberalism's own image.[108] Nussbaum is concerned to eliminate hierarchy[109], but meanwhile the Catholic Church regards herself as *essentially* hierarchical.[110]

To claims on behalf of the rights of groups, that is, group rights, the political liberal might be tempted to respond: These are contestable. I agree; indeed, they are perhaps even more contestable that claims on behalf of the rights of substantial persons. However, I submit that the ontology of group persons and their rights is no more contestable than that of human equality or of conscience as a (fragile) faculty. If equality and conscience are in, so *pari passu* should be group persons and their rights. In sum, the principle of equal liberty of conscience is a principle no less controversial than claims of group rights.

VI.

There is, though, another reply to the objection that group persons and their claimed rights depend upon contestable ontological premises, and it is with this that I would like to conclude. I borrow here from William Galston, whose chosen path is not political liberalism but liberal pluralism. Galston *observes* that human life "consist[s] in a multiplicity of spheres, some overlapping, with distinct natures and/or inner norms."[111] Liberal pluralism of the sort Galston defends proceeds "more empirically by considering the diverse forms of human sociability and association."[112] It is a "politics of recognition rather than of construction,"[113] because it does not claim that families and churches are normed and structured in the way, say, people gather on a train platform. It respects the fact that humans following and forming their consciences associate

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ecclesia[e] is often indirectly based, so to speak, on the personal rights of her children." Hans Rommen, *Church and State*, 12.3 REVIEW OF POLITICS 321, 337 (1950).

[106] MURRAY, *supra* note <> at 213-14. For one answer, *see* Michael Moreland, *Institutional Conscience and Moral Dilemmas: Why "Freedom of Conscience" is Bad for "Church Autonomy"*, GEO. J. ON LAW & PUB. POL'Y (forthcoming 2009).

[107] ROBERT POST & NANCY ROSENBLUM, CIVIL SOCIETY AND GOVERNMENT 13 (2002). "The 'logic of congruence' envisions civil society as reflecting common values and practices 'all the way down.'" *Id.*

[108] GLENDON, *supra* note <>, at 96.

[109] "If religion were trivial, it would not be so vitally important to forestall hierarchies and freedom in religious matters." NUSSBAUM, LIBERTY OF CONSCIENCE, *supra* note <>, at 12. "Often, as Kant observed, groups help support the fragile moral faculties – though care must always be taken to watch out lest the support system becomes, itself, a new source of hierarchy." *Id.* at 360.

[110] *See* Second Vatican Ecumenical Council, Dogmatic Constitution on the Church, Lumen gentium (1964) nos. 18-29 *available at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html. Chapter 3 concerns "the hierarchical constitution of the Church and of the episcopate specifically." *See also* Decree on the Pastoral Office of Bishops in the Church, Christus Dominus (1965), *available at* http://www.vatican.va/archive/hist_councils/ ii_vatican_council/documents /vat-ii_decree_ 19651028 _christus-dominus_en.html.

[111] William Galston, *The Idea of Political Liberalism*, in MORAL UNIVERSALISM AND PLURALISM: NOMOS XLIX 106 (Henry Richardson & Melissa Williams, eds., 2009). *See also* WILLIAM GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002).

[112] Galston, *supra* note <>, at 109.

[113] *Id.* at 106.

in ways that are both contestable *and* sometimes essential to individuals' following the conscience on behalf of which Nussbaum argues so powerfully. Equal respect of conscience leads, on Nussbaum's analysis, to the threat of forcing the Catholic Church to ordain women. By contrast, respect for the Church would lead to respect for individuals' freedom to join the Church or to leave the Church, and, correlatively, for the Church to govern herself and her members.

Make no mistake about it: In the Catholic Church, as in some other churches, people hear that God is not to be left at the altar; people are taught there that no part of human existence is immune from the divine call. "The hope" cannot be your hope, then, if you believe that you are called to live a religiously integrated existence.[114] But if you remain tempted by the political liberal's plan to disrespect you by demanding that you commit to structuring public discourse and life on a different set of principles than your private life, recall that the political liberal's plea rests on grounds that are as contestable as anything the Catholic Church teaches about, say, the Church's lack of power to ordain women. And, finally, if you still remain on the fence, meditate on what freedom of speech and religion, which I cherish, makes it possible for people to say and believe about the search in which you and your co-religionists are engaged:

> [I]f we really think of the hope of a transcendent ground for value as uninteresting or irrelevant to human ethics, as we should, then the news of its collapse will not change the way we think and act. It will just let us get on with the business of reasoning in which we were already engaged.[115]

Professor Nussbaum thus professes, in the *Harvard Law Review*, that the transcendent ground for value has collapsed.[116] But you need not believe that, and, at least for now, the churches remain more or less free to embody, and otherwise teach, what F.W.Maitland knew:

> When . . . a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted . . . .

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[114] "There's a common pattern to the liberal's impression that his independent-basis and his separation principle both deal fairly with religion – to his impression that the neutrality postulate honors the freedom and equality of the religious members of the society as much as it does the non-religious members. That common pattern is this: The liberal assumes that requiring religious persons to debate and act politically for reasons other than religious reasons is not in violation of their *religious* convictions; likewise he assumes that an educational program which makes no reference to religion is not in violation of any parent's *religious* convictions. He assumes, in other words, that though religious people may not be in the *habit* of dividing their life into a religious component and a non-religious component, nonetheless, their doing so would not be a violation of anybody's religion. But he's wrong wrong about this. It's when we bring into the picture persons for whom it is a matter of religious conviction that they ought to strive for a religiously integrated existence – it's then, especially, though not only then, that the unfairness of liberalism to religion comes to light." Wolterstorff, *supra* note <>, at 176-77. Discussing Rawls's ban on controversial bases of public life, Nussbaum comments: "I think Rawls is right to show people the respect of letting them sort out for themselves how to integrate their political and moral ideals." Martha C. Nussbaum, *The Enduring Significance of John Rawls*, THE CHRONICLE OF HIGHER EDUCATION, July 20, 2001.

[115] Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 740 (1994).

[116] "I see no chance of regaining even a minimal agreement on what constitutes the common good without some return to a religious-moral view of the human place in the cosmos and society. Without the restoration of the sense of some transcendence, there remains little hope [sic] for a consensus on what must count as good in itself. For such a good must present itself in an objective, *given* order." *Dupre*, *supra* note <> at 189.

> Let the moral philosopher explain this, let him explain it him explain it as illusion, let him explain it away; but he ought not to leave it unexplained, nor, I think will he be able to say that it is an illusion which is losing power, for, on the contrary, it seems to me to be persistently and progressively triumphing over certain philosophical and theological prejudices.[117]

With Martha Nussbaum, I say yes to human equality, yes to freedom of conscience; but I also say yes to the freedom of the churches. It is emphatically not my hope that everyone will agree with me, only that I and the churches – not just lone consciences -- will receive a respectful hearing for a true and vital pluralism of authorities, which can coexist with the pluralism of values in which we find ourselves given to live.

[117] FREDERIC W. MAITLAND, STATE, TRUST, AND CORPORATION 63, 68 (David Runcimand & Magnus Ryan eds., 2003).