Neutralitarian liberalism, which holds that the state should be neutral toward controversial conceptions of the good, is often defended as a generalization from the case of religious liberty. Yet the analogy misapprehends the core case upon which it is based. The Anglo-American tradition of religious liberty itself rests on a controversial conception of the good: the idea that religion is valuable and that legal rules should be crafted for the purpose of protecting that value.

Disestablishment of religion entails a kind of neutrality toward certain contested conceptions of the good. But it is a neutrality whose justification rests on a different contested conception. Perhaps that state of affairs is unjust, but the case for holding it to be so can find no support in the tradition of religious toleration.

In neutralitarian liberalism, religion disappears as a category of justification for rules of law. The state’s task is to provide citizens with all-purpose goods that enable them to exercise their moral powers. Religious activity is merely one of many ways of exercising those powers. Singling out religion for special treatment is thus arbitrary and unfair.

This way of thinking led many contemporary theories of religious liberty to identify some substitute for “religion” as the appropriate category of protection—comprehensive conceptions of the good, conscience, or something else that isn’t a contested idea of what’s good. But this transformation fails to capture settled intuitions about religious liberty. That failure suggests that perhaps neutralitarianism cannot achieve reflective equilibrium.

* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Mark Alznauer, Talbot Brewer, Bob Burns, and Josh Kleinfeld for helpful comments.
John Rawls claimed that the “intuitive idea” of his theory was “to generalize the principle of religious toleration to a social form.”¹ Other exponents of liberal neutrality described their project in similar terms. Bruce Ackerman: “The first principle [of Neutrality], a generalization of the Establishment and Free Exercise clauses of the Constitution, forbids citizens from justifying their legal rights by asserting the possession of an insight into the moral universe intrinsically superior to that of their fellows.”² Charles Larmore: “Liberalism . . . depends on moral commitments, but on ones that are neutral with respect to the general ideals of individualism and tradition. . . . It becomes again what it was in early modern times with regard to religious controversy: an appropriate response to the problem of reasonable disagreement about the good life.”³ Gerald Gaus: “liberal political theory removes certain proposals from the political agenda, not simply on the practical ground that they are too divisive, but because they have been defeated in public discussion. This liberal conviction – that impositions of religion were defeated – evolved into a more general conviction that justifications for imposing ways of living were also defeated.”⁴

The sequence of reasoning here is succinctly stated by Ronald Dworkin. Freedom of religion must consist in “some particularly important interest people have, an interest so important that it deserves special protection against official or other injury.”⁵ There is, however, no good reason for singling out theistic religion for special treatment. “So we must expand that right’s scope to reflect a better justification.”⁶ How? One can try to expand the definition of religion, but then its outer boundaries are uncertain. A better solution is “abandoning the idea of a special right to religious freedom with its high hurdle of protection and therefore its compelling need for strict limits and careful definition.”⁷ Instead, we should endorse a more general right to “ethical independence,” which “means that government must never restrict

¹ See John Rawls, A Theory of Justice 206 n./180n. rev. (1971; revised ed., 1999); see also id. at 220/193 rev. (“the principle of equal liberty . . . which arose historically with religious toleration can be extended to other instances.”)
² Bruce Ackerman, Reconstructing American Law 99 (1984)(footnote omitted).
⁶ Ibid., 117.
⁷ Ibid., 132.
freedom just because it assumes that one way for people to live their lives – one idea about what lives are most worth living just in themselves – is intrinsically better than another, not because its consequences are better but because people who live that way are better people.”

Religious liberty is an imperfect anticipation of this right. “We know why, historically, the right was expressed as limited to religion, but we insist that we make the best contemporary sense of the right, and supply the best available justification for it, by taking religious tolerance as an example of the more general right.”

This is not much of an argument: one option is summarily rejected and a different one substituted with no attention to the rest of the menu. In what follows, I will argue that neglect of the menu is doing a lot of work, not only in Dworkin (for whom it is constitutive of the argument) but for the other neutralitarians as well.

This paper’s aim is modest. It describes the missing menu item – which, as it happens, is the status quo that these writers hope to upend – and sketches some of its attractions. Those attractions are not a conclusive refutation of neutralitarianism. But any case for neutralitarianism must reckon with them.

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When you generalize from a case, you take that paradigmatic decision as given and seek to devise an attractive general principle that justifies the paradigm and can resolve analogous cases. If you’re going to do that, you must understand the core case and how it in fact operates.

Religious liberty has two dimensions, individual and social – classically corresponding with free exercise and disestablishment. Consider the classic arguments for each. I’ll focus on John Locke’s. Can they be generalized to support neutralitarianism?

A classic argument for both is civil peace: Locke was writing in response to nasty wars of religion. But we already have civil peace without neutralitarianism. So we must look to more specific arguments.

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8 Ibid., 130.
9 Ibid., 133.
10 Dworkin thinks the “great difficulty in defining the scope of [the] supposed moral right” to religious freedom is dispositive against it. Ibid., 129. The difficulty of definition may however turn out to be a feature, not a bug.
In defense of free exercise, Locke argued that law could not compel religion, because “true and saving Religion consists in the inward perswasion of the Mind, without which nothing can be acceptable to God. And such is the nature of the Understanding, that it cannot be compell’d to the belief of anything by outward force.”12 Not only is this argument religion-specific; it presumes a distinctly Protestant conception of religion. What analogue could there be for conceptions of the good? Dworkin understands that, if one were going to generalize from this to a rule that “people have a right in principle to the free exercise of their profound convictions about life and its responsibilities,” that special rights would attach to “all passionately held conviction.” The trouble is obvious: “no community could possibly accept that extended right.”13 Neutralitarianism is indifferent to the impact of laws so long as its constraint is respected in those laws’ justification.

Now consider disestablishment. One of its principal rationales, anticipated in Locke, is the state’s incompetence in religious matters: “The one only narrow way which leads to Heaven is not better known to the Magistrate than to private Persons,” Locke wrote, “and therefore I cannot safely take him for my Guide, who may probably be as ignorant of the way as my self, and who certainly is less concerned for my Salvation than I my self am.”14 This argument, too, is religion-specific. It would be hard to reconstruct it so that it entails neutralitarianism. It has not been shown that the state is incompetent to determine anything about the human good.15

The state may not be able to force religious truth, but it can facilitate citizens’ coming to see some ends as good. That result is hardly a futile aim. Rather, it is inevitable. The point has been put nicely by, of all people, Rawls: “the basic structure of a social and economic regime is not only an arrangement that satisfies given desires and aspirations but also an arrangement that arouses further desires and aspirations in the future.”16 Given that “the various contingencies of social life affect the content of people’s final ends and purposes, as well as the vigor and confidence with which they

13 Religion Without God, 117.
14 LOCKE, supra note , at 37.
pursue them, it is legitimate for political planners to try to shape those contingencies. People’s preferences are inevitably shaped in nonrational ways by their environment. George Sher asks, “exactly what is disrespectful about taking (benign) advantage of a causal process that would occur anyway?"

American law treats religion as a good, and promotes the idea that it is, so makes it more likely that citizens will see it that way. But its understanding of religion is deliberately vague.

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American First Amendment doctrine has used “neutrality” as one of its master concepts, but it treats religion as a good thing. Its neutrality is its insistence that religion’s goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute. It holds that religion’s value is best honored by prohibiting the state from trying to answer religious questions.

Religion, as such, is routinely given special treatment. Quakers’ and Mennonites’ objections to participation in war have been accommodated since Colonial times. Such accommodations are ubiquitous and very popular. Americans like religion, even minority religions. When Congress enacted the Religious Freedom Restoration Act (RFRA), which required states to grant such exemptions, the bill passed unanimously in the House and drew only three opposing votes in the Senate. After the Supreme Court struck down the Act as exceeding Congress’s powers, many states passed their own laws to the same effect. RFRA remains valid as applied to federal law.

17 Ibid.
18 For a catalogue of the ways in which this occurs, see Cass R. Sunstein and Richard H. Thaler, Libertarian Paternalism is Not an Oxymoron, 70 U. Chi. L. Rev. 1159 (2003).
19 Sher, Beyond Neutrality, 73.
21 The description of American law that follows is elaborated in my Defending American Religious Neutrality (2013).
Disestablishment, too, is based on a judgment that religion is especially valuable. One of its central purposes has always been protecting religion from corruption by the state.\(^2\) James Madison, the principal author of the First Amendment, argued that experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.\(^2\)

The same theme turns up in numerous Supreme Court opinions. Just one example: the Court’s declaration in *Engel v. Vitale*\(^2\) that under the Establishment Clause, “religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”\(^2\)

If the state must be neutral toward all competing conceptions of the good, then both of these aspects of religion clause doctrine must be discarded. Both rest on the premise that religion as such is good.

*The basic claim of these neutralitarians is Hegelian. Their aim is to understand what we are already doing and to show the immanent rationality of our practices. But then, it is important to beware of the temptation to describe those practices at such a high level of abstraction that the reality of what we are doing disappears. Wittgenstein’s advice — “don’t think, but look!”\(^2\) — is especially salient for understanding “religion,” the object of solicitude in American practice. The concept of “religion” is fuzzy at its core. Religion is not a natural kind. Any definition will leave some instances out.\(^2\) Two cautionary*  

\(^2\) See Defending American Religious Neutrality, at 46-77; the same story is told in greater detail in my *Corruption of Religion and the Establishment Clause*, 50 Wm. & Mary L. Rev. 1831 (2009).  
\(^2\) James Madison, Memorial and Remonstrance Against Religious Assessments (1785), in 2 The Writings of James Madison 183, 187 (1901).  
\(^2\) 370 U.S. 421 (1962).  
\(^2\) Id. at 431-32, quoting Madison, Memorial and Remonstrance.  
\(^2\) Thus, for example, John Finnis argues that religion is a basic human good, because while people disagree about religious truth, no reasonable person can
examples: In 1890, the Supreme Court declared that religion consisted in “one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” In 1931, Chief Justice Hughes referred to “belief in a relation to God involving duties superior to those arising from any human relation.” The Court has abandoned these, because they exclude nontheistic religions such as Buddhism. As religious diversity has grown, the category of religion has become increasingly capacious.

The closest the Court has come to defining the term is a pair of Vietnam draft exemption cases. Both involved claimants who conscientiously objected to war, but who would not avow belief in God. The Court responded with a functional definition of religion, holding that the question a court must answer is “whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.” It explained that the pertinent objection “cannot be based on a ‘merely personal’ moral code,” but it gave no example of the line that it was drawing. These were statutory interpretation cases, only tangentially related to the constitutional issue: two concurring opinions declared that if the statute were read less broadly, it would violate the establishment clause. Since then the Court has offered no further clarification of what it means by “religion.” Nor do any of the relevant statutes attempt a definition.

This vagueness is not inappropriate.

The best modern treatments of the definition problem have concluded—following Wittgenstein—that no dictionary deny that “if there is a transcendent origin of the universal order-of-things and of human freedom and reason, then one’s life and actions are in fundamental disorder if they are not brought, as best one can, into some sort of harmony with whatever can be known or surmised about that transcendent other and its lasting order.” John Finnis, Natural Law and Natural Rights 89-90 (1980). This formulation assumes that the question to be answered by religion is that of cosmic order. Some religions, such as Buddhism, are uninterested in the question of whether the cosmos is orderly or has a “transcendent origin.”

33 Defending American Religious Neutrality at 26-42.
35 Id. at 188-93 (Douglas, J., concurring); Welsh v. United States, 398 U.S. 333, 344-67 (1970) (Harlan, J., concurring in the result).
definition of religion will do, because no single feature unites all the things that are indisputably religions. Religions just have a “family resemblance” to one another. In doubtful cases, one can only ask how close the analogy is between a putative instance of religion and the indisputable instances.  

(Lest one think that the neo-Wittgensteinian approach advocated here is an artifact of academic preciousness, note that an analogical criterion is also used by that singularly hardheaded entity, the Internal Revenue Service.)

This process need not yield indeterminacy. Wittgenstein famously argued that “the meaning of a word is its use in the language.” Thus, for example, there is no single thing common to “games” which makes them all games, but “similarities, relationships, and a whole series of them at that.” The use of the word “game” is thus not circumscribed by any clear rule. But that does not mean that it is not circumscribed at all. The rules of appropriate comportment when riding on a bus, for instance, are not codified anywhere. But most natives of the culture understand what they are, and there may be no doubt at all as to how they apply in particular cases.

Anthropologists disagree about whether there is any identifiable essence to “religion.” Jonathan Z. Smith and Talal Asad claim that the term “religion” denotes an anthropological category, arising out of a particular Western practice of encountering and accounting for foreign belief systems associated with geopolitical entities with which the West was forced to deal.

William Cavanaugh argues that the distinction

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39 See Al Yankovic, Another One Rides the Bus (Placebo Records 1981).

between religion, understood as a distinctively unstable and
dangerous set of beliefs, and patriotism, imagined as a
stabilizing and valid reason to kill and die, is part of the
legitimating mythology of the modern state. Arising thus out
of a specific historical situation, and evolving in
unpredictable ways thereafter, “religion” would be surprising if
it had any essential denotation. Martin Riesebrodt, on the
contrary, argues that all religions serve common functions: they
promise to avert misfortune, help their followers manage crises,
and bring both temporary blessings and eternal salvation. For
legal purposes, it does not matter who is correct. Even if
theorists could converge upon a single definition, American law
will not have relied upon that definition, and the definition
may not be well suited to the law’s purposes.

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

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

41 The Myth of Religious Violence at 192.
43 See Words and Phrases, in West's Encyclopedia of American Law (2d ed.
2008).
44 Abandonment, 1 Words and Phrases 37-147 (2007); Abuse of Discretion, id.at
323-462 and, in the 2008 supplement, 8-25.
46 This stability may not last forever. Those draft cases placed pressure on
the definition of religion that was becoming fairly unendurable by the time
Why single out religion in this way? Religion is not a proxy for any other single value. Many distinguished legal theorists and philosophers have claimed that the proper object of the law’s solicitude is not religion, but something else—something more consistent with neutralitarianism. Scholars have proposed many candidates for the replacement position, including individual autonomy, a source of meaning inaccessible to other people, psychologically urgent needs (treating religion as analogous to a disability that needs accommodation), comprehensive views, deep and valuable human commitments, and conscience. Evidently, they regard American law as, at best, an imperfect anticipation of real disestablishment, the way that some Christians think of Judaism as an imperfect anticipation of real religious truth.

None of the substitutes that are on offer capture our settled intuitions about accommodation. Consider conscience. It focuses on those cases in which the agent feels impelled by a duty that she is capable of performing without depending on external contingencies. Some major instances of religious liberty don’t fit this description. Lyng v. Northwest Indian Cemetery Protective Association was a widely criticized decision in which Native Americans objected to a proposed logging road that would pass through an ancient worship site sacred to their tribe. The logging road, the Court conceded, would “virtually destroy” the ability of the Native Americans “to practice their religion.” Nonetheless, the Court, evidently persuaded that exemptions had to be based on conscience, held that there was no constitutionally cognizable burden, because the logging road had “no tendency to coerce the Vietnam war ended: in 1972, more young men successfully claimed exemption from the draft than were inducted. Andrew Koppelman, The Story of Welsh v. United States: Elliott Welsh’s Two Religious Tests, in First Amendment Stories 314-15 (Richard Garnett and Andrew Koppelman, eds. 2011). But this disintegration ended with the war, and has not been a problem since.


50 485 U.S. at 451.
individuals into acting contrary to their religious beliefs.”  

This result was quickly reversed by Congress, which evidently was not in the grip of this particular theory.  

A paradigm case for religious exemption, for most proponents of such exemptions, is the ritual use of peyote by the Native American Church, which the Supreme Court declined to protect in Employment Division v. Smith, but which received legislative accommodation shortly thereafter.  

Yet neither of the claimants in Smith was motivated to use peyote by religious conscience. Al Smith was motivated primarily by interest in exploring his Native American racial identity, and Galen Black was merely curious about the Church.

Any single factor justification for singling out religion will be overinclusive and underinclusive. Any invocation of any factor X as a justification will logically entail substituting X for religion as a basis for special treatment, making “religion” disappear as a category of analysis. This substitution will be unsatisfactory. There will be settled intuitions about establishment and accommodation that it will be unable to account for. Any X will be an imperfect substitute for religion, but a theory of religious freedom that focuses on that X will not be able to say why religion, rather than X, should be the object of solicitude.

There are two ways around this difficulty. One is to say that these are not ends that the state can directly aim at, and that religion is a good proxy. This does justify some imprecision in the law. We want to give licenses to “safe drivers,” but these are not directly detectible, so we use the somewhat overinclusive and underinclusive category of “those who have passed a driving test.” This doesn’t work for at least some of the substitutes on offer. The state can aim directly at accommodating conscience, say, or autonomy.

The other way is to say that religion is an adequate (though somewhat overinclusive and underinclusive) proxy for multiple goods, some of which are not ones that can directly be aimed at. “Religion” denotes salvation (if you think you need

51 Ibid., p. 450. Dworkin could dismiss the case even more easily: in merely constructing a road, the state wasn’t pursuing any contestable idea of the good.

52 Eissgruber and Sager, Religious Freedom and the Constitution, 243-44.

53 494 U.S. 872 (1990). This result was reversed, with respect to federal law, by statute, which the Court has willingly followed. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).


to be saved), harmony with the transcendent origin of universal order (if it exists), responding to the fundamentally imperfect character of human life (if it is imperfect), courage in the face of the heartbreaking aspects of human existence (if that kind of encouragement helps), a transcendent underpinning for the resolution to act morally (if that kind of underpinning helps), contact with that which is awesome and indescribable (if awe is something you feel), and many others. Not all of these are cognizable within neutralitarianism, but all of them are shared by multiple religious traditions. Each of those goods is, at least, more likely to be salient in religious than in nonreligious contexts. The fact that there is so much contestation among religions as to which of these goods is most salient is itself a reason for the state to remain vague about this question. Because “religion” — or, at least, that subset of it that is likely to come before American courts — captures multiple goods, any substitute that aims at any one of them will be underinclusive.

If you think that any of these is in fact good, and that its realization will be compromised if the state cannot cognize it, then that is a cost of neutralitarianism. Whether it is an unacceptable cost is beyond the scope of this essay. But whatever weight one gives to these goods is the measure of the sacrifice that one makes when one abandons the present practice of religious liberty.

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Thus far we have been discussing the state’s behavior, and the way it defines the object of its solicitude. Whether that solicitude is appropriate will depend on the character of its object. That object is not some abstract natural kind called religion. There is no such natural kind. It is the actual mix of religions that qualify for favorable treatment in the United States.

There are two ways in which the character of the object could make the practice illegitimate. There might be religious views in a given society that realize the relevant goods but are

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56 John M. Finnis, Natural Law and Natural Rights 89-90 (1980).
61 Defending American Religious Neutrality at 120-65.
excluded from special treatment. There might, on the other hand, be religions that get special treatment but do not realize the relevant goods. Whether either of these is the case can only be determined by examining religion as it is practiced in the pertinent society.

Our question is not whether religion, generically, is good. That question is profoundly unanswerable. In societies in which religious understanding and practice are implicated in most if not all of social life, such as ancient Sumerians or modern Brooklyn Hasidim, there is no secular world that stands apart from the transcendent cosmic order. For those who live in such a framework, life without religion is no more possible than life without carbon atoms. Their religion gives them a language and practices that make sense of their lives, but can also be a source of pain and confusion that makes difficult lives worse. These effects cannot be disentangled.

Our question is whether, in the United States, it is appropriate for the state to treat religion as if it is good. The basis for doing so is in part the peculiar nature of the religion-based claims that find their way to the courts here.

By the time any claim does that, it has passed through two filters that inevitably eliminate many religious forms. The first is that the most toxic kinds of religion cannot exist on American soil: because they cannot obey the basic rules of criminal law, they must change or die. The other (which is in part a consequence of the first) is that most manifestations of religion in the United States generate no legal or political claims.

Some religious beliefs are obviously bad, both in themselves and specifically for a free society. Early liberalism had to do a job on religion in order to make it into something that could exist in a liberal state. For instance, the now neglected second half of Hobbes’s Leviathan tried to show that Christianity, properly understood, did not require religious wars and persecutions. Hobbes’s project has been a huge success. The kind of destructive religion that he worried about is nearly extinct in the contemporary United States.

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64 When Eisenhower declared, “Our form of government has no sense unless it is founded in a deeply felt religious faith, and I don’t care what it is,” he less famously made clear in the next sentence that he was not talking about just any religion at all: “With us of course it is the Judeo-Christian
Any religious group that tried, for example, to violently crush nonadherents would itself quickly be crushed.\(^{65}\)

And then there is the second filter. American law is concerned only with the goodness of that subset of religion that is protected from corruption by the establishment clause, or is the basis of valid free exercise claims. Religions that demand state enforcement are not treated as good by the American regime. Most religious activity violates no law and so receives no judicial attention, positive or negative. The law must decide which (if any) state entanglements with religion ought to be avoided, and which (if any) religious claims the state should, can, or must accommodate. With respect to establishment, our question is whether religion is likely to be better if it is not (or, if you prefer, worse if it is) linked to the power of the state. With respect to free exercise, our question is whether the practice of accommodating religious claims is likely to make people’s lives better.\(^{66}\)

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The appropriateness of the American practice of solicitude for religion is likely to vary depending on how robust the just-mentioned filters are in any particular regime. That also limits the extent to which the relevant principle can be generalized, or abstracted away from the American experience.

Alasdair MacIntyre defines a “practice” as “any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.”\(^{67}\) Practices, as

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\(^{65}\) Under the contemporary state and federal RFRAs, a religion demanding, say, the killing of nonadherents would be entitled to judicial scrutiny of the burden that the homicide laws place upon its exercise. That burden would nominally be invalid unless necessary to a compelling interest. To that extent, even this religion would be treated as presumptively valuable. These laws so obviously survive such scrutiny that no one has bothered to test them.

\(^{66}\) For an argument in the affirmative, see Defending American Religious Neutrality at 121-24.

\(^{67}\) Alasdair MacIntyre, After Virtue: A Study in Moral Theory 187 (2d ed. 1984).
MacIntyre understands them, don’t have essences. They have histories.

American religious neutrality is a practice in MacIntyre’s sense. That fact counsels caution about abstracting away from its particular features. Such abstraction may end up discarding the standards that define the activity.

“A practice,” MacIntyre observes, “involves standards of excellence and obedience to rules as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them.”68 Those standards of excellence can constitute virtues: “A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.”69

Abstraction is part of the practice of American religious neutrality. As new minorities have emerged or immigrated, they have in time managed to renegotiate the terms of religious pluralism and disestablishment. One of the benefits of democratic contestation is that it makes relevant the size of any regime’s remainder—the people who don’t fit into the rules in place. The history of American disestablishment is a history of neutralities that shifted over time in order to cope with newly emergent remainders.70 A constant, however, is the imperative to devise a level of abstraction that minimizes the remainder while continuing to treat religion as a good. If you abstract away from that part of the practice, then you are no longer describing the practice, but something different and new. In fact, the point of this particular practice of abstraction is a good that is internal to that practice—the good of religion, which, as I’ve already explained, is not a natural kind. The neutralitarians propose to discard the core case and start over on an entirely different basis.

There are familiar Burkean reasons for caution. American religious neutrality is one of the world’s most successful legal strategies for coping with the fact of religious diversity. In the United States, a growing proliferation of remarkably different religious factions—this is likely the most religiously diverse society in human history—live together in peace and even some harmony. This has been beyond the capacities of many other generally well-functioning democracies, such as France and Germany.

68 Id. at 190.
69 Id. at 191.
A strength of the American approach is its responsiveness to what its citizens actually care about. The object of its solicitude has shifted as population demographics have shifted and diversity has grown. Neutralitarianism, on the other hand, is designedly indifferent to any concern other than a desire for all-purpose means to individual ends. This produces its own form of what Rawls called “the strains of commitment.”

Any political practice inevitably will increase the likelihood that citizens will accept the corresponding political principles. Rawls thus argues that “at the first stage of constitutional consensus the liberal principles of justice, initially accepted reluctantly as a modus vivendi and adopted into a constitution, tend to shift citizens’ comprehensive doctrines so that they at least accept the principles of a liberal constitution.”71 But this means acceptance of those principles, not of other, more abstract principles.

The tendency to seize on one aspect of a practice, fetishize it, and forget the point is evidently an ineradicable part of human nature. It’s evident, for example, on both sides of the affirmative action debate, one faction of which thinks the cure for racial inequality is state color-blindness, while the other thinks that the answer is more black faces in high places. Neither focuses much on the persistence of a black underclass, in the face of which affirmative action is a cheap and insignificant gesture. The aim of reshaping society to end racial inequality disappears. Neutralitarianism is another instance of the same tendency.

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Neutralitarianism made a big splash in liberal political theory, even though almost no substantive arguments for it were developed. Dworkin offered a pure ipse dixit.72 Ackerman gestured toward a cluster of arguments without carefully defending any of them.73 More substantial efforts have been made lately, preeminently by Gaus, but neutralitarianism didn’t need these in order to generate a major literature.74

Peter Berger and his colleagues have suggested that modern social life necessarily involves the daily experience of encounter with a plurality of lifeworlds that reflect differing

71 Rawls, Political Liberalism, 163.
73 Bruce Ackerman, Social Justice in the Liberal State 359-69 (1980).
74 See, e.g., Perfectionism and Neutrality: Essays in Liberal Theory 137 (Steven Wall & George Klosko, eds., 2003); Robert E. Goodin and Andrew Reeve, eds., Liberal Neutrality (1989).
and inconsistent norms. Ideologies of liberalism have facilitated this phenomenon, but they are not its cause. It is "more persuasive sociologically to view the experience of plurality as prior to the various bodies of ideas that have served to legitimate it."\textsuperscript{75} Institutional structures beget a consciousness of the importance of individual autonomy, which in turn begets legitimating ideologies.

The core motivator of neutralitarianism is the experience of the state as an imposer of alien norms. All the early neutralitarians specifically criticized the criminal prohibition of homosexual sex, which was the law in most states. That prohibition was understood to be somehow religiously based, and so to partake of the same wrong as the establishment of religion.\textsuperscript{76} If that case is foremost in your mind, then the idea of disabling the state from promoting ideas of the good will make intuitive sense. Arguments will be unnecessary. Neutralitarianism presents itself as a quasi-Kantian deduction from first principles, but its intuitive core is a bad inductive argument: since this departure from neutrality was oppressive, all departures from neutrality are oppressive. The life of political theory has not been logic. It has been articulating the zeitgeist.

* It remains possible - I certainly have not rebutted the possibility - that the arguments for religious liberty lead toward neutralitarianism through a logic that was never imagined by their original or even their modern proponents. Rawls, in explaining Hegel’s notion of the "cunning of reason," observes that this is part of the origin of modern religious liberty: "Ironically, Martin Luther, one of the most intolerant of men, turns out to be an agent of modern liberty."\textsuperscript{77} The separation of

\textsuperscript{76} That experience has also generated alienation from religion. The number of Americans who say that they have no religious affiliation has doubled in recent decades, from 8.2% in 1990 to 15.0% in 2008, and those with liberal views on homosexuality are more than twice as likely as their statistically similar peers to belong to this group. Barry A. Kosmin and Ariela Keysar, American Religious Identification Survey 2008, Summary Report (2009); Robert D. Putnam & David E. Campbell, American Grace: How Religion Divides and Unites Us 129 (2010). Almost half (48%) of LGBT Americans say they have no religious affiliation. Pew Research Social and Demographic Trends, A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times, June 13, 2013, ch. 6, \url{http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/7/#chapter-6-religion}.
\textsuperscript{77} Lectures on the History of Moral Philosophy, 348.
church and state, initially accepted as a mere *modus vivendi*, turns out to be necessary to modern liberty.

Hegel thought that some practices turn out, upon analysis, to be based on concepts that undermine the practice itself. Slavery is an example: it manifests the master’s freedom and need for recognition, but that freedom and that need is shared by everyone, and so slavery is self-undermining.

If the neutralitarians are right, then religious liberty is another practice that demands its own transcendence. In order to show this, however, they would have to discover claims within the practice itself that imply this transcendence. That, too, would require a deeper engagement with the specifics of American religious liberty than the neutralitarians have thus far attempted.