

Disaggregating a paradox? Faith, Justice and Liberalism's Religion

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1. Introduction

When it comes to the regulation of religion, political liberals, or liberal-egalitarians, confront a paradox. On the one hand, freedom of religion is typically enshrined as the archetypal liberal right – the subject of differential treatment in comparison to isomorphic non-religious commitments such as secular moral precepts or deeply-held beliefs of individual conscience. On the other, the robust commitment to equal respect for persons and state neutrality precludes affording differential treatment to particular values or conceptions of the good – especially without a principled, normatively acceptable, justification. The problem for liberal-egalitarians here is that, unlike accommodationists, they are not prepared to argue that religion possesses distinctive and normatively relevant features furnishing such a principled justification. Equally, unlike comprehensive or perfectionist liberals, for whom state neutrality need not always preclude elevating certain comprehensive values above others, for liberal-egalitarians it does. And so, the paradox arises: if religion is not special how and why do liberal states afford it differential treatment?¹

Over the years, liberal-egalitarians have debated numerous possible solutions to this. Though the specifics are far-ranging, the answers nevertheless run along two main trajectories of re-establishing neutrality – or what might be referred to as *levelling-down* and *levelling-up* (Schwartzman 2012, 1395-96; 2017, 17). The first aims at neutrality by dispensing with all differential treatment of religion; the second, by extending the differential treatment to all normatively relevant analogues. Each direction however faces serious challenges. As the split itself reveals, there is significant disagreement as to both the demarcation of differential treatment and its very justification as a mechanism of cultural (or difference-sensitive) justice.

In a recent and influential contribution to these issues, Cécile Laborde (2015, 2017) has attempted to overcome these complexities through a novel approach of deconstructing or 'disaggregating' religion into its discrete interpretive dimensions. The aim of this paper is to examine Laborde's *disaggregation* strategy (Part 3) and evaluate its effectiveness as a solution to the paradox (Part 4). I will argue that although the disaggregation approach significantly enhances the clarity and defensibility of the liberal-egalitarian framework, its success here only reveals the far greater hurdles for the type of solution it and other liberal-egalitarian attempts have sought. Elucidating this, I contend that the disaggregation strategy in fact underscores the need for exploring novel and lateral approaches to the paradox. The paper concludes with a brief indication of one such approach. To begin with, however, Part 2 provides further background and clarification of the paradox and the liberal-egalitarian framework.

2. Paradox?

I began this paper by introducing a paradox for liberal-egalitarians concerning the interaction between privileging religion and the robust commitment to state neutrality. This may strike as

¹ This paradox is also observed (from another angle) by Laborde (2012).

somewhat misguided. After all, liberal neutrality is consistent with elevating certain foundational rights and freedoms and protecting each exercise to the greatest extent compatible with the equal right of others. Accordingly, enshrining equal freedom of religion and conscience over the prescriptions of some particular comprehensive doctrine is precisely what liberal neutrality requires. It would be odd to talk about this as privileging or differential treatment when it is just the reverse of this which would be differentiation incompatible with neutrality.

All this is right but entirely orthogonal; the guarantee of foundational rights like freedom of religion and conscience is not here in question. Instead, it is differentiation in a comparative context whereby in spite of liberal state neutrality, religious commitments serve as the conceptual archetype for the category of protection-worthy interests and are, in practice, singled out for differential treatment compared to isomorphic non-religious interests such as secular moral precepts or deeply-held beliefs of individual conscience. I will refer to these as ‘closely-analogous interests’ or, simply, ‘analogues’.

Liberal state practice discloses two forms of differential legal treatment comprising an intriguing regulatory dynamic that is reflective of the counterpoised dimensions of the paradox outlined at the start. In an apparent endorsement of the first, religion is afforded special legal protections (or *free-exercise*) – predominantly via accommodations and exemptions to general laws (for example, concessionary tax treatment or immunities from anti-discrimination laws). Conversely, in a crude adherence to the second, religion is constrained (or *disestablished*) being legally excluded from legislative rationales and any receipt of state sponsorship or endorsement (*establishment*, for short). No analogue interests are subject to such patterns of constraint or protection. Thus, for example, whereas there are constitutional or other legal constraints on endorsing religious doctrines or symbols, no such constraints exist for a range of secular doctrines whether gay rights, reproductive choice or gun control (Schwartzman 2012, 1353). Meanwhile, religious grounds - but not isomorphic secular grounds - have been both legislatively and judicially upheld for special protection in a vast range of contexts from accommodations for employment benefits² to exemptions from mandatory school attendance³, abiding antidiscrimination laws⁴ or even compelled disclosure of criminal confessions.⁵ In each case of exclusive protection or constraint religion is singled out for what I have and will interchangeably call ‘differential’, ‘privileged’ or ‘special’ treatment.

To be sure and particularly regarding my reference to ‘exclusive’ here, I do not mean to assert that there is never a case of comparable treatment for a closely analogous non-religious interest. It is true, for example, that freedom of conscience (or, sometimes, ‘thought’) often appears alongside religion in constitutional and human rights instruments.⁶ Still, cases of legislative and judicial application pale in comparison to religion, underscoring just how exceptional they are. Even when applied, such as with judicial recognition of conscientious exemptions for combat duties,⁷ there has been considerable room to argue that the conscientious exemption was in fact an intended application of a religious one, loosely construed (see McConnell 1990, 1491, n420). My claim about exclusivity or differentiability then, even if not strict, is intended in this substantive sense.

Furthermore, it might be thought that in construing the regulatory dynamic in terms of ‘free-exercise’ and ‘disestablishment’, restricts the focus to the U.S. constitutional context and by extension those liberal jurisdictions that disestablish religion (according to one survey, this is around 40% of all liberal states (see Cross 2015, 166)). Yet, there are a great many liberal states which not only do not contain disestablishment provisions, but constitutionally establish a particular (state) religion (e.g. Judaism in Israel, Anglicanism in England, the Evangelical Lutheran Church in Norway (*ibid.*, 156)). Does this

² E.g. *Sherbert v. Verner* 374 U.S. 398 (1963) (*Sherbert*).

³ *Wisconsin v. Yoder* 406 U.S. 205 (1972) (*Yoder*).

⁴ *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49 (*Ashers-Baking*).

⁵ *Evidence Act 1995 (Cth)* s.127.

⁶ CCRF, s2(a), GG art. 4; *Human Rights Act* (1988) c. 42 (UK), art. 9; ECHR, art. 9; UDHR, art. 1, 18; ICCPR, art. 18.

⁷ Notably, *United States v. Seeger*, 380 U.S. 163 (1965) (*Seeger*); *Welsh v. United States*, 398 U.S. 333 (1970) (*Welsh*).

not indicate that the regulatory dynamic I have described is clearly inapplicable to a considerable portion of liberal state practice? Once again, in substance, the answer is negative. Contrary to the stark differences in formal expression, the actual effects or implementation across the heteronymous liberal regimes shows remarkable convergence. A recent explanation of this convergence trend is offered by Sharffs (2018) in terms of the common denominator of the rule of law. Essentially, much like free-exercise is moderated in its application to ensure it does not turn into a kind of establishment by conferring too much privilege on any religion, so too establishment is confined to a more formal and restricted application by equal recognition and preserving free-exercise of the non-established faiths.⁸ So while following the prevalent trends and adopting a U.S. gloss on the regulatory dynamic might present what is a more subtle legal landscape with heightened acuteness, it is nonetheless macrocosmically accurate in representing the salient tensions therein.

With the foregoing clarifications to the paradox and its regulatory manifestations, the crux of the problem for liberal-egalitarians should become increasingly apparent. If, as noted earlier, liberal-egalitarians are not prepared to endorse religion as distinctive or “special” in some normatively relevant way nor abandon robust neutrality, what justification can be furnished for the differential treatment?

Before turning specifically to Laborde’s disaggregation strategy, it is worth briefly reviewing the kinds of responses developed within the liberal-egalitarian framework. As already noted, notwithstanding significant internal variation both within and across the levelling-up and levelling-down trajectories, the fundamental baseline of liberal-egalitarian response is essentially to deny that religion should be singled-out for differential treatment – at least not *qua* religion. This endows the liberal-egalitarian framework with at least two possible advantages. First, contra accommodationism, it is not burdened with explaining what is distinctive and normatively relevant about religion to ground its ethical salience nor the equally fraught task of defining ‘religion’ or specifying what should and should not count as (saliently) religious. Second, albeit more contentiously, it evades the perceived complications of perfectionism with regard to the tension between retaining neutrality whilst affording salience to certain ideals.

Nevertheless, as the divergence between the various liberal-egalitarian proposals attests, there remain a range of unresolved challenges for liberal-egalitarians to work through. Indeed, accepting that religion holds no ethical salience *qua* religion, there still remains a justificatory void as to what (if anything) does or should? In other words, what are the implications or the proper place of religion and its analogues in contemporary, pluralistic liberal states?

The question is especially acute for liberal-egalitarians of the levelling-up variety for whom it requires explaining what (if anything) makes their redefined, broader categories of ethical salience ethically salient? Thus, with regard to disestablishment, what normatively relevant criteria should apply to determining the proper limits of state endorsements amongst competing values or conceptions of the good? Is it a preservation of individual ethical independence regardless of whether the incursion arises from the endorsement of religious or non-religious doctrines (Dworkin 2013, 137-145)? Or maintenance of equal respect through civic-non-disparagement via exclusionary effects on some citizens in partisan endorsements (Eisgruber and Sager 2007, 170, 192)? Or even the more general prohibition on appeals to comprehensive doctrines or perfectionist values in public justification (Quong 2011, 4-7, 12-15)? And if so, what is the proper characterisation of ‘public’ reasons and to what extent are religious or analogously comprehensive or sectarian reasons inadmissible thereto? Are they to be *ipso facto* categorically excluded as ‘exclusivists’ like Macedo (1997), Audi (2011) or Nussbaum (2011) maintain or required to be sometimes admissible given the arbitrariness or unfairness of their exclusion as inclusivists like Waldron (2012) and Eberle (2015) insist?

⁸ One interesting illustration can be found in Canadian jurisprudence which in the absence of a (dis)establishment clause has nevertheless relied solely on free-exercise provisions to achieve substantially the same dynamic (see Jeremy, 2006).

Similarly, with free-exercise, what shapes the category of ethical salience that determines which religious and analogous non-religious commitments are extended special protections? Again, there are various proposals here from ‘meaning-giving beliefs and commitments’ (Maclure and Taylor, 2011), to ‘questions of ultimate value and concern’ (Nussbaum 2008, 19, 168-174) or a comparative equalising proposal (Eisgruber and Sager 2007, 4 ff.), none of which seems evidently superior or conclusive in answering the above challenge.

For levelling-down responses, which, as it were, bite the bullet and instead seek to dispense with categories of ethical salience and differential treatment (e.g. Dworkin 2013, 105-147; Leiter 2013, 92ff. Barry 2001, 19-54), the above complications are largely averted. Nonetheless, levelling-down is left to grapple with defining the contours of bare neutrality (without salience) and the apparent deficiencies this poses for securing justice under conditions of cultural and religious plurality. As shall be seen, even properly neutral laws which neither directly nor latently target or discriminate against any identity may nonetheless indirectly or incidentally create disproportionate burdens on some but not others. Unlike levelling-up, which can propose categories of ethical salience covering accommodations or exemptions to alleviate these burdens, levelling-down seems lacking in remedy.

The above survey is, of course, condensed and cursory as reflected in the rather hazardous attempt to divide all views through the ‘levelling-up/levelling-down’ prism. Though this usefully captures the key underlying impulses running across the various responses in the liberal-egalitarian framework, it admittedly invites severe confusion concerning disestablishment where it is unclear whether removing constraints on religion is an “upward” or “downward” move. In my sketch above, exclusivism represents a levelling-down and inclusivism a levelling-up, but to avoid these complications, I will reserve these terms for their more straightforward application in relation to free-exercise and of generality where the ambiguity has no bearing.

3. Disaggregation

In *Liberalism’s Religion*, Laborde offers a novel proposal to the paradox and the complexities confronting the liberal-egalitarian responses thereto. Noting her general endorsement of the liberal-egalitarian framework (2017, 30-40), Laborde diagnoses the above complications as stemming from the same root cause: the inadequacy of religion as a politico-legal category and the tendency of liberal-egalitarians to *analogise* it with equally vague liberal categories of ‘respect-worthy interests’ modelled on something like the Rawlsian category of ‘conceptions of the good’ (*ibid.*, 3, 14, 27-28).

In particular, the *analogising* strategy is culpable in two key respects (*ibid.*, 4, 6). First, as just outlined with reference to levelling-up, despite evading the burden of justifying the *unique* salience of religion, liberal-egalitarians cannot entirely dispense with value-judgments about which kinds of beliefs and commitments are normatively relevant or “ethically salient” (*ibid.*, 5). This is what Laborde calls the *ethical salience challenge*.

Second, there is the *jurisdictional boundary challenge* which probes deeper into the very determination of value categories. It is one thing to assign ethical salience to something such as comprehensive doctrines (as impermissible bases of public justification), or liberty of conscience (as ground for legal exemption), but it is quite another to determine what is and is not ‘comprehensive’ or an instance of conscience, respectively. The same goes for other salient liberal categories: good/right, religious/non-religious, public/private, comprehensive/political and so on (*ibid.*, 8). Liberal-egalitarians, Laborde argues, must be more explicit on this and cannot rely on neutrality, which provides no guidance on how to demarcate these meta-jurisdictional categories (*ibid.*, 6, 70).

In what follows, I discuss how Laborde’s disaggregation approach might offer a corrective to these problems of liberal-egalitarian analogising. Given its deeper level of concern, and Laborde’s own

confinement of it to the specifics of institutional or associational autonomy, the jurisdictional boundary problem will be largely backgrounded, though I will return to it in Part 4.

3.1 Neutrality

In discussing the ethical salience challenge with respect to free-exercise – for which religious exemptions stand as the paradigm case – Laborde conveys the challenge as follows (*ibid.*, 201):

1. State neutrality prohibits judgments of ethical salience.
2. Religious exemptions assume the special ethical salience of religion.
Therefore
3. State neutrality prohibits religious exemptions.

At first glance, the conclusion appears to require a levelling-down abrogation of special protections for religion. However, the operative qualifier “special” in premise 2 allows for an interpretation consistent with levelling-up whereby the prohibition is only to the extent that the exemptions are unique to religion, meaning that a broader category of exemptions might be permissible. Yet, the permissibility seems ruled out by premise 1, which would apply to prohibit even an alternative (broader) category of ethical salience. The truth of premise 1 then becomes central to determining the implications of the argument and the divergent trajectories of response.

Before addressing Laborde’s assessment of this crucial premise, it is worth making apparent its parallel role in relation to disestablishment also. Although Laborde does not specifically deploy the above presentation for disestablishment, the substantive parallels allow for a like rendering:

1. State neutrality prohibits judgements of ethical salience.
- 2*. Disestablishment assumes the special ethical salience of religion.
Therefore
- 3*. State neutrality prohibits disestablishment.

As with the above on special protections, if premise 1 prohibits ethical salience then singling out religion (2*) (or its analogues) for special constraints is ruled out. With the subsequent analysis of neutrality, however, the subtle but important differences in the operation of neutrality in relation to special protections and special constraints will become clearer.

Starting with disestablishment then, how might premise 1 and neutrality be approached? Liberal-egalitarians posit that disestablishment is required neither because religion is unique nor because the state must be secular. Neutrality prohibits both alike. Yet the ethical salience challenge quickly emerges here since appealing to neutrality to preclude all conceptions of the good whether religious or secular, moral, philosophical or based on any other religious or non-religious worldview (*comprehensive doctrine*, for short) proves inconclusive.

As Laborde, amongst others, points out, there is something incoherent about strict or complete neutrality (2017, 40). Construing neutrality as “non-interference with all preferences, conceptions, commitments” – what Laborde terms “broad neutrality” – leads to uncertainties as to how and in respect of what the state may legitimately act (*ibid.*, 73-74). This is partly alluded to in my earlier mention of neutrality “without salience”: even if the state were to extend disestablishment to all analogues of religion, what kind of commitments would that capture or rely on? These problems of broad neutrality are well-known. Rawls, for example, distinguishes between procedural neutrality, neutrality of aim, and neutrality of effect whereby the first is self-defeating in inevitably presupposing substantive values or failing to quarantine substantively unjust ones while the third is overdetermined in respect of a particular value (even if just) (2005, 190-195). It is only neutrality of aim which can

be properly calibrated to allow impartiality amongst comprehensive doctrines and equality of opportunity in the pursuit of individual conceptions of the good. But still, this too cannot be devoid of substantive value commitments: it must be restricted to only *permissible* conceptions of the good and comprehensive doctrines, excluding as impermissible those not compatible with the specified aims (*idem*).

If all this is right and a coherent conception of neutrality must be guided by at least a thin conception of the good (in Laborde's parlance, "restricted neutrality" (2017, 71)). then it seems to follow that neutrality alone cannot explain what delimits permissible from impermissible or illiberal/unreasonable comprehensive doctrines or conceptions of the good.

The challenge of ethical salience thus presses political liberals or liberal-egalitarians to be more explicit about the operative substantive commitments within restricted neutrality. After all, the imposition of special protections or special constraints such as with disestablishment of religion or any analogue effectively entails that whatever religion or said analogue quintessentially is, it is not contained within the relevant conception of restricted neutrality. Yet, why this should be is not entirely clear even with further specification of the relevant conception let alone without it.

Consider, for instance, a restricted neutrality permitting the state to act only upon public reason justifications. Such a state might be precluded from endorsing particular positions in moral conflicts such as the permissibility of abortions, but not from promoting certain publicly justifiable goods (e.g. environmental protection, cultural heritage, or even economic and foreign policies indirectly favouring certain comprehensive doctrines over others) (Laborde 2017, 76-77). Given that in each case the relevant normative basis for discerning permissible and impermissible state endorsements is articulated relative to public versus sectarian reasons, any entanglements create serious conundrums: (where, for example, might the endorsement of animal rights, teaching Darwinian evolution, or ecological conservationism fall between public reason justification and furtive impositions of a partial conception of the good?).

Returning specifically to religion, the dynamic just seen readily applies to expose the inadequacies of the analogising strategy in response to the ethical salience challenge. If, environmental or cultural heritage protection can be construed as a *public* conception of the good not impermissibly encroaching on any personal ethics, could the same not hold to permit a state to, for example, decriminalise certain narcotic use necessary for religious ceremonial observances or legislate to protect a sacred artefact or site?

It will no doubt be responded here that it certainly could hold, but so what? Even if such endorsements of religious commitments are permissible it is not *for* religious reasons, but on essentially the same public reason basis as with the environmental and cultural heritage examples. Indeed, both the protection of the sacred site or relic and narcotic ritual could aptly conform to something like the restricted neutrality based on the "right to ethical independence in foundational matters" (*ibid.*, 72), famously proposed by Dworkin (2011, 376).

Granted, but even then enactments or restraints in recognition of such claims will nevertheless intimate the state's endorsement of the underlying religious commitment. To explain, being permitted by restricted neutrality to act in these matters does not automatically mean that the state needs to do so. Remaining altogether indifferent is also an option. Along with the environmental protection and cultural heritage examples, the case with religion here is not like that of endorsing vegetarianism over other diets, introducing Catholic hymns or recitations from the *Communist Manifesto* in public ceremonies. The latter are presumably ruled out by restricted neutrality. The former, however, are not, and the state is able to choose whether to act or remain indifferent. Not being indifferent thus constitutes a kind of endorsement even if justified on non-comprehensive/non-religious grounds.

Despite the appeal to state neutrality amongst reasonable conceptions of the good, liberal-egalitarians, Laborde argues, ultimately fall back on a more restricted neutrality supported by singling out some salient (even if thin) features of the good - whether ethical (such as ethical independence) or epistemological (such as some conceptions of public reason) – which dissect the inclusion and exclusion of state endorsements (Laborde 2017, 115). Where the norms of restricted neutrality are not transgressed, there is no preclusion on endorsements (*idem.*). Accordingly, Laborde rejects premise 1 – positing that though neutrality might preclude certain partialities amongst comprehensive doctrines or acting for sectarian rather than public reasons, this is not equivalent to a prohibition of judgments of ethical salience.

3.2 Disaggregation

If premise 1 is false, premise 2/2* gains a newfound significance. The key issue turns from ethical salience itself to the exclusivity or uniqueness of the ethical salience with respect to religion (comparatively, vis-à-vis non-religious analogues). In Laborde’s words, in the context of special protections, “the objection must be that religious exemptions single out an *inadequate category* of ethical salience (*ibid.*, 201, emphasis added).

The truth of premise 2/2* then turns on what is meant by religion. Taken in its conventional sense ‘religion’, Laborde concedes, might indeed be too broad or too narrow, making premise 2/2* true. Yet, if in line with the disaggregation strategy, ‘religion’ is not treated as an undifferentiated monolithic category or analogised with equally vague liberal categories of comprehensive doctrines or conceptions of the good, then what is protected/constrained are the relevant underlying interpretive values/disvalues making premise 2/2* false: “*not all* religion and *not only* religion, meets the relevant interpretive value” (*ibid.*, 203).

Retuning once more to disestablishment, this means that if religion (and for that matter any category of interest) does not wholesale offend the relevant norms of restricted neutrality it need not be subject to blanket exclusions. Correcting this, Laborde proposes disaggregating religion into three dimensions which roughly align with what liberal-egalitarians already implicitly rely upon in discriminating between permissible and impermissible state-endorsements. Indeed, Laborde explicitly draws on each of the liberal-egalitarian proposals cited in Part 2 (i.e. Dworkin, Sager and Eisgruber, Quong) to derive the interpretive values triad of religion as *inaccessible*, *vulnerable*, *comprehensive* (*ibid.*, 115-117). Nonetheless, it is though this disaggregated configuration of (dis)values that Laborde posits the pitfalls of analogising can be overcome and (concerning disestablishment) a more principled, defensible position between the earlier-cited exclusivist and inclusivist positions can be advanced.

While detailing of each dimension of the triad is beyond this paper’s purview, a few illustrations can convey the strategy’s import. Consider something like a religious commitment to almsgiving. Whether or not a state can endorse this does not depend on the religiosity of the commitment per se as, but on the reasons for endorsement. Reasons derived from scriptural prescriptions would be *inaccessible* to non-believers, but for as long as there are public reasons like the benefits of charitable donations the religious origin of this commitment is irrelevant to its endorsement for the accessible (public) reason (*ibid.*, 122-123).

The point here requires some clarification in relation to broader debates on the typology of public reason as between intelligibility, accessibility, shareability (Vallier and D’Agostino, 2014). These are essentially concerned with the stringency of what qualifies a justificatory reason as ‘public’ reason and might be canvassed by expanding on the illustration above. Intelligibility would require only that the scriptural reason can be understood as counting as a reason according to the evaluative standards of the reasoner in question, making it a standard often advocated by ‘convergence’ public reason

liberals (*ibid.*). To be accessible, however, the reason would need to be adapted to common evaluative standards as specified in the preceding paragraph. Notably, however, Laborde has more recently revised accessibility to also allow reference to individual standards of evaluation where they converge or “figure in the set of reasons that have some weight in different evaluative frameworks” (Laborde 2020, 121-122) Yet, this stops short of shareability which would further require that the reason can be shared or endorsed by all members of the public – as ‘consensus’ public reason liberals advance (*ibid.*, 121; Vallier and D’Agostino, 2014).

In light of this, it might be wondered why the relevant dimension for disaggregating is accessibility as opposed to the listed alternatives? Indeed, not only does it occupy an uneasy middle-ground between the inclusivist/exclusivist divide, but accessibility has been questioned in regard to both its independence from the shareability standard (Quong 2021; Laegaard 2020) and its capability of actually distinguishing between merely intelligible and accessible standards (Bardon 2020).

Laborde nevertheless insists that accessibility is the correct standard. Contra exclusivists, accessibility does not arbitrarily restrict religious reasons where they are amenable to common evaluative standards nor unfairly constrain them any more than secular reasons such as personal testimonies which do not meet common evaluative standards (Laborde 2017, 124-129). Contra inclusivists, accessibility stops short of intelligibility or convergence views which might be considered insensitive to the epistemic respect owed to citizens to be offered justificatory reasons upon standards of evaluation they share (*ibid.*, 129-130).

Accessibility, of course, is not the only possible category for moderating the excesses of exclusivism and inclusivism. A sophisticated context-sensitive refinement to inclusivism has also been developed by March (2013) which Laborde acknowledges as a counterpart disaggregative strategy (2017, 282, n41). Like Laborde, March argues against a homogenised conception of religious reason yet rather than turning to accessibility or other epistemic revisions of public reason, March proposes a typology of different kinds of religious reasons and contexts of political justification. The less stringent or theocratic the type of religious reason and the less potential for state interference with basic rights and freedoms the political decision involves, the more admissible religious reasons should become (March 2013, 532 ff).

Though, a detailed comparison would be needed to properly determine the mapping, there is certainly evidence of some convergence between Laborde’s accessibility and March’s typology of religious reasons whereby those increasingly divorced from esoteric scriptural premises and intertwined with broader cultural traditions or moral and practical wisdom are ipso facto also more accessible. This is less clear, however, between the political contexts and Laborde’s two further interpretive categories to be addressed below. For the purposes of disaggregation concerning disestablishment, however, March’s and Laborde’s strategies are broadly aligned and thus susceptible to common evaluation as shall be seen in Part 4.

As mentioned, accessibility as an exclusively epistemic category does not exhaust the categories of disvalue for disestablishment. Christian displays are often justified by reference to epistemically accessible bases of public culture or national tradition, but the permissibility of state-establishment will also depend on more substantive considerations about justice such as whether the instance of establishment triggers *vulnerability* by carrying adverse valence in respect of minority citizens. Again, the idea here is that the religiosity of a symbol is not itself the determinative. A nativity display in front of a courthouse might carry exclusionary valence whereas a Renaissance artwork littered with Christian motifs might not (Laborde 2017, 138).

Finally, even if not problematic on the foregoing dimensions, religious commitments cannot be established where this would mean establishing value-commitments which are *comprehensive*. While this might sound like an analogising between religion and the liberal category of comprehensive doctrines, the idea here is rather that of state limits on incursions into the private sphere of personal

ethics regardless of whether that incursion flows from comprehensive or public reasons. This can be better understood in connection with the disaggregated category for free-exercise with which I conclude this section.

Complimenting the disvalue (category) of comprehensiveness by defining the individual sphere of non-interference is the (value) category of integrity - or more specifically “integrity-protecting commitments” (or “IPCs”), which Laborde advances as the normatively relevant category for free-exercise (*ibid.* 203). As with disestablishment, while a full elaboration of this and its integration into broader considerations of justice is beyond present scope, the central idea is the protection of practices or acts (including voluntary inactions) which enable individuals to lead lives with integrity: “in accordance with how she thinks she ought to live” (*ibid.*, 204). Since integrity is closely tied to the values of “identity, autonomy, moral agency and self-respect” it is, Laborde explains, “grounded in widely shared values that are not sectarian...valued as good both by religious and non-religious citizens” (*idem.*)

IPCs then are a category of ethical salience that are precise in capturing the values that underlie free-exercise justifiable within the liberal-egalitarian norms of restricted neutrality. Importantly, IPCs are not coextensive with religion meaning that not all religious commitments will warrant special protection as IPCs just as much as some non-religious commitments will. Laborde concedes that there is a resemblance here to the levelling-up proposals such as from Nussbaum (2008) or Maclure and Taylor (2011) introduced in Part 2, yet maintains that since IPCs extend not just to beliefs but also more mundane but integrity-serving identity-embodied practices, her proposal overcomes various disanalogies and biases such that of privileging orthodoxy over orthopraxy (2017, 215).

Disaggregation thus reveals how no one dimension is entirely coextensive with ‘religion’. The interpretive dimensions identified apply equally to non-religious analogues such as politically vulnerable gendered, sexuality or racial identities, or comprehensive doctrines. Consequently, to the extent that religion or any other analogue does not violate liberal norms expressed in these dimensions, it need not be singled out for disestablishment (*ibid.*, 144) nor free-exercise (*ibid.*, 203).

4. Religion, Salience and the State

While these refinements, as will further emerge, are no trivial feat, disaggregation ultimately fails to resolve the paradox and confronts substantially the same problems as other levelling-up proposals which it merely shifts to deeper ground. To understand why and how, requires dissecting the question of ethical salience more carefully.

Though often overlooked, asking what is the ethically salient category in fact involves asking two closely-related questions: one about *coverage* – or what the nominated category comprises – and one about *basis* – or what makes the nominated category ethically salient. And while easy to conflate given that basis will typically determine coverage and instances of anomalous coverage might undermine the proposed basis, the questions are distinct.

4.1 Coverage

To illustrate the issues of coverage, examine the perfunctory example of helmet laws and the Khalsa Sikhs. In brief, numerous liberal jurisdictions contain laws mandating helmet-wearing for motorcycle riders. These laws are justified by appeal to neutral, public rationales like road safety and do not directly or latently target or discriminate against Khalsa practices. Indirectly, or incidentally, however, Khalsa Sikhs face a disproportionate burden to the average citizen: the observance of the *kesh* prevents wearing a helmet and thus being able to lawfully ride a motorcycle without contravening their beliefs. Liberal states thus typically grant exemptions to remove such burdens.

If religion is an inadequate category of ethical salience, then differential treatment such as this appears precluded by liberal neutrality pending normatively relevant justification. Specifically in terms of *coverage*, the category of religion covers more and/or less than what is ethically salient. To remedy this, an alternative category might be proposed offering coverage more aligned with all that is ethically salient to the exclusion of all that is not. So, for example, if “religiosity” too narrowly excludes analogous commitments, perhaps the category should instead be the deontic nature of belief.

It might be objected, however, that this unjustifiably excludes non-deontic but nevertheless deep commitments such as those of belonging to a collective identity. Nominating collective identity as the relevant category might rectify this, but still prove under-inclusive when it comes to an individual with analogously deep commitments not based on a collective identity and at the same time over-inclusive in capturing a range of collective identities whose beliefs/practices are inconsistent with the helmet law. The inclusion of anarchists and bikies with an organisational commitment to helmet-less riding might be problematic if one does not consider these sufficiently analogous to the Sikh.

Even if dropping the communal aspect might fix the under-inclusiveness, it is not clear that “deep commitments” – and for that matter other possibilities – resolve the over-inclusiveness or other forms of under-inclusiveness. Would an associational charter or the threat of group alienation or retribution make an anarchist or bikie commitment analogously “deep”, “deontic”, “onerous” to that of a Sikh? If one is to resist these analogies for inclusion, one needs further resources for differentiation.

The upshot here is that each modification of coverage triggers its own (dis)analogies. Returning specifically to religion, the same kind of coverage dynamic has already been canvassed in the paradox. Essentially, what troubles liberal-egalitarians about singling out ‘religion’ (conventionally understood) over isomorphic secular interests is that evidently like things are not treated alike. In this regard, the fuller significance of disaggregation with regard to coverage should now be clearer. Constructing the ethically salient category upon a precise set of interpretive values/disvalues allows Laborde’s disaggregation approach to coherently articulate the coverage of differential treatment free of the imprecision and anomalies of under/over-inclusive coverage plaguing analogising levelling-up strategies. This is indeed a considerable merit of the disaggregation approach and a key part of what makes Laborde’s contribution to these questions so valuable.

Nevertheless, there remains the further question of basis or justifying the nominated category as ethically salient. And it is here that the differences between disaggregation and other levelling-up proposals quickly dissipate.

4.2 Basis

As explained, questions of basis often run concurrently with coverage, but basis reaches deeper still. Even supposing that a nominated category of ethical salience were to somehow succeed in capturing all and only a clear set of closely analogous interests (with no anomalous exclusions/inclusions), there remains the question of what makes that category ethically salient in the first place? Why communal belonging? Why deontic nature or religiosity? Or profoundness? And so on. It would be (amongst other things) circular to simply insist that this category yields the desired coverage. The answer must be able to justify the basis by appeal to some relevant value without needing further such appeals so as to encounter a problem of infinite regress or circularity.

More than that, being an answer within the liberal-egalitarian framework, whatever justification is ultimately given must also be compatible with the norm of state neutrality. This is no trivial requirement. While perfectionist or comprehensive liberals might seek to avoid infinite regress by

reliance on some defensible substantive value(s), such prospects are defeated for liberal-egalitarians given neutrality's elimination of all but a narrow range of public/political values (see further below).

How then does the disaggregation approach justify its bases of coverage and in what way does it purport to depart from other liberal-egalitarian solutions, particularly of the levelling-up trajectory?

Central to Laborde's justification was 'restricted neutrality', which it was argued (contrary to the incoherent notion of 'broad neutrality'), permits judgments of ethical salience. Yet, how exactly might that be?

As the term itself implies, the ethical *salience* of something is determined against foundational background values. For our purposes, this would be the norms of liberal-egalitarian political morality, one such norm of which is state neutrality. Indeed, it is neutrality that makes ethical salience a "challenge". Beside neutrality are, of course, other foundational norms: for instance, the basic rights and liberties of movement, speech, association, even conscience and religion as well as respect for persons or the more general liberal commitment to the maximal set of liberties consistent with the same for all others. Interests in conflict with one or more of these norms might be precluded from having ethical salience for special protection, but perhaps will have ethical salience for special constraints.

While there may be several different liberal-egalitarian accounts as to the foundation of these norms and the exclusion of contradictory ones, there is nevertheless a key commonality: the norms are compatible with each other, including (crucially) state neutrality. By this I do not mean that liberal foundational norms are mutually complimentary such as, for instance, within a communitarian paradigm where certain norms of gender identity might compliment or reinforce other norms like traditional division of labour. This sense of compatibility would be patently too strong considering that many norms of liberalism - including foundational ones - frequently conflict as, for instance, in the pertinent case of ministerial exemption for all-male clergies wherein religious liberty and antidiscrimination norms are in tension (see Quong 2011, 205).

My claim, however, is sufficiently moderate to accommodate these kinds of tension because the alleged compatibility is a deeper, structural one. Tensions between liberal foundational norms are not instances of mutual exclusivity in a global sense such as between the norms of polygamy and monogamy or due process and summary execution. Instead, as Quong's example in fact shows, the tension is localised in discrete spheres. In contrast to the global exclusivity of the above examples, religious liberty and non-discrimination are broadly aligned except where the discriminatory practice coincides with the religious one. Outside these localised tensions an underlying structural compatibility persists. Non-discrimination, for example, often protects religious liberty much like neutrality protects from state interference in individual expression and freedom to form associations and so on. As Quong's own analysis corroborates, the tension represents a foundational rather than justificatory disagreement: it is a priority conflict within a shared normative framework ("a plausible balance of political values" cross-addressed to each other "as to why one public value ought to be prioritized over the other in cases of this kind" (*ibid.*, 207-209).

Thus clarified, the asserted compatibility of foundational norms is evident in the pertinent distinction alluded to in Part 2, namely between the freedom of conscience and religion as foundational norms harmonised with state neutrality and as categories for *differential* treatment of religion (or analogous interests) which occupy a far more ambivalent position to neutrality. Consistent with this, the ethical salience challenge can be seen as concerned with the ethical salience of interests nominated for *differential* treatment and not with ethical salience *in general*. The distinction proves to be of critical significance with regard to Laborde's disaggregation approach, as we are about to see.

4.3 Jurisdictional Boundary

One way of approaching the distinction just raised is through a brief exposure of the second of Laborde's named challenges to liberal-egalitarianism's analogising. This is the *jurisdictional boundary challenge*. Introduced in Part 3, the challenge concerns the necessity of a sovereign state making judgments of ethical salience in the process of applying or demarcating various categories of ethical salience. In this respect, the challenge has already been implicit in the earlier discussion of coverage. Categories of ethical salience are interpretive and capable of significant departure from their conventional semantic designations. Is a fervent anarchist 'religious' in some sense? In what sense is the Sikh commitment profound or even deontic that cannot be said of the bikie?

The deeper concern of the jurisdictional boundary challenge, however, is that it runs all the way down, pervading even the core political categories and foundational values. Laborde illustrates this with the example of justifications of liberal state neutrality as to positions on the permissibility of abortion. Essentially, by remaining neutral and leaving the matter to individual choice, the state already passes non-neutral value judgments such as not ascribing standing/interests to fetuses (Laborde 2017, 80).

Determinations about what is or is not a comprehensive doctrine, public/private, religious/non-religious, good/right and so on occur at a meta-ethical or meta-jurisdictional level where neutrality offers no guidance as to how such demarcations should be made. This has already been exhibited by the examples in Part 3, such as whether ecological protection can be construed as a public reason concern or an imposition of a comprehensive environmentalist doctrine. As Laborde emphasises, such meta-jurisdictional judgments are bereft of reliance on neutrality or any other foundational values.

Though the jurisdictional boundary challenge uncovers the underlying instability of even core liberal normative categories, its all-pervasiveness is also what makes the challenge largely inconsequential. Laborde's own confinement of this challenge to the specific issue of mediating conflicts between private associational and public norms attests as much. All normative proposals are caught in it and so the challenge ends up redundant – much like a metaphysical theory denying physical matter proves in connection with the actual building of a house.

4.4 Ethical Salience: General and Differential

Nevertheless, what is crucial about the jurisdictional boundary challenge concerns the earlier distinction between ethical salience in general and ethical salience in regard to interests nominated for differential treatment. If, as Laborde points out, the jurisdictional boundary challenge reaches all the way to judgments of ethical salience and neither neutrality nor like foundational liberal norms offer guidance as to how such judgments should be made, then Laborde's own argument about restricted neutrality effectively represents an instance of the jurisdictional boundary challenge.

To explain, at the point of adopting the distinctively liberal-egalitarian value of neutrality, the sovereign state has already necessarily engaged in prior value judgments adopting some over other possible conceptions of neutrality (or even other conceptions of the good). Indeed, and complimenting Laborde's reason for drawing on restricted neutrality, the jurisdictional boundary challenge incidentally serves as a block to the infinite value-regress problem and thus persists at various stages of interpreting and structuring the core norms (as Laborde's aforementioned abortion example seeks to illustrate).

The problem, however, is that not every judgment of ethical salience is made in the manner of those which set foundational norms such as the content of neutrality or various conceptions of the good. Some judgments of ethical salience, namely those concerning categories for differential treatment,

are made within an already set normative context – against the background of antecedent judgments of ethical salience like the foundational norms. To treat every judgment of ethical salience as an entirely *de novo* sovereign act would be to confuse the general possibility – or even necessity – of ethical salience judgments with specific instances thereof. In other words, the jurisdictional boundary challenge does not imply that subsequent judgements of ethical salience are entirely independent of or render preceding ones redundant. Accordingly, when it comes to salience concerning the basis for differential treatment it is a salience by reference to the background norms.

Nonetheless, Laborde's references do not always heed this distinction, resulting in equivocation as to 'ethical salience'. When Laborde introduces the ethical salience challenge the sense invoked seems to correspond to the salience in reference to background norms like restricted neutrality (*ibid.*, 6, 42-43, 48, 198). Yet, in her argument relying on restricted neutrality to defend the basis of the nominated values/disvalues Laborde's references to ethical salience take on the general sense disclosed by the jurisdictional boundary problem whereby the liberal state's antecedent commitment to neutrality does not end the capacity to make subsequent judgments of ethical salience (*ibid.*, 41, 71, 107, 131, 200-201). True as this may be, it does not mean, that such subsequent judgments of ethical salience are entirely unrestricted in possibilities. Crucially, the relevant background norms such as in the content of restricted neutrality do (as the first sense confirms) exert influence on subsequent judgments of salience, including potentially prohibiting *certain* kinds such as about differential treatment. In short, Laborde may be right that restricted neutrality does not outright preclude judgments of ethical salience, but this does not mean that restricted neutrality precludes none or allows *all* kinds of ethical salience judgments. This is what the distinction tracks and what Laborde does not consistently follow.

Accordingly, even if something like IPCs are supported by liberal-egalitarian norms of restricted neutrality as Laborde claims (*ibid.*, 204), the foregoing distinction suggests that this does not automatically mean that these norms also allow the state to endorse the ethical salience of IPCs for differential treatment. After all, as levelling-down liberal-egalitarians might point out about the Sikh case, being unable to comply with the neutral, publicly justified law does not threaten anyone's ability to live with integrity: there is no legal requirement to contravene custom or faith, which remains fulfilled by merely refraining from (lawfully) riding motorcycles (Barry 2001, 44-45). There may certainly be issues as to justice or equality here but these are separate matters. The present point is that differential treatment that is not grounded in neutrally justifiable or 'public reason' norms not only does not follow from but can even be precluded by the very (*antecedent*) ethical salience of (restricted) neutrality. Simply insisting that beyond its foundational, integrated role of precluding directly oppressive or discriminatory laws, integrity grounds differential treatment is to effectively endorse it as a perfectionist value inconsistent with liberal-egalitarian neutrality even under Laborde's 'restricted neutrality' corrective.

Similarly, with the disestablishment disvalue triad there is an underlying reliance on foundational norms like restricted neutrality which undermines their justification or basis. The choice of accessibility (or March's typology) as opposed to other epistemic standards (or typologies) can only be justified by appeals to what one takes as salient in the relevant conception of restricted neutrality. This is particularly vivid with the vulnerability category as a manifestly all-pervasive category. Exclusionary valence charges pervade political life: war memorials carry exclusionary valence with regard to pacifists, sanctioning capital punishment does so for Catholics and so on – all of which highlights the inadequacy of vulnerability for demarcating differential treatment without interpretive guidance of the very background norms against which ethical salience is proposed. Thus, what can and cannot be differentially disestablished does not transcend what is implicit in foundational norms

like neutrality and is inevitably caught in jurisdictional boundary problem as part of interpreting them.⁹

To be sure, the problem here is not the familiar administrative or judicial difficulty of giving specific interpretation/application to general categories (does a tax on ‘breads’ include cakes and pizzas? does ‘literary works’ copyright cover phone directories and computer algorithms? Etc.) and there is no expectation on Laborde’s account to comprehensively answer each instance of applying a category like IPCs or vulnerability etc.

Instead, the problem fundamentally concerns the *basis* of ethical salience with respect to categories for differential treatment: why does (against background or foundational norms) category ABC have salience for differential treatment as opposed to XYZ etc.?). As seen, though Laborde has shown restricted neutrality to offer the *general* possibility for judgments of ethical salience, this cannot automatically establish such judgments concerning categories for differential treatment. This is not to say the *basis* for Laborde’s proposed categories could not be derived from liberal-egalitarian restricted neutrality, only that it has not been presented. Indeed, uncovering the equivocation and contesting the assumption that restricted neutrality yields the ethical salience categories *sui generis*, it seems that, beyond the internal compatibility of foundational norms, further categories require independent substantiation to show compatibility/integration.

Restricted neutrality, as Laborde rightly identifies, is necessary if core liberal-egalitarian norms like freedom or equal citizenship and disvalues like sectarian justifications or coercion are to have ethical salience for protection/exclusion respectively. Yet, it is also precisely because neutrality already secures many of the fundamental liberal rights and freedoms that the basis of further ethical salience like differential treatment proves challenging. In fact, as alluded to earlier in discussing integrity in the Sikh case, this reveals a further important challenge unaddressed by the disaggregation approach.

4.5 A final challenge? Exemptions-Justification

Whereas the discussion so far has focused on the justification of particular values/disvalues, the unaddressed challenge concerns the justification of the very form of special protections per se. This might therefore be labelled the *exemptions-justification-puzzle*. Although this paper cannot give full consideration to this puzzle, it is still worth mentioning because of its orthogonal treatment by Laborde and its indications as to a further limitation of the disaggregation approach.

Differential treatment in the form of special protections such as accommodations or exemptions to general laws of uniform application poses a coherence problem. Claims for special protections (or ‘exemptions’ which I will henceforth use as the representative type) presuppose that the relevant law is legitimate upon the applicable liberal-egalitarian principles – for example, being neutrally or publicly justifiable. Indeed, were the law not legitimate the issue would be illegitimacy - not exemptions. Thus, the Sikh exemption claim to helmet laws is essentially about the indirect or incidental effect of the otherwise legitimate law concerning a publicly justifiable rationale: namely, road safety.

Incidental effects, however, are a ubiquitous feature of laws which will invariably burden some more than others. Noise curfew regulations disproportionately affect those inclined to party rather than sleep, road speed limits mostly inconvenience those with a penchant for speeding and so on (see Barry 2001, 34-35). Since it would presumably be incoherent to grant an exemption in respect of any incidental effect of any law, there should be some principled basis for determining which

⁹ Quong comes near to this point in his remark that Laborde’s disaggregation is primarily helpful only because it corresponds to her pluralistic view of what makes a legitimate state (2021, 50).

incidental effects warrant an exemption and which do not. And yet, if, based on the above, the principled basis should also come from the neutrally justifiable or public reason grounds on which the relevant law was justified, it would appear that the combination of legitimate law and exemptions thereto is an incoherent one. If there is really a valid basis for exemptions, then it is the law which requires amendment or repeal.

To be sure, the puzzle here does not affect all exemptions nor imply that there can never be exemptions to laws. Rather, for want of a better term, only ‘cultural’ exemptions are at stake. ‘Cultural’ here is intended in the broadest possible sense including ethnic, gendered, religious, doxastic and other like grounds. What is actually relevant is that these are not going to be part and parcel of the public rationale of the law as an exemption for medical use to a law criminalising the relevant narcotic substances would be. Whereas both the law and medical exemption belong to the publicly justifiable safety/harm-prevention rationale, an exemption to the same narcotics law on the basis of any of the aforementioned “cultural” interests would be extraneous to that rationale, triggering the puzzle.

Whatever disaggregation achieves in isolating discrete values for special protection, thereby stands orthogonal to the exemptions-justification-puzzle which, as just seen, concerns the coherence of special protections more generally. Interestingly, despite recognising its existence, Laborde explicitly sidelines this puzzle in her argument, emphasising her exclusive concern with “religious exemptions qua religious” (2017, 307).¹⁰ It is only in an oblique comment on this theme that Laborde suggests that certain indirect effects of neutrally-justified laws which significantly burden IPCs would be unjust (*ibid.*, 201).¹¹

5. Concluding Remarks

Examining the paradox with which this paper began, it was observed that the liberal-egalitarian dismissal of religion as *uniquely* special triggered the ethical salience challenge wherein responses analogising religion with other liberal categories proved ineffective and Laborde’s alternative strategy of disaggregation offered promise.

Dissecting this challenge further into questions of coverage and basis, revealed that though disaggregating religion into discrete values/disvalues, yielded a much more coherent coverage not vulnerable to anomalies and latent sectarian biases of analogising, the differences between disaggregation and other levelling-up proposals dissipated owing to the failure to conclusively justify the basis of disaggregated categories concerning ethical salience for *differential* treatment.

Thus, the disaggregation strategy effectively shifts the paradox to deeper ground where matters of justification meet justice and coherence as the exemptions-justification-puzzle disclosed. Do the disproportionate burdens incidentally imposed by otherwise legitimate general laws constitute an injustice upon relevant religious groups or cultural minorities? Or, is it in fact unjust to differentially

¹⁰ At n2 Laborde writes: “Conclusion 3 could be reached through a different argument – for example an argument that purports to show that exemptions *per se* are incompatible with equality or the rule of law. Although I do not think those arguments generally succeed, I do not discuss them in detail here, as I focus on the specifically liberal egalitarian concern with religious exemptions *qua* religious.”

¹¹ Although Laborde does not further elaborate, her prior reference to “strains of commitment” (2017, 201), suggests she has in mind something like the argument rehearsed by Quong (2006), namely neutrality that allows incidental burdens which are intolerable under impartial consideration could not secure rational commitment to a fair system of social cooperation (*ibid.*, 60). Differential treatment like exemptions is therefore required as a matter of justice in certain cases viz. where the law makes it impossible for an individual to combine their reasonable commitments with civic opportunities like employment or education (*ibid.*, 61). Whatever its merits might be, being aimed at the justice rather than the coherence of exemptions, this argument too leaves the primary challenge of the exemptions-justification-puzzle unanswered. I return briefly to the concern with justice in the concluding remarks.

constrain or protect certain interests but not others? And, to the extent that these questions interact with issues of equality amongst citizens, what kinds of metrics of equality should be used and construed on the liberal-egalitarian framework?

In concluding this paper, it is worth reflecting just how substantive and deep such questions prove to be. Essentially embedded here are foundational disagreements as to the requirements of justice and the nature of equality. These are genuine philosophical questions of significant independent value. Yet, they are also seemingly intractable or at least run parallel with non-philosophical public sphere debates on the same regulatory issues regarding religious and cultural interests. This sounds unpromising for a workable, practical solution to the regulatory paradox.

It does, however, prompt a certain reflection: the political nature of this paradox calls for a political solution. That is, a solution which can withstand reasonable disagreements about justice and ethical salience. But what might such a political solution be? And how could it bypass questions of justice that seem so central to the legitimacy of political power on the liberal view?

As mentioned, these questions cannot be answered in this paper. Rather, in closing, only a speculative suggestion can be put forward. Notwithstanding the independent philosophical value of solving the above questions of justice, it is worth noting that the answer might prove entirely moot should it be that the state cannot legitimately act in accordance with the answer. This would yield a lateral solution to the paradox based on pre-emptively demarcating what the state is permitted and not permitted in regulating in relation thereto.

This might seem untenable though, given that liberal principles of legitimacy already cover these questions and, as noted, the complications of differential treatment arise consequentially from the operation of legitimate laws. Interestingly, however, legitimacy is near invariably construed in relation to the exercise of political power in terms of law or decision-making whether legislative, executive, or judicial. Yet, few (if any) laws – especially the non-arbitrary, liberally-legitimate kind – are exhaustively specified. Rather, their applications and effects must be shaped in actual instances of implementation. And yet, it is far from clear how the theories or principles of liberal legitimacy, oriented towards decisions and law, apply to discerning the legitimacy of each application and effect. It is typically assumed that the legitimacy of laws/decision-making covers all reasonably intended or conceivable applications whereby the discernment task is not theoretical but real-world judicial.

The key to the political solution then begins with querying this and disentangling liberal legitimacy as between the exercise of political power in general and its exercise or operation in specific instances of application. The distinction is significant in two ways. First, given that it is in the effects that the complications of justice and differential treatment reside, if legitimacy were to preclude this in certain cases coinciding with ethically salient differential treatment cases like Sikh exemptions to helmet laws there could be lateral resolution as outlined. Second, given at least foundational consensus as to the basic principles of liberal legitimacy like public justification, if such principles could be extrapolated to discern when a legitimate law operates with legitimate or illegitimate effect that consensus might be deployed further in support of the lateral solution.

The immediate obstacle to such a proposal is that even if much of the above set-up holds, the indeterminate variety of effects seems fundamentally incommensurable with the general nature of principles of legitimacy. The hurdle is indeed significant, but as disaggregation has shown, there may yet be a possibility for a refined analytic solution here such as discerning discrete common features or categories of effects. In light of the foregoing observations, the implications of achieving this for the regulatory puzzle would, be immensely considerable.

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