

14

Neutrality and Excellence

Mark R. Reiff*

It is customary, I suppose, to begin an essay for a festschrift with a story about the honoree. Mine is as follows. A few years after I had received my PhD under Matthew Kramer's supervision, I returned to Cambridge for a visit. I was in the Law Faculty building, in the huge atrium that I fear makes it look a little too much like the inside of a Hyatt Hotel, when two of his current PhD students came up to me asking for advice. "How were they to take Professor Kramer?" they wanted to know. "What insight could I impart on how to process the very extensive and detailed criticism he was providing on their work? How seriously should they take all that criticism, and how should they react to it?" I was somewhat surprised by the inquiry, because I simply assumed that it would be obvious that the level of feedback that Professor Kramer famously provided to his students, something that was unfortunately far less common than it should have been for students supervised by other people, was simply one of the special benefits of being supervised by him. In fairness, I think these two students saw that clearly, but were still a little unsure how to process all the feedback that Kramer was currently providing to them.

I hesitated for a minute, and then I delivered the following advice: "Just remember that Kramer is always right. Use that as a rule of thumb to process his comments and criticism. Not because he will resent it if you challenge his criticism (he won't). But because in my experience, he is indeed always right. Not necessarily about what you should do to correct whatever problems he sees in your work, for he is not inside your head, and therefore he cannot know what you were really thinking when something you have written seems incorrect or misleading or unclear. Because you may have expressed yourself imperfectly, he may have misunderstood what you were trying to do or say. His suggestions may accordingly miss the mark, although when his understanding is correct they are usually spot on. What he is always right about is that there is a problem with what you wrote. If he found something wrong or unclear or misleading, you need to do something about this, and you ignore this imperative at your peril."

I don't know whether those students took my advice, but it has always held me in good stead, and I do not intend to violate it here. I am therefore not going to criticize Kramer's work on how to justify bringing certain forms of excellence into liberalism without violating the principle of neutrality. Not only out of respect but also because I truly find nothing objectionable there. Instead, what I am going to do is try to show

* My thanks, as always, to Matthew Kramer for both his criticisms and inspiration. Thanks also to the editors of this volume, and to all those in Cambridge at the workshop presentation of this essay for their comments and suggestions.

that there is another route to the place that Kramer has taken us. Nothing about what I am going to say suggests that Kramer's approach is wrong, or even that it has to be adjusted in some small way to accommodate the alternative I propose. My proposal simply takes us down a different path, one that travels through markedly different countryside and encounters different obstacles along the way, but arrives at the same point in the end. I believe that nothing in Kramer's work suggests that one cannot follow the path I will identify if one wants to do so, and nothing I will say suggests that one cannot follow the path he has already identified, as different as the two paths may be. In any event, that's my story and I will be sticking with it. For on this I will be invoking the privileges of age. Although I am his former student, I am also older by almost two years, something Kramer has always delighted in reminding me (I came to academia late in life whereas he came straight away). And having said that, since this also means I am running out of time slightly faster than Kramer is, I shall now get on with it.

1. Kramer's Aspirational Perfectionism

In *Liberalism with Excellence*,¹ Kramer makes an argument for how government support for the pursuit of excellence may enter into liberalism, despite liberalism's strong commitment to neutrality. Kramer seeks to challenge not only the uncompromising rejection of this position by liberal "neutralists" such as Jonathan Quong,² but also the so-called "blended" approach of "soft perfectionist" scholars such as Joseph Raz and George Sher,³ whom Kramer labels "edificatory perfectionists." What Kramer advocates is what he calls "aspirational perfectionism:" the idea that government should promote certain kinds of excellence in order to heighten what he calls "warranted self-respect." In making this argument, Kramer draws heavily on the work of John Rawls, who lists "the social bases of self-respect" as well as wealth and income and rights and opportunities as being among what Rawls calls "primary goods;" that is, goods that play an important part in the pursuit of a wide range of others forms of good.⁴ Although I am simplifying Kramer's argument in some important ways just to get its essence on the table, Kramer argues that because warranted self-respect is a primary good, its furtherance is not ruled out by liberalism's insistence on government neutrality, the idea that government should remain neutral as between controversial but nevertheless reasonable competing comprehensive conceptions of the good.⁵ Indeed, promoting warranted self-respect is not only consistent with the principle of neutrality, properly understood, promoting it is effectively required given the important role warranted self-respect plays in creating a robust and resilient liberal society.⁶

¹ Kramer, *Liberalism with Excellence*.

² See Quong, *Liberalism without Perfection*.

³ See, e.g., Sher, *Beyond Neutrality: Perfectionism and Politics*; Raz, *The Morality of Freedom*.

⁴ See Kramer, *Liberalism with Excellence*, 325–8.

⁵ See Kramer, *Liberalism with Excellence*, 342–3.

⁶ See Kramer, *Liberalism with Excellence*, 341–2.

Kramer calls his view a form of perfectionism, by which he means a form of soft perfectionism, but his argument actually establishes that it is not, although most liberal neutralists would no doubt disagree. I would actually characterize Kramer's aspirational view as a form of liberalism: it does not make a perfectionist exception to the usual liberal requirement of government neutrality; it simply relies on a more nuanced and precise conception of how the principle of neutrality should be understood by liberals. Accordingly, I might have preferred that Kramer call his theory "aspirational liberalism," but this is merely a semantic quibble. The point is that Kramer makes clear he thinks that support for the arts and for culture—indeed support for many of the same things that edificatory perfectionists advocate, albeit for very different reasons, is entirely consistent with the underlying commitments of liberalism. One need not be perfectionist at all to advocate this; one simply needs to appreciate the relationship between certain kinds of excellence and warranted self-respect and the essential nature of such a good in the creation and maintenance of a liberal society.

2. A Thicker Conception of Liberalism and Perfectionism

I suppose this is the point where I should say a little more about what I have in mind when I use the terms "liberalism" and "perfectionism." I conceive of these terms as describing two great families of political theories, each of which has many members. What makes a particular political theory a member of one family rather than the other is that at a higher level of abstraction, the members of each family all share various fundamental presuppositions about political morality, presuppositions that members of the other family reject. In itself, the claim that all political theories can be placed in one family or another is not a controversial position, but identifying the relevant presuppositions is. Many theorists claim that the distinction between these two families boils down to a single question: whether the particular theory at issue recognizes the principle of neutrality. Others are a little more expansive, claiming that a society's commitment to toleration is also a key distinguishing feature. My conception, in contrast, includes a much greater number of fundamental presuppositions. These include an embrace of the principles of neutrality and toleration, of course, but also a commitment to the following views: respecting individual liberty and the rule of law is to be given priority over maintaining government authority and national security; informed public discourse and debate is to have an extensive role in directing government action; the individual and not the community is the fundamental social unit; empiricism and not ideology should be the basis of both pure and practical reasoning; religious and political authority should not be conflated; all members of the polity are entitled to be treated with equal concern and respect; and punishment should, in some meaningful sense, be proportional to the legal, social, or moral wrong at issue.⁷ My conception of what makes a theory more like a member of one family rather than the other is accordingly much thicker than either liberals or perfectionists typically employ.

⁷ See Reiff, *The Unbearable Resilience of Illiberalism*; Reiff, "Trump and the End of Liberalism,"; Reiff, "The Attack on Liberalism," 173–210.

The reason for using a much thicker description of what distinguishes liberalism from perfectionism here is that doing so is far more useful analytically than trying to distill this to a single presupposition or two. For one thing, it allows us to see how so many people who each think of themselves as liberals can differ so dramatically on what they think liberalism requires. They can do this because each of the fundamental presuppositions I have identified are general concepts rather than detailed conceptions. Each fundamental presupposition needs to be given further content before it can be implemented, and this can be and often is done in different ways.⁸ Liberals can be for or against abortion, for or against greater redistribution of income, for or against greater government regulation of the market, for or against free trade with other nation-states, for or against stricter limits on immigration, and on either side of any number of other hotly contested social, domestic, and foreign policy issues of the day. Despite disagreeing about what liberalism requires in specific situations, however, each member of the liberal family draws their views from the same fundamental presuppositions; they just interpret these differently. There are of course limits to the range of interpretations that can still claim to be within each fundamental presupposition—the need for further specification does not make any of them meaningless. But there exists a wide range of interpretive possibilities nonetheless.

Because neutrality is the focus of the discussion that follows, I will not say much about the range of possible interpretations of the other fundamental presuppositions here. But the fact that the differences between liberalism and perfectionism do not depend on one's attitude toward neutrality alone is still important to recognize. For if we do use a thicker conception of the differences between liberalism and perfectionism, as I contend we should, the distinction between these two families of political thought becomes much more complex and variegated. To account for this, we must construct a y axis between liberalism and perfectionism that is as multi-factorial and nuanced as the x axis typically used to distinguish the range of views between left and right. To fully plot where some person, party, or policy falls on the political spectrum, one needs to do so on both axes, not just one. One can be on either the left or the right and anywhere in between and also be a liberal or a perfectionist or anything in between.⁹

Recognizing this is important, even when focusing on the principle of neutrality alone, because it is unlikely that we can otherwise appreciate what is at stake in the battle between liberalism and perfectionism, or fully understand the role the principle of neutrality plays in that battle. Some versions of perfectionism are relatively inoffensive, perhaps even attractive. But under my more general conception, excellence is in the mind of the beholder. The kind of Aristotelian virtues that many people think of when they think of kinds of excellence are of course virtues that many perfectionists embrace, at least many soft perfectionists. But other kinds of perfectionists identify starkly different characteristics as virtues and therefore embrace very different conceptions of excellence. Kramer's own conception is not Aristotelian, but Stoical,

⁸ For further discussion of the difference between a concept and a conception, see Dworkin, *Law's Empire*, 70–2.

⁹ See Reiff, *The Unbearable Resilience of Illiberalism*; Reiff, "Trump and the End of Liberalism;" and Reiff, "The Attack on Liberalism."

another form of soft perfectionism and therefore generally not discomfiting to those who embrace liberalism. But hard perfectionism is different.

Hard perfectionists generally interpret excellence along strict racial, gender, religious, ethnic, nationalistic, heterosexual, cultural, and/or class lines. Some hard perfectionists, for example, interpret excellence as constituting the elevation and promotion and protection of white, male, Christian, heterosexual culture of a specific national, ethnic, and even class background. This kind of perfectionism is probably not at all what Aristotle had in mind (although the matter is not free from doubt), but it is a form of perfectionism nonetheless. Other labels, such as populism, nationalism, fascism, totalitarianism, authoritarianism, and so on, are often used to describe these views, but each of these labels is misleading in important ways and in any event none of them (with the possible exception of populism) are commonly used to describe views that can range from the far left to the far right.¹⁰ Populism, in turn, is misleading because populists are rarely popular (especially on the right) outside a particular hard perfectionist segment of the polity. Thus, even though my thick conception of perfectionism goes well beyond the form of perfectionism embraced by soft perfectionists—the form articulated by Aristotle, at least as it is understood today, and that of the Stoics that inspire Kramer—this is still the best term on offer to refer to what I have in mind.

What this means is that many forms of perfectionism are perverse by liberal lights. The fact that some are not, given that they allegedly violate only the principle of neutrality and embrace a relatively inoffensive conception of excellence according to liberal sensibilities, does not mean that in considering the relationship between liberalism and perfectionism we should ignore the fact that there are some very unattractive versions of perfectionism out there given the highly dubious forms of excellence they promote. Indeed, in the real world, most of the regimes that have held power throughout history fall into the hard perfectionist category. As Isaiah Berlin once reminded us, strength, success, wealth, and power may be unattractive moral values to liberals, or to put it in perfectionist terms, unattractive forms of excellence, but they are moral values nonetheless, and are expressly embraced as forms of excellence by various illiberal conceptions of morality.¹¹

Using a thick conception also makes it much easier to see how being liberal or perfectionist need not be an either/or proposition: people, political theorists, governments, and political parties can be and usually are liberal or perfectionist in degrees. Indeed, this is an important part of the claim that the soft perfectionists are making, and Kramer does not fault them for this. But I do not intend to rely on the “one can be liberal or perfectionist in degrees” point to make my argument in this chapter. On the contrary, what I will argue is that if we employ a richer definition of liberalism, one that includes a more nuanced definition of neutrality, we can see that liberalism has all the resources that soft perfectionists think they need to borrow from perfectionism in order to get to where they want to go. It is not necessary to reject any liberal presuppositions and adopt any perfectionist ones to do this, although one can get to the same point via this latter routing too. But more importantly, it is largely because of the confusion created by the use of a very thin theory of the differences between liberalism

¹⁰ See Reiff, *The Unbearable Resilience of Illiberalism*.

¹¹ See Isaiah Berlin, “The Originality of Machiavelli,” 25–79.

and perfectionism that many people have come to the mistaken conclusion that one has to reject some parts of liberalism and accept some parts of perfectionism in order to justify government support for sport, culture and the arts, and certain other forms of excellence too.

Indeed, something like this might be behind Kramer's decision to label his view aspirational perfectionism rather than aspirational liberalism, although as I have already said, I do not think that this matters for any of the substantive points that Kramer makes. But I do think it is important that those of us who are basically liberals not concede that we must reach outside liberalism to justify our views. Because I do not disagree with Kramer's overall argument, however, and because I am not attacking it in any event, I will not spend time going over the detailed steps within it and explaining exactly how it works. I will also not attempt to defend it from edificatory perfectionist or liberal neutralist attacks. Kramer has done this already, and I see little that I could constructively add to the defenses Kramer has already provided. Instead, I shall propose a way of getting to the same place using a different route. Perhaps my argument will be less controversial than his, perhaps it will be more, but in either case it leads to the same conclusion: that government support for the kinds of excellence that both Kramer and the edificatory soft perfectionists promote does not violate the liberal commitment to neutrality. One need not be a perfectionist of any sort in order to argue for this. Exactly how this might work is what I shall spend the rest of this chapter discussing.

3. Neutrality and Justice, Rights, Aims, and Effects

The first distinction I want to make in our journey toward a resolution of the relationship between neutrality and excellence is one between commutative and distributive justice. Commutative justice, as I am using this term, is about the recognition of individual rights, their description, interpretation, protection, and enforcement. The principle of neutrality was never meant to require the government to be neutral with regard to either the establishment or enforcement of such rights. On the contrary, these rights are derived from whatever principles are thought to give us natural rights or human rights, or from the fundamental presuppositions (other than neutrality) that I already identified as underlying liberalism and from the constitutional and derivative rights promulgated pursuant thereto. I recognize that this is contrary to conventional wisdom, for it is often said that the principle of neutrality should and indeed does come into play with regard to the question of which rights should be recognized. For those who take this view, government should neither encourage or prohibit anyone from pursuing their particular conception of their good or chosen forms of excellence, and therefore should not recognize any right that would give a private person the ability to do so either.

Of course, it certainly is true that under liberalism, government should not recognize a right against something merely because a majority of the population disfavors the conception of the good it represents, even if the recognition of such a right might be in the common good. But the aspiration of neutrality is itself not a factor in determining what is or might be a right. Otherwise, it is difficult to see how there could be

any rights at all. The refusal to provide service to black people at an establishment that is otherwise open to the public is a violation of right in a liberal society, for example, even though treating this as such is not neutral between racist and egalitarian ways of life. It is nevertheless a violation of right because racist ways of life offend one of the other fundamental presuppositions of liberalism, the idea that all people have equal moral worth. Simply put, the neutrality limitation does not come into play when we are deciding which rights liberalism can recognize, for it is not a restriction on what a liberal society can do in the name of commutative justice. The only issue in those cases is whether the fundamental moral presuppositions which provide the framework for resolving individual claims of right under liberalism have been properly interpreted and instantiated. If they have, the principle of neutrality cannot be used for denying that claim of right enforcement, even when enforcing that right would indeed express a preference for one conception of the good over another. That is simply not what the principle of neutrality was ever intended to do.

I recognize, of course, that there is alternative explanation for why the recognition of anti-discrimination rights is not a violation of the principle of neutrality. This is that the principle of neutrality requires only that government be neutral between *reasonable* conceptions of the good, and racism is not reasonable for the same reason that it is appropriate to ban discrimination on the basis of race in the first place. In this sense, I suppose, the principle of neutrality does come into play as a potential defense to enforcement of non-discrimination rights; that defense is simply unsuccessful because government need not be neutral between a reasonable conception of the good and an unreasonable one. But the fact that the principle of neutrality is not available as a defense to a claim of right does not mean it provides a basis for the recognition of the right itself. So I think that this way of thinking about the role of the principle of neutrality is a mistake. It involves a form of double counting or, more accurately in this case, a form of double *not*-counting. Whatever reason we have for doing so, if something has been identified as an individual right despite whatever controversial conception of the good this may reflect, then this also entails the view that the argument against this position is unreasonable. Thinking of neutrality as playing any sort of role here is simply adding an unnecessary layer of analysis. Whatever work the reasonable/unreasonable distinction is doing is being done because this distinction is also embedded in other fundamental presuppositions and their progeny, principles that provide the basis for recognition of individual rights. Any consideration of whether the principle of neutrality is satisfied or violated is superfluous. Of course, anyone in a liberal society can always argue that the society should revisit the question of whether the right at issue was properly recognized. But this is not the same as concluding that the principle of neutrality is to be applied as a filter through which all liberal rights must pass. In determining whether a liberal society has properly recognized the right at issue, satisfaction of the principle of neutrality is neither necessary nor relevant.

Note that there is another distinction that is often asked to carry a lot of weight when dealing with the application of the principle of neutrality. This is the distinction between neutrality in effect and neutrality in justification (what Rawls calls “neutrality of aim”).¹² The liberal principle of neutrality is said to require the latter, but not the

¹² See Rawls, “The Priority of the Right and Ideas of the Good,” 449–72, 457–65.

former.¹³ Thus, the prohibition on murder is not a violation of the principle of neutrality even though it expresses disfavor for the conception of the good the murderer embraces, one might argue, because the pursuit of that conception also interferes with the pursuit of a wide variety of other conceptions of the good, a neutral reason.¹⁴ But this raises the question of whether the principle of neutrality requires that the actual motivation be neutral in justification or only that there be some hypothetical neutral motivation available, because it seems pretty clear that the prohibition on murder is actually driven by condemnation of the murderer's conception of the good. Indeed, it seems aimed directly at it. This makes relying on this distinction to operationalize the principle of neutrality very unsatisfying, for it gives greater moral force to the presence of a neutral hypothetical justification than to the presence of overwhelming evidence of an actual, non-neutral one. It makes neutrality more of a technical, almost bureaucratic requirement than a moral one.

In some cases, of course, giving the hypothetical moral priority over the actual might give an argument more moral force, as it does with Rawls's argument for the difference principle.¹⁵ But in this case, it is hard to see why it should be treated as having a similar effect. In his argument for the hypothetical decision situation that Rawls contends produces the difference principle, the move from the actual to the hypothetical gives us a way of seeing what people would do if they were not biased. In this case, in contrast, the same move would allow us to pander to our biases and pretend our actual decisions were not biased when they may very well have been. This is not a way of giving a hypothetical decision greater moral force, which we can then use to generate more just actual decisions. It is a way of disguising the problematic moral nature of an actual decision that has already been made.

As Kramer himself points out, even if we were to ignore this problem, there are situations in which even the presence of an actual neutral justification—say the maintenance of civil order—would sometimes lead to morally objectionable outcomes.¹⁶ It could, for example, lead to the segregation or even the expulsion of minority populations on the grounds that this would be one way of eliminating the violence their presence is serving to provoke. In some situations, it might even be the most cost-effective way of doing this considering the cost of effectively suppressing violence, no matter how unjust that violence is. If a mere hypothetical neutral justification is enough, this could only serve to multiply the number of situations in which these problems arise. In contrast, we can avoid the need for such intellectual contortions if we simply recognize that while the neutrality in effect/justification distinction cannot do the work that is being required of it, it does not have to. For once we have decided that some form of conduct is a violation of right, the principle of neutrality simply does not come into play. The only relevant question is whether that right has been properly identified and described according to the other substantive and procedural moral principles we embrace.

¹³ See Kymlicka, "Liberal Individualism and Liberal Neutrality," 883–905, 885–6; Arneson, "Liberal Neutrality on the Good: An Autopsy," 191–218.

¹⁴ See Simmonds, *Central Issues in Jurisprudence*, 14–15. See also Rawls, *A Theory of Justice*, 354–5; Rawls, *Justice as Fairness: A Restatement*, 153 n. 27 and 28; Rawls, "The Priority of the Right and Ideas of the Good," 457–65.

¹⁵ See Rawls, *A Theory of Justice*.

¹⁶ See Kramer, *Liberalism with Excellence*, 16–18.

4. Neutrality and Liberty

While the principle of neutrality does not come into play when we are dealing with claims of right, one of the places where it does come into play is when we are trying to explain the liberal concept of liberty. People can mean very different things when they talk about liberty, and they often slide back and forth between one meaning and another without realizing it. This leads to some very garbled thinking about the role these various kinds of liberty actually play in regulating our social and political life. To help us think more clearly about liberty, political philosophers have accordingly identified three main kinds of liberty with which we might be concerned: negative liberty, positive liberty, and republican liberty. While there are other kinds of liberty that various academics refer to and ordinary people do as well—economic liberty and religious liberty being two prominent examples—these are in fact merely applied versions of one or more of the three main philosophical categories and the principle of neutrality. Indeed, while many people seem to think these various kinds of liberty can conflict, and many philosophers seem to think so too, this is not correct. And it is the principle of neutrality that explains why. It provides the lubricant through which these various kinds of liberty can co-exist and interact.

To see how, let us begin by describing the main forms of liberty that are on the table. Negative liberty is infringed whenever someone (including but not limited to the government) interferes with the ability of someone else to do something that people generally have the capacity to do. But this does not mean such interference is necessarily wrongful. There is no general right to negative liberty in a liberal society. Indeed, ordered social life would be impossible if government did not interfere with negative liberty in a massive number of ways every day. Under liberalism, negative liberty is merely an analytical theory—it helps us identify when a particular kind of interference by other human agents has occurred and therefore needs to be justified. But it does not tell us what counts as a justification or how strong that justification needs to be. Some other theory, a political theory, a theory that identifies and embraces ends and sets priorities between them is needed to do that.¹⁷

Positive liberty, in contrast, is such a theory. Conceptions of positive liberty are political in the sense they set forth detailed instructions about how to live a fully realized life. They accordingly do set forth specific ends and set priorities between them. But they (or at least components of them) are also often highly controversial. Under the principle of neutrality, these controversial components of conceptions of positive liberty are not eligible to provide justifications for an infringement of negative liberty, even if they are reasonable. For in a world that is characterized by the presence of many reasonable yet conflicting views about how to lead a fully realized life, government is not being neutral if it favors one over another. It is also not treating people who hold different reasonable conceptions with the requisite equal concern and respect. And there is even a consequentialist argument supporting neutrality here too, for in a society characterized by reasonable pluralism, non-neutrality by the government is a recipe for conflict and oppression. So under the principle of neutrality, we must

¹⁷ See Reiff, *In the Name of Liberty*, 86–7.

not look to controversial components of conceptions of positive liberty to determine whether an interference with negative liberty in a liberal society is justified or not.

One place we might look, however, is to republican liberty. (Equality would be another, but since I am trying to explain how liberty and neutrality interact, I will not say much about the role of equality here.) Republican liberty conceives of freedom as freedom from domination by the arbitrary will of another. While it does have positive content, it is not controversial—at least it can be non-controversial if one employs a suitably thin conception of it.¹⁸ I recognize, of course, that the current trend is to go in the opposite direction. That is, it is becoming popular to articulate ever thicker conceptions of republican liberty, so thick in fact that some purport to be able to serve as comprehensive theories of justice rather than mere theories of republican liberty. I am not suggesting that these more comprehensive theories are incoherent or indefensible or might not be useful for some purposes; I am merely suggesting that we do not need (and indeed could not use) a more comprehensive and therefore more controversial theory of republican liberty for determining whether an infringement of negative liberty is justified, for using a controversial theory would violate the principle of neutrality. Like Kramer's conception of warranted self-respect, a thin conception of republican liberty that decries arbitrariness but nothing else can be seen as part of what Rawls called "a thin theory of the good," that is, a theory of the good that is part of and indeed essential to the pursuit of a wide variety of more comprehensive reasonable theories of the good.¹⁹ Consideration of elements of this thin theory of the good can therefore provide a justification for government interference with negative liberty without violating the principle of neutrality. I will say more about my view of what constitutes arbitrariness and therefore provide some further content to my thin conception of republican liberty at the end of this chapter, but I think I have said enough now to show that in its narrow form, republican liberty can indeed be used to justify interferences with negative liberty without violating the liberal principle of neutrality.

To see how these three concepts of liberty and the principle of neutrality all fit together and interact in practice, consider the current dispute about the scope of what is commonly called "religious" liberty. Some people claim that religious liberty is a right, and that this right prevents the government from forcing those who hold sincere religious objections to homosexuality to refrain from discriminating against LGBTQ people in various ways. But this represents a misunderstanding what religious liberty is and how it arises in a liberal society. Religious liberty is not a right in the Hohfeldian sense; it is, as its label suggests, a liberty.²⁰ It does not preclude interference. So while anti-discrimination rules do interfere with the negative liberty to discriminate, and some people may sincerely feel that their religion requires them to discriminate against LGBTQ people, prohibiting such discrimination, like any other infringement of negative liberty, may or may not be justified. This depends on what the justification for that interference is and how strong that justification may be.

¹⁸ See Reiff, *In the Name of Liberty*, 88–94.

¹⁹ See Rawls, *A Theory of Justice*, 347–50.

²⁰ For a comprehensive discussion of the Hohfeldian system of analyzing juridical relationships, see Kramer, "Rights without Trimmings," 7–60.

Where the principle of neutrality comes in, then, is that it provides guidance for determining what kinds of justifications are eligible for consideration when deciding the question of justification. For example, it tells us that controversial components of conceptions of positive liberty, the kinds of things that make up particular sets of religious beliefs, are ruled out as justifications. For if they were not, government could establish a state religion or at least favor one religion over another and even try to suppress some, for the infringements of negative liberty that would be required to do this would be justified. And if controversial components of conceptions of positive liberty cannot be used to justify infringements of negative liberty, they also cannot be used to justify non-compliance with rules that infringe negative liberty but are nevertheless justified on other, non-controversial grounds. Otherwise, the prohibition of the consideration of these controversial components as positive justifications for an interference with negative liberty would be meaningless, for it would lead to the creation of lots of rules and regulations that many people would then not be required to follow. So any claim that non-discrimination rules, even if those rules are otherwise justified, cannot be enforced against someone if compliance with that rule would violate that person's particular controversial religious conception of the good, must be rejected under the liberal principle of neutrality.²¹

Of course, so far, I have only established that a claim for a religious exemption from compliance is not justified. And this does not entail the conclusion that the infringement of negative liberty that these non-discrimination rules impose would itself be justified. Some other justification is needed to establish this. Again, reliance on controversial conceptions of positive liberty are ruled out by the principle of neutrality. But this is not the case when it comes to the narrow conception of republican liberty I have identified, for this would be part of the applicable thin theory of the good. And if we look to that conception of republican liberty, we can find the required guidance. For remember, republican liberty protects people against arbitrary treatment. Distinctions must be based on principles that are possible to defend based on considerations that are relevant to the decision at issue, and people who are similarly situated must be treated similarly. If we were to accept the idea that merchants could not be compelled to engage in what they considered "aiding and abetting" gay marriage given their religious beliefs, how could we decide what would constitute such aiding and abetting and what would not? The usual example given is that of a baker who does not want to provide a gay couple a wedding cake, as in the case the Supreme Court recently heard but ultimately failed to definitively decide.²² But could a gas station attendant refuse to fill up the tanks of those on their way to the ceremony or the reception? Could the local bank refuse to process the couple's checks? Could the local motel refuse to rent accommodation to the couple's guests? Indeed, could local business owners deny service to *everyone* involved or only to the couple getting married? Could service be denied only in connection with the marriage ceremony itself, or could it be denied to *all* gay people at *all* times on the grounds that facilitating gay relationships would inevitably lead some gay people to get married? How could gay people conduct

²¹ See Reiff, *In the Name of Liberty*; Reiff, "A Philosopher Argues Why No One Has the Right to Refuse Services to LGBT People."

²² See *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018).

their lives if all the facilities of commerce were available to them only on a contingent basis, depending on a business owner's particular religious beliefs? It seems that there is no way to do any line drawing here without relying on what would be some pretty arbitrary distinctions.

But more importantly, the refusal of service to gay couples is itself an arbitrary act. It is an act of arbitrary domination—just like the refusal to provide service to black or Jewish people or inter-racial couples.²³ Nothing about who these people are is relevant to the question of whether they can pay, which is the only relevant criterion in a liberal society for the exchange being proposed in the bakery case. And nothing about the introduction of such irrelevant criteria here is trivial. For those who have any doubt about this, simply imagine what it was like to experience life as a black person under Jim Crow. One cannot imagine being subject to these kinds of restrictions and still thinking of oneself as fully free. The protection against such arbitrary treatment is central to almost every possible conception of the good and plan of life a freedom-loving person might select. Unlike enforcing some controversial comprehensive conception of positive liberty, enforcing republican liberty is not inconsistent with the idea that government should be neutral between controversial conceptions of the good. And this means that any interference with the negative liberty of those who would refuse service to LGBTQ people *is* justified, for this protects the republican liberty of LGBTQ people and does not infringe the republican liberty of anyone else.

It is true, of course, that we sometimes do grant exceptions to compliance with various regulations for those whose compliance would contradict their sincere religious convictions. Religious students, for example, do not have to attend school on their religion's holidays even if attendance on that day would otherwise be compulsory. But this is because granting an accommodation here, unlike permitting discrimination, does not interfere with anyone else's republican liberty. It does not even interfere with anyone's else negative liberty. Giving students who embrace minority religions a day off on their religious holidays is nevertheless required by equality, given that all students are given days off on the religious holidays of majority religions, and doing so for one group does not interfere with doing so for another. And as long as non-religious students have the option of taking the same number of days off too, neutrality is complied with as well. So unlike the situation in which we are adding a superfluous level of neutrality analysis when it comes to deciding whether something can be a right, when we are considering how the various relevant conceptions of liberty fit together, the principle of neutrality is doing some real work. And unlike treating what is going on here as a conflict of rights, we can do this without having to explain why one right should be given priority over another, or how both rights can be respected when the enforcement of one would undercut the other.

Kramer, of course, is one of the leading exponents of negative liberty theory.²⁴ But in *Liberalism with Excellence*, he is primarily interested in questions of distributive justice, and especially in what limits, if any, apply to government support of what seem

²³ See, e.g., Swenson, "Company's Ban Against Gay Weddings Is Akin to 'White Applicants Only' Sign, Judge Says,"; Stolberg, "The Faces of Intermarriage, 50 Years After Loving v. Virginia."

²⁴ See, e.g., Kramer, *The Quality of Freedom*. For one of the many discussions of Kramer's theory, see Carter and Steiner, ch. 13 in this volume.

to be reasonable but controversial conceptions of the good. He does not say much about how he thinks negative liberty, positive liberty, republican liberty, and neutrality all come together in analyzing particular exercises of government power. So I do not know whether he would think the approach I have described would be contrary to his views. But I suspect he would agree that my approach is not inconsistent with his views. He ultimately argues that the forms of excellence he thinks government should support are *not* controversial—that is, he argues that support for activities that boost warranted self-respect does not violate neutrality because such support is instrumentally useful or even absolutely necessary to a wide variety of other, reasonable comprehensive conceptions of the good, and therefore can properly be thought of as part a thin theory of the good. For Kramer, then, support for these forms of excellence is not prohibited by the principle of neutrality, which is what I have just argued as well. But this still leaves open the question of what happens with regard to reasonable forms of excellence that are controversial, and therefore cannot be brought within the relevant thin theory of the good. These would indeed seem to be covered by the principle of neutrality. What I intend to show is that even so, there are ways the principle of neutrality can be satisfied without denying these forms of excellence government support.

5. Neutrality and Proportionality

Within the academy, a great deal of the dispute between those who identify as liberal neutralists and those who identify as soft perfectionists has to do with support for excellence in sport, culture, and the arts. With respect to more fundamental matters, theorists often disagree on the appropriate route to take to get to where they want to go, but nevertheless ultimately arrive at the same place. While routing is important, for this often has ramifications beyond the particular matter at issue, the controversy over how neutrality and the pursuit of excellence interrelate in a liberal society mostly plays itself out with regard to whether government can support forms of self-improvement and artistic expression. To liberal neutralists, providing support to the various forms of excellence within these broader categories seems straightforwardly non-neutral, both in the sense of supporting any forms of excellence in a society where the question of what constitutes excellence is reasonably contested and, to the extent some forms of excellence are nevertheless supported, in the sense of favoring “elitist” forms of culture and disfavoring forms of excellence in “popular” culture. The last claim, of course, is an empirical claim, and while lots of people make it, empirical work that confirms or debunks it is decidedly lacking. But people on both sides seem to assume that it is true, and therefore focus their arguments on whether this can be justified. I will say more about this in a moment, but first I want to get some other important points on the table.

First, note that support of excellence in sport, culture, and the arts does not typically raise questions of commutative justice. Absent unusual circumstances, no one has an individual right to support from the government for their favored form of excellence, and it violates no one’s individual right to provide it. The questions such support raise are accordingly purely distributive—that is, these questions are simply about how government should allocate the burdens and benefits of the collection and application of

the various resources at its command within the scope of what commutative justice allows. And the neutralist argument, of course, is that these questions should be resolved in a way that does not suggest the government disfavors one permissible form of excellence, or favors one over another.

In a paper called “Proportionality, Winner-Take-All, and Distributive Justice,”²⁵ I argued that there were two moral theories required to resolve any distributive dispute: one that tells you what weights to assign to the various arguments made by the competing parties, and another, often unrecognized theory that tells you which method of distribution to use once you have made the required weighing up. For there are two methods of distribution one could employ in every case: one could give the entire disputed good to the party with the strongest claim, a method of distribution I called “winner-take-all.” Alternatively, one could distribute the good proportionally, with each party receiving a share of the good equivalent to the relative moral strength of their argument for receiving it, a method of distribution I called “proportional division” or “strength-of-the-arguments.” Because resolution of the question of the appropriate distributive method can have a huge effect on how the good at issue was ultimately distributed, choosing which method to apply in a particular case clearly presents a question of justice.

I know some people suggest that dividing the relevant burdens or benefits up like this cannot be done in every case, for whatever is to be distributed may not as a practical matter be divisible, and therefore the number of cases in which this latter question of justice is present is limited. But this is not correct. Everything is divisible either in kind, by value, by time, by adding something else into the mix to make the sum total of what is under consideration divisible and then dividing that, or by lottery, and often by more than one of these methods. In the paper, I give numerous examples to show what I mean by this, but I will not repeat them here, because what we are talking about dividing here is money, which clearly is divisible. So applying proportional division here would not be problematic.

Given divisibility, then, the question of the appropriate method of distribution is squarely presented. I describe the various kinds of arguments that could be raised in favor of one method of distribution or the other in the paper, and I also give three examples of how recognition of the question of the method of distribution would help explain three aspects of our moral practice that otherwise seem mysterious. One is how settlement rather than adjudication of almost all legal disputes could possibly be just, given that this means neither party’s claimed rights are ever fully enforced. Another was how calling something a right could indeed do some real work and not simply lead to the same outcome that occurs when one is balancing competing interests, for balancing does indeed seem to occur in not only interest versus interest contests but in right versus interest contests and right versus right contests as well, where it takes place in the context of defining more precisely the scope of the right or rights involved. And the third was how to resolve the long-running problem of explaining how a moral theory can avoid being too demanding without failing to be demanding enough. In connection with that last argument, I noted as follows:

²⁵ *Politics, Philosophy, and Economics* 8 (2009): 5–42.

There is precedent for this approach to moral reasoning in the allocative decisions of nation-states. How can a government justify spending some of its limited resources on the arts, or on national parks, or on foreign aid when there are people within its own borders in need of food, shelter, and the basic necessities of life? Clearly, the claims of these people have greater moral weight than the claims of those who would benefit from a subsidized national theatre, or government-maintained parks, or any of the innumerable other less pressing projects that often seek a share of the limited resources in society's coffers. But even though these claims are weaker, they nevertheless have some moral weight. To explain why we divide our resources among these various projects rather than apply all our resources to our most pressing needs, we simply have to focus on the question of distributive method. Indeed, if we characterize what we are doing as satisfying the requirements of the principle of proportionality when we use public money to fund less pressing claims, we can avoid the twin charges of elitism and paternalism that often attend attempts to defend such uses of public funds. Because we are not favoring the interests of the minority over the interests of the majority or giving the majority what we think they would want if they only knew better, but rather recognizing the actual percentage of support for these projects within the relevant population, funding these projects in proportionate amounts is neither elitist nor paternalistic. It is simply a reflection of the fact that it is proportional division, not winner take all, which enjoys the privileged position in our moral thinking about distributive justice.²⁶

So how is supporting different forms of sport, culture, and the arts in proportion to their support within the relevant community consistent with the liberal commitment to neutrality? The reason, as I suggested above, is that we can look at how the government distributes its support to various reasonable activities and forms of excellence as presenting a question of distributive justice. People may reasonably disagree as to what is a form of excellence and which particular forms should receive government support, given their embrace of differing comprehensive conceptions of the good. But this does not mean that we must withhold support from all forms of excellence under the principle of neutrality. We don't need to weigh up any of the arguments in the sense of coming to an independent view of how strong each is either—that has already been done for us by the public as a whole in distributing their support over the various forms of excellence available. Accordingly, as long as funding is distributed to each individual form in proportion to the relative strength of its support within the community, the principle of neutrality is satisfied.

Note that by suggesting this, I am not simply assuming that consequentialist moral reasoning is the way to decide this question, or that rights and interests are treated no differently even if one rejects consequentialist forms of moral reasoning. For under my approach, if one of the claims on a government resource comes in the form of claim of right, winner-take-all applies. But even when claims of right are presented, balancing occurs. While balancing is the main event for those employing some form of consequentialist moral reasoning, those employing some form of deontological moral

²⁶ Reiff, "Proportionality, Winner-Take-All, and Distributive Justice," 5–42, 38.

reasoning have to do this too. They just do it in the context of more precisely defining the scope of the right or rights at issue, for only if what appears to be a conflict between one right and another or a right and a competing interest is an actual conflict, and not one that can be resolved by coming to a better understanding of the scope of the rights involved, would winner-take-all apply.²⁷ Indeed, if some sort of balancing was not part of the process of resolving borderline disputes about the scope of rights, it is unclear how these disputes could possibly be resolved. It is simply part of the process by which people think. So the kind of balancing or weighing up process that I am referring to here is always required. The distinction between consequentialist and deontological moral reasoning only matters with regard to where this occurs, not whether. The form of moral reasoning employed determines whether balancing *is* the decision procedure, or merely part of the process of determining what the precise conflict at issue is and therefore what is to be decided, after which the conflict is then resolved according to a much more straightforward decision procedure than balancing (rights are absolute and therefore cannot conflict and rights always prevail over competing interest).

In any event, it is hard to see here how a claim to exclude support for some or even all reasonable forms of excellence could be a claim of individual right. We cannot just assume that the principle of neutrality provides such a right, for this is the very question at issue. So unless such a right can be established on some independent grounds, the worry that employing a form of weighing up privileges consequentialist moral reasoning over deontological moral reasoning is not really relevant anyway. For even those who reject consequentialist moral reasoning agree that within the realm of the permissible, weighing up is an acceptable decision procedure. Which means that dividing up government support for various forms of excellence according to their respective support within the community is in no way inconsistent with recognizing a deontological justification for the principle of neutrality.

Is it true, however, that an individual right barring all support for controversial forms of excellence cannot be established on independent grounds? For that matter, is it true that such a right cannot be derived from the principle of neutrality itself without begging the question? Let us reconsider the claim that under the principle of neutrality, individuals have a right to demand that their tax payments not be used for projects whose goodness they can reasonably deny. The thinking here, I suppose, is that people can reasonably deny the good of even reasonable forms of excellence. And they can—this is in fact built into the idea of what being reasonable means in a world characterized by reasonable pluralism, which is the kind of world liberalism is supposed to address. Prohibiting government from supporting an activity whose goodness some people do or perhaps merely even could reasonably deny is, as the argument would then go, a violation of what neutrality requires. In support of this view, theorists point to the fact that liberalism requires that people be able to justify their actions about at least important matters using reasons that others could not reasonably reject. But this comes not from the principle of neutrality, but from liberalism's conception of the role of public discourse and debate. Most liberals call this "the idea of public reason" after Rawls's use of the term,²⁸ although unlike Rawls they often attach it to neutrality

²⁷ See Reiff, "Proportionality, Winner-Take-All, and Distributive Justice," 27–32.

²⁸ See, e.g., Rawls, "The Idea of Public Reason," 212–54; Rawls, "The Idea of Public Reason Revisited," 573–615.

rather than see it as I do as embodied in a separate principle.²⁹ In either case, however, “because God says so” would be an example of a reason that people could reasonably reject, for people can reasonably disagree that this is indeed what God says or even whether there is a God and even if there is, whether God’s Word should be given any much less decisive political authority.

But embracing the idea of public reason is a long way from saying that the government cannot assist in the pursuit of forms of excellence, the good of which some people can reasonably deny. This is not what the requirement of public reason could possibly mean, whether it is seen as part of the principle of neutrality or free-standing. In a liberal society, which by definition is characterized by reasonable pluralism about the good, anything that has a reasonable justification will almost always also be subject to reasonable objections. If neutrality precluded government from acting in these cases, then government could do nothing, or hardly anything. The principle of neutrality would be paralytic. The only way to avoid this problem is to keep the idea of neutrality between conceptions of good and the idea of public reason separate and distinct. Public reason requires that only certain kinds of reasons should be offered in support of whatever issues to which it applies. Even if we assume that the requirement of public reason applies to everything and not just fundamental constitutional and political questions, as some theorists do, this does not mean that the requirement of public reason is unsatisfied if a reasonable objection is raised to the support of a particular form of excellence. Public reason is meant to require that unreasonable arguments not be offered in favor of a position in public discourse and debate—not that there be no reasonable arguments *against* that position. Not being able to reasonably reject an argument does not mean that one has to accept it or be unreasonable, for then reasonable pluralism could not exist. Indeed, this idea is built into Rawls’s conception of the “burdens of judgment,” or the reasons why people may reasonably disagree.³⁰ And if we understand the requirement of public reason in this light, we can see that both it and the principle of neutrality can be satisfied when we allocate government support between various reasonable conceptions of excellence according to their relative support in the community. The criteria used for allocation in this case is a public reason, and it results in government being neutral toward the competing conceptions of the good involved because it means that government is not substituting its judgment about the good for the judgment of the governed as a whole. And neither principle gives anyone a right to veto support for a conception of the good that is otherwise reasonable no matter how reasonable their objection to it might be.

Nevertheless, there are precedents for recognizing a veto in our actual practice. For example, such thinking is behind various practices of private dues-collecting organizations such as bar associations and unions that allow members the option of deducting a certain amount from their dues if they do not want to fund the organization’s political activities, given that these activities can be controversial. Of course, the principle of neutrality is meant to apply only to the government, not to private organizations, so even in cases where the private organization is required to offer such a deduction by law, it is not clear why we should think of this as an example of the principle of

²⁹ See generally Quong, *Liberalism without Perfection*, 41–3.

³⁰ See Rawls, *Justice as Fairness*, 191; Rawls, *Political Liberalism*, 54.

neutrality in motion. But some theorists do think that the principle of neutrality applies to everything, usually by again relying on some misconception of the requirement of public reason and mistakenly conflating this with the principle of neutrality in the way I have already identified.³¹ But let's ignore this mistake and consider whether the claim that affording everyone a veto over how their tax dollars can be used is a reasonable position. For it seems clear that government could not possibly function if it gave each individual taxpayer a veto over how their tax money is spent across innumerable permissible activities. What if I am a pacifist and therefore reasonably object to funding national defense? Or perhaps I believe the correctional system is hopelessly discriminatory (not an unreasonable view) and so object to any funding for that? Or perhaps I am a right libertarian and believe that it is not the job of government to regulate pollution, or employment practices, or even competition, as some right libertarians reasonably do, and therefore do not want my taxes to be used to fund this? And why would those who did not believe these things nevertheless not claim they did if it could provide them a way of reducing their own taxes? Those who hold views about how government should allocate its resources have an opportunity to express these views by participating in the political and electoral process. But if their views lose out, the principle of neutrality does not provide them with a way of snatching a personal victory from the jaws of their general defeat. The principle of neutrality is designed to regulate what liberal government can do within the set of reasonable options it could feasibly pursue, not to be a tool for making it so government cannot do anything to which anyone reasonably objects, for this would make it impossible for government to function in a pluralistic society. And while we could alleviate some of this concern by categorizing a significant number of goods as part of a thin theory of the good to which the principle of neutrality does not apply, which some liberal neutralists try to do, the more we do this the more it seems like our interpretation of the principle of neutrality is itself being driven by a comprehensive conception of the good instead of creating the groundwork for a society characterized by reasonable pluralism as to such comprehensive conceptions. Instead of making liberalism a social place where a wide variety of reasonable comprehensive conceptions can flourish, it would leave the space available to do this pretty limited. This alone supplies a reason to reject any such interpretation of the principle of neutrality.

The same thinking applies if we argue that such an individual veto somehow arises from the right of equal concern and respect. That principle was also designed to enable government to function justly in a pluralistic society. If we interpret this requirement in such a way as to make it impossible for government to function at all, the principle is self-defeating. If we address this problem by recognizing numerous exceptions to the principle, we seriously chip away at the idea that equality regulates what we can do rather than being simply an expression of our pre-existing biases and prejudices. There is an additional problem too: the principle of equality does not tell us whether to treat people well or badly. It merely tells us that however we treat people, we must treat everyone who is similarly situated the same. Which is what we would be doing if everyone's favored form of excellence received government support in proportion

³¹ See the discussion in Kramer, *Liberalism with Excellence*, 29–30.

to its support within the community and no one had the right to a veto. And I do not see how a right to veto government support for forms of excellence whose goodness one could reasonably deny could be gotten out of some irreducibly minimal notion of what it means to be treated with respect either, except by stipulation. So I do not see how we could get a right to a veto out of the principle of equality either.

What if we do not focus on funding the essential practices of government, however, and instead just focus on support for sport, culture, and the arts? As Kramer notes, in an attempt to get to the same place as soft perfectionists, some liberal neutralists attempt to make this very distinction and segregate decisions with regard to “the fundamentals of constitutions and justice,” to which they contend neutrality applies, from less important matters, to which they contend it does not.³² I do not see how this approach is any more implementable if it entails a veto to only the most important decisions than if it entails a veto to everything, for by definition it still operates in the most important cases. But let us consider the opposite approach. What if we treat only less important decisions, those about self-improvement and expression, as covered by the principle of neutrality? I do not think anyone expressly admits to taking this view, but so much of the discussion about the principle of neutrality focuses on the extent to which, if any, government can support certain forms of sport, culture, and the arts, they might as well do.³³ When it comes to how these issues play out on the ground, this, as I said, is where the disagreement tends to lie.

In any event, if we do spin the common approach 180 degrees, the requirements of neutrality probably become implementable as a practical matter. But this does not make that approach reasonable. Why distinguish these forms of excellence from other aspects of our social life? The principle of neutrality was designed to require government to be neutral between reasonable but controversial conceptions of the good, and conceptions of the good regulate all aspects of our behavior, not just physical and mental self-improvement and expression. Besides, how would we describe the borderlines line here without relying on some pretty arbitrary distinctions? Is support for self-improvement and expression really different than support for more fundamental questions of social and political life? Cannot self-improvement and expression be political as well? Many liberal neutralists find the attempted distinction here untenable.³⁴ Moreover, the US Supreme Court has recently ruled that the compelled payment of any sum that could be used to promote even the most mundane bureaucratic functions of an organization that engages in any political activities whatsoever, or whose mere existence is politically controversial, is a form of compelled expression and therefore unconstitutional if the payor objects to these activities.³⁵ Whether one agrees with this decision or not, it demonstrates that drawing the relevant borderlines here between the more and less fundamental is no simple matter, whichever side of the border bears the constraint of neutrality. But more importantly, reducing the principle of neutrality to a principle solely regulating government support for self-improvement

³² Kramer, *Liberalism with Excellence*, 25–7.

³³ For references to just some of the literature focusing on this issue, see Kramer, *Liberalism with Excellence*, 346, n. 2.

³⁴ See the various theorists referenced in Kramer, *Liberalism with Excellence*, 27.

³⁵ See *Janus v. AFSCME*, 585 U.S. ____ (2018). For a more extensive discussion of this ruling and the problems it raises, see Reiff, *In the Name of Liberty*, 230–8.

and expression, instead of a principle about how liberal government can accommodate the existence of reasonable pluralism about all aspects of the good, would turn it into a mere fashion accessory of liberalism rather than a fundamental presupposition. It would require us to treat certain aspects of the good differently than other aspects, which itself would violate neutrality, making this interpretation of the principle of neutrality self-contradictory.

But this does not mean the principle of neutrality has no application when it comes to decisions about how to fund particular forms of excellence. Even if neither the principle of equality nor the principle of neutrality nor the principle of public reason prohibits the government from supporting non-essential forms of excellence, if this is what the majority of the electorate wants the government to do, the government still needs to do so in a manner consistent with the principle of neutrality. This means that it cannot just distribute its support without regard to the extent these activities are supported in the community. It cannot just give vast sums to underwrite opera and other forms of “high art” and nothing to anything else. Nor can it provide support only for popular culture and give nothing to more elitist forms of excellence, even if this is what the majority of voters would approve. As I argued above, proportional division is the default position; winner-take-all is only used where there is some special reason requiring this. But circumstances in which one or more of these special reasons might apply are rare.³⁶ And I can see no reason here that would justify departing from the default position of proportional division that the principle of neutrality would allow us to consider. Which means that neutrality is preserved when government does not favor one form of excellence over another but simply supports various kinds of excellence in proportion to their support within the community. Proportional division is not the result of government embracing a particular reasonable but controversial moral theory and deciding on this basis that certain projects are worth supporting and others are not. It is the result of the determination that many different paths toward excellence are reasonable and a recognition that dividing the available resources between these does not involve the government substituting its judgment for that of the community. Proportional division is not a violation of neutrality, it is an application of it.

What do we do then with racists, religious fundamentalists, misogynists, homophobes, and so on who claim a share of government support for engaging in private activities or forms of excellence that express these attitudes but do not violate anyone’s individual rights given the way the holders of these attitudes intend to pursue them? Must they be given some government support as well? No, because under any reasonable liberal moral theory, such views are unreasonable, not because they violate neutrality, but because they violate one or more of the other fundamental presuppositions of liberalism. Whether we think of this as meaning that no obligation to treat them neutrally could possibly arise, or as meaning that arguments in support of these unreasonable views are entitled to no weight at all in the balancing process, hardly matters. In either case, such activities are not entitled to government support even if some portion of the population supports them.

³⁶ I will not list these here because my space here is limited, but see Reiff, “Proportionality, Winner-Take-All, and Distributive Justice” for a full discussion.

But does the approach I am recommending not raise practical problems too? How are we to determine the degree of community support for any particular form of excellence? And what do we do about forms of excellence that are reasonable but only garner a trivial amount of public support? Must government provide each of these many, many types of activities a small amount of funds? Does this not pose an administrative nightmare that is almost as bad of giving everyone a veto? No, for as I argued in “Proportionality, Winner-Take-All, and Distributive Justice,” claims for support that garner only trivial amounts of support can be justly disregarded. Too fine-grained an approach to compliance with a general principle often makes that principle self-defeating, and threatens to undermine the whole project of which that principle is part. Under liberalism, fidelity to principle does not require unwavering, absolute, full, and strict compliance. Indeed, this is one of the most important distinctions between liberalism and perfectionism. The principles of liberalism are aspirational; one is committed to them and works toward them, and the aspiration is for pretty good compliance. It is understood that perfect compliance is neither expected nor possible, even when it comes to respecting pluralism.

6. External and Personal Preferences

There is also another way of determining whether a preference is entitled to proportional support or no support at all that I want to mention. This is to rely on the work of Ronald Dworkin. Dworkin pointed out that in applying the principle of neutrality, external preferences should not be counted.³⁷ External preferences are preferences about what other people should be able to do or receive. Personal preferences, in contrast, are about what you yourself should be able to do or receive. Under this view, external preferences such as preferences that certain kinds of excellence be denied funding are excluded in the decision procedure that determines which forms of excellence get what amount of support, because this is what neutrality requires. Only personal preferences can be legitimately counted under the principle of neutrality in deciding the relative extent to which government should support the various forms of excellence that its citizens support. The personal preference must still be reasonable, of course, and it is the government that must decide this according to the moral framework in place in the particular liberal society—this is not open to popular vote. But the fact that certain members of society may despise a particular form of excellence cannot be used to deprive it of government support under the principle of neutrality, or so Dworkin contends. Dworkin does not explain what he thinks neutrality requires with regard to determining how much support each reasonable form of excellence should receive, but he says nothing that would indicate he might disagree with my claim that neutrality requires proportional division.

Of course, as Dworkin himself acknowledges, it is sometimes difficult to tell an external preference from a personal one. Preferences phrased in one manner can often be rephrased and expressed in the other, especially if the preference is associational.

³⁷ See Dworkin, “What Rights Do We Have?,” 266–78, 275–6.

A white racist's external preference that black people be barred from living in his neighborhood, for example, can be rephrased as a personal preference that he live in a neighborhood where everyone is white. In most cases, however, this preference will be deemed unreasonable in whichever way it is phrased, so the difficulty in telling which phrasing is appropriate in the most problematic cases will never arise. This will only arise when dealing with reasonable preferences. And there is a more determinate way of telling whether a preference is personal or external here. We can think of a preference as external no matter how it is expressed if its effect is to deny certain forms of excellence support, in contrast to crediting one or more forms of excellence with support so that they get a share of whatever support is available. Preferences about the amount of support are irrelevant, for the government determines that by dividing up whatever amount of support is available according to their overall level of support within the community. If we use this as the test, we should not run into difficulties distinguishing the personal from the external as Dworkin suggests we should.

Indeed, this roughly approximates what we actually do in liberal societies. Opera, ballet, symphonies, fine art, and other forms of "high" culture do receive government support, but far less than professional sports or movie or TV production or other forms of excellence that might fairly be characterized as examples of popular culture, which receive support in the form of tax breaks and land giveaways that vastly exceed the value of what is given to the high arts. Forms of avant-garde art and performance receive some government support, but far less, which correlates roughly with the degree to which these forms of excellence are embraced by members of the relevant community. We can certainly argue about whether the proportions are right here, but the claim by those who prefer some forms of excellence and find others offensive, as well as the claims of those who find the support for any form of excellence offensive, are simply based on external preferences and therefore not something that must be taken into account for the government to remain neutral, even if these are reasonable. And if they are not, they are simply excluded outright under one or more of the other fundamental presuppositions of liberalism. Again, this is not a violation of the principle of neutrality, it is an example of it in motion.

7. Proportionality and Checkerboard Solutions

There is a more serious concern, however, that instead of being alleviated by Dworkin's work is actually intensified by it. This is the idea that that it is a violation of moral integrity to adopt what Dworkin calls "checkerboard solutions" to moral disputes.³⁸ For example, many people believe that women must have the right to control their own bodies, and therefore be given access to legal and safe abortion services when they need them. Others believe that abortion in almost all circumstances is the moral equivalent of murder. A checkerboard solution, one which is derived according to the support for each respective position within the population, which let us assume is 50-50, would allow abortions for women born on even numbered days but outlaw them for women born on odd numbers days or some equivalently probabilistic allocation.

³⁸ See Dworkin, *Law's Empire*, 176–84, 217–18.

But what I am advocating in the form of proportional division is not a checkerboard solution. In the abortion example, the even/odd day solution means that some women will have a right to abortion, and some women will not, as the result of a criterion that is entirely arbitrary. This is an infringement of moral integrity, according to Dworkin, because we are embracing two conflicting accounts of morality at one and the same time. Abortion cannot be morally permissible on even numbered days and morally prohibited on odd days under any moral theory that is entitled to our respect. In order to maintain its moral integrity, government simply needs to choose which moral argument it feels is correct and then support that on every day of the week. And doing otherwise is not only a violation of moral integrity; it is also an infringement of equality and of republican liberty, given the arbitrariness of the distinction that is doing all the work. Finally, depending on which moral view one takes, there is either a right to abortion or abortion is a violation of rights of the fetus, meaning the opposing moral view is unreasonable, and therefore not something toward which the principle of neutrality would even apply.

In contrast, when I am advocating support for certain forms of excellence according to their support within the community, I am not advocating that we embrace some sort of moral schizophrenia. Using the proportional division approach does not entail creating a checkerboard solution to competing moral claims of right. Proportional division does not require we maintain that something is morally worthy and morally condemnable at one and the same time. It merely instantiates the idea that to the extent these different views are reasonable, as determined by one or more of the other fundamental presuppositions of liberalism or the principles derived therefrom, it is not government's job to favor one view over the other, but to support each according to its support in the political community. In the abortion case, each side views the other's view as unreasonable and in fact a violation of individual right. Accordingly, choosing between these competing views does not implicate the principle of neutrality in any way. Rather, it implicates the interpretation of the other fundamental principles of liberalism, and implementing a checkerboard solution when these principles are determinative would indeed be a violation of moral integrity. When each of the competing claims are reasonable, however, supporting both is not a violation of individual right. And with regard to the amount of that support, neutrality requires proportional division, because that does not entail a moral commitment to one competing reasonable claim over others and therefore does not compromise integrity.

The one occasion on which an exception might arise to my claim that proportional division is what the principle of neutrality requires is when the competing forms of excellence involved are rivalrous. A form of excellence is rivalrous, in the sense I am using the term, when the pursuit of that form of excellence prevents others from pursuing reasonable forms of excellence that they support. Not in terms of depriving those forms of excellence of increased levels of funding, for we have already decided that the amount of funding provided must reflect the level of support in the community. But forms of excellence may be rivalrous if conditions are such that supporting one form, even proportionally, prevents other forms from being pursued. Designating certain land as a nature conservancy and thereby preventing those who would like to hunt on it from doing so might, for example, make the competing conceptions of the good involved here rivalrous. But these cases can usually

be dealt with by simply designating some other piece of land for hunting if the entire parcel in dispute is to be protected against hunting, and thereby apply the proportional division approach on a larger scale. In other words, this problem can be dealt with by making whatever is rivalrous more readily divisible in some way and thereby making it non-rivalrous. People cannot be entirely prevented from pursuing a reasonable form of excellence or, if they prefer, no form of excellence at all, but cases in which this would be the result of supporting another reasonable form of excellence are likely to be rare.

8. The Reasonable and Unreasonable and the Fear of Paternalism

I will finish by saying a little more about how we can tell a reasonable conception of the good from an unreasonable one, and by talking a little about paternalism. One criterion for distinguishing the reasonable from the unreasonable can be derived from liberalism's commitment to reasonable pluralism. Any theory that rejects reasonable pluralism, that claims there is only one true way to live a moral life and that all other conceptions are unreasonable, that advocates intolerance of the tolerant and rejection of neutrality no matter what the circumstances, is unreasonable, and therefore need not be assigned moral weight or otherwise treated with equal concern and respect under the liberal commitment to neutrality. Conceptions which reject the burdens of judgment, Rawls tells us, are unreasonable as well.³⁹ Rawls also tells us that those who are not willing to propose and abide by fair terms of social cooperation with those who are willing to do the same are unreasonable.⁴⁰ This last statement, however, strikes me as rather unhelpful. What is "fair" is simply another word for what is reasonable, so without specifying some more content for that alternative descriptor, which Rawls fails to do, this criterion probably has no uncontroversial applications beyond telling us that we need not be neutral toward, and tolerant of, those who expressly to reject the "fair terms" principle, whatever it may mean.

Despite the limited extent to which these various attempts to give further content to the reasonable/unreasonable distinction can be operationalized, they do provide some guidance and, perhaps even more importantly, they are limits that are accepted by even the most committed liberal neutralists, and most soft perfectionists as well. We can give the line between the reasonable and the unreasonable more content, however, by relying again on our thin conception of republican liberty. After all, the principle of neutrality is primarily designed to protect liberty, at least in my conception of it, so it would make sense to give it content by using a principle of liberty to do so. Once again, under my thin conception, there has been an interference with republican liberty when and only when a decision is arbitrary. A decision is arbitrary, in turn, only when it is based on no criteria, or is made without relevant criteria being adequately considered, or is based in whole or in part on criteria that are unrelated to the performance of the task or role under consideration, or is based on performance-related

³⁹ See Rawls, *Justice as Fairness*; Rawls, *Political Liberalism*, 54.

⁴⁰ See, e.g., John Rawls, *Political Liberalism*, 49.

criteria but does not treat similarly situated people similarly.⁴¹ Liberalism does not require neutrality toward conceptions of the good which are arbitrary in any of these ways. I realize that the edges of this definition of arbitrariness may be a little blurry—what does it mean for relevant criteria to be “adequately considered?” When are people “similarly situated?” And so on. But this is true whenever significant judgments must be made. The only way to make neutrality not blurry around the edges is to require neutrality toward either everything or nothing, and no liberal worth taking seriously advocates that.

Violations of rights that have been properly recognized would certainly be considered arbitrary in one of these ways. But there are many other actions or omissions that would also be considered arbitrary in one of these ways even though these actions or omissions do not constitute a violation of right. Refusing to hire people who are left-handed for a job in which handedness was irrelevant would be just one example out of countless possible others. Thus, this definition of what makes something unreasonable has greater scope than simply labeling all conduct which consists in a rights violation unreasonable. It will do some real work. To the extent this helps us determine the limits of the principle of neutrality, it is available for us to use. And it does not seem that the kind of government support for the arts and culture that both edificatory and aspirational perfectionists want to see is arbitrary—these claims are related to relevant goals and have at least some real moral weight. It is accordingly within the scope of the principle of neutrality for government to support them in some way. We need not stray into perfectionist territory to justify doing so.

Finally, I want to say something about paternalism, the substitution of one’s own judgment for another’s, and its relationship to the principle of neutrality. Surprisingly, despite being written about extensively, this relationship is not well-understood. Some theorists act as if paternalism is simply the opposite of neutrality—that is, they act as if paternalism and neutrality were simply different sides of the same coin. But this is not correct. The principle of neutrality is a principle of political morality; paternalism, or rather anti-paternalism, a principle of personal morality. The objective of the principle of neutrality is to create a certain kind of society, one which recognizes the existence and benefits of reasonable pluralism, and strives to ensure that government honors this by not expressing preferences between reasonable but conflicting conceptions of the good. Those who raise objections to paternalism, in contrast, are trying to protect a certain kind of personal autonomy—the ability to freely choose one’s own conception of the good without interference by other people, whether this be the state, one’s parents, one’s school, or an officious busybody—on the grounds that showing the appropriate respect for persons entails allowing individuals to make these choices for themselves. And it is true that when a state is not being neutral in the required way, it is also being paternalistic, at least according to most theorists. But the principle of neutrality is worried about something way beyond mere personal autonomy. It is worried about creating the background circumstances in which a certain kind of social and political life can take place, one in which what we commonly call “society” can be cohesive despite the existence of reasonable pluralism with regard to the good.

⁴¹ See Reiff, *In the Name of Liberty*, 89–93.

Operationalizing the different objectives behind the principle of neutrality and the paternalism objection does not and need not always lead to the same outcome.

For example, some theorists think it is not paternalistic for government to encourage certain activities but not require them, when this clearly would be a violation of neutrality if it were an activity to which the principle of neutrality applied. Incorporating the anti-paternalism objection into the principle of neutrality might accordingly pull us in two different directions and lead us analytically astray. But more importantly, mistakenly thinking that a concern for paternalism as at the center of the principle of neutrality and as therefore having some influence over its interpretation and application misses the significance that the principle of neutrality attributes to the attitudes and actions of the state. State paternalism is not simply a special case of paternalism. Thinking that it is fails to recognize that there are important social and political values at stake when we are trying to circumscribe the power of the state to conform to some overall vision of liberalism rather than simply express a rule of personal conduct. Whether Kramer's aspirational perfectionism or my version of liberal neutralism can be seen in some sense as paternalistic is accordingly irrelevant—if they cannot then the paternalism objection does not apply, and if they can, the paternalism objection is simply overcome by the more pressing need to ensure that this thing called liberalism can continue to exist.