

## How should we treat religion? On exemptions and exclusions

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The law of religious liberty in the U.S. has tilted in favor of religious citizens. The Constitution guarantees protections for the free exercise *of religion*. In *Wisconsin v. Yoder*, the Supreme Court interpreted the Free Exercise Clause as justifying exemptions and accommodations for people based on their religious objections to otherwise generally applicable legal requirements.<sup>1</sup> In *Sherbert v. Verner*, the Court extended protections for religious exercise. While *Yoder* provided relief from a policy that required people to violate their religious convictions, *Sherbert* provided relief from a policy that was found to impose a substantial burden on people practicing their religion.<sup>2</sup> The Court later repudiated religious exemptions to otherwise generally applicable legal requirements in *Employment Division, Oregon v. Smith*, but federal and state versions of the Religious Freedom Restoration Act have helped carve out special treatment for religious citizens that isn't typically extended to secular citizens who have objections to laws based on their moral values or other conscientious beliefs.<sup>3</sup> This differential treatment, according to some critics, in effect provides a kind of subsidy to religious citizens and is a kind of unequal treatment under the law.

For example, Brian Leiter has recently argued against the legitimacy of religious exemptions.<sup>4</sup> There are no principled reasons to afford special exemptions or accommodations to people acting in accordance with their religious beliefs. This is because, he argues, there are no reasons to afford special exemptions or accommodations to people acting according to principles that issue categorical demands on actions that are insulated from ordinary standards of evidence and rational justification. According to Leiter, such principles are essential to religious belief. It seems very strange to subsidize the actions of people making use of such epistemically dubious principles.

Leiter's argument relies on a controversial characterization of religion and the epistemology of religious belief. Scarcely any religious believers will understand their own religious beliefs in this way. They characterize their religious beliefs in much more epistemically neutral or positive ways. However, it is unclear whether their more positive characterizations would justify affording special exemptions or accommodations to religious principles of action. Certainly, belief in secular principles of action may have high levels of epistemic warrant, too. But an individual's level of epistemic warrant with respect to her principles of action is not a very important consideration for

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<sup>1</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1971). The Supreme Court ruled that Amish children could be exempted from compulsory secondary education requirements.

<sup>2</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963). The Supreme Court ruled that Sherbert, a Seventh Day Adventist, could receive state unemployment benefits after he left job when his employer moved to a six-day workweek.

<sup>3</sup> The recent *Burwell v. Hobby Lobby*, 573 U.S. \_\_\_\_ (2014) provides further evidence.

<sup>4</sup> Brian Leiter, *Why Tolerate Religion?* (Princeton, 2013). Others who have argued against special religious exemptions include Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Harvard, 2007) and Michah Schwartzman, "What if Religion is not Special?" *University of Chicago Law Review* 79:4 (2012), pp. 1351-1427.

the question of whether there are reasons to tolerate or accommodate her acting in accordance with it.<sup>5</sup> I will argue that much more important is the role that the relevant beliefs play in structuring the individual's practical identity.

By that metric, though, states should recognize religious principles of action as legally on all fours with certain sectarian, or non-religious, doctrines that people affirm as a matter of conscience. I argue for this conclusion in section 1. Standard justifications for norms requiring respect for claims of conscience fail to single out religious doctrines as special.

What should it mean if that's right?

If nothing distinguishes the normative significance of religious practical identities as compared to secular ones, we must still address the question of what level of respect should be afforded conscientious beliefs. Should the state extend the legal protections of conscience currently afforded religious citizens to non-religious citizens and so multiply the number of exemptions and kinds of accommodations? Or, should the state "level down" and reject appeals for special exemptions and accommodations, whether these appeals are derived from religious or secular principles of action? Leiter says conscientious objectors "should be out of luck."<sup>6</sup> I argue in section 2 for the more accommodating option.

I address a second question about the implications of the equal legal status of religious and secular doctrines in section 3. It arises from noticing an altogether different way that the law of religious liberty in the U.S. treats religion as special. The U.S. Constitution guarantees protections from religious establishment. The Court has interpreted these protections in ways that require or permit rules excluding certain public expressions of religious doctrines or values. Legislative bodies and courts have not attempted to apply these exclusions to expressions of sectarian secular doctrines or values. For example, although public schools are prohibited from teaching that certain religious doctrines are true, teachers have broad latitude to teach as true Keynesianism or, alternatively, Monetarism in economics classes. Neither are there any legal restrictions on teachers promoting vegetarianism<sup>7</sup>, yoga<sup>8</sup>, or even natural rights libertarianism. Is there a problem with the state giving its (at least implied) imprimatur to these or other controversial doctrines and values? Should the state be more careful and restrictive here? My response is somewhat tentative, but I don't think so, provided the state's support isn't directly coercive. And, if religious and secular sectarian doctrines

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<sup>5</sup> I understand Leiter to agree with this when it comes to some minimal sense of tolerating the belief (or the person who holds it). He disagrees, though, concerning reasons to offer accommodations in the sense of granting exemptions to generally applicable laws aimed at promoting the common good.

<sup>6</sup> Leiter, p. 4. Micah Schwartzman also defends the "leveling down" option in "What if Religion Isn't Special?"

<sup>7</sup> See Annette Konoske-Graf and Aparna Alluri, "Inside the Nation's First Vegetarian Public School" <http://school-stories.org/2014/05/inside-the-nations-first-vegetarian-public-school>, accessed June 25, 2014.

<sup>8</sup> See Susan Brochin, "Teaching Yoga in a Public School" <http://www.expandinglight.org/free/yoga-teacher/inspiration/unique/teaching-yoga-public-school.php>, accessed June 25, 2014.

should be treated legally on all fours with each other, then the same test should apply to cases of religious establishment.

I will argue, then, for the coherence and relative attractiveness of (i) robust protection for both religious and secular conscience, and (ii) weak restrictions on non-coercive establishment of both religious and secular doctrines. Section 1 concludes that any of a variety of moral and religious doctrines and values should have equal legal status. And given the normative significance of these doctrines and values, I argue in section 2 for the legitimacy of a broader range of legal accommodations to protect sectarian secular doctrines and values in the way the state does religious ones. Finally, in section 3, I argue for the legitimacy of a more narrow range of exclusions, which would allow in certain cases public support and expression of religious views, just as there is of non-religious views, provided that such support doesn't take the form of direct coercion.

### 1. Religion isn't special

Most people think the state should tolerate religion. Are there, however, *principled* reasons for toleration that apply to religion as a distinctive subset of conscientious commitments? Leiter explains that having principled reasons for tolerating some doctrine means that you can invoke “*moral or epistemic* reasons...to permit the disfavored group to keep on believing and doing what it does.”<sup>9</sup> Principled reasons to tolerate do not include tolerating in order to avoid conflict or as part of a bargain to achieve a second-best outcome or tolerating because the dominant group doesn't have, or doesn't believe it has, the means to effectively and reliably change the relevant beliefs or practices. Toleration would rather have to be justified in light of some normative principle. Leiter considers a Rawlsian principle of equal liberty, a utilitarian principle of maximizing human welfare and a Millian epistemic principle based on the idea that free inquiry and expression is truth conducive.

These principles all ground reasons of the right sort to tolerate religion, but not in such a way that they single out religious doctrines *as special* in the way much of U.S. law does. They militate against legal interference with acting in accordance with any conscientious commitment, not just religious ones. Rawlsian contractors in the original position will have significant regard for “convictions rooted in reasons central to the integrity of their lives”<sup>10</sup> whether they are religious or secular moral convictions. State interference with liberty of conscience harms human welfare, again, regardless of whether the conscience is religious or secular. Finally, the epistemic benefits of free inquiry and expression apply to both sorts of doctrines, religious and secular alike.

Despite these parallels, only religious adherents have typically enjoyed exemptions from generally applicable laws the government enacts with an eye towards the common good or promoting the general welfare. Only religious groups receive special treatment in the framing of specific laws, as it did in the Affordable Care Act, or the benefit of federal and state level Religious Freedom Restoration Acts. It seems much more difficult to justify this special treatment than to justify a stance of principled toleration. Proponents of “leveling down” deny any system of belief should get this level of protection; however, Leiter is especially concerned to show that religions shouldn't. This is because, according to Leiter, in order to justify the special treatment of providing exemptions to accommodate some commitment in the face of a law aiming at general welfare it's

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<sup>9</sup> Leiter, 2013, p. 13.

<sup>10</sup> *ibid*, p. 17.

necessary to show that the commitment has especially meritorious features that should be affirmed as praiseworthy.<sup>11</sup> Though he allows that the normative commitments of some religious believers warrant positive appraisal, religion – “the distinctively religious components of the beliefs and practices” – doesn’t qualify.<sup>12</sup> Leiter puts forward four features of religious belief that he regards as distinctive:

1. “there are at least some beliefs central to the religion that...issue in *categorical* demands on action....”
2. “Religious beliefs, in virtue of being based on ‘faith,’ are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science.”
3. “Religious beliefs involve, explicitly or implicitly, a metaphysics of ultimate reality.”
4. “there are some beliefs in religion that...render intelligible and tolerable the basic existential facts about human life, such as suffering and death.”<sup>13</sup>

Beliefs that are epistemically unhinged in the way Leiter says religious ones are can be tolerated in a society and so legally protected; but they don’t warrant any form of positive appraisal or esteem. Religious beliefs are “culpably without epistemic warrant” and so not fitting objects of appraisal respect.<sup>14</sup> Therefore, according to the argument, it would be puzzling to encourage these beliefs by accommodating people who hold them by permitting exemptions from generally applicable laws that states implement to promote the common good.

Things would be different, according to Leiter, if religious belief deserved appraisal respect. This could, perhaps, justify being more solicitous of religious believers in social policy. For example, he thinks that if a certain form of Thomism were true, according to which norms of rationality required affirming the existence of God, then religious believers could, in certain circumstances, legitimately be exempted from a law that interferes with the exercise of their beliefs, because “practices that are proper objects of appraisal respect often do command exemptions from generally applicable laws.”<sup>15</sup> But Leiter, and many, many others, unsurprisingly rejects these Thomistic claims about norms of rationality.

Might there be reasons to suppose that religious belief deserves appraisal respect in society despite its putative epistemic failings? In Leiter’s view, appraisal respect, and the special accommodations positive appraisal can justify, is reserved for unmitigated goods. Perhaps an argument for special treatment of religious belief can be made in terms of the potential unmitigated good of having a relationship with God. Presumably having a relationship with God, being the object of his love, is a very great good. This argument is not based on the idea that the belief has or can have an especially high level of epistemic warrant. It’s that the content of the belief relates to having a relationship with the supremely perfect being. That would be a really important good and

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<sup>11</sup> *ibid*, p. 84.

<sup>12</sup> *ibid*, p. 159, n. 35.

<sup>13</sup> Leiter discusses these aspect of religious belief in *ibid*, pp. 33-52.

<sup>14</sup> *ibid*, pp. 84-85.

<sup>15</sup> *ibid*, p. 102.

perhaps should be considered in the law of religious liberty. Begin with Leiter's conclusion: certainly it's good in some sense for everyone to be permitted to act according to their consciences, but there are limits. One sort of limit is that people can be legitimately prohibited from acting on their consciences when permitting the behavior would cause others harm or some other form of intrusion to their individual liberty. For example, governments have enforced prohibitions against plural marriage and drug use even when citizens have offered religious justifications for these practices.<sup>16</sup> Another limit could be when there is potential for the law to promote a society's general welfare. Goods associated with the general welfare have to be weighed against the good associated with people acting according to their consciences.

People acting according to their best lights is a significant good. It is whether they do this in accordance with sincerely held religious or secular doctrines. But, according to this argument for religion meriting appraisal respect, perhaps there is, in addition, a special good, an additional good, or something better about acting in accordance with what God wants for his creatures (if there is such a being); i.e. acting in a way that will promote their relationship with God. If this special (or weightier, or even just additional) good is available to human beings, perhaps governments should take it into account when adjudicating conflicts between the goods it pursues in its policies and the religious goods many of its citizens pursue.<sup>17</sup> For example, consider the Wisconsin law requiring two years of compulsory high school education in *Yoder*. Imagine a case where the good associated with requiring two years of high school is held up against the good of people acting according to their consciences. It's possible that the former outweighs whatever good there is in people merely acting according to their best lights, but doesn't outweigh that *plus the additional good* of Amish families trying (and perhaps succeeding) to live according to divine reality. This is another possible good that should be added onto that side of the scales and perhaps could, at least sometimes, make it a little harder for the state to pursue its sense of the common good when this conflicts with a citizen's conscientious objections.

I don't think this argument for the idea that religion is special because it merits appraisal respect succeeds. One could, of course, simply reject the putative good of living in accordance with divine reality and promoting one's relationship with God as culpable nonsense, but much of liberal political theory argues against the state relying on that kind of judgment as a basis for its policy-making. Traditional liberal advocates of state neutrality argue for retreating to neutral ground in the face of conflicts like these in order to ensure that legal requirements are adequately justified to all citizens.<sup>18</sup> This neutrality principle cuts both ways, though. Liberal state neutrality would rule out the

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<sup>16</sup> See *Reynolds v. U.S.*, 98 U.S. (8 Otto.) 145 (1878) and *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Native Americans were granted statutory relief concerning the issue in *Smith* through amendments to the American Indian Religious Freedom Act in 1994.

<sup>17</sup> I'm tempted to attribute something like this argument to Martha Nussbaum, but I'm not sure. See *Liberty of Conscience* (Basic Books, 2008), pp. 168-69.

<sup>18</sup> Charles Larmore is one such: "In discussing how to resolve some problem, people should respond to points of disagreement by *retreating to neutral ground*, to the beliefs they still share in order either to (a) resolve the disagreement and vindicate one of the disputed positions by means of arguments that proceed from this common ground, or (b) bypass the disagreement and seek a solution of the problem on the basis simply of this common ground" (*The Morals of Modernity* [Cambridge, 1996], p. 134-135, emphasis added).

putatively low epistemic status of religious belief as a basis for its policies as well as the putatively high value of religious goods. Scrupulous state neutrality would prevent the state from refusing to accommodate the Amish in *Yoder* on the basis that Amish beliefs are culpably silly; it would also prevent the state affording any additional weight to the good in having a relationship with God beyond that associated with any other conscientious commitment.

This doesn't mean that state neutrality is incompatible with assigning significant weight to claims of conscience, though. Claims of conscience are, almost by definition, of utmost importance to people and respecting them, ensuring that rules are justified to all citizens, requires the state to tolerate them acting in accordance with these beliefs, regardless of their epistemic warrant. Is this really a *neutral* stance? Perhaps not, but liberal political principles of neutrality haven't typically required that states be neutral about values, like, say, the value of toleration or a free conscience; rather, they require that states observe a certain kind of neutrality among *persons*, in order to adequately respect them, and this stance towards persons places constraints on what states can legitimately do to promote certain values. Many political philosophers attracted to this ideal now make the point in terms of requiring *public justification* for coercive state policy.<sup>19</sup>

Religious commitments are typically central to believers' practical reasoning. Their religious beliefs shape their conception of who they are. Acknowledging their reasons to act on these core beliefs is the most important thing we can do to respect them as persons who have the capacity and authority to determine for themselves what goals and values are sufficiently worthy to direct their plans and projects. Interfering with them in their exercise of these beliefs and values is infantilizing and disrespectful. To the extent that this interference prevents people from acting in line with their beliefs, reasoning, values and other practical commitments, it places a burden on their core identities by requiring that they maintain their allegiance to it and suffer some penalty, or else violate their integrity.<sup>20</sup>

Of course there are limits to the liberty of conscience afforded by these considerations: according to Rawls, interference is legitimate "only when it is necessary for liberty itself, to prevent an invasion of freedom that would be still worse."<sup>21</sup> So protections of religious conscience don't extend to people who *disrespect others* by interfering with *their* free exercise and, therefore, fail to acknowledge *their* practical identities and core reasons for acting. But this justification and this limitation apply with equal force to religious and secular consciences alike. The latter, no less than the former, shape people's practical identities and ground reasons to respect others by avoiding interference with their exercise.

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<sup>19</sup> Here's Rawls: "I believe, however, that the term neutrality is unfortunate; some of its connotations are highly misleading, others suggest altogether impracticable principles. For this reason I have not used it before in these lectures" (*Political Liberalism* [Columbia, 2005], p. 191). Similarly, Gerald Gaus has taken liberal neutrality in the direction of a principle of public justification (see "Liberal Neutrality: A Radical and Compelling Principle" in *Perfectionism and Neutrality*, George Klosko and Steven Wall, eds. [Rowman & Littlefield, 2003], pp. 137-165).

<sup>20</sup> Kevin Vallier, "Liberalism, Religion and Integrity," *Australasian Journal of Philosophy* 90:1 (2012), p. 155.

<sup>21</sup> John Rawls, *A Theory of Justice* (Harvard, 1971), p. 215.

This argument suggests that religious and secular consciences should have equal legal status. It also suggests that this status should be quite *high* relative to various goals the state pursues through coercive policies, even relative to its goal to promote the “common good.” I pursue this thought further in section 2. The primary aim of section 1 was simply to reinforce the difficulty in seeing how any principled argument for toleration could apply to claims of religious conscience but not those motivated by other sources of highly valued forms of life central to people’s practical identities. Claims of conscience are normatively powerful. Other things being equal, states should regard principles that have particular significance for individuals in their practical deliberations, ones that figure centrally in their practical identities, whether religious or secular, as having special normative weight and should therefore offer accommodations and exemptions as necessary. Minimally, states should show that they’re furthering genuinely compelling interests and values in ways that interfere with conscience as little as possible. Are there problems with this expanded *Sherbert* test?

## 2. Exemptions

On the “No Exemptions” approach to claims of conscience, instead of affording non-religious citizens the legal protections of conscience currently afforded only religious citizens, the state “levels down” eliminating special protections for religious believers. In Leiter’s version, exemptions are only justified if they don’t burden others who find themselves without the relevant conscientious objection, or if the view to be accommodated is distinctive in deserving positive appraisal. Since there are only reasons to *tolerate* religion, “then it is not obvious why the state should subordinate its other morally important objectives” to claims of conscience.<sup>22</sup>

In section 1, I implicated a principle of state neutrality or public justification in the Rawlsian argument for acknowledging the special normative significance of conscience and suggested that following it would expand the kinds of accommodations available to citizens motivated by their consciences. According to this principle, states shouldn’t have too much of a say about the value or worth of the doctrines that figure centrally in the formation of people’s practical identities. The state should observe a kind of neutrality about that. State neutrality as something feasible or desirable is a matter of significant controversy in liberal political theory.<sup>23</sup> Leiter expresses skepticism about it: “I reject the view that any state can really be neutral in this way...every state stands for and enacts what I call a ‘Vision of the Good.’”<sup>24</sup> He says that *it must* do so if it is going to be a state at all.<sup>25</sup> Moreover,

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<sup>22</sup> Leiter, p. 103.

<sup>23</sup> See, e.g., Joseph Raz, *The Morality of Freedom* (Oxford, 1986); Steven Wall, *Liberalism, Perfectionism and Restraint* (Cambridge, 1998) and Daniel Weinstock and Roberto Merrill, eds., *Political Neutrality: A Reevaluation* (Palgrave Macmillan, 2014).

<sup>24</sup> Leiter, 2013, p. 13. He offers two reasons for his skepticism. First, toleration can’t be neutral because toleration necessarily implies disapproval. He’s technically right that tolerant states can’t be neutral *in this way*, but most articulations of state neutrality are compatible with this kind of implicit disapproval. States succeed in being neutral when there is public justification for their policies, whatever the attitudes of agents of the state. Leiter’s second reason, based on the necessity of states enforcing a vision of the good, seems to me more important for evaluating these debates between traditional liberals and perfectionists about neutrality. Leiter’s discussion comes on page 118 ff. I take up the topic below.

according to Leiter, “when particular minority claims of conscience, religious or otherwise, assert the need to be exempted from neutral laws of general applicability, what they are demanding is not neutrality but...that the state suspend its pursuit of the general welfare in order to tolerate a conscientious practice of a minority of its citizens that is incompatible with it.”<sup>26</sup> This demand, however, is in fact a demand for a kind of neutrality; specifically, it’s a demand that the state have public justification for its policies and thereby avoids a form of sectarianism. States should comply with this demand and those that do will accord significant weight to its citizens’ claims of conscience.

Liberal political theory begins with a presumption in favor of liberty.<sup>27</sup> Joel Feinberg offers a paradigmatic statement of the presumption: “Liberty should be the norm; coercion always needs some special justification.”<sup>28</sup> A presumption in favor of liberty, or against, coercion, amounts to an asymmetric justificatory standard where the party advancing a coercive rule undertakes a burden to account for the legitimacy of a coercive rule. Mill provides an early statement of the presumption as a companion to his harm principle, to help guide its application: “the burden of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition.... The a priori assumption is in favour of freedom....”<sup>29</sup> So, for Mill, the presumption is met, and the restriction legitimate, if it is necessary to prevent harm to others. The harm principle shows how to justify coercion. A neutrality principle offers a slightly different account. Harm-based reasons are plausibly neutral in the relevant sense, but other reasons might be, too. For public reason liberals, the presumption imposes a Larmorian, or Rawlsian, or Gausian “justifiable to” principle to establish the legitimacy of coercion.<sup>30</sup> To be legitimate, the coercion has to be justified in terms of reasons that are public in the requisite sense. Accounts of public reason differ in all sorts of ways, but, speaking generically, the requirement prevents considerations that don’t make sense to idealized members of the public, ones they wouldn’t go along with, from figuring into a justification for coercing them. As such, it answers to the liberal commitment to respecting the free and equal moral status of persons.

A specification the public justification principle will mean that certain reasons for coercion will count as justifiers and others won’t. It *excludes* certain reasons from being able to do justificatory work by preventing them from being a legitimate basis for the law. Again, such principles are

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<sup>25</sup> *ibid*, p. 124. See also p. 168, n. 31.

<sup>26</sup> *ibid*, p. 14.

<sup>27</sup> This principle is a matter of increasing controversy in liberal political theory. See Colin Bird, “Coercion and Public Reason,” *Politics, Philosophy and Economics* 13:3 (2014), pp. 189-214; Jonathan Quong, “On the Idea of Public Reason” in David Reidy and Jon Mandle, eds. *A Companion to Rawls* (Oxford, 2014), pp. 265-280; and Andrew Lister, “Public Justification and the Limits of State Action,” *Politics, Philosophy and Economics* 9:2 (2010), pp. 151-175. This dispute *amongst liberals* puzzles me. If liberalism is the idea that people have a fundamentally equal moral and political status, then, *pro tanto*, I’m presumed not to be under another person’s authority. But that presumption means that, *pro tanto*, the normative force of a directive I give myself trumps the normative force of a directive someone else gives to me.

<sup>28</sup> Joel Feinberg, *Harm To Others: The Moral Limits of the Criminal Law* (Oxford, 1987), p. 9.

<sup>29</sup> J.S. Mill, *Collected Works of John Stuart Mill*, Vol. 21, J. M. Robson, ed. (Toronto, 1963), p. 262.

<sup>30</sup> See, e.g., Larmore, 1996; Rawls, 2005; and Gaus, *The Order of Public Reason* (Cambridge, 2011).



specified in all sorts of ways, but again speaking generically, they tend to exclude *sectarian* reasons. Gerald Gaus gives a general characterization of illiberal sectarianism where

$\beta$  is an illiberal sectarian doctrine in population P if (1)  $\beta$  is held only by S, a proper subset of P, (2), the members of S justify moral and political regulations R for the entire P population (3) by appeal to  $\beta$  and (4) only  $\beta$  could justify R.<sup>31</sup>

So liberals argue that it's illegitimate to enforce restrictions on others by appeal to a controversial sectarian doctrine, one which they have sufficient reason to reject, in cases where no other doctrines could justify those rules.<sup>32</sup> People whose doctrines provide them with an intelligible rationale for rejecting R have a defeater for it.<sup>33</sup> When they do, the rule is illegitimately pressed upon them. In such cases the state should either repeal R or accommodate people's objections to it by exempting them from it. But, importantly, it doesn't matter for this test whether the individual's reasons for rejecting R are religious or secular.

The U.S. Constitution's Free Exercise Clause is in one sense a narrow principle of exclusion. It requires that courts repeal or reform laws that restrict citizens with respect to their understanding of their religious commitments. When a citizen seeks exemption from an existing legal requirement based on a conscientious objection, she is saying that, by the lights of her conscientious commitments, the requirement coerces her in ways she has reason to reject. Broadening free exercise to include non-religious commitments and principles of action would apply this requirement to all citizens in order to similarly respect their free and equal moral status.<sup>34</sup> Broadening free exercise would, therefore, bring the law of religious liberty in the U.S. more in line with the liberal public justification principle. Doing so would bring about a more consistently non-sectarian state, which is an ideal that finds expression in the Establishment Clause.

Leiter maintains his "No Exemptions" rule against the prospect of broadening free exercise for three reasons. First, Leiter worries that a more liberal (in both senses) approach would "be tantamount to constitutionalizing a right to civil disobedience" and amounts "to a legalization of anarchy."<sup>35</sup> Similarly, Justice Antonin Scalia has said that more expansive exemptions could be

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<sup>31</sup> Gerald Gaus, "Sectarianism without Perfection? Quong's Political Liberalism," *Philosophy and Public Issues* 2:1 (2012), p. 8.

<sup>32</sup> Is *this* an appeal to an illegitimately coercive sectarian doctrine? I don't think so. First, what exactly is the coercion supposed to be? Second, I doubt that the reasons for endorsing the principle of public justification are sectarian. Most – *all?* – reasonable points of view would legitimately demand the exclusion of other S's  $\beta$ s from interfering with their highly valued practices, especially those related to their consciences.

<sup>33</sup> Kevin Vallier defends an intelligibility standard like this in *Liberal Politics and Public Faith: Beyond Separation* (Routledge: 2014).

<sup>34</sup> As it did in *Welsh v. U.S.* 398 U.S. 333 (1970). Welsh didn't have a *religious* objection to fighting in a war and the Court ruled that he shouldn't need to characterize his moral objection as even vaguely religious in nature.

<sup>35</sup> Leiter, 2013, p. 94.

“courting anarchy.”<sup>36</sup> The thought from Leiter and Scalia’s point of view is that a society that provided citizens with exemptions to laws that would require they act in ways they have reason to reject would have no laws that could legitimately be imposed upon all because every law would be defeated from the point of view of someone’s conscientious beliefs. There’s just no reason to think this is true. For one thing, having a conscientious objection that defeats a law is different than having a preference that the law better comport with one’s ideal sense of virtue or whatever. It’s different than just preferring not to be bound by it. The anarchy objection is extravagant primarily because avoiding anarchy is fairly easy to do in this context, not to mention that people have pretty significant reason to do so. “Leveling up” would amount to implementing some version of a substantial burden test, a least restrictive means test and a compelling interest test of the sort already part of RFRA’s that have been passed. Despite what one might gather from perusing recent headlines, this is hardly anarchy.

Somewhat more worrisome is Leiter second objection: how would courts tell the difference? Claims of religious conscience are somewhat tractable because the relevant beliefs are usually tied to a sacred text, an interpretive tradition or formal document that provides the relevant theological rationale for objecting. This allows the courts to better evaluate the intelligibility and sincerity of the claimant’s objection. Leiter notes that the state could deal with this problem by extending conscientious objector status to cover adherents of any moral tradition, religious or secular, which comes with the resources to reliably assess individual claims. He worries, though, that this compromise will almost certainly treat those with novel or idiosyncratic consciences unequally regardless of their sincerity. However, much depends on what the courts would come to count as evidence of sincerity under this alternative institutional arrangement. Leiter writes, “it is possible that a scheme of universal exemption for claims of conscience, with suitable evidential standards, might do well enough to blunt the inequality objection.”<sup>37</sup>

Leiter’s final argument is based on a claim of unfair burdens. I’ve argued that expanding the basis for accommodation to include non-religious claims of conscience is a way of dealing with legitimate concerns about unfair burdens. Leiter, however, suggests that as accommodations pile up other unfair burdens arise. In cases where some people receive an exemption to a generally applicable law, greater burdens fall on others who lack a conscientious objection and so must follow the law. For example, “if those with claims of conscience against military duty are exempted from service, then the burden (and all the very serious risks) will fall upon those who either have no conscientious objection or cannot successfully establish their conscientious claim.”<sup>38</sup> Cases like this would be “pure” cases of this kind of burden shifting. “Impure” cases would be those where people who receive an exemption create burdens for others, but it’s not the burden of following the law. For example, recently the Supreme Court of New Mexico has ruled against an Albuquerque wedding photographer seeking an exemption to New Mexico’s Human Rights Act, which makes it unlawful for a public accommodation to refuse its services to someone because of the person’s sexual orientation. The photographers had refused to photograph the wedding of a lesbian couple because they say it goes against their conscience to be involved so directly in commemorating the celebration of something they regard as morally wrong. Had the Court ruled in favor of the photographer, the

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<sup>36</sup> *Smith*, 110 Sup. Ct. 1595 (1990), p. 1605.

<sup>37</sup> Leiter, 2013, p. 99.

<sup>38</sup> *ibid*, p. 99.

exemption on conscientious grounds could be thought to impose a burden on the couple. According to Leiter, “If general compliance with laws is necessary to promote the ‘general welfare’ or the ‘common good,’ then selective exemptions from those laws is a morally objectionable injury to the general welfare.”<sup>39</sup> He immediately allows that not every exemption will have this effect – for example, perhaps there are other wedding photographers in Albuquerque – and many exemptions would avoid any significant burdens. But in the case of laws that promote the common good states should refuse to accommodate conscientious objectors.

Leiter’s argument fails to acknowledge the amount and degree of reasonable disagreement there is about the “general welfare” and “common good”. The laws under dispute don’t obviously promote the good or welfare of those who object to it for reasons of conscience. Because of what Rawls called the burdens of judgment, even reasonable people of normal good will come to very different conclusions about what manner of living is important enough to demand their allegiance or compliance. This sort of disagreement is the reason political philosophy is hard. How will people with such different views of ultimate concern justify as legitimate authoritative rules that will allow them to live together as equals? It won’t do, from the point of view of justifying a policy, either to deny the fact of this disagreement or to run roughshod over it. But Leiter must do one of these when he writes that “the state may not pass laws whose aim is to suppress claims of conscience – that would be inconsistent with principled toleration – but the state may, *of course*, pursue neutral objectives like the safety, health, and well-being of the populace.”<sup>40</sup> But why should judgments about the “general welfare” trump individual claims of conscience?

Leiter immediately responds to this question by claiming “that this is conceptually no different from the question, ‘Why should individual claims of conscience trump judgments about the general welfare?’”<sup>41</sup> Political liberals have answered this question. Individual claims of conscience count in such a way that they, in fact, do trump – or, as I have put it, defeat – requirements that would enlist an individual into someone else’s schemes for promoting a putative common good, especially in cases where that good is actually a sectarian doctrine, which others have sufficient reason to reject. They trump such claims because it’s the coercion a group would impose on an individual rather than an individual’s choice to do something that stands in need of justification. When Leiter insists that the two questions above are conceptually no different from each other he simply denies the longstanding liberal presumption in favor of liberty. If they’re no different from each other it would mean that an individual’s demand that society justify coercing her is no different than society’s demand that she comply with its rules. In as much as Leiter presents the two demands as symmetrical, he suggests that, in order for the individual to get out from under the society’s claim on her, she would have to effectively rebut it by giving reasons that would satisfy society that she should be let alone. If we follow Leiter in this way of abandoning the presumption, societal judgments about the general welfare would make a sectarian claim on an individual that she would stand under an obligation to justify any deviation from. It would mean that she is subordinate to the ends of others unless they grant her permission to act on the ends with which she identifies.

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<sup>39</sup> *ibid*, p. 99.

<sup>40</sup> *ibid*, p. 101. Emphasis added.

<sup>41</sup> *ibid*, p. 163, n. 12.

Leiter's "No Exemptions" approach is out of line with the liberal presumption in favor of liberty, an idea that figures into his own principled defense of toleration. At that point in his argument, he cited Rawls's view that citizens of conscience "cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes...[and] to gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs."<sup>42</sup> The "leveling down" approach fails to account for this special normative significance.

A first glance, "leveling up" concerning society's approach to the implication of treating religious and secular sectarian consciences as legally on all fours with each other may seem like a purely formal consistency "itch" that only a neurotic philosopher-type would think requires any "scratching". In other words, what is really motivating the move? After all, with the exception of *Welsh*, I haven't noted any examples of secular moral claims of great significance requiring legal accommodation. Are there any others that aren't addressed through guarantees of expression and association? I'm not sure. Whether or not you think there are depends on what you think about the legitimacy of other areas of American public policy. For example, is the criminalization of various drugs legitimate despite the importance that their use may play in the (non-religious) lives of a significant number of citizens? Claims of burdened conscience are the clearest examples of people's interests and projects that should be accommodated, but perhaps not the only ones. Additionally, it's plausible that many possible pieces of legislation are effectively blocked or simply non-starters because of Constitutional guarantees. Accommodation isn't necessary because these guarantees are already doing their job of protecting citizens from policies that would burden their projects and ideals. There's nothing to "level up" in such cases, and that's a feature of the system of law, not a bug. Finally, calling for the consistent treatment of religious and sectarian secular values highlights another area of American law where religious ones are treated as special. I turn to it now.

### 3. Exclusions

I noted above that the U.S. Constitution's Establishment Clause bears some relation, like the Free Exercise Clause, to a kind of principle of exclusion that prevents coercion on the basis of sectarian doctrines that many have reasons of their own for rejecting. Courts have found violations of establishment in cases where no one was literally attempting to establish a state religion, but more or less consistently anywhere the state is implicated in the support, promotion or encouragement of religious doctrines. Examples include setting up a state church, passing laws which specifically aid a religion, forcing or otherwise incentivizing individuals to attend church or hold to certain beliefs, taxing citizens to support religious institutions or activities and most any state participation in religious organizations or participation by religious organizations (as religious organizations) in government.<sup>43</sup> The law of religious liberty in the U.S., when this liberty is understood as freedom *from* religion, treats religion special by forbidding any whiff of state support, promotion or encouragement of religious doctrines.

Yet not all sectarian doctrines are excludable under the Establishment Clause. According to the Lemon test, a government's legislative action must have a secular purpose.<sup>44</sup> Legislatures,

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<sup>42</sup> Rawls, 1971, p. 207.

<sup>43</sup> See *Everson v. Board of Education*, 330 U.S. 1 (1947), p. 15-16.

<sup>44</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

without running afoul of establishment and without any embarrassment at all, may exercise broad discretion in imposing rules that support, promote or encourage secular sectarian doctrines. Likewise in France, *laïcité* represents the government's distinctive approach to disestablishment of religion, but, according to some interpretations, it represents a particular establishment of secularism. Leiter describes the French system as the establishment of a distinctive "Vision of the Good."<sup>45</sup> A *New York Times* editorial was less kind to the policy declaring, "Banning believers from following the discipline of their religion is, in fact, state-imposed secular fundamentalism."<sup>46</sup> This would be an obvious violation of liberalism's exclusion of sectarian coercive measures.

If there are reasons to treat religious and secular sectarian doctrines as legally on all fours with each other, then perhaps courts have sometimes been too quick to find violations of religious establishment. For example, a variety of government programs to provide support for parochial schools have been found unconstitutional. Officially sanctioned prayers in public schools have, as well. Courts have ruled that the Establishment Clause is compatible with some religious uses of public facilities. For example, in *Mergens*, the Supreme Court upheld the Equal Access Act, which allowed high school students to form a voluntary after-school Bible study club that could meet on school property like the school's other extra-curricular clubs.<sup>47</sup> The law, however, requires that agents of the state – teachers at the school – are allowed to attend meetings of religious clubs only in a custodial, and not a participatory, capacity.<sup>48</sup> This requirement doesn't apply with respect to meetings of other, non-religious, student clubs that promote any of a variety of sectarian secular values. The idea seems to be that if a government in one way or another seems to give its official endorsement or support to a set of distinctive, sectarian religious values, then it is guilty of an impermissible establishment of religion, because its endorsement or support constitutes coercion or unequal treatment. But a government may freely give its endorsement and support to a set of distinctive, sectarian secular values, even explicitly. A public school with a faculty-sponsored environmentalist club promoting deep ecology and veganism wouldn't raise any establishment issues. Why wouldn't this constitute an impermissible establishment of the distinctive, sectarian values associated with those doctrinal commitments?

One answer is simply that the Establishment Clause doesn't forbid that. It only forbids state establishment of religion. Of course, the focus of this inquiry is whether it *should* only forbid religious establishment, but I'd like to take this response seriously. It's actually a general response applying to questions about both establishment and accommodation. Legal rules typically evolve to deal with specific conflicts in social life and judgments about their legitimacy are at least related to

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<sup>45</sup> Leiter, p. 118. He argues, though, that it probably isn't a defensible one since he finds aspects of it that are incompatible with toleration. Otherwise, he thinks states are free to establish sectarian values.

<sup>46</sup> See "Secular fundamentalism," *New York Times*, December 19, 2003, [http://www.nytimes.com/2003/12/19/opinion/19iht-edscarf\\_ed3\\_.html](http://www.nytimes.com/2003/12/19/opinion/19iht-edscarf_ed3_.html). The bans applied to displays of religious symbols in state schools and other public buildings. See also Mustafa Akyol, "The threat is secular fundamentalism," *New York Times*, May 4, 2007 about abuses of state-sanctioned secularism in Turkey. [http://www.nytimes.com/2007/05/04/opinion/04iht-edakyol.1.5565938.html?\\_r=0](http://www.nytimes.com/2007/05/04/opinion/04iht-edakyol.1.5565938.html?_r=0).

<sup>47</sup> *Westside School District v. Mergens*, 496 U.S. 226 (1990).

<sup>48</sup> Equal Access Act, 20 U.S.C. §4071 (c)(3).

how well they mitigate those conflicts, rather than how consistently the rules have been sculpted. Even if it's kind of a mess or arbitrary, in one sense, for the legal system to single out religious doctrines when other points of view are often just as controversial and subject to defeat by the relevant principle of exclusion, this differential treatment isn't necessarily capricious. I think one would have to look back on the track record of the law of religious liberty in the U.S. and, for the most part, be impressed with how well it's done. This applies to issues related to both establishment and accommodation, which I discussed above in section 2. There is wisdom embedded in the evolution of Constitutional interpretation from precedent to precedent that was shaped by historical contingency and reflects, to a degree, a sense of what might be publicly justified to the U.S. citizenry from multiple and diverse points of view.

This apology for continuing to enforce the current policy equilibrium doesn't account for the uptick in controversy concerning the relationship between religion and politics. Mounting controversies may be evidence that society is in a transition period from one equilibrium point or basin of attraction to another. Additionally, if I can offer an explanation why the relevant historical contingencies are no longer applicable, then I can rebut this conservative argument. My admittedly under-informed historical conjecture is that the special treatment of religion in U.S. law is a holdover from the time when most citizens understood claims of conscience exclusively in terms of a religious tradition and conscientious value disagreements were usually grounded in religious disagreements. If that's right, and if religiously based value disagreement is increasingly simply one kind of value disagreement among many, then the religion clauses no longer fully serve their purpose and reevaluating them in light of the liberal commitment to a nonsectarian state is an instructive normative exercise. It may be true that the state isn't attempting to establish vegetarianism or other secular sectarian values, but the attempt to literally establish a state religion wouldn't get much traction these days, either. Again, the issue has become less one of literal establishment than state support, promotion or encouragement of controversial doctrines.

In the event, we're back where we started: the current legal interpretation of establishment issues doesn't seem to track all normatively significant disagreements about policy or treat our diverse citizenry equally. It treats religion special by being a great deal more scrupulous about potential religious establishment than the potential establishment of sectarian secular doctrines even though in both cases citizens would be coerced on the basis of sectarian doctrines they have reason, from their respective intelligible points of view, to reject. In terms of different group's perceptions of sectarian impositions, there isn't a relevant difference between an atheist's objection to tax monies being used to help fund the controversial aspects of the curricula of parochial schools and a Christian's objection to tax monies being used to help fund controversial aspects of the curricula of public schools.<sup>49</sup> Both parties occupy reasonable points of view from which their objections make sense. Yet government funding and support of sectarian values that would be unconstitutional were these values religious is absolutely routine.

One possibility here is to follow Anthony Ellis in arguing that "we could dispense with the Establishment Clause" and that "there should be no constitutional objection to an establishment of religion."<sup>50</sup> Instead, whether and which doctrines and values the state will promote will a matter of

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<sup>49</sup> The families represented in *Mozert v. Board of Education* (827 F.2d 1058 [1987]) claimed that the disputed textbook endorsed "secular humanism".

<sup>50</sup> Anthony Ellis, "What is Special about Religion?" *Law and Philosophy* 25 (2006), p. 241.

ordinary democratic law making, as long as it respects free exercise and provides for reasonable accommodation.

These final two qualifications are very important, but they only make sense in terms of the traditional liberal arguments for excluding illiberal sectarianism. It's also important to note that a given principle excluding illiberal sectarianism, including one that provided for some kind of establishment limitation, might be applied more or less strictly. The more strict application would argue that the principle leads to broad exclusions – a set of rules to eliminate public funding support for all sorts of institutions organized around sectarian commitments that conflict with intelligible points of view. The state would have to be a lot more careful, for example, with how it used tax revenues. The less strict application recognizes that it may be too much to ask that the state be responsible for eliminating all the ways different sectarian groups benefit from all the ways it employs public funds coercively obtained. On one hand, I understand the attraction of the strict mode of application. It's the notion that people would not be forced to do or to contribute to things that they regard as morally odious. On the other hand, the more permissive mode of application may have commendable features that even go beyond matters of practicality.

I view Mill as an advocate of this more permissive stance. He begins by comparing two kinds of government intervention. Authoritative interventions control the free agency of individuals. But:

There is another kind of intervention which is not authoritative: when a government, instead of issuing a command and enforcing it by penalties, adopts the course so seldom resorted to by governments, and of which such important use might be made, that of giving advice and promulgating information; or when, leaving individuals free to use their own means of pursuing any object of general interest, the government, not meddling with them, but not trusting the object solely to their care, establishes, side by side with their arrangements, an agency of its own for a like purpose. Thus, it is one thing to maintain a Church Establishment, and another to refuse toleration to other religions, or to persons professing no religion. It is one thing to provide schools or colleges, and another to require that no person shall act as an instructor of youth without a government license. There might be a national bank, or a government manufactory, without any monopoly against private banks and manufactories. There might be a post-office, without penalties against the conveyance of letters by any other means. There may be a corps of government engineers for civil purposes, while the profession of a civil engineer is free to be adopted by every one. There may be public hospitals, without any restriction upon private medical or surgical practice.<sup>51</sup>

He goes on to distinguish the two from each other in terms of different standards of justification:

The authoritative form of government intervention has a much more limited sphere of legitimate action than the other. It requires a much stronger necessity to justify it in any case; while there are large departments of human life from which it must be unreservedly and imperiously excluded.<sup>52</sup>

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<sup>51</sup> J.S. Mill, *Principles of Political Economy*, J. Riley ed. (Oxford, 1994), p. 325-326.

<sup>52</sup> *ibid*, p. 326.

The reason for the different standards of justification is the degree of coercion involved in the state's different activities. Authoritative interventions are paradigmatically coercive while a case where the state issues an official document, in his example above, giving advice or promulgating information might not be coercive at all. The degree of coercion is relevant as Mill continues with a fairly strong statement of the presumption in favor of liberty – one that at least hints at a test of public justification:

Even in those portions of conduct which do affect the interest of others, the onus of making out a case always lies on the defenders of legal prohibitions.... Scarcely any degree of utility, short of absolute necessity, will justify a prohibitory regulation, unless it can also be made to recommend itself to the general conscience; unless persons of ordinary good intentions either believe already, or can be induced to believe, that the thing prohibited is a thing which they ought not to wish to do.<sup>53</sup>

Such a strong presumption doesn't apply, according to Mill, to the second kind of government intervention:

It is otherwise with governmental interferences which do not restrain individual free agency. When a government provides means of fulfilling a certain end, leaving individuals free to avail themselves of different means if in their opinion preferable, there is no infringement of liberty, no irksome or degrading restraint. One of the principal objections to government interference is then absent. There is, however, in almost all forms of government agency, one thing which is compulsory: the provision of the pecuniary means. These are derived from taxation; or, if existing in the form of an endowment derived from public property, they are still the cause of as much compulsory taxation as the sale or the annual proceeds of the property would enable to be dispensed with. And the objection necessarily attaching to compulsory contributions, is almost always greatly aggravated by the expensive precautions and onerous restrictions, which are indispensable to prevent evasion of a compulsory tax.<sup>54</sup>

Mill's point in all this is that providing some state funding for these pursuits of general interest might not count as illegitimately coercive. Not because each member of the public has sufficient reason to endorse everything the state does with its tax revenues. They almost certainly don't. Rather, the key feature of Mill's more permissive suggestion is that no one needs to be *directly* implicated in any activities that violate their consciences. People, as tax payers, may still be *indirectly* implicated in activities they may have strong moral objections to; but the proximity is relevant. General tax revenues routinely fund activities people object to. In cases where their involvement in these activities is more direct or proximate, the government may establish relief in the form of other options, which it either undertakes directly or supports financially. In this way the scheme provides for a more narrow range of exclusions based on concerns about establishment while respecting people's reasons of conscience.

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<sup>53</sup> *ibid*, p. 327.

<sup>54</sup> *ibid*.



To illustrate, Mill's line of argument suggests that the complainants in *Mozert* would have reason to go along with a voucher system promoting greater educational choice.<sup>55</sup> Under such a system, the state provides parents publicly funded vouchers they can use to pay tuition fees at private schools, whether religious or secular. Parents can review curriculum options at different schools and select the one that accords with their preferences over a range of educational, social, philosophical and religious dimensions. A voucher system promises to reduce controversy in an area of social life that is currently rife with it while remaining within a range of publicly justified options. Of course, tax-funded public support for a religious education is controversial (but so is tax-funded public support for the NEA or the way K-12 science education sometimes ties evolutionary theory to philosophical naturalism). The policy and, indeed, the direction I've taken Mill's suggestions is therefore unlikely to be anyone's first-best ideal. However, they are appropriately responsive to people's beliefs, values and commitments in a way that the status quo isn't.

Moreover, you could exactly the same thing about an alternative proposal where all kinds of ideas and ideals may receive the kind of indirect public support in schools that are currently afforded only certain secular values. For example, public schools currently take an active approach towards influencing children in such a way that they may come to respect or adopt certain liberal values.<sup>56</sup> On the proposal I'm considering they can legitimately do this, so long as they respect free exercise and provide for reasonable accommodation. But additionally, on this proposal, public schools could legitimately play a role in influencing children to respect or adopt other values, as well, including even religious values. As long as this support involves only indirect coercion, as Mill understands it, and these schools respect free exercise and provide for reasonable accommodation, this should be permissible.

#### 4. Conclusion

Policy prescriptions and modifications based on considerations of someone's ideal are dime-a-dozen and typically display a kind of hubris and lack of sensitivity to normatively relevant historical contingencies. I don't think my proposals amount to just another example of that. As I've argued, my use of these liberal principles apply to real-world "church-state" controversies that indicate the way such cases are presently handled are inappropriately responsive to reasonable complaints and the respect religious and non-religious citizens alike are due.

Acting in accordance with religious belief is subject to, and protected by, the liberal public justification principle, just like any other sectarian doctrine is. This means that the principle of intelligible exclusion applies to both free exercise and establishment. Therefore, religion isn't special; rather, it should be viewed as legally on all fours with other sectarian commitments, including secular ones. This stance limits the way a state's 'Vision of the Good', or anyone else's, can find legitimate expression in public life compatible with the respect all persons are due. Generally, it is impermissible for states to enforce visions of the good over the intelligible objections of citizens of conscience. More specifically, I've argued with Mill that there are quite strict limits on a specific kind of coercion that is direct and proximate. But this needn't altogether eliminate expression of these sectarian visions. As Gaus writes, "there is nothing illiberal about being a sect" or having a 'Vision

<sup>55</sup> Indeed, Mill presents a model of school choice in *On Liberty* (Hackett, 1978), pp. 104-106.

<sup>56</sup> See Amy Gutmann, *Democratic Education* (Princeton: 1987) and Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Harvard: 2000).

of the Good' so long as it applies only to "a group of like-minded people...regulating its common life by common beliefs. What is objectionable" is when they coercively extend it to everyone, including people who have reasons of their own to reject it.<sup>57</sup> I argued in section 2 that this generates strong and broader protections for free expression and, somewhat more tentatively in section 3, it's compatible with the legitimacy of more narrow range of exclusion based on establishment.

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<sup>57</sup> Gaus, 2012, p. 8.