

## How Should We Treat Religion? On Exemptions and Exclusions

Kyle Swan

The law of religious liberty in the United States tends to tilt 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

---

<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 his 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.

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 endorse Leiter's account. They characterize their religious beliefs in much more epistemically neutral or positive ways. However, it is unclear whether even 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 isn't a very important consideration for the question of whether there are

---

<sup>4</sup> Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2013).

Others who have argued against special religious exemptions include Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007) and Michah Schwartzman, "What If Religion Is Not Special?" *University of Chicago Law Review* 79, no. 4 (2013): 1351–1427.

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 equivalent to certain sectarian or nonreligious doctrines that people affirm as a matter of conscience. I argue for this conclusion in section 3.1. 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 nonreligious 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

---

<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.

conscientious objectors “should be out of luck.”<sup>6</sup> I argue in section 3.2 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 3.3. It arises from noticing an altogether different way that the law of religious liberty in the United States treats religion as special. The 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, for example, egalitarianism in social studies. 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

---

<sup>6</sup> Leiter, *Religion*, 4. Micah Schwartzman also defends the “leveling down” option in “What If Religion Is Not Special?”

<sup>7</sup> See Annette Konoske-Graf and Aparna Alluri, “Inside the Nation’s First Vegetarian Public School,” *SchoolStories*, <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,” *The Expanding Light Retreat*, <http://www.expandinglight.org/free/yoga-teacher/inspiration/unique/teaching-yoga-public-school.php>, accessed June 25, 2014.

is somewhat tentative, but I don't think so. I argue that, provided the state's support isn't directly coercive, there aren't compelling reasons to require it to assume such an exacting posture of disinterest. And, if religious and secular sectarian doctrines should be treated legally as equivalent to each other, then the same test should apply to cases alleging an establishment of religion.

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 noncoercive establishment of both religious and secular doctrines. Section 3.1 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 3.2 for the legitimacy of a broader range of legal accommodations to protect sectarian secular doctrines similar to the state's protections for religious ones. Finally, in section 3.3, 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 nonreligious views, provided that such support doesn't take the form of direct coercion.

### 3.1. 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-

---

<sup>9</sup> Leiter, *Religion*, 13.

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 conducive to the discovery of truth.

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 US 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 toward the common good or promoting the general welfare. Typically, only religious groups receive special treatment in the framing of specific laws, as in the Affordable Care Act, or the direct benefit of federal and state level Religious Freedom Restoration Acts.<sup>11</sup> It seems

---

<sup>10</sup> Ibid., 17.

<sup>11</sup> Requirements derived from the ACA are complicated and still evolving in the courts, but it's worth noting that at least one secular organization has been exempted from the

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 necessary to show that the commitment has especially meritorious features that should be affirmed as praiseworthy.<sup>12</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 pass muster.<sup>13</sup> Leiter presents 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.

---

contraception mandate citing sincerely held ethical beliefs and “a basic tenet, based on scientific and medical knowledge that human life begins at conception/fertilization.” Two employees who cited religious reasons also joined the suit: *March for Life v. Burwell* Civil Action No. 2014-1149 (D.D.C, August 31, 2015).

<sup>12</sup> Ibid., 84.

<sup>13</sup> Ibid., 159, n. 35.

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>14</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>15</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>16</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

---

<sup>14</sup> Leiter discusses these aspect of religious belief in Leiter, *Religion*, 33–52.

<sup>15</sup> *Ibid.*, 84–85.

<sup>16</sup> *Ibid.*, 102.

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 perhaps should be considered in the law of religious liberty. The argument begins with what all concede: 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 interference with their liberty rights. Another limit could be when there is potential for the law to promote a society's general welfare. For example, governments have enforced prohibitions against plural marriage and drug use even when citizens have offered religious justifications for these practices.<sup>17</sup> 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's good whether they do this in accordance with sincerely held religious or secular doctrines. But,

---

<sup>17</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.

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)—that is, 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>18</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 justify pursuing 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 policymaking. Traditional liberal advocates of state

---

<sup>18</sup> I'm tempted to attribute something like this argument to Martha Nussbaum, but I'm not sure. See *Liberty of Conscience* (New York: Basic Books, 2008): 168–169.

neutrality argue for retreating to neutral ground in the face of value conflicts like these in order to ensure that legal requirements are adequately justified to all citizens.<sup>19</sup> This neutrality principle cuts both ways, though. Liberal state neutrality would rule out the 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 whether they reach some high level of 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

---

<sup>19</sup> Charles Larmore makes one such argument: "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, UK: Cambridge University Press, 1996]: 134–135, emphasis added).

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>20</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

---

<sup>20</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* [New York: Columbia University Press, 2005]: 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*, eds. George Klosko and Steven Wall [Lanham, MD: Rowman & Littlefield, 2003]: 137–165).

identities by requiring that they maintain their allegiance to it and suffer some penalty, or else violate their integrity.<sup>21</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>22</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.

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 3.2. The primary aim of section 3.1 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

---

<sup>21</sup> Kevin Vallier, “Liberalism, Religion and Integrity,” *Australasian Journal of Philosophy* 90, no. 1 (2011): 155.

<sup>22</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971): 215.

principles that have deep 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?

### 3.2. Exemptions

On the “No Exemptions” approach to claims of conscience, instead of affording nonreligious 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 its citizens’ claims of conscience.<sup>23</sup>

In section 3.1, 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

---

<sup>23</sup> Leiter, *Religion*, 103.

significant controversy in liberal political theory.<sup>24</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>25</sup> He says that *it must* do so if it is going to be a state at all.<sup>26</sup> Moreover, 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>27</sup> This demand, however, is in fact a

---

<sup>24</sup> See, e.g., Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986); Steven Wall, *Liberalism, Perfectionism, and Restraint* (Cambridge, MA: Cambridge University Press, 1998); and Daniel Weinstock and Roberto Merrill, eds., *Political Neutrality: A Reevaluation* (New York: Palgrave Macmillan, 2014).

<sup>25</sup> Leiter, *Religion*, 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 the disapproval that comes, implicitly, with tolerating something. 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 more important for evaluating these debates about neutrality between traditional liberals and liberal perfectionists. Leiter’s discussion comes on page 118 ff. I take up the topic below.

<sup>26</sup> *Ibid.*, 124. See also p. 168, n. 31.

<sup>27</sup> *Ibid.*, 14.

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>28</sup> Joel Feinberg offers a paradigmatic statement of the presumption: "Liberty should be the norm; coercion always needs some special justification."<sup>29</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

---

<sup>28</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, no. 3 (2014): 189–214; Jonathan Quong, "On the Idea of Public Reason," in *A Companion to Rawls*, eds. David Reidy and Jon Mandle (Oxford: Oxford University Press, 2014): 265–280; and Andrew Lister, "Public Justification and the Limits of State Action," *Politics, Philosophy and Economics* 9, no. 2 (2010): 151–175. This dispute *among liberals* puzzles me. If liberalism is the idea that people have a fundamentally equal moral and political status, then, *prima facie*, I'm presumed not to be under another person's authority. But that presumption means that, *prima facie*, the normative force of a directive I give myself is greater than the normative force of a directive someone else gives to me.

<sup>29</sup> Joel Feinberg, *Harm To Others: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1987): 9.

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>30</sup> So, for Mill, the presumption is met, and the restriction legitimate, if it is necessary to prevent certain kinds of 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>31</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 variously idealized members of the public—considerations they wouldn’t go along with— from figuring into a justification for coercing them. Rather, a successful justification would connect up with the beliefs and values of the person coerced. As such, it answers to the liberal commitment to respecting the free and equal moral status of persons.

A specification of 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

---

<sup>30</sup> J.S. Mill, *Collected Works of John Stuart Mill*, Vol. 21, ed. J. M. Robson (Toronto: University of Toronto Press, 1963): 262.

<sup>31</sup> See, e.g., Larmore, *Morals*; Rawls, *Liberalism*; and Gaus, *The Order of Public Reason* (New York: Cambridge University Press, 2011).

the law. Again, such principles are 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>32</sup>

So public reason liberals argue that it's illegitimate to enforce restrictions on others justified by appealing to a controversial sectarian doctrine, one which they have sufficient reason to reject, in cases where no other doctrines could justify those rules.<sup>33</sup> People whose doctrines provide them with an intelligible rationale for rejecting R have a defeater for it.<sup>34</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

---

<sup>32</sup> Gerald Gaus, "Sectarianism without Perfection? Quong's Political Liberalism," *Philosophy and Public Issues* 2, no. 1 (2012): 8.

<sup>33</sup> Is *this* an appeal to an illegitimately coercive sectarian doctrine? I don't think so. First, it's not that kind of rule. 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>34</sup> Kevin Vallier defends an intelligibility standard like this in *Liberal Politics and Public Faith: Beyond Separation* (New York: Routledge, 2014).

it. But, importantly, it doesn't matter for this test whether the individual's reasons for rejecting R are religious or secular.

The US Constitution's free exercise clause is in one sense a narrow principle of exclusion. It requires that, in the face of a complaint, courts subject laws restricting citizens with respect to their understanding of their religious commitments to a stricter form of scrutiny. 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 that aren't justified from her point of view. Broadening free exercise to include nonreligious commitments and principles of action would apply this requirement to scrutinize coercion in a way that applies to all citizens in order to similarly respect their free and equal moral status.<sup>35</sup> Broadening free exercise would, therefore, bring the law of religious liberty in the United States more in line with the liberal public justification principle. Doing so would bring about a more consistently nonsectarian 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>36</sup> Similarly, Justice Antonin Scalia has said that

---

<sup>35</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>36</sup> Leiter, *Religion*, 94.

more expansive exemptions could be “courting anarchy.”<sup>37</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 everyone 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, though. 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 the good 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, and 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 that are part of RFRA’s that have been already passed. Despite what one might gather from perusing recent news headlines, this is hardly anarchy.

Somewhat more worrisome is Leiter’s 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

---

<sup>37</sup> *Smith*, 110 Sup. Ct. 1595 (1990), 1605.

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>38</sup>

Leiter’s final argument is based on a claim of unfair burdens. I’ve argued that expanding the basis for accommodation to include nonreligious 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>39</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

---

<sup>38</sup> Leiter, *Religion*, 99.

<sup>39</sup> *Ibid.*, 99.

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 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>40</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 imposing 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 goodwill frequently come to very different conclusions about what manner of living is important enough to demand their allegiance or compliance. This sort of disagreement is one of the reasons 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

---

<sup>40</sup> Ibid., 99.

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>41</sup> Well-being may be a neutral objective, but more specified conceptions of it are anything but. Why should judgments about the general welfare trump individual claims of conscience?

Leiter immediately responds to this question by claiming “this is conceptually no different from the question, ‘Why should individual claims of conscience trump judgments about the general welfare?’”<sup>42</sup> Traditional 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

---

<sup>41</sup> Ibid., 101. Emphasis added.

<sup>42</sup> Ibid., 163, n. 12.

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.

Leiter's "No Exemptions" approach is, therefore, 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>43</sup> The "leveling down" approach fails to account for this special normative significance.

Since there are important interests at stake in defending the liberty of religious and secular consciences alike, and since "leveling up" secular sectarian conscientious commitments answers to a concern for fairness and equality in liberal democracies, these societies are committed to treating them equally with each other and protecting claims of both.<sup>44</sup> Moreover, calling for the consistent treatment of religious and sectarian secular

---

<sup>43</sup> Rawls, *Justice*, 207.

<sup>44</sup> See Michael Perry's essay in this volume for more examples of secular claims involved in some recent litigation in federal, state, and international courts to protect what he calls a right to moral freedom.

values highlights another area of US law where religious values are treated as special. I turn to it now.

### 3.3. Exclusions

I noted above that the US Constitution's Establishment Clause bears some relation, like the free exercise clause, to a kind of principle of exclusion that prevents people from being coerced on the basis of sectarian doctrines that can't be justified from their point of view. 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>45</sup> When the law of religious liberty in the United States is understood as guaranteeing freedom *from* religion, it treats religion as a special case by forbidding any whiff of state support, promotion, or encouragement of religious doctrines.<sup>46</sup>

But this amounts to a form of special treatment because not all sectarian doctrines are treated with suspicion under the Establishment Clause. In fact, according to the

---

<sup>45</sup> See *Everson v. Board of Education*, 330 U.S. 1 (1947): 15–16.

<sup>46</sup> Of course it doesn't always do this. Courts have found certain forms of state support for religion and religious citizens and enterprises to be compatible with the Establishment Clause.

Lemon test, a government's legislative action must have a secular purpose.<sup>47</sup>

Legislatures, without running afoul of the Establishment Clause 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>48</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>49</sup> This would be an obvious violation of liberalism's exclusion of sectarian coercive measures.

---

<sup>47</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court also applied the test in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), ruling that a courthouse display of the Ten Commandments violated the Establishment Clause. But it did not apply it in *Van Orden v. Perry*, 545 U.S. 677 (2005), allowing a display of the Ten Commandments at the state Capitol in Texas. The Court issued these rulings on the same day.

<sup>48</sup> Leiter, *Religion*, 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>49</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,

If there are reasons to treat religious and secular sectarian doctrines as legally equivalent to 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 afterschool Bible study club that could meet on school property like the school's other extracurricular clubs.<sup>50</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>51</sup> This requirement doesn't apply with respect to meetings of other nonreligious 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, sometimes even explicitly. A public school with a faculty-sponsored environmentalist club promoting deep ecology or veganism wouldn't raise any

---

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>50</sup> *Westside School District v. Mergens*, 496 U.S. 226 (1990).

<sup>51</sup> *Equal Access Act*, 20 U.S.C. §4071 (c)(3).

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 tradition-oriented 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 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 justificatory principle, the arbitrariness isn't necessarily capricious. I think one would have to look back on the track record of the law of religious liberty in the United States 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 3.2. 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 US citizenry from multiple and diverse points of view.

This apology for continuing to enforce the current policy equilibrium doesn't, however, 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 social equilibrium to another. Additionally, if I can offer an

explanation why the relevant historical contingencies are no longer applicable, then I can rebut this traditionalist argument. My admittedly underinformed historical conjecture is that the special treatment of religion in US 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 deep ecology, 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 as 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 groups' 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>52</sup> Both parties occupy reasonable points of view from which their objections make sense. Yet government funding and support for sectarian values that would be unconstitutional were these values religious is absolutely routine.

One possibility here is to argue that the difference that allows the state to support, promote, or encourage certain sectarian secular values, but view most provisions for religious values as instances of unconstitutional establishment, concerns the government interests at stake.<sup>53</sup> When they are sufficiently compelling, they override the objections of people who are being forced to participate in or support doctrines or values they reject. This test applies to secular and religious values alike, but religious ones will typically fail it—that is, the argument suggests that things will typically turn out such that the government will not have a legitimate interest in supporting, promoting, or encouraging religious doctrines or values sufficient to overcome people’s objections to being forced to participate or contribute. Yet when it comes to the secular values furthered by the government’s policies in pursuit of some common good, it will have. This line of argument leads us back to the worry discussed in section 3.2 above that this “common good” might not really be a good common to all. If it’s not—if it’s actually a contested good—or, to be more precise, if it’s actually a good that fails the relevant test of public justification, then this balancing approach will get the wrong result. In other words, the government’s claims about its interests aren’t to be balanced against the public

---

<sup>52</sup> The families represented in *Mozert v. Board of Education* (827 F.2d 1058 [1987]) claimed that the disputed textbook promoted “secular humanism.”

<sup>53</sup> See Micah Schwartzman, “Conscience, Speech, and Money,” *Virginia Law Review* 97 (2011): 317–384.

justification principle. Rather, the test of public justification stands between such claims and what should count as legitimate law.

Another possibility 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>54</sup> Instead, whether and which doctrines and values the state will promote will be a matter of ordinary democratic lawmaking, as long as it respects free exercise and provides for reasonable accommodations.

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 limits state establishment, might be applied more or less strictly. The stricter 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 eliminate 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

---

<sup>54</sup> Anthony Ellis, “What is Special about Religion?” *Law and Philosophy* 25, no. 2 (2006): 241. See also Richard Garnett, “Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience,” *Villanova Law Review* 54 (2009): 655–675 and Steven D. Smith, “Taxes, Conscience, and the Constitution,” *Constitutional Commentary* 23 (2006): 365–374.

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.

Mill provides an interesting precedent in the liberal tradition advocating this more permissive stance. He begins his argument by comparing two kinds of government intervention. Authoritative interventions prevent the free exercise of individual agency in some area. But, according to Mill:

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.<sup>55</sup>

For example, Mill cites a state creating a monopoly on banking services or manufacturing as an authoritative intervention. But, short of this, a state might instead create a national bank or a state factory or service that operates in an otherwise open market. USPS doesn't preclude FedEx from operating, so the state's intervention into this market is nonauthoritative. Likewise, he says, "There may be public hospitals, without any

---

<sup>55</sup> J. S. Mill, *Principles of Political Economy*, ed. J. Riley (Oxford: Oxford University Press, 1994): 325.

restriction upon private medical or surgical practice.”<sup>56</sup> Similarly, he says that a state that maintains an established church or denomination intervenes in social affairs, but only nonauthoritatively. That’s different, he suggests, from a state that would refuse to tolerate—that is, punish—other religious practices or those who practice no religion.

Mill accounts for the difference in terms of different standards of justification that apply to authoritative and nonauthoritative interventions:

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>57</sup>

In other words, 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, as 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:

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

---

<sup>56</sup> Ibid., 326.

<sup>57</sup> Ibid.

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>58</sup>

Such a strong presumption against legal prohibitions doesn't apply, according to Mill, to a government's nonauthoritative interventions because they "do not restrain individual free agency." He continues:

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.<sup>59</sup>

This doesn't mean, of course, that there are no objections to these nonauthoritative interventions. Mill is quick to acknowledge that any form of government agency will require some level of compulsory taxes. His point, though, is that the fiscal policies necessary to maintain a variety of government provisions that are associated with common interest don't 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 two key features of Mill's more permissive suggestion are that, first, the policies don't prevent the exercise of individual agency—that is, they don't involve prohibitions. Second, no one needs to be *directly* implicated in any activities that violate their consciences. People, as taxpayers, may still be *indirectly*

---

<sup>58</sup> Ibid., 327.

<sup>59</sup> Ibid., emphasis added.

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. Mill identifies the fact that the proposal will justify a narrower range of prohibitions, or exclusions, as its chief virtue.

Mill's line of argument suggests that the complainants in *Mozert* would have reason to go along with a voucher system, or one employing limited-use education savings accounts, promoting greater educational choice.<sup>60</sup> Under such a system, the state provides parents public per-pupil funds they can use for preapproved education products or services, including tuition at private schools, whether religious or secular. Parents can review curriculum options at different schools or at home and select the one that aligns with their preferences over a range of educational, social, philosophical, and religious dimensions. A system like this 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 is therefore unlikely to be anyone's first and best ideal. However, it is appropriately responsive to people's beliefs, values and commitments in a way that the status quo isn't.

---

<sup>60</sup> Indeed, Mill presents a model of school choice in *On Liberty* (Indianapolis: Hackett, 1978): 104–106.

Moreover, you could say 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>61</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 certain 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.

### 3.4. 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 another example of that. My application of liberal principles to real-world "church-state" controversies indicates that the present handling of many such cases is inappropriately responsive to reasonable complaints and the respect religious and nonreligious 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

---

<sup>61</sup> See Amy Gutmann, *Democratic Education* (Princeton, NJ: Princeton University Press, 1987) and Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2000).

that the principle applies to both free exercise and establishment. Therefore, religion isn't special; rather, it should be viewed as legally on an equal basis with other sectarian commitments, including secular ones. I have argued, *pace* Leiter and other advocates of leveling down, that 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 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>62</sup> I argued in section 3.2 that this generates strong and broader protections for free expression and, somewhat more tentatively in section 3.3, it's compatible with the legitimacy of more narrow range of exclusion based on establishment.

---

<sup>62</sup> Gaus, "Sectarianism without Perfection?" 8.