SYMPOSIUM

THE CHURCH AND THE STATE

EDITORIAL PREFACE

BY

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Editorial Preface

The relation between politics and religions should not necessarily be seen as a problem or reason of conflicts, but it could be understood within the broader issue of what attitude liberal-democratic states should show towards religious and cultural diversity. This problem is particularly important in contemporary societies characterized by a plurality of moral, political, and religious views. Separating 'the church' from 'the state' does not rule out the accommodation of some religious claims. However, the limits of and the justification for such an accommodation are extremely divisive matters, especially when religious minorities seem to be a threat for the liberal-democratic institutions.

This special volume of *Philosophy and Public Issues* addresses these problems through a discussion on the separation of church and state. In the first part of the volume, Robert Audi presents his recent *Democratic Authority and the Separation of Church and State* (Oxford: Oxford University Press 2011), addressing questions by Michael Perry, Domenico Melidoro, Jocelyn Maclure, Paul Weithman and Mario De Caro. In the second part, we host

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three papers critically engaging with contemporary theories on the relation between politics and religions.

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THE CHURCH AND THE STATE

A PRÉCIS TO DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE

BY ROBERT AUDI

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A Précis to Democratic Authority and the Separation of Church and State

Robert Audi

The contemporary world is beset by tensions between a secular outlook on life among many people and religious fundamentalism on the part of many others. There are numerous intermediate positions, but even between these, and among educated people who occupy them, there are similar tensions. This book is aimed at developing an important part of a political philosophy that can sustain a democratic tolerance on the part of both religious citizens and secular citizens. A guiding conviction is that a democratic state should protect the liberty of its citizens and, accordingly, should accommodate both religious liberty and cultural diversity in religion and in other realms of life. Religious citizens, however, commonly see a secular state as unfriendly toward religion. A major aim of this book is to articulate a framework of principles that enables secular governments to provide for the liberty of all citizens in a way that observes a reasonable separation of church—meaning religious institutions—and state and also minimizes alienation of religious citizens.

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As compared with other treatments of this problem, my method is distinctive in beginning with the relation between religion and ethics. This relation is crucial for any comprehensive political philosophy but (in my view) is insufficiently accounted for by philosophers, theologians, and political theorists. If the ethical standards that should govern human life depend on religion, it is easy to see why religious citizens might think that the morality sanctioned by their faith should structure their government. If, by contrast, religion has no moral authority, it is easy to see why secular citizens should think that the state, guided by universal moral rights, may limit religious practices.

Chapter 1, "The Autonomy of Ethics and the Moral Authority of Religion," shows how, on the one hand, ethics is epistemically independent of religion—evidentially autonomous in a way that makes moral knowledge possible for secular citizens—but, on the other hand, how religion and theology have a measure of moral authority. That ethics does not depend on religion is often denied by religious people (though the kind of dependence is question is often left unclear); that religion and theology have moral authority is often denied by secular thinkers. The chapter argues against both of these negative views and outlines a positive position that should enhance mutual understanding among their proponents.

Drawing on previous work,[1] this chapter also briefly introduces a new version of divine command theory in ethics, a version that I consider both plausible in itself and consonant with piety (though I do not myself hold it). On this theory, moral obligation is theologically

[1] Notably, my *Rationality and Religious Commitment* (Oxford and New York: Oxford University Press, 2011, paperback 2013).

comprehensible as, by its very nature, *meriting divine command*, even though it is not, ontically or epistemically, *grounded on divine command*. This view leaves room for moral knowledge that is epistemically independent of religion and hence accessible to non-theists; but the view also provides a conception of moral obligation on which our obligations are consonant with many kinds of theistic commitments. Chapter 1 is not, however, centered entirely on divine command ethics; its main purpose is to set out a position in ethics that supports the kind of separation of church and state, and the associated ethics of citizenship, defended in the book as a whole. The divine command theory is set forth mainly to show how, within a traditional theistic framework, religious people can accept ethical principles of the kind essential for guiding both democratic governments and political conduct by individuals.

Given what is established in Chapter 1, it is clear why a democratic society that protects religious liberty should want to maintain a separation of church and state. A major support for this separation is the idea that citizens should not be subject to coercion, whether through laws or through public policies, unless it is justified by reasons that can be understood and appreciated by rational, adequately informed adults independently of their religious position. Chapter 2, "The Liberties of Citizens and the Responsibilities of Governments," portrays a kind of church-state separation that accommodates both religious and secular citizens. Here I clarify and support three principles regarding government in relation to religion: a liberty principle calling for protection of religious freedom, an equality principle calling for equal treatment of different religions by government, and a neutrality principle calling for governmental neutrality toward religion. A well-

designed separation of church and state—which I take to be supported by all three principles—enables government to deal with important issues in contemporary life without either ignoring religion or according it undue privilege. There are several issues here, some more prominent in the United States than elsewhere, but each calling for resolutions that have implications for any democracy.

One such church-state issue is the treatment of evolutionary biology in the science curriculum of public schools. May teaching it be required material for students whose parents oppose the theory on religious grounds? If so, how should it be taught? A related problem is the legitimacy, given separation of church and state, of vouchers (governmentally supplied monetary allowances) to pay for private school education. Still another issue concerning such separation is governmental support of "faith-based initiatives," such as church-affiliated, governmentally supported shelters for the homeless. The theory of church-state separation presented in this chapter is shown to bear on all of these problems. From the point of view of constitutional law, the chapter takes account of both issues concerning governmental establishment of religion and problems regarding the free exercise of religion. Both kinds of issues are addressed in the First Amendment of the Constitution of the United States, but both are also quite general. They concern any pluralistic democracy in which religion is important.

The optimal balance between secularity in the state—which in practice implies a kind of governmental neutrality toward religion—and protection of religious liberty requires at least two kinds of principles: *institutional principles*, such as those appropriate to framing constitutions and to guiding

legislation, and *individual principles* articulating standards of civic virtue that apply to conduct by individuals. Chapter 2 concerns mainly the former principles; Chapter 3, "The Secular State and the Religious Citizen," concerns mainly the latter. My previous work has stressed, as necessary for justified support of coercive laws and public policies, what I have called "adequate secular reason"—a kind of religiously neutral reason—and in earlier work I have explicated both adequacy and secularity, though not in all the aspects discussed in this book. A principle presented and defended in this chapter (and much discussed in the literature on religion and politics) is the principle of secular rationale—or (as it might equally well be called) a principle of *natural reason*: citizens in a democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, adequate secular reason for this advocacy or support (e.g. for a vote) (pp. 67-68). John Rawls has used the different, though overlapping, terminology of "public reason," and both my view and his (among others addressing the same problem) have been widely examined.

Chapter 3 connects the idea of secular reason with what, historically—particularly from Thomas Aquinas on—has been called "natural reason." Natural reason—though perhaps not "public reason" (a phrase not adequately clarified by Rawls)—is a basic human endowment manifested in everyday reasoning. Fortunately, it is prominently recognized by many clergy and by many writers on political questions (though usually under different names), and indeed it is central, in some major religions. Part of my task in this chapter and elsewhere is to show how the kind of governmental neutrality I defend is

consonant with natural reason—roughly, reason as a natural endowment of normal adult human beings.

To be sure, natural reason may be taken, as it has been by philosophical theologians since medieval times, to provide sufficient grounds for accepting theism, say as the only good explanation of why there is a world at all, or as the best explanation of the natural order, or as evidenced by ordinary matters of fact, such as some stressed by Aquinas, for instance that there are motions and, apparently, causal chains. This raises a question not generally pursued in contemporary literature on religion and politics: whether, if natural reason itself favors theism, there is any need for democratic governments—which themselves depend on natural reason as a foundational source of standards—to separate church and state. Let me explain.

Suppose a theistically oriented conception of natural reason can be sustained or, in any case, cannot be supposed by democratic governments to fail. That conception poses a challenge to liberal political theory that has not been generally noticed. To see this challenge, suppose we make the plausible assumption that democracies may not properly assume that natural reason, which is shared by us all and does not rely on religious premises, cannot establish theism. If it can establish theism (and perhaps even if it cannot but cannot be assumed by government to fail in this), democracies would then seem to lack an adequate basis for a truly robust separation of church and state, one that rules out establishing even the generic "civil religion" historically present at least in the United States, though perhaps now declining in most quarters. How can a democracy completely separate church and state if the

proper use of human reason as shared by us all regardless of religious commitment leads to a theistic outlook? Without good grounds for a robust separation of church and state, democratic theory cannot justify the far-reaching governmental neutrality toward religion endorsed by liberal political theory. Chapter 3 is partly devoted to addressing this challenge to liberal political theory.

The first three chapters, then, clarify how an adequate conception of the proper relation between religion and politics is needed not just for political philosophy but also as an element in the constitutional development of evolving nations and as a contribution to peaceful coexistence in and among nations. But many questions remain concerning the kinds and limits of tolerance that are appropriate within the theory of religion and politics which the book provides. The final chapter, "Democratic Tolerance and Religious Obligation in a Globalized World," proposes standards of tolerance that are supported by the theory and are partly constitutive of civic virtue. I argue that these standards are harmonious both with major, widely shared ethical views and with the reciprocity appropriate to the principles I propose in the ethics of citizenship. One such standard is "*The principle of toleration*: If it not reasonable for proponents of coercion in a given matter to consider themselves epistemically superior in that matter to supporters of the corresponding liberty, then in that matter the former have a prima facie obligation to tolerate rather than coerce" (pp. 119-120). I also contend that civic virtue is not just a matter of overt behavior in matters of citizenship such as votes on public policy issues. Civic virtue requires acting for the right kind of reason. Another important element in it is what I call *civic voice,* a way of speaking that is specially appropriate to public political discourse. Civic voice can vary

independently of what is being said and may be manifested in written communication as well as orally.

The fourth and final chapter addresses the not uncommon cases (such as stem cell research and capital punishment) in which we may find ourselves in disagreement with people we consider equally rational and equally informed on the matter in question, where equal rationality in relation to a matter (such as the justification of military conscription) implies equal ability to assess relevant evidence regarding it. The principles of tolerance proposed for these cases (which are not presented as the only principles of tolerance one might support) are framed on the basis of an account of rational disagreement I have developed elsewhere.[2] In the light of my theory of religion and politics and my related account of tolerance, this final chapter also addresses such global issues as religion in the workplace, the rights of women, and the tension between nationalism and cosmopolitanism. The account of church-state separation and the associated account of the ethics of citizenship are shown to have international implications, for instance for the conduct of non-governmental international organizations such as multinational corporations and quasi-governmental institutions such as the United Nations.

Overall, the book is an attempt to advance the theory of liberal democracy, clarify the relation between religion and ethics, provide distinctive principles governing the place of religion in politics, and outline a theory of toleration. It frames institutional principles for the guidance of governmental policy toward religious institutions; it

[2] In, e.g., "The Ethics of Belief and the Morality of Disagreement: Intellectual Responsibility and Rational Disagreement," *Philosophy* 86 (2011), 5-29.

articulates citizenship standards for political conduct by individuals; it examines the case for affirming these two kinds of standards on the basis of what, historically, has been called natural reason; and it defends an account of toleration that enhances the practical application of the overall ethical framework.

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ROBERT AUDI'S "LIBERTY PRINCIPLE"

BY MICHAEL J. PERRY

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Robert Audi's "Liberty Principle"

Michael J. Perry

Among the other things he does in *Democratic Authority and the Separation of Church and State*,[1] Robert Audi develops and defends what he calls "the liberty principle" (pp. 40-43). The principle, as Audi explains, protects not only conduct animated by *religious* convictions and commitments but also conduct animated by *nonreligious* convictions and commitments that are comparably deep and identity-defining (42-43).

Both in my new book and in a forthcoming essay,[2] I have written about what I call the right to religious and moral freedom—which some call the right to freedom of conscience.[3] Of the various questions one might want to ask Audi about his liberty principle, these are the questions to which I am eager to hear Audi's response: 'What is the difference, if any, between your liberty principle and the

[1] Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011). Unless otherwise specified, parenthetical references refer to this text.
[2] See Michael J. Perry, *Human Rights in the Constitutional Law of the United States* (Cambridge: Cambridge University Press, 2013), 112-35; Michael J. Perry, "Freedom of Conscience as Religious and Moral Freedom," forthcoming in *Journal of Law and Religion*.
[3] See, e.g., Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge (MA): Harvard University Press, 2011).

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right—the internationally recognized human right—to religious and moral freedom? If different, are the principle and the right complementary or competitive? If competitive, which should we prefer, and why: your liberty principle or the internationally recognized human right to religious and moral freedom?'

Let me facilitate Audi's engagement with my inquiry by explicating the right to religious and moral freedom, the canonical articulation of which is Article 18 of the International Covenant on Civil and Political Rights (ICCPR),[4] according to which:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when

[4] Article 18 is the canonical articulation in the sense that the great majority of the countries of the world—about 87%—are parties to the ICCPR, including, as of 1992, the United States.

applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[5]

The United Nations Human Rights Committee—the body that monitors compliance with the ICCPR and, under the First Optional Protocol to the ICCPR, adjudicates cases brought by individuals alleging that a state party is in violation of the ICCPR—has stated that "[t]he right to freedom of thought, conscience and religion […] in article 18.1 is far-reaching and profound."[6] How "far-reaching and profound"? Note the breadth of the right that according to Article 18 "[e]veryone shall have": the right to freedom not just of "religion" but also of "conscience." The "right shall include freedom to have or adopt a religion *or belief* of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion *or belief* in worship, observance, practice and teaching" (emphasis added). Article 18 explicitly indicates that the right concerns moral as well as religious freedom—Article 18 explicitly identifies the "belief" that is protected as moral belief—when it states that "[t]he State parties to the

[5] Article 18 of the ICCPR is an elaboration of Article 18 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

[6] Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/9a30112c27d1167cc12563ed004d8f15?Opendocument.

[ICCPR] undertake to have respect for the liberty of parents and, when applicable, legal guardians to assure the religious *and moral* education of their children in conformity with their own convictions" (emphasis added). So, the right we are considering in this essay protects not only freedom to practice one's religion, including, of course, one's religiously-based morality; it also protects freedom to practice one's morality—freedom to "to manifest his […] belief in […] practice"—even if one's morality is not embedded in a religious tradition, *even if, that is, one's morality is embedded not in a transcendent worldview but in a worldview that is not transcendent.* (By a "transcendent" worldview, I mean a worldview that affirms, rather than denies or is agnostic about, the existence of a "transcendent" reality, as distinct from the reality that is or could be the object of natural-scientific inquiry.[7]) As the Human Rights Committee has put the point:

> [t]he Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. […] Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[8]

In deriving a right to conscientious objection from Article 18, the Human Rights Committee explained that

[7] On the idea of the "transcendent", see Charles Taylor, *A Secular Age* (Cambridge (MA): Harvard University Press, 2007); Michael Warner, Jonathan VanAntwerpen and Craig Calhoun, eds., *Varieties of Secularism in a Secular Age* (Cambridge (MA): Harvard University Press, 2010).
[8] Human Rights Committee, General Comment 22, fn. 6.

> the [legal] obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief" and emphasized that "there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs.[9]

The Supreme Court of Canada has emphasized that the right we are considering here is a broad right that protects freedom to practice one's morality without regard to whether one's morality is religiously-based. Referring to section 2(a) of the Canada's Charter of Rights and Freedoms, which states that "[e]veryone has […] freedom of conscience and religion", the Court has explained: "The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."[10] Section 2(a) "means that, subject to [certain limitations], no one is to be forced to act in a way contrary to his beliefs or his conscience."[11]

Two clarifications are in order. First: one's choice about what to do or to refrain from doing is protected by the right to religious and moral freedom if the choice is animated by what Maclure and Taylor call a person's "core or meaning-giving beliefs and commitments" as distinct

[9] Id.
[10] R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, 759.
[11] R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 337. See Howard Kislowicz, Richard Haigh and Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom," 48 *Alberta Law Review* 679, (2011): 707-13.

from those that are animated by "the legitimate but less fundamental 'preferences' we display as individuals."[12]

> [T]he beliefs that engage my conscience and the values with which I most identify, and those that allow me to find my way in a plural moral space, must be distinguished from my desires, tastes, and other personal preferences, that is, from all things liable to contribute to my well-being but which I could forgo without feeling as if I were betraying myself or straying from the path I have chosen. The nonfulfillment of a desire may upset me, but it generally does not impinge on the bedrock values and beliefs that define me in the most fundamental way; it does not inflict "moral harm."[13]

Second: that one is not—and understands that one is not—religiously and/or morally obligated to make a particular choice about what to do or to refrain from doing not entail that the choice is not protected under the right to religious and moral freedom. As the Canadian Supreme Court explained, in a case involving a religious practice:

> [T]o frame the right either in terms of objective religious "obligation" or even as the sincere subjective belief that an

[12] Maclure and Taylor, fn. 3, at 12-13.
[13] Id. at 77. Maclure and Taylor are well aware that there will be cases in which it is difficult to administer the distinction between "core or meaning-giving beliefs and commitments" and "the legitimate but less fundamental 'preferences' we display as individuals." See id. at 91-97. But there will also be many cases in which the distinction is relatively easy to administer. For example:

[A] Muslim nurse's decision to wear a scarf cannot be placed on the same footing as a colleague's choice to wear a baseball cap. In the first case the woman feels an obligation—to deviate from it would go against a practice that contributes toward defining her, she would be betraying herself, and her sense of integrity would be violated—which is not normally the case for her colleague (Id. at 77).

> obligation exists and that the practice is required […] would disregard the value of non-obligatory religious experiences by excluding those experience from protection. Jewish women, for example, strictly speaking, do not have a biblically mandated "obligation" to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict "obligation" to do so? Is the Jewish yarmulke or Sikh turban worthy of less recognition simply because it may be borne out of religious custom, not obligation? Should an individual Jew, who may personally deny the modern relevance of literal biblical "obligation" or "commandment", be precluded from making a freedom of religion argument despite the fact that for some reason he or she sincerely derives a closeness to his or her God by sitting in a succah? Surely not.[14]

As Article 18 makes clear, the right to religious and moral freedom is conditional; under the right, government may not ban or otherwise impede one's making a choice about what to do or to refrain from doing, thereby interfering with one's ability to live one's life in accord with one's religious and/or moral convictions and commitments, unless each of three conditions is satisfied:

> *The legitimacy condition*: The government action at issue (law, policy, etc.) must serve a legitimate government objective.[15] The specific government action at issue

[14] Syndicat Northcrest v. Amselem, [2004] 2 R.C.S. 551, 588. "It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection." Id. at 553.

[15] The Siracusa Principles state: "10. Whenever a limitation is required in the terms of the Covenant to be 'necessary,' this term implies that the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the covenant, [and] (c) pursues a legitimate aim".

might be not the law (policy, etc.) itself but the fact that the law does not exempt the (protected) conduct.

The least burdensome alternative condition: The government action—which, again, might be that the law does not exempt—must be necessary to serve the legitimate government objective, in the sense that the action serves the objective significantly better than would any less burdensome (to the protected practice) government action.[16]

The proportionality condition: The good the government action achieves must be sufficiently weighty to warrant the burden the action imposes on those who want to act in a way the action impedes.[17]

Article 18 sensibly and explicitly allows government to act for the purpose of protecting "public safety, order, health, or morals or the fundamental rights and freedoms

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For the Siracusa Principles, see United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), reprinted at 7 Human Rights Quarterly 3 (1985).

[16] The Siracusa Principles state: "11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

[17] The Siracusa Principles state: "10. Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation: […] (b) responds to a pressing public or social need, […] and (d) is proportionate to that aim." On proportionality inquiry under the right to religious and moral freedom, see T. Jeremy Gunn, "Permissible Limitations on the Freedom of Religion or Belief," in John Witte, Jr. and M. Christian Green, eds., *Religion and Human Rights: An Introduction* (New York: Oxford University Press 2011), 254, 263-66 (2012); Kislowicz, Haigh, & Ng, fn. 11, 686-93.

of others." Given, however, that the right we're considering—the right of which Article 18 is the canonical articulation—is the right to religious *and moral* freedom—this question is especially important: What morals count as *public* morals, under the right to religious and moral freedom?

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[18] state:

> 2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
>
> 3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
>
> 4. All limitations shall be interpreted in the light and context of the particular right concerned.

Therefore, with respect to "public morals", the Human Rights Committee has emphasized:

> [T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition […]. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the

[18] For the Siracusa Principles, see fn. 15.

> Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.[19]

As the editors of a casebook on the ICCPR have put the point, in summarizing several statements by the Human Rights Committee concerning protection of "public morals" under the right to religious and moral freedom: "'[P]ublic 'morals' measures should reflect a pluralistic view of society, rather than a single religious culture."[20]

"Protecting public morals" is undeniably a legitimate government objective under the right to religious and moral freedom: The canonical articulation of the right—Article 18 of the ICCPR—explicitly says so. However, if in banning or otherwise regulating (impeding) conduct *purportedly* in pursuit of that objective, government is acting based on—"based on" in the sense that government would not be regulating the conduct "but for"—either a religious belief that the conduct is immoral or a sectarian nonreligious belief that the conduct is immoral, government is not truly acting to protect *public* morals. It is, instead, acting to protect sectarian morals, *and protecting sectarian morals is not a legitimate government objective under the right to religious and moral freedom.*

Establishing and protecting the right to religious and moral freedom is a principal response to what Maclure and Taylor have identified as "[o]ne of the most important challenges facing contemporary societies," namely, "how to manage moral and religious diversity."[21] Crediting the

[19] Human Rights Committee, General Comment 22, fn. 6.
[20] Sarah Joseph, Jenny Schultz and Melissa Castan, eds., *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (Oxford: Oxford University Press, 2004), 510.
[21] Maclure and Taylor, fn. 3, at 1.

protection of sectarian morals as a legitimate government objective, under the right to religious and moral freedom, would be patently contrary to the effort "to manage moral and religious diversity." We can anticipate an argument to the effect that managing moral and religious diversity is only one objective, that nurturing social unity is another, and that from time to time the latter objective may require a society, through its government, to protect one or another aspect of sectarian morality.[22] However, such an argument is belied by the historical experience of the world's liberal democracies, which amply confirms not only that, as Maclure and Taylor have put the point, a society's "unity does not lie in unanimity about the meaning and

[22] In 1931, the fascist dictator of Italy, Benito Mussolini, proclaimed that "religious unity is one of the great strengths of a people." Quoted in John T. Noonan, Jr., *A Church That Can and Cannot Change*: *The Development of Catholic Moral Teaching* (South Bend (Indiana): University of Notre Dame Press 2005), 155-56. See also See Michael W. McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 *William & Mary L. Rev.* 2105, 2182 (2003): "Machiavelli, who called religion 'the instrument necessary above all others for the maintenance of a civilized state,' urged rulers to 'foster and encourage' religion 'even though they be convinced that is it quite fallacious.' Truth and social utility may, but need not, coincide." (Quoting Niccolo Machiavelli, *The Discourses* 139, 143 (Bernard R. Crick ed. & Leslie J. Walker trans., Penguin 1970) (1520).) Cf. "Atheist Defends Belief in God," The Tablet [London], Mar. 24, 2007, at 33:

A senior German ex-Communist has praised the Pope and defended belief in God as necessary for society […] "I'm convinced only the Churches are in a state to propagate moral norms and values," said Gregor Gysi, parliamentary chairman of Die Linke, a grouping of Germany's Democratic Left Party (PDS) and other left-wing groups. "I don't believe in God, but I accept that a society without God would be a society without values. This is why I don't oppose religious attitudes and convictions."

goals of existence but also that any efforts in the direction of such a uniformization would have devastating consequences for social peace."[23] The political powers-that-be do not need, and under the right to religious and moral freedom they do not have, discretion to ban or otherwise regulate conduct based on sectarian belief that the conduct is immoral.[24]

When is a belief, including a nonreligious belief, that X (a type of conduct) is immoral a sectarian belief? Consider what the celebrated American Jesuit John Courtney Murray wrote, in the mid-1960s, in his "Memo to [Boston's] Cardinal Cushing on Contraception Legislation":

[23] Maclure and Taylor, n. 1, at 18. See generally Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge: Cambridge University Press 2011). "[T]he core thesis [of this book] holds: to the extent that governments and societies restrict religious freedoms, physical persecution and conflict increase." Id. at 222. See also Paul Cruickshank, "Covered Faces, Open Rebellion," New York Times, Oct. 21, 2006. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states: "[T]he disregard and infringement of […] the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind."

[24] That the coercive imposition of sectarian moral belief violates the right to religious and moral freedom does not entail that the noncoercive affirmation of theistic belief does so. Examples of the latter, from the United States: the phrase "under God" in the Pledge of Allegiance, "In God We Trust" as the national motto, and "God save this honorable court" intoned at the beginning of judicial proceedings. I have addressed elsewhere the question whether the noncoercive affirmation of theistic belief violates the Establishment Clause of the U.S. Constitution: M. Perry, *The Political Morality of Liberal Democracy* (Cambridge: Cambridge University Press, 2010), 100-19 (Chapter 6: "Religion as a Basis of Lawmaking").

> [T]he practice [contraception], undertaken in the interests of "responsible parenthood," has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence.[25]

We may generalize Murray's insight: a belief, including a nonreligious belief, that X is immoral is sectarian if the claim that X is immoral is one that is widely contested—and in that sense sectarian—among the citizens of a religiously and morally pluralistic democracy.

Of course, it will not always be obvious which side of the line a particular moral belief falls on—sectarian or nonsectarian—but often it will be obvious. As Murray understood and emphasized to Cardinal Cushing, the belief

[25] "Memo to Cardinal Cushing on Contraception Legislation" (n.d., mid-1960s), http://woodstock.georgetown.edu/library/murray/1965f.htm. See also John Courtney Murray, SJ, Toledo Talk [delivered in Toledo on May 5, 1967), http://woodstock.georgetown.edu/library/murray/1965f.htm. Murray's influence on Boston's Archbishop, Cardinal Richard Cushing, and Cushing's influence on the repeal of the Massachusetts ban on the sale of contraceptives, is discussed in Seth Meehan, "Legal Aid," Boston College Magazine, Spring 2011, and in Seth Meehan, "Catholics and Contraception: Boston, 1965," New York Times, March 15, 2012. See also Joshua J. McElwee, "A Cardinal's Role in the End of a State's Ban on Contraception," National Catholic Reporter, Mar. 2-15, 2012. For the larger context within which Father Murray wrote and spoke, see Leslie Woodcock Tentler, Catholics and Contraception: An American History (Ithaca (NY): Cornell University Press, 2004). For a recent reflection on Murray's work by one of his foremost intellectual heirs, see David Hollenbach, SJ, "Religious Freedom and Law: John Courtney Murray Today," 1 *Journal of Moral Theology* 69, 75 (2012).

that contraception is immoral had clearly become sectarian. By contrast, certain moral beliefs—certain moral norms—are now clearly ecumenical, rather than sectarian, in religiously and morally pluralistic democracies. Consider, in that regard, what Maclure and Taylor have said about "popular sovereignty" and "basic human rights":

> [They] are the *constitutive* values of liberal and democratic political systems; they provide these systems with their foundation and aims. Although these values are not neutral, they are legitimate, because it is they that allow citizens espousing very different conceptions of the good to live together in peace. They allow individuals to be sovereign in their choices of conscience and to define their own life plan while respecting others' right to do the same. That is why people with very diverse religious, metaphysical, and secular convictions can share and affirm these constitutive values. They often arrive at them by very different paths, but they come together to defend them.[26]

***

To recapitulate: under the human right to religious and moral freedom, government may not interfere with one's freedom to live one's life in accord with one's religious and/or moral convictions and commitments unless each of the three conditions is satisfied: legitimacy, least burdensome alternative, and proportionality. And, as I have explained, under the legitimacy condition, government may not regulate conduct on the basis of sectarian moral belief.

Here, again, are my questions for Robert Audi: "What is the difference, if any, between what you call 'the liberty principle' and the internationally recognized human right to religious and moral freedom? If different, are the principle

[26] Maclure and Taylor, fn. 6, at 11.

and the right complementary or competitive? If competitive, which should we prefer, and why: the liberty principle or the right to religious and moral freedom?"

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SYMPOSIUM

THE CHURCH AND THE STATE

IS RELIGION SPECIAL? A QUESTION ON THE POSSIBILITY OF SINGLING OUT RELIGION

BY DOMENICO MELIDORO

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Is Religion Special?
A Question on the Possibility of Singling Out Religion

Domenico Melidoro

In the Preface to *Democratic Authority and the Separation of Church and State*,[1] Robert Audi maintains that this is "a short, highly readable book that both extends and refines the ideas developed in [his] earlier work" (p. vii)[2]. Ethics, religion, politics, and the ways in which they interact and coexist within a liberal democratic framework are the issues the author debates in this work. In this commentary, far from giving an overall critical evaluation of the book, I will deal with a foundational issue that, in my opinion, is not satisfactorily addressed. The main questions I shall address are these: is religion somehow *special*? Can we single out religion and distinguish it from other moral, cultural, and political commitments? Does religion have some features that differentiate religious faith and beliefs from the emotional bond someone has for her favorite soccer

[1] Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011). Unless otherwise specified, parenthetical references refer to this text.
[2] *Religious Commitment and Secular Reasons* (Cambridge: Cambridge University Press, 2000) is the main earlier work in which Audi's reflections on ethics, religion, and politics are systematically exposed.

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team or from less trivial attachments? The answers to these questions have considerable practical and theoretical implications in liberal institutions. That is why plausible answers are due. In fact, if religion is *special* in some way, it deserves a special treatment from the state and should be respected in a distinct way. On the contrary, if we cannot single out religion from other deep or identity-related human commitments, it does not raise distinctive issues and we can handle it the same way we handle similar commitments. Further, as it will be clearer hereinafter, the answers to the questions listed above have direct implications on the general understanding of secularism.

As the following pages will try to show, Audi's answer to the question on the possibility of singling out religion is unclear and suffers from some weaknesses. I proceed as follows. In § I, I give a summary of two possible answers to the enquiry on the distinctive character of religion: the first denies whereas the second asserts the special nature of religion. The two positions will be rendered with reference to the current debate in political philosophy. In § II, I give an account of Audi's answer and try to show that it somehow oscillates between the two positions represented in § I, and that, in any case, the reasons supporting the alleged special character of religion are inadequate.

I

Cécile Laborde has put forward a clear account of the thesis according to which religion is not special.[3] The position—that she calls *egalitarian theory of religious freedom*—has three premises. The first concerns the nature of religious freedom, the second is related to the possibility of exemption from general laws, and the last concerns the equal status of all citizens. Let us spend some more time analyzing each premise.

The first and the most relevant premise states that religious freedom does not deserve a distinct treatment because of its status. It is only a subcategory of more fundamental and general entitlements such as freedom of association, privacy, and free speech. For the advocates of the egalitarian theory of religious freedom, religion can matter to people for the depth characterizing religious commitments, but it is not uniquely distinctive. Conscience—understood as the human faculty for distinguishing the good from the bad or as the source of moral agency—is the supreme object of concern and respect. From this perspective, respect for the claims of conscience, whatever their content, is only derivative.

According to the second premise of the egalitarian theory, some exemptions from universally applicable laws are allowed, but are not granted due to the religious nature of a belief. Rather, the state has to equally respect all citizens and try to exempt them from general laws when their conscience suffers from unfair burdens imposed by such a belief. The exemptions should be admitted both in

[3] Cécile Laborde, "Equal Liberty, Non-Establishment and Religious Freedom," *Journal of Legal Theory*, forthcoming.

cases in which consciences are religiously oriented, and when they have a secular content.

The third and last premise maitains that the state has to acknowledge the equal civic status of citizens, has to be neutral towards its citizens, and (within certain limits) should not discriminate on the grounds of their choices, values, and lifestyles. This premise has immediate implications on some controversial issues in public policy. For instance, when financial public support is at stake, a religious group organizing activities of public interest should neither be penalized nor favored compared to another secular group.

Taking a stance that denies the possibility of singling out religion is significant because it has direct implications for the way secularism might be understood and accounted for. The egalitarian view just outlined paves the way for a broader notion of secularism. Religious diversity being nothing more than a dimension of normative diversity, the debate on secularism should be included in the broader discussion on how the state deals overall with diversity. In other words, as Charles Taylor has recently pointed out, secularism "has to do with the (correct) response of the democratic state to diversity"[4] rather than, in a narrow sense, only with the relation between state and religion.

The position worked out by theorists such as Laborde is strongly objected, generally from a religiously oriented perspective, by those who want to stress that religion is a distinctive phenomenon and that, precisely for this reason,

[4] Charles Taylor, "Why We Need a Radical Redefinition of Secularism", in E. Mendieta e J. VanAntwerpen (edited by), *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011), p. 36.

it raises special moral, political, and constitutional issues that have to be dealt with in special ways. From this point of view, religious freedom cannot be reduced to some higher ethical norms. Further, a religious belief is a *sui generis* belief, and its depth or capacity to structure personal identity fade into the background in comparison with its religious and transcendental nature. But what exactly makes religion so special? The answer is not easy, considering that metaphysical, moral, and psychological aspects are intertwined in any definition that holds religion special. I think that is worth to quote at length the following passage from a paper by Michael W. McConnel:

> Religion is a special phenomenon, in part, because it plays such a wide variety of roles in human life: it is an institution, but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and locus of community, akin to family ties, but it is more than that; it is an aspect of identity, but it is more than that; it provides answers to questions of ultimate reality, and offers a connection to the transcendent; but it is more than that. Religion cannot be reduced to a subset of any larger category. In any particular context, religion may appear to be analogous to some other aspect of human activity - to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human phenomenon that combines all of these aspects; if there were such a concept, it would probably be viewed as a religion.[5]

McConnell's position stresses the multifaceted nature and uniqueness of religion. Another view, more complex because of its strong metaphysical assumptions, is offered by John Finnis. According to Finnis, religion is "the practical expression of, or response to, truths about human

[5] Michael W. McConnell, "The Problem of Singling Out Religion," *De Paul Law Review*, 50 (2000): 1-47, p. 42.

society, about the persons who are a political community's members, and about the world in which any such community must take its place and find its ways and means."[6] Thus, religion concerns fundamental truths about society, persons, and the world. It is neither an irrational phenomenon nor a matter of deep commitments. In Finnis' conception, all those theorists who object to these views are actually looking at religion from an external and belittling perspective.

Finnis and McConnell, of course, are not the only theorists in favor of the special nature of religion. There are other positions. For instance, some theorists focus on the fact that religion is particularly conducive to civil strife and that it deserves special consideration for prudential reasons. Others stress the special link between religion and the promotion of morality in society. Others again rely on the distinctive intensity and strength of religious commitment. Some others point at the unique role of religion in the process of identity construction, or the transcendent authority and extra-mundane obligations, which distinguish religions from other forms of association.[7]

The debate on the uniqueness of religion, as these remarks glimpse, is complex and these few pages do not aim at providing a comprehensive and exhaustive overview. Also, this is not the place for adjudicating among opposing understandings of religion. Presenting these two opposite views is only a preliminary step in the direction to better

[6] John Finnis, "Does Free Exercise of Religion Deserve Constitutional Mention?," *The American Journal of Jurisprudence*, 54 (2009), p. 56.

[7] For un updated and well reasoned discussion, see Gemma Cornelissen, "Belief-Based Exemptions: Are Religious Beliefs Special?," *Ratio Juris*, 25 (2012): 85-109.

appreciate and critically engage with Audi's position on the uniqueness of religion.

II

Audi's views on the possibility of singling out religion come out in the pages he devotes to the liberty principle and religious freedom. He writes that "there are historical reasons for special attention to religion in political philosophy. One is the enormous power that religions—and sometimes clergy as individuals—have had over the faithful" (p. 42). Religions threaten eternal damnation if people disrespect some rules. At the same time, religions reward people with heaven or some kind of eternal life if they are pious and virtuous. These are the main reasons behind religions' enormous motivating power. In fact, due to religious motivations or pushed by bloodthirsty religious leaders, people can kill or die.

The second reason pertains to the depth of religious commitments and beliefs and to the ways in which they relate to personal identity. Audi talks about *protection of identity principle*: "the deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments tends to be" (p. 42). Audi specifies that this principle is not biased against non-religious commitments. In fact, secular as well religious commitments can have a fundamental role in shaping personal identities. However, Audi contends, "few if any non-religious kinds of commitments combine the depth and contribution to the sense of identity that go with

many (though not all) of the kinds of religious commitments" (p. 42-43).

Thus, it would seem that Audi belongs to the group of those, like McConnel and Finnis, claiming that religion is somehow special. The two reasons Audi mentions distinguish religion from other human phenomena. Thus, if this holds, religious beliefs and commitments deserve special protection because of their unique nature. However, at the same time, the non-discrimination against secular commitments seems to push Audi towards the position of those according to which religion is not special. If secular commitments can be equivalent to religious ones in shaping personal identity, there is no reason at all for deeming religion special. Rather than the intrinsic nature of a belief, what does matter is its intensity, its depth, and how it weighs against the overall constitution of a person's identity. As far as intensity and depth are concerned, religious and secular commitments are perfectly analogous. However—and here a further complication enters the scene—it is difficult to find a non-religious commitment that is able to play the role of a religious one.

So, one might ask, does Audi fall in the group of those distinguishing religion from other phenomena, or is he closer to what Laborde would label egalitarian theorists of religious freedom? I argue that Audi's belonging to the first group is objectionable because his arguments in support of the uniqueness are weak. In fact, "the enormous power that religions—and sometimes clergy as individuals—have had over the faithful" (p. 42) hardly is something that distinguishes religion from other forces shaping human conduct. Ethnic belonging, and history is full of tragic examples, can have the same force in convincing people to

kill other people or even to die in order to protect their ethnic group. The argument about the role of religion in shaping identity is weak as well. As Cornelissen argues, "not every intensely felt belief is religious. A person may intensely object to serving in the army because of a deeply felt but non-religious moral belief that war is wrong, or indeed, because of an enduring abhorrence for physical exercise."[8]

Is this enough for including Audi in the group of the egalitarian theorists of religious freedom? As I said a few lines back, the non-discrimination against secular commitments and the acknowledgment that non-religious beliefs can have an equivalent role to that of religious ones, would seem to move Audi towards the group of those who deny any special status to religion. However, the scope of this claim is strongly debunked a few lines later, where Audi remarks that religious commitments are somehow unique: "few if any non-religious kinds of commitments combine the depth and contribution to the sense of identity that go with many (though not all) of the kinds of religious commitments" (pp. 42-43).

As one might see now, Audi's stance on the uniqueness of religion is neither clear nor well argued. Perhaps Audi could reply that there is no need to choose between the position asserting the special nature of religion and the one denying its uniqueness.[9] In other words, given that the first view does not categorically rule out the second, Audi does

[8] Gemma Cornelissen, "Belief-Based Exemptions: Are Religious Beliefs Special?," cit., p. 90. See also Sonu Bedi, "What is so Special About Religion? The Dilemma of Religious Exemptions," *Journal of Political Philosophy*, 15 (2007): 235-249.
[9] Michele Bocchiola pushed me to consider this possible reply.

not need to choose either alternative, as maintained in the previous section. Were this reply plausible, it then would be possible to combine the best of each position. On this perspective, Audi, although not explicitly, might be trying to vindicate a *third way*. But, I wonder, is this argumentative strategy workable? Can religion be at the same time special and not special? A positive answer to this question would imply that religion deserves and does not deserve a special treatment and a special concern from the state at the same time. Could Audi explain away this apparent contradiction? And, if there were such a third way, what could its practical implications possibly be, for instance, for public policies or constitutional practice? Considering the oddity of this *third way* and the consequences resulting from its acceptance, the burden of the proof falls on those defending it.

III

As these last remarks show, the discussion can become more and more complex. Greater clarity and effort on a major foundational issue such as the special character of religion would have contributed to strengthen Audi's new fundamental contribution to the philosophical debate on ethics, religion, and politics. And I hope Audi could address this issue, helping us to better understand his take on the way a liberal state should treat religions.

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SYMPOSIUM

THE CHURCH AND THE STATE

POLITICAL SECULARISM AND PUBLIC REASON. THREE REMARKS ON AUDI'S *DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE*

BY JOCELYN MACLURE

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Political Secularism and Public Reason. Three Remarks on Audi's *Democratic Authority and the Separation of Church and State*

Jocelyn Maclure

I enjoyed reading *Democratic Authority and the Separation of Church and State*. The relationship between state and religion, the place of religion in the public sphere, and the accommodation claims made by religious minorities are fiercely debated in most democratic countries. No matter whether secularism is enshrined in the constitution or if a regime of weak establishment prevails, pluralist democracies are now facing a net set of challenges related to the management of moral and religious diversity. The wide ranging ethical pluralism of contemporary societies, the diversification of immigration, and the growing commitment to human rights and to, more controversially, "multiculturalism" or the "recognition" of minority groups are for the most part responsible for this new phase of the debate on religion and politics. As political philosophy often finds its vital impulsion from the conflicts that strain social cooperation, a growing number of normative

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theories of secularism, toleration, and religious freedom are now being developed.[1] Audi's recent book is a highly valuable contribution to this field.[2]

For the sake of the continuing critical discussion on secularism and religious freedom, I will comment on three issues that are central to both Audi's book and current scholarship. I will first interrogate Audi's conceptual analysis of the separation of church and state principle, and then comment on his answer to the much discussed question of what authorizes us, if anything, to single out religion. Finally, I will suggest that it is probably time to move beyond the debate on the proper place of religious convictions within public reason.

[1] See Rajeev Bhargava, "Political secularism : why it is needed and what can be learnt from its Indian version," *Secularism, Religion and Multicultural Citizenship* (New York: Cambridge University Press, 2008), 82-109; Cécile Laborde, "Political Liberalism and Religion: On Separation and Establishment," *Journal of Political Philosophy* 21 (2013): 67-86; Sune Lægaard, "Moderate Secularism and Multicultural Equality," *Politics* 28 (2008): 160-168; Brian Leiter, *Why Tolerate Religion* (Princeton: Princeton University Press, 2013); Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge: Harvard University Press, 2011); Tariq Modood, "Moderate Secularism, Religion as Identity and Respect for Religion," *The Political Quarterly* 81 (2010): 4-14; Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2007).

[2] All parenthetical page references in the main text refer to Robert Audi, *Democratic Authority and the Separation of Church and State*, Oxford: Oxford University Press, 2011. All other references are in the footnotes.

I

Political secularism

I first want to question the way Audi conceives the conceptual structure of the secular state. My understanding is that he sees the separation of church and state as the core principle of the secular state. The separation principle involves, he believes, "a protection of both religious liberty and governmental autonomy" (p. 39). This, he adds, requires some unpacking. In terms of "governmental regulation and structure," the separation of church and state involves three principles: 1-Religious liberty; 2-Equality, understood as the equal treatment of all religions; 3-Governmental neutrality toward religion.

Audi, it seems to me, reproduces an error made in most attempts to lay out the conceptual architecture of the secular state or *laïcité*. If he is undoubtedly right to think that political secularism is underpinned by a plurality of distinct, and potentially conflicting, principles, I want to suggest that he also needs to distinguish between what Charles Taylor and I called the *moral ends* and the *modus operandi* of the secular state.[3] I cannot make the argument fully explicit here, but the basic idea is that a liberal and democratic state needs to be secular in order to grant equal respect to all citizens—notwithstanding their worldview and conception of the good—and to protect their freedom of conscience and religion. The "separation" and "neutrality" principles are better seen as the institutional means to bring about the two ends of the secular state, as it is hard to see how the state can recognize all citizens as

[3] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, 2011.

equals and protect their religious liberty if it is organically linked to, or if it favour a, religion (in a significant way). Separation and neutrality are part of the institutional design of the secular state; their value is derivative, whereas the value equal respect and freedom of conscience and religion is intrinsic.[4] Accordingly, I fail to grasp why Audi affirms that the "[…] neutrality principle, which calls for governmental neutrality toward religion and the religious, is not entailed by even the other two principles together [religious liberty and equality]" (p. 45).

As a normative tool, a theory that makes the distinction between moral and institutional principles is more useful than a theory that doesn't. It directs our attention on the impact of a given norm or policy on the principles of equal respect and freedom of conscience, and it shows us that there is something wrong when priority is given to institutional principles such as "non-establishment," "separation" or "neutrality" over the moral ends of political secularism. It also allows us to understand why it makes sense to see as secular democratic regimes that have an official church and those that recognize religions in differentiated ways. Finally, since empirical scholars demonstrated in a myriad of ways how even the most secular states are never fully neutral with regards to the religious affiliations of its citizens, it makes more sense to see them as institutional principles that can be designed and applied in different and contextually sensitive ways.

[4] A proposition that is compatible with, but that does not require, Audi's moral realism/intuitionism (see *Democratic Authority and the Separation of Church and State*, "The Autonomy of Ethics and the Moral Authority of Religion", 9-36).

II

The Protection of Identity Principle

As just mentioned, Audi sees religious liberty as one of the core principles of the secular state. But why is it that religious convictions carry more moral and legal weight that other kinds of beliefs and commitments? Why should we single out religion? In line with the bulk of recent scholarship, Audi answers that religion generally plays a special role in the identity of the believer. According to the "protection of identity" principle: "[t]he deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments tends to be" (p. 42).

It is because religious beliefs tend be both deep and identity-conferring that they should have a special legal status; a status that vindicates, under specific circumstances, exemptions from generally applicable laws or other forms of what is called "reasonable accommodation" in the Canadian jurisprudence (p. 46). Against theorists like Brian Barry and Brian Leiter, I also believe that meaning-giving beliefs and commitments should be distinguished from the other subjective preferences that contribute to wellbeing but that are not crucial to one's moral identity.[5]

That being said, I found that Audi didn't do enough to provide an answer to those who argue that there is no normatively satisfying way, under conditions of reasonable moral pluralism, to give more weight to religious beliefs

[5] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, "Freedom of Conscience", 61-104.

and commitments. Is religious freedom compatible with the required axiological neutrality of the state? If so, how?

My own answer is that religious freedom ought to be seen, for normative purposes, as a subcategory of a broader class, i.e. freedom of conscience. There is no good reason to give priority to religious convictions over secular meaning-giving beliefs. I think that Audi agrees, but stills want to isolate religious beliefs on the basis of a psychological argument:

> Other kinds of commitments can be comparably deep; this principle does not discriminate against those. But few if any non-religious kinds of commitments combine the depth and contribution to the sense of identity that go with many (though not all) of the kinds of religious commitments. (pp. 42-43)

The meaning and implications of this qualification are not, to my knowledge, spelled out in the book. One way to understand Audi's position is to say, like for instance Andrew Koppelman, that religious commitments are uniquely special and should not be analogized with other types of commitments.[6] I don't know if Audi's argument about the unique combination of depth and contribution to one's self-identity that is provided by religious doctrines is supposed to be empirical, phenomenological, or otherwise, but we know that pacifists and vegetarians whose moral outlooks were thoroughly secular felt compelled to mount (in the end successful) exemption or accommodation claims. Why should, for instance, a vegetarian Hindu be accommodated in prison or in the army and not an utilitarian? The only acceptable answer, I think, is to see

[6] Andrew Koppelman, "Is it fair to give religion special treatment?" *University of Chicago Law Review* (2006): 571-604.

religious liberty as nested within freedom of conscience.[7] The relevant distinction is not between secular and religious meaning-giving beliefs and commitments, but between meaning-giving convictions and more peripheral subjective preferences.

III

Religious Convictions and Secular Reason: An Overlapping Consensus?

The role and status of religious convictions in political debates and in the justification of public norms is the issue that has arguably excited political philosophers the most since the publication of John Rawl's *Political Liberalism* and the rise of deliberative democracy theories in the 1990s. Rawls defined "public reason" as the "reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and amending their constitution."[8] He argued that citizens, when "discussing and voting on the most fundamental political questions" should "honour the limits of public reason" and "appeal only to a public conception of justice and not to the whole truth as they see it."[9] Since public

[7] Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2008), 61; Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2007); Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge: Harvard University Press, 2011).
[8] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 214.
[9] Ibid., 216.

reason's main function is to supply proper or warranted justification for basic public norms, the arguments put forward by citizens and public officials need to be derived from the principles of a shared political conception of justice rather than from one's comprehensive doctrine. Other influential philosophers such as Jürgen Habermas and Audi himself were thought to defend broadly congruent normative positions.[10]

Several critics asked whether the discipline of public reason imposed upon citizens was itself justified.[11] Is it reasonable to ask citizens committed to a secular or religious comprehensive doctrines to restrain from justifying their political positions on the basis of their most deeply-held beliefs? Is it always possible to draw the line between public and non-public reasons? Can't there be "reasonable disagreements" over that frontier?[12] Wouldn't all citizens benefit from a deeper understanding of the reasons, secular or not, that motivate citizens to endorse their preferred positions?

The debate on "public" or "secular" reason was fruitful. An overlapping consensus arguably emerged from that debate. It is not clear to me who still defends a dichotomy

[10] Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics* (C. Cronin, transl. Cambridge: The MIT Press, 1993); Robert Audi, *Religious Commitments and Secular Reason* (Cambridge: Cambridge University Press, 2000).

[11] Paul Weithman, *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press, 2002); Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002).

[12] Jocelyn Maclure, "On the Public Use of Practical Reason: Loosening the Grip of Neo-Kantianism", *Philosophy & Social Criticism* 32 (2006): 37-63.

between public and non-public reasons, although, to borrow from Hilary Putnam, a distinction might still be useful. Rawls clarified his position in "The Idea of Public Reason Revisited" with his famous "proviso" argument:

> [the public reason] requirement still allows us to introduce into political discussion at any time our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.[13]

Reason of all sorts can be uttered, but public justifications ought "in due course" to be provided.[14]

In a similar spirit, Habermas went out of his way in his recent work on religion in the public sphere to show how is vision of a sound "post-secular" deliberative democracy ought to be hospitable to the moral input of religiously committed citizens.[15] And without going in the specifics, Audi specifies in *Democratic Authority* that his "principle of secular rationale" requires only, if I got it right, that religiously committed citizens have secular reasons in addition to their religious reasons for supporting coercive laws and policies, and the public expression of these religious reasons is not precluded. The principle of secular rationale is "non-exclusive" (p. 68). Furthermore, it is a *pro*

[13] John Rawls, *The Law of Peoples and The Idea of Public Reason Revisited*, (Cambridge: Harvard University Press, 1999), 152.

[14] Prof. Audi suggests that the 'in due course' requirement is 'indeterminate' (p. 63). My (perhaps too charitable) interpretation of the proviso is that a public justification ought to be provided 'before a legislature or a court make a decision'.

[15] Jürgen Habermas, *Between Naturalism and Religion*, "Religion in the Public Sphere: Cognitive Presuppositions for the 'Public Use of Reason' by Religious and Secular Citizens" (C. Cronin, transl. Cambridge: Polity Press, 2008).

tanto obligation; it can be, under appropriate circumstances, overturned.

It does appear, then, that a rough agreement emerged on the status of religious convictions within public reason among several of the most influential participants to the discussion. It is a "rough," overlapping, agreement because nuances and rather minor disagreements remain, but few are arguing that religious beliefs should be kept in the antechamber of public deliberation. I myself think that political secularism requires that public norms and institutions be grounded upon public reasons—reasons drawn or derived from a political conception of justice—and that public deliberation should be open to comprehensive doctrines. Siding with Habermas and Charles Taylor, I do not think that the *proviso* is necessary. I do think that the habit of supplementing one's comprehensive reasons with public ones is a civic virtue, but I do not think that a normative theory of public reasoning should include an obligation to supply secular reasons. I hasten to add that a citizen who remains solely in the convictional space of his comprehensive doctrine should not expect to be able to rally fellow citizens to his position, but that's his own business.

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SYMPOSIUM

THE CHURCH AND THE STATE

POLITICAL SECULARISM AND PUBLIC REASON. THREE REMARKS ON AUDI'S *DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE*

BY JOCELYN MACLURE

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Political Secularism and Public Reason. Three Remarks on Audi's *Democratic Authority and the Separation of Church and State*

Jocelyn Maclure

I enjoyed reading *Democratic Authority and the Separation of Church and State*. The relationship between state and religion, the place of religion in the public sphere, and the accommodation claims made by religious minorities are fiercely debated in most democratic countries. No matter whether secularism is enshrined in the constitution or if a regime of weak establishment prevails, pluralist democracies are now facing a net set of challenges related to the management of moral and religious diversity. The wide ranging ethical pluralism of contemporary societies, the diversification of immigration, and the growing commitment to human rights and to, more controversially, "multiculturalism" or the "recognition" of minority groups are for the most part responsible for this new phase of the debate on religion and politics. As political philosophy often finds its vital impulsion from the conflicts that strain social cooperation, a growing number of normative

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theories of secularism, toleration, and religious freedom are now being developed.[1] Audi's recent book is a highly valuable contribution to this field.[2]

For the sake of the continuing critical discussion on secularism and religious freedom, I will comment on three issues that are central to both Audi's book and current scholarship. I will first interrogate Audi's conceptual analysis of the separation of church and state principle, and then comment on his answer to the much discussed question of what authorizes us, if anything, to single out religion. Finally, I will suggest that it is probably time to move beyond the debate on the proper place of religious convictions within public reason.

[1] See Rajeev Bhargava, "Political secularism : why it is needed and what can be learnt from its Indian version," *Secularism, Religion and Multicultural Citizenship* (New York: Cambridge University Press, 2008), 82-109; Cécile Laborde, "Political Liberalism and Religion: On Separation and Establishment," *Journal of Political Philosophy* 21 (2013): 67-86; Sune Lægaard, "Moderate Secularism and Multicultural Equality," *Politics* 28 (2008): 160-168; Brian Leiter, *Why Tolerate Religion* (Princeton: Princeton University Press, 2013); Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge: Harvard University Press, 2011); Tariq Modood, "Moderate Secularism, Religion as Identity and Respect for Religion," *The Political Quarterly* 81 (2010): 4-14; Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2007).

[2] All parenthetical page references in the main text refer to Robert Audi, *Democratic Authority and the Separation of Church and State*, Oxford: Oxford University Press, 2011. All other references are in the footnotes.

I

Political secularism

I first want to question the way Audi conceives the conceptual structure of the secular state. My understanding is that he sees the separation of church and state as the core principle of the secular state. The separation principle involves, he believes, "a protection of both religious liberty and governmental autonomy" (p. 39). This, he adds, requires some unpacking. In terms of "governmental regulation and structure," the separation of church and state involves three principles: 1-Religious liberty; 2-Equality, understood as the equal treatment of all religions; 3-Governmental neutrality toward religion.

Audi, it seems to me, reproduces an error made in most attempts to lay out the conceptual architecture of the secular state or *laïcité*. If he is undoubtedly right to think that political secularism is underpinned by a plurality of distinct, and potentially conflicting, principles, I want to suggest that he also needs to distinguish between what Charles Taylor and I called the *moral ends* and the *modus operandi* of the secular state.[3] I cannot make the argument fully explicit here, but the basic idea is that a liberal and democratic state needs to be secular in order to grant equal respect to all citizens—notwithstanding their worldview and conception of the good—and to protect their freedom of conscience and religion. The "separation" and "neutrality" principles are better seen as the institutional means to bring about the two ends of the secular state, as it is hard to see how the state can recognize all citizens as

[3] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, 2011.

equals and protect their religious liberty if it is organically linked to, or if it favour a, religion (in a significant way). Separation and neutrality are part of the institutional design of the secular state; their value is derivative, whereas the value equal respect and freedom of conscience and religion is intrinsic.[4] Accordingly, I fail to grasp why Audi affirms that the "[…] neutrality principle, which calls for governmental neutrality toward religion and the religious, is not entailed by even the other two principles together [religious liberty and equality]" (p. 45).

As a normative tool, a theory that makes the distinction between moral and institutional principles is more useful than a theory that doesn't. It directs our attention on the impact of a given norm or policy on the principles of equal respect and freedom of conscience, and it shows us that there is something wrong when priority is given to institutional principles such as "non-establishment," "separation" or "neutrality" over the moral ends of political secularism. It also allows us to understand why it makes sense to see as secular democratic regimes that have an official church and those that recognize religions in differentiated ways. Finally, since empirical scholars demonstrated in a myriad of ways how even the most secular states are never fully neutral with regards to the religious affiliations of its citizens, it makes more sense to see them as institutional principles that can be designed and applied in different and contextually sensitive ways.

[4] A proposition that is compatible with, but that does not require, Audi's moral realism/intuitionism (see *Democratic Authority and the Separation of Church and State*, "The Autonomy of Ethics and the Moral Authority of Religion", 9-36).

II

The Protection of Identity Principle

As just mentioned, Audi sees religious liberty as one of the core principles of the secular state. But why is it that religious convictions carry more moral and legal weight that other kinds of beliefs and commitments? Why should we single out religion? In line with the bulk of recent scholarship, Audi answers that religion generally plays a special role in the identity of the believer. According to the "protection of identity" principle: "[t]he deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments tends to be" (p. 42).

It is because religious beliefs tend be both deep and identity-conferring that they should have a special legal status; a status that vindicates, under specific circumstances, exemptions from generally applicable laws or other forms of what is called "reasonable accommodation" in the Canadian jurisprudence (p. 46). Against theorists like Brian Barry and Brian Leiter, I also believe that meaning-giving beliefs and commitments should be distinguished from the other subjective preferences that contribute to wellbeing but that are not crucial to one's moral identity.[5]

That being said, I found that Audi didn't do enough to provide an answer to those who argue that there is no normatively satisfying way, under conditions of reasonable moral pluralism, to give more weight to religious beliefs

[5] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, "Freedom of Conscience", 61-104.

and commitments. Is religious freedom compatible with the required axiological neutrality of the state? If so, how?

My own answer is that religious freedom ought to be seen, for normative purposes, as a subcategory of a broader class, i.e. freedom of conscience. There is no good reason to give priority to religious convictions over secular meaning-giving beliefs. I think that Audi agrees, but stills want to isolate religious beliefs on the basis of a psychological argument:

> Other kinds of commitments can be comparably deep; this principle does not discriminate against those. But few if any non-religious kinds of commitments combine the depth and contribution to the sense of identity that go with many (though not all) of the kinds of religious commitments. (pp. 42-43)

The meaning and implications of this qualification are not, to my knowledge, spelled out in the book. One way to understand Audi's position is to say, like for instance Andrew Koppelman, that religious commitments are uniquely special and should not be analogized with other types of commitments.[6] I don't know if Audi's argument about the unique combination of depth and contribution to one's self-identity that is provided by religious doctrines is supposed to be empirical, phenomenological, or otherwise, but we know that pacifists and vegetarians whose moral outlooks were thoroughly secular felt compelled to mount (in the end successful) exemption or accommodation claims. Why should, for instance, a vegetarian Hindu be accommodated in prison or in the army and not an utilitarian? The only acceptable answer, I think, is to see

[6] Andrew Koppelman, "Is it fair to give religion special treatment?" *University of Chicago Law Review* (2006): 571-604.

religious liberty as nested within freedom of conscience.[7] The relevant distinction is not between secular and religious meaning-giving beliefs and commitments, but between meaning-giving convictions and more peripheral subjective preferences.

III

Religious Convictions and Secular Reason: An Overlapping Consensus?

The role and status of religious convictions in political debates and in the justification of public norms is the issue that has arguably excited political philosophers the most since the publication of John Rawl's *Political Liberalism* and the rise of deliberative democracy theories in the 1990s. Rawls defined "public reason" as the "reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and amending their constitution."[8] He argued that citizens, when "discussing and voting on the most fundamental political questions" should "honour the limits of public reason" and "appeal only to a public conception of justice and not to the whole truth as they see it."[9] Since public

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THE CHURCH AND THE STATE

TOLERANCE: TOO LITTLE OR TOO MUCH?

ON ROBERT AUDI'S *DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE*

BY MARIO DE CARO

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Tolerance: Too Little or Too Much?

On Robert Audi's

Democratic Authority and the Separation of Church and State

Mario De Caro

I

Two Objections Regarding Tolerance

Almost a century has passed since D.W. Griffith wrote and directed *Intolerance* (1916), generally considered the second great masterpiece in the history of cinema. Using daring montage techniques and spectacular settings with the intent of showing how terrible the consequences of intolerance can be, Griffith intercut four parallel storylines that represented emblematic episodes, some historical, some imaginary. Thus—following the tragic happenings connected with the fall of Babylon to the Persians, Jesus's passion, St. Bartholomew's Day massacre, and a contemporary story of poverty, abuse and redemption—the audience could not help but get the message that Griffith intended to send: the world would be a much better place if only tolerance replaced hatred and intolerance. Today this claim may sound rather trite, but one should consider that it was expressed in a time of

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bigotry, racism, and war (World War One was already been fought around the world). Praise to Griffith, then.

Too bad that only one year earlier, Griffith had written and directed another movie, *The Birth of a Nation*, that notwithstanding its undeniable cinematic merits (it is generally reputed the first great masterpiece in the history of cinema) has always been considered a prototype of narrow-mindedness and intolerance. In that movie, Griffith described the Civil War as the fight engaged by the heroic Southerners against the risk of moral anarchy and civic dissolution that would result from the cynical Northerners' abolition of slavery. In this spirit, the African-Americans were represented as violent, ferocious, immoral, and generally drunk—with the exception of those who acknowledged the alleged intellectual and ethical superiority of the whites, and behaved accordingly. *The Birth of a Nation* suggested that the docile former slaves could be tolerated as free beings, but the undisciplined ones had to be fought as very dangerous criminals (actual or potential). Moreover, to make things clearer, Griffith represented the Ku Klux Klan as a noble association of valiant men fighting for justice and peace. Unsurprisingly, immediately after the première of *The Birth of a Nation* took place at the Liberty Theater in New York, severe criticisms arose. At that point, Griffith appealed to the right to freely express his beliefs. That is, he asked for tolerance.

Two interesting and seemingly opposite questions can be discussed in regard to Griffith's views on tolerance, and both are relevant for Robert Audi's valuable new volume, *Democratic Authority and the Separation of Church and State*. The first question is very general: Is tolerance an adequate tool for dealing with deep moral and political disagreements in a

democratic society? Or, to put it differently, is the request that "in a respectable democracy one should, within limits, tolerate conduct that one finds objectionable" sufficient for guaranteeing a fair treatment of cultural and religious differences?

D.W. Griffith was disposed to tolerate the African-Americans as long as they behaved according to his racist standards; but of course that form of tolerance was not enough. One could immediately respond that Griffith's appeal to tolerance was extremely biased and unfair. Still, this example can give us an idea of what Johann Wolfgang Goethe had in mind when he wrote that "Tolerance should be a temporary attitude only: it must lead to recognition. To tolerate means to insult."[1] Today some thinkers follow Goethe's train of reasoning and argue that mere tolerance is not enough: recognition and respect should be the ideals of a genuine democratic society.[2] This is because, in fact, tolerance has very often an asymmetric structure: while the

[1] J. W. Goethe *Maximen und Reflexionen*, *Werke* 6, 507, 1829, quoted in R. Forst, "Toleration", *The Stanford Encyclopedia of Philosophy* (Summer 2012 Edition), Edward N. Zalta (ed.), available on line at http://plato.stanford.edu/archives/sum2012/entries/toleration/

[2] Cf. E. Galeotti, "Citizenship and Equality: The Place for Toleration", *Political Theory* 21 (1993), 585–605; T. Scanlon, "The Difficulty of Tolerance," in D. Heyd (ed.), *Toleration. An Elusive Virtue* (Princeton: Princeton University Press, 1996), 226–239; R. Forst, *Contexts of Justice* (Berkeley and Los Angeles: University of California Press, 2002) and R. Forst, "The Limits of Toleration", *Constellations* 11 (2004), 312–325. An interesting criticism of the views centered on the notion of recognition, with a particular reference to the religious cultural conflicts, is in S. Mendus, *The changing face of toleration* (forthcoming); but see the reply by R. Sala, *Discussione di Susan Mendus'* The changing face of toleration, (forthcoming). At any rate, below I will argue that full respect and recognition cannot be described as forms of tolerance at all.

most powerful members of society (who generally, but not always, coincide with the majority) can decide whether to tolerate the presence of the weakest members of society, generally the reverse is not true. In this light, the practice of tolerance can only be a very partial achievement, and what democracy really needs is *recognition* and *respect* of the weakest members of society. Therefore, in the light of Goethe's objection, one should conclude that tolerance is too modest an ideal for an advanced democracy.

The second question I want to raise may appear to contradict the first. It concerns the very frequent cases in which tolerance seems inappropriate altogether—which, by the way, tend to be the most relevant examples of moral disagreement. D.W. Griffith, with his request of tolerance for his racist beliefs, can help us again in understanding why these cases are philosophically problematic. The cinematic expression of those beliefs (or, as a matter of fact, any expression of them) amounts to nothing less than hate speech. However, it is reasonable to think that we should not tolerate hate speech. An analogous example in this sense is the discriminatory attitude toward homosexuals, which is still very common in many cultures and religions, including the West. Most well-educated people would argue that tolerance of extremely homophobic views and conduct are morally wrong. The question then raises whether we can develop a conception of tolerance that makes it possible to discriminate adequately the cases in which tolerance is morally required from the cases in which it is morally illicit—that is, the cases in which tolerance would be too much of a concession to somebody who does not deserve it at all. We could call this the "Unjustified tolerance objection."

Below I will discuss Goethe's objection and the Unjustified tolerance objection by considering the treatment of tolerance offered in the last chapter of Audi's *Democratic Authority and the Separation of Church and State*.[3]

II

Audi's on Religion and Democratic Society

Many important philosophers (including Jürgen Habermas, Hilary Putnam, Ronald Dworkin, Philip Kitcher, Thomas Nagel, Daniel Dennett, and Brian Leiter) have recently written about the relevance, or lack of, that religion has for our political and ethical lives.[4] However, Robert Audi's *Democratic Authority and the Separation of Church and State* is deepest reflection published in the two decades following John Rawls's *Political Liberalism* on how a liberal democracy should balance the two essential but seemingly conflicting needs of cultivating secularization and

[3] Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011). Unless otherwise specified, parenthetical references refer to this text.
[4] J. Habermas, *An Awareness of What is Missing: Faith and Reason in a Post-secular Age* (Cambridge: Polity Press, 2010); H. Putnam, *Jewish Philosophy as a Guide to Life*: *Rosenzweig, Buber, Lévinas, Wittgenstein* (Bloomington: Indiana University Press, 2008); R. Dworkin, *Religion Without God* (Cambridge (MA): Harvard University Press, 2013); P. Kitcher, "Ethics without Religion", http://www.berfrois.com/2012/01/philip-kitcher-ethics-without-religion/, (2012); T. Nagel, *Secular Philosophy and the Religious Temperament: Essays 2002-2008* (New York: Oxford University Press, 2010); D. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (London: Penguin, 2006); B. Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2012).

guaranteeing religious freedom.[5] It is easy to predict that this book will be read still many decades from now. One of its assets is that, while many authors who write on these issues defend partisan views—by insisting either that religion does not add any special ingredient to democratic societies or that it is indispensable to them –, Audi holds a very balanced view. According to him, in a decent society religion is not imperative but still it holds an ethical authority of its own. In this light, Audi convincingly recommends a clear-cut Church-State separation and the government's maintenance of religious neutrality.

Another asset of the book is that—differently from the vast majority of contemporary philosophers, whose expertise is restricted to just a few topics –, Audi dominates many different areas, including philosophy of religion, action theory, epistemology, political philosophy, and ethics, which are in different measure relevant for the subject of this book. Unsurprisingly, then, in this book he draws with great competence, and very helpfully, from many of these fields.

Besides the mentioned issue of the separation between Church and State (in regard to which Audi advances an innovative theoretical proposal based on the "principle of secular rationale"), *Democratic Authority and the Separation of Church and State* develops original and deep proposals on topics such as the relationship between religion and ethics, the meaning of contemporary secularization, and the role that religions should play in the political arena.

[5] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

Since, of course, there is not much point in stressing how much I agree with this book, I will instead discuss the original proposal that Audi develops in the last chapter, which is dedicated to the hotly discussed question of tolerance. In this regard, I will raise two doubts connected with the objections mentioned at the beginning of this article.

III

The Limits of Tolerance

Tolerance is an attitude that tends to produce non-harmful behavior; still, as Audi notices, it implies "disapproval or at least a kind of dislike" (p. 106). Also, it is not a moral virtue, since "a wholly amoral person could be tolerant ... [and] even people who are not amoral can be tolerant for the wrong kinds of reasons" (p. 108). However, tolerance is an "adjunctive virtue [since] it assists the person in realizing moral virtue but it is not itself a moral virtue, such as justice, fidelity, or veracity" (p. 109). Being an adjunctive virtue, tolerance is a *normative* virtue—which means that it can be applied correctly or incorrectly.[6]

> Tolerance may […] be justified both behaviorally and attitudinally, but expressed in ethically inappropriate ways. It may be too vocal, too intrusive, too patronizing. It must achieve a mean between the excess of officious zeal and the deficiency of indifference toward the positive changes that would make it unnecessary […]. [For example] passive disapproval of unequal treatment is criticizably lax;

[6] On the idea of adjunctive virtues and their normative character, cf. R. Audi, R. and P.E. Murphy, "The Many Faces of Integrity", *Business Ethics Quarterly*, 16 (2006), 3-21.

> overzealous criticism may infringe both liberty and privacy rights and also be counterproductive (p. 108).

Therefore, one "cannot determine what counts as due tolerance apart from moral principles and associated rights" (p. 112)—and that implies that, in some cases, an act of tolerance can be immoral and an act of intolerance can be moral. It is morality, then, that determines when tolerance is correctly applied and when it is not.

It is interesting to compare Audi's idea that tolerance, if not a moral virtue, is still an adjunctive normative virtue with the view defended by Forst. According to Forst, "[i]n itself, […] toleration is not a virtue or value; it can only be a value if backed by the right normative reasons."[7] It is unclear to me, why Forst assumes that a virtue *always* has to be backed by right normative reasons. Let's consider attitudes such as courage, patience and benevolence. Generally, they are beneficial, but in particular situations they are not: sometimes courage is not the best attitude to take; in certain circumstances, remaining calm is just wrong; some people simply do not deserve benevolence. Still, everyone would agree that courage, patience and benevolence *are* virtues (even if not moral virtues, but adjunctive virtues, as Audi notices), and so they have always been considered—and this is because they respond to ethical and rational standards that in principle determine whether and when their particular manifestations are correct. The crucial point here is not that virtues have always to be backed by right normative notions, as Forst claims, but that they *could*. Audi is therefore right in saying that, even if it is not a moral virtue, tolerance is still a

[7] R. Forst, "Toleration", *The Stanford Encyclopedia of Philosophy* .

virtue, a normative virtue, since one can always be wrong in instantiating it.

A related open issue concerns the criteria that should be used for establishing when its applications are morally appropriate. In this regard, Audi proposes the following, very interesting principle that is applicable to both individuals and governments.

> *The principle of toleration.* If it is not reasonable for proponents of coercion in a given matter to consider themselves epistemically superior in that matter to supporters of the corresponding liberty, then in that matter the former have a prima facie obligation to tolerate rather than coerce (pp. 119-120).

This principle, in turn, assumes an idea that could be called "epistemic parity." In Audi's words,

> [e]pistemic peers are (rational) persons who are, in the matter in question, equally rational, possessed of the same relevant evidence, and equally conscientious in assessing that evidence. Rational disagreement between epistemic peers can occur not just inter-religiously—between people who differ in religion (or one or more of whom is not religious at all)—but also intra-religiously (p. 117).

Three remarks are relevant here. First, the main reason why the principle of toleration is so interesting is that it offers an epistemic criterion to decide whether some conduct should be tolerated. This is important because, when the possibility to tolerate something is controversial, this happens because some very difficult ethical issues are implied; thus, shifting from the ethical to the epistemological level is a very promising move. Second, the principle of toleration only gives *prima facie* obligations to tolerate rather then coerce; and this means that there can always be superior reasons that can supersede its results.

Third, this principle can give prima facie *sufficient* reasons for tolerating a conduct; but, in my opinion at least, it need not give prima facie *necessary* conditions. It may in fact happen that one has good ethical reasons for tolerating the conduct of someone who is not one's epistemic peer. Think, for example, of a bizarre animistic ceremony celebrated by the members of a community who believe that, in this way, their ancestors will contact them. The epistemic justification of such ceremony would of course be very unsatisfactory, so we would not consider the members of that community to be our epistemic peers; however, we could still have independent moral reasons to tolerate their ceremony.

Given the ingenious and deep conception of tolerance developed in *Democratic Authority and the Separation of Church and State*, it may be interesting to see how it could respond to the two objections raised at the beginning of this article, i.e. the Goethe's objection ("Is tolerance enough of a goal for a democratic society?") and the Unjustified tolerance objection ("How can we establish those cases in which toleration would be morally wrong?"). I will do this in the next two sections of this article.

IV

Goethe's Objection

According to the first objection, tolerance is a provisional instrument for dealing with cultural and religious differences in the democracies we actually live in (which are uncontroversially far from being ideal).

Certainly, tolerance is extremely important when it replaces open cultural and religious tensions conflicts, thereby preventing injustice and violence. One may think that in a society in which power was equally distributed but differences in beliefs and conduct still existed, tolerance could be enough of an ideal to allow for reinforcing peaceful coexistence. However, in the real world tolerance is very often the attitude that a dominant group assumes towards an individual or a minority or a less influential group whose ideas regarding some important ethical or political issues diverge from those of the dominant group. Therefore, very frequently the logic of tolerance is based on the distinction between a "tolerant entity" and a "tolerated one", and such roles are not interchangeable. Thus the tolerated is always in a state of social and cultural subordination. Let's for example consider, for example, the opinion expressed nowadays in the democratic societies regarding openly gay relationships. Without considering the foolish view that homosexuality should be banned altogether, different forms of tolerance toward the gay community are advocated in contemporary public discussion. More specifically, in an ascending order of inclusiveness, some people (including those conservative politicians who give voice to groups still numerically relevant in Western societies) claim that, while gays may be tolerated, it is clearly due to a moral and mental disorder;[8]

[8] In 2004, for example, during an interview to confirm the post of Vice President at the European Parliament for which he had been designated, the Italian politician (and professor of philosophy) Rocco Buttiglione declared that he viewed homosexuality not as a crime but as a sin. On other occasions he has claimed that homosexuality is objectively wrong, in the same sense in which not paying taxes is objectively wrong, and that it is a moral disorder that derives from a mental disorder (the "*Egodistonic* sexual orientation") (cf.

others maintain that informal unions should be tolerated but not formalized; still others hold that some rights should be granted to gays but other rights, including marriage, should not; finally, some claim that all civil rights should be granted to gays, including marriage. It should be noticed that the first three views ask for different levels of tolerance for gays, while in the last case the request of tolerance has been overcome by the request of unqualified respect and recognition. However, the latter result has been reached in very few places, and even there it does not seem completely stable. Thus, in most if not in all places, the discussions still tend to focus on how tolerant the straight majority should be toward gays.[9] This kind of relationship has the form of "*us* versus *them*" (the tolerant straight majority versus the tolerated gay minority). Never does it take the opposite form. Therefore, in this and many similar cases (even if not always), tolerance is an asymmetric relationship, in which one side has the power to decide what kind of, and to what extent, tolerance should be granted to the other side, which is thereby left in a condition of subordination.

This common phenomenon gives us an idea of what Goethe had in mind when, as mentioned above, he wrote that "Tolerance should be a temporary attitude only: it

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http://www.adnkronos.com/archivio/adnagenzia/2009/03/17/politica/gay-buttiglione-oms-riconosce-il-disturbo-di-disadattamento-sessuale_201630.php and http://www.lettera43.it/politica/1581/per-buttiglione-essere-gay-e-sbagliato.htm). At any rate, in Buttiglione's case, for the first time in its history the European Parliament denied the post to a candidate who had been designed to the Vicepresidency.

[9] The last group (that asking for full recognition of gays) is increasingly successful: more and more states and nations accept gay marriage. However we are still far from being able to say that even in Western democracies gays receive equal treatment.

must lead to recognition." In the Goethian perspective, tolerance—by conceptually implying that the tolerated persons are wrong—cannot be enough and should be conceived of only as a preliminary goal. Actually, when there is no perception that a person's conduct is wrong there is no need (and actually neither is there the possibility) to tolerate her and her conduct.

It can be argued, then, that democracies should seek full and equal recognition, in which nobody *tolerates* anybody else, but differences are accepted without asymmetry and without attributing to them any particular political or ethical relevance. This result has been obtained, for example, by Catholics and Protestants, after five centuries of often atrocious wars and persecutions. The historical development of this relationship is enlightening. After Luther started the Reformation (in 1517), in West Europe each Christian denomination saw the others as committing the worst of all possible errors, i.e., embracing the wrong religion—an error that would have given them nothing less than eternal damnation. Very often, then, the religious groups that comprised the majority in a particular city or state tended to persecute, often very brutally, the members of the competing religious groups. Given this intolerant attitude, it is unsurprising that massacres and wars followed, decimating the European population. Afterwards, an era of toleration slowly took place, starting with the Nancy edict and the theorizations of philosophers such as Bodin, Locke, Spinoza, Bayle, and Voltaire. In this new perspective, the various Christian denominations started to tolerate each other, even if each kept thinking the others were dramatically mistaken—and therefore, in some precise sense, constitutively inferior and worthy of suspicion or disdain. Finally, among the different Christian traditions,

also the age of tolerance has ended, and each side has begun to see the others as fully legitimate and worthy of respect.[10] Indeed, nowadays, no side sees the others as dramatically wrong. Consequently, tolerance is no longer needed—or even possible—because society has moved beyond it.

A three-stage process is clearly visible here that can be identified also in other cases. What happens in these cases is that, first, a marginal group is ostracized and sometimes persecuted because some of its beliefs and conduct are perceived as immoral and socially disruptive by the dominant members of society; next, the group is progressively accepted; and finally (in the most fortunate cases) it achieves full recognition and respect. Therefore the scheme is the following: after a first phase of intolerance and sometimes hate toward a marginal group,[11] a phase of tolerance follows, eventually followed by full recognition and respect in which even the appearance of relevant errors

[10] The civil war in the former Yugoslavia, in the 1990s, can seem like a partial exception to this rule, since part of the conflict was between Orthodox and Catholic Christian. But in that case, of course, the problem was much more a clash of identitarian nationalisms than of different religions.

[11] Very frequently, when a group is denied tolerance part of the reason is that that group is represented as intolerant and consequently unworty of tolerance (according to the line defended by Popper [*The Open Society and Its Enemies* (London: Kegan Paul, 1945)] and others). However, as noted by Forst (R. Forst, "Toleration," *The Stanford Encyclopedia of Philosophy* (Summer 2012 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/sum2012/entries/toleration/>, "the slogan 'no toleration of the intolerant' is not just vacuous but potentially dangerous, for the characterization of certain groups as intolerant is all too often itself a result of one-sidedness and intolerance" (see also R. Forst, "The Limits of Toleration").

by that group has evaporated. So the same need of tolerance, in any of its forms (since of all of them require the perception that the tolerated part is in some kind of relevant error), has disappeared.

A few remarks are useful here.

(i) Tolerance is an important achievement, but should not be considered the final goal in dealing with cultural, ethical, and religious differences. The implementation of full recognition and respect should be a higher, if more difficult to obtain, aspiration for truly democratic societies;

(ii) There may be conduct that will never pass from the level of toleration to that of full recognition and respect, but we are not in the epistemic condition to know for which specific conduct this will be the case;

(iii) History proves that, in many cases, conduct that was originally seen as intolerable by the strongest social groups, was later tolerated, and finally attained full recognition and respect.[12] At this last stage, the same belief that a particular conduct was wrong has disappeared and, correspondingly, too has the need and possibility of tolerating them (since toleration requires a perceived wrong conduct as its object);

(iv) The achievement of full recognition and respect is desirable for at least three reasons. First, it opens a much better way to fairness and equality than mere tolerance;

[12] Of course, this is an ideal characterization. It may happen that a phase of intolerance follows one in which a group had been tolerated. What is important, however, it is that there is some kind of historical teleology going from intolerance to tolerance to full respect and recognition.

second, it produces a much stronger feeling of integration in the groups whose conduct was initially fought and then only tolerated; third, it strongly reduces the possibility of identitarian and cultural clashes in a society;

(v) Reaching the level of being tolerated is a necessary condition for a kind of conduct that is disapproved of to later be respected and recognized as fully legitimate. That is, the conduct that never reaches the threshold of tolerability—i.e., which always remain intolerable—a fortiori cannot reach full respect and recognition.

As I said, this three-stage process has actually been very common in history. Let me give some examples. In the 1960s many Southerner Italians migrated in search for jobs to the Northern Italian regions, where they encountered open hostility by many of the natives (explicitly, many landlords refused to rent to people from the South). A few years later, the immigrants began to be tolerated, even if they were still looked upon with some suspicion; today, finally, they are almost completely recognized and respected (the "almost" caveat is due to the persistence of small, but noisy xenophobic minorities). In the USA the same process has happened with the immigration of many non-Wasp nationalities, who were first disrespected, then tolerated, and then finally got fully integrated. Analogously, in Europe and in the US atheists were first persecuted (many of them were burned in the early modern age and even according to Locke they could not be tolerated), then reached the stage of toleration, and now are fully accepted and recognized in most Western states.

Of course, tolerance is still necessary in many cases and in some cases is not even realized yet, even in mature

democracies. This is true, for example, in the case of immigrants from Africa and East Europe to Western Europe, who are very frequently subject to adverse propaganda and sometimes suffer violent attacks. In these cases, full recognition and respect are clearly still desirable goals, and widespread tolerance would already be a satisfactory result. Similarly, in most democracies tolerance is still a reasonable goal for most non-Christian religions, since the achievement of full recognition and respect is still far in time. Nevertheless, Goethe may have had a point in claiming that one should take tolerance as a temporary attitude only since, ideally, we should accept the others, even when they are very different from us, without assuming that they err against morality or reason.

To this objection one could perhaps try to respond that actually many views (including Audi's) do imply the possibility of a form of tolerance that implies full recognition and respect. Perhaps so. Still, it should be noticed that in that case the meaning of the word "tolerance" has changed deeply. In fact, full recognition and respect imply that all appearance of being in moral error (which, as Audi and many others correctly remark, is a necessary trait of toleration) has disappeared, as shown by the example of the Catholic and Protestant versions of Christianity.

What I have said in this paragraph does not imply that Audi's account of tolerance is wrong. What I have rather been arguing is only that the ideal of tolerance should be considered as intrinsically provisional, since in the long run one should ideally look for the full recognition and respect of the systems of conduct that are today only tolerated, insofar as they are perceived as morally wrong.

V

The Unjustified Tolerance Objection.

Let's now consider the Unjustified tolerance objection. As said, this objection concerns the situations (whose existence, of course, Audi is perfectly aware) in which tolerance would evidently be too much—i.e., its application would actually be ethically unjustified. Arguably, these situations include hate speech, homophobia, and some religious conduct, such as strong discrimination against women. It is very reasonable to think that this conduct should not be tolerated and that we should simply try to stop them (even if, as Audi convincingly argues, in trying to stop them it would be morally preferable to try to use persuasion rather than coercion).

What is problematic, however, is why exactly, while some problematic conduct should be tolerated, those just mentioned are instead below the threshold of tolerability. An account of toleration should be able to show that conducts such as cases of hate speech, differently from other problematic cases, are not acceptable at all and should not be tolerated.

As we have seen, Audi's view appeals to the principle of toleration, which states that it is "not reasonable for proponents of coercion in a given matter to consider themselves epistemically superior in that matter to supporters of the corresponding liberty, then in that matter the former have a prima facie obligation to tolerate rather then coerce." This, in turn, presupposes the notion of "epistemic parity", according to which "Epistemic peers are (rational) persons who are, in the matter in question, equally rational, possessed of the same relevant evidence,

and equally conscientious in assessing that evidence." The question we should ask then is: is the principle of toleration adequate for discriminating the cases in which tolerance is acceptable, or even required, from the cases in which it is not required or would even be immoral?

Let's consider a situation in which, in a democratic society, a religious group discriminates against women by compelling them to wear the burka (so that all parts of their bodies are perfectly covered all the time) at any public occasion from her adolescence to her death. And let's assume that, within that religious group, some not illegal by very harsh repercussions invariably follows if a woman contradicts the burka tradition (for example, with her public humiliation and social ostracization). Now let's imagine a well-intentioned philosopher who sees this conduct as deeply discriminatory and, consequently, as intolerable. According to Audi's account, preliminarily the philosopher has to evaluate if the leaders of that religion, who impose the use of burka to the women of his religion, are epistemic peers of hers. For the sake of the argument, let's imagine that those religious leaders are very well read and sensible, know the relevant evidence as much as the philosopher, understand perfectly why the philosopher thinks that the imposition of the burka is unfair, and have no problem with the fact that women outside their religious community do not wear the burka. In this situation, the philosopher should conclude that these religious leaders are epistemic peers of hers. So their opinion matters for deciding whether this is a case in which, at least prima facie, tolerance should be applied. However, the religious leaders also sincerely believe that respect of traditions is more important than the fairness in treatment. Consequently, they believe that women of their religion should never

show any part of their body in public and that legal but harsh punishment should always be imposed on their female coreligionists who have violated the burka norm. At this point, if I interpret correctly the principle of toleration, from it should follow that the philosopher has a prima facie obligation *not* to try to coerce the religious leaders that the burka is an obsolete, unfair tradition and that it should, at the very least, be made optional for the women of that religion. That is, prima facie the philosopher should tolerate the burka tradition even if she sees it as deeply unjust towards women. More examples of this kind could be presented, but I believe my point is clear: some conduct appears intolerable to us even if we should happen to be confronted with epistemic peers of ours who advocate it.

(In this respect, it is perhaps worth mentioning that these kinds of cases do not affect the view I presented early, according to which tolerance should ideally be supplanted by full recognition and respect. Since conduct like the imposition of the burka should not be tolerated in the first place, one can be confident that it will not reach the next stage of full recognition and respect. Actually, I do know of any concrete case in which some conduct has gone directly from not being tolerated to being fully recognized and respected, without passing through an intermediate phase of tolerance).

At this point, we should look at the role that the term "prima facie" plays in Audi's principle of toleration. As seen, this principle states that, in a matter in which one does not have epistemic primacy, one has "a *prima facie* obligation to tolerate rather then coerce." I suspect that in this context the term "prima facie" is used in order to protect the principle of toleration against objections like the

one just raised. If so, however, a question can be asked: What are the kinds of reasons or principles that can supersede the principle of toleration and dictate to us not to tolerate a conduct even when this is advocated by an epistemic peer of ours?

The most plausible candidates for playing the role of the superseding reasons in this context are of course ethical in character. They could then be of the kind, 'Do not tolerate anything that would violate a fundamental human right' or (as proposed by Rawls), "While an intolerant sect does not itself have title to complain of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger."[13] In this way, however, the risk is that these superseding ethical principles do in fact all the important work—substantially trumping the principle of toleration, with its elegant epistemological component.

Here is a possible reply to this objection: 'the principle of toleration only establishes when toleration should be applied in case one can draw from it the same conclusions that one could derive from the superseding ethical principle; but this fact does *not* prove that the principle of toleration cannot play an important role, since it can still give us prima facie reasons to be tolerant.'

Unfortunately this reply does not solve the problem. In the most sophisticated philosophical jargon (which is that

[13] J. Rawls, *A Theory of Justice* (Cambridge (MA): Harvard University Press, 1971), 220. Rawls's principle, which allows security to be a basis for denying tolerance, is particularly for the burka issue, since it is obviously particularly difficult to identify a person who wears a burka. Indeed, it has actually been used in their regard in France and in Italy.

intended by Audi), the term "prima facie" is used in regard to reasons that suffice unless defeated by considerations at least equally strong. However, in consideing the practice of imposing the burka on women (and in similar cases, which are the most problematic from the moral point of view), the ethical defeating reasons, which suggest not to tolerate, appear to be immediately evident and immediate. That is, in thinking about that practice, its ethical intolerability strikes us well before, and much more strongly, than the reasons its advocates may offer in its favor, even when they are our epistemic peers. And if the ethical level is that on which one should take the ultimate decision about whether tolerating or not, what role is left for the principle of toleration? That is, why should one consider the epistemic level at all?

The Unjustified tolerance objection seems to pose a serious problem, then. On the one side, the principle of toleration—which attributes an important role to epistemic reasons in matters of tolerance—looks very promising. On the other side, it is unclear which role it can exactly play in assessing difficult cases such as that concerning the imposition of the burka.

Is there a way out of this predicament?[14]

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[14] I thank Robert Audi and Ben Schupman for their interesting comments on a previous version of this article.

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SYMPOSIUM

THE CHURCH AND THE STATE

DEMOCRACY, SECULARITY, AND TOLERATION

BY ROBERT AUDI

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Democracy, Secularity, and Toleration

Robert Audi

It is an honor to be the subject of the five provocative and valuable commentary papers to which I am here replying, and I must say immediately that I will not have space to attempt a truly comprehensive response. My purpose is instead to combine meeting objections with clarifying and extending my position, in the hope of stimulating more exchanges of ideas and drawing other readers into further reflection on the enduringly important topic of democratic authority in relation to religion and the ethics of citizenship.

I

Principles and Rights as Elements in the Theory of Democracy: A Response to Michael Perry

Michael Perry asks me the difficult questions, "What is the difference, if any, between your liberty principle and the right—the internationally recognized human right—to religious and moral freedom? If different, are the principle and the right complementary or competitive?" (pp. 11-12 in this issue). My principle in question is "that government

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should protect religious liberty to the highest degree possible within a reasonable interpretation of the harm principle" (p. 41), where the latter principle is Mill's famous one in his *On Liberty*. In Mill's core formulation, this latter principle is "that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection […] to prevent harm to others." Let me reply to Perry by first making some general points about rights and principles and then proceeding to some more specific responses.

I leave aside the difficult question whether principles are normatively more basic than rights. There is no need to pursue that here, since nothing I say will depend on the matter.[1] Moreover, even if a principle, say one calling for religious freedom, is normatively more basic than the *corresponding right*—in this case the right to freedom of religion, the two can be equivalent in practice, say for policy-making: they may call for the same acts and rule out the same acts. Whatever the grounds for the equivalence between, on the one hand, satisfying the principle and, on the other, respecting the corresponding right, the principle can be true and important. Given what Perry says about the human right to religious freedom, I believe there is adequate reason to think that the importance of the principle is undiminished. To be sure, he refers to 'religious and moral freedom' and I take that to imply *two* rights, whereas I am focusing just on the right to religious freedom. For me, the term 'moral freedom' is far from

[1] I discuss the nature and relations among rights, principles, and obligations in "Wrongs within Rights," *Philosophical Perspectives* 15, 2005, 121-139.

clear, and the same holds for 'freedom of conscience', which I will return to in responding to Domenico Melidoro below.

In my view, then, my liberty principle might well be in practice equivalent to what Perry has in mind in describing *one* of the rights he compares with it: the right to religious freedom. There is, however, a conceptual difference between the principle and that right. This makes room for a kind of complementarity between them—which I believe exists at the conceptual level even if they are equivalent in their practical guidance. The relevant conceptual difference, however, also makes room for certain advantages on each side.

Take rights first. On the rights side, at least for *moral* rights, one advantage in debates is what might be called their *aura of righteousness*: rights are by their nature *claimable* by their possessors, *assertible* by them or by proxy, and *presumptively overriding*. Perry's discussion shows, however, that, realistically, when their content is properly spelled out, rights are conditional. Still, it is characteristic of *appeals* to rights that, in the context of restricting or producing action, they are taken to override any counter-considerations. If you assert your right to speak in a meeting, you normally imply that there is no overriding counter-consideration and you tend to expect compliance.

Now consider principles. Since principles are truth-valued, they can be derived by ordinary reasoning from other propositions, ideally others that are more plausible or more basic or both. Thus, if one could assume that human flourishing ought to be optimized, and that harm detracts from it, one could proceed (somewhat as Mill did) toward a deduction of the liberty principle. Rights claims can be

supported in various ways, but perhaps the only straightforward principle for deriving them from anything potentially supportive employs the idea that if there is a right to *x,* and *x* requires *y*, then there is a right to *y.* Thus, if we have a right to a safe environment and this requires governmental limitations on carbon emissions, we have a right to that. This strategy entails presupposing one right in deriving another and, typically, an empirical premise as well. There are other strategies, but proponents of rights as normatively essential tend to consider it self-evident that there are the rights they posit or, in any case, to consider this to be sufficiently intuitive not to need derivational support. No parallel, comparably general assumption holds for moral principles.

Perry is aware that the affirmation of a right is not clear until certain things are specified, notably including addressees—those who must accord or avoid violating the right—and conditions for inapplicability or defeasibility. By contrast, my liberty principle does have a clear addressee: it is addressed to government. Moreover, the *kind* of defeater for it is indicated by a "reasonable interpretation" of the harm principle. This twofold difference need not (as Perry realizes) be crucial once each position is spelled out. Indeed, he notes three conditions under which alone governments may limit religious freedom without violating the (conditional) right to it: the act in question must "serve a legitimate government objective," do so "better than would any less burdensome" alternative, and do this in the service of a "sufficiently weighty" good. I consider these conditions plausible as limiting the right to religious freedom, but they are no less applicable to clarifying the liberty and harm principles.

In the context of democratic theory, however, there is a difference between the liberty principle and the right to religious freedom. Affirmation of the right tells government roughly where not to tread; it is largely negative in thrust. The liberty principle does that too, but (in the contexts in which it is pertinent) affirming it also presents religious liberty as a *value* to be protected. This conceptual difference is associated with a difference in practice. Guided by the liberty principle, governments seek arrangements that presuppose religious expression and foster its freedom; guided by the right to religious freedom, government avoids clearly restrictive legislation affecting religion but, not improperly, may depend on assertions of the right to religious liberty to frame laws and policies that foster that liberty.

Again, I believe that principles and rights are often in a territory of complementarity, and I cannot see in Perry's paper any reason to think that we should give up either line of normative guidance of democratic government. If Perry and I differ on any normative issue in the domain of religion and politics, I doubt that it is owing to our differential emphasis on principles as opposed to rights.

II

The Place of Religion in Democracy: A Response to Domenico Melidoro

Many have questioned whether religion is special in any but an historically contingent way. Domenico Melidoro cites Cécile Laborde as maintaining that (in his words)

"religious freedom does not deserve a distinct treatment because of its status. It is only a subcategory of more fundamental and general entitlements such as freedom of association, privacy, and free speech" (p. 29 in this issue). He supports this with the claim (not explicitly ascribed to Laborde) that conscience—understood as the human faculty for distinguishing the good from the bad or as the source of moral agency—"is the supreme object of concern and respect" (Ibid.). Opposing the view that religion is not special, Michael McConnell and John Finnis are cited. Melidoro offers little argument against their "uniqueness thesis" regarding religion in relation to government, but he does take me to support it inadequately by my noting "the enormous power that religions—and sometimes clergy as individuals—have had over the faithful" (p. 42); and he notes that I myself have said that my Protection of Identity Principle—the principle that "the deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments tends to be" (p. 42)—does not require a government that accepts it to abandon neutrality toward religion.

The first thing to note by way of clarification is that my point about the power of religion as a sociopolitical force is meant not to explain (though it is meant to suggest) what is special about religion from the point of view of the theory of democracy but only to cite "historical reasons for the special attention to religion in political philosophy" (p 42). These reasons are important but (as will shortly be explained) are not my main concern in treating religion as in a certain way special.

Freedom of conscience as a concern of government

The second point I would stress is that we should not accept the view of conscience quoted above (at least not without what would be a detailed and partly stipulative account of what conscience is). I doubt that Melidoro would on reflection hold (or that Laborde holds) that conscience is "*the* supreme object of respect and concern" (italics added), though it is of course one important object of governmental concern. Nor is it "*the* faculty for distinguishing the good from the bad" (italics added); but if it is one such faculty, it is fallible. Plainly, an evil person, such as a committed Nazi, can have a conscience—one geared to corrupt values.

Surely history shows that conscience often operates under standards given to it, often earlier in life than the stage at which critical thinking is possible; if, as on most conceptions of conscience, it is distinct from reason, it has at best limited moral authority. If it is guided by reason, then what we learn from it about normative principles depends on our rational justification for those principles and other moral standards. It is not in general a first-order route to moral discovery, but a second-order "faculty" for monitoring our adherence to standards we have acquired from elsewhere.

There is of course a right to "freedom of conscience," as Perry notes; and the phrase is prominent in many declarations of human rights. But freedom of conscience is not a right to do *whatever* one's conscience dictates; it is more nearly the right not to have one's conscience manipulated or prevented from leading one to do what is permissible under such standards as the liberty principle. My book provides for this right, but I prefer not to take the

term 'freedom of conscience' to be clear enough to bear substantial weight on its own.

Religion and the sense of identity

This brings us to the main challenge Melidoro states: to indicate why religion is special in a way of concern to political philosophy. Here it should be useful to cite nine criteria for a religion that my book lists:

> (1) appropriately internalized belief in one or more supernatural beings (gods); (2) observance of a distinction between sacred and profane objects; (3) ritual acts focused on those objects; (4) a moral code believed to be sanctioned by the god(s); (5) religious feelings (awe, mystery, etc.) that tend to be aroused by the sacred objects and during rituals; (6) prayer and other communicative forms concerning the god(s); (7) a worldview according the individual a significant place in the universe; (8) a more or less comprehensive organization of life based on the worldview; and (9) a social organization bound together by (1)–(8) (p. 72).

I stressed that these are all conceptually relevant to something's being a religion but none individually necessary or sufficient for that. I also noted that religions such as Christianity, Judaism, and Islam—likely the most important group for our purposes—satisfy them all. For some denominations among these three with millions of adherents, the criteria are indeed robustly satisfied. Now there is no doubt that someone can feel as deep pangs of conscience about violating, say, an aesthetic principle as about violating a religious one. But pangs of conscience are only quite roughly correlated with the sense of identity.

Moreover, for reasons already indicated (one being the corruptibility of conscience), this alone need imply nothing

about what government should or should not protect. Secondly, insofar as something not called a religion but, say, a "philosophy of life," approaches satisfaction of all these criteria (some of which are more important than others), it becomes plausible to call it a religion. I have explicitly left room for the possibility that a non-religion plays a key role in someone's sense of identity (e.g., p. 71). As a matter of contingent fact, however, it seems rare that the sense of identity is as closely tied to a non-religious life-orientation as to a religious one, with its characteristically wide and deep reach into the conduct of human life. Where this occurs, the principle of protection of identity applies equally to such a secular person.

If Melidoro would settle for the point that religion is only contingently special in the ways I have indicated—and, given the criteria for it I have noted—in creating a *vulnerability* among many religious people to both harms and liabilities to limitations of their freedom, we might largely agree. In any case, I believe that a strong contingent uniqueness—which may indeed be undergirded by psychological laws of a certain kind—suffices for the Protection of Identity Principle to bear on how democratic governance should be normatively guided; but it does not suffice, nor have I claimed it suffices, for preferential treatment of the religious simply *as such* in making laws or framing public policies.[2]

[2] There is a different and more extensive discussion of what is special about religion in my *Rationality and Religious Commitment* (Cambridge: Cambridge University Press, 2000), esp. 100-103.

III

Political Secularism and the Accommodation of Religious Liberty: A Response to Jocelyn Maclure

Jocelyn Maclure takes me to see "the separation of church and state as the core principle of the secular state" (p. 39 in this issue). He questions whether it is such and also whether my neutrality principle is needed in addition to my other separationist principles. He apparently agrees, however, with my view that in a certain way religion is special, but he takes it to share with other orientations the element of "meaning-giving beliefs and commitments" (p. 41 in this issue) and asks why a vegetarian Hindu should "be accommodated in prison or in the army and not an utilitarian" (p. 42 in this issue). His positive view seems to be that "religious freedom ought to be seen, for normative purposes, as a subcategory of a broader class, i.e. freedom of conscience" (Ibid.).

In his concluding section he suggests that "political secularism requires that public norms and institutions be grounded upon public reasons" (p. 46 in this issue); but, like Jürgen Habermas and Charles Taylor, he does not go so far as to accept Rawls's famous proviso allowing that comprehensive views such as a religious perspective "may be introduced in public reason at any time provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support" (see my pp. 63-4 for the citation and discussion of this proviso). I have several comments that indicate both that his view is apparently close to mine overall but also different in some significant details.

First, in suggesting that I take "the separation of church and state as the core principle of the secular state," I can agree only if this means 'the secular state *qua* secular' and applies to religion conceived non-institutionally. A democratic state (at least one that is morally sound) will be secular; but it will have other commitments, for instance to liberty, and it may regard those as more important. Indeed, since the liberty principle does not entail, even though it supports, the equality principle prohibiting an established church, I would think that any democratic state should also have the liberty principle as part of its normative core. A minor point I should add concerns his doubt that my neutrality principle is needed in *addition* to the liberty principle and the equality principle as requiring of government equal treatment of different religions. I believe that he has simply assumed that a secular state will have an equality principle applying to *both* different religions and the religious as opposed to the secular. This double-barrelled principle would indeed entail the neutrality principle, but I have thought it best to treat neutrality as a further question beyond equal treatment of different religions. My neutrality principle will follow from my equality principle only with added premises, such as the premise that secularity is a kind of religion itself and hence cannot be "less preferred." Some think that this is true of *secularism,* but it is not true of mere secularity with no associated ideology.

What, then, of the vegetarian Hindu and the utilitarian? The example is a good one to illustrate the Protection of Identity Principle. We can adopt or abandon utilitarianism in a single sitting, and most of the ethical views constituting serious alternatives to it are close enough in existential implications to enable this to be considered mainly an intellectual change. But consider the change from Islam to

Christianity or from being seriously religious to being secular. These have wide existential implications often going beyond one's political orientation.

Maclure himself mentions "meaning-making beliefs and commitments." This strikes me as another way into the same point I put in terms of the sense of identity. It may have advantages well worth more reflection, but I suspect this is a case of complementarity rather than conflict. I do not see, however, that it will help to consider either view a "subcategory" of "freedom of conscience." For reasons I have already brought out, that term is ambiguous; and any of the notions it may plausibly be taken to express will depend, for any moral guidance that can provide on prior normative notions and possibly on such ideas as that undermining a person's sense of identity constitutes a kind of harm.

Regarding the idea that public norms and institutions should "be grounded upon public reasons," I think it will help to note that this must be taken to imply some kind of epistemic grounding—such as justifiability—rather than, as its wording suggests, grounding on actual convictions determining the adoption of the norms or the formation of the institutions. The first kind of grounding is historical and involves actual persons and their reasons for instituting certain practices. The second kind is normative and potentially hypothetical. An institution *founded for religious reasons* may still be *justifiable by secular reasons*, whether anyone does the justifying or not.

I assume he would grant this distinction and that 'groundability upon public reasons' would do better justice to his thinking. There is, however, a subtle point that he may have in mind as well: that civic virtue calls for

depending on reasons to determine policy only if one is sufficiently *motivated* by those reasons. If one is, the reasons are not just rationalizations, say considerations (which one may or may not privately endorse) offered to reduce opposition. These points are captured by my principle of secular motivation (p. 143), which I take to be plausible in itself and beneficial if internalized in the political life of a pluralistic democracy.

My last point here concerns Rawls's proviso. I agree with Maclure that we should not adopt it, and I offer a number of reasons why not (pp. 63-4). I see no reason why Maclure cannot take those reasons as supporting his own view. But I would add here something else (which I imagine he can also accept): that, in using the phrase 'introduced into public reason', the proviso is worded to give the impression that liberal restrictions on "advocacy and support of coercive laws and public politics" (my main focus in the part of the book in question) were restrictions of freedom of expression in general. They are not, as I have often emphasized. We can indeed use free speech to express ourselves religiously even while determined to coerce only if secular (natural) reasons justify coercion.

IV

Rational Disagreement and the Justification of Governmental Coercion: A Response to Paul Weithman

Paul Weithman's fine-grained and provocative critical comments are both challenging and (to me at least)

surprising. I find them surprising because, although he has himself produced substantial work on religion and politics that is quite different from mine—and contrasted with mine at one point in my book[3]—he focuses not mainly on how and why his own views on the ethic of citizenship differ from mine but mainly on an element in my view that I only recently developed and that is only sketched in the book. I refer to my proposed "Principle of Rational Disagreement" and the related discussion of epistemic parity. Let me begin by responding to his critique and then proceed to some overall comments that may help to advance discussion of the ethics of citizenship.

The harm principle and the justification of coercion

Weithman's point of departure is my statement of "sympathy with the idea [of John Stuart Mill] […] that justification of restrictions of liberty must come from adequate evidence that non-restriction will be significantly harmful to persons—though I would add that harm to animals, the environment or even property should also be taken to be a *potentially* adequate ground for restricting liberty" (my pp. 41-42, italics added). He takes this—which he calls *Audi's harm principle*—to imply an

> *Adequate evidence principle*: that "Restrictions of liberty are justified only if there is 'adequate evidence that non-restriction will be significantly harmful to persons, animals, the environment or property'" (p. 49 in this issue).

He then combines this implication with my

[3] See p. 65, where his *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press, 2001) is cited.

> *Principle of rational disagreement*: "The justification of coercion in a given instance is (other things equal) inversely proportional to the strength of the evidence for epistemic parity among disputants who disagree on whether the conditions of justified coercion are met in that instance" (p. 50 in this issue).

Next he supposes that, for citizens in pluralistic democracies who accept my harm principle, "at least part of what they may disagree about when they disagree about public policy is whether the condition expressed in … [my harm principle] is satisfied. That latter supposition, together with (3') [my Principle of Rational Disagreement], implies his wide harm principle:

> (4) The justification of coercion in a given instance is (other things equal) inversely proportional to the strength of the evidence for epistemic parity among disputants who disagree on whether there is adequate evidence that non-coercion will be significantly harmful to persons, animals, the environment or property (p 2).

The reasoning here depends on substituting, for 'the conditions for justified coercion are met'—call it C (for coercion justification)—the supposed equivalent 'there is adequate evidence that *non*-coercion will be significantly harmful to persons, animals, the environment or property'—call it AE (for adequate evidence of the specified kind). This is crucial for the case to show that my principle of rational disagreement commits me to (4)—call it *the presumptive harm principle*. Whatever the case for the truth of this principle (which, though plausible, does not take account of my qualifier 'potentially adequate'), it does not follow from the premises stated. This is because an inadmissible substitution has been made in an intentional context. Consider an analogy. Two students disagree about whether their teacher asked them to draw a circle. Suppose

a circle is necessarily equivalent to a closed plane figure whose circumference is its diameter multiplied by pi. It does not follow that they disagree about whether the teacher asked them to draw a closed plane figure whose circumference is its diameter times pi. They may both fail to have any belief at all about this (they may have no notion of the equivalence). Weithman is apparently assuming that since C and AE are (necessarily?) equivalent, we may substitute AE for C in specifying a disagreement on whether something is the case. I have no commitment to a necessary equivalence here, but the substitution would still be inadmissible.[4]

Another inference Weithman thinks I must draw also involves intentionality. After supposing that he has shown that my view commits me to his

> (9) Statutory restrictions on carbon emissions are unjustified in the US,

he says, "If Audi also thinks, as I assume he does, that government should not impose restrictions which are unjustified, then he *must* also think that

> (10) The US government should not enact statutory restrictions on carbon emissions" (p. 57 in this issue, italics mine).

[4] It is arguable that if the equivalence represents *synonymy,* the substitution is permissible. That is plausible, but I doubt, and think Weithman would doubt, that C and AE are synonymous. I should add that if 'about' is used *de re*, a where two people disagree about the size of the circle on a poster they are viewing, the substitution is permissible; but the kind of disagreement in question in our discussion is mainly on propositions.

The first point here is that I do not believe (9) and, indeed, have some difficulty seeing how Weithman can consider me committed to it. I believe he thinks I am committed to the claim that, as he puts it, "[t]here is conclusive evidence for epistemic parity among disputants in the US who disagree on whether there is adequate evidence that non-restriction of carbon emissions will be significantly harmful to persons, animals, the environment or property" (p. 60 in this issue). Since he quotes my point that a conclusive case for epistemic parity "is at best rare" (p. 53)—which suggests that I would not grant this conclusive evidence claim—we should look for some rationale in his paper for this mistaken attribution to me. One relevant thing he says about parity is that "with respect to questions of political philosophy, a commitment to citizens' political equality requires a rebuttable presumption of their epistemic parity despite marked differences in philosophical sophistication" (p. 63 in this issue). This is a very interesting view and might be arguable, depending on what counts as a rebuttable presumption and just where it should be made. But what is important here is that the passage shows that Weithman is thinking of epistemic parity as something like rationality, which can characterize persons in an *overall* way; he is not thinking of it as *relativized* to a specific matter that is or may be under dispute, whereas I have been working with a relativized notion that is very different from the one he apparently has in mind. I characterize epistemic parity as relative to a specific matter on which there is disagreement; thus, two people could be epistemically "on a par" in some overall way, as they could be equally rational overall, yet fall short of epistemic parity *on a specific matter of dispute,* such as emissions.

A second important point here can be seen by reflecting on the fact that one need not believe all of the logical consequences of what one believes. I am sure Weithman would agree and, if so, his meaning should presumably be taken to be that if I believe the two premises in question—including (9), which I reject—I must *accept* (10), in a sense implying commitment to it. But it is simply not true that one should accept all the logical consequences of what one believes (even all those one considers and sees to be consequences): sometimes applying modus tollens and giving up a "premise belief" is more reasonable than applying modus ponens and adding a "conclusion belief."[5]

The complexity of the notion of epistemic parity

It should help readers if I say more here about epistemic parity, especially if other readers understand my notion of it as Weithman apparently has. The following passage suggests that Weithman has departed from my notion of epistemic parity, and the passage should help to explain how he can take me to be committed to an epistemic parity claim. I have said that epistemic peers relative to a matter at issue "are (rational) persons who are, in the matter in question, equally rational, possessed of the same relevant

[5] This not to deny that at any given time one should avoid believing anything of the form of 'P; P entails Q; and not-Q'. But given that, at time t, one believes, say, P and Q, it does not follow that, at t or the earliest possible time thereafter, one should infer or accept Q. One might believe one may burn as much trash as one likes in one's backyard; realize that, if so, then everyone similarly positioned can, and, instead of accepting that general view, quite rationally give up the first belief. Among the detailed discussions of this commonly overlooked point about belief, acceptance, and inference is ch. 8 of my *Practical Reasoning and Ethical Decision* (London and New York: Routledge, 2006).

evidence, and equally conscientious in assessing the evidence" (p. 117). Immediately after quoting this Weithman says, "[t]he problem is that whether citizens are epistemic peers […] is typically revealed by how they argue for their positions" (p. 57 in this issue). This view about epistemic parity is not implied in anything I have said, and I reject it even on the assumption that Weithman's intention is to imply that determining the epistemic parity of two people is typically revealed in their arguing *equally* well. There is something to be said for taking this *argumental parity*, as we might call it, as *one* probabilistic indication of epistemic parity on a matter in dispute. But the notion of arguing well (and certainly that of "how" a person argues) is unclear. It leaves indeterminate, for instance, whether persuasiveness is crucial and whether good evidence is needed throughout, as well as how nearly cogent the argument must be epistemically.

In any case, on no plausible conception of two people's arguing equally well on a disputed matter would there be an entailment of either of two things my description of epistemic parity explicitly demands: (a) having the "same relevant evidence" on the matter and (b) "considering it equally conscientiously." When these two notions are taken seriously, one can appreciate why it is often so difficult to acquire even strong justification for someone's being one's epistemic peer in a dispute. To be sure, if we think we have relevant evidence our disputant lacks, this is significant. But this point does not undermine the value of the Principle of Rational Disagreement for certain important cases, including some involving agreement on what the relevant evidence is—as may occur in special cases where two people have been discussing a matter intensively over time (though that agreement is fallible). It should also be noted

that the principle can be extended to hypothetical disputants (in a way I partially explained on p. 120).

Since I am not committed to (10) and indeed reject it, I do not accept what Weithman's calls the worrisome "fact that one of Audi's central commitments in this book leads to a self-undermining argument" (p. 58 in this issue), by which he means the argument concluding with (10), which I have indicated seems invalidated by an inappropriate substitution in an intentional context. A more general point is that I do not see the short section of the book that introduces the rational disagreement principle as central in the book, nor did I represent it as such, though it is by no means minor. Important though the section is, none of the church-state separation principles or my principles of the ethics of citizenship depends on it. Indeed, he says himself that "the weaker condition," namely "Coercion is justified only if the claim that non-coercion will be significantly harmful to persons, animals, the environment or property can be supported by adequate accessible reasons" (p. 64 in this issue) is "all Audi really needs to get conclusions he wants" (p. 65 in this issue).

I do not mean to imply that the short section under discussion said all it should have about epistemic parity. I have written on that notion elsewhere and perhaps should not have expected readers pursuing the notion in detail to consult the article cited in note 8 in the section under discussion. Weithman is quite right to raise the important good questions he does about the notion and the principle in which it figures (pp. 2-3), but this is not the place to answer his concerns in that passage (some of which are dealt with in the paper cited in note 8). I should add, however, that the Principle of Rational Disagreement has

an 'other things equal' clause, and this may be taken to anticipate some of the complexities Weithman's discussion brings to our attention.

It is also important to bring out that I agree with Weithman's point that the Principle of Rational Disagreement does not specify "a *threshold* that the evidence for epistemic parity must surpass for coercion to be licitly imposed" (p. 53 in this issue), something I noted myself (p. 119). With this in mind I formulated, in the same section:

> *The principle of toleration*: If it not reasonable for proponents of coercion in a given matter to consider themselves epistemically superior in that matter to supporters of the corresponding liberty, then in that matter the former have a prima facie obligation to tolerate rather than coerce (pp. 119-120).

The threshold that this principle proposes is (as seems appropriate to its subject matter) not quantitative or incontestable (as I acknowledged in the context), but in any case the principle is not open to all the objections one might bring against the Principle of Rational Disagreement, though it covers the same ground concerning justification of coercion in matters of citizenship. Moreover, I am not aware of substantive points in Weithman's commentary that would require his rejecting it. Would he not think that if—say in the matter of carbon emissions—I do not consider myself epistemically superior, for instance in better assessing credible testimony of experts, to supporters of the corresponding liberty, I have a prima facie obligation not to coerce? Testimonial evidence is not ignored in the book (see, e.g., p. 80) and should be considered an important kind in relation to political discussion.

It is also appropriate to reiterate that the obligations mainly in question in my book need not be *rights-based*: the strong kind of obligations whose non-fulfillment entails violation of some moral right. I have always allowed that citizens may have a right to do something they ought not to do, as with prosperous people's refusing to contribute to any charities. Moreover, it seems possible for democratic governments to have a right, under certain conditions, to pass coercive legislation even when, say in terms of the long-term common good, this is not justified and they ought not to do it. I am not sure Weithman would agree. But that seems open to him. On his view (by contrast with what he called my intuitionism framework) it is "better to identify the justified policy *politically* than to accept the *Principle of Rational Disagreement*" (p. 59 in this issue). A political justification certainly seems to allow for distinguishing *rights* from *oughts* as I do. In any case, given the clarification of my use of the Principle—which I do not present as *necessary* for identifying justified policy, as opposed to being useful in that and other matters—and given other points of agreement between our positions, I am not sure how much difference in actual democratic practice there would have to be on his view as opposed to mine.

V

Tolerance as an Ideal for Pluralistic Democracies: A Response to Mario De Caro

Mario De Caro's exploration of the normative limits of tolerance as a guide to conduct raises a number of

questions pertinent to political philosophy. He makes more points than I can address here, but let me indicate where I see differences between us or the need for further inquiry or both. I will be especially concerned with whether he is too sympathetic with Goethe's striking claim, "Tolerance should be a temporary attitude only: it must lead to recognition. To tolerate means to insult" (p. 69 in this issue). De Caro maintains that "in the light of Goethe's objection, one should conclude that tolerance is too modest an ideal for an advanced democracy" (p. 70 in this issue).

With this view as background, it is no surprise that De Caro cannot accept my Principle of Toleration unqualifiedly. This is the principle that "[i]f it is not reasonable for proponents of coercion in a given matter to consider themselves epistemically superior in that matter to supporters of the corresponding liberty, then in that matter the former have a prima facie obligation to tolerate rather than coerce" (pp. 119-120). He rightly clarifies the scope of this, noting that "this principle can give prima facie *sufficient* reasons for tolerating a conduct; but… it need not give prima facie *necessary* conditions" (p. 76 in this issue). I can agree on this. There may, for instance, be no disagreement about a kind of act that merits tolerance, even if a diverse group of people observe the act. As I think De Caro realizes, the principle is meant to apply not to all possible cases in which tolerance may be an appropriate response, but where there is actual direct disagreement about whether to coerce, say to outlaw assisted suicide.

Given his understanding of the principle, it is perhaps to be expected that he thinks that "when there is no perception that a person's conduct is wrong there is no need (and actually neither is there the possibility) to tolerate

her and her conduct" (p. 79 in this issue). With this in mind he says that among Christian traditions "the age of tolerance has ended […] tolerance is no longer needed […] because society has moved beyond it" (p. 80 in this issue).

What is the ideal with respect to which he believes society should go beyond tolerance? It is "the achievement of full recognition and respect," and "Reaching the level of being tolerated is a necessary condition for a [kind of] conduct that is disapproved of to be later respected and recognized" (p. 82 in this issue). In supporting this ideal, he asks what kinds of reasons can override the prima facie obligation to tolerate that is posited by the toleration principle, and he concludes, "The most plausible candidates for playing the role of the superseding reasons in this context are of course ethical in character. They could then be of the kind, 'Do not tolerate anything that would violate a fundamental human right'" (p. 87 in this issue). This idea is illustrated by his hypothetical philosopher who thinks that imposing the burka on women in unfair and "should conclude" that the "religious leaders [who advocate imposition] are epistemic peers" (p. 86 in this issue). This reasoning leads him to the challenge for my view: "if the ethical level is that on which one should take the ultimate decision about whether tolerating or not, what role is left for the principle of toleration? That is, why should one consider the epistemic level at all?" (p. 88 in this issue).

Let me first comment on the ideal—call it the *transcendence ideal*—which calls on us ultimately to rise above tolerance (not intolerance since some things should not be tolerated, though to be sure if no one does these things there is no possibility of an *attitude* of intolerance toward them, as opposed to simple prohibition). This ideal is (as I

think De Caro might grant) utopian relative to human life as we know it. Even people who live or work together in harmony normally disagree on some questions and displease others by some of their actions. In a highly civilized society that is *pluralistic*, even if no one does moral *wrongs,* there will be behavior that some both dislike and disapprove of and have the power to prevent, but tolerate rather than prevent by force. This is *not* to deny that societies should try to accord recognition and a kind of respect to all persons. But we can fully recognize and—at least in relation to moral status—fully respect those we tolerate (a possibility De Caro seems to grant on p. 80 in this issue). Most of us have to tolerate what we consider excessive noise, long-windedness in materials we must read, departures from good manners on social occasions, and, of course, unreasonably rebellious children.

To be sure, tolerance can be quite unpleasant for those who exhibit it: disapproval and dislike are attitudes, or give rise to emotions, that one would prefer to avoid. We also typically dislike being tolerated (though we need not feel, as Goethe's quip suggests we might, an "insult" when we are tolerated, nor does De Caro endorse this part of Goethe's statement). These points are part of what makes De Caro's ideal attractive. It is an interesting question whether we *can* transcend tolerance, an achievement that he is right to see as a possible aspiration, while also giving up the disapproval and dislike we are bound to feel regarding some people's justifiable exercise of their liberties.

These points do not meet De Caro's challenge to justify using my Principle of Toleration (or any similar one) in political philosophy, given the high authority of independent moral standards it depends on. The challenge

is serious, and De Caro is right to issue it. Why not appeal directly to the most basic standards that apply? My use of the Principle in part derives from my commitment to an *ethics of belief*. One of its standards calls for seeking adequate evidence for certain beliefs, including important ones crucial for determining one's votes and, more broadly, one's political and other interpersonal conduct. With this in mind, I consider the Principle of Toleration a broadly moral one; it is not epistemic, though it employs the epistemic concepts of reasonableness and epistemic parity. I see it as belonging to ethics and applicable to both private and public decisions.

We can of course appeal directly to values, principles of obligation, and rights in making such decisions, as much of the exchange of views in this symposium indicates we should. But the Principle of Toleration facilitates such appeals. Even people who agree on these normative standards can disagree on the quality of the evidence there is supporting the view that a kind of behavior satisfies a relevant standard, say promotes human flourishing or is unfair. In these cases as in cases in which there is less background agreement, the following ethical principle is applicable. When we disagree with others in important matters, such as the extent of civil liberties, recognition and respect call for considering whether they have the same relevant evidence we possess, whether they are as rational on the matter at hand—where such rationality requires ability to appraise evidence—and whether they are equally conscientious in considering the evidence. If the answer to any of these questions is negative, that opens up the possibility of settling the disagreement by a kind of *epistemic rectification* or, failing that, of justifiably retaining one's view

against the challenge of disagreement by someone one respects.

To make the point more concrete, take the matter at issue to be whether imposing the burka on women contributes to their chastity and marital fidelity. Here, in suggesting parity between the philosopher and the religious proponent of coercion (p. 86 in this issue), De Caro apparently did not take account of all three dimensions of epistemic parity. I doubt (and think he would also doubt) that there is epistemic parity in this case between proponents of the sartorial liberty and proponents of coercion. I can agree with him, however, that there might anyway be, on moral grounds, a prima facie obligation, in special cases, not to coerce the religious participants in this practice to abandon it. Persuasion, for instance, might be possible, and, for a time at least, coercion might deeply impair the sense of identity of the persons in question. Such matters are highly contextual.

With some issues, however, including assisted suicide and capital punishment, there may be a case for epistemic parity at least between some of the disputants. Such parity may not be stable, since people's information and cognitive powers change; and epistemic parity should be understood as relative to time as well as to the matter in dispute. But it seems salutary in such cases for the Principle of Toleration to play a supplementary role in determining whether coercion is justified. I consider it a good principle for colleagues debating policy issues, governmental or in rule-governed organizations of many kinds. I believe, indeed, that some rational persons are guided by the Principle or something close to it even apart from accepting some formulation of it—it has in fact likely not been formulated

in published work earlier than mine. I conclude here that for human life as we know it in pluralistic societies, religion will continue to be both important and controversial, deep in the sense of identity of some citizens, much in need of attention in political philosophy, and best accommodated by secular states using principles approximating those my book defends.[6]

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[6] For helpful general comments on the penultimate draft I want to thank Mario De Caro, Paolo Monti, and Kevin Vallier.

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SECULAR RELIGIOUS ESTABLISHMENT:

A FRAMEWORK FOR DISCUSSING THE COMPATIBILITY OF INSTITUTIONAL RELIGIOUS ESTABLISHMENT WITH POLITICAL SECULARISM

BY SUNE LÆGAARD

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Secular Religious Establishment

A Framework For Discussing The Compatibility of Institutional Religious Establishment with Political Secularism

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Abstract. Secularism as a political doctrine claims that religion and politics should be separated. The compatibility question is whether secularism can accept some forms of religious establishment in the form of institutional linkages between state and organised religion. I argue that the answer to the compatibility question is not obvious and requires a systematic analysis of secularism. Based on a distinction between a general concept and specific conceptions of secularism I offer a general structure for conceptions of secularism that incorporates both a) basic values, e.g. political equality and freedom of conscience, b) intermediate political principles of separation, e.g. rights to religious liberty, and c) derived normative prescriptions, e.g. that an established church is unacceptable. I illustrate the structure using the conceptions of secularism advocated by Robert Audi and by Charles Taylor and Jocelyn Maclure. Given this general structure, the normative implications of secularism, e.g. for the compatibility question, depend on how the basic values and political principles are specified. Different understandings of the basic values yield different conditions for compatibility. Some conceptions of secularism are therefore compatible with some forms of religious establishment. I illustrate the use of the framework for discussion of particular establishment cases and how the framework provides a structure for the normative discussion about which conception of secularism to accept.

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I

Introduction

I will call the question whether secularism is normatively compatible with or rules out religious establishment *the compatibility question*. This question both recalls a classic issue in political philosophy about the relationship between religion and political authority and relates to contemporary political debates of increasing prominence, e.g. due to the rise of internationally enforced human rights norms and increasing religious diversity. The compatibility question is premised on an understanding of secularism as a political doctrine about the separation of religion and politics, and of establishment as an institutional relationship between state and organised religion. While some liberal democratic states, like the US and France, clearly do have an extensive (although not absolute) institutional separation of church and state, many continue to uphold some form of religious establishment, either state churches, as in the UK, Denmark or Norway, corporatist relations between the state and a range of religious communities, as in Germany or the Netherlands, or concordats with the Catholic church, as in many countries in southern Europe.

The compatibility question has become increasingly pressing as religion has been re-politicised during recent decades. This development is partly due to increasing religious diversity in liberal democracies and to the ascendancy of religion as a factor in world politics. But the compatibility question does not only concern majority-minority relations, or relations between "the West" and "the rest"; it is a more general question about the role of religion and whether and, if so, how religion can

legitimately be part of politics.[1] How liberal democracies should accommodate religious minorities or handle religiously infused disagreements *across* borders depends on how the fundamental issue about the relation between politics and religion *within* liberal democracies is understood.[2] So the compatibility question is not only about the legitimacy of particular institutions in a few countries; it is also, and more fundamentally, about how liberal democracies understand themselves. The broader relevance of the discussion concerns how we should understand secularism more generally. This paper provides a general analysis of the structure of secularism as a political position. The structure has significance for discussions of secularism in relation to a range of political issues, institutional as well as non-institutional.

I consider secularism as a principled and systematic theoretical view and my analysis of it as such is intended to provide a framework for discussing the justifications, implications and plausibility of secularism. Such philosophical discussions of secularism have recently been dismissed by many scholars as naïve or obsolete given the actually existing relations between politics and religion (supposed to show that philosophical notions of "separation" of religion and politics have no foothold in reality and therefore no relevance) or the alleged "post-secular society" where religion is increasing in social and political prominence. My analysis of secularism shows how

[1] Charles Taylor, "Western Secularity,", in C. Calhoun, M. Juergensmeyer, and J. Van Antwerpen (eds), *Rethinking Secularism* (Oxford: Oxford University Press, 2011): 31-53.
[2] On politics and religion in international relations, see e.g. Erin K. Wilson, *After Secularism: Rethinking Religion in Global Politics* (Basingstoke: Palgrave Macmillan, 2012).

secularism need not be committed to an empirically untenable idea of separation and need not be incompatible with the social and political prominence of religion.

The case of religious establishment is especially relevant for the understanding of secularism, both because it presents a fundamental question about the meaning and implications of secularism, and because it is not directly concerned with other, currently more controversial, issues debated under the headings of multiculturalism or the "clash of civilisations". It might therefore serve better as a test case for discussing the self-identification of liberal democracies as secular before these other controversies are entered.

The compatibility question is not merely terminological. Secularism is a substantial normative view, so compatibility is not merely a question about the applicability of a linguistic label. Since, as will be apparent below, prominent conceptions of secularism are interpretations of the values central to liberal democracy, the compatibility of secularism and establishment is important for the normative justifiability of specific policies. This is also crucial for how debates are framed: If a specific understanding of how "we" liberal democrats are secular is assumed, this will affect what is seen as politically acceptable, and whether specific groups are represented as legitimate political claims makers or as "foreign" influences. In the absence of a critical discussion of secularism, it might play an ideological role in the negative sense of an idea that distorts public debates about religion and politics.

The structure of the paper is as follows: Section II discusses an immediate reply to the compatibility question and sketches some desiderata for a theoretical discussion of

secularism. Section III provides a working definition of "establishment". Section IV discusses the structure of conceptions of secularism and illustrates this with two prominent conceptions of secularism, namely those of Robert Audi[3] and of Charles Taylor and Jocelyn Maclure[4]. Section V examines Audi's and Taylor and Maclure's remarks about establishment. Section VI sets out a general framework for discussions of secularism based on the structure of conceptions of secularism. Section VII illustrates the applicability of the framework in practice by using it to interpret the *Lautsi* case about mandatory crucifixes in Italian public schools. Sections VIII and IX concern how the framework facilitates normative discussion of religious freedom and religious equality, respectively. Section X concludes.

II

The (Too) Easy Answer To The Compatibility Question

One immediate response to the compatibility question might be that establishment obviously is inadmissible according to secularism. Some might consider the idea that religious establishment is compatible with secularism outright oxymoronic, i.e. as conceptually confused. But this immediate response rests on a simplistic and uninteresting

[3] Robert Audi, *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000) and *Democratic Authority and the Separation of Church and State* (Oxford: Oxford University Press, 2011).
[4] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge, Ma.: Harvard University Press, 2011).

understanding of secularism. As a reply to the compatibility question, the claim that secularism obviously rules out establishment can be reconstructed as an argument: establishment is incompatible with secularism because secularism *means* that church and state should be separated. But this argument begs the question; secularism is then *defined* as a requirement of separation of church and state, i.e. as the rejection of establishment. Secularism then does not provide a philosophically interesting *justification* for the conclusion, since the premise simply consists in an affirmation of it. To make the claim interesting, secularism has to be explicated, not merely as an affirmation of the conclusion that church and state should be separated, but as an *independent* claim that can function as a justification for this conclusion.

So it is *not* obvious whether, when and why establishment is incompatible with secularism. Whatever problems there might be with establishment are not explicable on purely conceptual grounds. It is theoretically unsatisfactory to reject institutional links between church and state on the basis that secularism simply *means* separation of church and state, not only because it does *not* necessarily mean this at all, but also because we want to know *why* it should mean this, if it does. There is therefore need for a closer examination of 1) what secularism can mean if it does not simply mean that church and state should be separated, 2) what the value commitments underlying secularism thus understood might be, and 3) what requirements of separation actually follow from these justifications.

III

Establishment

To discuss the compatibility question we also need to know the meaning of "establishment". Here a working definition will suffice, namely that religious establishment denotes an *institutional* relationship between *religious organisations* such as churches and the *state*.[5] An institution is a public system of rules regularly complied with.[6] Both the state and religious organisations are institutions in this sense. But since this idea of an institution is very general and potentially covers much more, further specifications are needed if we are to capture only the institutional links I am interested in here. The institutional links in question are those pertaining to the specific features of states and churches that distinguish them from other institutions. These features are mainly the political authority and coercive enforcement of laws by the state and the specific religious aspects of religious organisations (i.e. not the features of churches that they share with other private associations). Compatibility concerns institutional links that connect the political authority and coercive power of the state to the specifically religious aspects of religious organisations.[7]

[5] Cf. R. Audi, *Religious Commitment and Secular Reason*, 32; Matteo Bonotti, "Beyond Establishment and Separation: Political Liberalism, Religion and Democracy," *Res Publica* 18 (2012): 333-349.
[6] John Rawls, *A Theory of Justice*, revised edition (Cambridge: Harvard University Press, 1999), 47-48.
[7] It might be objected that the focus on state authority and coercive power is blind to the more informal aspects of establishment, e.g. the symbolic priority and broader cultural privileges an established religion will enjoy in a society. I acknowledge the importance of this. But note two things: First, even if the relevant institutional links are defined in

There are so many differences between institutional links between state and church in various countries that further specification will immediately exclude some of these from consideration. In some countries establishment is expressed in the constitution, but not in others. In some it involves economic subsidies of the church, whereas other established churches are self-sustained. In some it involves representation of the church in public functions whereas in others it does not.

The discussion can proceed on the basis of the working definition and paradigm cases such as the kinds of institutional links that exist between church(es) and state in most European countries. These are sometimes described as "moderate", "weak" or "modest" forms of establishment,[8] due to the fact that there is a significant degree of autonomy between state and church, which distinguish these forms of establishment from full blooded forms of theocracy or religiously based political orders.

formal ways, this does not in itself mean that the normative assessment of these links cannot or should not take more informal (cultural, symbolic) effects into account. The choice of a specific *object* of assessment is in itself silent on the *standards* of assessment. Secondly, as I argue below, the conditions of compatibility depend on how the particular conception of secularism is specified and justified. So the objection might simply show that a plausible conception of secularism should be specified in a way sensitive to informal aspects of establishment.

[8] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005); M. Bonotti, "Beyond Establishment and Separation: Political Liberalism, Religion and Democracy"; Daniel Brudney, "On noncoercive establishment," *Political Theory* 33 (2005): 812–39; Tariq Modood, *Multiculturalism: A Civic Idea* (Cambridge: Polity, 2007); Cécile Laborde, "Political Liberalism and Religion: On Separation and Establishment," *Journal of Political Philosophy* 21 (2013): 67–86.

Whereas theocracy (where state and religion are not separated at all) is incompatible with any recognisable form of secularism, the moderate forms of European establishment are exactly the kinds of cases where the answer to the compatibility question is not obvious. Here we need a further examination of secularism.

IV

Conceptions of Secularism

Secularism is a) a *political* view, b) requiring *separation*, c) of *politics* and *religion*. This is the type of view that might figure in philosophically interesting arguments for specific answers to the compatibility question. I thus propose that the general *concept* of secularism has the noted features (a, b and c). In keeping with John Rawls' classic concept/conception distinction,[9] there can then be different *conceptions* of secularism. Such conceptions diverge as to what "separation", "politics" and "religion" mean and as to their justification for the claim.[10] It is these specific conceptions that might figure in more detailed arguments about the compatibility of secularism and establishment.

I propose that conceptions of secularism can be represented as having a specific *structure* incorporating: a)

[9] J. Rawls, *A Theory of Justice*, 5.

[10] The general concept does not settle what "separation" means and what degree of separation is required. This is what differentiates specific conceptions. There might be limits beyond which an understanding of separation would no longer match our conceptual intuitions. But since I here discuss a theoretical understanding rather than a lexical definition of secularism, I will not address this issue.

basic values, e.g. liberal democratic values of freedom and equality; b) intermediate political principles of separation, e.g. religious freedom, religious equality and state neutrality; and c) derived normative prescriptions, e.g. that (specific forms of) establishment are not acceptable. This differentiation is needed if secularism is to function as a *theoretical justification* for claims about the relationship between politics and religion, since we then need not just *claims* about whether establishment is acceptable or not, but worked out *explanations* for these claims. So this structure seems required by the *function* that conceptions of secularism are supposed to play. But the structure is furthermore descriptively and interpretatively helpful in capturing and comparing conceptions and secularism controversies. I will illustrate and support this by examining two conceptions of secularism, namely those proposed by Audi and by Taylor and Maclure (this and the following section) and a particular controversy (section VII).

Robert Audi does not explicitly formulate a conception of secularism. In fact, elsewhere he characterises secularism as "a position calling for a strong separation of church and state and implying opposition to religious world-views as, for instance, not rational or politically divisive."[11] He explicitly distinguishes his own view from secularism in this stronger sense, which he apparently does not endorse.[12] But this strong characterisation of secularism is a particular conception of secularism. It is furthermore a controversial conception that is philosophically uninteresting for present purposes in the way I described in the introduction, since it merely consists in an affirmation of the conclusion that I

[11] R. Audi, *Democratic Authority and the Separation of Church and State*, 73.
[12] Ibid., 77.

want to discuss possible justifications for. Since Audi is concerned with the relationship between politics and religion and takes the relevant principles in this respect to be principles of separation, I will categorise his view as a conception of secularism.

Audi discusses the principles of separation as components of liberal democracy, which he takes to be a political ideal "above all committed to preserving basic liberty and basic equality of political power for all individual citizens".[13] So the principles of separation are on the one hand more general than the particular claim that an established church should be separated from the state; the principles of separation are supposed to provide justifications for particular claims like this. But on the other hand the principles of separation are themselves justified with reference to more basic values. While Audi is deliberately vague regarding the precise meaning of the basic values, his characteristic clearly exemplifies how the principles of separation are *intermediate* between general political values and specific policy recommendations.

Audi's conception of secularism furthermore includes *several* intermediate principles of separation: the *libertarian* principle that "The state must permit the practice of any religion, though within certain limits"; the *equalitarian* principle that "the state may not give preference to any religion over another"; and the *neutrality* principle that "the state should neither favour or disfavour religion (or the religious) as such, that is, give positive or negative

[13] R. Audi, *Religious Commitment and Secular Reason*, 31; cf. R. Audi, *Democratic Authority and the Separation of Church and State*, 37.

preference to institutions or persons simply because they are religious."[14]

Charles Taylor also characterises secularism as a complex view. He formulates secularism in terms of the French revolutionary trinity of freedom, equality and fraternity: Religious liberty means that "No one must be forced in the domain of religion, or basic belief"; religious equality means that "There must be equality between people of different faiths or basic belief; no religious outlook or (religious or areligious) Weltanschauung can enjoy a privileged status, let alone be adopted as the official view of the state"; and religious fraternity means that "all spiritual families must be heard, included in the ongoing process of determining what the society is about (its political identity), and how it is going to realize these goals (the exact regime of rights and privileges)."[15] According to Taylor, these goals can conflict and there is no single or timeless way of realising them. Secularism is accordingly not merely complex; it is in fact a value pluralist position in the sense that it incorporates several distinct and mutually irreducible normative considerations that can come into conflict with each other.[16]

Taylor elaborates and further develops his pluralist understanding of secularism in his collaboration with Jocelyn Maclure, where they propose to understand

[14] R. Audi, *Religious Commitment and Secular Reason*, 32-33; cf. R. Audi, *Democratic Authority and the Separation of Church and State*, 40-47.

[15] Charles Taylor, "What Does Secularism Mean?" in his *Dilemmas and Connections: Selected Essays* (Cambridge, Mass.: Harvard University Press, 2011): 303-325, at 309.

[16] J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 24.

secularism as a view composed both of a set of *values* and of a set of *political means*:

> secularism rests on two major principles, namely, equality of respect and freedom of conscience, and two operative modes that make the realization of these principles possible: to wit, the separation of church and state and the neutrality of the state towards religions.[17]

The interpretation of separation and neutrality as "operative modes" is crucial; they are the institutional mechanisms usually relied on to achieve the values, but they are only part of secularism in the sense and to the extent required by the values. Separation and neutrality are "indispensable institutional arrangements".[18] But they are not definitive of secularism in the same way as freedom and equality; they are not ends in themselves, but derived institutional mechanisms that can be interpreted in more or less permissive or restrictive ways depending on what serves the values. This generates different "regimes of secularism" that prioritise the values differently and consequently interpret the operative modes differently.[19]

V

Secularism and Establishment

The question now is what these conceptions of secularism have to say about the compatibility question. The concern with freedom, equality and the indispensable

[17] Ibid., 20.
[18] Ibid., 20, 23.
[19] Ibid., 27-35.

reference to separation might seem sufficient to rule out establishment. But this is not necessarily so. Taylor and Maclure write of modern liberal democracies that

> [s]uch democracies, even those that continue to recognize an official church – live under what can be called a "regime of secularism."[20]

To say that state recognition of an official church is a regime of secularism means that it may be an institutional way of implementing the values at the basis of secularism:

> [t]he few Western countries that continue to recognize an official church (the United Kingdom and Denmark, for example) are very mitigated systems of "establishment" and seek to respect the principles of equal respect and freedom of conscience.[21]

So according to Taylor and Maclure, a state can be secular even though it does not conform to American ideas of separation of church and state or French notions of *laïcité*.

This compatibility view might merely show that Taylor and Maclure's conception of secularism is more lax than that held by Audi, who initially states that the equalitarian principle "rules out an established church – whose existence might be plausibly argued to be compatible with the libertarian principle".[22] But Audi immediately adds that:

> There are, to be sure, kinds and degrees of establishment, and some kinds may have minimal impact or may be accompanied by

[20] Ibid., 9.
[21] Ibid., 26.
[22] R. Audi, *Religious Commitment and Secular Reason*, 33, cf. R. Audi, *Democratic Authority and the Separation of Church and State*, 43.

> compensations for the privileges they extend to the established church. Still, other things equal, the greater degree of establishment in a society, the less it counts as a liberal democracy.[23]

He also presupposes that democracies are secular "even if, as a matter of historical precedent [[...]] they have an established church",[24] which only makes sense if there is a way in which a democracy can both uphold an established church and still count as secular.

These remarks by Audi suggest that establishment is not necessarily incompatible with religious equality or neutrality. One possible reason for this might be that each of the three separation principles should not be understood as necessary conditions for liberal democracy that have to be fulfilled to a maximal degree, but as desiderata that can be fulfilled to a greater or lesser extent. This reading is corroborated by Audi's further remark that:

> Great Britain is an interesting case here, and it surely shows that some degree of establishment is compatible with a high (though by no means maximal) degree of liberal democracy.[25]

Another reason why establishment might be compatible with secularism is that there are different kinds and degrees of establishment in different respects. Audi claims that:

> [t]he equality principle implies non-establishment as ordinarily understood: minimally as requiring that no religion has official state endorsement and a statutory role in legislation or in determining public policy.[26]

[23] R. Audi, *Religious Commitment and Secular Reason*, 33.
[24] R. Audi, *Democratic Authority and the Separation of Church and State*, 38.
[25] R. Audi, *Religious Commitment and Secular Reason*, 221.
[26] R. Audi, *Democratic Authority and the Separation of Church and State*, 43.

He further distinguishes between "formal" and "doctrinal" establishment, where the former only consists in "a statutory or broadly constitutional governmental role of a particular religion", e.g. representation in some governmental institutions, but where "no governmental powers are conferred". Doctrinal establishment, on the other hand, "occurs when certain substantive religious doctrines […] are given a specific role in law or public policy."[27]

If *some* kinds of establishment are compatible with the separation principles and the liberal democratic values underlying them, the question is *which* forms? This is a question about what more specific conditions for compatibility follow from a given conception of secularism.

VI

A Framework For Discussing Secularism

Audi's and Taylor and Maclure's few explicit remarks about establishment suggest that the answer to the compatibility question might be positive in some cases. But the remarks are only made in passing and are not justified in any explicit or systematic way. Given the structure of secularism outlined in section IV, the normative implications of secularism, e.g. regarding the acceptability of religious establishment, depend on the prescriptive content of the separation principles, which in turn is justified with reference to the basic values.

[27] Ibid.

Given this structure, further discussion of secularism must take the form of a (re)construction of secularism as a *theoretically integrated* view, i.e. one where the claims about specific normative implications in fact cohere with the separation principles and basic values. Coherence here means, not only that the different levels must be consistent, but also that the normative claims should be explained and supported by the principles and basic values. Only then are the normative claims theoretically grounded, rather than pre-theoretical passing remarks.[28]

So the proposed framework has three elements: a) the general concept of secularism as a political position on the relationship between politics and religion requiring some form of separation, b) the distinction between values, principles and implications, where there might be complexity at each level, and b) the requirement of theoretical integration, which follows from the understanding of secularism as a theoretical view. Only when a position on the relationship between politics and religion lives up to both of the latter conditions is it a *theoretical* view in the philosophically interesting sense. If there are several basic values or political principles, as in Audi's or in Taylor and Maclure's conceptions, the

[28] Note that this is not a foundationalist requirement. That the political principles and normative implications "derive from" and "depend on" basic values does not imply that these values have epistemic priority. Theoretical integration is rather a cohenrentist requirement needed to make sense of secularism as theoretical view with the indicated structure. Coherence is here a matter of internal fit between the different components of secularism. In a broader justificatory perspective, coherence should also be a matter of equilibrium with other normative commitments we might have. Here I will only focus on the former aspect of coherence between derivative claims and basic values.

requirement of theoretical integration becomes even more important, since it then requires a weighing, prioritisation or systematic specification of different values and principles.[29]

VII

The Framework In Practice

Interpreting *Lautsi*

The point of the framework is to be able to represent different views *as* conceptions of secularism (as views about the relation between politics and religion), to be able to show in *which* ways they differ (which basic values, intermediate principles and derived implications), and to facilitate discussion of them on this basis (the requirement of coherence across the three levels).

To illustrate the use of the framework for the first two purposes, I will now apply it to a well-known secularism

[29] J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 24, understand the complexity as a form of value pluralism, i.e. that the different values can come into conflict and are incommensurable. This is a phenomenologically plausible characterisation of the normative dilemmas that often face us. But as a characterisation of secularism as a *theoretical* position, this is unsatisfactory for much the same reason that Rawls objected to "intuitionism" in *A Theory of Justice*, namely that it leaves the normative implications indeterminate. To avoid this, strict priority rules are not necessary; a weighing of competing values can sometimes generate reasonably clear implications, but this requires that values are to some extent commensurable.

controversy, namely the case *Lautsi versus Italy*.[30] The case concerned the permissibility of mandatory crucifixes in all classrooms of Italian state schools. It went to the Second Chamber of the European Court of Human Rights in 2009 and then to the Grand Chamber in 2011.[31] *Lautsi* exemplified the compatibility question; it concerned establishment insofar as public schools are state institutions and crucifixes are religious symbols.[32] The Second Chamber and the Grand Chamber sharply disagreed on whether crucifixes could be permitted; the Second Chamber said no, the Grand Chamber said yes. The actual explanation for this divergence is probably first of all a matter of real politics (much pressure was brought to bear on the court following the Second Chamber ruling, which would have drastic implications not easily acceptable for many countries). But if one focuses on the principled arguments in play, the divergent views articulated about *Lautsi* can be represented as different conceptions of secularism.

Initially, the case concerned a number of different considerations, including freedom of religion, non-discrimination, and state neutrality. The legal rules appealed

[30] *Lautsi v Italy*, European Court of Human Rights, Grand Chamber, App No 30814/06, March 18, 2011.

[31] Rex Ahdar, "Is Secularism Neutral?", *Ratio Juris* 26 (2013): 404–29, and Ian Leigh, "The European Court of Human Rights and religious neutrality", in G. D'Costa, M. Evans, T. Modood and J. Rivers (eds), *Religion in a Liberal State* (Cambridge: Cambridge University Press, 2013): 38-66.

[32] In Italian courts it had been claimed that crucifixes were not religious symbols. This claim was rejected by the Second Chamber. Although the Grand Chamber disagreed with the Second Chamber in other respects, it too held that crucifixes were religious symbols. Mandatory crucifixes in public schools therefore are a case of an institutional link between state and Christianity, *in casu* as represented by the Catholic Church.

to (the Italian Constitution and the European Convention of Human Rights) do not themselves mention "secularism". The concept nevertheless played a prominent role in the Court; the Second Chamber justified its ruling on the basis that the Italian state was under a requirement of neutrality, whereas the Grand Chamber rejected this ruling on the basis that the Second Chamber had conflated neutrality and secularism. The Grand Chamber furthermore rejected ideas of state secularism on the basis that secularism is a partisan ideology.

My claim is that the positions of both the Second and the Grand Chambers articulate conceptions of secularism and that the framework can show how and in what ways they differ as such. Given the shared premise that crucifixes are religious symbols, both rulings concerned the relationship between politics and religion. Even when the *word* "secularism" is not mentioned, the discussions of neutrality, freedom of religion and non-discrimination all imply that there are respects in which states should not support or endorse religious views; even the Grand Chamber agrees that under some circumstances mandatory religious symbols would be ruled out – it just argued that, in the specific case, the crucifixes did not infringe on religious freedom (because they were deemed "passive" non-proselytising symbols) or constituted illegitimate non-neutrality (because pupils could wear non-Christian religious symbols and schools sometimes celebrated Ramadan). Because even the Grand Chamber thinks that the applicable principles of religious freedom, non-discrimination and neutrality sometimes would rule out religious symbols or other forms of establishment, the Grand Chamber itself subscribes to a conception of secularism.

The Second Chamber's conception of secularism is based on political values of freedom and equality, resulting in a principle of neutrality requiring state institutions to abstain from aligning themselves with any particular religious view. This requires separation in the sense of removal of religious symbols from public institutions. The Grand Chamber's explicitly understand secularism as "an ideology" based on substantial claims (e.g. about religion as false, oppressive or dangerous) resulting in a principle of state hostility to religion. This would then imply removal of religious symbols as a way of limiting and subjugating religion. The Grand Chamber rejects secularism thus understood, but it actually accepts another conception of secularism. As argued above, it accepts principles similar to those appealed to by the Second Chamber; it merely disagrees regarding the extent to which they require separation.

All of these views are genuine *conceptions* of secularism. The tragedy of *Lautsi*, however, is that the Italian state and the Grand Chamber (as well as many commentators) failed to engage in a real discussion of the Second Chamber's conception. Instead, they equivocated over the first and second conceptions of secularism (i.e. the Second Chamber's and the view of secularism as a substantial religion-hostile ideology rejected by the Grand Chamber) and used the non-neutrality of the second sense to reject the Second Chamber's ruling, without seriously considering whether the kind of neutrality required of a liberal democratic state justifies the claim for removal.

Within the framework, the Grand Chamber decision can be seen as fixed exclusively on the level of political *implications*, i.e. the demand for removal of crucifixes from

classrooms. This leads to the equivocation over the first and second sense of secularism, because the Grand Chamber fails to consider that different underlying *principles* might support the claim for removal. This is even more disappointing, since the Grand Chamber itself invokes notions of neutrality, freedom and equality as justifications for the permissibility of crucifixes. The question to ask is which interpretations of religious freedom, non-discrimination and state neutrality are most plausible and whether a plausible reading of these values might warrant the demand for removal. Such a discussion presupposes the distinction between principles (e.g. the right to freedom of religion) and underlying *values* that can account for divergent interpretations of a given principle.

The simple device of distinguishing between the three levels of values, principles and implications provides a much needed structure to the discussion that can help focus on the real disagreements. Furthermore, the framework can capture both the Second Chamber's actual view, as well as the substantial religion-hostile view erroneously ascribed to the Second Chamber by the Grand Chamber, and the Grand Chambers own view *as* conceptions of secularism. So rather than understanding secularism in an artificially narrow way, e.g. as only denoting institutional regimes such as the French one, or as a term of abuse, e.g. the Grand Chamber's idea of secularism as a religion-hostile ideology, the framework offers a theoretical and systematic way of understanding secularism, which can encompass a broad range of views.

VIII

A Famework For Normative Discussion

Religious Freedom

Answers to compatibility questions turn on the values and principles inserted into the structure. The framework itself does not say anything about which values to insert. Rather, it provides a structure within which different claims, arguments and justifications can be represented *as* conceptions of secularism, thereby making the real differences between them as such clearer. The compatibility question therefore has to be posed in relation to particular conceptions of secularism, and answers to it accordingly require specification of the values, e.g. what kinds of equality and liberty are required by a particular conception.[33]

The next question is *which* claims and conceptions to accept – when it comes to the compatibility question, we want to know whether a particular form of establishment is compatible with secularism. The framework facilitates this discussion in virtue of the distinction between the three levels and the requirements of theoretical integration. In this section I will illustrate this, using religious freedom as an example. This is an apt example, both because it was one of the things at stake in the *Lautsi* case, and because it is explicitly a central part of both Audi's and Taylor and Maclure's conceptions of secularism. I will briefly discuss the meaning of religious freedom in their conceptions. Then I will show how the requirement of theoretical integration sets the stage for normative discussion.

[33] Sune Lægaard, "Moderate Secularism and Multicultural Equality," *Politics* 28 (2008): 160-168.

One implication of the framework is that terms like "freedom" (or "liberty") and "equality" can refer to different elements of conceptions of secularism at different levels and with different functions. The most important difference is between freedom or equality as fundamental ("basic") values, which are supposed to justify principles, and freedom or equality as intermediate political principles supposed to regulate a specific area. The meaning of "freedom" and "equality" is most easily ascertained in the latter case, but it is on the other hand the claims about what freedom and equality mean at this derivative political level that are in need of justification.

Both Audi and Taylor and Maclure understand the relevant political principles of freedom in line with formulations about freedom of belief, conscience and religion as they figure in prominent human rights documents.[34] As political principles, they require the state not to interfere with citizens' beliefs, worship or observance of religious prescriptions.[35] The meaning of "freedom" involved in the political principles is a notion of negative liberty, i.e. absence of interference or coercion.[36] What is controversial is not the core meaning of the principle, or the sense of freedom it involves, but the exact extent of the protection (what activities are protected and which kinds of actions count as infringements of the protected freedom) and where to draw the limits (what might justify limiting the protected freedom).

[34] J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 65.
[35] R. Audi, *Religious Commitment and Secular Reason*, 34.
[36] Ibid., 27; R. Audi, *Democratic Authority and the Separation of Church and State*, 40.

The substantive normative questions arise when it comes to the extent of this protection. For present purposes, the question is whether the protection of freedom rules out religious establishment because establishment constitutes interference with religious liberty. One of the questions at stake in *Lautsi* was whether mandatory crucifixes in public schools violated the religious freedom of pupils.[37] The Second Chamber thought this constituted a violation of religious freedom because crucifixes are religious symbols and were mandatory. The Grand Chamber took the opposite view on the basis that crucifixes were "passive symbols", i.e. not proselytising in the sense ruled out by the Convention. But the question is why it is the "active" or "passive" nature of the crucifixes that matters. The Grand Chamber ruling implies that religious freedom is not violated if a symbol is "passive" (and that it would be if "active"). But we need to know why this is the relevant form of freedom?

This is precisely where we need the guidance of political principles. The mere appeal to religious freedom is not sufficient, since the two Chambers agree on the importance of this. So in order to make progress, the principle of religious freedom has to be further specified. And in order to justify one specification over others, we need to be able to show how it fits with more basic values supposed to underlie secularism in general and principles of religious freedom in particular. This is the requirement of theoretical integration. Rather than ascribing underlying justifications to the Court (which would be second-guessing), I will

[37] R. Ahdar, "Is Secularism Neutral?" 422-25; I. Leigh, "The European Court of Human Rights and religious neutrality", 60.

illustrate how this might work in the case of Audi's and Taylor and Maclure's conceptions of secularism.

Taylor and Maclure are explicitly concerned with freedom of conscience understood as a matter of protecting individuals' "moral integrity", which is understood as their ability to live in accordance with their "core or meaning-giving convictions and commitments".[38] What is non-instrumentally valuable is not negative liberty as such, e.g. that one is not interfered with when praying or observing religious prescriptions, but that it allows one to live in accordance with one's core convictions. If rules or regulations prevent me from living in accordance with my core convictions, I am alienated – there is a mismatch between my convictions and actions.

Audi also seems to understand the basic value of freedom as linked to integrity[39] and he also refers to the avoidance of alienation as a reason why a liberal democracy should not coerce citizens on the basis of religious reasons they do not share.[40] This suggests that freedom is not, at the most fundamental level, about negative liberty. This interpretation is corroborated by Audi's claim that coercion of citizens that infringes negative liberty is justifiable if they would accept it were they sufficiently rational.[41] Audi's fundamental concern therefore also seems to be with a form of moral integrity. This is further supported by his justification for requiring citizens to provide secular reasons when they support policies that might restrict other citizens' freedom because religious reasons would not pass

[38] J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 76-77.
[39] R. Audi, *Religious Commitment and Secular Reason*, 5-6.
[40] Ibid., 67-68, 87.
[41] Ibid., 67.

this test of hypothetical consent by those coerced by the policies in question. Secular reasons are required here because all citizens are supposed to be able to "identify" with the justifications for coercive laws and policies.[42] This is most clearly expressed when Audi explains the basis for protections of religious liberty with reference to "the protection of identity principle", which states that:

> The deeper a set of commitments is in a person, and the closer it comes to determining that person's sense of identity, the stronger the case for protecting the expression of those commitments tends to be.[43]

If one interprets the basic value of freedom as a concern with integrity, we have a justification for the political principles protecting freedom of conscience and religion. If what is at stake is each individual's ability to live their own life in accordance with their own conscientious convictions, this provides guidance for setting the limits of that protection and for judging what counts as infringements.

The distinction between principles and basic values helps articulate integrity as the *value* justifying *principles* of religious freedom. The requirement of theoretical integration can now kick in, turning the interpretative and analytical exercise into a normative discussion: if the value of moral integrity is what underlies the principle of religious freedom, this affects the extent of religious freedom, and thereby what the implications of this way of grounding religious freedom are. We can thereby assess the plausibility of the grounding of religious freedom in moral integrity as well as claims that religious freedom has specific

[42] Ibid., 123.
[43] R. Audi, *Democratic Authority and the Separation of Church and State*, 42.

implications, e.g. for the removal of crucifixes. Assessments of plausibility hinge on two parameters: a) the fit in terms of explanatory power between the three levels, and b) the fit between the implications and independent considered judgements about cases covered by a given principle.[44] We should therefore ask what the grounding of religious freedom in moral integrity implies, and whether these implications are plausible.

While moral integrity clearly provides a possible justification for religious freedom, there are several problems with it. The value of moral integrity has to be qualified, e.g. by saying that the relevant core convictions only concern duties that are self-regarding (in a sense to be specified and defended), in order to avoid conflicts with the rights of others. Even then some might think an integrity justification over-inclusive, since it also requires protection of non-religious conscientious claims.[45] More problematically, the integrity justification seems under-

[44] As the term "considered judgments" suggests, I understand the second point as part of a reflective equilibrium methodology, cf. J. Rawls, *A Theory of Justice*. What the framework adds to traditional reflective equilibrium methodology is the idea that secularism should be understood as a *complex* of values, principles and implications with an internal coherence requirement, which should be assessed as a whole in relation to considered judgements and other theories. But the framework is not dependent on acceptance of reflective equilibrium methodology: theorists who subscribe, say, to some form of epistemic foundationalism, e.g. a version of ethical intuitionism, could still accept the framework. Its contribution would then be to spell out the implications of independently justified basic values for the issue of the relationship between politics and religion.

[45] J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 90, acknowledge this and see it as a positive feature, but others might object to the elision of any distinction between religious freedom and freedom of conscience.

inclusive since it primarily justifies protection of individual conscientious acts, but not a broad range of other activities usually also associated with religious freedom, which might not be plausibly understood in terms of "core convictions" such as individual duties of observance.[46] Furthermore, not only does the moral integrity justification suggest either that any claim for protection should be followed or that courts would have to assess the conscientiousness of claimants in cases over religious freedom, both of which seem *prima facie* problematic; conscientious exemptions along these lines also involve a moral problem of shifting burdens of compliance onto other citizens.[47]

My point in listing these objections here is that the articulation of secularism within the proposed framework forces proponents of any specific justification to consider how it affects the content of the political principles and defend the plausibility of its implications. Proponents of a moral integrity justification for religious freedom would have to accept and defend the plausibility of the noted implications, or explain why other components of their conception of secularism might change otherwise implausible implications. This goes for any claim about the implications of a given principle as well, e.g. the Grand Chamber's assumption that what matters for pupils' religious freedom is that they are not subjected to proselytisation. The insistence that the "passive" nature of crucifixes settles the issue is tantamount to a condition of compatibility: if a form of establishment is not

[46] Daniel Weinstock, "Beyond Objective and Subjective: Assessing the Legitimacy of Religious Claims to Accommodation", *Les ateliers de l'éthique / The Ethics Forum*, 6 (2011): 155-175.

[47] Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013).

proselytising, it is compatible with the Grand Chamber's conception of secularism. But this is doubly problematic. Proselytisation is arguably not always a problem in terms of religious freedom (some forms of proselytisation seem compatible with religious freedom, e.g. spreading the word in public spaces). And one cannot infer from the fact that crucifixes are not proselytising that they do not violate religious freedom (there are clear examples of violations of religious freedom that are not cases of proselytisation but rather, e.g., simple persecution). So non-proselytisation as a condition of compatibility is both over- and under-inclusive.

A more fully worked out conception of secularism might provide the answers that the Court's legal ruling leaves open. Consider Audi's view that basic freedom is a matter of whether citizens can "identify" with the reasons justifying laws and policies. One might think that mandatory crucifixes in public schools still violate basic freedom even if they do not infringe citizens' negative freedom, e.g. because the state alienates citizens by preferring a specific religion. Non-Christian citizens probably cannot "identify" with crucifixes, at least not given that crucifixes are indeed religious symbols. Therefore it might be claimed that establishment alienates these citizens from the state and thereby violates their basic freedom in the sense of moral integrity. If so, removal of crucifixes might be a requirement of Audi's equalitarian principle even if they do not infringe his libertarian

principle,[48] and the justification for this would be that removal is necessary for protecting citizens' moral integrity.

But this argument for incompatibility faces the difficulty that, at least as formulated by Audi, moral integrity is only violated when people are coerced. If the institutional link between state and church does not involve coercion of individual citizens, as would be the case if they were forced to adhere to a particular religion or follow its prescriptions, then their moral integrity is not violated. In Taylor and Maclure's terms, *moral* integrity is a matter of a correspondence between individuals' core convictions and their own actions. If establishment does not interfere with citizens' (in some sense only self-regarding) actions, it cannot alienate them in the relevant moral sense. They might of course be alienated in other ways, e.g. *feel* that they cannot identify with public schools as long as they display crucifixes. But this is then a *psychological* sense of estrangement that need not be a sign of *moral* alienation in the relevant sense. So even though perhaps not a desirable arrangement, a religious establishment that alienates some citizens psychologically but does not infringe their negative freedom or coerce them in ways that violate their moral integrity could be compatible with basic freedom.

So the integrity understanding of basic freedom might support the Grand Chamber's ruling, given that pupils are not coerced in a relevant sense. In that case it could provide a worked-out theoretical replacement of the insufficient compatibility condition suggested by the Grand Chamber. Of course, the mere fact that a possible reading of moral

[48] Which is possible according to R. Audi, *Religious Commitment and Secular Reason*, 33, and *Democratic Authority and the Separation of Church and State*, 44.

integrity gives the same implication as the Grand Chamber's ruling does shows neither that the Grand Chamber adheres to the value of moral integrity nor that this is the most plausible basic value. This merely illustrates the kind of support for claims like that of the Grand Chamber called for by the requirement of theoretical integration. But theoretical integration at the same time implies that, if one relies on the understanding of basic freedom as moral integrity, then one also has to accept the noted implications of such an understanding in other respects.

Other interpretations of religious freedom than that in terms of moral integrity are of course possible – and in light of the problems noted above, some of these might furthermore be more plausible. The point of the foregoing discussion was not to settle this normative issue, but to illustrate how the framework can contribute to the analysis and critical discussion of both claims in actual cases and theoretical attempts to provide justifications for principles that could support such claims.

IX

A Framework For Normative Discussion

Religious Equality

The framework understands secularism as a complex position incorporating several basic values and political principles, e.g. the objections to crucifixes in *Lautsi* which concerned non-discrimination and neutrality as well as religious freedom. This complexity might account for the

difficulties of capturing the debate or providing plausible justifications solely in terms of religious freedom. The problem was that the two chambers also disagreed on the understanding of equality.

The framework again provides a model for handling this disagreement. The distinction between the three levels means that "equality" can both refer to a principle of equal treatment and to different ideals of equality underlying such principles. If the disagreements are to be seen as expressions of systematic theoretical conceptions of secularism, we need to explain them as following from different specifications of equal treatment principles, which in turn must be justified on the basis of fundamental values.

Audi's equalitarian principle simply states that the state may not give preference to one religion over another.[49] The question then is what "governmental preference" means, which depends on the justification for the principle. Audi's justification for the principle mainly appeals to considerations of basic freedom: governmental preference for one religion puts pressure on the free exercise of other religions[50] and it makes it more likely that laws will reflect a specific religion, which might threaten religious freedom.[51] Audi's main reason for requiring separation of church and state is that "where church and state are not separate, religious liberty is threatened" since religious minorities may then reasonably fear discrimination and domination.[52]

But these justifications are mainly slippery slope arguments that hinge crucially on contingent empirical

[49] R. Audi, *Religious Commitment and Secular Reason*, 33.
[50] R. Audi, *Religious Commitment and Secular Reason*, 35-36.
[51] Ibid., 36.
[52] R. Audi, *Democratic Authority and the Separation of Church and State*, 39.

effects of governmental preference. It is neither a necessary nor always a likely consequence of establishment that minority religions will find their religious freedom under pressure or suffer discrimination. In *Lautsi* it was precisely claimed that crucifixes did not lead to limits on the religious freedom of pupils in other respects.

So if concerns with religious freedom were the only grounds for the equalitarian principle, the justification for that principle would be weak and would not provide substantive normative substance to the notion of "governmental preference" and "equal treatment".

But the equalitarian principle is also based on a concern that "citizens should have equal opportunities to exercise political power on a fair basis."[53] But again it is not clear why this requires a ban on governmental preference in a way that rules out establishment. As *Lautsi* exemplifies, establishment is not necessarily about assigning political power to the established church.

Audi in fact seems to address this question in his distinction between "formal" and "doctrinal" establishment. The way he draws this distinction is somewhat unclear; it arguably incorporates several distinctions each picking out an aspect relevant for equality.

One question is whether a religion has a statutory or broadly constitutional role. Another question is whether a specific religion is assigned governmental powers. A religion might be written into the constitution or other legislation without being assigned governmental powers. If this is the case, one might talk about "formal" establishment (e.g. *Lautsi*). Although this might be

[53] R. Audi, *Religious Commitment and Secular Reason*, 36.

problematic in other respects, it is unclear why it should be problematic from the point of view of a concern with equal political power.

If the underlying concern is with equal political power, we need to specify the form of "governmental power" in question. This is so because establishment might involve delegation of some forms of executive governmental power to churches, e.g. the power to conduct legally binding marriages.[54] While this is a form of assignment of governmental powers to organised religions, it is not necessarily one that is problematic from the point of view of political equality.

A third question concerns whether a specific religion receives official state endorsement. Endorsement could for instance be expressed in a written constitution or in other prominent documents, e.g. an official pledge of allegiance. Endorsement would be incompatible with basic equality if this is understood as a requirement of neutrality regarding citizens' conceptions of the good.[55] But *reference* to a religion is not equivalent to *endorsement*; so even if a specific religion has a statutory or constitutional *role*, this need not take the form of an endorsement of the *doctrinal content* of that religion.[56] *Lautsi* precisely concerns a case where doctrinal content is absent or unclear; even if the crucifixes are religious symbols, their precise content is unclear. So if the incompatibility claim is to be justified on the basis of

[54] Sune Lægaard, "Unequal recognition, misrecognition and injustice: The case of religious minorities in Denmark," *Ethnicities* 12 (2012): 197-214.

[55] E.g. J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 9-10.

[56] S. Lægaard, "Unequal recognition, misrecognition and injustice: The case of religious minorities in Denmark."

equality, it has to be shown that equality not only rules out endorsement of specific doctrines, but also more vague religious gestures.

A fourth question concerns whether a religion is given a role in law or public policy. If a religion were given influence in determining policy, this would be assignment of governmental power that might be problematic from the point of view of political equality. But special representation of religions in political decision making is not the only way in which religion might influence policy making or legislation. The legislature might pass laws enforcing religious rules, or there might be religiously based criteria for eligibility to certain benefits, without the religion in question having had any direct representation or governmental power in the decision making process. So it is not enough to rule out assignment of governmental power to a religion; requirements of justificatory neutrality and equal treatment of citizens are also needed.

Audi's distinction between formal and doctrinal establishment can be interpreted as incorporating at least these four concerns. The concerns are independent and hence do not necessarily go together. The basic idea behind the distinction thus understood is that a form of establishment might be compatible with equality even if the established church has a statutory or broadly constitutional role *if* it does not involve a) assignment of governmental powers to the religion in a way violating political equality; b) state endorsement of the doctrinal content of the religion in question; or c) policies or legislation that either can only be justified on religious grounds or directly enforce religious rules. A lot remains to be specified here (e.g. what exactly counts as endorsement and when a law or

policy is religiously based). But the main point for present purposes is that there are forms of establishment, e.g. *Lautsi*, that arguably do not violate these conditions and therefore could be compatible with secularism.

X
Conclusion

I have in this paper taken my point of departure in the conceptions of secularism advocated by Audi and by Taylor and Maclure to illustrate a general structure of secularism as a normative view. This provides a general framework for discussions of conceptions of secularism and questions involving secularism. The discussion of what forms of establishment are compatible with these conceptions thus interpreted illustrates a general point, namely that the implications of secularism depend on how the basic values and principles are fleshed out. Any given way of cashing these out will generate compatibility conditions that religious establishment can be evaluated against.

For many (but not necessarily all) conceptions of secularism, there will be forms of establishment that are compatible with it. This theoretical point squares well with the empirical fact that even French *laïcité*, American separationism and Turkish Kemalism allow certain institutional links to organised religion, e.g. state support for certain religious schools, chaplains in prisons and military facilities, and state control of mosques. It is also reflected in the typologies proposed in many recent works on secularism and establishment. Such typologies often

distinguish between "coercive" and "non-coercive" establishment,[57] "moderate" and "radical" secularism,[58] or "militant separation", "modest separation", "modest establishment" and "militant establishment".[59] Such typologies articulate that there are many degrees and kinds of establishment. But once we inquire into how the different types are delineated, it also becomes clear that the distinguishing characteristics concern compatibility with normative criteria. The typologies are not descriptive but moralised in the sense that the reference of terms like "modest establishment" depends on which institutional arrangements actually live up to specific normative requirements. So secularism is "a normatively dependent concept".[60] This supports my claim that in order to answer the compatibility question, we need to pick out specific conceptions of secularism and determine, though application of the requirement of theoretical integration, what compatibility conditions follow from their normative content.

I have used the conceptions advocated by Audi and by Taylor and Maclure to exemplify how certain conditions of compatibility follow from how we specify the basic values. I have shown how the substance of the basic values affect the conditions for compatibility and that even quite demanding specifications, e.g. of freedom as moral integrity, do not necessarily rule out establishment. I have

[57] D. Brudney, "On noncoercive establishment."

[58] T. Modood, *Multiculturalism: A Civic Idea*, cf. S. Lægaard, "Moderate Secularism and Multicultural Equality."

[59] C. Laborde, "Political Liberalism and Religion: On Separation and Establishment."

[60] As Rainer Forst, *Toleration in conflict* (Cambridge: Cambridge University Press, 2013), has agued for toleration.

also shown how the requirement of theoretical integration not only calls for a reconstruction of the internal coherence of conceptions, but also sets the stage for a normative discussion of the plausibility of both derived claims and proposed justifications.

That a conception *permits* a form of religious establishment does not mean that there is a good positive justification for having this kind of religious establishment. I have discussed secularism as a position that *rules out* certain things; that establishment is compatible with secularism merely means that it is not ruled out. One might demand more than this in terms of justification. Even if a form of establishment is not ruled out by secularism, there might not be sufficiently good positive reasons for upholding it – or there might be good positive reasons of other kinds for not accepting establishment.[61]

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THE CHURCH AND THE STATE

FREEDOM OF RELIGION AND FREEDOM OF CONSCIENCE IN POSTSECULAR SOCIETIES

BY FRANÇOIS BOUCHER

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Exemptions to the Law, Freedom of Religion and Freedom of Conscience in Postsecular Societies

François Boucher

Abstract. In this paper, I argue that the diversity characteristic of postsecular societies challenges the special legal status of religion and confronts liberal egalitarians to a dilemma. I first argue that there are no good reasons to single out religion for special legal treatment and to make conventional religious convictions the only legitimate candidates for exemptions to neutral laws of general applicability. Then, I show that once they acknowledge this point, liberal egalitarians find themselves at a crossroad, contemplating two seemingly unattractive options. On the one hand, they can expand practices of religious exemptions so as to offer similar legal protection to non-religious commitments. However, many think that this runs the risk of an uncontrollable proliferation of exemptions. On the other hand, liberals can adopt a deflationist strategy and deny that the protection of freedom requires granting exemptions to the law, for both religious and secular commitments, thereby abandoning practices of exemptions which are sometimes needed to treat individuals with equal concern. I show that this dilemma is central in the recent accounts of religious freedom proposed by Ronald Dworkin and Brian Leiter, who both adopt the deflationist approach. I argue that fears related to the proliferation of exemptions are exaggerated and that citizens of postsecular societies are in no rush to turn their back to the expansionist approach to exemptionism.

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I

Postsecularism and The New Religious Pluralism

In this article, I want to address one particular challenge that the reasonable accommodation of religion poses in postsecular societies. As one Canadian jurist puts it, reasonable accommodation requires that public institutions as well as private corporations adapt their norms and policies to the religious and cultural practices with which they conflict, unless such an adaptation generate an excessive constraint either by violating the rights of certain citizens, by imposing a significant financial burden to the institution or by preventing the law to achieve its otherwise legitimate aims.[1] I want to focus on one particular form of religious accommodation which consists in granting legal exemptions to neutral and generally applicable laws to enable individuals to live in accordance with their convictions when those conflict with laws and regulations.

Exemptionism is practiced in several countries. For instance, in the United Kingdom, Sikhs are exempted from laws requiring motorcycle drivers to wear a helmet and from laws requiring the wearing of helmets on construction sites.[2] In Canada, the legal obligation of reasonable accommodation has been mobilized to authorize young Sikhs to carry the kirpan (a symbolical dagger) in classrooms.[3] In the United States, Christian workers who

[1] José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse," *Revue de droit de McGill* 43 (1998): 325-358.
[2] See the *Motor-Cycle Crash Helmets (Religious Exemption) Act*, 1976 and Section 11 of the *Employment Act* of 1989.
[3] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 1 S.C.R. 256 (2006) SCC 6.

have been fired after having refused to work on Saturday for religious reasons have been entitled to unemployment compensation.[4] Those are just a few examples of legal exemptions that have been granted by courts in order to accommodate individuals' religious convictions and practices. Many demands for accommodation are much more controversial and several have been rejected by tribunals. For instance, recently in Canada, a group of Catholic parents demanded to be exempted from a mandatory course titled *Ethics and religious culture*, which aims at familiarising pupils with religious diversity, dialogue and critical thinking in relation to ethical questions. The Supreme Court rejected their demand.[5] In 1990, the Supreme Court of the United States refused to exempt members Native American Church from laws prohibiting the consumption of peyote (a psychoactive drug) although they claimed this practice was essential to further their spiritual aims.[6]

[4] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[5] *S.L. v. Commission scolaire des Chênes*, (2012) CSC 7.

[6] *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Before *Smith*, since the *Sherbert* decision, States could not restrict religious freedom unless this was necessary to protect a compelling interest. *Smith* considerably lessened the protection of religious freedom by making it possible for States to adopt a "valid and neutral law of general applicability" infringing the free exercise of religion even in the absence of a compelling interest. In 1993, Congress adopted the *Religious Freedom Restoration Act* (RFRA) which reintroduced a pre-*Smith* level of protection for religious freedom. However, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court asserted that Congress had exceeded its authority in passing the RFRA. Since then, it is understood, roughly, that the RFRA applies to the federal government only. However, several States have adopted their own RFRAs. See Greenawalt, Kent, *Religion and the Constitution. Volume 1: Free Exercise and Fairness* (Princeton, NJ: Princeton University Press, 2006), 29-33. In

Exemptionism poses a distinctive normative challenge in postsecular societies. Postsecular societies, as I will understand them in this paper, are societies that are marked by a new dynamics of religious pluralism in which there is an explosion of diversity due to phenomena of the individualization of belief and contemporary patterns of immigration. The term "postsecular" is somehow a buzzword in the social sciences and several meanings and connotations are attached to it.[7] To avoid ambiguities, I shall simply stipulate what I mean by "postsecular."

As I will understand it, postsecularism is a societal condition defined in relation to the idea of secularization. Secularization is a complex descriptive notion in sociology: it purports to refer to a multifaceted phenomenon characterized by the autonomisation of different spheres of activity (economic, political, religious, etc.), the rise of a disenchanted worldview, the decline of the influence of religion, and the individualization of religious practices and beliefs. Following sociologist José Casanova, we can break the concept of secularization down into different subparts. For Casanova, we should distinguish the core thesis of the theory of secularization from two sub theses. The core thesis of secularization asserts that functional differentiation in modern societies emancipates the

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1996, the State of Oregon granted members of the Native American Church an exemption from drug laws allowing its members only to use peyote for ritualistic purposes, see the *American Indian Religious Freedom Act*, 42 U.S.C. § 1996a.

[7] For some clarification regarding the varieties of postsecularism, see James A. Beckford, "SSSR Presidential Address: Public Religions and the Postsecular: Critical Reflections," *Journal for the Scientific Study of Religion* 51 (2012): 3-13. Beckford distinguishes six groups or clusters of ideas and meanings associated with the term "postsecularism."

religious sphere of activity from secular ones and opens the door for a process of individualization of beliefs by which individuals' convictions come to be less and less under the influence of government and of official religious authorities. The first sub-thesis of secularization predicts the decline of religion; it postulates the progressive shrinkage and, eventually, the disappearance of religion. The second sub-thesis affirms the privatization of religious beliefs; it asserts that religion in the modern era is bound to become a personal affair and to assume a marginalized place in the public sphere.[8]

I understand postsecularism as a societal condition in which only the core thesis of secularization obtains. Postsecular societies are not societies in which religious belief is on a sharp and steady decline (let alone, on its way to disappear) and they are not societies in which religious practices tends to be more and more privatized. They are rather societies in which there is great religious diversity and which are marked by the deprivatization of religion.[9]

Postsecular societies are thus secularized only in the thin sense that, as religion is emancipated from other spheres, most notably from political authority, they embrace freedom of religion and allow each individual to decide for himself how to pursue salvation, enlightenment or the ultimate meaning of human life. This process leads to an explosion of diversity of beliefs. This means at least three things.

[8] José Casanova, *Public Religions in the Modern World* (Chicago and London: University of Chicago Press, 1994), 19-39.
[9] On the deprivatization of religion, see ibid., 66.

First, the processes of immigration and of individualization of belief lead to a proliferation of religious groups. Hinduism, Islam, Sikhism and Buddhism, just to mention a few, are now practiced by many in Western societies. Religious diversity is no more contained within the boundaries of Western monotheistic religions. Moreover, new ways of believing have appeared in those societies in the last decades. Just think for instance about the emergence of the Church of Scientology, of New Age spirituality, or of the Western reinterpretation of Asian and Indigenous religions, without forgetting the emergence of surprising and eccentric cults such as Wicca[10], the International Church of Jediism[11] or the Missionary Church of Kopimism.[12]

Secondly, this new religious pluralism is also characterized by a wide variety of modes of religiosity, ranging from orthodox religions, in which the emphasis is put on external conformity in the performance of rituals, to 'protestantized' religions, in which the emphasis is put on the subjective dimension of religion and the intimacy of the individual conscience.

[10] A modern pagan cult based on belief in witchcraft.

[11] Basing their views on the fictional world depicted in the *Star Wars* movies from George Lucas, Jediists believe that the "force" unites all living creatures, people, plants and animal and teach that humans should learn to not let emotions cloud their judgment and to channel their emotions for constructive purposes. See http://www.churchofjediism.org.uk/about.html. Accessed on February 19, 2014.

[12] Kopimism is an officially recognized religion in Sweden and it has many chapters around the world. It professes that knowledge, as well as the copying and sharing information are sacred. See http://kopimistsamfundet.ca/. Accessed on February 19, 2014.

Thirdly, postsecular societies are also marked by the fact that atheism, agnosticism and non-religious lifestyles are now viable options, if not the dominant option. As Charles Taylor notes, our current age is one in which belief in God and adherence to mainstream or official forms of religiosity are not taken for granted; unorthodoxy and unbelief now share the stage with dominant and traditional forms of religion.[13] Postsecular societies are thus marked by an increasing gap between believers and nonbelievers, as well as by a multiplication of religions and of modes of religiosity.

As Western societies become more and more postsecular, they face an important normative question regarding religious freedom. What should be the basis for justifying legal exemptions? Should the citizens of such societies extend the legal protection currently granted to conventional religious beliefs to unconventional beliefs and to secular commitments? In 1965, in *United States v. Seeger*, and in 1970, in *Welsh v. United States*, the U.S. Supreme Court took this road and decided to grant the status of conscientious objector to induction into the armed forces to individuals who did not belong to any religious sect and whose views were derived from "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those" who had been granted the status of conscientious objector on religious grounds.[14] In a similar way, the Federal Court of Canada decided in 2002, in *Maurice v. Canada*, that a prison was violating the plaintiff's freedom of conscience by denying

[13] Charles Taylor, *A Secular Age* (Cambridge MA: Harvard University Press, 2010). 1-22.
[14] United States v. Seeger 380 U.S. 163 (1965), 176.

him the right to receive vegetarian meals despite the fact that he did not embraced any religious beliefs.[15]

Is this expansive strategy the right way to proceed? Should the citizens of postsecular societies instead treat religion as being special under the law and as being the unique legitimate beneficiary of legal protection not granted to analogous secular commitments and unconventional spiritual beliefs? Several decisions of the U.S. Supreme Court favour this approach. For instance, in 2012, in *Hosanna-Tabor Lutheran Evangelical Church and School v. EEOC*, the Court affirmed that religious organizations are entitled to a special legal exemption from federal laws against employment discrimination (the ministerial exception) on the basis that religious freedom prevents government from interfering with the freedom of *religious* groups to select their own ministers. In *Wisconsin v. Yoder*, the Court rejected the possibility of granting exemptions to reasonable state regulations in matters of education for secular ways of life insisting that "to have the protection of the Religion Clauses, the claims must be rooted in religious beliefs."[16]

It may seem that the accommodation of non-conventional religions and of non-religious convictions of conscience is a trivial matter. Yet, as I will explain, it raises important questions of legal philosophy. Moreover, as the number of adherents to non-conventional faiths and of non-believers is rising, we can expect that more and more claims of religious freedom will have to do with the new postsecular diversity. For instance, in the Canadian

[15] *Maurice v. Canada* (Attorney General), 2002 FCT 69, [2002] 2 F.C. D-47.
[16] *Wisconsin v. Yoder*, 406 U.S. 205 (1972), 215.

province of Ontario, in the 2011-2012 fiscal year, roughly 15% of the applications received by the Human Rights Tribunal of Ontario citing creed as a ground of discrimination were made by applicants who did not adhere to a conventional religion or to any religion.[17]

The question of whether or not religion should be given special legal treatment is of particular interest for liberal egalitarian political philosophers because it exposes them to an unsettling dilemma. As I will argue, there are good reasons, from a liberal point of view, to oppose favouring religious beliefs by making them the only type of foundational commitment that can ground an exemption (II). Moreover, the main arguments supporting the view that religion should be given special treatment are unconvincing (III). Once it is established that religion should not be regarded as special and that analogous secular convictions of conscience should benefit from equivalent protection, liberal egalitarians found themselves at a crossroad, contemplating two seemingly unattractive alternatives. On the one hand, the acknowledgement that religion is not special *vis-à-vis* areligious foundational commitments could entail that the purview of exemptionsim should be broadened so as to offer equivalent protection to secular commitments. Yet, this

[17] This includes people adhering to atheism, Witchcraft, Elemental magic, Ethical veganism, Kabala, Rastafarian, Taoism, Wiccan, Yoga system and cosmology, Zen, Zoroastrianism, and people who claimed they are not be affiliated to any creed. Ontario Human Rights Commission, *Human Rights and Creed Research and Consultation Report* (2013), Section 3.1.2. http://www.ohrc.on.ca/en/human-rights-and-creed-research-and-consultation-report. Accessed on February 20, 2014.

solution appears to be overinclusive since it potentially leads to an unwelcome and uncontrollable proliferation of exemptions to the law. On the other hand, if we seek to avoid the pitfalls of unrestricted multiplication of legal exemptions in a fair manner, by offering no or almost none legal protection for both religious and secular convictions, then we jeopardized our egalitarian and liberal commitments which sometimes requires exemptionism. I illustrate this dilemma in section IV by discussing two different recent liberal egalitarian approaches to exemptionism in postsecular societies, which have been developed by Ronald Dworkin and Brian Leiter. I conclude by suggesting that the threat of proliferation is overstated and that the option of expanding the purview of exemptionism to accommodate postsecular pluralism is still a viable one (V).

II

Egalitarian Theories of Religious Freedom

For liberal egalitarians, according special treatment to religious convictions alone but not to secular ethical convictions is inherently suspicious, as this seems to arbitrarily privilege believers over unbelievers and to affirm that only the former are worthy of respect and toleration. For instance, opposing the idea that religion should be privileged under the law, American legal scholars Christopher Eisgruber and Lawrence Sager assert that: "[to] single out one of the ways that persons come to understand what is important in life, and grant those who choose that way a license to disregard legal norms that the rest of us are

obliged to obey, is to defeat rather than fulfil our commitment to toleration."[18]

Moreover, one of the main challenges to the idea that religion should treated as special is that in order to offer legal protection to religion *qua* religion, the state has to settle on a definition of religion. It is however very hard to come to an uncontroversial definition of religion which is not underinclusive and does not exclude certain forms of worship which should arguably benefit from legal protection if other forms of worship benefit from such protection. Should we define religion by the belief in a transcendent supreme being, thereby excluding non-theistic religions? Should we define religion by the existence of an official institutional structure codifying rituals, beliefs, norms of conduct and so on, thereby excluding believers which are not affiliated to any religious organization? Should we rather simply work with a list of all the historically important religions we know of, thereby excluding new forms of spirituality? Given the exclusive character of any objective definition of religion, it is hard to avoid the conclusion that having the government using such a definition to determine which beliefs can benefit from legal protection, and which ones cannot, is tantamount to having public authorities deciding what count as truly religious. This is an unwelcomed form of doctrinal establishment of religion. As Eisgruber and Sager claim: "in order to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are

[18] Christopher L. Eisgruber and Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct," *University of Chicago Law Review* 61 (1994): 1325.

entitled to special treatment as 'religious' while others are not, we are creating a sphere of orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore."[19]

The quandaries associated with the singling out of religion for special treatment under the law have lead several liberal egalitarians to develop a new approach to religious freedom which places religious convictions on par with non-religious deep ethical commitments. They have developed "egalitarian theories of religious freedom," to take an expression recently coined by Cécile Laborde. According to Laborde, those theories share the view that "religious freedom is not a distinctive freedom and that it should be treated under a more general equality-based regime" and they assert that "[r]eligious beliefs and activities might be *specially* protected, but not *uniquely* so: if and when they are, it is as a sub-set of a broader category of respect-worthy beliefs and activities."[20] For example, Dworkin insists that religious freedom should be treated as an instance of ethical independence from government with regard to foundational matters:

> we cannot declare a right to religious freedom and then reject rights to freedom of choice in […] other foundational matters without striking self-contradiction. For if we insist that no particular religion be treated as special in politics, then we cannot treat religion itself as special in politics, as more central to dignity than sexual identification, for example. So we must not treat religious freedom

[19] Christopher L. Eisgruber and Lawrence G. Sager, "Does it Matter What Religion Is?," *Notre Dame Law Review* 84 (2009): 807.
[20] Cécile Laborde, "Equal Liberty, Non-Establishment and Religious Freedom," *Journal of Legal Theory* (forthcoming), 3. Available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160896.

as *sui generis*. It is only one consequence of the more general right to ethical independence in foundational matters.[21]

Another prominent egalitarian theory of religious freedom asserts that freedom of religion should be understood as deriving from, or as being subsumed under, freedom of conscience. For instance, Maclure and Taylor argue that religious convictions ought to be legally protected, but only *qua* convictions of conscience understood as "meaning-giving beliefs and commitments."[22] In a similar way, Eisgruber and Sager deny that religion should be given a special treatment under the law but affirm that religious convictions should be protected as a member of the broader category of "deep commitments."[23] More recently Brian Leiter claimed that "[i]f matters of religious conscience deserves toleration […]

[21] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011), 376. See also Ronald Dworkin, *Is Democracy Possible Here?* (Princeton: Princeton University Press, 2006), 61.

[22] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge MA: Harvard University Press, 2011): 75-76. As Maclure and Taylor explain, these convictions play an important and very deep role in one's life. Convictions of conscience give a moral orientation to people's life, they are the fundamental beliefs and commitments that make it possible for persons to have a moral identity and to make moral judgments (*Ibid.*, 77). Convictions of conscience are thus what Taylor earlier called "strong evaluations": that is, evaluations about right or wrong, better or worse, higher or lower which are not reducible to mere preferences, desires and inclinations but are rather the standards by which desires, preferences and inclinations can be judged. See Charles Taylor, *Sources of the Self: The making of Modern Identity* (Cambridge, MA: Harvard University Press, 1989): 4.

[23] Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007): 6. *Cf.* Andrew Koppelman, "Is it fair to Give Religion Special Treatment?," *University of Illinois Law Review* 3 (2006): 571-603.

then they do so because they involve matters of conscience, not matters of religion."[24]

In the next section, I explain why the main arguments contradicting egalitarian theories of religious freedom and purporting to establish that religion is special are mistaken.

III

Is Religion Special?

Several legal scholars and political philosophers have directly addressed the question of whether or not religion is morally and legally distinctive and of whether or not legal exemptions should be extended to similarly situated nonbelievers.[25] Matthew McConnell is one of the most refined proponents of the view that religion should be singled out by law for special treatment. He offers several arguments in support of this view. In this section, I discuss three of those arguments: first I discuss the idea that

[24] Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013): 64.

[25] See for instance Sonu Bedi, "Debate: What is so Special About Religion? The Dilemma of Religious Exemption," *The Journal of Political Philosophy* 15 (2007): 235-249; C. Eisgruber and L. Sager, *Religious Freedom and the Constitution*; Anthony Ellis, "What is Special About Religion?," *Law and Philosophy* 25 (2006): 219-241; A. Koppelman, "Is it fair to Give Religion Special Treatment?"; C. Laborde, "Equal Liberty, Non-Establishment and Religious Freedom"; B. Leiter, *Why Tolerate Religion?*; J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 85-97; Michael W. McConnell, "The Problem of Singling Out Religion," *De Paul Law Review* 50 (2000): 1-47; Micah Schwartzman, "What if Religion isn't Special?," *University of Chicago Law Review* 79 (2013): 1351-1427.

religion is special because it involves duties to God, something which finds no parallel in secular worldviews and unconventional new religious creeds. Second, I discuss the idea that religion is a fundamental and irreducible good which cannot properly be accounted for by being subsumed in a larger, more general category. Third, I discuss the view that religion should benefit from special legal protection because it also is specially burdened by the law given its disabilities under the non-establishment principle.

McConnell claims that religion is distinctive from non-religious worldviews since it involves duties to God; no single feature of secular worldviews parallels believers' sincere belief in the existence of divine authority. This distinctive feature of religion is morally significant, for the purpose of singling out religion as the unique basis for justifying exemptions, because no atheist or agnostic can experience a conflict between what he sincerely perceives to be divine commands and civic obligations. As McConnell puts it, freedom of religion is special because "no other freedom is a duty to a higher authority."[26]

Is this argument receivable in a postsecular society? One may object from the start that this argument cannot be offered as a public justification in such a society since it requires nonbelievers to recognize God's authority. However, this objection misses the target. McConnell is well aware that many citizens are nonbelievers and that laws and policies cannot be justified to them by appealing to the existence of God and to divine authority. His argument does not demand citizens to recognize the objective validity of God's commands; it does not, for instance, claim that

[26] M. McConnell, "The Problem of Singling Out Religion," 30.

religion is special because, as a matter of fact, not respecting a divine commandment is a ticket to Hell or because it is objectively bad that God's will remains unfulfilled. It rather simply demands nonbelievers to give due moral consideration to the fact that, from their subjective point of view, believers experience a disturbing conflict between divine and temporal authority. As he explains:

> belief in the reality of a God is not necessary to the argument. An individual needs only to believe conditionally that if there is a God, this idea can be revealed only through the "conviction and conscience" of the individual and not through the hand of the state. […] Moreover, it is logically possible, indeed humane and praiseworthy, for those who do not believe in the existence of God, but who recognize that many of their fellow citizens do, to refrain from using the power of the state to create conflicts with what are perceived (even if incorrectly) as divine commands.[27]

McConnell is surely right to claim that nonbelievers can appreciate the burden placed on the conscience of believers who cannot comply with their perceived religious duties while fulfilling civic obligations. Yet, in making this point, McConnell also makes a significant concession to the opponents to the view that religion should singled out for special legal treatment. What his argument implies is that religion is not politically salient (in relation to the issue of legal exemptions) because of its objective truth, but because of some aspects of the subjective experience of believers. Religion is salient not because there are clashes between law and what God truly demands of his followers, but because there are clashes between law and what believers perceive

[27] Ibid., 30.

to be their religious obligations. However, it is very implausible that what follows from this subjective understanding of religion is the conclusion that it is morally legitimate to single out religion as the sole valid basis for claiming exemptions to the law.[28]

Firstly, it is not logically impossible that, from a subjective point of view, many nonbelievers experience the demands of (secular) morality as being as much categorical, fundamental and central to their identity as divine commands are from the believers' point of view.[29] Secular morality also has sources of authority which are 'higher' in the sense that they 'transcend' the individual by presenting themselves as binding regardless of the desires and preferences of individuals. For instance both Kantian morality, since it is based on the universal law of reason, and political morality, understood as the norms recognized by a political community, are independent from the wills and whims of any particular individual. Furthermore, is there any reason to think that religiously motivated vegetarians have a commitment to vegetarianism which is necessarily stronger, more intense, deeper and more central to their identity than the commitment of ethical vegetarians opposed to meat-eating on secular grounds (for animal welfare considerations, for example)? If what matters is the strength of the perceived moral imperatives, then religious

[28] Note that this argument in itself cannot justify giving legal protection to non-theistic conventional religion such as Buddhism, for instance. For a similar objection to McConnell, see Koppleman, "Is it fair to Give Religion Special Treatment?," 593.

[29] Many have highlighted this point. Maclure and Taylor, *Secularism and Freedom of Conscience*, 97; Koppleman, "Is it fair to Give Religion Special Treatment?," 592-593; Martha Nussbaum, *Liberty of Conscience* (New York: Basic Books, 2008): 168-169.

and secular vegetarians are similarly situated when they find themselves in situations where they cannot live by their vegetarian commitments. McConnell's argument offers no reason to rule out this possibility.

Secondly, McConnell is concerned with providing a public justification for the singling out of religion.[30] As mentioned, he deems it important to explain why nonbelievers can and should give due consideration to the fact that believers have stringent duties to their God. But if nonbelievers are expected to give due consideration to the fact that some religious citizens sincerely believe that they have to comply with duties that conflict with the law, is it not legitimate to also expect religious citizens to give due consideration to the fact that some nonbelievers sincerely believe they also have important conscientious duties that conflict with the law? Public justification is underpinned by a norm of reciprocity which is undermined if only nonbelievers have to give proper consideration to the

[30] McConnell does not use the term "public justification." I offer this interpretation as a reconstruction of his argument. In doing so, I assume that the reason why McConnell points out that non-believers citizens can recognize and understand the special importance that their religious fellow citizens attach to being able to comply with God's commands is that he implicitly recognizes the value of justifying laws by considerations that every citizens can understand and accept. If I am right, this makes him very close to embracing the idea that the constitutional singling out of religion as the sole basis for granting legal exemptions is compatible with something akin to the principle, central to Rawls's conception of public reason, of liberal legitimacy which asserts that: "[the] exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason." John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 137, 217.

sincere beliefs of their religious co-citizens and if the latter can ignore the sincere beliefs of the former.

A second argument for singling out religion as special under the law claims that religion is an irreducible good. Religion's special legal status is based in this case on the impossibility to assimilate its value to something else. There are two variants of this argument.

First, some claim that religion is an intrinsic good. In this view, religion is politically salient *qua* religion because it is valuable in itself and is not merely a means to achieve some other value.[31] This argument asserts that the legal status of freedom of religion is based on the intrinsic moral worth of religion as such. Michael Sandel thus claims that: "[t]he case for according special protection to the free exercise of religion presupposes that religious belief, as characteristically practiced in a particular society, produces ways of being and acting that are worthy of honor and appreciation-either because they are admirable in themselves or because they foster qualities of character that make good citizens."[32] Similarly, in a recent article

[31] Rafael Domingo, "Religion for Hedgehogs? An Argument against the Dworkinian Approach to religious Freedom," *Oxford Journal of Law and Religion* 1 (2012), 1-22. The argument that religion is an intrinsic good ought not to be confused with the argument, for instance put forth by Tariq Modood, that religion is a public good. See Tariq Modood, "Moderate Secularism, Religion as Identity and Respect for Religion," *The Political Quarterly* 88 (2010), 6. Modood claims that religion is a good that benefits the whole society because it is a source of important moral intuitions and of political mobilization, and because certain religious organizations are providers of social services. This view does not imply that religion is an intrinsic and irreducible good, but only an instrumental one.

[32] Michael Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), 257; see also

criticizing the Dworkinian approach to religious freedom, Rafael Domingo asserts the irreducibility of the value of religion to any other good or value : "[l]ike life, property and security, religion calls for a particular status in law because it is a foundational good, not simply an implication of ethical independence."[33] Both Sandel and Domingo assert that the essential meaning of freedom of religion is lost in approaches to religious freedom attempting to "assimilate religious liberty into liberty in general."[34] They claim that religious freedom should be understood as protecting intrinsically valuable religious activities, not as protecting the freedom to make autonomous choices in matters of religion. For instance, Sandel argues that the understanding of religious liberty as an instance of liberty in general trivializes religion, exalts the value of free and voluntary choice as an end in itself, and confuses "the pursuit of preferences with the exercise of [religious] duties."[35] Similarly, Domingo claims that viewing religious freedom as an instance of ethical independence, "replaces the search for moral truths with a criterion of personal authenticity that inescapably leads to a subjectivist conception of ethical and moral judgement without the possibility of an external rule."[36]

These authors adopt what we may call a substantial and perfectionist conception of religious freedom. It is

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Michael Sandel, "Religious Liberty: Freedom of Choice or Freedom of Conscience," in *Secularism and its Critics* ed. Rajeev Bhargava (Oxford : Oxford University Press, 1998), 85-92.

[33] R. Domingo, "Religion for Hedgehogs?" 3.

[34] M. Sandel, "Religious Liberty: Freedom of Choice or Freedom of Conscience," 92.

[35] Ibid., 92. Cf. M. Sandel, *Public Philosophy*, 255-257.

[36] R. Domingo, "Religion for Hedgehogs?," 16.

substantial, by opposition to being procedural, because it views freedom of religion as protecting the participation of individuals in certain activities considered to be properly religious and it is perfectionist because it holds that the justification of freedom of religion is to be found in the value of those religious activities. By contrast, a procedural understanding of religious freedom conceives that the purpose of religious freedom is to protect the capacity of individuals to make autonomous choices with regard to religious matters, regardless of the content of those choices. Such a conception is not a perfectionist one since it does not tie the justification of religious freedom to the content of individuals' choices or to specific activities. It rather makes the justification of religious freedom rest on the view that it is wrong for a government to force someone to act against his deepest convictions, regardless of what those are (provided, of course, that they are compatible with respecting others' rights).

What is problematic with a substantive and perfectionist conception of religious freedom is that it requires governments and tribunals to rely on judgements about the moral worth of individual beliefs and practices which are alienating and disrespectful to individuals and groups who disagree with the official or the majority's view on the worth of religion. How can a government adopting such a conception of religious freedom protect unpopular religious minorities dissenting with officially recognized religious views? How can atheists avoid feeling as second class citizens when the government openly affirms that religion is intrinsically good and worthy of special respect? It is not a secret that some mainstream religions embrace views which are disrespectful to many persons such as homosexuals, non-believers or the members of a different

religion. How can a government relying on the substantive and perfectionist conception of religious liberty avoid the dilemma of having to choose between putting its stamp of approval on those disrespectful religious views or drastically curtailing the religious freedom of those mainstream religious groups? The substantial and perfectionist conception of religious freedom entails a too great proximity between state and religion to protect the equal status and religious liberty of citizens.

McConnell offers a different version of the argument that religion should be special under the law because it is an irreducible good. In this view, it is not that religion in itself is intrinsically valuable, but rather it is a unique mix of several things which are themselves valuable. McConnell claims that religion is a special phenomenon because it is a complex bundle of several aspects, the sum of which is never found in totality in its alleged secular analogues. Religion is distinctive because it is composed of a list of many valuable elements and it is the only thing to have all these elements together:

> Religion is a special phenomenon, in part, because it plays such a wide variety of roles in human life: it is an institution, but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and locus of community, akin to family ties, but it is more than that; it is an aspect of identity, but it is more than that; it provides answers to questions of ultimate reality, and offers a connection to the transcendent; but it is more than that. Religion cannot be reduced to a subset of any larger category. In any particular context, religion may appear to be analogous to some other aspect of human activity—to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human

> phenomenon that combines all of these aspects; if there were such a concept, it would probably be viewed as a religion.[37]

It should be stressed that the only conclusion that can be drawn from the premise that religion is a thing composed of a bundle of aspects which are never found all together in another human activity is that religion is a unique phenomenon, not that it is irreducible to any other good or value. Quite to the contrary, the argument relies on the view that religion is reducible to many goods (personal identity, collective identity, answer to ultimate questions, and so on). Moreover, to conclude from the aforementioned premise that religion should be special under the law in the sense that it should benefit from legal protection not granted to secular commitments, organizations and activities, one needs to make the very demanding (and very implausible) assumption that every single element which defines religion is a necessary condition for special legal protection. For although religion may be the only thing to combine all those elements, many other things are characterized by at least one of those elements—to be sure, nations, professions and families also sustain ties of personal loyalty and secular ethical convictions can also be sources of personal identity. McConnell relies on the claim that the discrete constitutive elements of religion are all necessary conditions for special legal protection (they are conjointly necessary), yet this claim is left undefended despite its being quite implausible. For instance, is it really legitimate to deny a religious exemption because the claimant is not part of an institutionalized religion or because her religion does not link her to a particular community even if this claimant has

[37] M. McConnell, "The Problem of Singling Out Religion," 42.

a sincere belief that she has a religious obligation deeply rooted in her moral identity? Why would a secular conviction, which is a source of personal and collective identity, not be considered as a legitimate basis for legal protection if those characteristics are seen as playing a role in the justification of the legal protection offered to religion? Why is lack of connection to 'transcendence,' in the previous case, so important that it justifies a denial of legal protection?

A third argument in support of the view that religion should be special claims that the special status of religion does not constitute a privilege which only benefits believers but is rather "a matter of balance."[38] As McConnell recalls, in the United States, the two religious clauses of the First Amendment (non-establishment of religion and free exercise of religion) single out religion both for its privileges, since the free exercise clauses singles out religions as the special beneficiaries of legal exemptions, and for its disabilities, since non-establishment forbids government to proclaim the truth or falsity of a religion and to promote one religion over the others. The counter part of free exercise exemptions is that no religion may use the coercive arm of the state to promote its own sectarian objectives. This disability specially targets religions since governments are under no interdiction to promote secular values and objectives. The separation between religion and politics takes the form of a twin protection (of religion from government and of government from religion): although government cannot infringe on religious liberty,

[38] Ibid., 10; *Cf.* Abner S. Greene, "The Political Balance of the Religion Clauses," *Yale Law Journal* 102 (1993), 1611-1644; M. Schwartzman, "What if Religion Is Not Special?", 1368.

believers cannot use state laws to further their religious ends. According to McConnell, this hands-off approach to religion and politics "creates a trade-off that few other ideologies or system of belief would care to make."[39] For instance, although a conscientious environmentalist may not benefit from an exemption under the free exercise clause, governments are free to promote environmentalist values and objectives. Thus, there would be something unfair in allowing, on the one hand, non-believers to both be able to claim exemptions from generally applicable laws and to use the coercive apparatus of the state to further their aims and, on the other end, to allow religious citizens to be exempted from laws conflicting with their beliefs while forbidding them to use the arm of the state to promote their own ends.

This argument for the singling out of religion is mistaken. First, religion is not specially targeted for its disability. For instance, it would be as much wrong for a government to assert the truth of atheism or to promote agnosticism as it would be to establish any religion. Moreover, although governments may promote environmentalists' objectives on the (neutral) grounds of intergenerational justice and concern for the health and safety of citizens, it may not do so on the ground that the metaphysical doctrine of deep ecology, for instance, is true. Most importantly, the balance and trade-off argument is problematic because it is dubious that the rationale for religious exemptions is found in the idea that religious citizens should be compensated for the disability created by the non-establishment of religion. Non-establishment of religion is not an arbitrary compromise that can only be

[39] M. McConnell, "The Problem of Singling Out Religion," 10.

morally justified if some compensation is provided to religious citizens. Non-establishment is justified on its own terms because when the state puts its stamp of approval on one religion, it does not treat non-adherents of that religion with equal respect since it symbolically creates a hierarchy of ranks and sends the message that some are second-class citizens.[40]

IV

A Liberal Egalitarian Dilemma

So far, I have argued that there are good reasons to oppose the claim that religion should benefit from special protection *qua* religion. If religion is singled out for special legal treatment, one needs to rely on an official definition of religion and this generates just the kind of religious orthodoxy that religious freedom should combat. Moreover, it seems arbitrary to refuse to treat one religion as special *vis-à-vis* other religions but to treat religion itself as special *vis-à-vis* non-religious deep ethical commitments, unless we can highlight some features of religion which introduce a morally significant difference. Yet, the main attempts to highlight such a morally significant distinction fail. Indeed, secular moral imperatives can also be deeply rooted in one's sense of identity and integrity. In addition, attempts to show that religion is a foundational and irreducible good are unconvincing. Finally, religious

[40] See for instance, Cécile Laborde, "Political Liberalism and Religion: On Separation and Establishment," *Journal of Political Philosophy* 21 (2011), 82-86; M. Nussbaum, *Liberty of Conscience*, 227.

exemptions are not granted to compensate believers for the disability religion suffers under non-establishment regimes.

What conclusions should liberal egalitarians draw from the view that it is morally problematic to single out religion as the sole basis for justifying legal exemptions? Should we adopt an expansionist strategy and claim that exemptions must also be available for non-believers whose deep commitments clash with government's laws and regulations? Eisgruber and Sager as well as Maclure and Taylor adopt this option.[41] Or, should we rather adopt a deflationist strategy asserting that, from a moral point of view, no exemptions are required, neither for secular commitments nor for religious beliefs? Brian Barry defends such a no-exemptions position in *Culture and Equality*.[42]

In this section, I want to illustrate that the acknowledgement that religion should not be singled out as special for the purpose of justifying legal exemptions confronts liberal egalitarians with a dilemma. One the one hand, the deflationist strategy is unsatisfactory from the point of view of justice since exemptions are often required to alleviate an unfair burden imposed on minority groups by the uniform application of laws, even when those laws have a neutral justification and do not explicitly aim to discriminate against those minorities or to restrict their freedom.[43] Yet, on the other hand, the expansionist

[41] C. Eisgruber and L. Sager, *Religious Freedom and the Constitution*; J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*.

[42] Brian Barry, *Culture and Equality. An Egalitarian Critique of Multiculturalism* (Cambridge MA: Harvard University Press, 2001).

[43] See for instance, Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 114-115; Jonathan Quong, "Cultural Exemptions, Expensive Tastes, and Equal Opportunities," *Journal of Applied Philosophy*, 23 (2006): 53-71.

strategy, especially when practiced in a postsecular society, seems to open the door to an unlimited proliferation of exemptions threatening the authority of the state and its capacity to pursue legitimate societal objectives in all spheres of legislation. Two very different recent egalitarian theories of religious freedom, one proposed by Brian Leiter[44], the other by Ronald Dworkin[45], exemplify this dilemma.

Leiter adopts a version of the deflationist strategy in his recent book *Why Tolerate Religion?*. He claims that "the No exemptions approach to claims of conscience […], religious or otherwise, is the most consistent with fairness."[46] This approach asserts that there should be no exemptions for "burden-shifting" claims of conscience which conflict with laws pursuing neutral objectives. Burden-shifting exemptions are those exemptions that impose a burden on individuals who have no legitimate claim of exemption.[47] For instance, Leiter argues that a conscientious objection to

[44] B. Leiter, *Why Tolerate Religion?*.

[45] R. Dworkin, *Religion without God*, 105-147. The main difference between both approaches lies in the different conceptions of religion which underpin them. Leiter views religious commitments as being radically different from secular ethical commitments since the former are based on beliefs that are "insulated from reasons and evidence" (*Why Tolerate Religion?,* 33-35) and, consequently, are harmful (Ibid., 60-66) and do not deserve our esteem (Ibid., 68-91). Dworkin, by contrast, argues for an expansive concept of religion: "the religious attitude accepts the full, independent reality of value" and "rejects all forms of naturalism" (*Religion without God*, 10, 13. Thus, for Dworkin there are godless and secular religions and secular ethical commitments are, from the start, on par with the conscientious commitments of theistic religions.

[46] B. Leiter, *Why Tolerate Religion?*, 130-131.

[47] Ibid., 99.

military service is burden-shifting since, presumably, when one citizen refuses to take arms someone else, who cannot be exempted on conscientious grounds, needs to do it.[48] A claim of conscience that impose a fiscal burden on the rest of society when accommodated is also burden-shifting. Nonetheless, Leiter still opens the door only for those legal exemptions which are not burden-shifting.

Leiter adopts the deflationist view by fear that the expansionist strategy will lead to a proliferation of demands for exemptions. He notably asserts that a universal regime of exemptions of conscience will be "tantamount to constitutionalizing a right to civil disobedience."[49] For instance, he worries that if there is nothing special about the Sikh's religious belief in the obligation to always carry a kirpan and if we recognize an obligation to exempt Sikhs, in some contexts, from laws forbidding individuals to carry knifes, then we also must provide an exemption, in similar contexts, to the "lone eccentric, who for reasons known only to him, feels a categorical compulsion, which he deeply identifies as a matter of personal integrity, to always have a knife nearby."[50]

[48] Ibid., 99.

[49] B. Leiter, *Why Tolerate Religion?*, 94.

[50] Ibid., 93. Leiter also worries about the practical difficulties associated with evaluating the sincerity of exemptions claims and he believes that all burden-shifting exemptions are morally problematic. I discuss the burden-shifting objection below. However, I will not address the difficulty of assessing the sincerity of conscientious beliefs. For illumining discussions of this matter, see K. Greenawalt, *Religion and the Constitution*, 109-123; Daniel Weinstock, "Beyond Objective and Subjective: Assessing the Legitimacy of Religious Claims to Accommodation," *Les ateliers de l'éthique* 6 (2011): 155-175; Avigail Eisenberg, *Reasons of Identity. A Normative Guide to the Political and Legal*

Leiter's view is unattractive for egalitarian reasons. It is very dubious that it is always unfair to grant an exemption for a burden-shifting practice. For instance, imagine that it is clearly established that the provision of halal, kosher, and vegan menus in closed public institutions (hospitals, schools, prisons and the army) results in an increased work load for the working staff of those institutions and is slightly more costly than only providing menus which do not accommodate the dietary practices of individuals. It seems disproportionate, in this case, to burden the conscience of individuals who sincerely believe that they have the obligation to follow a certain diet just so that each taxpayer can save a few pennies. This burden is disproportionate since the accommodation of dietary conscientious requirements in those closed public institutions regards a matter that is central to several individuals' moral identity and because such accommodation is, in some cases (in schools and hospitals, at least), a tool to promote equality of opportunity and of access to public services. Leiter never explains on which conception of justice and of the fair distribution of the burdens any benefits of cooperation he relies on to identify an unfair burden in all cases of burden-shifting exemptions. He simply views all shifts in the currently existing pattern of distribution of burdens produced by exemptions to the law as being unfair. He thus seems to believe that currently existing social institutions provide an appropriate baseline from which all claims of inequalities can be normatively assessed. However, there is no reason to believe that laws and institutions which have historically been shaped by cultural and religious majorities provide an impartial

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Assessment of Identity Claims (Oxford: Oxford University Press, 2009), Chap. 5.

baseline allowing us to identify which burdens are unfair. Leiter thus commits the mistake of taking the status quo as an impartial standpoint enabling him to identify all shifts of burden as unfair.[51]

Dworkin's egalitarian theory of religious freedom also faces the dilemma between fully embracing the demands of equality and avoiding the pitfalls of the proliferation of exemptions. Dworkin adopts a deflationist position with regard to exemptionism in order to counter the threat of proliferation. He embraces the rationale and outcome of the *Smith* decision of the U.S. Supreme Court, which significantly lowered the protection given to religious convictions. Indeed, *Smith* asserted that government was under no obligation to prove that it had a compelling and urgent interest in order to justify limitations to the free exercise of religion. Religious practices can be restricted by a law pursuing a neutral purpose and does not aim at discriminating a group or at limiting religious freedom.

Dworkin captures this view by saying that the right to religious freedom is not a special right to a particular liberty. A special right offers a very strong protection to individual liberty as it forbids government to abridge it unless it has a compelling justification, that is, unless there is an emergency. Freedom of speech is, according to Dworkin, such a special liberty since it should only be restricted in the face of clear and imminent danger.[52] By contrast, as a subcategory of the right to ethical independence, the right to religious freedom is a general

[51] Cécile Laborde, *Critical Republicanism. The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008): 82.
[52] Dworkin, *Religion withou God*, 131. *Cf.* R. Dworkin, *Justice for Hedgehogs*, 369.

right. General rights offer a much weaker protection to individual liberty. Indeed, a general right only protects individuals against those infringements to their liberty that are not justified by neutral considerations. To use Dworkin's words:

> [e]thical independence means that government must never restrict freedom just because it assumes that one way for people to live their lives—one idea about what lives are most worth living just in themselves—is intrinsically better than another, not because its consequences are better but because people who live that way are better people.[53]
>
> If we deny a special right to free exercise of religious practice, and rely only on the general right to ethical independence, then religions may be forced to restrict their practices so as to obey rational, nondiscriminatory laws that do not display less than equal concerns for them.[54]

I qualify Dworkin's account of exemptionism as a deflationist one partly because it only protects ethical convictions regarding foundational matters from perfectionist and majoritarian attempts to restricts individual liberty and asserts that governments are under no obligation to grant exemptions from neutrally justified laws. But most importantly, his view that religious freedom is a general right, as opposed to a special one, is a consequence of his endorsement that religion is not special. For Dworkin, religious and secular personal ethical commitments deserve similar legal protection.[55] Moreover, he notes that "once we break the connection between religious conviction and orthodox theism, we have no firm

[53] Dworkin, *Religion*, 130
[54] Ibid., 135-136. *Cf.* Dworkin, *Justice for Hedgehogs*, 369, 377; Dworkin, *Is Democracy Possible Here?*, 71.
[55] Dworkin, *Religion without God*, 110-116.

way of excluding even the wildest ethical eccentricity from the category of a protected faith."[56] The inclusion of all, even the most eccentric, ethical convictions is unproblematic if the kind of protection granted to foundational commitments is that of a general right. However, if the protection offered to foundational commitments takes the stronger form of a special right, which can only be abridged when there is a compelling and urgent interest, then a legislatively paralyzing proliferation of exemptions to laws pursuing rationally and neutrally justified objectives is, according to Dworkin, unavoidable: "[i]f the Native American Church is entitled to an exemption from drug-control laws, then Huxley's followers would be entitled to an exemption, and skeptical hippies would be entitled to denounce the entire drug-control regime as a religious establishment."[57]

Dworkin's egalitarian theory of religious freedom is problematic on egalitarian grounds because the inclusion of secular convictions into the category of those beliefs worthy of legal protection only comes at the price of diluting such protection to the point where it denies certain exemptions needed for egalitarian purposes. The general right to ethical independence only limits the reasons offered by governments to curtail individual liberty. As such, it does not protect individuals from indirect discrimination, which proceeds from the unintended and unforeseen effect of laws which pursue valid and neutrally justified aims.[58] Yet, many demands for exemptions are

[56] Ibid., 124.
[57] Ibid., 135.
[58] Direct discrimination results from an explicit or deliberate intention to discriminate, whereas indirect discrimination results from the unintended and unforeseen effects of certain laws and policies. Pierre

demands to rectify indirect discrimination. For instance, laws requiring a helmet for motorcycle riders and construction workers as well as laws prohibiting the wearing of knives in classrooms do not explicitly aim at discriminating against the Sikhs. They aim at promoting safety and security. However, they can have, indirectly, the effect of undermining Sikhs' opportunities to live in accordance with the demands of their conscience *and* to access certain workplaces, to engage into certain recreational activities, or to obtain basic instruction.[59]

One may object that I am being unfair to Dworkin as he still manages some place for exemptions designed to rectify indirect discrimination. Indeed, he claims that the general right to ethical independence forbids legislatures to justify laws in a way that "covertly" assumes that some ethical commitments are less valuable than others by ignoring the special importance those commitments have to individuals embracing them.[60] This, according to Dworkin, requires governments that prohibit or burden certain practices regarded as "sacred" by a group to provide an exemption "[i]f an exception can be managed with no significant damage to the policy at play."[61] However, it seems that Dworkin claims, only those exemptions which do not affect the pursuit by the state of neutrally justified objectives should be granted. In this view, the demands of individual conscience should always give way to civic obligations; as Dworkin puts forth: "[t]hat priority of non-

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Bosset, *Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable* (Québec: Commission des droits de la personne et des droits de la jeunesse du Québec, 2007), 3.

[59] J. Quong, "Cultural Exemptions," 62.

[60] Dworkin, *Religion without God*, 136.

[61] Ibid. 136.

[directly] discriminatory collective government over private religious exercise seems inevitable and right."[62] Not very much unlike Leiter's dismissal of all burden-shifting exemptions, Dworkin's subordination of individual conscience to the demands of citizenship runs the risk of imposing disproportional restrictions of individual liberty in foundational matters since in this framework, even the prospect of a slight loss in terms of the state's capacity to further legitimate collective goals (such as, for instance, the aims to levy taxes to finance roads and aid the poor, forbid drugs to protect the community from the social costs of addiction, and protect forests because forests are in fact wonderful)[63] is enough to justify restrictions to the fundamental right to freedom of conscience and religion.[64]

V

Individual Conscience and the Proliferation of Exemptions

It is true that the inclusion of secular convictions of conscience, non-religious ethical commitments and non-conventional religious beliefs in the category of beliefs entitled to legal protection opens the door to a vast array of

[62] Ibid. 137.
[63] Ibid., 130-131.
[64] It is not uninteresting to note that Dworkin seems to have departed from earlier accounts of rights (and especially of the right to ethical independence) where he defined rights in relation to their special weight against collective goals such that only goals of special urgency and importance could override a right. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press), 92; *Justice for Hedgehogs*, 369.

exemptions. Thus, the expansionist approach to exemptions in a postsecular society may lead to the accommodation of all sorts of weird and eccentric beliefs.[65] However, in itself, the mere fact that some beliefs and practices appear to be eccentric, ridiculous, weird or even blatantly irrational to a majority of citizens is not sufficient to establish that there is something morally problematic in granting constitutional protection to those beliefs. Quite to the contrary, it is precisely one desiderata of a theory of religious freedom to provide protection to unpopular beliefs from the majority's propensity to impose its views and to not take minority opinions seriously.

What is worrying with the threat of proliferation is not proliferation in itself, it is the prospect of a legislatively paralyzing proliferation arising out of the accumulation of several exemptions. If governments are to grant exemptions, they must be consistent and must therefore grant similar exemptions to similarly situated groups and this may go on until we reach the point where the government's ability to pursue legitimate objectives is severely undermined by the multiplication of measures for accommodating individuals' conscience. Thus, although the initial exemption creating a precedent for subsequent ones may not, taken individually, seriously impair the state's capacity to pursue a legitimate legislative objective, the addition of similar exemptions may do so. For instance, if allowing only the members of the Native American Church to consume peyote for ritualistic purposes does not in itself

[65] For instance, Barry highlights that in the U.S. and in the U.K., Witchcraft has been at times viewed as a religion entitled to similar protection than, say, the Anglican or the Catholic Churches. B. Barry, *Culture and Equality*, 52-53.

defeats the purpose of drug prohibition laws, the generalized practice of granting exemptions to drug laws could, presumably, severely burden the state's capacity to prohibit drugs when it is expanded to cover other groups that have conscientious commitments, religious or not, which are similar to those of the Native American Church. The legitimate worry associated with the threat of proliferation is not that exemptionism forces to accommodate eccentric practices, it is that by recognizing the demands of individuals' private conscience we will undermine legitimate state authority and government's capacity to enact any kind of regulation designed to further neutral and valuable aims.[66]

[66] For instance, in *Smith*, the Court was worried that the practice of exemptionism amounted to "a system in which each conscience is a law unto itself" and that it would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, *see, e.g., Gillette v. United States,* 401 U. S. 437 (1971), to the payment of taxes, *see, e.g., United States v. Lee*, [106 U.S. 196 (1882)]; to health and safety regulation such as manslaughter and child neglect laws, *see, e.g., Funkhouser v. State,* 763 P.2d 695 (Okla.Crim.App.1988), compulsory vaccination laws, *see, e.g., Cude v. State,* 237 Ark. 927, 377 S.W.2d 816 (1964), drug laws, *see, e.g., Olsen v. Drug Enforcement Administration,* 279 U.S.App.D.C. 1, 878 F.2d 1458 (1989), and traffic laws, *see Cox v. New Hampshire,* 312 U. S. 569 (1941); to social welfare legislation such as minimum wage laws, *see Susan and Tony Alamo Foundation v. Secretary of Labor,* 471 U. S. 290 (1985), child labor laws, *see Prince v. Massachusetts,* 321 U. S. 158 (1944), animal cruelty laws, *see, e.g., Church of the Lukumi Babalu Aye Inc. v. City of Hialeah,* 723 F.Supp. 1467 (S.D.Fla.1989), *cf. State v. Massey,* 229 N.C. 734, 51 S.E.2d 179, *appeal dism'd,* 336 U.S. 942 (1949), environmental protection laws, *see United States v. Little,* 638 F. Supp. 337 (Mont.1986), and laws providing for equality of opportunity for the races, *see, e.g., Bob Jones University v. United States,* 461 U. S. 574, 461 U. S. 603-604 (1983)." *Employment Division, v. Smith* at 494 U. S. 888-889.

I want to conclude by highlighting a few aspects of conscientious convictions in order to suggest that fears of proliferation are perhaps exaggerated and do not clearly warrant adopting the deflationist strategy. Those practices are designed to protect an important fundamental freedom as well as to foster equality of opportunity and fair terms of integration for minority groups. We may thus want to pause before giving in to allegations of a slippery slope towards legislative paralysis.

First, although it is legitimate to worry that an expansionist approach to legal exemptions will lead to an unwelcome proliferation, we must not forget the importance and value of freedom of conscience and religion. People do suffer a morally significant burden when they are unable to act in accordance with the demands of their conscience, religious or not. Convictions of conscience are indeed intimately linked to individuals' identity as moral agents and sense of self-respect. When people are forced to act against these convictions, they experience a loss of personal integrity, a feeling of self-alienation, a sense that their own actions violate the moral principles defining who they are.[67] It would therefore be problematic to impose such a burden of conscience to citizens simply on the ground that we absolutely want to avoid committing ourselves to grant exemptions to hypothetical exemptions claimants, such as Leiter's lone and eccentric individual who feels a categorical compulsion to always wear a knife, in the advent that such hypothetical

[67] Paul Bou-Habib, "A Theory of Religious Accommodation," *Journal of Applied Philosophy*, 23 (2006): 109-126; J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 76-77; M. Nussbaum, *Liberty of Conscience*, 19-20, 53-5.

claimants come to be real persons. I would here suggest that the problem of proliferation should only be viewed as serious when we can point to actually existing groups or individuals (or to groups which can reasonably be expected to exist in a foreseeable future) who are similarly situated than the group or individual who sets the precedent for a certain type of exemption to the law.

Secondly, the phenomenon of individualization of beliefs in modern and postsecular societies does not necessarily mean that more and more individuals come to embrace totalizing and comprehensive worldviews which require them to systematically follow an orthodox and rigid way of life. Quite to the contrary, as Maclure and Taylor remark, in modern societies, individuals' moral identity is often structured around many poles (professional life, family, social engagement, etc.). People are thus much more likely to enjoy a certain margin of manoeuvring in arbitrating between foundational values and commitments. If this is right, then several individuals in those societies embrace a much more fluid and eclectic set of values than those who attempt to strictly follow an orthodox conception of religion.[68] These individuals, who can be expected to form the bulk of the population, are less likely to view their values as unconditional obligations and thus less likely to ask for exemptions.

Finally, even in the case of those individuals who embrace a more totalizing and orthodox conception, the prospects of finding a compromise which can both enable citizens to comply with their conscientious duties and allow the state to further its neutrally justified objectives is greater than what proponents of deflationist approaches to

[68] J. Maclure and C. Taylor, *Secularism and Freedom of Conscience*, 94.

exemptionism seem to suggest. An expansionist view of exemptionism and freedom of conscience does not require the kind of complete and unquestioned deference to the demands of individual conscience that would lead to legislative paralysis. Both laws and religious practices have a degree a flexibility which often makes it possible for public authorities to achieve their ends with less restrictive policies and provides them with a wiggle room to regulate individuals' practices in ways consistent with respecting conscientious convictions.

First, public authorities can make efforts to imagine different ways to pursue the same legitimate goal and select the one which least restricts free exercise of religion. There is nothing sacred, special or unique which links a public goal and the particular measure adopted by a government to achieve this goal. There is no constitutive link between a policy and the goal it serves; there is just a link of instrumental rationality: policies are means to pursue certain collective goals.

Moreover, religious practices also have a certain degree of flexibility which gives the state some room to regulate these practices in ways which do not limit too harshly freedom of conscience. Religious practices often have many dimensions and can be reinterpreted in many ways. Some of these dimensions are essential to the believers' deep understanding of their religious obligations; others are more contingent and unrelated to their sense of integrity. Not all aspects of a given religious practice are essential to fulfill a religious prescription. It might be the case that the state is able to further an end that apparently inevitably conflicts with someone's religious freedom simply by asking her to change aspects of her religious practice which

are not essential to the fulfillment of a religious obligation. For instance, this is how the *Multani* case was decided by the Supreme Court of Canada.[69] The case involved a conflict between the Board of a public school which demanded to a Sikh student to stop wearing his kirpan at school. The student refused on the ground of his sincere belief that wearing this religious symbol is a central obligation of Sikhism. The Board claimed that its demand was justified since it aimed at preserving security and safety at school, the kirpan being a ceremonial dagger that could be used as a weapon by the bearer or by another student stealing the object. The Court authorised the student to wear the kirpan at school, but required that it be placed in a sealed case and worn underneath the clothes. This involved asking Sikhs to reinterpret their practices and to drop certain of their components. The original practice was to wear the kirpan in an unsealed case, outside the clothes. But, after deliberating with the court, it appeared to the Sikh student and his family that he could both fulfill his obligation to wear a kirpan and meet the schools demands regarding security by changing some aspects of this practice.

This example shows that both the means by which governments pursue valid collective goals and the practices of citizens based on conscientious convictions are flexible enough to make sense of a duty to seek accommodations understood as mutual adjustments reached after deliberation. The idea that the conflicting authorities of individual conscience and the state require us to choose between unquestioned and unrestricted deference to individual conscience and systematic subordination of

[69] *Multani v. Commision scolaire Marguerite-Bourgeoys.*

conscience to the demands of citizenship poses a false dilemma.

In sum, fears of proliferation leading egalitarians to embrace the deflationist view on exemptionism are exaggerated. First, it would be ill advised to curtail such a fundamental freedom as the freedom of conscience to avoid some clearly undesirable but hypothetical cases of accommodation. Second, the individualization of beliefs in postsecular societies is much more likely to lead most individuals to adopt fluid and adaptable value commitments. Third, both the law and individuals' religious and conscientious practices have a certain degree of flexibility which, in some cases, allows for reconciliation between the demands of conscience and the demands of citizenship via a reciprocal modification of initially conflicting practices. Egalitarian theorists of religious freedom should be careful not to jump too quickly to the conclusion that only the deflationist strategy to exemptionism is viable in postsecular societies.[70]

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[70] I presented earlier versions of this paper at the 2013 Manchester Political Theory Workshop and at the Religion and Political Theory workshop at University College London in September 2013. I benefited from valuable comments from Valérie Amiraux, Aurélia Bardon, Cristobal Bellolio, Cécile Laborde, Lois Lee, Domenico Melidoro, Ronan McCrea, Roland Pierik and Andrew Shorten. Moreover, the research project leading to this publication was funded by the Fond Québécois de Recherche Société et Culture.

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A POSTSECULAR RATIONALE?

RELIGIOUS AND SECULAR AS EPISTEMIC PEERS

BY PAOLO MONTI

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A Postsecular Rationale?
Religious and Secular as Epistemic Peers

Paolo Monti

Abstract. In *Democratic Authority and the Separation of Church and State*, Robert Audi addresses disagreements among equally rational persons on political matters of coercion by analysing the features of discussions between epistemic peers, and supporting a normative principle of toleration. It is possible to question the extent to which Audi's views are consistent with the possibility of religious citizens being properly defined as epistemic peers with their non-religious counterparts, insofar as he also argues for some significant constraints on religious reasons in public debates, and he advocates secular reasons being considered as equivalent to natural reasons.
I shall also consider Jürgen Habermas's criticism of Audi's stance. One of Habermas' main points focused on Audi's strong division between religious and non-religious arguments that requires religious citizens to artificially split their reasons, while non-religiously affiliated citizens are not met with any similar requirement. Also, analysing the concept of epistemic parity, we can as well grasp some of the main features of the Habermasian idea of postsecularism. The difference between secular and postsecular views can be framed as hinging on what it means to be epistemic peers, thus bearing consequences on the understanding of the relationship between church and state—particularly regarding the nature of state neutrality and the different status of churches and organised secular groups.

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I

Introduction. Religious and Secular Reasons

What does equality require, when it comes to participation in public discourse and political deliberation? The multifaceted efforts put in place to answer this question have often lead to question the boundaries of public reasons, roughly defined as reasons that are universally accessible to every citizen and, as such, apt to provide the basis for political deliberation.[1] One of the most heated subjects has been the inequality of the burdens that are imposed upon religious or non-religious persons when they try to access a public arena whose boundaries are defined in secular or religious terms. In this regard, I think that more attention should go to the epistemological characterization that secular and religious reasons, and the relationship between them, receive. If we care about equality, the framework for rational discussion should be set up in the most unbiased way. If the rationality criteria embedded within the normative framework of public deliberation are ultimately unfair in one sense or another, that could put citizens with different kinds of belief into a condition of epistemic imparity even before the conversation actually had a chance to take place.

Among others positions in the contemporary debate, Robert Audi's e Jürgen Habermas' views are relevant to understand what is at stake here. Audi claims that equality

[1] The concept of "public reason" is mostly connected with the work of John Rawls, but it has been subject to several interpretations and discussions. For the original formulation, see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); "The Idea of Public Reason Revisited," *The University of Chicago Law Review* 64 (1997): 765–807.

of participation in public discourse and political deliberation should allow religious reasons to play a role of their own, but he also argues that religious citizens should articulate sufficient secular reasons to justify their public views. Habermas, on the other hand, argues that positions like the one defended by Audi are intrinsically unfair in distributing the burdens between secular and religious citizens, and thus suggests that we should pursue some kind of cooperative discursive involvement from both parts. He also maintains that the secular citizens should be expected to engage in a self-critical assessment of the boundaries of public rationality as much as their religious counterparts are.

In this paper I am going to take on Audi's view showing that he is mostly right in rejecting the accusations of exclusivism that have been raised against his quite comprehensive view, but I also claim that his account of epistemic parity between secular and religious citizens is somewhat at odds with his own normative principle of secular rationale. I will then compare and contrast Audi's view with the one maintained by Habermas, showing that they differ on their conception of epistemic parity and on their characterization of the equality of burdens required to participate in public discourse. In conclusion, I claim that both views show some significant internal tensions that leave room for further developments, even if in general I think that the Habermasian postsecular perspective articulates a more promising framework to face the inequality of burdens that the access to public discourse may require from secular and religious citizens. This is a quite relevant conclusion because these views do not only point to different ethics of citizenship but might also

impact, as I will illustrate, on the regulation of the institutional relationships between church and state.

II

Robert Audi on Epistemic Parity and Toleration

With *Democratic Authority and the Separation of Church and State*, Robert Audi took a step forward in his personal, wide-ranging contribution to the topic of the place of religious commitment in contemporary democracies.[2] His position has grown around the development of a core ethics of citizenship, and has been progressively refined and enriched in a series of works that have drawn attention and stoked debate in the field.[3] I cannot cover his entire view here, so I will focus mainly on how his latest book addresses the issue of disagreements between equally rational persons on political matters of coercion, and analyses the features of discussions between epistemic peers to advocate for a normative principle of toleration.

[2] Robert Audi, *Democratic Authority and the Separation of Church and State* (Oxford: Oxford University Press, 2011). Unless otherwise specified, parenthetical references refer to this text.

[3] Among others, see Robert Audi, "The Place of Religious Argument in a Free and Democratic Society," *San Diego Law Review* 30 (1993): 677–702; "Liberal Democracy and the Place of Religion in Politics," In *Religion in the Public Square*, by Robert Audi and Nicholas Wolterstorff (Lanham: Rowman & Littlefield, 1997); *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000); "Religion, Morality, and Law in Liberal Democratic Societies: Divine Command Ethics and the Separation of Religion and Politics," *The Modern Schoolman* 78, nos. 2–3 (2001): 199–217; *Rationality and Religious Commitment* (Oxford: Oxford University Press, 2011).

The starting point for Audi's analysis is his principle of secular rationale:

> *The principle of secular rationale*: Citizens in a democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, [an] adequate secular reason for this advocacy or support (e.g. for a vote). (pp. 65-66).

This principle provides the cornerstone of Audi's normative views on the matter and has often been taken as the core of his overall theory.[4] It is grounded in the notion that in a democratic setting, coercion always has to be justified through rational arguments, which have to be accessible to all citizens, regardless of their religious or secular views. Audi does not imply nor believe that adequate reasons must be shared by everyone, but only that they need to be understandable to all rational adults, which means that they should be "appraisable by them through using natural reason in the light of facts to which they have access on the basis of exercising their natural rational capacities" (p. 70). This characterisation of secular reasons as appraisable by "natural reason" and acquirable through the exercise of "natural capacities" is quite relevant and was incorporated into Audi's view on the basis of his latest elaborations on the correct understanding of the principle of secular rationale. He goes as far as stating that "it is important to see that the principle of secular rationale could

[4] It should be noted that the formulation of the principle stays essentially unchanged thorough all of his works. Among others, see "The Separation of Church and State and the Obligations of Citizenship," *Philosophy & Public Affairs* 18, no. 3 (1989): 259–296; "Liberal Democracy and the Place of Religion," 25; *Religious Commitment and Secular Reason*, 86.

with virtually equal appropriateness be called the principle of natural reason" (p. 76). What he tries to point to here is a characterisation of secular reasons as free as possible from the burden of an interpretation of the "secular" as partisan, one-sided kinds of reasons, which have to be opposed to religious ones in a scheme of cultural and historical contraposition. Thus, understanding secular reasons as natural ones is an approach meant to offer a more inclusive common field that can serve as a ground for shared, basic normative claims or, at least, to provide secular reasons with a less vague and controversial meaning in the eyes of the religious interlocutor (See p. 78). In terms of the epistemic status of reasons, Audi is quite sharp in arguing that natural reasons are all secular in the epistemic sense (See pp. 86-87). This, in turn, implies that religious reasons are not just un-secular, but also distinctively "un-natural" in epistemic terms. Audi recognises that religious reasons are not the only ones with manifest problems regarding their universal accessibility. In this regard, he nonetheless states that "although religious reasons are not the only kind that should not be the basis for coercion, they are nonetheless special," and this is because of "their major role in the sense of identity of many people" and "the high authority they have in the eyes of many of them" (p. 71).

Within this framework, then, the principle of secular rationale offers a normative ethical requirement that citizens should consider when it comes to their active participation in the processes of public debate and political representation. Ideally, if they are consistent with such a principle, the citizens should be greatly facilitated in their deliberative tasks, and as a result find a high level of cooperation on most normative issues. However, there is another way to approach the issue of pluralistic public

discourse between religious and non-religious people. We can, in fact, assume as a premise the actual occurrence of deep, persisting disagreements and question the normative limits of democratic toleration in such situations. It is for facing this kind of challenge that Audi elaborates the principles of rational disagreement and toleration. These can be considered, in a sense, as mirroring the purpose of the principle of secular rationale on the other side of the matter: they frame a normative approach to deal with persisting disagreements, whereas the latter is meant to convey the normative conditions of plausible democratic agreements.[5] The principle of rational disagreement is formulated as follows:

> *Principle of rational disagreement*: The justification of coercion in a given instance is (other things equal) inversely proportional to the strength of the evidence for epistemic parity among disputants who disagree on whether coercion in that instance is warranted (p. 118).

Rational disagreement between epistemic peers is openly construed by Audi as inclusive of relationships between people who differ in religion, between religious and non-religious people, or even between people with the same religious affiliation (See p. 117). Understanding the implications of epistemic parity thus becomes crucial to appropriately grasp the scope and applications of the principle.

As Audi puts it, "roughly, epistemic peers are (rational) persons who are, in the matter in question, equally rational, possessed of the same relevant evidence, and equally

[5] To this purpose, the principle of secular rationale is joined, in Audi's account, by the principles of secular motivation and religious rationale, which I will not cover here. See Ibid., 143–145 and 89–90, respectively.

conscientious in assessing that evidence" (p. 117).[6] The principle of rational disagreement consequently stands on grounds of reciprocity, which should equally concern all interlocutors in the same measure, insofar as they are in conditions of parity.[7] The weakness of the justifications that citizens may offer in such situations is, however, problematic, and it may be taken as a premise for different kinds of conduct. Audi himself acknowledges this issue, by claiming that situations of persisting disagreement with interlocutors that appear to be epistemic peers could lead to scepticism or quite simply to both sides taking their own unchanged view as the right one. He argues, though, that this kind of situation should rather be faced with humility, by being open to the possibility that we could be at least less justified than our peers in holding our position. In public deliberation humility pushes towards a very restrained attitude when the rationale for coercive laws and public policy doesn't look very strong if compared to the opposing one.

This kind of stance, consistent with Audi's general epistemological views that are characterized by a sharp anti-sceptical position based on a distinct moderate foundationalism,[8] leads to the normative take, which

[6] Elsewhere in his work the definition of epistemic parity essentially matches. See e.g. Robert Audi, *Epistemology: a Contemporary Introduction to the Theory of Knowledge*, 3rd ed. (New York and London: Routledge, 2011), 373: "Roughly, to be an epistemic peer in a given matter is to be (a) exposed to the same relevant evidence as oneself, (b) equally conscious in considering it, and (c) equally rational in the matter."
[7] See Audi, *Democratic Authority*, 118, where he writes: "The principle of rational disagreement is certainly in the spirit of 'Do unto others'."
[8] See Audi, *Epistemology*, 333–377.

defines the principle of toleration in relation to situations of persisting disagreement:

> *The principle of toleration*: If it [is] not reasonable for proponents of coercion in a given matter to consider themselves epistemically superior in that matter to supporters of the corresponding liberty, then in that matter the former have a prima facie obligation to tolerate rather than coerce (pp. 119-120).

The principle normatively articulates the "humility" option with a precise liberal tone: in situations of epistemic parity, individual freedom of conduct is always preferable over coercion (See pp. 117-118).

III

A Restless Parity

Audi's views assigned a significant role to religious reasons in public deliberation, but, at the same time, he establishes some clear limitations to religious reasons and an overall priority of secular reasons over religious ones, especially in matters of coercion. It is not obvious, though, that the kind of priority of the secular that Audi defends is fully compatible with the possibility for religious and secular citizens to be effectively epistemic peers. This issue may appear to be a primarily epistemological one, but it also carries significant political consequences, since if two citizens cannot be actually considered epistemic peers when they discuss on a matters of public interest, they will also be less than equal when it comes to their participation in public deliberation. Let us explore in more details the implications of Audi's account on this matter.

Being part of the same general normative account, Audi's principle of toleration is meant to be fully compatible with his principle of secular rationale. The latter, though, places a significant restriction on sociopolitical appeals to religious reasons, and this restriction seems particularly relevant if, as we have seen, secular reasons are intended as equivalent to natural reasons—an expression of our natural cognitive capabilities. This raises some concerns about the viability of epistemic parity as a key notion that is applicable to the relationship between religious and non-religious citizens within the boundaries of Audi's conceptual framework. One concern comes from the intrinsic difficulty of applying the very notion of epistemic parity in such a complex, deliberative scenario. Another comes from the aforementioned friction between the principle of secular rationale and the ideal of reciprocity, which grounds the principles of rational disagreement and toleration.

To better articulate the first concern, I will examine some more detailed considerations of epistemic parity elaborated elsewhere by Audi himself.[9] The basic idea here is that two interlocutors are in a situation of epistemic parity with respect to a specific claim if they are (1) equally rational and (2) equally informed on facts relevant to that claim. Most notably, Audi argues that these considerations can be extended beyond specific claims to be applied to general subject matters, as it may be in the case of the realm of practical ethics. The criteria of epistemic parity can thus be plausibly applicable to the subject of an ethics of

[9] Robert Audi, "Rational Disagreement as a Challenge to Practical Ethics," in *Epistemology: New Essays*, ed. Quentin Smith (Oxford: Oxford University Press, 2008), 236.

citizenship, which is my concern here. Moreover, Audi also elaborates that when both (1) and (2) are satisfied, there is a situation of full epistemic parity, and when only one is satisfied, or either is only partially satisfied, there is a situation of partial epistemic parity, where the latter notion admits degrees.

This account, while consistent with the characterisation we have seen so far, offers a more nuanced and plural take on epistemic parity. First, it authorizes an extension of the concept, from being applied to specific matters to being applied to wide-ranging subjects—in this case, ethics. Second, it allows for an application in different degrees: from partial peers to full peers. At the same time, both conditions for epistemic parity appear as problematic. Rationality conditions are in general difficult to define and apply,[10] as they are related to the different forms of appropriateness that characterize the cognitive and practical responses of each individual to their experiences. On the other hand, information conditions, while apparently easy to determine with reference to certain factual knowledge, are instead extremely controversial when it comes to identifying which ones are actually the relevant facts at stake. Moreover, it should be noted that normative considerations of tolerance require every citizen to be able to recognise the parity of their interlocutors, and thus to appropriately apply the above condition to people they are in persistent disagreement with. Whether, and to what extent, this is always possible is at least dubious. Audi himself acknowledges that our access to others' total evidence is indirect, difficult and incomplete, to the point

[10] As Audi himself puts it, "rationality conditions are both multifarious and subtle". Ibid.

that it may often be difficult or, in practice, impossible, to have adequate evidence for thinking that someone else is in fact an epistemic peer.[11] While he suggests that these difficulties do not bar the possibility of being justified in one's assessment of one's status and level of epistemic parity with others, the problematic nature of the evaluations persists and underlines the relevance of self-scrutiny as a condition for reasonably maintaining a belief when we think that there is a significant probability that a disputant is effectively an epistemic peer.[12] The problem here lies not in the vagueness of the concept, but in its practicability. Audi is developing an ethics of citizenship, and as such, some level of vagueness in the concepts can be accepted. The principles, though, are still meant to provide a plausible guide for citizens' behaviours, and thus should be applicable by citizens with some degree of uncontroversial precision. Audi himself acknowledges that the non-trivial applicability of the principle may in fact be a problem, even if he puts aside the concern by stating that the level of sophistication it requires should be possessed in general by "a competent high school graduate in many educationally 'advanced' countries" (p. 119). His point is fair but debatable, particularly if contrasted with the point he makes about the multifarious and subtle nature of the rationality conditions.

The trouble with the assessment of epistemic parity is intertwined with the concern about the relationship between the principle of secular rationale and the principles of rational disagreement and toleration. It should be noted that the first principle is meant to hold a certain primacy

[11] Ibid., 237.
[12] Ibid., 238.

and be independent of the others. As Audi points out, "the principle of rational disagreement is a useful adjunct to the principle of secular rationale—the principle of natural reason—but is not essential to the appropriate employment of the latter" (p. 119). In this sense, the epistemic restrictions it imposes hold in a way that is not dependent on considerations about the epistemic parity of the interlocutors. Or, more likely, as I suggest here, the principle already places a significant statement of epistemic imparity between religious and non-religious citizens. Following the principle of secular rationale, in public debates, religious citizens are always required to decisively rely on a non-religious subset of their reasons—even though their religious reasons can supplement their secular ones—and those non-religious reasons are identified with the natural scope of reason as a faculty they share with other human beings. On the other hand, non-religious citizens are not subject to any similar requirement, thus making their whole set of reasons acceptable within public arguments. This, along with the awareness that religious reasons are often deeply relevant to the identity and outlook of religious citizens, may reasonably lead people to wonder if they can ever be assessed, within this frame, as full epistemic peers with their secular counterparts. Leaving aside the requirements of self-scrutiny, which could be questioned from a secular point of view, the segmentation of their reasons may not be compatible with a statement of equally available relevant evidence—the information condition—between secular and religious counterparts, insofar as all the evidence within the secular horizon is deemed universally accessible and naturally available in a way that is denied to any evidence that comes from religious sources. The very rationality of the two sides—the

rationality condition—may also consequently be unequal, particularly if we consider how the religious citizen is described as structurally relying on epistemic sources that exceed the scope of their natural cognitive powers.

On these grounds, it is possible to question to what extent Audi's view is consistent with the possibility of religious citizens being properly defined as epistemic peers with their non-religious counterparts, insofar as the principle of secular rationale holds. This problem is especially apparent because the principle of secular rationale is paired with the assumption that secular reasons, as we have seen, can be meant as quasi-synonymous with natural reasons, while religious reasons are not. The principles of rational disagreement and tolerance would thus put the religious at a structural disadvantage, even before any consideration is given to the specific matter at hand.[13]

This kind of tension does not undermine the principle of rational disagreement in itself, or even the principle of secular rationale. It poses a challenge, though, to the overall

[13] An interesting case is that of atheist citizens. They hold some reasons that could be considered "religious' since they are grounded in a stance on religious matters, like the existence of God, and that may be deeply rooted in their sense of identity, as it is in the case of religious people. In this perspective, the atheist could be affected by the two principles in question as much as the religious person could. Audi, interestingly enough, underlines how his characterization of secular reasons is "theologically neutral and in no way atheistic" (p. 77). On the other hand, though, his characterization of religion and of the religious, articulated in nine criteria, is distinctively pointing to forms of organized religion, with specific communities, rituals, sacred objects, prayers and so on (P. 72). In this sense, the atheist can hardly fit into the overall account of the religious as opposed to the secular offered by Audi.

consistency of Audi's outlook. The most plausible counter argument here is that, in his view, the assessment of epistemic parity is restricted to situations of disagreement on specific topics in specific circumstances. Two citizens, secular and religious, could be recognised as equally rational *in general*, while still not peers *on a specific matter*, or vice versa. This line of reasoning, though, does not seem to be entirely convincing. Are these two levels so independent? Does not this overly weaken the relationship between global and local rationality? If two people are not epistemic peers overall, is not their ability to be epistemic peers on specific matters also intrinsically weakened? If they have an "overall" different ability to appraise evidence, is not this inevitably reflected in their ability to appraise evidence in a specific case? In the account of rationality *in* and *of* a practice that Audi himself offers in *The Architecture of Reason*, it seems that, beyond the special standards of the rationality characteristic of practices, the local practices themselves presuppose "the general standards of practical rationality."[14] This suggests that if the general standards are flawed or diminished, it will inevitably be reflected at the local level. Such an account of rationality seems thus to support a view that sees general and particular epistemic parity as mutually connected.

Audi's account of the relationship between religious and non-religious citizens has been as influential as it has been subject to debate by other scholars. Some of the most recurrent critiques have been general issues of inequality in

[14] Robert Audi, *The Architecture of Reason. The Structure and Substance of Rationality* (Oxford: Oxford University Press, 2001), 190.

the burdens imposed upon religious and secular citizens.[15] Audi's development and refinement of his views has, over time, provided detailed answers to most of his critics, sketching a more and more articulated and inclusive perimeter for secular and religious citizens to engage in political discussion. Such a framework, though it sincerely aims to somehow include religious reasons besides secular ones, may still not allow for the level of epistemic parity that Audi himself suggests is possible between all citizens.

IV

Jürgen Habermas and the Equal Burden

I shall now consider a different and equally influential take on the relationship between religious and non-religious perspectives, with the intent of suggesting an alternative account of epistemic parity and thus performing a comparative assessment with Audi's view. I am thinking of the wide-ranging reflection that Jürgen Habermas has articulated on the category of the postsecular. Habermas is an especially interesting interlocutor here because of his criticism of Audi's stance. This criticism provides an interesting starting point for our analysis of the Habermasian position on epistemic parity.

[15] Among others, see Paul J. Weithman, "The Separation of Church and State: Some Questions for Professor Audi," *Philosophy and Public Affairs* 20, no. 1 (1991): 66–76; Philip L. Quinn, "Political Liberalisms and their Exclusions of the Religious," *Proceedings and Addresses of the APA* 69, no. 2 (1995): 35–56; Nicholas Wolterstorff, "The Role of Religion in decision and discussion of political issues," in *Religion in the Public Square* by Robert Audi and Nicholas Wolterstorff.

Habermas' concerns are framed within a general assessment of the attitude of liberal, contractualist outlooks towards the place of religion in the public square. Most notably, he writes:

> The self-understanding of the constitutional state has developed within the framework of a contractualist tradition that relies on 'natural' reason, in other words solely on public arguments to which supposedly *all* persons have *equal access*. The assumption of a common human reason forms the basis of justification for a secular state that no longer depends on religious legitimation. And this in turn makes the separation of state and church possible at the institutional level in the first place. The historical backdrop against which the liberal conception emerged were the religious wars and confessional disputes in early Modern times. The constitutional state responded first by the secularization and then by the democratization of political power. This genealogy also forms the background to John Rawls's *Political Liberalism*.[16]

This short analysis is especially interesting because it identifies two essential elements in the genealogy of modern liberalism, and particularly of Rawlsian political liberalism: the notion of "natural" reasons as basic grounds for public discussion, and the standard of universal accessibility to all citizens. It comes as no surprise, then, that in Habermas' account, Audi's view does not only represent a typical expression of that tradition, but more specifically, a direct elaboration upon Rawlsian premises. As he puts it, "Robert Audi clothes the duty of civility postulated by Rawls in a special 'principle of secular justifications.'"[17] Seen as an evolved and refined version of

[16] Jürgen Habermas, "Religion in the Public Sphere," *European Journal of Philosophy* 14, no. 1 (2006), 4.
[17] Ibid., 7.

the Rawlsian stance, the principle of secular rationale is subject to an assessment that has also been applied, in some cases, to the notion of the duty of civility. One of Habermas' main remarks is, in fact, about the strong, artificial division between religious and non-religious reasons that the principle of secular rationale demands from religious citizens, while non-religiously affiliated citizens are not met with any similar requirement. While Habermas was making this point, the issue had not yet be treated by Audi with open reference to the status of citizens as epistemic peers. However, it seems clear that Habermas points to the same idea of epistemic reciprocity between religious and non-religious citizens that I am specifically trying to address here by looking at Audi's latest work.[18]

Habermas' main counterpoint to the principle of secular rationale is, essentially, that "many religious citizens would not be able to undertake such an artificial division within their own minds without jeopardizing their existence as pious persons."[19] He tries to focus on the burden that such normative statements impose; not only on the public behaviour of citizens, but on their self-understanding as religious persons. This points to the fact that some religious individuals do not have the ability to properly make such a distinction and formulate public arguments on secular grounds that are foreign to them; thus, they are practically excluded from participating in public deliberation. But the critique implies even more than that. As Habermas puts it, that kind of approach ignores "the integral role that religion

[18] Habermas' observations are essentially just directed to the account given by Audi in 1997 in "Liberal Democracy and the Place of Religion in Politics', thus only address the early core of his views and, above all, the principle of secular rationale.

[19] Habermas, "Religion in the Public Sphere," 8.

plays in the life of a person of faith, in other words to religion's 'seat' in everyday life." Any sincerely religious person "pursues her daily rounds by drawing on belief" and in this sense their "true belief is not only a doctrine, believed content, but a source of energy that the person who has a faith taps performatively and thus nurtures his or her entire life."[20]

On these premises, Habermas cannot accept a perspective that expects religious citizens to abstain from referring to religious reasons as their main public reasons. Instead, he suggests to translate religious insights into a more widely accessible language. This is an exercise that has historically been at the basis of some significant landmarks of our civilization—like the derivation of fundamental human rights from the notion of the dignity of every human being as a child of the Creator—and which should be undertaken as a cooperative learning processes that involves religious and secular citizens alike.

Such a normative perspective, though, may be viable only given certain epistemic premises. That is what Habermas tries to convey through the notion of postsecularity, which embeds certain kinds of epistemic attitude, both of religious citizens towards secular ones and of secular citizens towards religious ones, thus overcoming the imposition of asymmetrical burdens on one group or the other. The definition of those attitudes is a historical process that, at least in Western countries, religious citizens have for the most part already endured, pushed by the necessity to cope with a secular environment whose cognitive and moral features are often at odds with their religious convictions. Through many steps, secularisation

[20] Ibid.

had a deep impact on the theological self-understanding of the most influential religions present in modern societies, often producing a certain level of attunement with some of the basic moral and political values of liberal democracy. Habermas suggests that a somewhat similar process should positively impact the views inspired by the tradition of the Enlightenment. In this sense, "the insight by secular citizens that they live in a post-secular society that is *epistemically adjusted* to the continued existence of religious communities first requires a change in mentality that is no less cognitively exacting than the adaptation of religious awareness to the challenges of an ever more secularized environment."[21] This specific kind of reciprocity could offer a more equal and fruitful background for public discourse, where the secular citizens must understand their conflict with religious views as a reasonably expected disagreement at least as much as the religious citizens are required to do. This implies that, from a secular perspective, nobody should be considered irrational because of their religious convictions *as such*, thus allowing at least implicitly for a first condition of epistemic parity. Not only rationality, but also relevant information, seems to be equally available in Habermas' view, insofar as he thinks that religious doctrines should be recognised, at least potentially, as bearing cognitive resources about the meaning of personal and social life, which may be unavailable from a secular perspective. In this sense, it seems we can say that the criteria of epistemic parity so far illustrated in Audi's account could be applied within a postsecular context without, in principle, favouring one side over the other.

[21] Ibid., 15.

Moreover, it should be noted that Habermas also pairs his consideration of reasonable disagreement with a specific remark on the meaning of toleration. The process of transforming the epistemic attitudes between secular and religious citizens apparently aims for a status of symmetrical engagement that the notion of toleration seems unable to capture entirely. What is at stake goes indeed beyond a respectful attitude towards the existential significance that religion has for religious people. More radically, Habermas argues that secular citizens should engage in "a self-reflective transcending of a secularist self-understanding of Modernity."[22] This secularist self-understanding of Modernity is strongly related to a certain conception of secularization, construed as a linear and irreversible process that inevitably leads to the disappearance of religions. Within the perimeter of such understanding, Habermas argues, it is impossible for a secular citizen to take seriously any contribution that comes from the religious field or even to admit that it may carry some valuable content that can be translated in a different language.

Now, while Habermas does not specifically frame the issue in terms of epistemic parity, it is quite clear that what he is aiming for is a substantially equivalent condition of epistemic attitudes that includes mutual recognition of rationality and access to relevant information. Such a condition is to be achieved through a process of self-understanding that re-positions secular and religious stances as more closely historically and socially intertwined than previous conflictive understandings would have allowed. In this sense, "the required work of philosophical

[22] Ibid., 14–15.

reconstruction goes to show that the ethics of democratic citizenship assumes secular citizens exhibit a mentality that is no less demanding than the corresponding mentality of their religious counterparts,"[23] since they are required to undertake a similar effort of self-critical understanding. Epistemic parity consequently seems to be achieved through a process that imposes an equal burden on all interlocutors, regardless of their affiliation and commitments.

V

Audi's Response to Habermas

Habermas' criticism did not remain unanswered. Audi addressed it quite extensively in *Democratic Authority*, mainly by pointing to the fairness and inclusiveness of his principle of secular rationale, which actually does largely allow for the contribution of religious reasons, as long as they are accompanied by appropriate secular ones. He also contrasts the inclusiveness of his principle with the requirement of translation into generally accessible terms, which Habermas imposes on the public arguments of religious citizens to the advantage of their secular counterparts.

To the argument that religious citizens draw on religious resources to define their own lives and thus would have to bear a deep internal division to rely on secular arguments, Audi opposes a different consideration of reciprocity. In this regard, he states that "in the very understanding of one's own religious view and how it differs from others,

[23] Ibid., 18.

one has much of what is needed to distinguish religious reasons from other kinds and to see some of the reasons why we are obligated to have adequate secular reasons as a basis for coercive laws or public policies" (p. 88). The idea here is that the internal insight one's religious horizon can have, along with some basic moral considerations grounded in natural reason, is enough to grasp why no one should be coerced on the basis of someone else's religious reasons. This conclusion would apply both to people of other affiliations and to people without any religious affiliation, thus justifying the principle of secular rationale as a safeguard against that risk.

On the other hand, Audi briefly considers the positive stance articulated by his interlocutor, and regarding the Habermasian requirement of translation of the religious cognitive contributions into a more widely accessible language, he argues that it is actually more demanding than his principle of secular rationale. Engaging in a translation doesn't in fact just expects a religious citizen to understand both secular and religious discourse, as the principle of secular rationale does, but also to find some significant correspondence between the two (pp. 88-89).

This quite critical reply offered by Audi helps to point out one of the differences between these two views. Habermas is interested in underlining how religious worldviews may bring to public discourse some cognitive contributions that the secular resources in the tradition of the Enlightenment cannot offer. This stresses the originality of religious insights, but also needs those insights to be in some way "commensurable" with non-religious views and consequently translatable into other languages and forms. Audi takes a more epistemically modest stance

and wants to allow for a deep level of incommensurability between secular and religious reasons. In his view, the two fields may be so deeply divided that their forms and contents are not transferrable, and still within the limits of the principle of secular rationale a religious citizen could be able to bring arguments taken from both. In particular, he seems to underline how religious arguments could preserve all their untranslated religious characters, say in theological language and with quotes from the Holy Scriptures, as long as they are not the only arguments brought to the table. The price may be, as Habermas points out, the burden of a deep internal schism that not everyone may be able or willing to bear. The cooperative translation would be more respectful of integrity, in this regard, since it necessarily entails a sense of actual significance of the religious cognitive content not just for the religious citizen, but also for her secular counterpart. As Audi remarks, though, Habermas nonetheless expects the formal space of political and juridical institutions to be characterized by the primacy of secular reasoning, even if that may be the translation of some religious claims. This seems like a strong requirement, possibly even stronger than what Audi expects in the same area. I will come back to this when assessing their positions on the features of the institutional relationship between church and state.

VI

Discussing the views

It is now possible to make a first comparative assessment of the two views we have been discussing so

far. Audi is correct both in underlying the moderate and comprehensive nature of his own proposal, particularly when compared to other Rawlsian takes on public use of religious arguments, and in pointing to the non-trivial normative requirements of Habermas' views. However, there is still some unresolved conflict regarding the possibility of religious citizens being recognised as epistemic peers with non-religious citizens under the constraints of the principle of secular rationale. Given the above premises, there is room to suggest that the roots of the disagreement between Audi and Habermas actually lie in their respective framing of what the status of epistemic parity between religious and non-religious interlocutors in public discourse entails.

In Audi's approach, epistemic parity is a notion that comes into play within the principles of rational disagreement and toleration, where it supports the priority of toleration over coercion in cases of rational disagreement between epistemic peers on a specific matter. However, the epistemic parity of religious and non-religious citizens, as I have noted, seems to be problematic under the principle of secular rationale, where the set of universally acceptable and naturally accessible reasons is in fact taken to be a subset of reasons for some interlocutors and not for others, due to their religious convictions.

On the other hand, in Habermas' view, epistemic parity seems more a condition that has to be constantly brought about through a cooperative process of engagement between religious and non-religious citizens; a process that is meant to transform the shape of the epistemic horizon of both, entailing a reassessment of what has to be taken as rational or irrational, accessible or translatable, in both the

religious and secular domains. Some mutual recognition of a certain level of rationality is a premise; some measure of it has to be assumed at the beginning of the process. But this is just the first stage of a joint effort that allows for translation and then, as a consequence of translation, opens a shared field of evidence—even though the term "evidence" may be here too narrow, as Habermas points largely to symbolic and motivational resources as well. Moreover, it is by actively engaging in that cooperative effort that the citizens' conceptions of what is rational and irrational are transformed. Habermas has no literal account of the concept of epistemic parity presented by Audi, but he accounts here for both elements of it: the mutual recognition of rationality and of access to relevant evidence. They are in fact both included in the "complementary learning process" implied by his postsecular stance, a process that involves "the assimilation and the reflexive transformation of both religious and secular mentalities."[24]

VI

The Postsecular Stance

As we have seen so far, Audi and Habermas express two significant and alternative takes on what epistemic parity and an equal distribution of burdens do entail when it comes to public discourse between religious and secular

[24] Jürgen Habermas, "Pre-political Foundations of the Democratic Constitutional State," in *Dialectics of Secularization: On Reason and Religion*, by Jürgen Habermas and Joseph Ratzinger, edited by Florian Schuller (San Francisco: Ignatius Press, 2006), 47.

citizens. To better understand how deep this divide actually is, and to what extent the postsecular framework offers an alternative paradigm to confront this issue, we need to articulate in more details the Habermasian views on this topic.

A main focus of Habermas' work is the inquiry into the cultural understandings that draw the line between some basic correlative notions, like rational and irrational or religious and secular. In particular, he is of the view that the liberal tradition has developed a significant bias when it comes to the definition of the boundaries of the deliberative public sphere, too often designed from distinctively abstract and secular premises and then ineffectively imposed upon the lively and diverse field of public discourse.

From this line of thought stems the idea of the postsecular setting as a social and historical context that allows for a self-critical re-assessment of the epistemic boundaries of religious and secular views, and for a cooperative attempt at mutual communication of their resources, which can serve as a necessary support to the struggling political spheres of the Western democracies.[25]

[25] While Habermas clearly states that the cognitive and motivational resources of religions are indeed precious for contemporary liberal democracies too often plagued by individualism and indifference, he also constantly underlines that their inclusion is not to be intended as the result of a utilitarian argument. See Habermas, "Pre-political Foundations," 46–47: "The expression "postsecular" does more than give public recognition to religious fellowships in view of the functional contribution they make to the reproduction of motivations and attitudes that are societally desirable. The public awareness of a post-secular society also reflects a normative insight that has consequences for the political dealings on unbelieving citizens with believing citizens.

Within such a context, the distinction between secular and religious views certainly stays, but "the methodological separation between the two universes of discourse is compatible with the openness of philosophy to possible cognitive contents of religion."[26] This "appropriation" is not meant to entail any specific claim of the secular worldview's superiority, but it is rather a statement of awareness of the kind of intertwined epistemic condition that links secular and religious citizens in postsecular societies. In this regard, Habermas adds that "this posture distinguishes the postmetaphysical self-understanding of the Kantian tradition from the neopaganism that appeals—whether rightly or wrongly—to Nietzsche."[27]

This remark offers insight into a significant premise of the postsecular stance, which is the influence of the postmetaphysical perspective on both religious and secular views. In Habermas' words, the term "postmetaphysical" is used "not only in a methodological sense that concerns procedures and conceptual means, but also in a substantial sense, to describe agnostic positions that make a sharp distinction between belief and knowledge without assuming the validity of a particular religion (as does modern apologetics) or without denying the possible cognitive

In the postsecular society, there is an increasing consensus that certain phases of the "modernization of the public consciousness" involve the assimilation and the reflexive transformation of both religious and secular mentalities. If both sides agree to understand the secularization of society as a complementary learning process, then they will also have cognitive reasons to take seriously each other's contributions to controversial subjects in the public debate."

[26] Jürgen Habermas, "The Boundary between Faith and Knowledge: On the Reception and Contemporary Importance of Kant's Philosophy of Religion," In *Between Naturalism and Religion*, 245.

[27] Habermas, "The Boundary between Faith and Knowledge," 246.

content of these traditions (as does scientism)."[28] Within this perspective, both secular and religious "militant" views have to drop a measure of their epistemic claims, if for nothing else than to admit a certain degree of cognitive value in the inputs that come from different outlooks. In this late stage of Modernity, religious beliefs are still believable and actually believed by many. The category of postsecularity is useful precisely to address the consequences of this somewhat unexpected phenomenon.

A secular stance conscious of the postmetaphysical framework is expected to avoid the temptation of defining what is true and false in religion merely within the limits of philosophical, secular reason. At the same time, though, the conditions of religious belief have also changed and every believer has to conceive oneself as a believer among different kinds of believers, integrating this pluralism into one's own epistemic horizon. This weakens the barrier between the secular and religious fields, and sets the stage for the subsequent transformation of the self-understanding that each view holds. In a sense, it is due to the confidence in the influence of the postmetaphysical cultural climate that Habermas' stance assumes that a certain level of "commensurability" between secular and religious perspectives exists. This assumption is not unimportant, though, and sets a constraint over the validity of the postsecular stance.

In the end, as we have seen, Habermas claims that the effort of translation into a generally accessible language that is required from religious citizens does not impose an asymmetrical burden, insofar as secular citizens are expected to do their part by accepting contributions to

[28] Ibid., 245.

public debate, even if expressed in religious language, and by joining the translation effort of their religious counterparts. But is this postsecular burden really equal? Habermas seems aware that the statement is not obvious, even if he claims that a substantial level of parity is nonetheless respected. Even if the expectations which apply to the secular citizens do not "fully counterbalance the non-neutrality in the effects of the principle of tolerance," the "residual imbalance" is not a foundation strong enough to reject the justification of the principle itself. In particular, "in the light of the glaring injustice that is overcome by abolishing religious discrimination, it would be disproportionate of believers to reject the demand for tolerance because its burdens are not shared equally."[29]

Here, the principle of tolerance is meant as a liberal respect for all citizens, regardless of their worldviews and lifestyles, and is presented as more difficult for religious citizens to bear, due to the strong normativity of their moral outlooks. More significantly, though, it should be noted that within the postsecular framework, what seems to undermine epistemic parity is not the asymmetry of the burdens as much as it is the asymmetry in the nature of the expected effort. It cannot be denied that Habermas expects every citizen to contribute to the achievement of communicative equality, and to avoid the imposition of any worldview, be it secular or religious. The required translation is a one-way process, however, from a religious language to one that is more widely accessible. In this sense, the postsecular stance prescribes a cooperative process of self-understanding and reciprocal learning, but

[29] Habermas, "Equal Treatment of Cultures," 310.

not a strictly symmetrical one.[30] If the burden is asymmetrical, how can we really talk of an equal burden? The point is relevant as an internal tension in Habermas' view, since his main critique of Audi, and of Rawlsian views in general, is precisely about the inequality of burdens and seems, consequently, to presuppose the normativity of an egalitarian stance on the matter. Certainly, both secular and religious citizens are expected to undertake some kind of effort to achieve the conditions for public discourse, but it is still largely open to debate how the Habermasian stance actually grants a more equal distribution of burdens and not just a different, somewhat cooperative, but still asymmetrical-and thus potentially unfair-one.[31]

[30] It is likely in this sense that Habermas sometimes defines the learning process as "complementary', which allows for the different nature of the effort on the two sides. See Habermas, "Religion in the Public Sphere," 15–16: "An epistemic mindset is presupposed here that would originate from a self-critical assessment of the limits of secular reason. However, this cognitive precondition indicates that the version of an ethics of citizenship I have proposed may only be expected from all citizens equally if both, religious as well as secular citizens, already have undergone complementary learning processes."

[31] I do not want to imply that this asymmetry will always go in favour of one of the two sides. It can go either way. One could make a case about the fact that secular citizens are actually at a disadvantage because they are being asked to remain open to the potential truth of a rival worldview in a way that religious citizens are not, since they are only expected to translate their own views in a different language. In some situations it may be the case, but Habermas also clearly underlines how in the postsecular societies the religious communities have been already widely pressured by the process of secularization to question themselves and to open up to the epistemic potential of the secular worldview. They certainly remain under that expectation, even if the spotlight is now rather on the application of that kind of requirement in the secular field.

VIII

Secular or Postsecular Institutions?

Framing differently the issue of the unequal burdens required to participate in public discourse has implications that go beyond the epistemology of the public sphere or the ethics of citizenship. The equality of citizens as secular or religious persons is at stake and this puts into question how secular and religious institutions should deal with each other in the light of the multi-layered identity of their members, who are citizens of a state and, at the same time, affiliated to churches or secular groups. I argue that, in this sense, secular and postsecular accounts point to two different ways of thinking about the separation of church and state.

Around the concept of epistemic parity, we can grasp at least one of the main ideas of postsecularism, which, after Habermas' account, is receiving wide attention in both philosophical and sociological circles.[32] Postsecular accounts try to minimize the assumption of a normative priority of the secular over the religious, and advocate a process of mutual understanding, with a reciprocally acknowledged epistemic parity as the possible outcome of the process. Within this context, actual epistemic parity is more of a working hypothesis, always in the making, and particular arrangements are in some way subject to the outcome of the processes of mutual understanding. In this

[32] Among others, see Craig Calhoun, Mark Juergensmeyer and Jonathan Vanantwerpen (eds.), *Rethinking Secularism* (Oxford: Oxford University Press, 2011); Philip S. Gorski et al., *The Postsecular in Question* (New York: New York University Press, 2012); Peter Nynäs, Mika Lassander and Terhi Utriainen, eds., *Post-secular Society* (New Brunswick: Transaction Publishers, 2012).

sense, the postsecular stance is concerned with the historical and pragmatic character of the concepts of rationality and evidence, basic elements in the definition of epistemic parity. In this context, epistemic parity can be seen as a status whose conditions have to be cooperatively realized and whose criteria are always socially defined and redefined rather than merely assessed.

Audi's understanding, on the other hand, is more akin to traditional political liberalism—though with a significant level of refinement and articulation. Public discourse is characterized by a conspicuous normative priority of the secular, even if formulated in very inclusive terms, from which follows an overall principle of toleration, particularly in defence of liberty against coercion to individual conduct. Within this context, parity between the secular and the religious seems problematic, but public discourse within these limits can still be significantly inclusive and tolerant of religious reasons.

Now, the contrast between secular and postsecular accounts can be framed as a contrast between alternative paradigms of epistemic parity, with some noteworthy consequences at the institutional level. While in general both kinds of views support, in some form, the principle of separation between church and state, their normative considerations about public discourse have in fact influenced the way social institutions, most notably churches and states, are expected to conceive themselves, their relationship with citizens and their own social agency in the public sphere. Interesting examples of this difference are the nature of the neutrality of the state's authority and the peculiar status of churches, when compared to organised cultural groups of non-religious character.

In Audi's view, "neutrality is best understood in the context of a governmental commitment to liberty, in part because government should not be neutral toward either threats to liberty or violations of liberties guaranteed by law" (p. 45). On the other hand, he claims that limits to the protection of liberty can be justified on the basis of moral considerations. This is a relevant trait in Audi's views, and it is rooted in his conviction that some moral duties and rights can be appropriately grounded through the natural use of our cognitive powers and can find a wide rational agreement independent of cultural and religious diversity.[33] Here, the substantial overlapping of secular and natural reasons is again of significance, since the limitation of the state's neutrality towards religion is grounded in this prioritising of some essential moral norms (mainly in the form of fundamental human rights) over others, which rely on different grounds of normativity, especially of a religious nature. A normative moral outlook of secular character thus oversees the limits and applications of the neutrality of the state towards religions.

In Habermas' view, the topic of neutrality is linked to the protection of liberties as well, but in a different fashion and with different concerns. In his own words:

> The neutrality of the state authority on questions of world views guarantees the same ethical freedom to every citizen. This is incompatible with the political universalization of a secularist world view. When secularized citizens act in their role as citizens of the state, they must not deny in principle that religious images of the world have the potential to express truth. Nor must they refuse their believing fellow citizens the right to make

[33] Most notably, Audi's moral theory is stated in *Moral Knowledge and Ethical Character* (Oxford: Oxford University Press, 1997) and in *The Good in the Right: a Theory of Intuition and Intrinsic Value* (Princeton: Princeton University Press, 2004).

> contributions in a religious language to public debates. Indeed, a liberal political culture can expect that the secularized citizens play their part in the endeavors to translate relevant contributions from the religious language into a language that is accessible to the public as a whole.[34]

The neutrality of the state is here construed through the distinct postsecular conceptions of equal burden and cooperative translation. The notion of an epistemic parity, which originates from self-critical processes of understanding, shapes the meaning of an institutional feature, neutrality, which is crucial in defining the relationship between liberal democracies and organised religions. Even though the normative consequences of this influence do not receive a proper articulation here, a framework for their discussion is set. On this account, though, it should be noted that Habermas' position is at least mixed. On the one hand, he characterizes the institutional space with a strong priority of the secular language, to a very similar effect than most Rawlsian views and, possibly, as Audi argues, even more strictly than the principle of secular rationale would require. Still, the postsecular stance is different insofar as it frames the priority of the secular into a self-critical and cooperative re-assessment of the secular itself and does not allow for a "naturalisation" of it, as Audi seems inclined to do by maintaining the equivalence between secular and natural reasons. It is in this sense that the conditions of a fair institutional epistemic framework are, again, more the result of a self-aware historical process of negotiation and transformation, rather the formalisation of the limits of "natural reason" conceived in a secular fashion. It is certainly questionable to what extent Habermas' stance on the priority of the secular in the institutional space is

[34] Habermas, "Pre-political Foundations," 51–52.

entirely consistent with the implications of his own postsecular outlook, or if it is still a substantive heritage of the tradition of the Enlightenment that he claims we should in some way transcend.

The solid, morally grounded view of neutrality advocated by Audi at least consistently reflects his take on epistemic parity and toleration, inasmuch as it relies on liberty as the default position and questions on what grounds it can be legitimately limited. In this case, strong moral reasons that can be reasonably shared regardless of religious convictions are found to be an appropriate basis for limiting religious liberty: the practical use of secular reason is once again the primary ground.

A similar line of consideration can be taken when it comes to the definition of the political role of churches. Audi views the traditional liberal notion of the separation of church and state as entirely consistent with the principles he formulated regarding the conduct of religious persons. In this regard, he argues that the principles he suggests for the individual citizens are also entirely applicable to the conduct of religious institutions as well as to that of clergy acting as such and not simply as citizens (See p. 95). However, the fundamentally religious nature of churches and their clergy requires a specific application of those principles to the effect that their direct involvement in political debates, when it comes to matters of coercion of individual conduct, should always be avoided, as they are structurally non-secular, and churches and clergy should be

limited to the public expression of their distinct moral views.[35]

On this topic, Habermas once again pursues the strategy of the "equal burden" and remarks that "the advance in reflexivity exacted from religious consciousness in pluralistic societies in turn provides a model for the mindset of secular groups in multicultural societies."[36] The organised secular groups are not excepted in the postsecular frame and are expected to share the transformative burden with churches and other religious organisations. Actually, it is not even clear that they hold an epistemic advantage over their counterparts. The exercise of tolerance, in fact, demands that all kinds of communities, secular and religious alike, should actively build cognitive bridges between their internal ethos and the morality of human rights that characterizes the contemporary democratic societies. In this sense, Habermas argues, secular groups "whose historical development is out of sync with the surrounding culture may find this even more difficult than religious communities that can draw on the highly developed conceptual resources of one of the major world religions."[37]

On the other hand, the burden on religious groups is not irrelevant: "The formation of religious communities harmonizes with the secular process of socialization only when […] corresponding statements of norms and values

[35] See Ibid., 95–98. This normative stance is here expressed by two specific principles: the principle of ecclesiastical political neutrality and the principle of clerical political neutrality.
[36] Jürgen Habermas, "Religious Tolerance as Pacemaker for Cultural Rights," In *Between Naturalism and Religion* (Cambridge: Polity Press, 2008), 270.
[37] Ibid.

are not only differentiated *from one another*, but when one statement follows consistently *from the other*."[38] Once again, the public role of religious elements that Audi pursues through a strategy of distinction, limitation and fair balance is pursued by Habermas as the result of a process whose features are transformation, learning and equal burden.

IX

Conclusions

All things considered, it appears that in Audi's secular perspective, the field of epistemic parity is one of natural reasons and distinctively secular justifications, and upon this ground he builds a system of normative relationships at the institutional level, most notably around the liberal principle of the separation of church and state. It should be noted that the principle of secular rationale is not meant as a factor of exclusion *per se*. Audi designs a fairly inclusive normative setting around the principle and advocates an ideal of "theoethical equilibrium," in the light of which each individual should pursue a unitary outlook through a reflective fine-tuning of convictions coming from religious and secular sources alike (See pp. 20-23). However, the religious and secular stay essentially separated, and the grounds for their regulation are not neutral. Within this limits, in any case, his normative views about the relationship between church and state are very consistent and provide a solid connection between the principles of a quite inclusive ethics of citizenship and the justification of

[38] Habermas, "Equal Treatment of Cultures," 308.

the political separation between religious and secular power.

In Habermas' postsecular perspective the space of epistemic parity is that of communicative reason and self-critical understandings of the limits of the secular and religious in postmetaphysical terms. This "postsecular rationale" provides some justification for a different take on secular and religious institutions, whose processes of historical self-understanding are similar and mutually intertwined.[39] The features of a postsecular relationship between churches and states are in part already a product of the effects of secularisation, and in part a possibility whose actual outcome is still to be determined. It is debatable, though, to what extent the quite traditional Habermasian stance on the priority of secular reasons at the institutional level is effectively a consistent development of his own call for a self-critical reassessment of the Modern understanding of the religious and for a new kind of cooperative effort, with equal burdens, between secular and religious citizens.

Whatever shape the future relationship between religious and secular groups, communities and organisations, and states and churches takes, it seems,

[39] Habermas takes the consequences of this shifting understanding beyond the boundaries of the life of single states and churches, to the international setting. See Habermas, "Equal Treatment of Cultures," 310: "This observation paves the way for a dialectical understanding of cultural secularization. If we conceive of the modernization of public consciousness in Europe as a learning process that affects and changes religious and secular mentalities alike by forcing the tradition of Enlightenment, as well as religious doctrines, to reflect on their respective limits, then the international tensions between major cultures and world religions also appear in a different light."

anyway, to depend significantly on what kind of parity the citizens will be willing to reciprocally acknowledge. Where persons meet as peers, they can also meet as cooperative fellow citizens: that is certainly a crucial place where social arrangements meet epistemic ones.

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