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Political Liberalism, Religious Liberty, and Religious Establishment

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Religion is a trap and a snare for states in the modern world. People fervently believe in religious doctrines, which they take to be central for the guidance of their own lives and pivotal for determining morally appropriate and just laws and public policies. The religious beliefs of members of modern societies tend to be wildly diverse. They conflict with each other in ways that resist sensible compromise. Jesus is either the Son of God, the Savior whose teachings will lead us to eternal salvation, or he is not.

What stance toward religion does a just state maintain? This essay outlines and defends an answer to this question that is associated with the slogan calling for the separation of church and state. The defense consists of knocking down bad defenses and merely gesturing toward a better one. But even if this hint of a defense can be successfully developed, it will only go so far. Toward the end of the essay, an objection is raised that is not susceptible to decisive refutation and that can be properly engaged only by case by case adjudication seeking best policies for current actual circumstances. The issue in play here arises from the consideration that, despite the fact that it would be morally desirable to achieve a certain goal, it does not follow that any attempted movement toward achieving that goal would be morally desirable in any and all circumstances.

1. Separation of Church and State

The thought that there should be a wall separating church and state is a slogan that expresses a metaphor, and not one that is self-interpreting. The rough idea is that a wall protects what lies on one of its sides from interference from the other side. The protection looks to be symmetrical; each side is protected from the other. In my view, the important constraint is that the state is obligated to refrain from providing special privileges, power, or subsidies to any church or sect. Were the state to do so, this would be to breach the wall by interfering wrongfully in the religious sphere. To favor one sect is to disfavor others. The separation ideal also prohibits sects and churches from attempting to seek political power for the purpose of gaining from the state any special privileges, powers, or subsidies. We should construe the idea of gaining privileges as including putting the force of state law behind sectarian doctrines. If the Roman Catholic Church prohibits use of contraceptive devices on religious grounds—for church officials, church members, or others acting on their behalf to seek to put state power behind this prohibition would violate the separation ideal. So would seeking to pressure people toward conforming to religious doctrine by noncoercive means—such as providing tax reductions for those who refrain from contraception. Of course, some religious norms might be thought to be dual in nature, having normative force for us both in virtue of their status as having been commanded by God and also in virtue of their inherent reasonableness. If we set aside claims of divine command and still find that there are compelling independent reasons supporting the claim that contraception is immoral, pointing out these independent

compelling reasons in the public square as grounds for legislation against contraception is not any sort of breach in the wall of separation between church and state.[1]

Some sort of generalization of the ideas just stated has to be part of the separation doctrine. Suppose the state enacts laws and policies that promote the recitation and internal endorsement of nondenominational prayers, so anodyne in content that no sect or church will count them as reflections of its doctrines. The prayers are not recognizably Christian or Jewish or Islamic or Buddhist; nor do they match any other particular religious doctrines at all closely. The prayers might simply summon the spiritual forces of good in the universe to give us supernatural aid in our spiritual endeavors. Putting the weight of state power behind such vague prayers should count as a violation of the separation doctrine. Writing to defend the separation of church and state, Robert Audi includes within it what he calls a "neutrality principle" and states in these words: "The state should give no preference to religion (or the religious) *as such,* that is, to institutions or persons simply because they are religious."[2] I endorse the idea Audi affirms, though the label "neutrality principle" is perhaps misleading. The state is under no obligation to be neutral between religion and science or between religion and core values essential to a flourishing just society. The obligation is one-sided—to refrain from favoring the religious as such over the nonreligious, not to refrain from favoring either the religious or the nonreligious. This nonneutrality is a core feature of the separation of church and state doctrine and part of the reason it is perennially contentious.[3] Religious advocates who regard the separation doctrine standardly conceived as tending toward state establishment of some vague doctrine antithetical to religion along the lines of secular humanism or modern godlessness have a point. Why we should nonetheless accept a full-blooded separation doctrine despite its failure to be evenhandedly neutral in disputes between religious and other values is a question this essay will eventually address.

The doctrine of the separation of church and state is an ideal of political morality consisting of three claims: (1) The state should not favor (or give any preference to) any church or sect or to any church or sect doctrine; (2) The state should not favor (or give any preference to) religion as such or the religious over nonreligion or the nonreligious; and (3) neither public officials nor ordinary citizens should seek to bring it about that claim (1) or claim (2) is violated. The favoring of religious doctrine that separation rules out is favoring of religious doctrine as such: If a church excoriates racism and celebrates baseball and there are good and sufficient nonreligious reasons to excoriate racism and

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[1] I use the phrase "religion in the public square," but it can be misleading. Advocates of religious doctrines are at liberty to proselytize for their ideas in the public square. Exercising free speech rights in this way does not run counter to separation of church and state. Advocacy for public policy proposals on religious grounds does run counter to separation as formulated in this essay. Legal rights of freedom of speech protect such advocacy, but the ideal of separation condemns it, and in this limited sense, separation bars religion from the public square.

[2] Robert Audi, "The Separation of Church and State and the Obligations of Citizenship," *Philosophy and Public Affairs* 18 (1989): 259–296.

[3] But see the final two paragraphs of section eight of this essay. Separation of church and state does not imply support for persecution of religion.

celebrate baseball, then state policies that entrench nonracism and baseball do not run counter to the separation doctrine and church advocacy of nonracism and baseball is also perfectly consistent with separation (at least if the church advocates recognize that these practices have adequate self-standing support of secular reasons).

2. Against the Free Exercise Clause

The separation doctrine I want to defend is a claim of political morality, not one of constitutional interpretation. Indeed many estimable constitutions known to us may run afoul of this claim of political morality.[4] Simply for illustrative purposes, and not because this particular constitution has special transcendent merit, I single out the U.S. Constitution.[5] The First Amendment to this Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." There are two requirements here, one relating to establishment and one to free exercise. There should be no quarrel with the first. It says that that the state ought not to give a privileged place in society to any church or sect by special subsidy of its practices, endorsement of its doctrines, or incorporation of its rituals or practices in official state functions. Nor should the state make any particular church or sect an agency of the state. Nor should the state by its laws and public policies favor one church or sect over others. Nor should the state favor religion as such or religious people as such over nonreligion and the nonreligious. These claims constitute the core of what I am calling "separation of church and state."

The Free Exercise clause, in contrast, is problematic and on one natural interpretation objectionable. I take it that the idea of refraining from prohibiting the free exercise of religion goes beyond protecting citizens in their rights of freedom of speech and assembly. These rights give strong legal protection to religious believers, as well as

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[4] Article 18 of the International Covenant on Civil and Political Rights, adopted by the United Nations in 1966, and signed by 166 countries as of 2010, reads in part:

> 1. Everyone shall have the right to freedom of thought, conscience, and religion. This 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.
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> 2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.
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> 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.

Cited from Michael J. Perry, "From Religious Freedom to Moral Freedom," *San Diego Law Review* 47 (2010): 993-1013, at 994.

[5] For a vigorous defense of the religion clauses of the U.S. Constitution and "America's tradition of religious equality," see Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008).

others, to freedom to speak when they are addressing a (willing, uncoerced) broad audience on some matter of public affairs, broadly construed to include any issue that concerns how we should live.[6] This also includes rights to assemble with like minded others for the purpose of refining one's beliefs, reinforcing them by ceremony and ritual, organizing to proselytize others, and advancing one's beliefs by public action, and so on. They protect the rights of the religiously inclined to speak, assemble, organize, and engage in ceremony and ritual just as they protect the similar rights of the nonreligious.[7] So the free exercise of religion is evidently intended to go beyond these other basic freedoms. The idea is roughly[8] that one is free to exercise one's religion when the following is true: one has the opportunity to live according to the dictates of one's chosen religion without interference of government or law up to some point. What point? Views differ. Roughly, most would probably say that a law wrongfully burdens the free exercise of one's religion if the law either fails to serve a legitimate state purpose or does serve such a purpose but in a way that poses an excessive cost on the religiously burdened—a cost that is disproportionate to the gains the law, as framed, provides in the terms of this legitimate purpose. Details aside, the idea is that there is a special presumption of unconstitutionality that attaches to a law that limits people's liberty or imposes burdens on people when it impinges on people's religious concerns as compared to other sorts of concerns they might have. This tilting in favor of religion is wrong and amounts to a type of wrongful discrimination.[9]

To see the problem, consider a law that forbids ingesting peyote or similar psychedelic drugs.[10] Now imagine three different groups of persons who find their significant projects hindered by this law. One groups consists of adherents of a religious group whose traditional sacred rituals give an important place to the ingestion of peyote or some other psychedelic. Another group consists of persons who feel themselves bound in conscience to carry out work to save the environment from human degradation. Their practice, central to their organizing momentum, is to gather weekly and ingest peyote and contemplate the Earth's precarious richness and gird themselves for the fight to save the environment. A third group of people surfs in the ocean for fun and pleasure. They gather together to surf, and engaging in a pre-surf ritual involving ingestion of peyote, which

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[6] The formulation in the text is not fully apt. Freedom of speech includes the right (for example) to pass out leaflets that one knows no one will take and read. The right does not include an entitlement to force speech on unwilling listeners, but nor is it conditional on having a willing audience. Nor need one be intending to communicate ideas that add to public debate; one might simply intend to bear witness, as when many speakers parade before a microphone and say "I agree" at a protest rally.

[7] So the freedom to worship should count as an aspect of freedom of speech and assembly.

[8] This is a rough characterization. You do not enjoy freedom to exercise your religion if the state scrupulously leaves you alone but fails to protect you when mobs ransack and burn your synagogue, mosque, or church or harass you while you are carrying out religious rituals or other functions.

[9] See Richard Arneson, "Against Freedom of Conscience*, San Diego Law Review* 47 (2010): 1015–1040.

[10] The example in the text differs from, but is inspired by, the facts of *Employment Division v. Smith*, 494 U.S. 872 (1990).

turns what would have been a joyous activity into a sublime experience of unsurpassed excellence and merit. All three groups could alter their practices to bring them into conformity with legal requirements, but at some considerable cost. My complaint is that, on its face, the Free Exercise clause of the First Amendment tilts in favor of the first group. If we follow some legal theorists and Supreme Court decisions and stretch the constitutional protection of the free exercise of religion so that it protects a broader category of individual action, motivated and compelled by conscientious moral belief, then the discrepancy in legal treatment that the Free Exercise clause mandates is between groups one and two on the one side and group three on the other. Whether one interprets the free exercise ideal narrowly or broadly, either way it mandates wrongful discrimination.

3. Accommodation

Rejecting the claim that there is a special moral mandate to accommodate religious practice does not gainsay the value of seeking to accommodate those individuals who would be specially burdened by requiring them to conform to otherwise acceptable state law. Law is a blunt instrument of social control. Laws should be formulated in terms that are simple and easy to administer. A good law does not try to register in its formulation all of the subtle niceties and complexities that might arise in its application in varying circumstances. Hence a law can bear down very heavily on some individuals to little or no purpose. The law demands that they bear sacrifices that are disproportionate to any gains their compliance might bring about for other citizens. In some situations there is no sensible way to alleviate their burden, but in other cases, there is. A law can be rewritten to restrict its scope, or an informal practice may exempt some from strict conformity, or various levels of discretion in the enforcement of law may be deployed to good purpose.

A law might mandate that all individuals residing in a territory shall be vaccinated to reduce the incidence of some dread disease. The risk of harm from vaccination is small and the expected gains for the public are great. Nonetheless there may be a subgroup of the population that bears far greater than average risk of adverse medical consequences from being vaccinated. Since the public health gains from vaccination diminish hardly at all if a group as small as this subgroup does not participate in the program, and given that being vaccinated imposes a special burden of risk on members of the subgroup and not others, any reasonable and morally sensitive cost and benefit calculation yields the judgment that the members of the subgroup should not be legally required to obtain this vaccination. In these circumstances the state should accommodate the members of the subgroup be exempting them from the general legal requirement to submit to this vaccination treatment.

Accommodation can occur in many ways by adjustment of any of several elements of the enforcement mechanism. There might be a good case for incorporating some form of accommodation provision in a constitution that sets judicially enforced limits to what legislatures and government officials may permissibly do. I take no stand on this issue.

The standard that determines whether an individual claim for an accommodation should be granted involves balancing the extent to which she (along with others for whose sake she wishes to act) would be made worse off if she is required to conform to the requirements of some law that applies to her, versus how badly off others would be

made if she were not required to conform. Exactly what the standard should be is beyond the purview of this essay. For our purposes it is necessary only to note that the coin of the realm here is well-being or welfare gains and losses.[11] The notion of welfare in play here can be variously construed; but the sheer fact that my conscience tells me not to do X does not mean that I suffer any sort of burden if the law imposes penalties on me for not doing X. What holds of conscientious judgment in general, a fortiori holds for religiously based conscientious judgment. The sheer fact that God tells me not to do X does not establish any sort of prima facie case that I should be excused from the legal burden of a statutory requirement that requires me to do X.

Far from being the case that there is a general moral presumption in favor of bending the laws as far as is possible to encourage each person to live according to her conscientious beliefs about what is good and right without suffering legal punishment as a consequence, there is, in fact, a general moral presumption against such generalized accommodation of conscientious belief. In modern societies there is wide and deep pluralism of belief: citizens disagree about what we owe one another and about what constitutes a worthwhile human life. We are all made better off, up to a point, by our own individual lights if a set of rules is adopted and coercively enforced elicits general voluntary acceptance—even though many of the rules taken one by one are obnoxious to many citizens. In these circumstances, there is room for a cooperative practice whereby I obey rules that offend my conscience in some domain, while others obey rules that offend their individual consciences in other domains. The overall result may be that the situation of general rule-following is superior from each of our conscientious standpoints than the situation that would result if none of us deferred to others' opposed conscientious judgments. When such a cooperative practice is in effect, others are disposed, up to some threshold point, to obey laws even though they are obnoxious to their conscience. When this is the case, there is then a general fair play obligation that falls on me to reciprocate and dispose myself to follow laws that offend my conscience, up to a point, and to act on this disposition.

Another constraint on measuring the special burdens that obedience to laws imposes on particular groups is that the gains and losses that are advanced as constituting a burden must be measurable and checkable by generally acceptable procedures. The magnitude of a claimed burden cannot rely on supernatural claims, as when I might claim that the gods will be angry and rain ruin on my clan if the mountain sacred to members of my faith is disturbed. Government agencies and officials ought not to be in the business of verifying such claims; accepting them at face value for the purpose of determining someone's burden status is unthinkable. This is an aspect of the norm of the separation of church and state. Here and elsewhere state agents ought not to be called on to interpret and substantiate particular theological claims in order to determine what their legal duties are and how they ought to proceed in order to fulfill their assigned roles.

The reasonable position here is not that a government should never be required to modify its legal policies, or suspend their enforcement, in order to accommodate religious believers who are specially burdened by the requirement of conformity to the law in

[11] Well-being can accrue to an individual from an action that is not narrowly self-interested, such as an act aimed at benefiting close family members or an act that furthers altruistic endeavors that have become one's important life projects.

question. The claim, rather, is that the accommodation norm should not be formulated so that it protects religious practices or practices similar to religion as such. The burdens that merit accommodation are costs to people's well-being that compliance with the law would impose on them, and that are disproportionate to the advantage to society that the imposition of the law achieves. That compliance with law—which would prevent people from complying with their religious convictions or conscientious judgment about what they ought to do—is not necessarily a disadvantage at all, and certainly not a disadvantage of a type that trumps all others.

A final note: whether a particular accommodation of some class of persons is fair should be assessed not by peering at the particular law in question, but by looking at the entire set of laws and accommodations in force. An accommodation that, in isolation, looks like an unwarranted privilege for one group might seem fair when seen against the wider background of accommodations provided to other groups in other contexts.

4. Eisgruber and Sager on Accommodation and Equal Liberty

The separation doctrine described here may be compared to the views on accommodation of religion developed by Christopher L. Eisgruber and Lawrence G. Sager.[12] They find the separation of church and state metaphor unhelpful, but their reasons do not conflict with anything I would want to claim. They frame their position as an interpretation of the Establishment and Free Exercise clauses, but they aim to construe the Free Exercise doctrine so it does not require, and in fact disallows, special legal privilege for religion. Take zoning law restrictions in their bearing on church endeavors as a canonical example of their view. If a zoning law forbids certain activities and uses of property in a neighborhood, a claim that one ought legally to be exempt from the requirement to conform to the zoning ordinance should not acquire greater moral weight or gain support from the Free Exercise clause of the Constitution just because the claimant is a church or a set of religious believers engaged in religious activity. So they say, and this essay's separation doctrine agrees.

Eisgruber and Sager hold that the core of constitutionally protected religious liberty is a nondiscrimination norm. This is one part of a three-part norm that they call "Equal Liberty." They write that "it insists in the name of equality that no members of our political community ought to be devalued on account of the spiritual foundations of their important commitments and projects."[13] The other two elements in Equal Liberty are the denial that the Constitution mandates special favoring of religion or religious

[12] Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007). They are offering an interpretation of the U.S. Constitution, not defending claims of political morality. For criticism of Eisgruber and Sager from the standpoint that this Constitution does treat religion as unique and special—and reasonably so—disfavoring it in some ways and favoring it in others, see Kent Greenawalt, *Establishment and Fairness,* vol. 2, *Religion and the Constitution* (Princeton and Oxford: Princeton University Press, 2008), ch. 21.

[13] Eisgruber and Sager, *Religious Freedom* (above n. 12), 52.

Richard/Arneson 4/13/13 12:47 PM
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claims and the broad affirmation of general constitutional guarantees of "free speech, personal autonomy, associative freedom, and private property."[14]

I agree that, for example, a law that prohibits animal sacrifice in a gerrymandered way—where it is clearly aimed not at fostering animal welfare but specifically at banning the rituals of the Santeria religion—wrongfully discriminates against persons on the basis of their religious commitments. But I suspect a norm against any devaluing of persons on account of the spiritual foundations of their important commitments is overly protective. The state ought to refrain from acts that insult any persons. Each person has a dignity that commands respect. This applies to racists, to convicted serial murderers, and to everyone else. In pursuing legitimate secular objectives, however, a state may legitimately do what has the effect of—at least implicitly—leveling harsh criticism against the defective spiritual foundations of people's important commitments. Consider the teaching of evolution in school biology classes. Eisgruber and Sager agree that evolution should be taught, and that laws that impede its teaching, or muddy the water by requiring the teaching of religion-based alternatives to scientific ideas—such as creation science and intelligent design—would be wrongful establishment of religion. The schools should help students learn science as we best currently understand it. So far so good. But Eisgruber and Sager suppose that it would be consistent with their Equal Liberty construal of the religion clauses of the Constitution if the law were to require that high school biology teachers issue a disclaimer along these lines to their students: "Science is science and religious faith is religious faith. Nothing we are going to say about the scientific evidence and theory should be taken to be a commentary on the value or validity of anyone's religious commitments."[15]

I do not dispute that Eisgruber and Sager might be right in their interpretation of what the U.S. Constitution permits. But the law they envisage violates the separation of church and state, as construed in this essay, and illustrates why "no devaluing" is overly protective. Religious doctrines make empirical claims, and claims about proper methods for discovering empirical truth, that are straightforwardly in conflict with scientific understanding. Religious doctrines also make claims about what is morally right, and claims about proper methods for discovering moral truths (such as, look in the sacred book), that are straightforwardly in conflict with secular moral understanding. (I don't claim our moral understanding is very developed; "moral science" is in a primitive stage. But the point just made still holds.[16]) So a legal requirement that teachers say "that science is science and religion is religion and the one is not in conflict with the other" is requiring teachers to announce a false vague religious ideology. In fact, a well taught high school biology class should provide competent students whose parents espouse fundamentalist Christian doctrine and a literal belief in Genesis with all the premises they needs to draw the conclusion that their parents' religious beliefs about biology are hokum. It would be wrongfully insulting for the biology teacher to call attention in class

[14] Ibid., 53.

[15] Ibid., 195.

[16] For a sophisticated discussion of the fundamentals of ethics from a theistic standpoint, see Robert Adams, *Finite and Infinite Goods* (New York and Oxford: Oxford University Press, 1999). Adams sees religious truths as the uniquely rational basis for reasonable ethical norms and imperatives.

to this conclusion he has enabled his student to draw; that would be gratuitously insulting. But the good biology teacher devalues some individuals on account of the spiritual foundations of their important commitments and projects. Although this further claim would be more controversial, I would say much the same if the state sought to teach ethical and moral reasoning in schools. How should we go about reasoning about what is right and good, what is worthy of pursuit and what we owe to one another? This is a good topic for school. Sensible answers to it conflict with many people's sincere and deep religious convictions, according to which the answers are to be found in the revelations of a sacred book. There is genuine conflict between ethics and religion just as there is genuine conflict between science and religion.

5. Separation and Rawlsian Political Liberalism

The claims made so far in this essay amount to no more than an interpretation of the ideal of separation of church and state. In advancing this interpretation I make no claim to originality; the idea is a familiar one. The question naturally arises: Why should anyone accept this doctrine so interpreted? One might appeal to an underlying ideal of a democratic society governed by laws enacted by majority rule processes, in which all citizens have equal voting power, and against a background of broad freedom of speech on public affairs. However, one can picture a fully and continuously democratic society that steadily violates the separation of church and state ideal by procedurally proper democratic vote.

A very appealing answer appeals to the doctrine of political liberalism, as articulated in the later philosophical writings of John Rawls, and to associated ideals of state neutrality. Consider Rawls' liberal principle of legitimacy: "our exercise of political power is fully proper 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." Rawls adds: "all questions arising in the legislature that concern or border on constitutional essentials, or basic questions of justice, should also be settled, so far as is possible, by principles and ideals that can be similarly endorsed."[17] This seems to leave it open that public policies and laws not involving basic questions of justice might be legitimate—even if not justifiable according to principles acceptable to all—provided the procedures by which the laws and policies are established accords with a constitution acceptable to all. From a certain angle, the restriction looks odd. Matters of nonbasic justice are still matters of justice. Even if a policy is enacted via a fair procedure, this fact always seems to leave open the question, whether the substance of the policy is fair.

If we extend the liberal legitimacy norm so that it applies to all laws and public policies, and not only to the presumably more restricted domain of basic justice and constitutional essentials, we have the basis for a strong separation of church and state doctrine in the form of a requirement of public reason: Legislators should only support proposed laws that are fully justified by appeal to reasons we can share, reasons whose reason-giving force is independent of any controversial conceptions of the good or of

[17] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 137. See also John Rawls, "The Idea of Public Reason Revisited," repr. in Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

what we owe to one another. Public officials should establish only policies that are likewise justifiable in this neutral way. Religious views are always controversial conceptions, so the laws and public policies will be fully justifiable independently of any religious doctrines. Moreover, the water flows back: Citizens in their role as voters casting ballots that play a role in determining the content of laws and public policies should vote only in ways that are fully justifiable in terms of reasons we can share, reasons of right and good that none can reasonably reject.

This looks to be separation of church and state with a vengeance. In present public culture there is no norm against voting on the basis of one's conscientious convictions—no matter what their source. Religious convictions are thought to be a perfectly respectable, and, indeed, an especially admirable basis for voting one way rather than another. Nevertheless, the public reason requirement rules out as illegitimate voting on the basis of religious beliefs. Any such belief would be sectarian if proposed as the shared justification for public policies. The reasons we can share thus immediately shrink to secular reasons, and, indeed, only to a small subset of these: the secular reasons that are sufficiently uncontroversial that no one, whatever his comprehensive beliefs, could reasonably reject.

Rawls associates the liberal legitimacy norm with a neutrality ideal: State laws and policies should be justifiable without appeal to controversial ethical doctrines, and state laws and policies should not aim to promote some controversial ethical conceptions or their adherents over other conceptions or their adherents. Rawls states this last idea, which he calls "neutrality of aim," as follows: "that the state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it."[18]

Political liberalism is a response to the problem of how there could be shared agreement on principles that regulate the conduct of public affairs in a diverse society in which there is stable disagreement on the nature of the good life (that is to say, what goals are worthy of pursuit) and on the nature of the right (what we owe to one another). If we disagree on fundamentals, it might seem as though there could be, at most, strategic alignment for mutual advantage. The idea of political liberalism is that there might be logical space for principled agreement despite ultimate disagreements. The principles that are to regulate common affairs might be the object of consensus from opposed standpoints. Atheists might reason from "There is no God" to the conclusion that there is no point to persecution, so toleration is acceptable; while if theists starts with "There is a God" and add that God seeks willing assent, not coerced assent, they conclude that persecution is wrong and toleration is acceptable.

There is no guarantee that a substantial doctrine suitable for the regulation of society can be the object of this sort of overlapping consensus; but there is no guarantee that the project must fail. If it succeeds we have established the possibility of reasonable people disagreeing down to the roots in their worldviews and ideologies, yet agreeing on

[18] Rawls, *Political Liberalism* (above n. 17), 193. In Rawls's terminology, a "comprehensive doctrine" is one that aims to provide an encompassing world view that tells us how to live, what we owe others, what aims are valuable and worthy of pursuit, and what is the place of individuals in the cosmos. He opines that each distinct religion and sect typically espouses a particular comprehensive doctrine in this sense.

Richard/Arneson 4/13/13 12:47 PM
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the basic terms of their cooperation and resolving to impose on each other only on terms none can reasonably reject from her own standpoint. Each agrees, on principle, not to force his worldview on the others without relinquishing his firm adherence and commitment to his particular view, the one that he believes to be true. (Won't some reasonable standpoints judge that ensuring that their particular view prevails, if that can be arranged, is better from their standpoint than agreeing to renounce forced imposition on those who conscientiously disagree? In this project we stipulate that one who is willing to impose his views coercively on those who reasonably reject them is being unreasonable, and we seek a consensus among the reasonable.)

6. Political Liberalism does not Support Separation of Church and State

Nothing said so far indicates exactly how and why the political liberalism doctrine supports separation of church and state as formulated in this essay. At most, the relationship between the doctrines appears to be one of vague affinity. Can more be said?

Rawls associates his proposed liberal legitimacy norm with closely related ideals of neutrality of aim and neutrality of justification. Here is a statement of the two ideas:

(1) Neutrality of aim requires that no action or policy pursued by the state should aim to promote some controversial ways of life or conceptions of the good over others.

(2) Neutrality of justification requires that any policies pursued by the state should be justified independently of any appeal to the supposed superiority of some ways of life or conceptions of the good over others.

If we add the premise that state action that favors one church or sect over others, or favors the religious as such, always aims to promote one controversial way of life or conception of the good over another, then we can conclude that neutrality of aim would be violated by any state action that violates the separation doctrine. Political liberalism requires that citizens refrain from seeking to use state power in ways that would violate neutrality, so political liberalism would then require that citizens refrain from seeking to bring about state action that would violate (principles 1 and 2 of) the separation doctrine. Moreover, any state action that is justifiable, if at all, only by appeal to some controversial religious claim will violate the neutrality of justification, inasmuch as such state actions and striving by citizens to bring about such state actions will straightforwardly violate the separation doctrine as well.

If the seemingly divisive and controversial separation doctrine can be brought under the rubric of political liberalism in this way, then a path opens up whereby one can picture religious and nonreligious citizens coexisting in genuine harmony. From the standpoint of all reasonable significant convictions about how to live, including religious convictions, the exclusion of religion from the public square appears sensible and right. Separation, in this perspective, need not be a sectarian doctrine imposed on an array of religious adherents.

Trouble awaits. The problem is that neutrality of aim is not actually an entailment of the political liberalism doctrine. Hence, one can consistently affirm political liberalism and deny neutrality of aim and then further deny the separation doctrine.

A stylized example can serve to illustrate the problem. Suppose that social science research shows that churchgoing and religious sect affiliation reduce the incidence of criminal conduct. The state responds by enacting laws that promote churchgoing and religious sect affiliation in order to reduce crime. Suppose that these laws significantly

reduce crime and no alternative laws would do better to reduce crime. So it might be the case that there is a cogent, compelling neutral justification for the laws, even though they involve the state in promoting some controversial ways of life or conception of the good over others—religious lifestyles are being promoted over nonreligious lifestyles. One might imagine a further case, in which social science shows that not just any sect affiliation is equally beneficial in promoting abstinence from crime. Buddhism and fundamentalist Christianity, it turns out, score high in producing law abiding citizens; other religions and sects score lower. On this basis the state promotes not only churchgoing over non-churchgoing ways of life, but, more specifically, some sect affiliations over others. I assume that if the crime problem is severe and otherwise intractable, a wide array of sensible moral arguments will converge in justifying the promotion of some controversial ways of life and conceptions of how to live (namely, religious ones), over others. But in this imagined scenario, political liberalism, identified here with the liberal legitimacy norm, can be satisfied even though neutrality of aim is not. The state that promotes sect adherence to bring about a tolerable level of safety and public order is promoting some controversial ways of life over others (and so violating neutrality of aim); but nothing rules out the possibility that this violation of neutrality of aim is justifiable by appeal to principles that should attract the allegiance of all reasonable points of view in a diverse society. Violation of neutrality of aim can be justifiable in the terms of principles that none can reasonably reject. (Although there is clearly a tradeoff of values here, and different sensible views that qualify as reasonable according to the political liberalism standard will assign greater or lesser weight to public safety as against other values with which it might conflict, I suppose that there is a level of public safety and an amount of gain in public safety that promotion of religion can reach, such that given that level and that amount, the promotion state actions will be acceptable according to the liberal legitimacy norm.)

7. Rawlsian Political Liberalism is Unacceptable

In the previous section I have denied that one who accepts political liberalism as formulated here is necessarily committed to accepting separation of church and state. Maybe this result is not so damaging. Perhaps contingent truths that hold pervasively in the modern world rule out the scenarios in which one can consistently follow political liberalism but violate separation. Maybe so, maybe not. However, there is worse to come.

Despite its elegance and appealing simplicity, the political liberalism doctrine and the norm of neutrality of justification that is allied with it are vulnerable to simple objections that are hard to overcome. So whatever support these doctrines might give to the doctrine of separation of church and state is weightless, because the doctrines themselves do not withstand critical scrutiny.

To see the problem, consider the simple formulation that government actions and policies are morally illegitimate unless they are justifiable by appeal to principles that none could reasonably reject. What would render one's justification of a proposed principle *beyond reasonable rejection*? A reasonable person, let us vaguely stipulate, is one who is responsive to reasons, able to discern reasons, and assess their strength. Reasonableness evidently admits of degrees. But there is immediately a dilemma for the political liberalism doctrine: If one stipulates that a reasonable person is one who is fully responsive to reasons, always discerns the reasons there are, assesses them correctly, and

makes no cognitive or other errors in his practical reasoning, then liberal legitimacy ceases to be an independent requirement. The norm just says that state actions and policies are morally legitimate just in case they are best supported by the reasons there are. If, on the other hand, one relaxes the requirements of reasonableness, so one can count as a reasonable person even if one's beliefs and judgments are mistaken and rest on cognitive errors in one's attempts to discern and assess the reasons—then it is no longer plausible to maintain that it is wrong for the state to impose policies on individuals that those individuals could (in the relaxed sense) reasonably reject. Why would it be wrong or morally illegitimate for the state to impose policies on me just in virtue of the fact that I object to them on moral grounds, if the basis of my rejection is some cognitive error—such as adding up two and two and getting five as the answer?

A version of the same problem afflicts the idea of "controversial" conception of good in the liberal neutrality doctrines. It will not do to say that a doctrine is controversial just in case someone actually controverts it and finds it objectionable. The ideas that friendship is a great good in human life, and that forming and sustaining friendship are worthwhile endeavors, are not rendered controversial just by virtue of the fact that some eccentric thinks friendship is worthless. On the other side, even if all members of society are deluded into uncritical acceptance of some oddball cult belief, the sheer fact that no one objects to it does not render the cult belief uncontroversial in the relevant sense. The issue is normative—not descriptive—of its controversial content. A doctrine of how to live and what goals in life are worth seeking is controversial if there is good reason to object to it (whether or not anyone actually objects). But then a question arises regarding how to understand neutrality of justification.

Consider the idea that nonheterosexual sex, sexual activity between individuals of the same sex, can be good and worthwhile, on a par with heterosexual sex. This is a controversial notion in that there are some points that can be raised against it. Some versions of natural law doctrine, such as those promulgated by John Finnis and Germain Grisez, raise points against same-sex sex that have some merit.[19] Nonetheless, I would hold that, all things considered, the idea that same-sex is valuable and on par with heterosexual sex is normatively uncontroversial—after careful scrutiny, no fully rational and reasonable person unencumbered by sheer prejudice or religious dogma would reject it. In other words, neutrality of justification either becomes trivial or unreasonable. It becomes trivial if it incorporates a maximally strong normative notion of uncontroversiality, in which case neutrality only requires that state policies should be justifiable, supported by best reasons (so far as these can be discerned from our present-day epistemic perspective). It becomes unreasonable if it incorporates some weaker notion of uncontroversiality, in which case neutrality of justification rules out establishing and maintaining state policies that are, according to our best lights, correct, best supported by the reasons there are; just because some people do or might object to the policies on somewhat reasonable but not, all things considered, reasonable grounds.

[19] John Finnis, "Marriage as a Basic and Exigent Good," *The Monist* 91 (2008): 396–414; also Finnis, *Natural Law and Natural Rights* (New York and Oxford: Oxford University Press, 1980); Germain Grisez and Russell Shaw, *Beyond the New Morality: The Responsibilities of Freedom*, rev. ed. (Notre Dame: Notre Dame University Press, 1980).

Another way to see that the political liberalism ideal is defective is to note that the ideal it upholds—of fully rational and reasonable people disagreeing on morals and ethics while agreeing on a common conception of justice to regulate their affairs—is incoherent. Consider the simplest example: a two-person society in which one member bears allegiance to Roman Catholicism and another to Lutheran Protestantism. The political liberalism ideal envisages each affirming the rationality and reasonableness of the other, each affirming a comprehensive ethical view that is contrary to the view of the others, and both affirming from opposed perspectives common principles of justice. The unstable position here is that I (suppose I am the Roman Catholic) am supposed to believe that there are private reasons that suffice to single out Catholicism as the uniquely rational doctrine I should follow; yet, since I recognize that you (the Protestant) rationally disagree, I recognize, and you recognize as well, that the public reasons we share exclude the genuine private reasons each of us separately affirms. This idea of a private reason, however, makes no sense. What is sauce for the goose is sauce for the gander; a reason for me is a reason for you if you and I are in relevantly similar circumstances. Since we share a common public culture with freedom of inquiry, we share the same epistemic vantage point. The reasons I have for believing Catholicism are available to you and your reasons for affirming Lutheranism are available to me. But if my reasons outweigh yours, they do so for you as well; and if your reasons outweigh mine, they do so for me as well. There is no stable epistemic common ground, standing on which we rationally agree to disagree. If the reasons I can advance in favor of Catholic doctrine are counterbalanced by reasons you can offer, there is an epistemic stalemate; that too should be a conclusion we both share if we are both fully reasonable and rational. If you weight some reasons more highly than I do, and there is no decisive reason in favor of your weighting of reasons rather than mine, again the stable position we should reach is not your believing Lutheranism and my believing Catholicism, but both of us believing that there is no decisive reason to affirm either doctrine and, so far as we know, either doctrine could be true, or perhaps some third alternative not yet explored.

Of course, in the world as we know it, people do stably affirm contrary doctrines; this, however, simply reflects the fact that we have limited cognitive powers and are only imperfectly rational. This means that in the actual world, state policies might impose on me against my considered conscientious beliefs, yet the state policy might be correct, best supported by reasons, and my opposed position might simply be wrong (the opposite can occur as well, state policies are often horribly wrong-headed). This means that the liberal legitimacy norm should be rejected, if it is formulated with a relaxed notion of reasonableness, so that people can be reasonable even though making mistakes and affirming, even consistently over time, beliefs unsupported by available evidence.

It is not wrongfully disrespectful or morally illegitimate, per se, to impose state policy on me—even a coercive state policy, for that matter—when the policy is justified and my opposition is unjustified. As a partly rational agent, I have a nonrevocable commitment to following reasons and being ruled by reasons; so when other people or the state coerce me to follow the path of reason, when, left free, I would wander onto another path, the coercion is in accord with my deeper rational will.[20] Example: Suppose

[20] There are different types of cases in which the will imputed to me might be different from what is, in the ordinary sense, my actual will. In one case, I want to act on the best reasons that apply and try to identify

I am a conscientious racist. It is not merely the case that a racist ideology strikes me as correct, it is also true that I have conscientiously thought hard and long and tried as best I can to discover what is practically reasonable in this domain. I just get it wrong. The state law that requires me to refrain from wrongful racial discrimination can be a morally acceptable law; a substantive political liberalism doctrine that leaves room for its being morally illegitimate to put state power behind principles that some citizens "reasonably" reject should itself be rejected. The same goes for any other conscientious belief I hold that falls short of what accords with political morality (as best we can discern it from the present day epistemic perspective).

8. Toward an Alternative Argument supporting Separation of Church and State

By now, the separation doctrine appears to be thoroughly undermined, lacking in support. The argument to this point has challenged the idea that one can rule out as inappropriate or illegitimate a proposed justification for state action on the mere ground that it is controversial. What is controversial might nonetheless be objectively correct. More to the point, a controversial proposal, subject to plausible objections and replies, might still at the end of the day—all things considered from the standpoint of the practical reasons available to us—be the proposal that is most likely to be true, singled out as best by the reasons we have. Basing state actions on moral principles that are best, in this sense, coupled with our best understanding of what are the relevant empirical facts—the relevant facts being those singled out as relevant by the best principles—does not involve any wrongful imposition on dissenters, even conscientious dissenters.

But nothing in any of this rules out the possibility that religious claims and doctrines might figure in the best available reasons. The sheer fact that the doctrines of the religious sect I embrace are rejected by rival sects and by most members of the

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them. If I misidentify the best reasons, my real will, in a sense, is to act on what really are the relevant reasons—not what I am taking to be that. In another type of case, I might make no effort to identify the best reasons that are relevant to my choice of action and might even make efforts to avoid recognizing them (perhaps I have an inchoate suspicion that the reasons would point me toward an action I would dislike doing). Here I might entirely lack any motivation to seek to identify the course of action that reasons support and do that. Nonetheless, possessing rational agency capacity, I have some ability to recognize reasons; and reasons are only considerations that fix what ought to be done. Insofar as I am rational, I must will to believe what is true and act in accordance with the reasons there are. Since my actual empirical motivations might entirely repudiate this latent rational will, it might seem implausible to impute such a will to me at all. But if I am repudiating rule by reasons, if my will is, at the bottom line, to live according to what I now subjectively take to be right—whether or not there is any backing for my current subjective feeling—it does not seem a wrongful violation of my autonomy to issue coercive threats to seek to induce me to conform my conduct to the requirements of just law. The same goes if my repudiation of rule by reasons is only partial; my rejection of the principles that justify the law that is being imposed on me has some rational backing, and would not be affirmed by me if this were not true. I am indifferent to the further career of reasons and reasoning beyond this threshold level of reasonableness.

society I inhabit does not rule out the possibility that sound ethical imperatives are constituted by divine commands and that these divine commands are uniquely captured in the doctrines of my sect. So, nothing rules out appealing to religious claims as a basis for state policy.

Any such claim is subject to public appraisal and assessment. The question becomes whether one's claims, be they religious, secular, or something else altogether, are defensible in the forum of practical reason and stand out from the pack of competing claims as better backed by reasons.

Here the case for secular establishment begins. In this essay I cannot touch on this case or even begin a light sketch of arguments that need to be made in convincing detail. I simply want to indicate the character of the argument that needs to be made in order to sustain a claim that the basic political and social arrangements of one's society are tolerably just. For example, suppose the laws permit a pregnant woman to secure an abortion. This abortion regime is just if, and only if, the claim that a pregnant woman has a moral right to secure an abortion is really correct; and the regime is morally legitimate if, and only if, so far as we can tell from the best epistemic position we can reach, the claim that a pregnant woman has the moral right to secure an abortion is correct (just ignore the further complication, irrelevant here, that there is some gap between what is morally the case and what bits of morality should be enforced by law).

The next step is simply to observe that the building blocks for good arguments concerning what is morally right and just are of two sorts: (1) evaluative and specifically moral claims and (2) empirical claims about what are the facts about the natural universe and about what causes what in the natural universe. Religious doctrines affirming supernatural claims as a basis for how we should live are irrelevant and unhelpful in discovering sensible claims of types one and two.

This is not a matter of conceptual or logical necessity. In principle, for example, the existence of an all-powerful God who rules the universe with infinite kindness might affect what we ought to believe about what the world is like and how we should comport ourselves within it. But the arguments for the existence of such a God, or for any religious claim that would have comparable significance, are spectacularly weak and unequivocally merit rejection.

(To avoid misunderstanding, I should emphasize that for purposes of this essay this claim is simply an assumption, and one for which I provide no shred of argument. The relevant arguments are complicated, and well beyond the scope of this essay.[21] Someone who disagrees and thinks there is good evidence for religious claims is welcome to take my argument as an argument against separation of church and state.)

The only plausible basis for empirical claims is the evidence of observation, as refined in common-sense theories of evidence and justification and as further refined in the complex and ongoing development of scientific methodology. The only plausible evidence for ethical claims is intuitive judgment made in a cool hour and adjusted and corrected by the demand that one's judgments, overall, should form a consistent and coherent set. Particular judgments—such as that Sally ought to get the prize on offer here

[21] The relevant arguments are in philosophy of religion. For an accessible introduction written from an atheistic standpoint, see J. L. Mackie, *The Miracle of Theism: Arguments For and Against the Existence of God* (Oxford: Oxford University Press, 1982).

and now—are made true by being derivable from true general claims, along with premises asserting the relevant empirical facts and general claims are rendered plausible and shown likely to be true by their power to explain and justify the particular judgments that remain intuitively plausible after extended critical reflection. At any given time, one's set of ethical beliefs may be vitiated by inconsistency or by their being formed by processes involving cognitive error. Ethical truth is what would be affirmed in a "reflective equilibrium" between particular and general beliefs emerging from ideally extended ideal critical scrutiny.[22] Premises appealing to God's wishes, God's will, God's commands, and the like do not figure in the bases for either rational empirical or rational ethical beliefs. Making progress toward ideal reflective equilibrium in ethics is likely a collective project of humanity extending through history.

The above is a mouthful, but even swallowing and accepting all of it would not yet suffice to justify the doctrine of separation of church and state. The points just made concern the epistemic defects in religious doctrines, regarded as paths to the empirical and ethical truths needed to guide our lives and regulate state policies. However, there are grounds for favoring religion and the religious as such, and perhaps grounds for favoring some churches and sects over others, that are unaffected by these epistemic defects—on the assumption that they are genuine defects as here postulated. Consider the plausible claim that religions and churches by and large tend to channel their followers toward adherence to descent values including honesty, prudence, social solidarity, nonmaleficence, trustworthiness, and broadly extended charity. Consider also the plausible claim that affiliation to churches tends to be an important source of uncontroversial goods in life for many people. From religious involvement people gain community, regular friendly social contact, friendship, and much else. To the extent that careful investigation clarifies and supports these claims, they generate arguments for favoring religion and churches in violation of separation of church and state.

The argument would not be that in pursuing legitimate secular objectives the state might permissibly act in ways that, as a side effect, generate advantages for religion and churches, as when providing school tuition vouchers to parents (in response to the duty of the public to ensure adequate education for all children and the right of parents to raise their children as they see fit within appropriate limits) predictably ends up benefiting religious schools and the churches that operate them. The argument would be that the state permissibly acts with the aim of promoting religion and some churches because doing so is a means to advancing some legitimate secular goal. The latter violates separation even if the former does not.

Again, I shall simply point to the kind of argument that would have to be developed in order to defend the separation doctrine against the attack just adumbrated. Here is a crude comparable case: Suppose social science research of the future determined that belief in Santa Claus oddly has unexpected beneficial consequences.

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[22] The "reflective equilibrium" idea is from John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 40–46. See also Norman Daniels, "Wide Reflective Equilibrium and Moral Theory," repr. in Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice* (Cambridge: Cambridge University Press, 1996); also T.M. Scanlon, "Rawls on Justification," in *A Cambridge Companion to Rawls,* ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003).

Believers tend to be more socially trusting and thereby come to be more reliable participants in cooperative enterprises and more valuable members of society. There are cults that promote belief in Santa Claus for adults as well as children, so the possibility arises of doing good by promoting Santa Claus cults. I suppose a just state should balk at this suggestion. The state ought not to be party to promoting false beliefs and superstitions among its members even if good comes of it. Instead, resolute efforts should be made to find other ways to secure the goods without promoting false belief and superstition.[23]

The state ought to be fostering the autonomy and cognitive maturity and epistemic skills of its citizens, on the ground that these virtues and skills will be generally conducive to individuals coming to form increasingly sophisticated, nuanced, and epistemically warranted beliefs. The liberal hope is that in the long run more good for people fairly distributed will be achieved by fostering people's rationality than by accepting their now limited rationality and manipulating it in the service of good.[24] If belief in Santa Claus cults is entrenched in society and the belief system has become central to many people's sense of the values they most cherish, the state should not engage in direct propaganda against the cults, which would be insulting to citizens and likely counterproductive. However, the state should not engage in promoting the cults and should seek indirect ways of dampening their attraction and their influence.

The argument for separation of church and state suggested here might seem to offer no principled barrier to outright persecution of religious faith. Grant that there should be freedom of speech and expression and other basic civil liberties. Within these constraints, why should the state not seek to dissuade people from religious belief and practice, say by proselytizing against religion or by offering tax incentives favoring the nonreligious?

To address this question, one would need to characterize the morally proper goals that a just state pursues. This task is beyond the scope of this essay. In rough terms, if policies that advance human well-being fairly distributed have the effect of discouraging religious adherence, that is no objection to them.[25] But actions that intend the dampening

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[23] And if these resolute efforts fail? Suppose we cannot establish and sustain a world order that does not condemn a large percentage of its inhabitants to grim and miserable lives without extensive establishment of religion? In that possible world (which, so far as I can see, not the actual world) sound ethical principles would imply that liberalism should be abandoned. Liberal political norms are a matter of lore (what will bring about morally good outcomes in our world) as well as principle (what count as morally good outcomes).

[24] The locus classicus of this liberal argument is in J. S. Mill, *On Liberty*, ed. Elizabeth Rapaport, (Indianapolis: Hackett Publishing Company, 1978). This text is available at http://www.utilitarianism.com/jsmill.htm. Originally published 1859.

[25] Here I gesture vaguely toward the welfarist and consequentialist morality that I deem most defensible. I rely on the broad idea that the ultimate concern dictated by morality is the advance of the welfare of humans (and other animals) along with its fair distribution in part three of this essay. It should be emphasized that the separation of church and state doctrine affirmed here is defensible from a range of

of religious adherence either as a goal or as a means to some goal tend to do harm, not good, as the history of progress toward liberal toleration attests, so we should abjure such policies. There is also a live-and-let-live element in any viable liberal political morality; secularist attempts to disfavor the religious breed attempts to disfavor the secular. These considerations are matters of lore; not fundamental principle, but liberal toleration itself is a doctrine derived jointly from stable empirical facts about the natural and social world and moral principles, rather than being derivable from the latter alone.

9. Revisiting Political Liberalism and Rejecting It

David Estlund defends the idea that the state coerces those within its jurisdiction with legitimate authority when it acts on the basis of policies that are justified from every qualified point of view. A point of view need not be constituted by truths to be qualified; it suffices that the beliefs that shape the point of view satisfy a threshold standard of reasonableness or be reasonable enough. Some truths, then, could not form a basis for state action that would have legitimate authority, because any justification of this basis for state action would be rejected from some qualified point of view. As Estlund puts it, "even if the pope has a pipeline to God's will, it does not follow that atheists may permissibly be coerced on the basis of justifications drawn from Catholic doctrine. Some non-Catholic views should count as qualified for this purpose even if they are mistaken."[26] This is a deft statement of the political liberalism norm.

The claim that the pope has a pipeline to God's will is ambiguous. It might mean that the pope has a wild hunch or a private revelation (which might be just a vivid dream) that happens to be true without being, in any sense, epistemically warranted. If this is true, then the pope's say-so is not a legitimate basis for state policy. But another possible meaning of having a pipeline is that the pope has discovered a reliable method for discerning truth in religious matters, and hence has shareable reasons that are better than the competing reasons that atheist and agnostics and apostates and such can muster. The political liberalism idea slurs over this distinction, or, perhaps it would be fairer to say, makes nothing of it. This is the distinction between being in possession of the truth, perhaps by sheer coincidence, without compelling warrant, and being in possession of claims to truth (which might or might not be ultimately correct) that are more strongly backed by available reasons than any competing claims to truth. The available reasons are the reasons identifiable by the best methods of the day. The theorist who denies the political liberalism doctrine as elaborated by Estlund would hold that there might be candidate state policies that are backed by compelling justification and that ought to be implemented even though they are subject to rejection from some qualified viewpoint. This is so because a viewpoint might be qualified because it passes a threshold of reasonableness even though it is not as reasonable as other competing viewpoints; this is

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plausible moral theories including right-based, not welfare-based, doctrines. Separation of church and state is an object consensus of overlapping plausible moral views. On welfarism, see Richard Arneson, "Welfare Should Be the Currency of Justice," *Canadian Journal of Philosophy* 30 (2000): 497–524.

[26] David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008).

so especially if it is inferior to the viewpoint that is most reasonable on balance, so far as we can discern with the best cognitive resources presently available.

Now back to the pope's claimed pipeline to truth. I agree with Estlund to this extent: it is unlikely that there are good grounds for putting state power behind Catholic doctrine and suppressing atheists and heretics. The basis for this hunch is simple: Catholic doctrine backed by the best arguments that can be mustered in its defense is not superior to some rival religious doctrines, to some alternative metaphysically extravagant quasi-religious doctrines, or to some metaphysically non-extravagant versions of atheism and agnosticism. In contrast, metaphysically non-extravagant versions of atheism and agnosticism will turn out to be better supported by arguments than rivals. Hence, in effect, rejecting political liberalism, we would end up, it is plausible to suppose, endorsing a secular religious establishment. You might ask, what is a "secular religious establishment"? A state with an established church subsidizes the church's activities, proclaims official state endorsement of its doctrines, favors the established church over other churches and over nonreligious organizations and movements that are rivals to it, and so on. A state with a secular establishment subsidizes sensible nonreligious organizations in preference to religious organizations (for example, Oxfam gets tax benefits unavailable to any church organization), lends official state support to uncontroversial scientific claims and to the scientific method for establishing empirical facts, lends official state support to the best nonreligious, this-worldly values, especially uncontroversial ones, has procedures in place that aim to keep sectarian religious doctrines from shaping the content of state laws and public policies, and so on. Secular establishment so understood is fully compatible with robust protection of people's freedom to worship and follow their religious faith, freedom to proselytize on behalf of religious doctrines, freedom to assemble and organize for religious purposes, legal (though not moral) freedom to seek to influence the choice of laws and public policies so that they conform to favored religious doctrines, and so on. In the same way, the state's maintaining an established church is compatible with the state's protection of religious liberty.

Estlund raises the same issue in a slightly different context. He considers a hypothetical case for state-enforced mandatory Bible study:

> "1. Christianity is a truth of the utmost importance.
> "2. Truths of the utmost importance ought to be taught in public school, a policy backed up with state force.
> "3. Therefore, Christianity ought to be taught in public schools, a policy backed up with state force."

Estlund notes that the political liberalism doctrine he embraces allows one to reject the third statement, which looks to be objectionably sectarian and a wrongful denial of religious liberty, without making the controversial claim that the first is false. Instead, the third does not follow from the first because the second is false. There are truths of the utmost importance that should not be taught in public schools on a mandatory basis for all. Some truths are controversial, and unsuited to be rammed down the throats of those who have reasonable grounds for rejecting them as a basis for state policy, regardless of where ultimate truth lies.

Rejecting political liberalism, I claim we should respond to the proposed argument in a somewhat similar way. The secular establishment doctrine does not deny

that the first statement may be true. It might, for all we know. However, we have no good grounds for believing it. Hence it is epistemically unsuitable as a basis for state policy. In contrast, there are claims about human well-being and human equality and individual moral rights that are controversial, but still stand out from the pack of candidate justifications for state policy as better supported by reasons. Claims of this sort may not coalesce into a unique set but rather form groups of alternative coherent doctrines, none of which is decisively defeated by any rivals. So, some set in this epistemically privileged group can legitimately be enforced by state power on the ground that no decisively superior basis for state policy can be identified. Since there may be truths of the utmost importance to which we have, at present, no epistemic access, the sheer fact that it is possible that claim X is true is not an adequate basis for legitimate state policy. Truths of the utmost importance to which we have at present no epistemic access are not a morally appropriate basis for state policy. It follows that the second and third statements are false.[27] The correct response is that, so far as we can tell, Christianity is not true, and, a fortiori, not a truth of the utmost importance. If the pope really did have a pipeline to God, this would be a proper basis for religious establishment; in fact, our common negative assessment of the Spanish Inquisition would then require radical revision.

10. Conclusion: A Retreat

The argument in this essay has an abstract and almost otherworldly character. Even if my claims are accepted, pressing practical issues remain entirely open. The question addressed in this essay might be put in these words: If you were an agent with the power to create a political system according to your preferences, and you wanted above all to create a just political order, what would be the relation between church and state in the system you would build? An alternative formulation would be that this essay provides a cogent response for use by a majority of secular voters in a tolerably just social democracy that enforces separation of church and state, if they were challenged by a disgruntled coalition of voters committed to religious creeds who claim that the current regime discriminates against religion and wrongfully blocks religion from the public square. For many who are uneasy about the relationship between church and state, the questions that are troubling them are not ones this essay addresses.

For all that has been said in this essay, it might be the case that in a society torn by religious strife, the attempt to establish and maintain separation of church and state would exacerbate strife and bring it about that, for the foreseeable future, basic human rights for all members of society would be less fulfilled than they would be if a mild religious establishment were put in place that settled the question of which religion is to be dominant, and encouraged most people to turn their energies away from religious quarrels.

For all that has been said in this essay, it might be the case that in a society in which most people's decent sociable dispositions are tied to their religious convictions, any successful attempt to convince them that religious convictions are not proper grounds for advocating public policies in a diverse society would dampen their willingness to support decent and humane social policies. The predictable result of attempts to inhibit

[27] We ignore the problem, here irrelevant, that some truths (for example, quantum field theory) might be too complex to be usefully taught in school.

people from undertaking religious-political campaigns for social causes would be that the laws and public policies of the society come to be increasingly mean-spirited, inegalitarian, and unjust.

In the two imaginary cases just sketched, pressing for separation of church and state, would likely be morally wrong. At least, none of the abstract arguments canvassed in this essay rules out this possibility. There are many similar scenarios that elicit the same judgment. Consider a political community that encompasses people of widely divergent religious worldviews. There is stable deep disagreement in people's fundamental beliefs. This may be the actual situation of any modern society that we can envisage that does not wrongly persecute and expel adherents of minority doctrines. In these circumstances, establishing and maintaining a state policy that is scrupulously neutral between different doctrines and between people of opposed convictions is not automatically the uniquely just response to pluralism of belief. In some circumstances, a more sane response is to divide the political community into politically autonomous territorial units, each political unit according special privileges to the religion that has the allegiance of the bulk of the inhabitants of that territory. This approach might be carried out via a federalist strategy, the separate units being autonomous federal regions united in one political state. The approach might also be carried out via a secession or dismemberment strategy—the original political community disappearing and being replaced by two or more separate states, with each one featuring a different established religion in alignment with the convictions of the bulk of the citizens.

It is not a decisive objection to the religious-establishment-for-social-justice proposals just mentioned that they would perpetrate some form of injustice only in virtue of failure to conform to separation of church and state. In the circumstances under review, which might correspond to actual circumstances in some or all current societies, the principles of justice will be incompletely fulfilled no matter what feasible policy option we pursue. The question we then face is, roughly: What is the best place we can get to from where we now are. (This is only "roughly" the right question to pose because, as stated, it ignores the interaction between the values of the outcomes a policy choice might reach and the probabilities that this or that outcome will obtain given that choice.) Confining attention to the justice of church-state relations, we should acknowledge that insistence on upholding the most just form of this relationship might be counterproductive in its own terms and lead to more unjust church-state relations than what might, instead, have been obtained by a less insistent stance. Broadening the focus so that the justice of church-state relations is seen as only one component of an encompassing ideal of social justice, we should acknowledge the immediate possibility of tradeoffs in justice values. In the unfortunate conditions of this-worldly existence, acceptance of less than the best obtainable state of affairs as assessed by one justice value might be warranted by the fact that this compromise in this domain of justice enables greater fulfillment of other components and more justice overall, all things considered.

These quick and dirty reflections on justice for here and now do not constitute backtracking on my part from any of the abstract claims urged in this essay. In order to make sensible judgments of policy choice among feasible alternatives with different social justice outcomes, none ideal, one needs a standard of social justice to be able to rank policy and strategy choices by their social justice desirability. Separation of church and state is one element (derivative, not fundamental) in the standard of social justice.

Nor should we leap to the conclusion that the norm of separation of church and state belongs to a misty ideal that has no relevance to the selection of the best moral policies in a variety of real-world circumstances. On the contrary: in confronting various policy choices at lower levels of abstraction for various pervasive modern conditions, I would tend to argue that more separation of church and state is better than less of it, and that, by and large, we should press for this secularist policy precisely in order to make whatever small steps toward justice we can make in the world as we see it. In other words, I would press for separation of church and state, so to speak, in pragmatic practice as well as in ideal practical theory.[28] My point here is simply that these would be completely different arguments from the ones considered in this essay. To argue for this or that policy in actual given circumstances (including the facts about the distribution of people's beliefs), one would need to attend to matters of history and culture and, more generally, to the messy and unruly jumble of factors that will determine the likely consequences of policy choice in the real world. This essay does none of this.

Finally, although this essay sometimes adopts the strident tone of the militant secularist, this tone is powerless to overcome a truism: our ability to determine the likely consequences of various policy choices even in the short term is not that great, and for many choices we face, the even more uncertain long-run consequences we are even less able to discern are the more important ones. In this situation the policy choices the liberal recommends reflect a somewhat optimistic assessment of the capacities of human beings for enlightenment, reasoned reflection, and allegiance in conduct to whatever conclusions are best supported by the reasons there are. These issues are ultimately empirical but, in practice, somewhat intractable. That is to say that the liberal social justice project in which separation of church and state is a familiar traditional element rests not just on reason and evidence, but on secular faith.

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[28] In their contribution to this volume, "Equal Membership, Religious Freedom, and the Idea of a Homeland," Christopher L. Eisgruber and Lawrence G. Sager explore the proposal that religious establishment is consistent with a liberal political morality of equality and liberty. The idea is roughly that in a world like ours in which Jews and other religious adherents are, in some places, persecuted for their religious beliefs, the existence of some political societies that provide the special protection of religious establishment for one of these otherwise persecuted groups can increase the cause of liberty and equality overall. (A similar point might hold for ethnicity and other cultural markers.) We should oppose this suggestion. Religious establishment, even prettified with liberal trimmings, must be unfair to members of society who hold other views, including the children of adherents of the favored creed, who might come to dissent from it. On a global scale, adherents of liberty and equality are more likely to advance the cause by creating pockets of justice where they can rather than by offsetting "bad favoritism" elsewhere by reverse (moderate) "bad favoritism" in their sphere of influence. These scrappy remarks, however, are promissory notes toward new arguments that need to be made in response to proposals of this ilk. My essay does not try to develop such arguments, but it does seek to distinguish "secular establishment" from genuine religious establishment and to indicate that arguments against genuine religious establishment do not tell against its secular counterpart.