

# LIBERAL SECULARISM AND RELIGIOUS FREEDOM IN THE PUBLIC SPACE: REFORMING POLITICAL DISCOURSE

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## INTRODUCTION

One would prefer not to think of Justice Anthony Kennedy as a Keynesian “[m]adm[a]n in authority who hear[s] voices in the air” and who “distill[s] [his] frenzy from some academic scribbler of a few years back.”<sup>1</sup> Still, in at least one passage, *Obergefell v. Hodges*<sup>2</sup> confirms that “the ideas which civil servants and politicians . . . apply to current events are not likely to be the newest.”<sup>3</sup> Consider:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.<sup>4</sup>

According to Justice Kennedy, “decent and honorable religious or philosophical premises” may ground “sincere, personal opposition” to same-sex marriage—apparently reasonably so—but those same premises, if they would be enacted in law and public policy, become unacceptable.<sup>5</sup> This idea is not “the newest.” It is, in fact, the liberalism that venerable academic scribblers such as John Rawls and Robert Audi have

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1. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 383–84 (1936).

2. 135 S. Ct. 2584 (2015).

3. KEYNES, *supra* note 1, at 384.

4. *Obergefell*, 135 S. Ct. at 2602.

5. *See id.*

long espoused.<sup>6</sup> Unfortunately, that liberalism has also long been unsatisfactory, and it remains so, not least because it unduly restricts religious liberty.

This Article advocates the realization of a more robust, and indeed a more neutral, liberty, particularly in the realm of political discourse. Part I shows that Rawls and Audi, as exemplars of liberalism, enticingly claim that religious freedom and non-establishment are separate principles and that the implementation of these principles leads to a neutral public square. Part II attempts to show that a public square so ordered, while appearing to be even-handed, is actually secularist, or not “truly” neutral. Instead, non-establishment leads to a public square where non-religion predominates over religion in political discourse. Finally, Part III articulates and defends the broader view of religious freedom. Ultimately, only the full inclusion of all religious and non-religious perspectives in a pluralistic debate will promote the neutrality, freedom, and equality that liberal theorists rightly and ardently desire.

## I. THE LIBERAL ACCOUNT OF RELIGIOUS FREEDOM: FREEDOM, NEUTRALITY, AND EQUALITY

### A. *Separation of Religious Freedom from Non-Establishment*

The traditional and prevailing liberal view is that religious freedom and non-establishment are separate principles. Religious freedom is about individuals being free to believe and practice as they choose without interference by the state, and non-establishment is about preventing government from endorsing or coercing the practice of a particular religion.<sup>7</sup> In the liberal framework, the separation of these principles is supposed to preserve religious freedom. Rawls and Audi are ex-

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6. See generally ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000); JOHN RAWLS, POLITICAL LIBERALISM (expanded ed. 2005); Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677 (1993).

7. See Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom*, 49 MCGILL L.J. 635, 638–39, 649 (2004); see also, e.g., Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 673–74 (1980); John Norton Moore, *The Supreme Court and the Relationship Between the “Establishment” and “Free Exercise” Clauses*, 42 TEX. L. REV. 142, 146–49 (1964). See generally 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008).

emplary exponents of this entrenched separationist perspective in which distinguishing religious freedom from non-establishment and balancing them appropriately results in genuine neutrality, freedom, and equality.<sup>8</sup>

Under Rawls's theory of liberalism, all coercive laws must be justified by "public reason."<sup>9</sup> Coercive laws may not be based on "comprehensive doctrines."<sup>10</sup> For Rawls, *any* comprehensive

8. See generally Cecile Laborde, *Political Liberalism and Religion: On Separation and Establishment*, 21 J. POL. PHIL. 67, 67–69 (2013).

9. According to Rawls, public reason is "the shared form of reasoning that the citizens of a pluralist democratic society should use when deciding constitutional essentials and questions of basic justice." See Blain Neufeld, *Public reason*, in THE CAMBRIDGE RAWLS LEXICON, § 172, at 666 (Jon Mandle & David A. Reidy eds., 2014); see also *infra* note 22. Rawls believes this form of reasoning "makes the realization of the ideal of fair social cooperation amongst free and equal citizens possible in pluralist societies." *Id.*; see also Jonathan Quong, *Public Reason*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/entries/public-reason/> [<https://perma.cc/R48V-LAAT>] (Public reason is "the moral or political rules that regulate our common life [must] be, in some sense, justifiable or acceptable to all those persons over whom the rules purport to have authority.").

10. RAWLS, *supra* note 6, at 60–61. According to Rawls:

A comprehensive doctrine is a set of beliefs affirmed by citizens concerning a range of values, including moral, metaphysical, and religious commitments, as well as beliefs about personal virtues, and political beliefs about the way society ought to be arranged. They form a conception of the good and inform judgments concerning "what is of value in life, the ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole."

Paul Voice, *Comprehensive doctrine*, in THE CAMBRIDGE RAWLS LEXICON, *supra* note 9, § 39, at 126. (quoting RAWLS, *supra* note 6, at 13 (citation omitted)). A fully comprehensive doctrine "cover[s] all (or most of) the major issues of human value, including moral, religious, metaphysical and political values." *Id.* at 127.

In Rawls's view, a comprehensive doctrine may be reasonable or unreasonable. Reasonable comprehensive doctrines are translatable into political reasons; they "propose terms in public political discourse that others might be willing to accept. In other words, they offer political rather than comprehensive reasons." *Id.* A reasonable comprehensive doctrine is an exercise of theoretical reason in the sense that it organizes major moral and philosophical aspects of human life in a consistent and coherent manner; it is an exercise of practical reason in the sense that it attaches weight to associated values in ways which distinguish it from other doctrines; and while it is not absolute it does draw upon an established tradition of thought. See RAWLS, *supra* note 6, at 59. Unreasonable comprehensive doctrines "make political judgments, take political action, and argue for principles of justice solely from within the perspective of their comprehensive doctrines." Voice, *supra*, at 127.

Comprehensive doctrines may also be religious or secular. "[P]erfectionism, utilitarianism, Idealism, and Marxism" are examples of (arguably) secular fully

doctrine, reasonable or unreasonable, religious or secular, cannot be a public reason without translation into “proper political reasons,”<sup>11</sup> and so is an inadequate basis for coercive law. The liberal principle of non-establishment, in particular, prohibits coercive laws based on religious comprehensive doctrines. This non-establishment principle is distinct from the Rawlsian principle of religious freedom, which forbids the use of state power to repress religious reasonable comprehensive doctrines.

At first glance, the distinction between Rawls’s non-establishment and religious freedom principles might seem artificial. Could it not be that a religious reasonable comprehensive doctrine might form the basis for a coercive law (breaching the non-establishment principle) which represses other incommensurable religious reasonable comprehensive doctrines (breaching the religious freedom principle at the same time)? This is certainly possible, even probable. But that kind of situation does not exhaust the permutations of reasonable comprehensive doctrines in relation to the two principles. A religious reasonable comprehensive doctrine might form the basis for a secular law, which does not repress another reasonable religious comprehensive doctrine (for example, a law requiring that creation be taught alongside evolution in public schools). Here the non-establishment principle would be violated but the religious freedom principle would not. Conversely, a secular reasonable comprehensive doctrine might form the basis for a law that represses a religious reasonable comprehensive doctrine (for example, a Marxist regime might prohibit the publication of Christian literature). Here the religious freedom principle would be violated but the non-establishment principle would not be (though the general Rawlsian prohibition on laws based on comprehensive doctrines would). Thus, notwithstanding the overlap between the two principles, they are nonetheless independent in the Rawlsian framework.<sup>12</sup>

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comprehensive doctrines. *Id.* Christianity and Islam are examples of religious fully comprehensive doctrines.

11. RAWLS, *supra* note 6, at 453 (arguing that comprehensive doctrines must be translated into “proper political reasons” consistent with public reason before they may be deployed in public political forums); *see also infra* Section II.A (explaining the insufficiency of this “proviso”).

12. A similar argument could be applied to Audi’s framework outlined below. The illustration assumes a traditional view of non-establishment and religious freedom, consistent with the Rawlsian framework. Less traditional views might

Audi's views are similar in this respect. The assumption underlying his view of the role of religious arguments in liberal democracies is that they are free societies "committed to preserving freedom, especially in religion."<sup>13</sup> This commitment to preserving freedom in the sense of preventing "unjustified" coercion against religion is the typical liberal idea of religious freedom. As distinct from coercion against religion (contrary to the religious freedom principle), Audi supports the non-establishment idea that religion should not be invoked as the basis for political laws, for this could lead to division and dominance of one religion over others in a pluralistic society, which is incompatible with liberal ideas of freedom and equality.<sup>14</sup>

*B. Balancing Religious Freedom and Non-Establishment*

Rawls addresses this question of pluralism as follows:

[T]he basic structure of such a society is effectively regulated by a political conception of justice that is the focus of an overlapping consensus of at least the reasonable comprehensive doctrines affirmed by its citizens. This enables that shared political conception to serve as the basis of public reason in debates about political questions when constitutional essentials and matters of basic justice are at stake.<sup>15</sup>

A reasonable approach sees "society as a system of fair cooperation" between reasonable comprehensive doctrines.<sup>16</sup> When doctrines that are reasonably acceptable to all people (regardless of their own reasonable comprehensive doctrines) are used to promulgate laws, those laws provide fair terms for all individuals in the society. The Rawlsian approach, in a sense, is a

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consider "secularism" or "Marxism" as "religious" for non-establishment purposes, but they are not considered here. See, e.g., Larry Alexander, *Kent Greenawalt and the Difficulty (Impossibility?) of Religion Clause Theory*, 25 CONST. COMMENT. 243 (2008); Derek Davis, *Is Atheism a Religion? Recent Judicial Perspectives on the Constitutional Meaning of "Religion"*, 47 J. CHURCH & ST. 707 (2005); John Knechtle, *If We Don't Know What It Is, How Do We Know If It's Established?*, 41 BRANDEIS L.J. 521 (2003). The broader view of religious freedom developed in Part III would see the first example as an issue of non-establishment within the context of religious freedom and evaluate it on that basis. The second example would obviously still be directly considered as an issue of religious freedom.

13. Audi, *supra* note 6, at 687.

14. *Id.* at 690-91.

15. RAWLS, *supra* note 6, at 48.

16. *Id.* at 49-50.

system of equality based on the universal acceptance of minimum terms.<sup>17</sup>

Reasonable persons may not accept, or indeed may deny, reasonable comprehensive doctrines. Nevertheless, they should not want the state apparatus to repress reasonable comprehensive doctrines to which they do not adhere because they would not desire repression of their own reasonable comprehensive doctrines.<sup>18</sup> This is the condition of reciprocity. To preserve “unity and stability,” Rawls introduces the idea of an “overlapping consensus of reasonable comprehensive doctrines,” which “endorse the political conception, each from its own point of view.”<sup>19</sup> To the extent that there is a consensus, there is a certain unity, and “stability is possible when the doctrines making up the consensus are affirmed by society’s politically active citizens.”<sup>20</sup> For Rawls, all this “leads to a form of toleration and supports the idea of public reason.”<sup>21</sup>

Rawls states that:

Public reason is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizenship. The subject of their reason is the good of the public: what the political conception of justice requires of society’s basic structure of institutions, and of the purposes and ends they are to serve.<sup>22</sup>

The citizens, “as a collective body, exercise final political and coercive power over one another in enacting laws” on fundamental issues, such as equality of opportunity and which religions to tolerate.<sup>23</sup> Fundamentally, therefore, political power may only be exercised on the basis of public reason as a matter of liberal legitimacy:

[O]ur 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 may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational [in accordance

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17. *See id.*

18. *See id.* at 60–62.

19. *Id.* at 134.

20. *Id.*

21. *Id.* at 59.

22. *Id.* at 213.

23. *Id.* at 214.

with non-establishment] . . . consistent with their freedom and equality [preserving religious freedom].<sup>24</sup>

Audi takes up the Rawlsian line of thought, albeit with explicitly “secular” reason rather than the more ostensibly neutral “public” reason. He presents a theory of how “religious arguments may be properly used in a free and democratic society [without] mask[ing] their religious character [or] undermin[ing]” the separation of church and state, which he distinguishes from secularization.<sup>25</sup> Audi focuses specifically on the “role of religious arguments and the explicit use of, or tacit reliance on, religious considerations as grounds for laws or public policies.”<sup>26</sup> His theory has a similar framework to Rawls’s: “[L]iberal democracy is properly so called because of its two fundamental commitments: to the freedom of citizens and to their basic political equality, symbolized above all in the practice of according one person one vote.”<sup>27</sup> Audi identifies the balance of these two potentially competing principles as challenging, particularly considering the injunction to respect the individual autonomy and equality of persons such that their vote is not coerced or prevented from being truly representative.<sup>28</sup>

Any liberal society ought to incorporate as much promotion of the good in that society as is needed to fulfill their sociopolitical vision, but no more and no less. Similarly, coercion, as ostensibly inimical to promoting freedom, is only justified when the action or inaction is what people would do “autonomously” if “appropriately informed and fully rational;” when citizens understand the rationale, they are able to support the action on the basis of general liberal democratic ideals “*independently* of what they happen to approve of politically, religiously, or . . . morally.”<sup>29</sup>

For Audi, it follows that “the use of secular reason must in general be the main basis of sociopolitical decision.”<sup>30</sup> He does not indicate what an exceptional circumstance would be, or how secondary bases could be incorporated. He explains this

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24. *Id.* at 217–18.

25. Audi, note 6, at 678.

26. *Id.* at 678–79.

27. AUDI, *supra* note 6, at 4.

28. *Id.* at 5–6.

29. Audi, *supra* note 6, at 689–90.

30. *Id.* at 690.

by saying that where there is a “reason which is esoteric in a sense implying that a normal rational person lacks access to it,” that person will tend to resent coercion on such a basis.<sup>31</sup> Since such coercion has no place in a liberal democracy, esoteric reasons—presumably including religious reasons as diametrically opposed to secular reason—should not be the basis for legal and political coercion.<sup>32</sup> Audi then underscores the point by contemplating the strife that permitting esoteric reasons would lead to.<sup>33</sup>

Fundamentally, the state should be “secular” in the sense that religion should not influence, support, or control state power because religion is intrinsically private and fractured through different, competing beliefs. This is Audi’s version of the non-establishment principle.<sup>34</sup> Furthermore, this separation actually protects religious freedom by allowing freedom of belief and practice without influence or interference by the state.<sup>35</sup>

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31. *Id.*

32. *See id.*

33. *See id.* at 690–91.

34. The *Lemon* test in Establishment Clause jurisprudence echoes this basic scheme: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). The vitality of this test is somewhat unclear, since more recent cases have looked to endorsement, coercion, historical practice, or the level of controversy sparked. The endorsement test, first formulated by Justice O’Connor, bars the government from appearing to endorse or favor a religion over other religions, or religion generally over non-religion. *See* *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O’Connor, J. concurring) (proposing, for the first time, the endorsement test). In the public prayer context, the Court has inquired into “coercion.” *See* *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that the Establishment Clause prohibits government coercion of anyone to support or participate in religion or its exercise). The Establishment Clause has not, however, been extended to prohibit certain practices rooted in history and tradition. *See, e.g.,* *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (holding Establishment Clause does not prohibit town tradition of having volunteer chaplains pray to begin each legislative session); *Van Orden v. Perry*, 545 U.S. 677, 681–92 (2005) (plurality opinion) (holding Establishment Clause does not prohibit Texas from displaying a Ten Commandments monument at the state capital); *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding the Establishment Clause does not prohibit Nebraska from having paid chaplains give prayers to begin each legislative session). Justice Breyer plotted a different course in *Van Orden*, suggesting in a concurrence that the Establishment Clause should be pragmatically applied to reduce religious controversies. *See* 545 U.S. at 698–706 (Breyer, J., concurring).

35. *See* Audi, *supra* note 6, at 690–91.



## II. A SUBTLE SECULARISM

The commitment to protecting freedom and equality through a neutral balance of religious freedom and non-establishment is a foundational principle of both the Rawlsian and Audian frameworks. The effect of these frameworks, however, is actually to privilege non-establishment over religious freedom, and the result for religion is neither neutral nor free.

A. *Non-Establishment Dominance*

Rawls argues that the content of public reason is formed by a political conception of justice, which involves values of political justice such as equal political and civil liberty, equality of opportunity, social equality and economic reciprocity, and values of the common good. In addition, the inquiry must be free and public, and people must be reasonable and ready to honor the duty of civility. Finally, the principle of political legitimacy requires that the discussions be equally “justifiable to all citizens,” meaning that “we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial . . . . [W]e are not to appeal to comprehensive religious and philosophical doctrines.”<sup>36</sup>

There are many difficulties with this final statement. It is hardly clear what common sense actually is, nor is it clear what general beliefs and forms of reasoning are “presently accepted,” nor is it clear what methods and conclusions of science are apparently beyond controversy. Presently accepted or non-controversial surely cannot mean universally accepted at this moment in time, for there is very little content that is accepted without exception or debate. If not universally accepted, to

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36. RAWLS, *supra* note 6, at 224–25. The Establishment Clause in First Amendment jurisprudence generally has not extended this far, largely because the Free Speech Clause protects expressing religious views in political contexts. See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 831 (1995) (holding that university’s denial of funding to students seeking to publish pro-religion content violated Free Speech Clause by discriminating against “religious editorial viewpoints”). Nevertheless, traces of this principle do arise when discerning the purpose of a given law in Establishment Clause cases. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that a law requiring that creationism and evolution be taught side-by-side in schools established religion because its purpose was to promote religion, in part based on statements by supporters in the state legislature).

what extent must the population “accept” this form of reasoning or this scientific premise? Rawls does not address this question.<sup>37</sup> And in either case, it does not seem possible to campaign for change to what “equally justifiable” means under this system, since any alternatives are automatically excluded by the principle of political legitimacy.

These general problems are related to the specific problem of where religious views fit in this framework. Through the apparent adherence to liberal non-establishment principles, it would seem that religious perspectives are automatically excluded. If the vision Rawls espouses is the authentic, equally participating citizen, the apparent restriction on public religious arguments is troubling. It is difficult to imagine how one can agitate for change on a religious basis without presenting a religious argument. Rawls acknowledges that a religion may be a reasonable doctrine, and as long as it is presented in a reasonable (accessible and equal) way, there seems to be no reason why it should not be included. Perhaps there is an implicit assumption that comprehensive religious doctrines are not in accordance with “common” sense, but this would just be effectively reinscribing “secular” or “non-religious” sense as “common” sense—and such a move is difficult for Rawls, because it is not really free and equal for religious citizens at all. To his credit, Rawls does acknowledge this, and he distinguishes public reason from secular values or secular reason, which he defines as “reasoning in terms of comprehensive non-religious doctrines. Such doctrines and values are much too broad to serve the purposes of public reason.”<sup>38</sup>

Rawls therefore attempts to provide for religious freedom in his account of public reason, and argues that the reasonable comprehensive doctrines are not being excluded from public reason outright, but are merely being presented in this reasonable and accessible fashion:

What public reason asks is that citizens be able to explain their vote to one another in terms of a reasonable balance of

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37. For Eberle’s engagement with the problems of populist conceptions of public justification in the Rawlsian framework for explication of the point, see CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTIONS IN LIBERAL POLITICS* 212–22 (2002). For the same point in relation to equivalent claims by Audi, see BRYAN MCGRAW, *FAITH IN POLITICS: RELIGION AND LIBERAL DEMOCRACY* 95 (2010).

38. RAWLS, *supra* note 6, at 452.

public political values, it being understood by everyone that of course the plurality of reasonable comprehensive doctrines held by citizens is thought by them to provide further and often transcendent backing for those values . . . . The only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values. Yet given that the doctrines actually held support a reasonable balance, how could anyone complain? What would be the objection?<sup>39</sup>

The objection is not to a reasonable balance of public political values, or even necessarily to explanation of a vote or policy position in terms of a reasonable balance of these values. The objection is to the implicit prior premise that comprehensive religious doctrines, as an example, cannot support a reasonable balance in the sense that articulation of one's views are politically illegitimate if such a doctrine is appealed to during that articulation. This premise, adhering to non-establishment principles requiring that religious doctrine not form the basis for political decision, restricts religious freedom by preventing religious doctrine from being invoked to support public political values. Religions can also aim to promote a reasonable balance of freedom and equality as general public political values, especially the imperative to preserve religious freedom.<sup>40</sup> Even if certain religious comprehensive doctrines restrict freedom and equality, this might not be enough to justify their exclusion. Some restrictions on freedom and equality are compatible with a reasonable balance, for example, religious ministers being granted exemptions against anti-discrimination laws in terms of whom they choose to marry.

The fundamental question, then, is why religious doctrine cannot form part of the public reason. The doctrine must presumably only be accepted in the sense of being comprehensible or accessible, not universally agreed upon. If religious views can form part of the public reason, a more consistent view that promotes freedom and equality for all citizens seems to be that public reason can incorporate some of these fundamental reasonable comprehensive doctrines, religious and secular.

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39. *Id.* at 243–44.

40. See e.g., REX AHDAR & IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 11–37 (2005); JOHN MILBANK & ADRIAN PABST, *THE POLITICS OF VIRTUE: POST-LIBERALISM AND THE HUMAN FUTURE* 28–36 (2016).

Rawls does come close to something like this when defining the limits of public reason. In particular, he supports an “inclusive view” of public reason, which he understands to be “allowing citizens, in certain situations, to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen the ideal of public reason itself.”<sup>41</sup> Rawls illustrates this through situations involving different religious groups disputing amongst themselves about an issue of basic justice, and his position appears to be that these groups may publicly declare why their respective comprehensive religious doctrines affirm authentic freedom and equality, which ultimately strengthens these political values constitutive of public reason in a liberal state.<sup>42</sup> This later development by Rawls exposes a tension between this view and his position expressed in earlier versions of *Political Liberalism*.

The issue could ultimately be decided by Rawls’s final piece on public reason, “The Idea of Public Reason Revisited,” which he declares to be “by far the best statement I have written on ideas of public reason and political liberalism.”<sup>43</sup> Here, Rawls clarifies that “in public reason comprehensive doctrines of truth or right” should be “replaced by an idea of the politically reasonable addressed to citizens as citizens.”<sup>44</sup> This does not involve criticism of any comprehensive doctrine, and any “reasonable doctrine” must accept a “constitutional democratic regime” and the idea of “legitimate law.”<sup>45</sup> Rawls distinguishes between the “public” nature of the reason, which operates at the level of judicial decision-making and statements by legislators or parliamentary candidates, and the nonpublic reasons of background culture, which include the many various comprehensive doctrines and to which public reason does not apply.<sup>46</sup> Importantly, “[s]ometimes those who appear to reject the idea of public reason actually mean to assert the need for full and

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41. RAWLS, *supra* note 6, at 247.

42. *See id.* at 248–49.

43. *Id.* at 438.

44. *Id.* at 441.

45. *Id.*

46. *Id.* at 443–44.

open discussion in the background culture. With this political liberalism fully agrees.”<sup>47</sup>

The distinction Rawls makes between public and nonpublic reasons is essential. The argument in this Article so far could be viewed as advocating for full and open discussion in the background culture, consistent with Rawls. Certainly this Article does not argue for any less. Indeed, it argues for more. Rawls essentially postulates a separation between nonpublic reasons and public reasons. If we are talking about religious reasonable comprehensive doctrines, religious discourse or religious “freedom” is relegated to the private sphere, and non-establishment principles undergirding public reason in this sense imply that public reason is just a certain kind of non-religious (secular) reason. In other words, the separation of religious freedom into nonpublic or private reasons as a function of (non-establishment) public reason results in the dominance of the non-establishment principle and the secularization of public discourse. Religious freedom is intrinsically restricted. In particular, the inclusion of statements by parliamentary candidates as within the realm of public reason is vexing. On this view, reference by such candidates to a comprehensive religious doctrine for the formation of their political views is politically illegitimate and inconsistent with the tenets of public reason. This notion of public reason ought to be rejected as inconsistent with freedom and equality, because it eliminates the possibility that a religious reasonable comprehensive doctrine can inform “public” debate of political questions.

Again, Rawls acutely anticipates the objection:

[T]hose who believe that fundamental political questions should be decided by what they regard as the best reasons according to their own idea of the whole truth—including their religious or secular comprehensive doctrine—and not by reasons that might be shared by all citizens as free and equal, will of course reject the idea of public reason. Political liberalism views this insistence on the whole truth in politics as incompatible with democratic citizenship and the idea of legitimate law.<sup>48</sup>

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47. *Id.* at 444.

48. *Id.* at 447.

This view certainly seems a prudent one, particularly if we consider something institutional such as a theocracy that is incompatible with the idea of democracy. But if we are merely talking about public discussion or policy arguments, then problems remain.

There is no objection to the fact that ideas should be communicated in a way that is accessible for all citizens so that they can freely and equally participate in the democratic process. However, if we are excluding, say, the “whole truth in politics” based on the best reasons of a particular religion, is this not a *de facto* secularism or implementation of a secular comprehensive doctrine, which is in turn not shared by free and equal religious citizens? Indeed, is it even fully reasonable to argue for a religious position without relying fully on the religious doctrine?

Consider the claim that the legal community should be governed according to the Christian principle of the “law of love,” with all the pregnant theological ideas that implies.<sup>49</sup> This is obviously a religious argument based on a religious comprehensive doctrine. But it is far from incompatible with “democratic citizenship” and “the idea of legitimate law”: even if people do not agree with the underlying theological concepts, they can rationally accept and implement the practice of loving your neighbor as yourself as beneficial for society.<sup>50</sup> If we were to divorce the law of love from its theological context—making it a secular argument rather than a religious one—the argument would lose force and specificity. One would not even know what “loving your neighbor” really means without, for example, considering the Parable of the Good Samaritan contained in the New Testament.<sup>51</sup> In this sense, excluding the “whole truth” of a religious comprehensive doctrine unnecessarily secularizes political discourse and undermines the pursuit of political justice by limiting conceptions of public good.

In the end, it seems straightforward that a doctrine is based on either secular or religious reasoning, and if religious reasoning is excluded, that only leaves a comprehensive secular doctrine—despite Rawls’s claim that public reason is not reducible

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49. See generally ALEX DEAGON, *FROM VIOLENCE TO PEACE: THEOLOGY, LAW AND COMMUNITY* (2017).

50. See MILBANK & PABST, *supra* note 40, at 7.

51. See *Luke* 10:25–37.

to secular reason.<sup>52</sup> Non-establishment principles remain dominant and continue to exclude the public manifestation of religious reasons, thus restricting religious freedom. Furthermore, the exclusion of religious perspectives is difficult to reconcile with the possibility, discussed earlier, for comprehensive religious doctrine to be explicitly invoked in order to strengthen the ideas of political liberalism such as freedom of speech and equality of opportunity. Though it may be possible to work out a consistent system, there is an unresolved tension here.

Rawls does acknowledge that the content of public reason is given by political conceptions of justice (as defined above), and to engage in public reason is to appeal to one of these conceptions in debating political questions. "This 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."<sup>53</sup> This "proviso," as Rawls calls it,<sup>54</sup> seems to say that one can publicly put forward a religious perspective for policy influence as long as it is justified through public reason. However, that is really just a tautology—one can only engage in public reason (that is, introduce into political discussion one's comprehensive religious doctrine to support a principle, according to the proviso) if one engages in secular public reason by giving properly public reasons for the relevant principle. Religious perspectives on their own ground remain relegated to the background culture. The proviso becomes a restatement of the original framework rather than an exception to it. In addition, Rawls states:

[W]hat we cannot do in public reason is to proceed directly from our comprehensive doctrine, or a part thereof, to one or several political principles and values, and the particular institutions they support. Instead, we are required first to work to the basic ideas of a complete political conception and from there to elaborate its principles and ideals, and to use the arguments they provide.<sup>55</sup>

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52. Cf. MCGRAW, *supra* note 37, at 134 (concluding that Rawlsian public reason ends up being, in effect, Audi's secular reason).

53. RAWLS, *supra* note 6, at 453.

54. *Id.*

55. *Id.* at 455.

For religious or secular comprehensive doctrines in particular, Rawls claims this legitimacy condition is necessary in order to “fairly” ensure the “liberty of its adherents consistent with the equal liberties of other reasonable free and equal citizens.”<sup>56</sup> This is true to an extent, but the liberties of free participation and equal opportunity are nevertheless denied to those seeking to ground their political views in a comprehensive religious doctrine for the purpose of public discussion. Despite the undeniable attempt at preserving religious freedom through the legitimacy condition, the condition’s emphasis on non-establishment through excluding religious arguments from public policy actually undermines freedom and equality.

Audi adopts similar assumptions and a similar line of reasoning to Rawls’s, with the important difference that he explicitly distinguishes between religious reasons, which should not form the basis for public policy, and secular reasons that are universally understandable and therefore may form a legitimate basis for public policy.<sup>57</sup> He states that an equalitarian principle is required in liberal democracies in order to ensure that governments do not establish or prefer one religion over others or over non-religions, since this would impair a free and equal society.<sup>58</sup>

In addition to this liberal idea of non-establishment, Audi advocates the typical liberal principle of religious freedom, acknowledging that religious ideals may well “inspire” the political structure of society, and may “figure quite properly in major aspects of its development.”<sup>59</sup> He also states that a free and democratic society should, at a minimum, allow freedom of religious belief, assembly and practice, “provided these practices do not violate certain basic moral rights.”<sup>60</sup> These are certainly agreeable propositions, but this minimalist conception, if it is as far as Audi is willing to go, fundamentally relegates religion to the private sphere. Audi does not explain how reli-

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56. *Id.* at 460.

57. For a fascinating exchange between Audi and Wolterstorff (who is broadly in support of the ideas promoted in this article), see generally ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE* (1997).

58. See AUDI, *supra* note 6, at 36.

59. *Id.* at 6.

60. *Id.* at 34.



gious ideals might properly figure in important aspects of the development of political structure. He also does not define basic moral rights, which could enable the scope of religious freedom to be conceived as very narrow. This type of narrow, privatized definition of religious freedom suggests that the principle of non-establishment dominates Audi's conception. Indeed, consistent application of Audi's principles would either leave politics "largely denuded of moral arguments altogether" or "affect things so slightly as to be irrelevant politically."<sup>61</sup>

The need for a free and equal society that does not operate by illegitimate coercion is not here disputed and to at least this extent the equalitarian principle should be affirmed.<sup>62</sup> Nevertheless, there is a question as to whether the equalitarian principle also applies to the secular. Audi does not consider whether the principle could be applied to the establishment or preference of secularism over different religions. It seems that it should if the principle is neutrally or equally applied.<sup>63</sup> In Audi's framework, however, the dominant emphasis on non-establishment appears to prevent establishment or preference of religion over non-religion only. It does not prevent establishment or preference of non-religion over religion. And if non-religion is preferred over religion, obviously this advantages the atheist, agnostic, or secularist in the political context—in effect restricting religion by excluding it from the public space, and restricting religious individuals by preventing them from putting religious arguments in political discourse. As alluded to earlier with the "law of love" example, not all religious beliefs can be easily or meaningfully framed as secular values without also importing the relevant content of that religious belief. It may well be very onerous to require the ordinary religious citizen to reframe their religious conviction as

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61. MCGRAW, *supra* note 37, at 91.

62. Even so, it is not always clear what "coercion" means. *Cf.* Lee v. Weisman, 505 U.S. 577, 593 (1992) (holding that the social pressures to remain silent, stand, and so forth during a prayer at a graduation ceremony amounted to coercion).

63. Although the prohibition against "an establishment of religion" precludes this kind of argument on constitutional grounds, the Equal Protection Clause and Free Exercise Clause *might* provide some protection against governmental preference of non-religion. *See* Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017) (holding that the exclusion of a church from a generally available government benefit violated the Free Exercise Clause).

a secular argument.<sup>64</sup> It might even be part of the convictions of a religious citizen that he is required to base his social and political convictions on his religion rather than a purely secular argument.<sup>65</sup> These factors severely restrict the ability of religious citizens to participate in the democratic process on their own terms. Such advantage for the non-religious is precisely what the liberal theory seeks to avoid, according to both Audi and Rawls. That is the fundamental reason why secular liberalism is problematic as an approach to freedom of religion. Audi's argument therefore fails for these—and other—reasons.<sup>66</sup>

Audi, like Rawls, anticipates the position that an article like this ultimately raises: we are not necessarily talking about preferring different religions by legal coercion or institutional arrangement, but merely facilitating a free and equal audience for the consideration of religious arguments in a policy context. Audi still asserts that “just as we separate church and state institutionally, we should, in certain aspects of our thinking and public conduct, separate religion from law and public policy matters.”<sup>67</sup> This principle of non-establishment prevents religious motivation for policy change that is incommensurable with the rest of the population, unless the policy change can also be supported by “evidentially adequate secular reasons.”<sup>68</sup>

The incompatibility problem does not seem to be alleviated, however, by the provision of allegedly universal secular reasons, for these intrinsically exclude religious reasons and therefore unequally restrict religious freedom. There may be no good secular reasons for a particular proposal, but there may be good religious reasons. Even Cecile Laborde, an ardent and competent defender of public reason in the vein of Rawls and Audi, acknowledges this. Laborde gives the example of fundamental issues of life and death such as abortion or euthanasia which invoke the “sanctity of all human life” as an argument.<sup>69</sup> According to Laborde, the secular ideal of human

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64. See the example provided by Wolterstorff in AUDI & WOLTERSTORFF, *supra* note 57, at 161–64.

65. See AUDI & WOLTERSTORFF, *supra* note 57, at 105.

66. See *id.* at 91–103.

67. Audi, *supra* note 6, at 691.

68. *Id.*

69. See Cecile Laborde, *Justificatory secularism*, in RELIGION IN A LIBERAL STATE 164, 180 (Gavin D'Costa et al. eds., 2013).

dignity is “perhaps not robust enough” to be a pure secular justification for preserving life in this context, and the various strands of it are certainly not the shared, accepted views which public reason requires.<sup>70</sup> If that is so, there seems to be no objection to the religious reasons being proposed and debated alongside the secular reasons. The discussion of religious perspectives may well prove to be evidentially adequate and therefore legitimate, unless there is a presumption against the evidential adequacy of religious arguments.

Audi is careful here, emphasizing that there may be secular reasons parallel to religious reasons, and it is not necessary that religious reasons be evidentially inadequate. The point of the non-establishment principle is to prevent domination by one religion over others.<sup>71</sup> Audi, through what he calls the reciprocity argument, nevertheless argues that if religious authorities are the source of a person’s belief influencing a policy, he should attempt to provide a “readily intelligible secular rationale” for that policy, because that is what he would reasonably desire other religions with incompatible practices to do. However, even Audi acknowledges that the freedom to use public religious arguments is constrained, which is permissible because of the overriding need for non-establishment. He notes, “[t]he kind of commitment to secular reason that I propose may constrain the use of some religious arguments, but it can protect people against coercion or pressure brought by conflicting religious arguments from others.”<sup>72</sup> Audi also notes that his principles have limits, and stresses that they are not stringent. Religious arguments can be properly used with parallel secular arguments, whether in a public policy context or in other contexts.<sup>73</sup> However, this point appears to be little more than a token acknowledgement of religious freedom within a context of non-establishment dominance.

Moreover, as Christopher Eberle argues, even if we are talking about coercion, the fact that a citizen must try to seek Audian public justification—that is, secular reasons—for a law does not at all imply that a citizen cannot support a coercive

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70. *See id.*

71. *See Audi, supra* note 6, at 694.

72. *Id.* at 700.

73. *See id.* at 695–696.

law for which no secular reasons can be found.<sup>74</sup> Eberle observes that a citizen's resentment towards a coercive law is not a function of "the fact that my compatriots have only a religious reason for that law," but may be from my belief that those supporting the law have failed to pursue a rational justification for the law.<sup>75</sup> If such a rational justification is pursued but ultimately rejected by me, it is the content and coercion of the law that causes resentment, not the reasons for the law (which could be secular or religious in this context).<sup>76</sup> Therefore, the reciprocity argument fails to justify the exclusion of religious reasons.

The reciprocity point is certainly a valid and commendable motivation. But again, there seems to be no reason why a religion cannot provide a "readily intelligible" rationale or argument, unless the assumption is that the very concept of a readily intelligible religious argument is incoherent—which Audi denies. It seems plausible that one could articulate a religious argument in a way that is understandable by a secular person, even if the secular person does not share the religious assumptions.<sup>77</sup> One can then discuss the validity of the respective assumptions, come to a conclusion, and enact policy on whatever compromise is made. Not everyone will agree, but they can understand, and this is consistent with the operation of a liberal democracy.

Audi finally concedes:

This sociopolitical ascendancy of secular argument in justifying coercion does not, however, imply a commitment to its being epistemically better than all religious argument. Agreeing on the principles—and referees—of a game does not entail believing that, from a higher point of view, there can be no better game, or superior referees. But at least as long as we consent to play the game, we are obligated to abide by its rules.<sup>78</sup>

As far as the need to compromise and settle on agreement somewhere in a liberal democracy, this is fair enough. But there is no reason why public debate about the principles of the

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74. See EBERLE, *supra* note 37, at 68–71.

75. *Id.* at 137.

76. See *id.* at 137–39.

77. See MCGRAW, *supra* note 37, at 91.

78. Audi, *supra* note 6, at 697–98.

game and the referees cannot be canvassed, or the status quo challenged. If a free and equal society is to debate the validity of the rules of the game, there must be some scope to refer to mechanisms outside those rules. Again, this is not necessarily at the stage of institutional coercion, but at the stage of public policy discussion. If the rules of the game are “evidentially adequate secular reasons,” and there is no suggestion that religious reasons are necessarily evidentially inadequate, and we as a free democratic society are at least able to critically evaluate these rules, reference to religious reasons is an essential component of that evaluation process.<sup>79</sup>

B. *Not Neutral and Not Free*

The secularist liberal solution of simply eliminating religious perspectives in a public policy context based on a principle of non-establishment does not allow either equality or freedom for religious persons or groups holding religious views that affect public policy issues.

Individuals and groups do not enjoy equality with others like them if the government does not act neutrally toward them. As a general rule, however, as John Perry observes, “public speech cannot be regulated by neutral rules specified in advance” because “[l]imits on public reason based on such a conception are bound to be unfair, excluding reasons purely because they are contested, and often excluding reasons that we have good reason to endorse,” such as arguments for the abolition of slavery.<sup>80</sup> If there are exceptions to this rule, modern political liberalism does not trigger them. The problem is not just that liberalism affects different worldviews differently, but that it lacks the neutrality it espouses because its very appeal to concepts such as freedom and equality entails metaphysical commitments.<sup>81</sup> Stanley Fish puts it incisively:

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79. See generally STEVEN SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997).

80. John Perry, *Arguing out of bounds: Christian eloquence and the end of Johannine liberalism*, in RELIGION IN A LIBERAL STATE, *supra* note 69, at 219, 230.

81. See *id.* at 65; see also MATTHEW SCHERER, *BEYOND CHURCH AND STATE: DEMOCRACY, SECULARISM AND CONVERSION* 132–38 (2013); Raymond Plant, *Religion in a liberal state*, in RELIGION IN A LIBERAL STATE, *supra* note 69, at 9, 19, 22. Scherer goes even further, arguing that Rawlsian secularism involves not only “faith in a particular image of reason,” but the veneration of Rawls as a “saint” and “canoni-

[I]t is my contention . . . that liberalism doesn't have the content it believes it has. That is, it does not have at its center an adjudicative mechanism that stands apart from any particular moral and political agenda. Rather it is a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the discourse of religion—that had held it for centuries.<sup>82</sup>

Liberalism neglects that it is a position espousing particular views. Secular reasons are not amoral, certainly not neutral, and their very definition as secular depends on the dichotomy between liberalism, which it claims is governed by reason, and religion, which it claims is governed by faith. This supposedly neutral theory dooms any attempt to present viable “religious” alternatives or challenges to secular reason because, in the liberal framework, these arguments are not the kind of reasons that can rightly be considered.

Thornton and Luker offer a slightly different, if related, faulty distinction. For them, religious belief is concerned with interior life, “paradigmatically private and subjective,” as opposed to law which is “concerned only with the outward manifestation of a belief or prejudice.”<sup>83</sup> Starting from these premises, they lament that “[r]eligious organisations have long held a relationship to the public sphere *qua* government through assertion of moral authority over issues of social significance.”<sup>84</sup> But they do not take into account that for many religions, religion is intrinsically political in the sense that that it also regulates and informs public interactions and obedience to laws in addition to “private” belief and worship (for example through proselytization or particular moral views with politico-legal import, such as about marriage or abortion).

Thornton and Luker's non-neutral framework brings to light the limits on freedom that result from inequality. Under the liberal paradigm, religions are not free to advance their politi-

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zation” of his works, resulting in a kind of “miraculous” captivation and “conversion” of his audience through skilled rhetoric. See SCHERER, *supra*.

82. Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 1000 (1987).

83. Margaret Thornton & Trish Luker, *The Spectral Ground: Religious Belief Discrimination*, 9 MACQUARIE L.J. 71, 72–73 (2009). These claims are addressed in Part III.

84. *Id.* at 73.

cal views. Indeed, where the state is one expanding in regulatory power, such disadvantaged religions face further restriction. If the expanding regulatory state has its own vision of the social good which it seeks to implement (as Leigh and Ahdar claim it does), and that vision conflicts with particular religious doctrines or practices, the inevitable result will be the restriction of religious freedom.<sup>85</sup> In this way the liberal principles of non-establishment and religious freedom overlap: an expanding regulatory state seeking to implement its vision of the good, and assuming religion is private or at least subservient to state interests, will lead to increasing state interference with religious belief or practice that conflicts with the state vision.<sup>86</sup>

On what non-neutral grounds is such a restriction, not just on belief and practice, but even on public defense of those beliefs and practices, justifiable? More broadly, why it is a problem when religious organizations assert moral authority over issues of social significance? Non-religious people and organizations also assert moral authority over issues of social significance. This is what it means to be part of a democracy entailing different views. At the point moral authority is asserted, the different parties can engage in a full, free, open, and equal discussion.

### III. PURSUING TRUE NEUTRALITY AND EQUALITY: PLURALISM AND RELIGIOUS FREEDOM

#### A. *A Broader View of Religious Freedom?*

None of this is to say that religious freedom should be absolute. Of course certain “religious practices” including murder and human sacrifice cannot be considered reasonable exercises

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85. See Ahdar & Leigh, *supra* note 7, at 679–80.

86. This type of state interference occurs already. For example, in *Craig v. Masterpiece Cakeshop*, a Colorado court of appeals upheld the application of a state anti-discrimination statute to a bakery that refused, on religious grounds, to prepare a cake for a same-sex wedding. See 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017). Similar laws have forced Catholic Charities to stop offering adoption services in Massachusetts, Illinois, and Washington, D.C., because those laws would otherwise require Catholic Charities to place children with same-sex couples. See Joshua J. Craddock, *The Case for Complicity-Based Religious Accommodations*, 12 TENN. J.L. & POL’Y 233, 266 nn.99–100 (2018).

of religious freedom within a liberal democracy.<sup>87</sup> The limiting principle here is conduct that directly harms others in a way disproportionate to the expression of the freedom.<sup>88</sup> This is a generally liberal rationale as it pursues freedom and equality, but it is different from the liberal-secularist approach, which privileges non-religion over religion in a non-neutral and unequal way, thereby unduly restricting religious freedom. To address this imbalance and restore genuine freedom and equality, this Part proposes a broader view of religious freedom within a pluralist approach to the interaction between religion and non-religion in the public political context.

However radical, a broad view of religious freedom is not idiosyncratic. Consider first Leigh and Ahdar's explanations of the Christian justifications for religious freedom, which imply that religious freedom encompasses both "freedom to preach, worship and practise" and that it is "not for religion to compel religion," meaning also that the state should not compel particular religious practice.<sup>89</sup> This first aspect is the traditional principle of "religious freedom" or "free exercise of religion," while the second is the traditionally independent principle of "non-establishment of religion." Hence on this view, religious freedom encompasses both free exercise and non-establishment. Leigh and Ahdar further explicitly define "religious freedom" as having a broad nature, including internal and external dimensions.<sup>90</sup> The internal dimension is "a purely internal freedom to believe."<sup>91</sup> The external dimension includes the "freedom to actively manifest one's religion or belief in various spheres (public, private, etc.) and in a variety of ways

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87. Cf. *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding a law prohibiting polygamy against a Free Exercise Clause challenge).

88. See Alex Deagon, *Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage*, 20 INT'L TRADE & BUS. L. REV. 239, 280–86 (2017).

89. See AHDAR & LEIGH, *supra* note 40, at 12, 23–25, 35–50. For example, Professor Garnett argues that religious freedom needs to be understood by reference to the older Catholic idea of the "freedom of the church," which meant both that the state cannot appoint church leaders (or otherwise interfere) and that the church is publicly recognized and protected in its role vis-a-vis the state; the preamble and first clause of the Magna Carta are examples of this. See generally Richard Garnett, "The Freedom of the Church": (Towards) an Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33 (2013).

90. Ahdar & Leigh, *supra* note 7, at 650–51.

91. *Id.* at 650.



(worship, teaching, and so on),” subject to certain limitations.<sup>92</sup> These first two aspects comprise the traditional “narrow” definition of religious freedom. Leigh and Ahdar then state that religious freedom further includes “freedom *from* coercion or discrimination on the grounds of religious (or non-religious) belief.”<sup>93</sup> This is traditionally the principle of non-establishment. Thus, Leigh and Ahdar’s view is a capacious view of religious freedom, including both free exercise and non-establishment.

Michael McConnell expresses a similar view in critiquing the strict secularism of Brian Leiter.<sup>94</sup> McConnell argues that “[t]he establishment of religion may be consistent with mere toleration [in Leiter’s sense of the state promoting a particular view and having a non-neutral approach to different views], but it is not consistent with the full and free exercise of religion.”<sup>95</sup> McConnell in effect argues that establishment (even weak establishment) is incompatible with full religious freedom, which implies that religious freedom and non-establishment are not separate principles. Rather, religious freedom includes non-establishment because part of freedom of religion is freedom from state compulsion to a particular religious or non-religious perspective.<sup>96</sup>

Steven Smith also seems to propound this broad view of religious freedom, contending that any constitutional protection of religious freedom relies on “priority” (that religious convictions and duties take precedence over other types of belief and duties) and “voluntariness” (that compelled religion is not true

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92. *Id.*

93. *Id.*

94. See Michael McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 808 (2013). McConnell’s piece critiques a contemporaneous book by Brian Leiter that disapproves of religious exemptions, BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013).

95. McConnell, *supra* note 94, at 808.

96. Then-Justice Rehnquist argued that the Establishment Clause, as originally conceived, requires only that government not prefer one religion to another, not that the state remain neutral between religion and non-religion. See *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting). Other justices have expressed support for this view as well. See *e.g.*, *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justices White and Thomas). However, Professor McConnell himself does not believe non-preferentialism is a viable theory. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 146–47 & n.142 (1992).

or efficacious religion).<sup>97</sup> The protection of religious freedom entails both freedom to believe and practice (religious freedom), and freedom from state compulsion to particular beliefs and practices (non-establishment). Since freedom to believe and practice includes freedom from compulsion to particular beliefs and practices, the second category is really implied in the first.<sup>98</sup>

One of the fundamental differences between the narrow liberal conception of religious freedom and this broader conception is the acknowledgement that religion is not merely private. Religion is not “simply a matter for the individual,” since opinions can and often do have “influence on actions.”<sup>99</sup> The exercise of religion is totalizing and “a-jurisdictional”—it cannot simply be excluded from the category of “public” any more than an individual’s other beliefs or convictions can be excluded from his or her public actions.<sup>100</sup> Though the liberal approach is apparently neutral because “public” or “secular” reason applies “as much to atheists as religionists,” “religious vocabulary is absent from public discourse in a way that atheist vocabulary is not.”<sup>101</sup> The exclusion of religious arguments is therefore an “asymmetrical constraint on public officials with religious convictions which prevents them from invoking their most cherished beliefs and requires them to subdue aspects of their personality before participating in public life.”<sup>102</sup>

In this way the narrow liberal conception of religious freedom actually severely restricts freedom by unequally excluding religion from the public space and preventing religious citizens from holistic participation in society. Conversely, the broad view of religious freedom allows full and equal participation of both religious and non-religious people in all aspects of public life. It is important to bear in mind that this is not an argument for the broader view of religious freedom on the premise that we should not exclude religious perspectives from public policy (or vice versa). This would make the argument

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97. See Steven Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse* 140 U. PA. L. REV. 149, 154–55 (1991).

98. See *id.*

99. AHDAR & LEIGH, *supra* note 40, at 35.

100. *Id.* at 50; see also EBERLE, *supra* note 37, at 144–46.

101. AHDAR & LEIGH, *supra* note 40, at 69.

102. *Id.* at 51.

circular. Rather, it is an observation that the broader view of religious freedom naturally entails including religious arguments in public policy, and so the broader view should be preferred because it more effectively promotes genuine freedom and equality. Recalling that the broad view of religious freedom also incorporates the liberal non-establishment principle, it is appropriate to consider how genuine neutrality can be further entrenched by limiting a strict secularist approach to non-establishment.

B. *Embracing Neutrality by Limiting (Secularist) Non-Establishment*

"[O]ne of the greatest threats to free exercise is establishment, and one of the best guarantees of non-establishment is free exercise."<sup>103</sup> But "if too strict a view is taken of non-establishment, it could amount to hostility to religion and constitute an infringement of free exercise."<sup>104</sup> While purporting to be neutral, the strict secularist non-establishment principle is actually hostile to freedom, particularly religious freedom.

A typical example of how a strict secularist approach to non-establishment might tend to undermine religious freedom can be provided by briefly considering an article by Wojciech Sadurski. Sadurski claims that the "secular liberal state" should have "neutrality" toward religion, regarding it "as essentially a private matter."<sup>105</sup> He states that an appearance of "coextensiveness" between the principles of religious freedom and non-establishment is "largely illusory," and that the free exercise principle "threatens to undermine the disengagement of the state from religious matters demanded by the Non-Establishment Principle."<sup>106</sup> This indicates assumptions of independence and of non-establishment dominance, resulting in the exclusion of religion from the public space. More explicitly, Sadurski rejects prioritizing free exercise over non-establishment:

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103. Joshua Puls, *The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees*, 26 FED. L. REV. 139, 150 (1998).

104. *Id.* at 159.

105. Wojciech Sadurski, *Neutrality of Law Towards Religion*, 12 SYDNEY L. REV. 420, 421 (1990).

106. *Id.* at 423.

If the Free Exercise Principle is to be unconstrained by the Non-Establishment Principle then there is virtually no conceivable limit to official endorsements of religious beliefs and ceremonies . . . . The implausibility of the strategy of prioritizing the Free Exercise Principle over the Non-Establishment Principle lies in the fact that such a priority would lead to an undermining of those very values which are to be served by the principle of religious freedom: the values of free choice and pursuit of any religious beliefs (or of rejection of religion) without any governmental inhibition.<sup>107</sup>

However, a broader view of religious freedom does not necessarily imply that free exercise is “unconstrained” by non-establishment. Religious freedom incorporates both free exercise and non-establishment; the principles are co-dependent. So as a function of allowing religious freedom (that is, not allowing direct or indirect compulsion by the state towards a particular religious view), non-establishment would operate to prevent the state establishment of a religion (through, for example, limiting “official endorsement of religious beliefs and ceremonies”) even under this broader view. Moreover, a broader view of free exercise preserves free choice and the pursuit or rejection of religion without governmental inhibition *precisely because* of this dependence. A broader view of religious freedom rejects the de facto secularism of traditional neutrality because that secularism effectively involves government inhibition of religious freedom. The pluralist framework proposed in conjunction with the broader view means that all the different religious and non-religious views are free to exist and debate in the public sphere, without government inhibition or government promotion of any particular view. This more effectively satisfies the “principle of religious freedom” stated by Sadurski.

Sadurski also responds to the charge of liberalism’s non-neutrality:

[L]iberalism cannot, without running into hopeless contradiction, allow itself to be neutral between neutral accounts (motivated by non-religious considerations, even if in conflict with *some* precepts of *some* religions) and those articles of faith which themselves implicate a rejection of neutrality as the main part of a liberal vision of political values. The fundamentalist . . . is grounded in a cluster of values which

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107. *Id.* at 426.

reject respect for value pluralism, toleration for diverse moral views, an open attitude to the potentialities of human reason, and the equal moral agency of all individuals, regardless of their substantive moral conceptions. These values underlie the constitutional order of a liberal state; their rejection cannot be mandated by liberal neutrality. It does not follow that “religious faith” as such is dangerous for a liberal order, but rather that it can coexist with a liberal order when kept in a private dimension of social interaction. If given political support through state and law, it threatens those very values upon which liberal neutrality (including the toleration for diverse religious beliefs themselves) is erected.<sup>108</sup>

Sadurski argues, in effect, that liberalism cannot be neutral when it comes to religious views (“fundamentalism”) that reject liberal political values such as respecting pluralism, tolerating diverse moral views, having an open attitude to reason, and believing in the equal moral agency of all individuals, because all of these are essential for the operation of a liberal democracy. Although one could quibble about whether the “fundamentalist” (however Sadurski understands the term) actually rejects these values, this argument is fine as far as it goes. It is consistent with the general liberal limiting principle described above.

The problem is Sadurski’s equivocation of terms and consequent implications that lead to the conclusion that “religious faith . . . can coexist with a liberal order when kept in a private dimension of social interaction.”<sup>109</sup> This expresses the far stronger and more restrictive principles of liberal secularism. The conclusion first assumes a public-private divide that is unsustainable for many religious people because religious faith necessarily informs external actions, both public and private, which are in turn regulated by the law of a liberal state. As Raymond Plant notes, the alleged protection of religious faith through relegation to the private sphere “fail[s] to understand the internal relationship between religion and what it sees as intrinsic aspects of its claims in the public realm, or, to put the point another way, between belief and the intrinsic forms of its manifestation.”<sup>110</sup> Put differently, “[a] religion which is never

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108. *Id.* at 441–42.

109. *Id.*

110. Plant, *supra* note 81, at 14.

expressed does not exist; once it is expressed it is communicative and public.”<sup>111</sup>

More importantly, Sadurski refers to “fundamentalist” religion as rejecting liberal values, but then equivocates and extends this to all “religious faith” as part of the argument for privatization. However, not all religious faith can be reduced to the kind of “fundamentalism” that rejects these liberal values, and therefore there is no reason to exclude all religious faith from the public sphere. Indeed, as Fish and Steven Smith identify, secularist liberal “neutrality” would appear to actually run into the “hopeless contradiction” referred to by Sadurski precisely because it is not neutral when it comes to religious views.<sup>112</sup> Consequently, Linda Woodhead argues, “secularism is conflicted” because of its “manifest failure to respect the freedom, rights and normal conditions of existence of decent religious people and institutions.”<sup>113</sup>

For example, it seems inconsistent with liberal equality that those who adhere to a secular worldview may be able to publicly express themselves in policy debate in terms of their secularism, but those who adhere to a religious worldview may not be able to so express themselves in terms of their religion.<sup>114</sup> Reid Mortensen identifies potential problems with the strict separation involved in a secularist “wall of separation,” including that “it is potentially anti-religious. Separating the religious from the sphere of government action privileges the non-religious or the antireligious in the public square.”<sup>115</sup> The idea of state neutrality embeds a distinct state preference for particular types of religion and religious expression, and is therefore “not one of neutral evenhandedness,”<sup>116</sup> and true neutrality itself is problematic in an arena of moral pluralism.<sup>117</sup>

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111. Linda Woodhead, *Liberal religion and illiberal secularism*, in RELIGION IN A LIBERAL STATE, *supra* note 69, at 93, 96.

112. See SMITH, *supra* note 79, at 36; Fish, *supra* note 82, at 1000; Smith, *supra* note 97, at 149–50.

113. Woodhead, *supra* note 111, at 96.

114. See Reid Mortensen, *The Establishment Clause: A Search for Meaning*, 33 U. QUEENSL. L.J. 109, 124–25 (2014).

115. *Id.* at 124.

116. *Id.* at 124.

117. See *id.* at 124–125; see also Augusto Zimmermann & Daniel Weinberger, *Secularization by Law? The Establishment Clauses and Religion in the Public Square in Australia and the United States*, 10 INT’L J. CONST. L. 208–41 (2012) (arguing that

*C. Freedom through Pluralism*

It is also worth remembering that secularism is a limited framework in the sense that it overlooks ways in which the dominant religion in a culture can be integrated into government operations. In other words, the political space is not characterized by a strict separation of secular and non-secular, but is instead imbued with religiously informed processes, culture, and social values.<sup>118</sup> For example, both the U.S. House of Representatives and the Senate elect Chaplains, House and Senate sessions begin with prayer, and many members of Congress host a yearly National Prayer Breakfast.<sup>119</sup> Less obviously, intrinsic ideas of human value, rights and welfare stem from Christian beliefs.<sup>120</sup> What Thornton and Luker acknowledge of Australia seems true of the United States, too: “Despite a formal commitment to secularism, the heritage of English Protestantism underpins all aspects of socio-political and legal organization . . . and there is an ambivalent response to atheism or agnosticism as an alternative.”<sup>121</sup>

This Article also acknowledges such a construction, and therefore seeks the free expression of all religious opinions in the public sphere, to be considered and critiqued in the marketplace of ideas. Secularism, atheism, agnosticism, Christianity, and all other religions and non-religions should freely be able to express and critique each other’s views. Rather than a secularism which excludes religious views from public political discussion, or the simplistic substitution of atheism or agnosticism for traditional Christianity, what is required is a sensible balancing of the different claims, taking into account minority religions, majority religions, and no religion—what Veit Bader

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Australian courts should avoid the United States’ tendency to use “secularism” to privatize religion, thereby undermining democracy); cf. Jeremy Patrick, *Religion, Secularism, and the National School Chaplaincy and Student Welfare Program*, 33 U. QUEENSL. L.J. 187 (2014).

118. See H. Randell-Moon, *Section 116: The Politics of Secularism in Australian Legal and Political Discourse*, in RELIGION, SPIRITUALITY AND THE SOCIAL SCIENCES (Basia Spalek & Alia Imtoul eds., 2008).

119. See Francine Kiefer, *Prayer and politics in Congress*, CHRISTIAN SCI. MONITOR (Sept. 17, 2016), <https://www.csmonitor.com/USA/Politics/2016/0917/Prayer-and-politics-in-Congress> [<https://perma.cc/M9QC-3TDT>].

120. See Randell-Moon, *supra* note 115, at 59–60.

121. Thornton & Luker, *supra* note 81, at 78.

calls “Priority for Democracy”<sup>122</sup> and Eberle calls “Pluralism.”<sup>123</sup> This points the way to a system and a culture wherein the state allows all views, religious and non-religious, to be freely and equally proposed and considered—the true liberal democracy.<sup>124</sup>

Since we cannot justify or advocate laws free from attachments to our own perspective of the good life, an authentic approach to public discourse requires that we openly allude to these entrenched perspectives.<sup>125</sup> This produces a forthright debate containing partisan religious and non-religious moral visions, which is far superior to “an anaemic, least-common-denominator culture lacking in conviction or purpose, or else a deceptive civic culture in which participants disguise their true interests and convictions in a homogenizing public vocabulary that is ‘neutral’ but ineffectual.”<sup>126</sup> As Plant asks:

If a conception of the good or goods lies at the heart of an account of liberal society and any attempt to banish such ideas will lead to illusion, why should not the religious perspective with its view of the good and human flourishing have a role in deliberating about what the core or essential goods are?<sup>127</sup>

To put it in Rawlsian terms, a system could exist where each reasonable comprehensive doctrine is freely and equally able to contribute to public policy debate using the reasoning of that doctrine. It is obviously unlikely that there would be full agreement, but there may be overlap between doctrines—Rawls acknowledges this much in relation to public reason itself.<sup>128</sup> Once all views have been freely and equally debated in accordance with the duty of civility, the situation can resolve

122. Veit Bader, *Religious Pluralism: Secularism or Priority for Democracy?* 27 *POL. THEORY* 597, 608 (1999).

123. EBERLE, *supra* note 37, at 215–16.

124. For a broad understanding of what freedom of (public) religion requires, see John Witte, Jr., *From Establishment to Freedom of Public Religion*, *CAP. U. L. REV.* 499–519 (2004).

125. See Dan Kahan, *The Cognitively Illiberal State*, 60 *STAN. L. REV.* 115, 151–154 (2007).

126. Steven D. Smith, *Toleration and Liberal Commitments*, in *TOLERATION AND ITS LIMITS: NOMOS XLVIII* 243, 269 (Melissa S. Williams & Jeremy Waldron eds., 2008).

127. Plant, *supra* note 81, at 28.

128. See RAWLS, *supra* note 9, at 387.



itself through the usual means of a constitutional democracy—elections and implementation.<sup>129</sup> Of course, the debate would need to be articulated in a publicly comprehensible way using mutually available reasons, but these need not necessarily be disconnected from the reasonable comprehensive doctrines in the stringent way Rawls advocates.<sup>130</sup> When explaining our views or seeking to persuade our fellow citizens, we should be able to offer whatever views and rhetorical mechanisms we think best, whether that be “a logical syllogism,” “a poem,” “a sacred text,” “a philosopher,” or “our favourite film.”<sup>131</sup>

#### IV. CONCLUSION

Eberle, against the likes of Rawls and Audi, compellingly defends the thesis that “a citizen has an obligation sincerely and conscientiously to pursue a widely convincing secular rationale for her favored coercive laws, but she doesn’t have an obligation to withhold support from a coercive law for which she lacks a widely convincing secular rationale.”<sup>132</sup> A citizen who has religious reasons for supporting a coercive law is allowed to publicly voice those reasons in policy debate. Rather than public reason, which is effectively secular reason that excludes religious perspectives, Eberle advocates for an “ideal of conscientious engagement” which involves sincerely and genuinely arriving at rationally justifiable views (where rationally justifiable includes reference to religious reasons). He also advocates for respectfully engaging those with different views by articulating those reasons and receiving objections to learn from them, perhaps resulting in refinement of the view.<sup>133</sup> Since it is unlikely that there will be sufficient agreement between reasonable persons to provide a public justification for intrinsically contested values, the engagement results in a society of respectful citizens who are reasonably and rationally able to put forth their various religious and non-religious views, or a “pluralist” society.<sup>134</sup> And pluralism encourages religious vitality

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129. See Bader, *supra* note 122.

130. Cf. RAWLS, *supra* note 9, at 226–27.

131. Perry, *supra* note 80, at 230.

132. EBERLE, *supra* note 37, at 10.

133. See *id.* at 104–06.

134. See *id.* at 215–16.

and facilitates freedom of religion.<sup>135</sup> Bryan McGraw also persuasively argues that the involvement of religion in politics actually results in a freer and more democratic society.<sup>136</sup>

Thus, the arguments of this Article are not intended to deny the fundamental liberal desire to facilitate a free, equal and democratic society. This desire is, of course, of paramount value. Rather, these arguments are intended to suggest that secular liberalism, and its narrow view of religious freedom which denies freedom of public expression and equality of opportunity to religious perspectives, is not the best model for facilitating the neutral, free, and equal society we all aspire to. A broader view of religious freedom combined with a pluralist framework is equally inclusive of both public religion and non-religion, thereby promoting a more authentic political discourse.

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135. *See id.* at 41–47.

136. *See generally* MCGRAW, *supra* note 37.