
RELIGION, EQUALITY, AND PUBLIC REASON

MICAH SCHWARTZMAN*

INTRODUCTION	1321
I. THEORIES OF RELIGIOUS FREEDOM.....	1323
II. RELIGION, EQUALITY, AND ANARCHY	1328
A. <i>Free Exercise</i>	1328
B. <i>Disestablishment</i>	1331
III. THE INEVITABILITY OF PUBLIC REASON	1333
CONCLUSION.....	1336

INTRODUCTION

The First Amendment singles out religion for special treatment. It does so in two ways. The Establishment Clause imposes a special legal disability on religion by limiting the government's power to advance or support it, and the Free Exercise Clause provides special protection by preventing the government from enacting laws that impose significant burdens on religion. As a constitutional matter, religion is thus subject to both special *disabilities* and special *protections*. By comparison, nonreligious ethical, moral, and philosophical views are neither subject to a principle of disestablishment, nor are those who hold such views given special protection against laws that burden their fundamental beliefs and practices.

In recent years, a growing number of critics and commentators have asked whether singling out religion in these ways is morally justifiable. Some have argued that religion does not warrant special treatment because it cannot be distinguished in any meaningful way from at least some nonreligious ethical and moral views.¹ Others have defended the distinctiveness of religion,

* Edward F. Howrey Professor of Law, University of Virginia School of Law. For helpful discussions and comments, I would like to thank Leslie Kendrick and Richard Schragger.

¹ There is now a significant literature defending this general view. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 13 (2007); AMY GUTMANN, IDENTITY IN DEMOCRACY 151-91 (2004); BRIAN LEITER, WHY TOLERATE RELIGION? 4 (2013); JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 9-14 (2011); Anthony Ellis, *What Is Special About Religion?*, 25 L. & PHIL. 219, 220 (2006); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 556-57 (1998); James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 943 (2005). I have also argued along these lines. See Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). For an earlier expression of this view, see MILTON KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE

offering various theological,² metaphysical,³ epistemic,⁴ psychological,⁵ and moral⁶ arguments for distinguishing between religious and secular commitments.

There is now a robust and increasingly sophisticated debate about whether, or in what ways, religion is special. In his book, *Religion Without God*,⁷ Ronald Dworkin sides with those who reject the distinctiveness of religion. Some of the arguments he gives for this view, which appear in the third chapter of the book, are familiar and well developed in the existing literature. But Dworkin follows them through to defend a position that is striking for its internal coherence and, indeed, for its originality. Those virtues are, however, difficult to appreciate without more context. Dworkin did not always place his own views inside the existing legal and philosophical literature, choosing instead to develop his arguments on their own terms. That choice may be understandable, but here it has the effect of obscuring the significance of his contribution.⁸

In what follows, I situate Dworkin's argument within the larger debate about whether religion ought to receive special treatment under the law. I do that by

99 (1968).

² See Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope and Scandal*, 21 J. CONTEMP. LEGAL ISSUES 165, 189-93 (2013); John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 291 (1996); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160 (2013).

³ See, e.g., Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 792 (2013) (suggesting that religious duties might be "ontologically superior" to "personal conclusions about right and wrong").

⁴ See John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 798-801 (1986); Abner Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. ILL. L. REV. 535, 537-38.

⁵ See Thomas C. Berg, *Secular Purpose, Accommodations, and Why Religion Is Special (Enough)*, 80 U. CHI. L. REV. DIALOGUE 24, 36 (2013); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 319 (1996).

⁶ See ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 143-44 (2013) (arguing that even if religious convictions are not epistemically or ontologically distinctive, religion can serve as a legal proxy to promote various important goods); Andrew Koppelman, *Religion's Specialized Specialness*, U. CHI. L. REV. DIALOGUE 71, 74 (2013) (arguing likewise). *But see* Micah Schwartzman, *Religion as a Legal Proxy: A Reply to Koppelman*, 51 SAN DIEGO L. REV. (forthcoming 2014) (arguing that singling out religion as a legal proxy is unfair to those with nonreligious claims of conscience), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416254.

⁷ RONALD DWORKIN, *RELIGION WITHOUT GOD* 105-48 (2013).

⁸ In his recent work on religious freedom, Dworkin did not discuss or refer to any of the literature cited in the previous notes. See RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* 52-89 (2006) [hereinafter DWORKIN, *IS DEMOCRACY POSSIBLE HERE?*]; RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 375-76 (2011) [hereinafter DWORKIN, *JUSTICE FOR HEDGEHOGS*].

describing a taxonomy of views about religion's distinctiveness in Part I, and by showing how Dworkin's view relates to that taxonomy in Part II. This conceptual groundwork is important for purposes of clarifying the underlying structure of the existing debate and for understanding what Dworkin has added to it.

My aims in situating Dworkin's view are not, however, merely analytical. With a better sense of why Dworkin takes the position that he does, it becomes possible to see that any theory that accepts certain claims about liberty and equality will be driven toward replacing a distinction between religious and secular commitments with one that turns on the difference between public and nonpublic values. The latter distinction is central to the idea of public reason, which holds that the government must justify its actions according to reasons that citizens can, in principle, accept solely in virtue of their status as free and equal members of a democratic society.⁹ Although Dworkin resists this idea of public reason,¹⁰ his arguments against the distinctiveness of religion lead him inexorably to some conception of it, suggesting the unavoidability – or perhaps the inevitability – of a commitment to public reason for those who occupy a certain place in the debate about whether religion is special.

I. THEORIES OF RELIGIOUS FREEDOM

In the debate about whether religion warrants special treatment, it is possible to classify competing views along two dimensions, which track important aspects of the two Religion Clauses of the First Amendment.¹¹ The first asks whether religion ought to be singled out for special legal disability through a principle of disestablishment. More specifically, we can ask whether disestablishment requires that government provide a secular purpose to justify its actions.¹² Theories that require a secular purpose are *exclusive* because they reject religious views as legitimate grounds for political and legal decisionmaking. By contrast, *inclusive* theories hold that religious views should be treated like nonreligious ethical and moral beliefs that are included

⁹ See JOHN RAWLS, POLITICAL LIBERALISM 212-25 (1996) [hereinafter RAWLS, POLITICAL LIBERALISM]; JOHN RAWLS, *The Idea of Public Reason Revisited*, in COLLECTED PAPERS 573-79 (Samuel Freeman ed., 1999) [hereinafter RAWLS, *Public Reason*]; see also Charles Larmore, *Public Reason*, in THE CAMBRIDGE COMPANION TO RAWLS 368-93 (Samuel Freeman ed., 2002); Jonathan Quong, *On the Idea of Public Reason*, in A COMPANION TO RAWLS 265-80 (Jon Mandle & David A. Reidy eds., 2014).

¹⁰ See DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 8, at 64-65; RONALD DWORKIN, JUSTICE IN ROBES 252-54 (2006).

¹¹ This Part draws substantially on a longer and more detailed discussion in Schwartzman, *supra* note 1, at 1358-77.

¹² A requirement of secular purpose is part of the test for determining an Establishment Clause violation under *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Although this requirement has been much criticized, numerous decisions by the Supreme Court have reaffirmed it. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 95-99 (2002).

or accepted as permissible justifications for state action. According to such theories, there is no reason to single out religious beliefs for special disability. They should receive the same treatment in the political and legal process as any secular belief or commitment.

With respect to the free exercise of religion, we can again distinguish between two types of theories. Theories of *accommodation* hold that religion should receive special protection in the form of legal exemptions or accommodations from general laws that impose burdens on religious beliefs and practices. Theories that reject special accommodations for religious views are forms of *nonaccommodation*. Such theories require that government treat religious views as no more worthy of protection than nonreligious ethical and moral views. The government can either extend special protections to religious and nonreligious views equally, or it can deny such protections. What it cannot do is discriminate between religious and nonreligious doctrines in granting legal accommodations.

Theories of religious freedom can be described in terms of the positions that they adopt with respect to whether religion is special for purposes of disestablishment and free exercise. Bringing together the categories specified above, there are four main possibilities, illustrated as follows:

	<i>Inclusive</i>	<i>Exclusive</i>
<i>Religious Accommodation</i>	(1) Inclusive Accommodation	(2) Exclusive Accommodation
<i>No Special Religious Accommodation</i>	(4) Inclusive Nonaccommodation	(3) Exclusive Nonaccommodation

1. *Inclusive accommodation* holds that religious convictions are *not special* for justifying political and legal decisions, but they *are* special for purposes of granting accommodations.¹³ According to this theory, religious beliefs should be treated like nonreligious beliefs as grounds for justifying state action. Religion is *not special* in that regard. But when it comes to free exercise, religious beliefs should receive greater protection than nonreligious ethical and moral views. At least in that respect, religion does warrant special treatment.

¹³ Michael McConnell seems to adopt a view of this kind. Compare Michael W. McConnell, *Secular Reason and the Misguided Attempt to Exclude Religious Arguments from Democratic Deliberation*, 1 J.L. PHIL. & CULTURE 159, 165 (2007) (arguing that religious views should be included on equal terms with nonreligious views in the political process), with Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 11 (arguing that religious views should receive special constitutional and statutory exemptions from burdensome laws).

2. *Exclusive accommodation* holds that religious convictions *are special* for justifying political and legal decisions, and they also *are special* for purposes of granting accommodations.¹⁴ This theory treats religion as distinctive on both dimensions of religious freedom. Religion should be singled out for exclusion as a source of justification for state action, and it should be given special exemptions from burdensome laws – exemptions that are not otherwise available to those with secular ethical and moral commitments.
3. *Exclusive nonaccommodation* holds that religious convictions *are special* for justifying political and legal decisions, but they are *not special* for purposes of accommodation.¹⁵ This view supports a secular purpose requirement that excludes religion, even while allowing the state to act on nonreligious ethical and moral views. And it combines that religion-specific exclusion with the view that religion should be treated like all other secular commitments in receiving (or not receiving) exemptions from the law.
4. *Inclusive nonaccommodation* holds that religious convictions are *not special* for justifying political and legal decisions, and they are also *not special* for purposes of accommodation.¹⁶ This view is the mirror image of (2) exclusive accommodation, in that it does not treat religion as special on either dimension of religious freedom. It would include or accept religious convictions as proper grounds for supporting state action, giving them the same status as secular commitments. And it would treat those with religious and secular beliefs equally with respect to accommodations, providing legal exemptions for all or none.

This taxonomy of theories is useful for two reasons. First, it is important to see that some theories treat religion distinctively for some purposes but not others. Once this becomes apparent, it is possible to raise questions about whether those theories are internally consistent in their accounts of what makes religion special. For example, we can ask whether an inclusive

¹⁴ See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1633-39 (1993) (arguing that religious views should be singled out for exclusion from the political process and that, to remedy this exclusion, they should receive special legal exemptions). For a different set of arguments for exclusive accommodation, including that religion warrants special protection as a legal proxy for important goods and that a secular purpose requirement is necessary to prevent establishment of religion, see Koppelman, *supra* note 6.

¹⁵ See Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITTS. L. REV. 75, 79 (1990); William P. Marshall, *The Inequality of Anti-Establishment*, 1993 BYU L. REV. 63, 69-70; Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 493 (1996).

¹⁶ For different versions of this view, see EISGRUBER & SAGER, *supra* note 1, at 78-120; LEITER, *supra* note 1, at 92-115; Ellis, *supra* note 1, at 241.

accommodationist has a good reason for arguing that religious views should be treated like all other secular commitments as the basis for decisionmaking in the political process, while simultaneously claiming that religion deserves greater protections than other commitments when it is burdened by the results of that process. A similar question can be posed to exclusive nonaccommodationists, who argue that religious reasons ought to be disfavored as justifications for the law, but then treated the same as secular views for purposes of receiving accommodations. What justifies equal treatment on one side of the equation and unequal treatment on the other? I have argued elsewhere that the two asymmetric theories – inclusive accommodation and exclusive nonaccommodation – face serious difficulties in maintaining arguments to preserve their internal coherence.¹⁷

Second, by focusing attention on the problem of consistency across the dimensions of free exercise and disestablishment, this taxonomy also helps reveal a pattern of objections to all four types of theories. Those theories that treat religion as distinctive in one dimension or another run into an *equality* objection, namely, that none of the standard arguments – whether theological, metaphysical, epistemic, or psychological – for giving religion special treatment are sufficient to justify disabling or privileging religion as compared to nonreligious ethical and moral views.¹⁸ Thus, theories that would exclude religious reasons as justifications for state action are under pressure to explain what it is about religion that makes it especially unfit for democratic politics. And theories that privilege religion in receiving exemptions are persistently challenged with paradigmatic examples, including the Vietnam draft protest cases,¹⁹ in which those with secular convictions have claims that, at least intuitively, seem as morally and psychologically compelling as those of their religious counterparts.²⁰

Theories that reject the distinctiveness of religion manage to escape variations of the equality objection, but they must then confront the potential anarchical implications of expanding disabilities or protections for religion to include secular ethical and moral convictions. With respect to special protections, theories of nonaccommodation can treat religious and nonreligious views equally in one of two ways. They can “level up” by extending protections afforded to religious views to those with comparable secular

¹⁷ See Schwartzman, *supra* note 1, at 1377-89.

¹⁸ See *id.* at 1392-93 (rejecting epistemic arguments for distinguishing between religious and secular comprehensive doctrines); see also Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 335-37 (2011) (rejecting theological and psychological arguments for religion’s distinctiveness). For additional arguments supporting the equality objection, see sources cited *supra* note 1.

¹⁹ See *Welsh v. United States*, 398 U.S. 333, 339-40 (1970); *United States v. Seeger*, 380 U.S. 163, 165-66 (1965).

²⁰ See, e.g., Schwartzman, *supra* note 6 (manuscript at 9) (providing examples of secular claims of conscience that warrant the same level of protection as religiously motivated claims).

convictions,²¹ or they can “level down” by denying protections for both religious and secular views.²² The problem with leveling up is that anyone with a strongly held ethical or moral view, whether religiously motivated or not, would have a claim for exemption from the law. That prospect, in turn, triggers an anarchy objection, which is that no society can tolerate individuals deciding for themselves, on the basis of their religious or secular consciences, which laws they will follow and which are morally objectionable.²³ The only other option, then, is to level down. And so theories of nonaccommodation are pushed in the direction of limiting religious liberty in the name of equality and in an attempt to avoid the lawlessness that would appear to follow from adopting any other strategy.²⁴

The tension between equality and anarchy motivates a similar pattern of argument with respect to religious disestablishment. Theories of exclusion hold that religion cannot serve as the basis for political and legal decisionmaking. But such theories are charged with unfairness toward religion, excluding believers’ fundamental convictions while allowing nonbelievers to shape the law on the basis of their deeply held ethical and moral beliefs. As with theories of free exercise, there are two ways to respond to this equality objection: either abandon the exclusion of religious convictions in favor of an inclusive approach to the political process, which introduces the possibility of religiously motivated or theocratic law, or broaden the scope of exclusion to cover secular ethical and moral views. Yet if we take the latter option, we immediately confront another anarchy objection: a state that cannot rely on religious or secular convictions to justify its actions would be completely incapacitated, unable to legitimate any of its political or legal decisions, which is an absurd outcome for all but the most committed political or philosophical anarchists. How to avoid this result, while treating religious and secular commitments equally, remains perhaps the most difficult and underexplored problem in existing theories of religious freedom.

²¹ See GUTMANN, *supra* note 1, at 171-77 (arguing that the state should accommodate equally religious and secular conscientious convictions); KONVITZ, *supra* note 1, at 73-106 (arguing the same); Schwartzman, *supra* note 6 (manuscript at 7-8) (arguing for extending religious freedom to include secular claims of conscience).

²² LEITER, *supra* note 1, at 94-100 (arguing for a “No Exemptions” approach to religious accommodations on grounds of fairness to nonreligious views and to avoid anarchy).

²³ See, e.g., Emp’t Div. v. Smith, 494 U.S. 872, 888 (1990) (stating that constitutionally mandated religious exemptions “would be courting anarchy”); LEITER, *supra* note 1, at 94 (arguing that a universal system of conscientious objection “would appear to amount to a legalization of anarchy!”).

²⁴ My claim here is not that an anarchy objection is necessarily fatal to theories of nonaccommodation, only that this type of objection is both predictable and that it raises serious concerns about granting exemptions for those with both religious and secular convictions. For more on this point, including an argument that interest balancing is a standard response to the anarchy objection, see Schwartzman, *supra* note 6 (manuscript at 11).

II. RELIGION, EQUALITY, AND ANARCHY

With this taxonomy in place, and having sketched the equality and anarchy objections that seem to afflict the various theories of religious freedom, I now want to situate Dworkin's view using this theoretical framework and show how he responds to the standard objections.

A. *Free Exercise*

Consider, first, Dworkin's approach to religious free exercise, which follows a pattern familiar from other theories of nonaccommodation. That is, Dworkin begins by asking why religious convictions should receive legal privileges that do not extend to secular ethical and moral commitments. As Dworkin observes, this question is a matter of political morality.²⁵ In the first two chapters of *Religion Without God*, Dworkin argues that atheists share with traditional believers a certain "religious attitude" toward the objectivity of moral, ethical, and aesthetic values.²⁶ But even if one rejects the idea of "religious atheism"²⁷ as an oxymoron, or as metaphysically confused, a question of political morality remains, namely, whether nonbelievers' ethical and moral convictions – religious or not – warrant the same level of legal protection as those of traditional religious believers.

The answer, Dworkin argues, is that there is no reason to interpret religious freedom narrowly to cover only traditional beliefs associated with theism or acceptance of a supernatural deity (or deities). Dworkin considers and rejects three justifications for singling out traditional religious views: (1) that accommodating religion preserves social stability and avoids religious persecution, conflict, and violence; (2) that religious believers fear eternal damnation and therefore suffer more than nonbelievers when compelled to act against their consciences; and (3) that traditional religions impose weighty and sometimes categorical duties and responsibilities on their adherents, whose self-respect depends on fulfilling such obligations.²⁸

As Dworkin argues, none of these justifications is sufficient to warrant special treatment for theistic beliefs and practices. The general problem with all such arguments is that they are seriously over- and underinclusive.²⁹ In terms of overinclusiveness, not all religious beliefs must be accommodated to avoid social conflict; not all religious believers live in fear of eternal damnation; and not all religious duties rise to the level of implicating a believer's sense of self-respect. As for underinclusiveness, failing to

²⁵ DWORKIN, *supra* note 7, at 109.

²⁶ *Id.* at 2-3 ("Many millions of people who count themselves as atheists have convictions and experiences similar to and just as profound as those that believers count as religious.").

²⁷ *Id.* at 5.

²⁸ *Id.* at 110-14.

²⁹ Although Dworkin does not mention it, there is a substantial literature developing and responding to arguments on this point. See sources cited *supra* note 1.

accommodate some secular ethical convictions might lead to social conflict (as much, anyway, as caused by those with religious convictions); some nonbelievers experience their ethical and moral duties with as much psychological force and motivation as those with traditional beliefs; and following secular claims of conscience may be as important for a nonbeliever's sense of self-respect as it is for a believer's.³⁰

If there is no reason to give special protection to theistic views, the question then is whether to "level up" by extending accommodations to those with secular convictions or to "level down" by denying special protections for everyone. Dworkin opts for the latter strategy, and his main reason for doing so is the anarchy objection. Responding to the suggestion that the state could "simply extrapolate the special rights and privileges now restricted to conventional religion to all passionately held conviction," Dworkin concludes that "no community could possibly accept that extended right."³¹

In leveling down, Dworkin argues that the right to religious freedom must be reconceived according to what he describes as a "more radical approach."³² So far, we have been considering the implications of what Dworkin calls a *special* right to religious liberty, which "declares that government must not constrain religious exercise in any way, absent an extraordinary emergency."³³ But since a right of that kind cannot be appropriately generalized to encompass secular commitments, at least not without courting anarchy, Dworkin argues that religious freedom is better interpreted as a *general* right to what he calls "ethical independence."³⁴

The idea of ethical independence is central to Dworkin's political philosophy,³⁵ and I cannot hope to give more than a cursory description of it here. But the gist of the idea is roughly this: Individuals are morally responsible for deciding how best to lead their lives. The state cannot and should not make that determination for them. Thus, when the state enacts policies, especially coercive laws, it must refrain from doing so on the basis of reasons that presuppose a particular ethical view, or what is sometimes called a "conception of the good."³⁶ In other words, the state must maintain a position of neutrality with respect to religious and secular ethical views. It cannot take sides by enacting laws on the basis of reasons that assume the superiority of one view over another.³⁷

³⁰ DWORKIN, *supra* note 7, at 2-3.

³¹ *Id.* at 117.

³² *Id.* at 129.

³³ *Id.* at 132-33.

³⁴ *Id.*

³⁵ See DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 8, at 17-21; DWORKIN, *supra* note 10, at 211-13, 368-71.

³⁶ See RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 19 (discussing what it means to have a conception of the good).

³⁷ DWORKIN, *supra* note 7, at 130 ("[G]overnment must never restrict freedom just

It should be emphasized that the general right of ethical independence is formulated as a principle of reason-giving or *justification*. As Dworkin explains, “[e]thical independence . . . stops government from restricting freedom only for certain reasons and not for others.”³⁸ When religious freedom is interpreted accordingly, religious believers and nonbelievers can object to laws whose purpose is to advance a particular religious or ethical view. But when laws are based on reasons that do not violate this constraint, there can be no complaint against them. For example, in *Employment Division v. Smith*,³⁹ the State prohibited the use of peyote. Had it done so because some public officials took a negative view of Native American religious practices, that would clearly have violated their religious freedom. But if the State acted to protect against the harmful consequences of drug addiction, then religious users of peyote could not have relied on the general right of ethical independence to obtain an exemption from the law. For that they would need a special right, one that would require the State to produce a compelling interest for applying the law. Absent such a right, Dworkin argues, “religions may be forced to restrict their practices so as to obey rational, nondiscriminatory laws that do not display less than equal concern for them.”⁴⁰

Dworkin knew that this conclusion would strike many readers as implausible (or worse), and it is certain to draw serious criticism.⁴¹ For present

because it assumes that one way for people to live their lives . . . is intrinsically better than another.”).

³⁸ *Id.* at 131.

³⁹ *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990).

⁴⁰ DWORKIN, *supra* note 7, at 136.

⁴¹ See, e.g., Paul Horwitz, “A Troublesome Right”: The “Law” in Dworkin’s Treatment of Law and Religion, 94 B.U. L. REV. 1225 (2014). For my own part, although I am sympathetic to Dworkin’s argument for equality between religious and secular commitments, he moves too quickly over the possibility that a subset of such commitments – for example, those that rise to the level of conscientious objection – can be protected without courting anarchy. Elsewhere, I have argued for supplementing a special right of religious liberty with a right to freedom of conscience. See Schwartzman, *supra* note 6 (manuscript at 8); see also GUTMANN, *supra* note 1, at 171-77; KONVITZ, *supra* note 1, at 73-106. Dworkin claims that “[o]nce we break the connection between religious conviction and orthodox theism, we seem to have no firm way of excluding even the wildest ethical eccentricity from the category of protected faith.” DWORKIN, *supra* note 7, at 124. But there are two obvious replies to this objection. First, a connection between religious conviction and orthodox theism allows for plenty of “ethical eccentricity.” There are examples of theists claiming legal exemptions for honor killings, refusal of life-saving medical treatment and vaccinations (including for minors), animal sacrifice, and all types of discrimination on the basis of race, sex, gender, and so on. See, e.g., Schwartzman, *supra* note 6 (manuscript at 10). The anarchy objection is easily motivated even when special protections are limited to theistic conceptions of religion. Second, secular commitments that are extravagant or that impose substantial burdens can be limited, either by statute or by courts applying some form of balancing inquiry, including measuring against substantial or compelling state interests. Determining how that balancing should be conducted may be a difficult problem, but if so,

purposes, however, it is important to see that understanding religious freedom as a general right of ethical independence draws whatever appeal it has from the pressure to satisfy two desiderata, namely, the value of equality between religious and nonreligious views, and the avoidance of moral and political anarchy. To be persuasive, I think, Dworkin's critics must explain which of these values they are prepared to sacrifice (and why), or they must show how religious freedom can be interpreted and defended in a manner that is consistent with both values.

B. *Disestablishment*

The general right of ethical independence not only grounds Dworkin's approach to legal exemptions, which is a version of nonaccommodation, but it also serves as the basis for his theory of disestablishment. As we have seen, ethical independence constrains the types of reasons that the state may give to justify its actions. In the context of disestablishment, this means the state may not rely upon religious convictions to justify school prayer, government displays of religious symbols, teaching creationism, or, for that matter, prohibitions on abortion or gay marriage.⁴² Instead, the state must remain neutral between competing conceptions of the good, relying on reasons that do not assume the superiority of one view over another.⁴³

At this point, recalling the taxonomy of theories described above, it might be tempting to think of Dworkin as having adopted a theory of exclusive nonaccommodation, which holds that religious convictions *are special* for purposes of justifying political and legal decisions – in that they are distinctively disabled – but *are not special* for purposes of accommodation. Earlier I said that this view faces an equality objection because it singles out religion for exclusion from political and legal decisionmaking, while treating religious and secular convictions equally by rejecting accommodations for them all.

It would be a mistake, however, to classify Dworkin's theory in this way. His view is not exclusive in the sense of singling out traditional religion for exclusion as a justification for state action; rather, the right of ethical independence also requires the exclusion of secular ethical convictions. The state can no more rely on the ethical views of atheists than on those of traditional theists. Dworkin's theory thus extends the principle of equality to religious disestablishment by expanding the scope of its exclusion to cover reasons that depend for their appeal on assumptions about the superiority of secular ethical ideals.

We are now in a position to see more clearly the internal consistency and innovation of Dworkin's theory. In the taxonomy above, there are only two

that problem exists whether special protections are provided for religious or secular commitments, or both.

⁴² DWORKIN, *supra* note 7, at 137-46.

⁴³ *Id.* at 141-42.

theories that treat religious views consistently – as either distinctive or not – in both dimensions of religious freedom, that is, with respect to free exercise and disestablishment. The first is exclusive accommodation, which holds that religion is special on both sides: it should be singled out for exclusion, and it should be especially accommodated. That view faces dual equality objections, because excluding only religious views discriminates unfairly against them and because accommodating only religious views discriminates unfairly against those with secular convictions. By contrast, the second symmetrical theory, inclusive nonaccommodation, avoids both of these equality objections by holding that (1) religion should be treated like secular views as permissible grounds for justifying state action, and (2) religious and secular commitments should be treated equally in decisions about whether to grant or deny accommodations. The problem with this theory is that it allows for restrictions on freedom justified solely by particular religious or secular ethical doctrines, leaving open the possibility of theocratic law, or, for that matter, secular ethical paternalism.

Dworkin's theory achieves internal consistency without falling into either of these alternatives, and in so doing takes a position that is formally outside of the taxonomy described above. His view might be characterized most accurately as a modified version of exclusive nonaccommodation, where the exclusion of convictions as grounds for justifying state action extends not only to religious views but also to a certain subset of secular convictions as well.

A theory that excludes both religious and secular convictions answers an important equality objection, but in doing so it raises a further question about what grounds, if any, the state may rely upon to justify its decisions. Here an expanded exclusionary theory faces an anarchy objection of its own: if the state cannot rely on religious or secular convictions as legitimate grounds for supporting its policies, then it might appear that the state is hamstrung. It cannot take any actions without violating the principle of exclusion. And since that seems absurd, the expansion of exclusion to cover secular ethical commitments must be mistaken.⁴⁴

Dworkin answers this objection implicitly by drawing a fundamental distinction between personal ethical convictions and what he calls “impersonal” values.⁴⁵ The general right of ethical independence requires the state to be neutral with respect to different conceptions of the good, that is, ideas about how best to live one’s life. But there is a fundamental difference, argues Dworkin, between personal ethical commitments and collective moral and aesthetic values. In *Religion Without God*, Dworkin only hints at what kinds of values citizens and public officials might rely upon in making political and legal decisions. He says that “ethical independence does not prevent government from interfering with people’s chosen way of life for other

⁴⁴ For a version of this objection, see Steven D. Smith, Barnette’s *Big Blunder*, 78 CHI.-KENT L. REV. 625, 637-38 (2003).

⁴⁵ See DWORAKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 8, at 70-71.

reasons: to protect other people from harm, for example, or to protect natural wonders, or to improve the general welfare.”⁴⁶ But there is little explanation as to why these values are not aspects of various religious or secular ethical views, which otherwise might be included on equal terms as grounds for collective decisionmaking. Given the crucial significance of distinguishing between private ethical convictions and values that are properly grounds for justifying state action, Dworkin might have done more to clarify the basis for this distinction, especially by giving a fuller description of the types of reasons that might satisfy the constraints imposed by the general right of ethical independence.⁴⁷

III. THE INEVITABILITY OF PUBLIC REASON

Any theory of religious freedom that expands religious disestablishment to cover secular ethical commitments must offer some account of those reasons that can justify state action and those that cannot. Although Dworkin resisted using these concepts, what is needed here is an account of public justification, or what John Rawls and others have referred to as the idea of public reason,⁴⁸ which would specify the legitimate grounds for the collective or public use of political power. Over the past two decades, the idea of public reason has been developed in various ways into different philosophical conceptions.⁴⁹ But some account of this kind is indispensable for those, like Dworkin, who conceive of religious liberty in terms of constraints on the types of reasons that a state can offer to its citizens as grounds for limiting their freedom.

The idea of public reason holds that citizens and public officials have a moral duty to justify their political and legal decisions by appealing to values that other reasonable people could accept in virtue of their status as free and equal citizens.⁵⁰ Citizens are “reasonable” on this view when they meet two conditions: first, that they are willing to propose and act according to fair terms of social cooperation,⁵¹ and second, they recognize what Rawls refers to as the

⁴⁶ DWORKIN, *supra* note 7, at 130-31.

⁴⁷ Those familiar with Dworkin’s wider body of work might think this criticism unfair. But at least in the context of discussing religious freedom, Dworkin’s defense of the distinction between private and public values is limited to a few fairly discrete and somewhat elusive passages, with shifting accounts and terminology. *But see* DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 8, at 70-71; DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 8, at 370-71.

⁴⁸ See RAWLS, *Public Reason*, *supra* note 9, at 612-14; *see also* JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 315-17 (2011).

⁴⁹ For an excellent survey of the now vast literature on public reason, see Jonathan Quong, *Public Reason*, STAN ENCYCL. PHIL. (2013), <http://plato.stanford.edu/archives/sum2013/entries/public-reason>, archived at <http://perma.cc/VUZ3-BKR4>.

⁵⁰ *Id.*

⁵¹ RAWLS, *Public Reason*, *supra* note 9, at 578.

“burdens of judgment,”⁵² which include various limitations of practical reasoning that lead people of good faith to disagree persistently about matters of religion, ethics, and, more generally, what it means to lead a good and meaningful life. Those who accept these two conditions should also accept that when they advocate or justify political decisions, they have reasons of fairness and reciprocity to avoid, as much as possible, relying on religious and ethical convictions that are subject to reasonable disagreement. Instead of invoking such convictions, they should rely on public reasons, which appeal to political values – for example, “equal political and civil liberty; equality of opportunity; the values of social equality and economic reciprocity”⁵³ – that citizens with widely divergent religious and secular views might nevertheless accept as a legitimate basis for justifying their collective decisions.

Of course, the idea of public reason raises numerous questions and has been subjected to extensive criticism, which I cannot address here.⁵⁴ I do, however, want to respond to an objection raised by Dworkin, who ought to have been more sympathetic to this idea and whose theory of religious freedom seems to require a fundamental distinction between something like public and nonpublic reasons.

In an earlier discussion of religious freedom, published prior to *Religion Without God*, Dworkin objects to the idea of public reason because it “exclude[s] people’s most profound convictions from political debate.”⁵⁵ That would be undesirable, he argues, for a number of reasons. Perhaps most fundamentally, Dworkin is convinced that our society’s most serious cultural conflicts could be narrowed, if not resolved, by philosophical argument. To the extent that public reason cuts off that argument by limiting the kinds of reasons that citizens and public officials can appeal to in justifying their views, it prevents genuine deliberation about the religious and ethical ideas that provide

⁵² See RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 48-58; RAWLS, *Public Reason*, *supra* note 9, at 578.

⁵³ RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 224.

⁵⁴ See RONALD C. DEN OTTER, JUDICIAL REVIEW IN AN AGE OF MORAL PLURALISM 200-30 (2009) (defending public reason against standard objections); Quong, *supra* note 9, at 275-78 (responding to various objections to public reason arising from constraints on the role of religious convictions in public justification).

⁵⁵ DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 8, at 65. In another place, Dworkin offers two other objections to public reason. He argues, first, that the idea of fair cooperation and reciprocity does not exclude any moral views that a person thinks are “plainly right,” except perhaps religious convictions. DWORKIN, *supra* note 10, at 252. Second, and somewhat inconsistently, Dworkin expresses “equally great difficulties with the distinction between political values on the one hand and comprehensive moral convictions on the other,” arguing that Rawls’s own conception of justice might be excluded as morally controversial. *Id.* at 252-53. Although I cannot pursue them here, I do not think either of these criticisms is persuasive, in part for reasons given by others. See DEN OTTER, *supra* note 54, at 201-08; Samuel Freeman, *Public Reason and Political Justification*, 72 FORDHAM L. REV. 2021, 2063-65 (2004).

many people with their strongest source of moral and political motivation. Furthermore, Dworkin worries that it is impossible for people to set aside their religious and ethical convictions, and that attempting to do so would be insincere and inauthentic. For example, why would anyone – especially liberals and progressives – want Dr. Martin Luther King, Jr. to have expressed himself solely in terms of public reason? His religious views were not only central to his identity, providing him and countless others with motivation and hope, but they also enabled him to engage with his adversaries by challenging their deepest commitments.⁵⁶

I believe that Dworkin's resistance to the idea of public reason rests on a misunderstanding, one that is rather more difficult to comprehend given his own views about religious freedom. According to the demands of public reason, citizens and public officials have a duty to justify their political decisions on the basis of reasons that others might reasonably accept. Nothing prevents them from also offering reasons on the basis of their religious views⁵⁷ or, for that matter, on the basis of views that they believe others may hold.⁵⁸ They are morally (and, of course, legally) free to engage others in argument about whatever they choose. When Dworkin argues for religious atheism on the basis of a controversial metaphysics, he does not run afoul of public reason. If, however, he offers that metaphysical argument as the basis for a law that restricts others' freedom, then he has indeed failed to provide them with the right sort of reason.

What is strange about Dworkin's failure to appreciate this point is that his own theory of religious freedom leads to the same conclusion. If Martin Luther King, Jr. were advocating civil rights today, and doing so solely on the basis of his religious convictions, acceptance of Dworkin's general right of ethical independence would lead us to say that the law could not be based on Dr. King's understanding of what Christianity requires of us. That is not the type of reason that the state can appeal to without telling citizens how best to lead their lives – in other words, without violating their ethical independence.

Dworkin might respond by arguing that his metaphysical and moral arguments are meant to persuade people to accept the right of ethical independence. Once they have done so, they will appreciate the constraints imposed by that right, and indeed see them as a reflection of their own deepest convictions.⁵⁹ But this response misses the point. The right of ethical

⁵⁶ DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 8, at 65.

⁵⁷ See Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. POL. PHIL. 375, 394 (2011) ("[T]he wide view of public reason does not prevent citizens and officials from presenting their ethical and religious arguments in public deliberation. Nothing in the principle of sincere public justification precludes supplementing public reasons with arguments based on nonpublic values.").

⁵⁸ For further discussion of this point, see Micah Schwartzman, *The Ethics of Reasoning from Conjecture*, 9 J. MORAL PHIL. 521, 523 (2012).

⁵⁹ See DWORKIN, IS DEMOCRACY POSSIBLE HERE?, *supra* note 8, at 65-66.

independence, like the duty imposed by public reason, might be justified in any numbers of ways. Perhaps Dworkin's arguments for it are the most powerful, or perhaps not. But if the right is justified, then it requires some distinction between religious and ethical convictions for which citizens are privately responsible and public values that can be offered to others as justifications for how the state treats them. For citizens to respect that distinction, they cannot ask the state to act on the basis of their deepest convictions. Those reasons are off-limits. They must be able to articulate some other ground, one that is appropriately public, for the demands they make on their fellow citizens.⁶⁰

Determining what reasons citizens can legitimately appeal to – the content of public reason – is a project that must necessarily occupy those who accept a theory of religious freedom that excludes both religious and secular ethical convictions as grounds for state action. There can be no way of avoiding the need to identify a proper subset of moral and political values that can serve as the basis for political and legal decisionmaking. For those who accept that believers and nonbelievers deserve equal respect for their competing and conflicting views, the need for some theory of public reason is inevitable.

CONCLUSION

Theories of religious freedom can be classified according to whether they view religion as warranting special protections and special disabilities. Dworkin's theory takes a consistent and novel approach to religion's distinctiveness, namely, by denying it across both dimensions of free exercise and disestablishment. With respect to free exercise, others have defended similar theories of nonaccommodation, holding that religion is not special for purposes of granting legal exemptions. But outside of liberal political philosophy – and, indeed, even within it – the idea that a principle of disestablishment should apply to both religious and secular ethical doctrines

⁶⁰ Martin Luther King, Jr. understood this point better than many contemporary political philosophers. In arguing against segregation, he did not limit his appeal on the basis of his Christian convictions, important as they were to him. Consider the following passage in which King imagines a religious skeptic and offers his own reply:

[Suppose] I don't believe in these abstract things called moral laws and I'm not too religious, so I don't believe in the law of God; you have to get a little more concrete, and more practical. What do you mean when you say that a law is unjust, and a law is just? Well, I would go on to say in more concrete terms that an unjust law is a code that the majority inflicts on the minority that is not binding on itself. . . . Another thing we can say is that an unjust law is a code which the majority inflicts upon the minority, which that minority had no part in enacting or creating, because that minority had no right to vote in many instances, so that the legislative bodies that made these laws were not democratically elected.

MARTIN LUTHER KING, JR., *Love, Law, and Civil Disobedience, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING* 49 (James Melvin Washington ed., 1986). It is hard to imagine a better example of how a religious citizen might fulfill the duty to offer others public reasons and, in so doing, comply with the right of ethical independence.

remains unfamiliar and underexplored. Dworkin was undeterred by the radical implications of his view that believers and nonbelievers should stand as political equals. We are only beginning to understand the full significance of that idea, but it points unavoidably, I believe, toward some conception of public reason.