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# Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed

Benjamin Berger

Osgoode Hall Law School of York University, [bberger@osgoode.yorku.ca](mailto:bberger@osgoode.yorku.ca)

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# *Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed*

**Benjamin L. Berger\***

There is perhaps no more important access point into the key issues of modern political and legal theory than the questions raised by the interaction of law and religion in contemporary constitutional democracies. Of course, much classical political and moral theory was forged on the issue of the relationship between religious difference and state authority. John Locke's work was directly influenced by this issue, writing as he did about the just configuration of state authority and moral difference in the wake of the Thirty Years' War. Yet debates about the appropriate role of religion in public life and the challenges posed by religious difference also cut an important figure, in a variety of ways, in the writings of Hobbes, Rousseau, Spinoza, Hegel, and much of the work that we now view as being at the centre of the development of modern political philosophy.<sup>1</sup> Furthermore, the mutual imbrications of law and religion in the development of the western legal tradition are many and well established. At the structural level, Harold Berman famously traces the origins of modern western European legal systems to the Papal Revolution begun in 1075.<sup>2</sup> James Whitman shows the extent to which this mutual influence is (elusively) true of core doctrines of contemporary law, such as the principle of proof beyond a reasonable doubt.<sup>3</sup> The relationship between law and religion has been fertile soil for both the development of the modern legal system and the foundations of modern political philosophy.

Yet the claim at the outset of this article was that the questions generated by the interaction of law and religion are indispensable *contemporary* channels into the core questions of modern political and legal theory. Recent years have seen a migration of issues regarding religious difference and the nature and structure of the state back to the centre of legal and political theory. As western liberal democracies have been met with heretofore unprecedented degrees and forms of religious diversity, we have watched as diverse political and legal traditions have struggled mightily with the interaction among law, politics, and religion. The exigency and centrality of issues of law and religion to contemporary thinking about the just state is evidenced by a host of high-profile issues such as the Dutch cartoon controversy; the French political and legal response to the Islamic veil; U.S. debates over the presence of religious symbols, such as the Ten Commandments, in public space; and the hand-wringing of constitutional theorists about the appropriate role to be given to religion in the crafting of new constitutions for transitional states such as Afghanistan and Iraq. Given Canada's official state policy of multiculturalism, Canadian political and legal philosophy has long been consumed with issues of cultural difference and the law. Religion has found its way to the centre of conversations about multiculturalism, spawning a host of cases before the Supreme Court of Canada, a new body of legal scholarship, and a high-profile public commis-

sion looking at issues of the accommodation of religious difference.<sup>4</sup>

Put briefly, the interaction of law and religion is the field on which questions central to contemporary constitutional and political theory are being debated and worked out. The area is deserving of philosophical attention because, arguably more than any other contemporary issue in the law, debates about law and religion are exposing crucial fault lines in modern legal and political theory, some old and some rather new. The fraught contemporary relationship between law and religion raises issues about the nature of modern law, adjudication, and rights, and provides unique access to problems of community, identity, belonging, and authority that lie at the heart of contemporary democratic and political theory. Meaningful study of the relationship between law and religion also resists disciplinary boundaries, inviting and perhaps demanding the insights of history, philosophy, sociology, and anthropology.

This piece is intended to serve as a kind of philosophical or conceptual primer on a set of issues that, whether raised overtly in public debates or not, shape and suffuse conversations about the relationship between law and religion in the modern state. The concepts and debates raised are at work in many constitutional orders, and appreciation of these abiding issues is crucial to understanding the relationship between law and religion wherever it arises. Indeed, understanding these broader themes is invaluable in the comparative study of law and religion, a point that will be made below. Nevertheless, this short article specifically seeks to ground the examination of these issues in Canadian social and jurisprudential soil. In the end, the hope is not only to provide a broad mapping of certain central theoretical issues at the heart of the study of law and religion, thereby helping to orient a reader interested in this debate, but also to give a flavour of the way in which these issues offer uniquely valuable conduits into key questions in contemporary legal and political philosophy.

## 1. Defining “the secular”

Perhaps the key definitional issue at play in philosophical and legal debates regarding the interaction of law and religion is the issue of how one is to understand the idea of the “secular.” The word “secular” circulates promiscuously in popular, political, and academic discussions of modern constitutional democracy, but its precise meaning and the implications of the concept for law and public policy are deeply uncertain and the root of much debate and conflict in this area. At its outer limits, the term is unproblematic; a secular state can be distinguished from a theocracy wherein there is no distinction between public authority and religious authority. Short of this bright line, however, one finds a spectrum of definitions and understandings of the meaning and demands of secularism. It would be comfortingly simple if one could attribute differences about the just relationship between religion and the law to the distinction between those who assert a commitment to secularism and those who disavow the concept. Instead, what one finds in the scholarship and jurisprudence is an enormous breadth of conceptions of the secular among those who agree that it is a concept of importance in modern constitutional and political thought.

Locke’s *Letter Concerning Toleration* is an important touchstone for one vision of the secular.<sup>5</sup> Locke’s preoccupation in the letter is to distinguish the jurisdiction of the church from that of the commonwealth. Locke famously wrote:

[T]he church itself is a thing absolutely separate and distinct from the commonwealth. The boundaries on both sides are fixed and immovable. He jumbles heaven and earth together, the things most remote and opposite, who mixes these societies, which are, in their original, end, business, and in every thing, perfectly distinct, and infinitely different from each other.<sup>6</sup>

This vision of the separation of state authority from religious authority remains an influential conception of the meaning of the secular; a secular constitution is one that achieves a sharp division between church and state. When

religion mixes with the authority of the magistrate (to use Locke's term for the person wielding state power), one is faced with a breach of a particular understanding of the demands of a secular polity. One might point to the U.S. Constitution's doctrine of non-establishment as the quintessential modern expression of this vision of secularism. The first amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; and so in the U.S. context the movement of public funds from state to religion is intrinsically suspect. One commonly referenced counterpoint to the U.S. example is that of Germany, where religion receives all manner of state support, "establishing" religion in a number of ways that would be anathema in the United States. The picture is rather more complex, however, and this complexity is telling of an important point that has emerged in contemporary scholarship about the nature of secularism.

In an important article on comparative issues in law and religion, James Whitman demonstrates that although there is an institutional separation of church and state in the United States, there is a mixing of religion and politics and religion and law that would be offensive to European sensibilities.<sup>7</sup> By contrast, the European model mixes the institutions of government and religious institutions to a degree unacceptable to U.S. eyes, but is far stricter about the separation of politics and law from religious reasons and rhetoric. The inconvenient truth, as Whitman explains, is that "[b]oth represent forms of the separation of church and state."<sup>8</sup> Whitman's article points to an important insight that has been generated from contemporary scholarship regarding the concept of the secular: namely, that there are "secularisms" rather than a single configuration of the secular. A number of scholars working in religious studies and political theory have emphasized this point, tracking the diverse manifestations of the porous commitment to the "secular" in a variety of national traditions.<sup>9</sup> This scholarship shows that, short of serving to distinguish political orders from outright theocracy, the term "secular" serves, at most, as a placeholder for a set of possible institutional and social arrange-

ments that seek to secure an appropriate role for religion in public life.<sup>10</sup> Accordingly, the term "secular" is a flag marking a site of debate about the scope and shape of this "appropriate role."

What, then, are some of the leading positions on the meaning of the "secular" as a legal and political concept? Locke's bare statement cited above reflects one still-influential conception of the proper place of religion in public affairs—that it ought to be confined to the private realm, ceding public space to language, arguments, and symbols that can attract the support and allegiance of any citizen, irrespective of his or her religious commitments. John Rawls stands as the most prominent and frequently invoked exponent of this position on the use of religious reasons in public decision-making.<sup>11</sup> One of his central arguments is that modern constitutional democracy requires individuals, as a matter of civic respect, to bracket their "comprehensive doctrines," including their religious perspectives, in favour of "public reasons"—reasons that can attract the overlapping consensus of all of those who view a matter with disinterested reason.<sup>12</sup> On this view, secularism inheres in the withdrawal of religion and religious reasons from the public sphere.<sup>13</sup> Applied to the interaction of law and religion, this vision of the secular requires the independence of law and legal decision-making from religious influences.

An alternative perspective on the meaning and implications of the idea of secularism understands the command that law and public affairs be conducted on a secular basis as a gesture towards a kind of pluralism or inclusiveness based on multicultural equality.<sup>14</sup> Those who take this view of the secular argue that it is not only impossible, but also undesirable, for a culturally diverse society to require that religion be bracketed when one enters into debate about law and public affairs.<sup>15</sup> Parekh, for example, while accepting a "weak" secularism that requires the separation of religious and state institutions, resists a "strong secularism" that would require that "political debate and deliberation should be conducted in terms of secular reasons alone,"<sup>16</sup> arguing that to do so is "unwise because it deprives political life of both the

valuable insights religion offers and the moral energies it can mobilize for just and worthwhile causes.”<sup>17</sup> Although those who take this “pluralist” approach to secularism vary broadly on the limits that they might impose on the influence of religion on public decision-making, all agree that secularism does not demand the expulsion of religion from the public sphere.

I have focused thus far on the role that differing definitions of the secular may have on one’s view of the appropriate role for religion in public decision-making. Yet the way one imagines the secular has implications for a host of legal issues with which courts have had to wrestle in recent years. One’s view of the demands of secularism affects the propriety of the display of religious symbols in public space. Despite the vast differences between their traditions, both the U.S. and France have faced this issue in the display of the Ten Commandments and the wearing of “conspicuous” religious symbols in public schools, respectively. Whereas the issue is processed through the logic of non-establishment in the United States and through ideas of *laïcité*<sup>18</sup> in France, both are ultimately debates about the meaning of living in a secular constitutional democracy. One’s approach to secularism may also affect the difficult legal question of the margin that ought to be afforded for religious law to operate independently of state interference—a matter that, in 2004, was debated in Canada in the form of controversy about Islamic law-based family arbitration.<sup>19</sup> Indeed, one finds—more or less explicitly—debates about the meaning and implications of secularism at the core of much constitutional adjudication about the limits of legal tolerance and the demand for accommodation of religious difference. A recent case heard by the Supreme Court of Canada led it to reflect explicitly on the meaning of the secular and the requirements of accommodation and tolerance in a multicultural society. In *Chamberlain v Surrey School District No 36*<sup>20</sup> the Court was asked to rule on the significance of a legislative mandate that public schooling be conducted in a “strictly secular” manner and what this meant for the religiously-motivated decision of a School Board to prohibit the use of books depicting same-sex parented families in a Kindergarten family education course. Chief

Justice McLachlin explained as follows:

The Act’s insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people’s lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others.<sup>21</sup>

One sees the complexity and tensions surrounding the idea of “the secular” described in this section reflected, albeit not resolved, in this quotation: on the one hand, “strict secularism” imposes real limits on the permissible forms of public debate and grounds for legal decision-making; on the other, it does not bar religion from law and public decision-making, and imposes obligations of inclusion and respect. Given an array of available and defensible options, how one understands the common injunction that a modern constitutional democracy must be “secular” is crucial in shaping one’s ultimate sense of the just relationship between law and religion. It is to the related question of the nature of legal tolerance and accommodation that I now turn.

## 2. Multiculturalism, accommodation, and the limits of tolerance

“Every age,” Paul Kahn writes in his essential study of contemporary liberalism, “has its own point of access to ethical and political deliberation. For us, that point is the problem of cultural pluralism.”<sup>22</sup> The ur-case of cultural pluralism in modern political history is religious difference, but questions of cultural pluralism have expanded well beyond their religiously focused foundations; indeed, one might say that the religious roots of multiculturalism have been hidden by the many other forms of cultural diversity that have grown in countries like Canada, the U.S., the U.K., and France. Nevertheless, the imperative to create some form of accommodation or tolerance for beliefs and practices other than those of the majority culture continues to appear in some of its most challenging contemporary forms in matters of religious difference. Increasing quantities of ink are now being spilled on the application of doctrines of multiculturalism and accommodation to matters of deep religious difference. The concepts of tolerance, accommodation, and multiculturalism are wedded though distinguishable; multiculturalism designates a state policy towards cultural difference, whereas toleration and accommodation gesture to legal and policy responses to instances of difference. The expression of respect for multiculturalism and juridical and political recognition of the need for tolerance and accommodation is so prevalent as to seem anodyne. A recent decision by the Supreme Court of Canada on the permissible use of religious law in a secular society begins with the kind of statement that one could find in the judicial or political rhetoric of most modern western democracies: “Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected.”<sup>23</sup>

The great difficulty concealed by these placid statements is that cultural and religious difference carries with it strongly-held norma-

tive views that may grate mightily on the values and moral positions of society at large, positions and values that are commonly embedded in and expressed through the law. Kahn reflects the true ethical and moral challenge of cultural pluralism:

Lacking a conviction in the absolute truth of our own beliefs and practices, we are uncertain how to respond to those who live by different norms. We are all too aware that such differences exist, as we interact with cultures that put different values on life and death, family and society, religion and the state, men and women. We constantly confront the question of whether some of the practices supported by these values are beyond the limits of our own commitment to liberal moral philosophy and a political practice of tolerance. We worry about moral cowardice when we fail to respond critically, and about cultural imperialism when we do respond.<sup>24</sup>

Religious diversity poses these dilemmas starkly and confronts the law with the question to which I alluded in the discussion of secularism—what are the appropriate limits on religious difference in a liberal constitutional democracy committed to certain principles and visions of the good, but for which respect and tolerance for cultural difference stands as one such good?

Legal and philosophical scholarship has responded with a variety of attempts to articulate a basis for a workable approach to managing religious and cultural difference. At the more theoretical end of things, Charles Taylor has expounded an influential conception of multiculturalism that is based on a politics of mutual recognition.<sup>25</sup> In a similar vein, James Tully has wrestled with issues of deep cultural difference in the Indigenous context by developing a conception of treaty constitutionalism that, again, grounds legal and political relationships in recognition and reciprocity.<sup>26</sup> Taylor and Tully approach the matter from the perspective of political philosophy, seeking to develop a more robust ethical foundation for a meaningful form of multiculturalism. Where these theories have been thin on practical details, others have sought to work with concepts of multiculturalism in a manner that generates

principles that can guide the legal management of the line between tolerance and the protection of public values, the fraught line to which Kahn has pointed. Will Kymlicka's highly influential work is of this second type. Kymlicka's *Multicultural Citizenship* articulates a model of legal multiculturalism based on a distinction between internal restrictions (rules and norms of a community that bind members within the group) and external protections (principles imposed by society that seek to promote fairness between minority groups).<sup>27</sup> Kymlicka ultimately argues that "liberals can and should endorse certain external protections . . . but should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices."<sup>28</sup> For Kymlicka, then, multiculturalism involves inter-group toleration but requires attention to intra-group liberty. More recently, Ayelet Shachar has suggested a form of religious multiculturalism that has as its centrepiece the concept of "transformative accommodation."<sup>29</sup> Shachar defends the importance of the accommodation of diverse religious cultures while identifying the ways in which women are particularly vulnerable in the private spheres, in which most models of secularism permit religion a robust autonomy. She uses the concept of jurisdiction as a means of providing a balance between respect for and tolerance of religious cultures and the protection of the rights of women within these communities. In her approach, neither religious groups nor the state would have a monopoly on decisional authority as regards the community; rather they would share jurisdiction with defined "reversal points" at which community members could choose to opt for the state's jurisdiction over that of the religious community. In the end, Shachar argues that such a model will provide a due degree of accommodation of difference while encouraging religious communities to tend to the interests of vulnerable sub-groups, ultimately leading to the liberalization of orthodox communities.

However, features of the models suggested by both Kymlicka and Shachar point to an emergent and important strand of scholarship that questions the concept of toleration at a foundational level. Wendy Brown suggests that the

idea of toleration has an ineradicable dimension of domination woven into its very fabric.<sup>30</sup> Toleration, Brown argues, is a means of inscribing and affirming the difference of minority groups (the tolerated) while preserving the power and privilege of the group that gets to do the tolerating. Brown's compelling study suggests that toleration is not, in the end, so tolerant—at least in the sense suggested in most political and legal rhetoric. Others have begun to take this insight and apply it to the practices of legal toleration of religious difference.<sup>31</sup> Guided by Bernard Williams' philosophical insight that true toleration involves ceding territory on matters of deep importance to oneself,<sup>32</sup> does the protection of religious freedom actually yield toleration of the kind promised in the story of legal multiculturalism? Carefully considered, legal toleration may amount to simply the recognition of those points at which the central values of a liberal constitutional democracy are not troubled or threatened by religious difference. When this line of indifference is transgressed, the law enforces its commitments and conceptions of the good. Are the limits of toleration precisely the boundaries of what truly matters to the law, with legal toleration of religion ultimately serving as a means of enforcing the liberal culture embedded in modern constitutionalism? This is arguably the underlying logic and effect of the models proposed by both Kymlicka and Shachar; and if this account of legal toleration is accurate, the tools of the law offer no easy escape from the multiculturalist conundrum that Kahn so poignantly exposes. In the end, the question of the politics of multiculturalism and toleration remains a substantial issue in the interaction of law and religion, one that points not only to the value-infused nature of legal culture, but also to the complex nature of legal rights and the adjudication of religion.

### 3. The nature of rights and the adjudication of religion

While contemporary scholarship has raised questions regarding the structure and nature of the legal toleration of religion, the adjudication of claims of freedom of religion has exposed issues about the nature of rights and adjudication

to which scholarship must now react. These issues are tied closely to the matters discussed thus far—the nature of the secular and the limits of toleration. Both secularism and toleration are, at base, proxy concepts for the line-drawing that seems intrinsic to the management of deep religious difference in contemporary constitutional democracies. The core task of constitutional adjudication of religious freedom—the central means by which the interaction of law and religion manifests in the modern legal arena—amounts to an exercise in defining the boundaries of religious liberty in light of the core values embedded in the public legal order. As courts have engaged in this boundary-drawing exercise, the adjudication of religious freedom has yielded lessons about the structure of rights and the nature of the adjudication of religious freedom. Consider two such lessons.

First, with respect to the structure and nature of rights, the adjudication of claims of religious freedom has shown that it is much more difficult to “take rights seriously” than is imagined by those, like Ronald Dworkin,<sup>33</sup> who have advocated for an understanding of constitutional rights as trumps—as legal principles whose vindication over other public policy matters is assured by their status as “rights.” Adjudication of matters of religious freedom has put this conception of rights under serious stress. The normative and ontological “thickness” involved in religion has made the adjudication of claims of religious freedom particularly adept at challenging this understanding of rights. Religious beliefs and practices are invested with ideas about and attitudes towards the world, ideas and attitudes that are both central to the religious culture and can be at odds with other constitutionally protected goods and weighty matters of public policy. The Supreme Court of Canada has put the difficulty as follows: “In judging the seriousness of the limit [on freedom of religion] in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs.”<sup>34</sup> In Canada, freedom of religion jurispru-

dence has been one of the leading contemporary sources of cases showing the potential for the conflict of rights, cases in which a claim of freedom of religion comes into conflict with another constitutional guarantee, frequently the protection of equality. What should be done when the protection of religious freedom conflicts with the protection of equality on the basis of sexual orientation? Such cases have demonstrated that the protection of rights is rarely, in practice, a matter of “trumps.”<sup>35</sup> Conflicts between rights and serious conflict between religious freedom and pressing public interests are the rule, not the exception. As such, freedom of religion cases have been particularly important in putting to the philosophic community the challenge of thinking about rights as markers for a set of interests (among many) rather than as non-negotiable imperatives. The dominant theoretical and jurisprudential answer to this practical reality has been to argue that the key task of constitutional adjudication is that of the balancing of rights and interests through proportionality tests.<sup>36</sup> One scholar has gone so far as to characterize proportionality balancing as the “ultimate rule of law”<sup>37</sup>—a far cry from the idea of rights as trumps.

Scholars have pointed to a second lesson about the nature of adjudication and the structure of the right of religious freedom that appears to emerge from the jurisprudence and, in particular, the boundary-drawing that seems inherent in the concepts of both secularism and legal toleration. This incipient line of argument suggests that the adjudication of religious freedom inevitably involves the imposition of some juridical conception of what religion is, or what about religion really matters, and, in so doing, imposes a legal filter on what “counts” as protected religion. Writing from the U.S. setting, Winnifred Sullivan has put the argument most starkly in her book *The Impossibility of Religious Freedom*.<sup>38</sup> The essence of Sullivan’s position is that the use of any concept of religious freedom requires a definition of religion and in this very act of defining religion certain orthodoxies are imposed while other dimensions of lived religion and the variety of modes of being religious are diminished or excluded from legal protection. “Crudely speaking,” Sullivan

argues, forms of religion that are private, voluntary, and believed rather than practiced (forms she refers to as “protestant”) are “free” whereas other forms of religion are “closely regulated by law.”<sup>39</sup> I have argued that adjudication of religion requires the imposition of a definition of religion and that this definition is informed by the cultural commitments of the constitutional rule of law itself, a culture of law’s rule that is deeply indebted to and contiguous with core components of the political culture of liberalism, which privileges autonomy and choice over identity, the individual over the group, and insists on a more-or-less stable division between the public and private dimensions of human life.<sup>40</sup> “Law shapes religion in its own ideological image and likeness and conceptually confines it to the individual, choice-centred, and private dimensions of human life.”<sup>41</sup> Adjudication of rights-based claims cannot be insulated from the informing culture of law’s rule and, as such, involves the imposition of a particular set of beliefs about what is of value in the human being and the shape of a good society—matters on which religious communities hold strong commitments of their own.

#### 4. Why protect religion?

Attention to the difficulties involved in the adjudication of religious freedom claims, including the manner in which freedom of religion seems readily to fall into conflict with other rights, gestures to a final—and fundamental—question raised in the scholarship regarding the interaction of religion and modern constitutionalism. The variety of claims made under free exercise or religious freedom clauses, the challenges that these claims pose for reconciliation with public policy, and the manner in which they have drawn civic debate into questions of the degree of moral difference tolerable in a secular society, all suggest a foundational question—why do we single out religious belief and practice for special constitutional protection? The obvious follow-up is “and should we continue to do so?” To reach back to the discussion of secularism, in his magisterial study of the concept and nature of secularism, Charles Taylor explores three ways of thinking about

“the secular.”<sup>42</sup> One model of secularism involves the retreat of religion from public spaces (secularism 1); another is the general decline of religious belief and practice in society (secularism 2). But Taylor’s argument is that the essence of modern secularism is best understood as the comparatively modern shift “from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others” (secularism 3).<sup>43</sup> There is a great deal to commend this understanding of secularism, but it raises the difficult question that is the final conceptual fault line in the interaction of law and religion that I wish to explore: if religion has become one possible means of human flourishing among many other options, why do constitutions continue to single out and protect religion?

One forceful answer that has emerged in the scholarship is that “[t]here is simply no good reason for offering religion a priority over other deep passions and commitments.”<sup>44</sup> Larry Sager and Christopher Eisgruber have been the leading and most explicit proponents of this view.<sup>45</sup> Reflecting on the U.S. context, Eisgruber and Sager have argued that there is no defensible basis for affording religious beliefs and actions a particular constitutional privilege. Their argument is not that religious beliefs and actions are undeserving of constitutional regard. Rather, their thesis is a kind of levelling move, suggesting that the reasons for protecting religious freedom can be fully accounted for through more generally applicable constitutional principles of equality and liberty. A combination of basic equality considerations and a general liberty principle—a combination that Eisgruber and Sager call the principle of “Equal Liberty”—is sufficient to take full account of what animates our instincts to protect religion. The protection of religious freedom is nothing more, in short, than a particular application of constitutional protections available to all, irrespective of the specifically religious dimension of their beliefs, identity, or actions.<sup>46</sup>

To the question of why we find specific reference to religious freedom in constitutions around the world if the “problem” of religious

freedom is wholly answerable with a generally applicable Equal Liberty principle, Sager and Eisgruber answer by noting that history has shown that religion is “especially vulnerable to hostility or neglect.”<sup>247</sup> Specific protections of religious freedom are, on this view, simply markers for a basis on which the Equal Liberty principle has often been breached. There is nothing, however, distinctively valuable about the “religion” in freedom of religion that attracts (or ought to attract) constitutional protection.

Other scholars have offered a very different answer to the question of why constitutions specifically protect religion, explicitly rejecting the idea that abstract principles of equality and liberty give sufficient account for the special regard that constitutions give to religious freedom. “[W]e are fooling ourselves,” one author writes in direct response to Sager’s argument, “if we think we can define a coherent conception of freedom of religion without recognising that the freedom presupposes an affirmative valuing of religion. If we attempt to do so, we almost always end up smuggling in a covert valuing of religious practice.”<sup>248</sup> In the constitutional protection of religion one finds an abiding sense that religious views have a special place in the way in which a person makes sense of his or her world and that religion speaks to a dimension of human existence deserving of regard and respect. Although equality and liberty are necessary aspects of the constitutional protection of religious belief and practice, freedom of religion cannot be accounted for separate from a societal recognition of the unique depth and importance that religion continues to hold for fellow members of our political community. Certain writers take a more utilitarian approach, emphasizing the goods that religion (perhaps uniquely) brings to society, benefits that better explain why religion is and ought to be given distinct constitutional regard. Although recognizing its potentially pernicious faces, Parekh notes that religion has historically served as an important counterweight to state authority, animating a number of emancipatory movements, “nurturing sensibilities and values the latter ignores or suppresses,”<sup>249</sup> and providing a host of other benefits to society.

Yet separate from (if related to) these moral and utilitarian answers to the question, “why protect religion?”, there is also a tantalizing ontological possibility: does freedom of religion serve as a marker for a kind of anxiety about metaphysical certainty within the law? Perhaps the special protection given to freedom of religion flows in part from a recognition that religion asks the kinds of questions and affords forms of answer to which the law is neither inclined nor equipped to respond. And if these questions and answers are both important and unanswerable within the law, freedom of religion may be a cautionary principle—an expression of law’s modesty about what it can say about the structure of things and meaning of an individual or community’s experiences.

## 5. Concluding comments

The select key theoretical issues canvassed in this piece demonstrate the manner in which the interaction of law and religion has emerged as a uniquely valuable contemporary site for reflection on questions central to the philosophy of law. Be it the nature of adjudication, the structure of rights, the role of law in contemporary public life, or issues of law’s relationship to moral and cultural diversity, cases and controversies about religion and religious freedom arising in modern western constitutional orders have afforded invaluable avenues into central questions of social and legal philosophy. The interaction of law and religion has provided unique traction to scholars working on basic issues in religious studies, political theory, legal philosophy, and jurisprudence. In concluding this piece, I wish to gesture to an issue that sits at the foundation of all of these questions.

Any or all of these various lines of inquiry opened up by attention to the modern political and juridical interaction between law and religion ultimately require reflection on a fundamental question in legal theory, the nature of “the rule of law.” It is a precious conceit of modern constitutionalism that law enjoys autonomy from culture. Its role is to sit above the realm of the cultural, curating but not itself participating in the world of vying ontologies, epistemologies, and metaphysics that is incum-

bent in a society marked by deep cultural and religious difference. This conceit is an aspect of law's fierce commitment to its own neutrality as the ground for its authority. Yet each of the veins of inquiry identified in this piece—the meaning of the secular; the limits of legal tolerance; the structure of rights and nature of adjudication; and the basis for the protection of religion—destabilizes the separation between the role and function of culture and the rule of law. As one digs deeply into each or any of these issues, the nature of the constitutional rule of law as one means of ordering experience, of making sense of the world, of providing a horizon within which to interpret human affairs, becomes more and more difficult to ignore. In this, one sees that the great richness of the study of the interaction of law and religion lies not solely in the study of identity and diversity or in what it suggests about religion in the modern constitutional democracy; enormous challenge and edification inhere in what the study of law's relationship with religion suggests and invites by way of reflection about *the nature of law* itself.

## Notes

- \* Associate Professor, Faculty of Law and Department of Philosophy, University of Victoria. The author wishes to thank Andrew Harding for his comments on earlier drafts of this piece and Emily Lapper and Ilona Cairns for their outstanding research assistance.
- 1 See Mark Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (New York: Alfred A Knopf, 2007).
  - 2 See Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983); Harold Berman, *The Interaction of Law and Religion* (Nashville and New York: Abingdon Press, 1974).
  - 3 James Q Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2008).
  - 4 See Gérard Bouchard & Charles Taylor, *Building The Future: A Time for Reconciliation* (Québec: Consultation Commission on Accommodation Practices Related to Cultural Difference, 2008). The Government of Québec established the Commission that authored this report in 2007 in response to public concerns regarding the accommodation of religious difference, including controversies regarding decisions of the Supreme

Court of Canada on cases originating in the Province of Québec. The Order-in-Council establishing the Commission described its mandate as follows: to “a) take stock of accommodation practices in Québec; b) analyse the attendant issues bearing in mind the experience of other societies; c) conduct an extensive consultation on this topic; and d) formulate recommendations to the government to ensure that accommodation practices conform to Québec’s values as a pluralistic, democratic, egalitarian society.”

- 5 John Locke, “A Letter Concerning Toleration,” in *The Works of John Locke: A New Edition, Corrected*, vol VI (London: Tegg et al, 1823) 2.
- 6 *Ibid* at 21.
- 7 See James Q Whitman, “Separating Church and State: The Atlantic Divide” (2008) 34:3 *Historical Reflections* 86 [Whitman].
- 8 *Ibid* at 90. Whitman’s central argument in this piece is that the reason for this difference between the approach to the separation of church and state in the United States and that found in northern continental countries is not (as is conventionally asserted) the Protestant influence in the United States and that of Catholicism on the Continent. Rather, the explanation is found in the fact that, in northern European countries, “the state, over many centuries, has gradually assumed many of the historic functions performed by the medieval church,” whereas, in the United States, “historic church functions have generally either been left to the churches, or else they have died out entirely” (at 91–92).
- 9 See, e.g., Janet R Jakobsen & Ann Pellegrini, eds, *Secularisms* (Durham: Duke University Press, 2008); José Cassanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994).
- 10 Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).
- 11 See also Robert Audi, “Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality Toward the Good” (2005) 19 *Notre Dame Journal of Law, Ethics & Public Policy* 197. For a debate regarding the role of religious considerations in public debate and politics, see Robert Audi & Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Public Debate* (Lanham, Md: Rowman & Littlefield, 1997).
- 12 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996).
- 13 In *Formations of the Secular*, *supra* note 10 at 199, Talal Asad critically observes that “[f]rom the

- point of view of secularism, religion has the option either of confining itself to private belief and worship or of engaging in public talk that makes no demands on life. In either case such religion is seen by secularism to take the form it should properly have. Each is equally the condition of its legitimacy.”
- 14 See Tariq Modood, *Multiculturalism: A Civic Idea* (Cambridge: Polity Press, 2007); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge: Harvard University Press, 2000) [Parekh].
- 15 See, e.g., Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004); Michael J Perry, *Under God? Religious Faith and Liberal Democracy* (Cambridge: Cambridge University Press, 2003); Paul Horwitz, “The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond” (1996) 54:1 *University of Toronto Faculty of Law Review* 1.
- 16 Parekh, *supra* note 14 at 322.
- 17 *Ibid* at 324.
- 18 The term *laïcité* refers to an approach to religion and the public sphere that, rather than emphasizing state neutrality and free exercise, focuses on the complete separation of politics and religion and the creation of a common (and secular) public identity. For accounts of this concept of *laïcité*, see Whitman, *supra* note 7 at 93; Yolande Jansen, “*Laïcité*, or the Politics of Republican Secularism” in Hent de Vries & Lawrence Sullivan, eds, *Political Theologies: Public Religion in a Post-Secular World* (New York: Fordham University Press, 2006) 475; Talal Asad, “Trying to Understand French Secularism” in Hent de Vries & Lawrence E Sullivan, eds, *Political Theologies: Public Religion in a Post-Secular World* (New York: Fordham University Press, 2006) 494.
- 19 See Natasha Bakht, “Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women” (2004) 1 *Muslim World Journal of Human Rights* 1022.
- 20 [2002] 4 SCR 710, 2002 SCC 86 (CanLII).
- 21 *Ibid* at para 19.
- 22 Paul W Kahn, *Putting Liberalism in its Place* (Princeton: Princeton University Press, 2005) at 1 [Kahn].
- 23 *Bruker v Markovitz*, [2007] 3 SCR 607, 2007 SCC 54 (CanLII) at para 1.
- 24 Kahn, *supra* note 22 at 1.
- 25 Charles Taylor, “The Politics of Recognition” in *Philosophical Arguments* (Cambridge: Harvard University Press, 1995) 225.
- 26 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).
- 27 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).
- 28 *Ibid* at 37.
- 29 Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001).
- 30 Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton and Oxford: Princeton University Press, 2006).
- 31 I did so in Benjamin L Berger, “The Cultural Limits of Legal Tolerance” (2008) 21:2 *Canadian Journal of Law and Jurisprudence* 245.
- 32 Bernard Williams, “Tolerating the Intolerable” in Susan Mendes, ed, *The Politics of Toleration in Modern Life* (Durham: Duke University Press, 1999) 65.
- 33 Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).
- 34 *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, 2009 SCC 37 (CanLII) at para 90.
- 35 See, e.g., *AC v Manitoba (Director of Child and Family Services)*, [2009] 2 SCR 181, 2009 SCC 30 (CanLII); *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, 2006 SCC 6 (CanLII); *Trinity Western University v College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31 (CanLII).
- 36 See, e.g., Robert Alexy, *A Theory of Constitutional Rights*, trans by Julian Rivers (Oxford: Oxford University Press, 2002); Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006).
- 37 David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).
- 38 Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton and Oxford: Princeton University Press, 2005).
- 39 *Ibid* at 8.
- 40 I advanced this argument in Benjamin L Berger, “Law’s Religion: Rendering Culture” (2007) 45:2 *Osgoode Hall Law Journal* 277.
- 41 *Ibid* at 310.
- 42 Charles Taylor, *A Secular Age* (Cambridge: Harvard University Press, 2007).
- 43 *Ibid* at 3.
- 44 Lawrence G Sager, “The Moral Economy of Religious Freedom” in Peter Cane, Carolyn Evans & Zoe Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 16 at 18 [Sager].
- 45 Christopher L Eisgruber & Lawrence G Sager, *Religious Freedom and the Constitution* (Cam-

bridge: Harvard University Press, 2007). For other arguments seeking to establish an approach to religious freedom that does not depend upon a distinctive valuation of religion, see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001); Michael W McConnell, "The Problem of Singling out Religion" (2000) 50 DePaul Law Review 1; Michael W. McConnell & Richard Posner, "An Economic Approach to Issues of Religious Freedom" (1989) 56 University of Chicago Law Review 1.

46 See also Martha C Nussbaum, *Liberty of Conscience: In Defence of America's Tradition of Religious Equality* (New York: Basic Books, 2008). Nussbaum similarly emphasizes a general ethic of equality, rather than a specific valuation of religion, that animates the U.S. protection of religious freedom.

47 Sager, *supra* note 44 at 34.

48 Jeremy Webber, "Understanding the Religion in Freedom of Religion" in Peter Cane, Carolyn Evans & Zoe Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 26 at 27. See also Jeremy Webber, "The Irreducibly Religious Content of Freedom of Religion" in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: University of British Columbia Press, 2006).

49 Parekh, *supra* note 14 at 328.