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Public Reason's Faith

Rawls famously described his version of political liberalism as a consequence of an application of the principle of toleration to philosophy itself. Political liberalism, as he understands it, requires that one abstain from taking a position on competing (reasonable) conceptions of the good life even while affirming an agreement on fundamental political values. This is of course another way of formulating his idea of an overlapping consensus in which citizens can disagree on conceptions of the good while still embracing shared political values. This could also be described as Rawls's case for democratic toleration, though as I hope to show there might also be some good reasons for not using this description.

As is also well-known to this audience, Glen Newey has been a forceful critic of liberal attempts to reconcile toleration with other liberal political values, including both public reason and democracy. Indeed, he has questioned whether toleration remains a coherent value or ideal in democratic politics. According to Newey, Rawls's use of an overlapping consensus among reasonable views ultimately seeks to avoid or circumvent what Newey calls the 'circumstances of politics'. The idea of an overlapping consensus among reasonable views on fundamental political values either presupposes strong normative assumptions about what the limits of toleration rightly are (and so doesn't take pluralism seriously enough) or it makes factual or empirical assumptions about the scope of agreement that Newey considers to be deeply suspect. Which views are "reasonably rejectable" varies according to circumstances, including in particular circumstances related to polit-

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ical stability.[1] Further, on Newey's view, toleration is not obviously a virtue that can be applied to the exercise of political authority in a democratic regime. Political authority institutes or imposes terms of toleration between symmetrically situated conflicting parties – specifies what the limits of toleration are – and so it would be a mistake to see the state (or political authority) as itself exhibiting toleration. In this respect, Newey embraces what Rainer Forst (and others) call the "permission" conception of toleration-in the paradigmatic case, the enlightened despot permits views with which he personally disagrees.[2] But with the shift to an impersonal democratic state, it is no longer obvious that the state is best described as acting tolerantly. Newey concedes that there might be a limited role for toleration as a virtue among citizens; but it plays a much less significant role than is suggested by Rawls's remarks about applying the principle of toleration to philosophy itself.[3]

These remarks already expose some deep disagreements between Rawls and Newey on the understanding of what politics is or what it might mean to have a political conception of justice. Indeed, earlier in *After Politics* Newey described Rawls's political liberalism as both "anti-political" and "post-political".[4] I don't intend to enter (very far) into this large debate about the definition of the political. Newey's criticisms of political liberalism and toleration are nevertheless important – even apart from their deeper disagreement on the nature of politics. Is toleration a coherent ideal? Is toleration compatible with respect or is respect beyond toleration? Is toleration something a political authority might exhibit in its effort to be neutral with respect to competing conceptions of the good? Though I don't agree with all of the details of his analysis, I think there is some reason to think Newey is correct in his conclusion that – to cite the title of an earlier essay – "democratic toleration is a rubber duck".[5] That is to say, toleration is not what it appears to be since, strictly speaking, the state imposes the limits of toleration (among competing parties) but does not

[1] Newey 2013, 121.

[2] Forst 2013, 436.

[3] Newey 2013, 120.

[4] Newey 2001a, 178.

[5] Newey 2001b.

itself behave tolerantly toward others. However, as I hope to show, the reasons for this are quite different than those offered by Newey. I also propose to explore this question in connection with some more specific debates primarily (but not exclusively) in the U.S. about the role of religion in the public sphere.

The discussion about toleration I have in mind concerns the treatment of religion within political liberalism with respect to the two clauses concerning religion in the First Amendment. On the one hand, the establishment clause has provided a basis for treating religion as special in a negative manner: it has been used to argue that religious reasons should not be invoked in the context of making or justifying laws, or at least laws concerning constitutional essentials, on the grounds that religion should be kept separate from the state. At the same time, the "free exercise" clause of the first amendment has been invoked to claim that sometimes religion is special in the sense that it is entitled to special accommodations and protections. Thus, the state has made accommodation to religious groups who have been disadvantaged by (otherwise purportedly neutral) state policy, but has denied such accommodations to non-religious groups.

One might claim that liberalism (including political liberalism) is at least consistent – in both cases it treats religion as "special", even though in the one case it excludes it from politics while in the other case it accords it special benefits. But this is a rather abstract way of viewing the matter – and many critics of liberalism have been quick to fault liberalism for its lack of even-handedness.[6] It seems inconsistent to grant accommodations on basis of religious considerations, but then not allow citizens to appeal to religious considerations in justification of policy (while permitting non-religious justifications) (Eberle 2002; McConnell 2013). Or, from a competing perspective, if one is opposed to the use of religious justification for law and policy, one should also be hesitant to support accommodations for religious organizations (as some stronger secularists have argued) (Leiter 2013) [see Table 1]**.**

[6] See Woltersdorff 1997; Eberle 2002.

Table 1 • Is religion special?
(see Schwartzman 2012, for diagram and references)

	Accommodation	*Non-accommodation*
Inclusive	1 not special, special Michael McConnell, Nicholas Wolterstorff	2 not special, not special C. Eisgruber and L. Sager
Exclusive	3 special, special Robert Audi, Andrew Koppelman, Cecile Laborde	4 special, not special William Marshall

A more recent response among some liberals – Dworkin is a good example as is also Brian Leiter in his book, *Why Tolerate Religion?* – has been to argue that religion is not "special" in either case: it is not religion *per se* that is prohibited by the establishment clause, but any comprehensive ethical view that citizens could reasonably reject. Similarly the "free exercise" clause provides a basis for granting not only religious accommodation but also accommodations for any sincere matters of conscience or what Laborde calls "identity-protecting commitments" (215). This is a strong response to the claim that religion is "special" – and one that remains controversial. For example, it has been charged that this view – and with respect to both clauses – inevitably leads to anarchy.[7] In the first case, because it is not clear there is any basis for justifying law if all ethical views are excluded; in the second "free exercise" case because it leads to what many regard as frivolous exemptions – say, for attendance at football games, etc. [see Table 2].

[7] Dworkin 2013, 124; see also Schwartzman 2014, 1321-1337.

Table 2 • Is conscience, or principled conviction about the good, special?
(see Schwartzman 2012, for diagram and references)

	Accommodation	*Non-accommodation*
Inclusive	1 level-up, level-up G. Gaus and K. Vallier	2 level-up, level-down B. Leiter, *Why Tolerate Religion?* Peter Jones
Exclusive	3 level-down, level-up J. Quong; C. Laborde; *Public reasons liberalism* Habermas	4 level-down, level-down Strong secular republicanism? some versions of luck egalitarianism?

There is another criticism, though, and one that has been especially directed at political liberalism and its tendency to be inconsistent in its views about religion. With respect to establishment, it displays a preference to "level-down": to argue that no comprehensive views (not only religious ones) can be appealed to in justification of law. By contrast, with respect to the "free exercise" clause, it reveals a tendency to "level-up" – that is, to provide accommodations not only to religious minorities, but as a more general way to address various multicultural concerns.[8] It would (as above) seem to be more consistent to level-down in both cases; or to level-up in both cases. (Schwartzman has also suggested that position #4 in Table 2 might be the most egalitarian at least initially.) In my remarks here, I would like to see what might be said in favor of less consistency – perhaps in the name of greater equality!

In her recent book, *Liberalism's Religion*, Cecile Laborde defends a position that embraces this proposal.[9] On the one hand, she defends what she calls "minimal secularism" and a "restrained neutrality". Religion is not special; but still there are good reasons (good public reasons) for excluding appeals to comprehensive views in the justification of law (or at least constitutional

[8] See, for example, the criticisms of Barry 2001.

[9] Laborde 2017.

essentials), when those comprehensive views fail to meet various conditions (ch. 4). She thus adopts what I've called the "levelling-down" view with respect to the establishment clause. At the same time, though, she advocates a "levelling-up" view with respect to the free-exercise clause (see chapter 6). Consequently, in view of her arguments it is not clear that there remains any significant role for toleration strictly speaking and so, in some respects, some of Newey's reservations would seem to be confirmed: The democratic state need not tolerate unreasonable views – in the specific sense that those views should not play a role in the justification of basic law or constitutional essentials – and it should "accommodate" and not simply tolerate views that are unfairly disadvantaged by otherwise "neutral" practices.

1. The "establishment" clause

In ways that bear resemblance to other "post-secular" accounts of the relation between religion and politics (e.g., Maclure, Taylor 2011), Laborde defends "minimal secularism" and "restrained neutrality" against various alternatives that advocate a more "inclusivist" interpretation of the establishment clause. For example, she rejects Gaus and Vallier's defense of inclusivism on epistemic grounds. According to them, the epistemic criterion for public reason should not be "shareability" (Quong 2011) but rather "intelligibility" by which they mean that comprehensive doctrines and viewpoints must be understandable from the agent's own point of view even if those agents don't otherwise accept them as true or even reasonable. Reasons that are in this sense intelligible should not be excluded from playing a role in political justification. This is clearly offered as a widely inclusive view in which few reasons are excluded from playing a role in justification. Laborde rejects this view on the grounds that it fails to respect citizens for whom those reasons might not be accessible. Accessibility, in contrast to intelligibility, requires that reasons be followable by others who do not share the comprehensive ethical view in which those reasons are located. Inaccessibility is however not a feature only of religious views – some feminist views, for example, might also be inaccessible – and, she argues, some religious views may indeed be accessible (see her remarks on Waldron on Locke). Accessibility thus admits a wider range of reasons than some stronger secular accounts (Audi 2011), but still qualifies as an "exclusivist" view.

At the same time, Laborde is critical of other defenses of exclusivism for their failure to clarify sufficiently the relevant distinction between public and non-public reasons. For example, she is critical of those who simply stipulate an identity or isomorphism between reasonable views and those that embrace political liberalism.[10] But she is also critical of views, such as Jonathan Quong's, that attempt to defend a distinction between public and non-public reasons solely on epistemic grounds. (For her, accessibility is a necessary but not sufficient basis for distinguishing public from nonpublic reasons.) As she notes, Quong has proposed a distinction between foundational and justificatory disagreements and suggests that, while disagreements about the good are foundational or go all the way down, disagreements about justice are justificatory in character – they presuppose a liberal set of political values in terms of which such disagreements might finally be settled (even if they are not yet settled) (98f.). Though she grants that this is an improvement upon a stipulative resolution, she argues that it nonetheless fails since it does not answer what she calls the "jurisdictional boundary problem" (104). According to her, the distinction between public and nonpublic reasons (and so, ultimately too, the distinction between matters of justice or right and conceptions of the good life) are not ones that can be settled on epistemic grounds alone but rather require an exercise of state power. In this respect, her view once again would seem to be closer to Newey's view about the fundamental role played by the state's interest in maintaining peace and security.

Laborde's own solution is however somewhat perplexing. I quote her at length: "Theorists of liberal neutrality tend to assume that the right and the good are self-evident categories of moral reasoning; yet, clearly, they have evolved historically and are themselves the sites of foundational political disagreement. Disagreement about justice goes deeper than Quong admits… It depends on a prior identification of which areas of social life are justice-apt. And this determination cannot be made without judgments of substantive, metaphysical, and ontological question – judgments that ultimately it is the province of the state to make… In sum, it looks as though critical religion theorists have a point when they say that liberal neutrality assumes a prior conception of the legitimacy of the state as a 'meta-jurisdictional' authority" (109).

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[10] See, for example, her comments on Lecce 2008.

This statement is surprising given that it is made by someone who identifies herself as a public reasons theorist, even if one with a "republican" twist.[11] The apparent inconsistency is, I believe, due to a significant ambiguity in how her remarks are interpreted. On the one hand, they could be read as an endorsement of the "anti-political" critique of contemporary political liberalism advanced by Newey and others. Attempts to give a philosophical or epistemic account of the distinction between public and non-public and, beyond that, reasonable and unreasonable (since the latter are ones that fail to incorporate the proper distinction between public and non-public), all reflect attempts to escape the 'circumstance of politics'. And, as Newey has argued, it is precisely the role of the state to impose limits of toleration between symmetrically situated parties, each of whom claims that the other is behaving in an intolerable manner.[12] Her own claims that it is exclusively states (or the democratic state) that have *Kompetenz-Kompetenz*, that is: "The authority to define their own spheres of competence, as well as those of other institutions" (Laborde 2017, 165) would seem to lend some support to this reading.

However, this reading does not fit well with other remarks Laborde makes about the legitimacy of political authority. Of course, in one sense the state must be the final arbiter – the state does not share this *Kompetenz* with other institutions as some recent pluralists and "new religion institutionalists" have argued.[13] But there is still a question of the sort of considerations on which the state should base its decisions and exercise its jurisdictional power. On this second reading, Laborde's claim about the state's jurisdictional authority is also a normative claim that such decisions must be democratically made, where this assumes too in accordance with core liberal values (159). To be sure, this is not solely an epistemic matter; but it is also not an arbitrary exercise of power, as a more Schmittian view might have it. For public reason liberals – and here I include both Rawls and Habermas – the democratic process must also trust itself to a liberal political culture that informs those democratic procedures. Or, as Habermas puts it, democratic procedures must meet a liberal political culture halfway if they can make

[11] Laborde 2013, 67-86. For a different interpretation of the relation between state neutrality and accommodation, see Baynes 1992, 50-69.

[12] Newey 2013, ch. 3.

[13] For a critique of this new pluralism see Cohen 2017.

any claim to legitimacy.[14] There is then no *a priori* guarantee of a convergence among (reasonable) views on fundamental values (in a way that perhaps Quong assumes, though his "internalist" defense leaves this unclear), but neither is the appeal to democratic procedure an attempt to escape the "circumstances of politics". Rather, I would like to suggest, it reflects a deep reliance on what Habermas calls "democratic common sense" ("Faith and Knowledge") or what Rawls also calls a "reasonable faith".[15] As Rawls argued in his 1980 Dewey lectures, even the theoretical construction of the 'original position' must, in the last analysis, be acceptable to each citizen viewed as a free and equal member of society. More poignantly, in his response to Habermas' suggestion that he (Rawls 1996) had assigned a less modest role to philosophy than Habermas himself, Rawls replied, "In justice as fairness there are no experts. Heaven forbid".[16] Rawls too maintains that ultimately any contributions offered by 'students of philosophy' must be received as that of one citizen among others (427). Just as for Habermas "quasi-transcendental" reconstructions cannot displace common sense knowledge but at most help to guide it, for Rawls "philosophy as defense" can only hope to make explicit what is found in common human reason defending it against more pretentious attempts in grounding.[17] In other words, and to bring home the point of this second interpretation, the claim that jurisdictional authority belongs to the democratic state is neither pure philosophy imposed from above nor an acquiescence to the (sheer) "circumstances of politics". It is an expression of democratic common sense or reasonable faith shared by Habermas and Rawls. (Of course, this claim does not deny that there is much more to be said about the character and limits of the notion of reasonableness implicit in this idea of a reasonable faith.[18])

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[14] Habermas 1996, 461.

[15] For further discussion, see my comparison of Habermas and Rawls in Baynes 2016, ch. 8.

[16] Rawls 1996, 427.

[17] Rawls 1999, 306.

[18] This idea of a reasonable faith also seems (to me) close to Rainer Forst's recent defense of an ideal of toleration in the tradition of Pierre Bayle (in contrast to Kant), see his *Normativity and Power*, ch. 5. Forst's own debate with Newey concerns the question of whether there is an impartial moral point of view that can ground the "limits of toleration" that is not itself subject to the "circumstances of politics". My own view is that the idea of such an impartial moral grounding of these limits remains part of the hope of a "reasonable faith" – and what I have called the "dialectic" of moral and political constructivism (Baynes 2016, 124f).

2. The "free exercise" clause

My remarks on Laborde's interpretation of the free exercise clause will be brief (since establishment is controversial enough!). Again, to locate her position, she defends what I have labeled #3 in my diagram: exclusive accommodationist. Thus, while she argues that we should "level-down" when it concerns public justification – that is, on her view, public officials (at least) should not invoke reasons that are not accessible and that, even if they are accessible, otherwise infringe on the 'civic equality' of citizens in the justification of policies – she also claims that we should "level-up" when it concerns accommodating those who might be (unfairly) burdened or disadvantaged by the impact of those policies. For example, it is appropriate as a matter of justice to accommodate those who are unfairly burdened by employment laws that are based on secular considerations (see critiques of *Sherbert v. Verner*, which held Seventh-Day Adventist was not entitled to unemployment benefits). Such accommodations should not be restricted to religious minorities but should also be extended to any minority group whose "integrity-protecting commitments" are disproportionately burdened (203). In other words, religion *per se* is not special.

Laborde thus argues against positions like that of Brian Leiter who defend a "level-down" view on accommodation. On his view accommodations for those who have been disadvantaged should be rare and he argues against "burden-shifting" in favor of those who have been disadvantaged by the fact that they are simply in the minority. His view seems to be that individuals should be willing to bear the costs of their more expensive tastes, even when they are based on considerations of principle. Laborde by contrast argues that this gives unfair advantage to the status quo. She also argues that, in contrast to Leiter's attempt to explain any accommodations by appeal to a principle of toleration alone, accommodations can and should also be based on considerations of equal respect. Exemptions from general laws, for example, are thus not based on the claim that a majority permits a minority practice to exist despite their disapproval of that practice but on a claim that those disadvantaged have a right to equal opportunity of core life-choices based on considerations of equal respect (see also Alan Patten). As she puts it, "all individuals should have a fair opportunity not to have their 'identity-protecting commitments' disproportionately burdened" (228). She cites in her support the UK case of *Ahmad v. Inner London Education Authority* (1976) as an illus-

tration: Accommodating Ahmad's Friday work schedule is a means to secure equal opportunity in the context of the advantaged Christian majority (231).

Of course, this view raises a number of difficult considerations – are those who believe their integrity is burdened by laws permitting same-sex marriage also entitled to accommodations (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 2017))? Are private organizations entitled to similar sorts of exemptions even if this imposes significant costs on their employees? (*Burwell v. Hobby Lobby Stores*, 2014).[19] Unfortunately, there is not space here to pursue these extremely difficult questions further. Laborde's general strategy is nonetheless clear: One should "level-up" not "level-down".

Conclusion

Laborde's extended defense of what I have called an "exclusive accommodationist" position is at one level quite far from Newey's reservations about the place of toleration in contemporary democratic theory. Yet, even if it is for different reasons, they seem to be in agreement about the limited role for toleration in contemporary democratic politics. Rawls's description of political liberalism as the consequence of applying toleration to philosophy itself is, it seems, quite misleading: What political liberalism calls for, on the part of the state, is not for it tolerate (reasonable) conceptions of the good life (since that implies a negative judgment that one then has reason to refrain from acting on). Rather, it calls for "abstinence" (in Raz's memorable phrase): the state should not take a position one way or the other concerning the truth or rightness of the view in question (though Raz is of course himself critical of this view). This means that on an "exclusivist" reading of the establishment clause one should not take a further position on the merits of the "ethical view" in question; rather, from the point of view of justice, all (reasonable) views are equal and none should have any "special" status (leveling-down). Ian Carter has more recently extended this idea to assessments of the normative status of citizens themselves in connection with what he calls "opacity respect".[20] What this suggests is that, in exercising abstinence, one is not simply "tolerating" a fellow citizen (since

[19] See, more generally, Schwartzman 2016.

[20] Carter 2011, 538-571; Carter 2013.

one refrains from making a judgment at all). One takes recognition respect as a 'range property' (Rawls) and abstains from making any further judgment of the degree to which a person exhibits it. Further, with respect to the "free exercise" clause again the primary idea seems not to be one of "tolerating" minorities, but rather of attempting to be sure that minorities are, through accommodation, respected as equals. So, with respect to the "non-religious" reinterpretations of the two religion clauses, it is not clear on this rendering of the "exclusive accommodationist" view that toleration is an appropriate term or a relevant virtue (at least from the point of view of the state). As I suggested in my opening remarks, this seems to yield an unexpected convergence with political liberalism on Newey's thesis that "toleration is a rubber duck"!

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