

TAKING LIBERALISM AND RELIGIOUS LIBERTY SERIOUSLY: SHIFTING OUR NOTION OF TOLERATION FROM LOCKE TO MILL

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INTRODUCTION: TOLERATING THE INTOLERANT

There is an uneasy alliance between our national commitment to liberalism and our equally fundamental commitment to religious liberty. Liberalism is a political philosophy that presumes the central importance of individual agency in the justification of social or governmental arrangements.¹ Jeremy Waldron states this presumption as follows:

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¹ It is usually a mistake to conceive a political philosophy as a monolithic doctrine. The political philosophy of "liberalism" is no different. Instead, it is more like a presumptive

[L]iberals are committed to a conception of freedom and of respect for the capacities and the agency of individual men and women, and . . . these commitments generate a requirement that all aspects of the social world should either be made acceptable or be capable of being made acceptable to every last individual.²

Unfettered religious practice, on the other hand, is not necessarily committed to the central importance of individual agency, especially when that agency might jeopardize the salvation of the individual or the salvation of others. Religious lifestyles are thereby often characterized as lifestyles prone to the illiberal use of government, forcing individuals to accept some tenet or behavior they would not accept if given the choice.³ It is all the more surprising, therefore, that liberalism, whatever its other alleged shortcomings, is properly recognized for its early and ardent stand in protecting religious practice.⁴ Continuing in the liberal tradition, our

orientation or stance taken to questions of governmental arrangements and the role of individuals within these arrangements. As we shall see, there can be significant differences of opinion and viewpoint, different “brands” if you will, within the presumptive orientation. Cf. Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 306 n.4 (1990) (“Despite the disagreement as to the specific content of ‘liberalism,’ there is no obviously preferable replacement for the term as a description of a family of political ideas and practices that emphasize the importance of individual freedom and of preserving space for personal autonomy free from collective control.”).

² JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, at 36–37 (1993).

³ See, e.g., Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 690 (1993) (“[A] liberal democracy must make special efforts to prevent religious domination of one group by another . . . [because] the authority structure common in many religions can make a desire to dominate other groups natural and can provide a rationale for it.”); Christopher L. Eisgruber, *Madison’s Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 373 (1995) (characterizing religious lifestyles by their “resistance to persuasion . . . and resistance to compromise—mak[ing] religious factions an especially virulent threat to the vigor of republican politics”); William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 859 (1993) (maintaining that if religion is “unleashed as a political force” it may “lead to a particularly acrimonious divisiveness among different religions” and may be “easily transformed into movements of intolerance, repression, hate, and persecution”). Even the Supreme Court on occasion has engaged in an illiberal characterization of religion:

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.

Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) (citations omitted).

⁴ See, e.g., JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (The Liberal Arts Press 2d ed. 1955) (1689) [hereinafter *FIRST LETTER*]; JOHN LOCKE, *A SECOND LETTER CONCERNING TOLERATION* (1690), *reprinted in* 6 *THE WORKS OF JOHN LOCKE* 59–137 (1963); JOHN LOCKE, *A THIRD LETTER FOR TOLERATION* (1690), *reprinted in* 6 *THE WORKS OF JOHN LOCKE* 139–546 (1963); JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENC’D PRINTING*

nation's earliest legal pronouncements were firmly committed to protecting, at least in principle, if not in fact, each person's religion.⁵ Indeed, it would be difficult to make any meaningful sense of the language of the First Amendment if this were not the case.⁶ And therein lies the rub—our commitment to liberalism requires us to tolerate religious lifestyles that do not necessarily tolerate the lifestyles of others.

Assuming religious lifestyles are properly characterized as illiberal lifestyles,⁷ conflict arises where our commitment to individual agency insists that we tolerate the illiberal lifestyles of others. Faced with such conflict, we have to ask ourselves the following difficult question: At what point do the failures of religious lifestyles to commit to a respect for individual agency⁸ strip those lifestyles of their presumed protection under the principle of liberalism? At what point can, and should, we stop tolerating the intolerant?

This is a fundamental question for a liberal society, such as ours, and it generates the corollary question of the proper scope of religious toleration in a society committed to liberalism. This question brings into proper focus the central concern of the Religion Clauses, namely religious tolerance, and provides us with a yardstick to gauge the adequacy of the Supreme Court's varying interpretations of these clauses.⁹ The primary

(1644), reprinted in *THE TRADITION OF FREEDOM* 3–32 (Milton Mayer ed., Oceana Publ'ns 1957).

⁵ See U.S. CONST. amend. I.

⁶ See *id.* (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .”).

⁷ But see, e.g., Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 642 (1999) (arguing against the view that religious lifestyles are inherently intolerant, or at least more intolerant than nonreligious lifestyles, and claiming that “[r]eligious citizens and groups are very much like other ideologically oriented citizens and groups, for good and for ill, and are properly subject to no limitations on democratic participation that are not equally applicable to others”).

⁸ Of course, from *within* the alleged intolerant perspective, a commitment to the individual may arguably be best protected by denying that individual agency over her actions, for example, if such denial would lead to her salvation.

⁹ Accordingly, I join the growing list of commentators who contend that the Supreme Court's recent shift to the even-handed treatment of religion and non-religion—what the Court terms “neutrality”—as the central value protected by the Religion Clauses, is misguided. See, e.g., Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 498–531 (2004) (providing a sustained critique of the Court's current concept of religious neutrality); Smith, *supra* note 1, at 353–56 (same); see also Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1016 (1990) (arguing for the right to exemptions for religious conduct then stating that “[t]he right to exemptions for religious conduct is more easily explained in terms of religious liberty than in terms of neutrality”); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 134–68 (1992) (questioning whether the current Court's “evenhanded” analysis is truly “neutral” and suggesting instead that

task of this essay is to suggest where the line between governmental tolerance and intolerance of religious lifestyles should be drawn and, thereby, to outline the proper contours of our notion of religious liberty.¹⁰

Liberals of different stripe provide us with different answers to the question of religious tolerance. We shall look in some detail at two answers provided by John Locke and John Stuart Mill. We shall see that our current national commitment is to a “thin” conception of religious liberty,¹¹ which protects religious belief, but not religious practice—a conception of religious liberty we inherit primarily from the writings of John Locke.¹² This thin conception of religious tolerance has taken two forms: (1) an early form that essentially required government to stay out of religious matters altogether and created an unnecessary tension between the free exercise and the disestablishment of religion,¹³ and (2) a recent form that allows for the inclusion of religious matters in the polity, but only on the condition that religious and nonreligious matters are regulated even-handedly, effectively eviscerating the free exercise of religion.¹⁴ I

it is slanted towards majoritarian religions and secular decision-making). For my criticism of the Court’s recent shift to neutrality or equal treatment as the primary analytical construct for the Religion Clauses, see *infra*, Part III.

¹⁰ I do assume a fairly close and direct relationship between the amount of toleration afforded and the amount of individual agency tolerated. The greater the tolerance afforded, the greater the scope of individual agency tolerated, and vice versa.

¹¹ I use the words “thin” and “thick” throughout this essay to indicate the extent and depth of the toleration afforded. For example, if our conception of liberalism requires us only to tolerate an individual’s thoughts and feelings, but not her actions, life projects, and associations, then the toleration is “thinner” than a commitment requiring the toleration of all these components of individual agency. The words “weak” and “strong” are close to the meaning intended but for the fact that they more explicitly connote moral evaluations. My usage differs somewhat from Rawls’s usage, as when he describes the primary goods selected in the original position as based on a “thin” theory of goodness. See JOHN RAWLS, A THEORY OF JUSTICE § 60 (1971). While both our uses of “thin” imply a lack of substance or depth, my use does not imply an underlying shared consensus as does Rawls’s usage.

¹² See FIRST LETTER, *supra* note 4.

¹³ The Supreme Court’s early establishment jurisprudence expansively read the Establishment Clause as preventing government from either advancing or inhibiting religion. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). During this same period, however, the Court also read the Free Exercise Clause as requiring government to exempt religious practice from burdensome regulations, which arguably requires government to “advance” religion and violates the Court’s disestablishment jurisprudence. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 218–19 (1972).

¹⁴ Perhaps in reaction to the above conflict, see *supra* note 13, the Court recently read the Establishment Clause as allowing government support of religion if there is a wide class of recipients receiving the support and if the support is for secular purposes. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002). During this same period, however, the Court also read the Free Exercise Clause as requiring government to treat religious practice just like it treats any other secular practice. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990)

will explain this thin notion of toleration and why it is inadequate in Part I of the essay.

In Part II, I will argue that there is a more adequate conception of religious toleration available within the liberal tradition. This notion of religious toleration is derived primarily from John Stuart Mill's work, *On Liberty*.¹⁵ I hope to show that this conception of toleration avoids the main pitfalls of the dominant understanding that we have inherited from Locke.

Finally, in Part III, I will apply these competing conceptions of religious toleration to the Supreme Court's current jurisprudence concerning the Religion Clauses. I hope to demonstrate that many of the alleged problems in this area are avoided, if not solved, by shifting our notion of religious toleration from Locke to Mill.

Before I discuss the answers presented by Locke and Mill, I must acknowledge that the difficulties of the main task before us are heightened by the presence of two modern social developments. First, there has been tremendous expansion of government since our nation was founded, much more since the time when Locke and Mill wrote.¹⁶ If we view the relationship between government regulation and religious liberty as a zero-sum game, then as government grows, religious liberty correspondingly shrinks. On this view, the growth of government signals the effective decline of religious freedom. As we shall see, the rise of the modern regulatory state places extreme pressure on Locke's notion of religious tolerance. Second, there has been a tremendous proliferation of religious communities in our nation since our founding.¹⁷ I will also discuss what effect this proliferation of religious communities has on our conception of religious tolerance. The notion of tolerance proffered here assumes that any adequate account of the relationship between liberalism and religious liberty must embrace these current social realities.¹⁸

(arguably eviscerating any independent protection afforded to religion by the Free Exercise Clause); see also *infra* Part III (criticizing the Court's current Religion Clauses jurisprudence).

¹⁵ John Stuart Mill, *On Liberty* (1859), reprinted in 43 GREAT BOOKS OF THE WESTERN WORLD 267 (Robert Maynard Hutchins et al. eds., 1952) [hereinafter *On Liberty*].

¹⁶ See generally, Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 104-07 (2000) (providing a brief overview of government growth in the twentieth century).

¹⁷ See MARY FARRELL BEDNAROWSKI, AMERICAN RELIGION: A CULTURAL PERSPECTIVE 2-4 (1984) (noting that more than 1200 different religions are practiced in the United States today).

¹⁸ As innocuous as this claim sounds, these societal developments have effectively been ignored by originalists in the field, and the Supreme Court's current jurisprudence in this area often provides little evidence that it is willing to embrace them.

I. JOHN LOCKE: A LETTER CONCERNING TOLERATION

John Locke's *A Letter Concerning Toleration* shook the political world of the late 1600s with its bold statement supporting religious toleration at a time when intolerance of religious choice was the norm. It is justly praised as a tremendous advance over previous protections afforded religion. In the late 1600s, governments coerced religious choice, without even seeing the need to justify such coercion. Given this brutish political climate, even Locke's failure to tolerate Catholics and Atheists is understandable¹⁹ and does not gainsay his progress towards a more robust protection of religious liberty. After Locke's argument for toleration, such facile assumption of government power could no longer be justified. So how did Locke propose to protect religious liberty in a climate of largely unquestioned government coercion of religion?

A. The Realm of Religious Belief

I shall term Locke's answer to the toleration and protection of religious liberty "thin dualism." First, we need to take a closer look at Locke's dualism. Locke accomplished the task of protecting what he valued as the most important component of religious liberty, religious belief, by sharply separating the realm of religious belief from the realm of religious practice—separating individuals' religious beliefs from their social actions, including their religious actions. He claimed that individual religious beliefs are absolutely immune from government regulation, because they essentially occur in a realm (in our heads or hearts) separate from the realm of action that includes the physical restraints of governmental coercion. Locke wrote: "For no man *can*, if he would, conform his faith to the dictates of another. All the life and power of true religion consist in the *inward* and full persuasion of the mind; and faith is not faith without believing."²⁰

Governmental power, on the other hand, "consists only in *outward* force," and "such is the nature of the understanding that it cannot be compelled to the belief of anything by outward force."²¹ This is really an

¹⁹ See FIRST LETTER, *supra* note 4, at 50–52. In fairness to Locke, he excluded both groups on (arguably) secular grounds. Locke excluded Catholicism from toleration, because he believed that Papist doctrine undermined the absolute sovereignty of secular government in the realm of social interactions, and he excluded Atheists from toleration primarily because he believed they would not make good citizens without a belief in God to support the making of "[p]romises, covenants, and oaths." *Id.* at 52. As we shall see, such treatment of religious lifestyles is permitted under Locke's theory if the reasons for the treatment are secular. See *infra* notes 27–31 and accompanying text.

²⁰ FIRST LETTER, *supra* note 4, at 18 (emphasis added).

²¹ *Id.* (emphasis added).

argument from futility or impossibility. Locke is claiming that government coercion of religious belief is futile and impossible, because the act of coercion and the “act” of religious belief take place in separate ontological realms; therefore, any causal connection between them is impossible. Locke stated that government coercion of religious belief is “impertinent,” because “penalties are no way capable to produce such belief. It is only light and evidence that can work a change in men’s opinions; which light can in no manner proceed from corporal sufferings or any other outward penalties.”²² This separation of realms, which Locke called “jurisdictions,”²³—an inward realm of belief, consciousness, and thought; and an outward realm of action—is what I mean by the assumption of dualism in Locke’s theory.

To put it mildly, Locke’s proposed solution for the protection of religious belief rests upon an overly optimistic epistemology. Apply enough pressure to the thumbscrews, for enough time, and we will begin to believe whatever is asked of us! The findings of modern social and behavioral science counsel a cautious skepticism concerning Locke’s understanding of the dynamics of belief. Indeed, it is arguable that our religious beliefs, assumed by Locke to be impervious to social influence, are as much a product of social forces as a result of individual choice. Mill, recognizing the power of cultural forces over our beliefs, informed the proud Christian “that the same causes which make him a Churchman in London, would have made him a Buddhist or a Confucian in Pekin.”²⁴ Our cautious skepticism concerning Locke’s understanding of the dynamics of belief is based properly on the wealth of evidence provided by the social sciences that strongly belies his quaint optimism.

Such skepticism also spills over to an important corollary of Locke’s dualism; namely, if religious belief is immune from government coercion, then government is acting irrationally when it attempts to coerce religious belief. Locke stated, “the care of souls cannot belong to the civil magistrate because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind.”²⁵ Unfortunately, if government coercion *can* effect religious belief, and history is replete with evidence that it can, then we will need another reason for preventing government coercion of religious belief than Locke’s proffered reason that such efforts are impossible.

²² *Id.* at 19.

²³ *Id.* at 17.

²⁴ *On Liberty*, *supra* note 15, at 275.

²⁵ FIRST LETTER, *supra* note 4, at 18.

B. The Realm of Government Regulation

As a consequence of his dualism, Locke placed all social action, and more importantly for our purposes, religious practice, within the realm susceptible to the regulatory actions of government. This move in itself is not problematic. Indeed, religious practice does occupy the same realm as other actions, including government actions. The difficulty is Locke's further assumption that all actions within the realm of social action are properly subject to, with one proviso, government control. Just as the individual absolutely rules the realm of personal belief, the government (essentially) rules the realm of all social interactions, including the "outward worship"²⁶ of religious practice. Locke's trade-off is, therefore, that government can regulate, even curtail, religious practice, without affecting the core of religious liberty, which for Locke is religious belief.

However, there is one important limitation to government's regulation of the realm of social interaction, namely, its reasons for regulation must not be religious. For Locke, to hold otherwise is to violate the underlying dualism. Locke wrote that "the magistrate has no power to impose by his laws the use of any rites and ceremonies in any church."²⁷ Locke's famous example is animal sacrifice. The government cannot mandate that a particular religion either partake of or discontinue animal sacrifice, if the government's regulation is based on religious grounds.²⁸ But government may curtail the slaughter of animals, including religiously mandated animal sacrifice, if it can present a secular reason for the regulation. Locke's famous passage reads as follows:

But if peradventure such were the state of things that the interest of the commonwealth required all slaughter of beasts should be forborne for some while, in order to the increasing of the stock of cattle that had been destroyed by some extraordinary murrain, who sees not that the magistrate, in such a case, may forbid all his subjects to kill any calves for any use whatsoever? Only it is to be observed that, in this case, the law is not made about a religious but a political matter; nor is the sacrifice, but the slaughter of calves, thereby prohibited.²⁹

The impact on religious practice is somewhat mitigated in the above example by the regulation being imposed only for a limited duration. But, this time limitation is not necessary to the argument. Locke did not claim that only regulations of religious practices of limited time duration are justifiable. Locke said that if the regulation is secular, in "the interest of

²⁶ *Id.* at 35.

²⁷ *Id.* at 39.

²⁸ *Id.* at 39–40.

²⁹ *Id.* at 40.

the commonwealth,” then the regulation is justifiable, regardless of how intrusive the regulation is to the religious practice in question. It is not the impact of the regulation that is important; it is the rationale for the regulation that is important. In modern terminology, government regulation of religious practice must be “formally neutral,” not directed at regulating the practice *because* it is religious, but it does not have to be “substantively neutral,” meaning the *effects* of the regulation can effectively extinguish the practice *if* it is based on secular reasons.³⁰ Jeremy Waldron noted:

What matters for Locke’s purposes is not coercion as such or its effects, but the reasons that motivate it. If the reasons are religious, the coercion is irrational. But if the reasons are economic or political, then the argument for toleration gets no grip despite the fact that the coercion may discriminate unequally in its consequences against a particular group.³¹

Locke’s theory provokes the question: What if government believes it has secular reasons for regulating religious practice, but religious adherents subject to the regulation do not agree? Note that this is simply a recasting of our question concerning the proper scope of religious toleration mentioned in the introduction.³² According to Locke, the religious adherents do not “deserve a dispensation,” they must follow the law.³³ Their only recourse is to divine compensation,³⁴ for in the realm of social interactions, the presumption is in favor of government. Locke summed up his position, “[w]hatsoever is lawful in the commonwealth cannot be prohibited by the magistrate in the church,” but “those things that are . . . forbidden by laws, those things ought not to be permitted to churches in their sacred rites.”³⁵ He concluded with the admonition that “the magistrate ought always to be very careful that he [does] not misuse his authority to the oppression of any church, under pretense of public good.”³⁶ Of course, it will be the government under Locke’s theory that decides whether an asserted public good is “pretense” or not.

³⁰ See Laycock, *supra* note 9, at 999–1006 (explaining the difference between “formal” and “substantive” neutrality).

³¹ WALDRON, *supra* note 2, at 105.

³² See *supra* text accompanying notes 7–8.

³³ See FIRST LETTER, *supra* note 4, at 48.

³⁴ *Id.* at 49.

³⁵ *Id.* at 40.

³⁶ *Id.*

C. Locke's Answer: "Thin Dualism"—Tolerate Religious Belief, Not Religious Practice

To gauge the success of Locke's answer to the question of religious toleration, we must gauge the importance of religious practice to our conception of religious liberty. The general implication of Locke's answer is that the importance of individual agency lies only in the act(s) of believing, or choosing to believe, but not in the life projects, life plans, and social associations that result from these beliefs. While an important component of the value we place on individual agency is constituted by freedom of choice (belief), equally important is the value we place on individuals' freedom to act out, and on, their beliefs. The problem with Locke's theory is that it does not even entertain this presumption; instead, government is presumed to have the power, and the right, to regulate all outward actions, so long as it does not regulate them for religious reasons. Of course, this presumption of allowing individuals to act out their beliefs has limits. But, Locke's theory leads to the counterintuitive position that even *tolerant* acts can be regulated by government, because they are *acts* and thereby are within the government's proper domain. Locke's theory of tolerance is thin indeed. Instead, the theory we seek should be able to distinguish between tolerant acts, which should not be regulated by government, and intolerant acts, which (arguably) should be regulated by government. Locke's solution effectively denies individuals agency over their actions and places *that* agency under a presumption of government control. This is really no solution at all if our goal is to make government accountable to individual agency, as a serious commitment to liberalism would require.

Government's control over its own outward acts also causes a problem under Locke's system, and the problem is exacerbated if we view Locke's notion of limited government in the context of modern expanded governments and administrative states. It only stands to reason that as government regulation extends to more areas of social life, the potential effects, good or ill, of government regulation also increase. Unfortunately, the effects of government regulation on individual lifestyles, including religious practice, play no role in Locke's notions of coercion or tolerance.³⁷ According to Locke, government does not have to tolerate the objections of religious adherents, or of any other lifestyle for that matter, if their objections are based on the *effects* of government regulation of their religious practices. Such complaints, if they are to be successful, must be based on the reasons for the regulation. The problem here is that it is

³⁷ See *supra* notes 29–31 and accompanying text.

government that determines whether its reasons are properly secular or improperly religious. It should perhaps be noted at this point again that Locke's position is counter to a serious commitment to liberalism, a political philosophy grounded on governmental accountability to individual agency.

Of course, there is the possibility that enough complaining could prod government to change the law or eventually lead to a change in government. However, this places minorities, including religious minorities, at a severe disadvantage because they do not possess the political clout to change government or its laws. This is really no solution at all if our goal is to make government more directly accountable to individual agency, and not the other way around.

Locke is properly recognized as a major contributor to a more liberal conception of religious toleration because protecting what individuals think, say, and believe about religion is no mean feat. Indeed, as we shall see, the protection of religious belief, and only religious belief, is still the dominant conception of religious liberty under First Amendment jurisprudence some three hundred years later. Nevertheless, Locke's restriction of religious liberty to only the "act" of belief and his refusal to extend the contours of religious liberty to the tolerant social acts constituting religious practice are the reasons why I term Locke's theory of religious toleration as a particularly thin theory of protection.³⁸

Locke's answer to our original question concerning how much tolerance must be extended to religious liberty is now squarely before us. His brand of liberalism commits us to the view that we must tolerate intolerant, as well as tolerant, religious beliefs, because any attempt to regulate belief is futile and impossible. Thus far, so good, although modern social science belies this line of justification. But his theory also commits us to the view that government does not have to tolerate the religious actions or practices of others, even if they are *tolerant*. As long as our reasons for regulating these actions are "in the interest of the commonwealth," which government solely determines, the religious nature of the actions regulated does not matter and the effects of government action on those practices do not matter at all!

Locke's answer is incomplete and probably inconsistent. It is incomplete because it regulates tolerant and intolerant actions indiscriminately without demonstrating why we should not distinguish between the two. More importantly, it is arguably inconsistent because it regulates tolerant actions without demonstrating how such regulation is

³⁸ See *supra* notes 11–12 and accompanying text.

required by our commitment to liberalism. Arguably, just the opposite is required by our liberalism: we should tolerate, not regulate, tolerant religious acts.

II. JOHN STUART MILL: ON LIBERTY

Nearly two hundred years after Locke wrote his famous letter, there was a movement afoot in England to prohibit the sale and consumption of alcohol. John Stuart Mill quoted the spokesman of the movement, Lord Stanley, as follows: “All matters relating to thought, opinion, conscience, appear to me to be without the sphere of legislation; all pertaining to social act, habit, relation, subject only to a discretionary power vested in the State itself, and not in the individual, to be within it.”³⁹ Note the similarity to Locke’s dualism in Lord Stanley’s argument. Government can regulate all outward conduct because it is inherently social and within the sphere of legislation, while anything pertaining to individual agency is to be located within the inward sphere of personal thought. The concepts of liberalism and tolerance in mid-nineteenth century England had not changed significantly in nearly two hundred years.

Mill, however, was deeply troubled by Lord Stanley’s argument and claimed that “there is no violation of liberty which it would not justify.”⁴⁰ Mill attacked the argument’s unsupported dualism—unfettered inward thought versus government-controlled outward conduct—because it excluded “a third class, different from either of these, viz., acts and habits which are not social, but individual; although it is to this class, surely, that the act of drinking fermented liquors belongs.”⁴¹ The point of Mill’s criticism is clear—not all outward conduct is “social” and thereby subject to discretionary government control. There is a sphere of outward “individual” conduct where government regulation cannot be justified. To hold otherwise is to countenance a theory of governmental power where any violation of individual liberty can be justified. Mill then sets out to devise a principle of government regulation that will safeguard the sphere of outward “individual” conduct.

A. *The Harm Principle I: What Does Not Constitute “Harm”*

Mill stated his principle, the now-famous “harm principle,” as follows:

³⁹ *On Liberty*, *supra* note 15, at 310.

⁴⁰ *Id.*

⁴¹ *Id.*

That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else.⁴²

Although Mill sometimes used imprecise language in describing outward “individual” conduct,⁴³ we must not assume that the harm principle rests on another untenable dualism—this time, a dualism in the realm of action, between actions that only affect the agent, and actions that affect others.⁴⁴ Several commentators accused Mill of this error and proceeded to argue that there are no actions solely affecting the agent, because all actions, in principle at least, have an effect on others. Robert Paul Wolff, for example, pointed out that a devout Calvinist or vegetarian might be “harmed” because the “very presence in his community of a Catholic or a meat-eater may cause him fully as much pain as a blow to the face or the theft of his purse.”⁴⁵ Because all outward conduct potentially affects others, these critics contended that the harm principle potentially subjects all outward conduct to government regulation.

In fact, Mill is not guilty of bifurcating outward conduct by its effects. He properly acknowledged that even “individual,” self-regarding conduct potentially affects others.⁴⁶ The harm principle is proffered as a principle

⁴² *Id.* at 271.

⁴³ *Id.* at 305 (“The distinction here pointed out [is] between the part of a person’s life which concerns only himself, and that which concerns others.”).

⁴⁴ I do not mean to imply, of course, that Mill was only interested in protecting conduct and not protecting thought or belief. *See On Liberty, supra* note 15, at 274; *see also infra* notes 60, 80 and accompanying text.

⁴⁵ ROBERT PAUL WOLFF, *THE POVERTY OF LIBERALISM* 24 (Boston Univ. Press 1969).

⁴⁶ For example, Mill wrote:

How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them.

On Liberty, supra note 15, at 305. “When I say [affects] only himself, I mean directly, and in the first instance; for whatever affects himself, may affect others through himself.” *Id.* at 272.

of political justification, not as a metaphysical principle. The harm principle requires that some of the effects of our actions on others should not count as justification for the political regulation of those acts; it does not require that an individual's conduct have no affect on others in order to be protected. Specifically, the harm principle excludes as a method of political justification the moral distress that others have with our actions—what Mill terms the effects of our actions on others that result from their “notions of morality, taste, or propriety.”⁴⁷ This type of effect on others does not constitute “harm” under Mill's principle. Excluding morality, taste, and propriety as methods of political justification has significant consequences for Mill because “[t]he likings and dislikings of society, or of some powerful portion of it, are thus the main thing which has practically determined the rules laid down for general observance, under the penalties of law or opinion.”⁴⁸

For Mill, the sphere of outward “individual” conduct safeguarded by the harm principle includes: (1) those actions that primarily affect the agent alone (if there are such acts), and (2) acts that affect “other people solely insofar as they believe such actions to be right or wrong.”⁴⁹ As to both types of effects, there is no harm to others under the harm principle and individual independence from government regulation is, as of right, absolute. Joseph Raz succinctly stated this point: “The common way of stating [the harm principle's] point is to regard it as excluding considerations of private morality from politics.”⁵⁰ In other words, Mill did not deny that the presence of Catholics in the community might distress the devout Calvinist. Instead, he denied that such distress is a harm warranting government intervention or regulation. Precluding the moral distress of others as a method of political justification explains Mill's statement to the effect that the opinions of others concerning the wisdom or foolishness of an act does not constitute harm, and cannot, without more, justify government regulation of the act.⁵¹ In order to justify the political regulation of outward “individual” conduct, a different kind of harm to others is required.

⁴⁷ *Id.* at 270.

⁴⁸ *Id.*

⁴⁹ C. L. TEN, *MILL ON LIBERTY* 19 (1980) (quoting Richard Wollheim, *John Stuart Mill and the Limits of State Action*, 40 *SOC. RES.* 9 (1973)).

⁵⁰ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 413 (1986); *see also* WALDRON, *supra* note 2, at 115–33.

⁵¹ *See* text quoted *supra* note 42. *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (stating that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice”) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

B. The Harm Principle II: What Does Constitute "Harm"

An idea of the kinds of outward conduct that do cause harm to others can be gleaned from the examples that Mill lists in *On Liberty*. First, physical harm to others constitutes harm under Mill's principle.⁵² So the blow to the face of the devout Calvinist does constitute harm. In discussing the prevention of violent crime, Mill wrote that "definite damage, or a definite risk of damage" to another individual provides *prima facie* justification for government to regulate the action.⁵³ So the theft of the devout Calvinist's purse also constitutes harm. Additionally, the violation of "a distinct and assignable obligation to any other person or persons" also constitutes a *prima facie* justification for government regulation.⁵⁴ Mill explained that "[n]o person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty."⁵⁵ Harm also includes a public dimension requiring "each person's bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury and molestation."⁵⁶ Finally, the foreseeable risks of the above harms afford government the power to prevent crime and accidents before they occur, but there must be evidence close to "certainty," not "only a danger of mischief," for government regulation of pre-harmful acts to be justified.⁵⁷

Two points in Mill's discussion of the kinds of acts that cause harm to others are of particular importance. First, the class of actions that constitute "harm to others" is fairly circumscribed. Mill's discussion of these harmful acts essentially required that government not interfere with the physical agency of others.⁵⁸ Second, and more important, Mill's discussion presumed that outward "individual" conduct should not be interfered with *unless* it can be established that the conduct causes harm to

⁵² See *On Liberty*, *supra* note 15, at 303 (citing "molestation" as harm to others).

⁵³ *Id.* at 306, 313 (discussing the prevention of crime and accidents).

⁵⁴ *Id.* at 306.

⁵⁵ *Id.*

⁵⁶ *Id.* at 303.

⁵⁷ *Id.* at 313.

⁵⁸ Isaiah Berlin correctly claimed that Mill's notion of liberty is aligned with a "negative" notion of liberty. See ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 7 (1958) (explaining the "negative" notion of liberty as follows: "I am normally said to be free to the degree to which no human being interferes with my activity"). In fairness to Mill, he did recognize some "positive" liberties (duties) as well as the liberty of noninterference, but noted that "[t]o make any one answerable for doing evil to others is the rule; to make him answerable for not preventing evil is, comparatively speaking, the exception." *On Liberty*, *supra* note 15, at 272.

another, and only harm of a specific circumscribed sort will count.⁵⁹ Mill's presumption in favor of allowing individuals to act out their life projects, life plans, and social associations, unless there is established evidence of a particular kind of harm to others, is the vital component of individual agency missing from Locke's theory.

Mill wrote that the safeguarded region of outward "individual" conduct includes: (1) "the inward domain of consciousness;"⁶⁰ (2) "liberty of tastes and pursuits; of framing the plan of our life to suit our own character;"⁶¹ and (3) "liberty . . . of combination among individuals."⁶² Implementing Mill's harm principle, thus, reunited the components of individual agency that were separated by Locke—the freedom to make choices and the presumptive freedom to act out, and on, those choices.⁶³ Because Mill's principle achieves this deeper unity of individual agency, presumptively protecting both individual thought and outward lifestyle, I term Mill's principle a "thicker" answer to liberal tolerance than that afforded by Locke's thin dualism.

C. *Autonomy and the Diversity of Lifestyles*

Implementing Mill's brand of liberalism requires a community to redefine its notion of tolerance to include the right of individuals to act out, and on, their interests as well as to exclude the moral distress of its members as grounds for political regulation. These are serious political commitments for any community to make.

Mill's underlying justification for such serious commitments is centered on a fundamental commitment to individual autonomy. For Mill, individual autonomy—the self-authorship of our lives—is an intrinsic good. Constructing our lives for ourselves is as intrinsically important to us as the types of lives we construct.⁶⁴ Mill wrote that "[i]f a person

⁵⁹ Indeed, in situations where the competing interests of individuals are opposed, such as competition for trade, political, or professional positions, Mill claimed that the inevitable harm to some competitor does *not* justify government regulation. Mill wrote, "it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference." *On Liberty*, *supra* note 15, at 312.

⁶⁰ *Id.* at 272.

⁶¹ *Id.* at 273.

⁶² *Id.*

⁶³ *See supra* part I.C.

⁶⁴ To be sure, Mill does recognize that some lifestyles are better than others, and he does not ignore the value of achieving a greater consensus concerning the better lifestyles. But if this consensus is achieved by imposition, rather than through autonomous choice, he states that it would be "no trifling drawback" from the potential benefit that might be achieved from the universal recognition of the "best" lifestyles. *On Liberty*, *supra* note 15, at 287–88.

possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, *but because it is his own mode.*⁶⁵ Individual autonomy is also an essential ingredient of human happiness, regardless if it is used to achieve bad ends or to make bad choices.⁶⁶ He stated, “Where, not the person’s own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.”⁶⁷

If individual autonomy is intrinsically valuable, then Mill argued that the political procurement of the conditions necessary for autonomous lifestyles is also intrinsically valuable. According to Mill, individual autonomy requires two necessary conditions: “freedom[] and variety of situations.”⁶⁸ The condition of freedom required for individual autonomy is best achieved by government implementation of the harm principle; our choices and actions have enough room for exercise if the government does not interfere with our activities until we harm others. The condition of variety required for individual autonomy is best achieved by exposure to a wide range of beliefs, issues, and lifestyles; this exposure, in turn, is best assured by excluding the moral distress of others as a method of political regulation. On this last point, Jeremy Waldron wrote:

On Liberty contains several arguments in favor of individual freedom of thought, discussion, and life-style. The most important of these are based on the desirability of what I am going to refer to as *ethical confrontation*—the open clash between earnestly held ideals and opinions about the nature and basis of the good life. Ethical confrontation should be understood to include conflicts on all sorts of issues—moral, philosophical, political, and religious—and to range from verbal debate on the one hand to the demonstration and flaunting of rival life-styles on the other. On Mill’s view, the main argument against interference with individual liberty was that it diminished the occasion and opportunity for ethical confrontation in this sense.⁶⁹

Mill stated that “[t]he beliefs which we have most warrant for have no safeguard to rest on, but a standing invitation to the whole world to prove

⁶⁵ *Id.* at 299 (emphasis added).

⁶⁶ *See id.* at 283 (“Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think.”); *cf.* RAZ, *supra* note 50, at 411–12 (explaining that an autonomy-based freedom does not extend to the morally bad or repugnant, but admitting the value of autonomy even in choosing the morally bad or repugnant).

⁶⁷ *On Liberty*, *supra* note 15, at 293–94.

⁶⁸ *Id.* at 294.

⁶⁹ WALDRON, *supra* note 2, at 120–21 (emphasis in original).

them unfounded.”⁷⁰ If we do not experience the confrontation with conflicting viewpoints and lifestyles, then our personal creeds and life choices lose their meaning; they become “a few phrases retained by rote,”⁷¹ and “remain[] as it were outside the mind . . . manifesting [their] power by not suffering any fresh and living conviction to get in, but [themselves] doing nothing for the mind or heart, except standing sentinel over them to keep them vacant.”⁷² In this situation, we are not living autonomous lives, and our choices are little more than “dead dogma.”⁷³ Indeed, the confrontation with diverse opinions and lifestyles is so important to living autonomously that if they are not readily available in our society, Mill insisted that we should have to manufacture them.⁷⁴

Modern discussions of individual autonomy propose similar structural conditions. For example, Joseph Raz stated that “[t]he conditions of autonomy are complex and consist of three distinct components: appropriate mental abilities, an adequate range of options, and independence.”⁷⁵ Mill also stated that individual autonomy can only be achieved with the possession of a “tolerable amount of common sense and experience.”⁷⁶ Individuals must have the appropriate mental abilities to live autonomously; as such, Mill did not apply the harm principle’s presumption to children or to those who cannot take care of themselves.⁷⁷ Perhaps more than any other writer, Mill emphasized the central importance of confronting a range of options in order to live

⁷⁰ *On Liberty*, *supra* note 15, at 277; *see also* *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis and Holmes, J.J., concurring) (stating “the fitting remedy for evil counsels is good ones” and that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (writing that “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out”). It should be noted that Mill extended his argument for the freedom of opinion, as do I, to include the autonomy of lifestyles. Mill stated “the reasons which make it imperative that human beings should be free to form opinions . . . the same reasons . . . require that men should be free to act upon their opinions—to carry these out in their lives, without hindrance, either physical or moral, from their fellow-men, so long as it is at their own risk and peril.” *On Liberty*, *supra* note 15, at 293.

⁷¹ *On Liberty*, *supra* note 15, at 285.

⁷² *Id.* at 286.

⁷³ *See id.* at 283.

⁷⁴ *See id.* at 284, 288. To drive home his point, Mill noted that even “[t]he most intolerant of churches, the Roman Catholic Church . . . at the canonisation of a saint, admits, and listens patiently to, a ‘devil’s advocate.’ The holiest of men, it appears, cannot be admitted to posthumous honours, until all that the devil could say against him is known and weighed.” *Id.* at 276–77.

⁷⁵ RAZ, *supra* note 50, at 372.

⁷⁶ *On Liberty*, *supra* note 15, at 299.

⁷⁷ *See id.* at 271–72.

autonomously. He wrote, “[a] man cannot get a coat or a pair of boots to fit him unless they are either made to his measure, or he has a whole warehouseful to choose from: and is it easier to fit him with a life than with a coat?”⁷⁸ Finally, the necessary condition of independence mentioned by Raz is supplied in Mill’s theory by implementing the harm principle to limit external control over individual choice and action.⁷⁹

We now see that Mill did offer an underlying justification for the difficult political move towards implementing the harm principle. In short, communities holding themselves out as “liberal” communities, such as our community, are structured on an underlying fundamental commitment to individual autonomy. It is the move to the harm principle—extending our notion of tolerance to include the right of individuals to act out, and on, their interests and excluding the moral distress of citizens as grounds for political regulation—that will best achieve the conditions necessary for individual autonomy to flourish.

D. Mill’s Answer: “Thick Pluralism”—Tolerate Religious Belief and Practice, Unless There is Harm

The foregoing analysis provides us with Mill’s answer to our original question concerning how much tolerance should be extended to religious lifestyles. Mill’s brand of liberalism, similar to Locke’s, commits us to tolerating both tolerant and intolerant religious beliefs.⁸⁰ Instead of basing this protection on a flawed epistemology, however, Mill based the protection on an underlying theory of individual autonomy. The reason to prevent government regulation of religious belief is the value we place on autonomy, the self-authorship of our lives. If government can censor our beliefs with impunity, our autonomy would all but vanish. Significantly, the moral distress of others, or of the government, cannot justify the regulation of religious belief. Mill did not claim that such regulation is impossible or futile. His essay is replete with examples of such

⁷⁸ *Id.* at 299.

⁷⁹ See *supra* Part II.A, II.B.

⁸⁰ Mill’s famous example of the corn-dealer delineates the extent of his theory’s protection for opinion and belief. Mill wrote:

An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.

On Liberty, *supra* note 15, at 293; cf. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

regulation.⁸¹ Rather, he claimed that such regulation is not consistent with our commitment to liberalism and autonomy, as understood through the harm principle.

Unlike Locke's theory, however, Mill's brand of liberalism *does* supply us with a principled way to distinguish tolerant from intolerant actions. Actions that harm others are intolerant actions, and only they are subject to government regulation. The practices of religious adherents that do not harm others, in either their physical integrity or assignable obligations, should not be subject to government control. As with all individual agents, Mill armed religious adherents with a *prima facie* presumption against regulating their beliefs and activities where there is no established harm to others. The moral distress of others, or of the government, cannot serve as justification for the regulation of religious practice. Even the illiberal "flaunting" of rival religious lifestyles should be permitted.⁸² Mill wrote:

[I]t is fit to take some notice of those who say that the free expression of all opinions should be permitted, on condition that the manner be temperate, and do not pass the bounds of fair discussion. Much might be said on the impossibility of fixing where these supposed bounds are to be placed; for if the test be offence to those whose opinions are attacked, I think experience testifies that this offence is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them, if he shows any strong feeling on the subject, an intemperate opponent.⁸³

For an example of the scope of tolerance extended by Mill to allegedly illiberal religious lifestyles, we need look no further than his discussion of Mormonism and the practice of polygamy nearly twenty years before the Supreme Court would sanction the legal prohibition of the practice.⁸⁴ Mill argued that the general moral disapprobation of the practice, which the Supreme Court relies on to ban polygamy,⁸⁵ does not justify government intervention.⁸⁶ Because by all accounts, such activity is "voluntary on the part of the women," our moral notions against such behavior do not count as harm and do not, without more, provide us with

⁸¹ See generally *On Liberty*, *supra* note 15, at 302–12 (recounting the long history of religious repression and persecution of different sects).

⁸² See *supra* note 69 and accompanying text.

⁸³ *On Liberty*, *supra* note 15, at 292.

⁸⁴ See *Reynolds v. United States*, 98 U.S. 145, 161–67 (1878).

⁸⁵ *Id.* at 164 ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.").

⁸⁶ *On Liberty*, *supra* note 15, at 311.

justifiable grounds for the political regulation of the practice.⁸⁷ In short, the alleged intolerance of a religious lifestyle, both in belief and practice—Mill’s term is the “intemperance” of the lifestyle⁸⁸—does not strip that lifestyle of its protection under the harm principle unless it can be established that the pursuit of this chosen lifestyle harms others.

Finally, whereas Locke’s theory of toleration does not even entertain the effect of government regulation on religious practice, Mill’s theory provides a principled way to distinguish between justified and unjustified government regulation. Only those regulations that prevent imminent harm to others are justified in regulating religious practices. Indeed, the structural importance of the diversity of lifestyles under Mill’s theory of individual autonomy arguably requires government to take *positive* steps to maintain the diversity of religious practices, specifically the practices of minority religions.⁸⁹ Mill wrote:

[I]f either of the two opinions has a better claim than the other, not merely to be tolerated, but to be encouraged and countenanced, it is the one which happens at the particular time and place to be in a minority [because it] is the opinion which, for the time being, represents the neglected interests, the side of human well-being which is in danger of obtaining less than its share.⁹⁰

Based on the foregoing discussion, if we take our commitment to liberalism seriously, and I contend that we must, we see that Mill’s notion of religious tolerance more adequately expresses that commitment than does Locke’s. As I have termed Locke’s notion of religious tolerance “thin dualism,” I now term Mill’s notion of religious tolerance “thick pluralism.” Mill’s notion of religious tolerance is based on an underlying commitment to individual autonomy—reuniting the freedom to make choices with the presumptive freedom to act out, and on, those choices—and it requires that we maintain the widest diversity of lifestyles, including religious lifestyles, in order for individual autonomy to flourish.

⁸⁷ *Id.*

⁸⁸ *Id.* at 292.

⁸⁹ See TEN, *supra* note 49, 60–61 (explaining that “there is no necessary connection between Millian liberalism and either a doctrine of economic *laissez-faire*, or a theory of the minimal functions of the state. It is possible to combine Mill’s liberty principle with, for example, a belief in socialism.”).

⁹⁰ *On Liberty*, *supra* note 15, at 289.

III. CURRENT RELIGION CLAUSES JURISPRUDENCE: SHIFTING OUR NOTION OF TOLERATION FROM LOCKE TO MILL

I have claimed that our current national commitment to religious liberty is to a thin conception of religious liberty that protects essentially religious belief, not practice—a conception of religious liberty we inherit primarily from John Locke. I do not mean to imply that the Supreme Court's current interpretations of the Religion Clauses are driven by the same concerns that drove Locke, or by his particular epistemological commitments or values. Several commentators have suggested, quite plausibly I think, that the current Court is motivated not so much by a concern for religious liberty as by its new emphasis on the ascendant value of equality—equal treatment between religion and non-religion—that influences so heavily most areas of constitutional analysis today.⁹¹

Nevertheless, it is not mere coincidence that a thin theory of religious liberty is an easier fit with the Court's new commitment to equality than is a thick theory. To see that this is the case, we need only to step back and look at what is required by a commitment to equality. A commitment to equal treatment is not concerned with the *amount* of liberty to be afforded individuals; rather, it is concerned with the conditions under which it is afforded. A commitment to equal treatment can be satisfied by both a government regulation that affords individuals robust protection for their right-claims and by a regulation that affords the same individuals no protection at all. As long as everybody gets the same amount, the actual amount of liberty afforded does not raise an equality concern.⁹² If the

⁹¹ See, e.g., DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* 207 (2003) (“The trend toward formal equality brings increasing coherence to the Supreme Court’s constitutional decisionmaking under the Religion Clauses.”); John H. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 209 n.68 (noting that although the Court has not always adopted the “equality” principle in its Establishment Clause cases “the state of the law might be considerably improved if it were”). Philip B. Kurland noted:

These commands [of the Religion Clauses] would be impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause, *i.e.*, they must be read to mean that religion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations.

Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961); see also Mark Tushnet, “*Of Church and State and the Supreme Court*”: *Kurland Revisited*, 1989 SUP. CT. REV. 373, 400–02 (arguing for the adoption of Kurland’s analysis). *But see* Mitchell v. Helms, 530 U.S. 793, 877 (2000) (Souter, J., dissenting) (criticizing plurality’s “equality” position stating that “[t]here is no rule of religious equal protection to the effect that any expenditure for the benefit of religious school students is necessarily constitutional so long as public school pupils are favored on ostensibly identical terms.”).

⁹² See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 224–26 (1971) (holding that there is no equal protection violation when a municipality chooses to close all access to public swimming

demands of equality are met in both situations, it is easy to discern that practical constraints will shift the Court toward a thin theory of protection. Practically speaking, protection can most easily be distributed to all (equal treatment) if the amount of protection is fairly small. A thick theory of religious liberty, on the other hand, is concerned with the actual amount of liberty afforded individuals, and falling below a certain amount is unjustified even if everyone falls (equally) below the required amount. It is not surprising, therefore, that the Court's current Religion Clauses jurisprudence combines Locke's notion of thin religious toleration with its new commitment to equal treatment. Unfortunately, the problems attending this thin notion of toleration are also present in modern case law. I hope to demonstrate that one possible way to avoid these attendant problems is to shift our notion of religious tolerance from Locke's thin dualism to Mill's thick pluralism.

A. *Free Exercise*

For more than a decade the Supreme Court's interpretation of the Free Exercise Clause has focused primarily on the reasons or motivations for government regulation of religious practice—not on the effects of such regulation.⁹³ If government regulates religious practice *because* it is religious, meaning that government proffers a religious (or an anti-religious) rationale for the regulation, then the regulation is constitutionally impermissible.⁹⁴ For example, if government regulates peyote use only *because* it is used as part of the sacrament of the Native American Church, then the regulation's improper (anti-religious) motive violates the Free Exercise Clause. If, on the other hand, government can present secular reasons for the regulation that are generally applicable to religious and non-religious practices alike, even if the resulting regulation severely affects religious practice, then "the First Amendment has not been offended."⁹⁵ So the general even-handed regulation of controlled substances, which includes banning the use of peyote by Native American

pools, rather than integrate them, because the *effect* of the regulation treats everyone the same—no one receives the benefit of the pools).

⁹³ See *Employment Div. v. Smith*, 494 U.S. 872 (1990). Before the Court were the claims of Alfred Smith and Galen Black, who were fired from their jobs with a private drug rehabilitation organization, because they ingested peyote for sacramental purposes at a ceremony of the Native American Church. *Id.* at 874. Their subsequent application for unemployment benefits was denied because the state of Oregon determined that petitioners were fired for work-related "misconduct." *Id.* After a series of determinations by various courts, the Oregon Supreme Court held that the denial of unemployment benefits violated petitioners' free exercise rights under the First Amendment. *Id.* at 874–76. The United States Supreme Court reversed. *Id.* at 890.

⁹⁴ See *id.* at 877.

⁹⁵ *Id.* at 878.

Church members, does not offend the Free Exercise Clause if motivated by government's general concern with rising drug use nationwide. There will be no violation of free exercise, therefore, if the regulation burdens religious practice for secular, non-religious reasons.

This recent re-interpretation of the Free Exercise Clause significantly altered the protection afforded by the Free Exercise Clause in earlier case law.⁹⁶ Prior case law held that once the claimant demonstrated that government regulation significantly burdened her religious practice, the burden shifted to the government to demonstrate that the regulation met a "compelling" interest and used the least restrictive means to attain that interest.⁹⁷ We need to take a closer look at the argument presented by the Court requiring such a drastic change in the protections afforded to religious practices by the Free Exercise Clause.

The Court began its new interpretation of free exercise with a now familiar claim: "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."⁹⁸ This basic immunity of religious belief from government regulation existed in both Locke and Mill's notion of religious toleration,⁹⁹ and the Court followed their lead by stating that free exercise excludes "governmental regulation of religious *beliefs* as such."¹⁰⁰

Of course, the free exercise of religion involves more than mere belief and profession. It also includes the acts of religious adherents, for example, assembling with others for worship, participating in sacraments, and proselytizing, to name a few. The Court stated that government regulation seeking to regulate such acts "only when they are engaged in for religious reasons, or only because of the religious belief that they display" is constitutionally prohibited.¹⁰¹ In effect, such government regulation would itself be based on (anti-) religious reasons, by its denial of the legitimacy of the religious reasons of others, and improperly run afoul of

⁹⁶ As we shall see, it also harkens back to a conception of religious toleration first announced by the Court in 1878. *See id.* at 879 ("Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.") (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). *See also infra* pages 392–93.

⁹⁷ *See, e.g.,* *Frazee v. Ill. Dep't. of Employment Sec.*, 489 U.S. 829, 835 (1989); *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136, 141 (1987); *Thomas v. Review Bd*, 450 U.S. 707, 718–19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 234–36 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406–09 (1963).

⁹⁸ *Smith*, 494 U.S. at 877.

⁹⁹ *See supra* Parts I.A, II.D (explaining Locke's and Mill's notion of religious toleration respectively).

¹⁰⁰ *Smith*, 494 U.S. at 877 (quoting *Sherbert*, 374 U.S. at 402).

¹⁰¹ *Id.*

both free exercise and establishment restrictions. It should be recalled that this step in the Court's analysis is similar to Locke's proviso that government regulation of the realm of social interaction cannot be based on religious reasons. The government cannot mandate, or prohibit, "any rites and ceremonies in any Church."¹⁰² And according to Mill, such government regulation of religious practice would be improper unless it could be demonstrated that the practice in question harms the interests of others.¹⁰³ Thus far, the Court's reasoning is consistent with its prior precedent and also consistent with either Locke or Mill's notion of religious toleration.

It is the next step in the Court's analysis that is so troubling: the Court claimed that if regulating the exercise of religion is not the *object* of government regulation, but merely the incidental effect of a generally applicable provision, then no free exercise interest is infringed. The Court stated that "[i]t is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the [regulation] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."¹⁰⁴ The Court's understanding of religious liberty does not "reliev[e] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."¹⁰⁵ In other words, if the government has a secular reason for the regulation, religious adherents must obey the regulation even if it effectively curtails the religious practice in question. The Court stated that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).'"¹⁰⁶

This line of the Court's argument mirrors Locke's dualism and his analysis of animal sacrifice.¹⁰⁷ If the government's regulation is based on religious grounds, the government cannot mandate that a particular religion either partake of or discontinue animal sacrifice. But, the government may curtail the slaughter of animals, including religiously mandated animal sacrifice, if it can present a secular reason for the regulation. In the case before the Court, peyote was regulated as a controlled criminal substance

¹⁰² FIRST LETTER, *supra* note 4, at 39. See discussion *supra* Part I.C.

¹⁰³ See discussion *supra* Part II.D.

¹⁰⁴ *Smith*, 494 U.S. at 878.

¹⁰⁵ *Id.* at 879 (quoting *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 594 (1940)).

¹⁰⁶ *Id.* (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

¹⁰⁷ See *supra* note 29 and accompanying text.

under a general criminal statute.¹⁰⁸ To borrow from Locke's famous passage: The law in this case was "not made about a religious, but a political matter," nor was the sacrament of the Native American Church, but the criminal possession of a controlled substance, thereby prohibited.¹⁰⁹ Of course, religious adherents, who are denied unemployment benefits because they practice their religion,¹¹⁰ will find little solace or comfort in the government's secular justification for such a burden. To use Locke's phrase, the regulation's justification lies in "the interest of the commonwealth."¹¹¹

It is not by accident that at this stage of the argument the Court found support for its position in an old case concerning criminalization of the practice of polygamy. The *Smith* Court cited to the *Reynolds* Court for the proposition that to allow religious adherents a presumption in favor of their right to free exercise when secular government regulation invades that right is "in effect to permit every citizen to become a law unto himself."¹¹² The *Reynolds* Court allowed the regulation of a fundamental practice of Mormonism by reasoning that "Congress was deprived of all legislative power over mere opinion, but was *left free* to reach actions which were in violation of social duties or subversive of good order."¹¹³ A clearer affirmation of Locke's dualism is hard to find: religious belief is protected; religious practice is unprotected. The current Court, one hundred and twenty-five years later, still seems satisfied with this separation of religious belief from religious conduct.

Similar to our analysis of Locke's notion of religious tolerance in Part I, the adequacy of the Court's interpretation of free exercise depends upon the importance of religious practice to our conception of religious liberty. The Court's interpretation implies that the importance of individual agency lies only in the act(s) of choosing our religious beliefs, but not in the practices that result from those choices (beliefs). So long as government regulation is not specifically directed at regulating religious practice because it is religious, regulation may effectively curtail religious practice if it is rooted in independent secular reasons. In the modern regulatory state, few, if any, laws are directed specifically at religious practices *because* they are religious.¹¹⁴ Most laws are generally applicable to

¹⁰⁸ See *Smith*, 494 U.S. at 874.

¹⁰⁹ See *supra* note 29 and accompanying text.

¹¹⁰ See *Smith*, 494 U.S. at 874.

¹¹¹ See *supra* note 29 and accompanying text.

¹¹² *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

¹¹³ *Reynolds*, 98 U.S. at 164 (emphasis added).

¹¹⁴ Of course, even today a regulation can be directed at a religious practice *because* it is religious, even if modern legislatures are clever enough not to identify the religious practice in

religious and non-religious practices alike and, therefore, they only incidentally affect the practices regulated. Justice O'Connor correctly noted, however, that a "person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons . . . even if the law is generally applicable."¹¹⁵

For the Court, the effects of government regulation on religious practice are of no concern if the reasons for the regulation are secular. Similar to Locke's analysis, the Court's theory is that we do not have to tolerate the objections of religious adherents if their objections are based on the *effects* of government regulation on their religious practices.¹¹⁶ Such complaints, if they are to succeed, must be based on the improper (religious) reasons for the regulation, and it will be government that determines if its motivations are religious or not. Moreover, generally applicable regulations are, by implication, properly secular and constitutionally valid.

It is at this stage of the Court's argument—the justification of government regulation if it is generally applicable to all—that Mill's notion of religious toleration becomes incompatible with the Court's analysis and, as we have seen, with Locke. For Mill, the scope of a law does not justify enacting it; a regulation is justified only if it prevents harm to others. Unless the government can demonstrate harm to others, the importance we place on individual agency and autonomy requires a *prima facie* presumption in favor of not regulating the activity in question. In the case before the Court, the central question should have been what harm were petitioners causing to others by their sacramental use of peyote, either to the physical integrity of others or in petitioners' assignable obligations to others? Arguably, there was no harm to others,¹¹⁷ and as long as there is no evidence of harm to others, the *prima facie* presumption in favor of allowing the religious practice to continue remains in force.

Instead of recognizing this presumption in favor of individual agency, the Court called such a presumption a "luxury." The Court stated that "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an

the statutory language. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533–40 (1993) (holding municipal regulation specifically directed at Santerian religious practice invalid because it allowed the slaughter of animals for (almost) any reason *except* the Santerian sacrifice of animals).

¹¹⁵ *Smith*, 494 U.S. at 893–94 (O'Connor, J., concurring).

¹¹⁶ *See* discussion *supra* page 376–77.

¹¹⁷ *See Smith*, 494 U.S. at 911–12 (Blackmun, J., dissenting) (pointing that there was no finding of harm in the case).

interest of the highest order.”¹¹⁸ The Court, as did Locke, interpreted the presumption of control exactly backwards. If providing individual agency with a *prima facie* presumption against government regulation—unless the regulation *is* of the highest order—is a luxury, then our fundamental commitment to liberalism is also a luxury. A consistent theory of liberalism would have government regulation accountable, in principle at least, to individual agency and not the other way around.

The Court’s argument provokes the following question: If we do deem government regulation of religious conduct presumptively invalid, do we also necessarily run the risk, which so concerned the Court in *Smith*, of permitting each religious adherent “to become a law unto himself”?¹¹⁹ The answer must be “No.” Our commitment to individual agency and autonomy establishes only a *prima facie* protection for individual choice and lifestyle—not an absolute protection. Of course, this presumption of allowing individuals to act out their beliefs has limits. The presumptive protection is defeasible if harm to others can be established. Mill’s position is that where harm to others is established, a *prima facie* case for government regulation is established. For example, cases denying the free exercise claims of religious adherents to refuse blood transfusions for their children are decided correctly because of the harm to others (the children) which such practices foreseeably cause.¹²⁰ In cases where there is no established harm to others, however, the government must present a very significant interest that defeats the *prima facie* presumption against such regulation. What Mill had in mind in these cases, I contend, more closely approximates the “compelling” interest test, as enunciated in the Court’s prior free exercise jurisprudence,¹²¹ than the thin protection afforded religious liberty in *Smith*.¹²² At least the test enunciated in the prior case

¹¹⁸ *Id.* at 888.

¹¹⁹ *Id.* at 885 (quoting *Reynolds*, 98 U.S. at 167).

¹²⁰ *See, e.g., In re* President and Dirs. of Georgetown Coll., 331 F.2d 1000 (D.C. Cir. 1964); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618 (1952) (holding that a child whose parents refused a life-saving blood transfusion was considered a neglected child and authorizing a guardian to consent to the procedure); *Morrison v. State*, 252 S.W.2d 97 (Mo. Ct. App. 1952) (determining that a child whose father refuses a blood transfusion because of religious reasons is held to be a ward of the state); *Mitchell v. Davis*, 205 S.W.2d 812 (Tex. Civ. App. 1947) (affirming that the child was a neglected child and that a blood transfusion was necessary even if parents did not consent). *See generally* *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (holding that “[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death” and that a parent does not have the right to put her child in harm’s way because of her religious beliefs) (citations omitted).

¹²¹ *See* cases cited *supra* note 97 and accompanying text.

¹²² The Court did recognize how important the “compelling” interest test is to other fields of law, namely, in free speech and equal protection. *See Smith*, 494 U.S. at 885–86. But in those fields the Court’s current test does not extend to “race-neutral laws that have the *effect* of

law gets the fundamental presumption of liberalism—protecting individual agency—correct. Mill’s answer to the Court’s concern in *Smith* is that each person is not a law unto himself if his actions are constrained by the prevention of harm to others, and by the like liberty for all.

The final stage in the Court’s reasoning in *Smith* is perhaps the most troubling of all. If courts will no longer protect religious practices from government interference as long as regulations are based on secular and generally applicable provisions, then the only recourse religious adherents have for the toleration of their lifestyles rests with the political branches. The Court wrote, “Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process”¹²³ and concluded with the following admission:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.¹²⁴

The passage is embarrassing, because even the Court recognized that majority religions, with enough political clout, will ensure that their religious practices are not significantly infringed by incidental legislation. For example, legislation prohibiting the use of alcohol because of its deleterious health effects, which would include banning its use in religious sacraments, would now pass constitutional muster under the theory of free exercise enunciated in *Smith*. In practice, however, if legislators wish to be reelected, the political clout of the Catholic Church would prevent such a regulation’s enactment. Minority religions, without numbers sufficient to affect the political process, will remain the hapless victims of incidental legislation regulating their religious practices. Neither constitutional text nor even the Court’s recent commitment to equal treatment in this area of jurisprudence supports such unequal treatment of minority religious liberties.

Instead of relegating minority religions to second-class citizenship, which is alleged to be the unavoidable consequence of democratic

disproportionately disadvantaging” a particular racial group or to “generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech.” *Id.* at 886 n.3. This analysis reinforces just how thin a notion of religious tolerance, proposed in the majority’s opinion, is. The effects of government regulation on religious practice are not considered pertinent; and if they are considered at all, it “is a constitutional anomaly.” *Id.* at 886.

¹²³ *Smith*, 494 U.S. at 890.

¹²⁴ *Id.*

government,¹²⁵ Mill's theory requires government not only to be mindful of the effects of its actions on religious practice, but requires heightened scrutiny of government regulation affecting minority religious practice. According to Mill, it is minority religious practice that has the better claim to our tolerance because it is more vulnerable and exposed more easily to extinction.¹²⁶ The slow loss of divergent, minority lifestyles through incidental government regulation coerces those living the lifestyles in question and also slowly undermines the conditions necessary for the autonomy of us all.

This discussion has demonstrated that a shift to Mill's theory of religious tolerance has practical doctrinal consequences. If we shift our notion of religious tolerance from Locke to Mill, and every argument in the preceding discussion indicates that we should, then we must shift correspondingly the Court's doctrinal test for free exercise from *Smith* back to *Sherbert*.¹²⁷

¹²⁵ However, note Justice O'Connor's concurrence in *Smith* quoting Justice Jackson:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Smith, 494 U.S. at 903 (quoting *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)).

¹²⁶ See *supra* notes 89–90 and accompanying text.

¹²⁷ See *supra* note 97 and accompanying text. The Court's latest foray into free exercise did not result in greater protection for the petitioner who lost his free exercise claim, but it may have signaled that Court is no longer willing to use the formal neutrality doctrine enunciated in *Smith* to the exclusion of a burden balancing test when addressing a free exercise claim—a test which would look at the effects of government regulation on religious practice again. See *Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307 (2004). The majority noted that “the State's disfavor of religion (if it can be called that) is of a far milder kind . . . impos[ing] neither criminal nor civil sanctions on any type of religious service or rite.” *Davey*, 124 S. Ct. at 1312. The majority went on to state that “[t]he State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars.” *Davey*, 124 S. Ct. at 1315. The Warren Court using the *Sherbert* test could not have said it better. The majority's justification of government regulation sounds like a return to a type of burden analysis, and it did not elude the critical eye of Justice Scalia, who wrote the *Smith* majority. Scalia stated:

The Court offers no authority for approving facial discrimination against religion simply because its material consequences are not severe. I might understand such a test if we were still in the business of reviewing facially neutral laws that merely happen to burden some individual's religious exercise, but we are not.

Davey, 124 S. Ct. at 1318 (Scalia, J., dissenting) (citing *Smith*, 494 U.S. at 885). If the Court is signaling such a shift, it would be welcomed.

B. Establishment

The Court's recent Establishment Clause jurisprudence has undergone almost as radical a transformation as the recent transformation in its free exercise jurisprudence described above. The Court's early Establishment Clause jurisprudence expansively read the clause to prohibit three main types of government regulation: (1) government regulations based on sectarian reasons or motivations;¹²⁸ (2) regulations that required undue interference or "entanglement" between secular and sectarian institutions;¹²⁹ and, (3) government regulations the effects of which primarily advance religion.¹³⁰ The problems with this expansive reading of the restrictions of the Establishment Clause are legion, if not somewhat

¹²⁸ See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (holding that "to withstand the strictures of the Establishment Clause there must be secular legislative purpose"). The Court prohibited sectarian rationales from government regulation based on the view that the Establishment Clause "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* at 217. Locke could not have said it any better. See *supra* notes 29–31 and accompanying text. Of course, this restriction would become known as the "secular purpose" prong of the *Lemon* test, see *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), and because the Court viewed each prong of the *Lemon* test as an independent safeguard of disestablishment, the Court would use the lack of secular purpose to strike down legislation without even considering the legislation's effects or possible entanglements. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (finding sufficient grounds, in the absence of clear secular purpose, to strike down a Louisiana statute which mandated that "creationist science" instruction needed to accompany any teaching of evolution theory in public schools); *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968) (deeming unconstitutional an Arkansas statute that prohibited the teaching of the theory of evolution in public schools on the grounds that the statute's purpose was the advancement of fundamentalist sectarian views).

¹²⁹ See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (allowing tax exemptions for religious organizations based partly on the fact that "the end result—the effect—is not an excessive government entanglement with religion . . . [and that] [e]limination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes"). Again, this restriction would become known as the "excessive entanglement" prong of the *Lemon* test. See *Lemon*, 403 U.S. at 613. It would also serve independently to safeguard disestablishment. See, e.g., *id.* at 613–14 (striking down the Pennsylvania and Rhode Island programs supplying partial government dollars for parochial school teachers solely because "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion").

¹³⁰ See, e.g., *Schempp*, 374 U.S. at 222 ("The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."); see also *Lemon*, 403 U.S. at 612 (stating the "primary effects" prong of its test as requiring that the regulation's "principal or primary effect must be one that neither advances nor inhibits religion"). I couch this restriction as restricting "advancement" of religion only, not the "inhibition" of religion, because I know of no case where a regulation's inhibition of religion has required the Court to declare it unconstitutional.

comical.¹³¹ By enforcing each of the restrictions independently, the Court's early expansion of disestablishment effectively placed governmental regulation in an untenable position. On the one hand, if government attempted to assure that its regulation would not advance religion, then the regulation was subject to violating the non-interference or "entanglement" restriction. On the other hand, if government did not monitor the potential advancement of religion, then the regulation was subject to violating the restriction against non-advancement. Even the Court was aware of this "Catch-22" in applying the *Lemon* test.¹³²

More important for our purposes, this expansive reading of the Establishment Clause also generated the unnecessary conflict between the demands of disestablishment and the demands of free exercise. During this same period, as we have seen, the Court also read the Free Exercise Clause as requiring government to exempt religious practice from burdensome regulation unless it could present a "compelling" interest for the regulation.¹³³ Candidly, such free exercise exemptions required government to have a "sectarian" purpose as well as to "advance" religion. Free exercise exemptions thus violated the Court's then-concurrent disestablishment jurisprudence. Justice O'Connor correctly wrote that "[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden."¹³⁴ As we have seen, such free exercise exemptions are required by a shift to a more robust theory of religious toleration.¹³⁵ Something must give. Accordingly, the Court's early disestablishment understanding of "secular" purpose and "advancement" of religion must be modified to allow such exemptions without violating establishment concerns. As is, the Court's early expansive reading of

¹³¹ For example, under the restrictions of the *Lemon* test government may pay for parochial students' bus fare to and from school. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 16–17 (1947). Yet it cannot pay for parochial school trips. *See* *Wolman v. Walter*, 433 U.S. 229, 254–55 (1977). Government may fund the costs of books for parochial school students. *See* *Bd. of Educ. v. Allen*, 392 U.S. 236, 248 (1968). Yet it cannot cover the costs of maps. *See* *Meek v. Pittenger*, 421 U.S. 349, 362 (1975) (approving textbook loans, but not other additional materials). The Court's delicate analysis provokes the following question: Could government fund the costs of atlases for parochial schools?

¹³² *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988) (stating that monitoring the federal monies of the Adolescent Family Life Act "presents us with yet another 'Catch-22' argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid" (citing *Aguilar v. Felton*, 473 U.S. 402, 421 (1985) (Rehnquist, J., dissenting))).

¹³³ *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *see also supra* note 13 and accompanying text.

¹³⁴ *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring).

¹³⁵ *See supra* notes 114–126 and accompanying text.

disestablishment cannot be sustained consistently with our fundamental commitment to liberalism.¹³⁶

Fortunately, the Court's recent Establishment Clause jurisprudence presents a narrower reading of the clause's restrictions. However, teasing out exactly what those restrictions are is difficult because the Court proffers different doctrinal tests for disestablishment, depending upon which test musters enough votes in a particular case or context. Roughly speaking, the Court employs an "endorsement" version and a "formal neutrality" version of the doctrinal test for disestablishment.¹³⁷ Unfortunately, both tests still retain the prohibition on regulations that are based on sectarian motives.¹³⁸ In doing this, both tests are still misguided.

To be sure, under either disestablishment test a regulation need not possess an exclusively secular purpose. If the secular purpose "happens to coincide or harmonize with the tenets of some or all religions," then the

¹³⁶ In fairness to the Court at this time, it did recognize the doctrinal difficulties generated by maintaining an expansive reading of disestablishment and a robust reading of free exercise, and it attempted to answer them. Justice Brennan, for example, wrote:

[N]othing in the Establishment Clause forbids the application of legislation having *purely secular ends* in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs. Surely the Framers would never have understood that such a construction sanctions that involvement which violates the Establishment Clause.

Schempp, 374 U.S. at 295 (Brennan, J., concurring) (emphasis added). But this response merely begs the question because of the use of wordplay. Instead of blinking reality and calling the protection of free exercise "secular," why not to realize instead that the Framers would never have understood or agreed to this expansive construction of disestablishment.

¹³⁷ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, ___ U.S. ___, 124 S. Ct. 2301, 2321 (2004) (O'Connor, J., concurring) ("When a court confronts a challenge to government-sponsored speech or displays, I continue to believe that the endorsement test [] captures the essential command of the Establishment Clause."). *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), reinterpreted *Lemon* as follows:

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id. For the formal neutrality test, see *Mitchell v. Helms*, 530 U.S. 793, 807–09 (2000) (plurality opinion) (retaining the purpose prong from *Lemon* but reinterpreting the effects prong as follows: "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."). I do not mean to imply that all members of the current Court have rejected the expansive restrictions of the traditional *Lemon* test. See *id.* at 884 (Souter, Stevens, and Ginsberg, J.J., dissenting) (stating that "the basic principle of establishment scrutiny of aid remains the principle as stated in *Everson*, that there may be no public aid to religion or support for the religious mission of any institution").

¹³⁸ See *supra* note 137.

regulation is not unconstitutional on that ground.¹³⁹ But if a religious purpose “predominates”¹⁴⁰ the regulation, or if the regulation is “entirely motivated”¹⁴¹ by a religious purpose, then the regulation violates the Establishment Clause under either new test. Once again we see a restatement of Locke’s dualistic proviso against government regulation based upon religious reasons. Like Locke’s position, however, the current Court’s position makes the effective protection of free exercise an anomaly, if not an impossibility. We have seen that a more robust theory of religious tolerance requires a presumption against government regulation. If government burdens religious exercise, the government must lift that burden in the absence of a compelling interest to do otherwise. The reasons for government lifting the burden are, frankly, to protect religious practice, and thus these reasons *are* predominately religious. It blinks reality to hold otherwise, and moreover, it is unnecessary to do so. On this last point, Justice Scalia’s discontent with the “secular purpose” prong of the test(s) is essentially correct:

We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.¹⁴²

Whereas the requirement of a secular governmental purpose is required by Locke’s theory of religious tolerance, it is not required by Mill’s theory. Therefore, it should not be required by the Court’s disestablishment jurisprudence. For Mill, government regulation shall be justified politically if it prevents harm to others and also may be justified if it maintains the necessary diversity of lifestyles required for individual autonomy. It is the regulation’s effects—preventing harm or maintaining diversity—not the rationales for the regulation, secular or sectarian, that

¹³⁹ See *Harris v. McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

¹⁴⁰ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 599 (1987) (Powell, J., concurring).

¹⁴¹ See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

¹⁴² *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting). Justice Scalia went on to conclude that “[g]iven the many hazards involved in assessing the subjective intent of governmental decisionmakers, the first prong of *Lemon* is defensible, I think, only if the text of the Establishment Clause demands it. That is surely not the case.” *Id.* at 639.

are important.¹⁴³ Undoubtedly, however, the candid protection of free exercise requires the Court to abandon its secular purpose restriction.¹⁴⁴

The reinterpretation of the “effects” or “advancement” prong of the *Lemon* test indicates most clearly the Court’s recent shift to a less expansive reading of establishment restrictions. Under the endorsement version of disestablishment, some government regulations that advance religion no longer violate the Establishment Clause. Justice O’Connor wrote that “the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion.”¹⁴⁵ This is a marked change from the expansive requirements of the *Lemon* test.¹⁴⁶ Instead, only government regulations that “have the effect of communicating a message of government endorsement . . . of religion” are invalid under the advancement prong of the endorsement test.¹⁴⁷ Employing the endorsement test therefore inevitably leads to two interrelated questions: (1) under what conditions does the government communicate an endorsement of religion?; and (2) to whom must the government communicate—who must receive and interpret the message?

Justice O’Connor stated that government practices communicate an endorsement of religion if they “send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored

¹⁴³ Indeed, counterintuitive consequences result from the strict enforcement of the secular purpose prong. For example, the Free Exercise clause demands that an individual cannot be barred from holding public office because of her religion. *See* *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (Brennan, J., concurring). If, however, enough like-minded individuals are elected and vote their consciences, the resulting regulation would be unconstitutional under the secular purpose prong of disestablishment, even if the regulation prevented harm to others. *See* *Edwards*, 482 U.S. at 615 (Scalia, J., dissenting) (“We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved.”).

¹⁴⁴ Accordingly, those regulations struck down by the Court *only* on the ground that they possessed a predominately religious purpose are wrongly decided. *See* *Edwards*, 482 U.S. at 596–97; *Wallace*, 472 U.S. at 60–61; *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968). Indeed, the problem with public school prayer cases is not that such prayer (or curriculum) violates establishment properly understood. Instead, the problem with public school prayer is that it violates the free exercise rights of students properly understood. Consider Justice Thomas’s dissenting opinion in *Newdow* in which he stated that “the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause, which would probably cover little more than the Free Exercise Clause.” *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2328 (2004) (Thomas, J., dissenting). Unfortunately, because Justice Thomas also adhered to the understanding of free exercise protections put forward in *Smith*, he proceeded to conclude *incorrectly* that the Pledge policy “does not infringe any free-exercise rights.” *Id.* at 2330.

¹⁴⁵ *Lynch v. Donnelly*, 465 U.S. 668, 691–92 (1984) (O’Connor, J., concurring).

¹⁴⁶ *See supra* notes 128–32 and accompanying text.

¹⁴⁷ *Lynch*, 465 U.S. at 692.

members of the political community.”¹⁴⁸ The problem, however, remains in defining what constitutes outsider or insider status. Does the mere *feeling* of being an outsider or an insider suffice? Do any outsider’s or insider’s feelings count? If so, any government regulation concerning religion arguably results in some citizens feeling as though they are outsiders and others feeling as though they are insiders. This reading of endorsement seems as broad as the Court’s early establishment jurisprudence, which we have seen results in inadequate protections for religious liberty. More important for our purposes, we have seen that under Mill’s harm principle the feelings of citizens, what Mill deemed “likings and dislikings,”¹⁴⁹ are not adequate grounds for the justification of government regulation. To justify political regulation there must be a dimension of preventing harm to others, and the feelings of others do not count as harm.¹⁵⁰ If, on the other hand, endorsement means something more, namely that government puts in place some form of sanctions or penalties backed by the force of law—viz., those citizens that the regulation penalizes are “outsiders” and those who are not are “insiders”—then only the most imprecise use of language allows us to claim that government is sending a “message” of endorsement. In this scenario, government is sending a sheriff, not a message.

To be sure, Justice O’Connor qualified the conditions under which government practices send messages endorsing religion. We are informed that we must view the regulation or practice in the proper context, couched in the proper history, and with a proper understanding of the requirements of free exercise.¹⁵¹ Additionally, only a certain type of observer can properly determine whether the practice sends a message of endorsement. Not surprisingly, the proper observer, what Justice O’Connor termed the “reasonable observer,” is one who is armed with the proper context, history, and free exercise jurisprudence necessary to decipher the message of endorsement.¹⁵² Justice O’Connor wrote that “the ‘reasonable observer’ must embody a *community ideal of social judgment*, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context.”¹⁵³ But these “limiting” conditions for endorsement create their own problems. For example, government messages that possess a

¹⁴⁸ *Id.* at 688.

¹⁴⁹ *See supra* notes 47–49 and accompanying text.

¹⁵⁰ *See supra* notes 50–51 and accompanying text.

¹⁵¹ *County of Allegheny v. ACLU*, 492 U.S. 573, 625–32 (1989) (O’Connor, J., concurring).

¹⁵² *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2322 (2004) (O’Connor, J., concurring).

¹⁵³ *Id.* (emphasis added).

long history of being transmitted and are well-known to all, what Justice O'Connor termed the messages' "history and ubiquity,"¹⁵⁴ are not viewed as endorsements of religion to the "community ideal of social judgment."¹⁵⁵ However, "novel or uncommon references to religion," Justice O'Connor continued, "can more easily be perceived as government endorsements because the reasonable observer cannot be presumed to be fully familiar with their origins."¹⁵⁶ Accordingly, government regulations or practices addressing majority religions and practices are unlikely to be viewed as endorsements by the community ideal. On the other hand, government practices or regulations addressing minority religions, or novel religious expression and practice, are more readily viewed as endorsements by the community ideal. This understanding of disestablishment, which is protecting majority religions at the expense of their minority and novel counterparts, is not acceptable as a general theory of religious liberty. Such approach is directly contradicted by Mill's concern with maintaining the necessary conditions for individual autonomy, including protecting the lifestyles of religious minorities that a liberal state requires.¹⁵⁷

Under the "formal neutrality" version of disestablishment, we see again that some government regulations that would have been an advancement of religion under the *Lemon* test no longer violate the Establishment Clause.¹⁵⁸ Specifically in the areas of governmental funding and access to governmental property, the formal neutrality version of disestablishment requires only that the aid or access be "offered to a broad

¹⁵⁴ *Id.* at 2323.

¹⁵⁵ *Id.* at 2322.

¹⁵⁶ *Id.* at 2323.

¹⁵⁷ See *supra* notes 83–90 and accompanying text. Interestingly, other members of the Court found the endorsement test too protective of minority religions at the expense of majority religions. For example, Justice Kennedy wrote:

[T]he very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to this type of inquiry . . . creat[ing] classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions.

Allegheny, 492 U.S. at 677 (Kennedy, J., dissenting). This again illustrates that basing the advancement prong of disestablishment on the feelings of citizens, even if it is based on the perceptions of the ideal citizen, who ever that may be, does not result in a workable theory of protection for religious liberty, be it majority or minority religious liberties.

¹⁵⁸ Compare *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382–98 (1985), and *Aguilar v. Felton*, 473 U.S. 402, 412–14 (1985) (employing *Lemon* test to find Title I of the Education Act, funding public school teachers to provide remedial education at parochial schools, unconstitutional entanglement with and advancement of religion), with *Agostini v. Felton*, 521 U.S. 203, 231 (1997) (overruling *Ball* and *Aguilar* in pertinent part because "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis").

range of groups or persons without regard to their religion” in order to avoid the improper advancement of religion.¹⁵⁹ Under the restrictions of *formal* neutrality, government aid or access does not have to effect or advance religious and nonreligious institutions equally. Indeed, if that was required by governmental neutrality it would no longer be “formal” and it would be impossible to achieve in practice. Alan Schwarz correctly noted that “equal aid results in unequal benefits and if equal benefits cannot in practice be realized then any aid will increase the power of some churches more than others, and often the church that benefits most is the one which is already closest to dominance.”¹⁶⁰ To avoid this difficulty, the formal neutrality version of disestablishment requires only that government have the *intention* to effect or advance religious and nonreligious institutions equally.¹⁶¹ The road to hell, of course, is said to be paved with good intentions.

The formal neutrality version of disestablishment is corollary to the Court’s current doctrine of free exercise. We have seen in the context of free exercise that if government regulation is neutral and generally applicable, then no free exercise claim can lie.¹⁶² We also determined that this analysis offered inadequate protection for religious liberty.¹⁶³ Now, we see that if government benefits are neutral and generally available, then no Establishment Clause claim can lie. This too is an inadequate analysis of disestablishment concerns. The problem in both contexts is that the effects of government regulation on religion are essentially ignored. If government regulation severely burdens religious practice, formal neutrality must be rejected because that effect does create a constitutional concern under the Free Exercise Clause. If government regulation provides substantial aid to dominant churches and not to minority churches, formal neutrality must be rejected because that effect does create a constitutional concern under the Establishment Clause. Employing formal neutrality as the central value of the Religion Clauses, though

¹⁵⁹ See *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion).

¹⁶⁰ Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 *YALE L.J.* 692, 722 (1968).

¹⁶¹ This formal understanding of governmental neutrality explains why the plurality opinion in *Mitchell* is not concerned with the actual effect, even divertible effect, of the aid for religious uses. See *Mitchell*, 530 U.S. at 820.

So long as the governmental aid is not itself ‘unsuitable for use in the public schools because of religious content,’ and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.

Id. (citations omitted).

¹⁶² See *supra* notes 104, 105 and accompanying text.

¹⁶³ See *supra* notes 118–36 and accompanying text.

arguably a gain in doctrinal consistency, comes at the cost of religious liberty because under this doctrine the effects of government regulation on religion are not even relevant. The Court's recent move to formal neutrality is still firmly caught in the throes of Locke's dualism.¹⁶⁴

Although both the endorsement version and the formal neutrality version of disestablishment are correct in rejecting the expansive reading of the Court's early Establishment Clause jurisprudence, neither theory properly identifies the type of government regulation that constitutes an improper advancement of religion. To identify what actually does constitute an improper advancement of religion, we must return to the entanglement prong of the *Lemon* test, which, ironically, has been all but forgotten by the Court's recent shift in establishment jurisprudence.¹⁶⁵ The key to understanding government's improper advancement of religion is to recognize that establishment primarily addresses the *institutional* effects of government regulation in the context of Church and State. The institutions of Church and State must remain separate and un-entangled, at least when it comes to sharing their essential defining powers. The most obvious entanglement of governmental powers with a religious institution would be for government to delegate its regulatory power to a church.¹⁶⁶ Accordingly, cases such as *Larkin v. Grendel's Den*¹⁶⁷ are central to understanding the proper restrictions of the entanglement prong of disestablishment. In *Grendel's Den*, government effectively delegated to the Catholic Church governmental power to veto certain liquor license applications.¹⁶⁸ Here, there is the real risk of government regulation being based on the "notions of morality, taste, or propriety"¹⁶⁹ of a particular church rather than on the prevention of harm to others or the maintenance of alternative lifestyles. The Court correctly noted that "[t]his statute enmeshes churches in the exercise of substantial governmental powers

¹⁶⁴ See *supra* text accompanying note 37.

¹⁶⁵ For the endorsement version of disestablishment, entanglement is seen as essentially a redundant inquiry into the "advancement effect" of government regulation. See *Agostini v. Felton*, 521 U.S. 203, 232 (1997) ("Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'"). For the formal neutrality version of disestablishment, entanglement is only relevant to the primary inquiry into a regulation's "advancement effect." See, e.g., *Mitchell*, 530 U.S. at 807-08 ("We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon's* entanglement inquiry as simply one criterion relevant to determining a statute's effect.").

¹⁶⁶ Of course, the converse is also troubling in cases where government institutions are delegated the sectarian powers to determine religious doctrine for religious institutions.

¹⁶⁷ 459 U.S. 116 (1982).

¹⁶⁸ *Id.* at 122.

¹⁶⁹ See *supra* note 47 and accompanying text.

contrary to our consistent interpretation of the Establishment Clause; '[t]he objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other.'¹⁷⁰

Note that the Court in *Grendel's Den* was concerned by a religious institution exercising the traditional powers of a secular governmental institution, not with government accommodation of religious practice. The original entanglement prong of the *Lemon* test properly recognized this commitment to separating the institutions of Church and State.¹⁷¹ The difficulty with the *Lemon* test is that it also precluded government regulations having a religious purpose or a religious effect even if the regulation did not institutionally advance religion.¹⁷² As we have seen, once these additional restrictions are added to disestablishment the protection of free exercise is jeopardized.¹⁷³ Instead, the proper course is to maintain the institutional restrictions of disestablishment, that is to say, the traditional powers of these institutions should not be shared, but discard the secular purpose and traditional advancement doctrines. Then we can also maintain, consistent with a shift to the robust protection of religious liberty, the free exercise of religious adherents. Recognizing the *institutional* dimension of establishment restrictions (preventing shared institutional power between Church and State) and the *individual* dimension of free exercise restrictions (preventing harm to others) allows for a consistent and robust protection of religious liberty.

This analysis of the Court's current establishment jurisprudence leads to two important caveats. First, neither Locke nor Mill directly addressed our nation's concern with disestablishment primarily because England had, and still has, an established church. Nevertheless, Mill's theory of robust protection of individual agency, which included the robust protection of the religious practice of individuals, is more aligned with the narrower reading of establishment restrictions suggested above. A narrower reading of disestablishment is required by the expansive reading of underlying free exercise protections for religious adherents. Second, the determination of when and under what conditions institutional entanglement between Church and State exists will not always be readily apparent. While some institutional entanglement is inevitable, much of the Court's current

¹⁷⁰ *Grendel's Den*, 459 U.S. at 126; see also Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1018 (1989) ("The essential task of the establishment clause under a separation construction would be two-fold: to prevent government from interfering in the internal affairs of religious institutions and, conversely, to prohibit religious institutions from directly exercising governmental authority.").

¹⁷¹ *Grendel's Den*, 459 U.S. at 126 (citing *Lemon*, 403 U.S. 602, 614 (1971)).

¹⁷² See *supra* notes 128, 130 and accompanying text.

¹⁷³ See *supra* notes 133–36 and accompanying text.

establishment jurisprudence, such as its analysis of the crèche cases,¹⁷⁴ clearly missed the mark because no institutional powers are shared or advanced by the facts of those cases. Although the line between government acknowledgement of religious institutions, which is constitutional, and government empowerment of religious institutions, which is arguably unconstitutional, is often murky, at least the concern over institutional separation asks the right question: has government made a law, the effects of which share the respective powers defining the institutions of Church and State?

Once again this discussion has demonstrated that a shift to Mill's theory of religious tolerance will have practical doctrinal consequences in the context of disestablishment. If we shift our notion of religious tolerance from Locke to Mill, then we must deemphasize, if not abandon, the Court's current fascination with the secular purpose and formal neutrality of government regulation. Instead, renewed doctrinal emphasis should be placed on "excessive entanglement," the avoidance of institutional entanglements between Church and State.

CONCLUSION

This essay began with the claim that there is an uneasy alliance between our national commitment to liberalism and our equally fundamental commitment to religious liberty. It has demonstrated that the underlying uneasiness results in large part from the type of liberalism we are committed to. Historically, we have been committed to a thin theory of religious liberty primarily inherited from John Locke—protecting religious belief but not religious practice. Consequently, we have been rudderless with regards to distinguishing tolerant from intolerant religious commitments. Locke's answer to our original question—when can we stop tolerating the intolerant?—is, whenever government so chooses. All outward behavior, tolerant or intolerant alike, is subject to a presumption of government control. The Court's current Religion Clauses jurisprudence, which is so heavily influenced by the thin theory of Locke, is also rudderless and suffers from the same inability to distinguish tolerant from intolerant religious commitments.

But, this is not the only theory of liberalism available. Indeed, this essay has demonstrated that John Stuart Mill presented us with a sounder view of liberalism in general, and a sounder view of the protections required for religious liberty in particular. Mill's answer to our original

¹⁷⁴ See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

question—when can we stop tolerating the intolerant?—is, when there is imminent harm to others. Actions harming others are intolerant actions, and only these actions are subject to the presumption of government regulation. Implementing Mill's brand of liberalism requires us to redefine our notion of tolerance to include the right of religious adherents to act out, and on, their interests as well as to exclude the moral distress of others as grounds for political regulation of individual lifestyles. Mill's theory reunited the essential aspects of individual agency to include a presumption against government regulation of both belief and lifestyle. Of course, this presumption is limited by the harm to others and by a like liberty for all.

We also have seen that if we do implement Mill's brand of liberalism it will require the Court to return to prior case law and to a burden analysis in the context of free exercise jurisprudence. It will also require the Court to abandon its fascination with secularism and neutrality that consumes the doctrinal tests in the context of disestablishment. Mill's theory recommended a renewed commitment to institutional separation, but this is not equivalent to a commitment to secularism.

When religious adherents request our tolerance of their religious lifestyles, the answer we give reflects more on our underlying political commitments than on the particular religion or lifestyle in question. The correct response is that we should tolerate alternative lifestyles, even those that do not tolerate others, so long as there is no evidence of harm to others. When religious institutions request government support or access, the correct response is to tolerate support and access for religious institutions, so long as there is little danger of delegating governmental powers to them or sectarian powers to the government. These are significant and difficult political commitments for any liberal society to enforce, especially at this time of heightened conflict and concern over religious intolerance. I believe that this nation's underlying fundamental commitment to individual autonomy and agency requires no less from us.