

Religion, Law, and the State: Toleration, Non-preferentialism, and Equidistance

Scott Morrison*

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I. INTRODUCTION

After decades of religious war in 17th Century England, John Locke was, from his refuge in Holland, in need of toleration. Following the Glorious Revolution and the Toleration Act, which proscribed persecution of Protestants, the likes of Locke returned home.¹ Shortly thereafter, in 1869, he published his *Letter Concerning Toleration*.² From that date forward, forged in the crucible of conflicting orthodoxies and religious violence, religious toleration has stood as a stalwart structural element of the liberal tradition.

What does religious toleration demand? What arrangement of state and religious groups most adequately satisfies that demand?

In America, the highway Locke's letter traveled soon split into two. The framers of the Constitution reached the fork in toleration's course not long after they agreed to the free exercise and non-establishment clauses of the First Amendment.³ The first fork led to a wall between church and state. In 1802, Thomas Jefferson penned the mural metaphor in response to the Danbury Baptist Association in Connecticut who had petitioned for the designation of a national day of fasting, to commemorate tribulations suffered in the country's, then short, history.⁴ The President denied their request.⁵

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1. See ROBERT ROYAL, *THE GOD THAT DID NOT FAIL: HOW RELIGION BUILT AND SUSTAINS THE WEST* 185-86 (2006).
 2. See generally JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (William Popple trans., 1689).
 3. 16 THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 281-82 (Albert Ellergy Bergh ed., 1907) & Americans United for Separation of Church and State, Thomas Jefferson's Letter to the Danbury Baptists, available at https://www.au.org/files/images/page_photos/jeffersons-letter-to-the.pdf (last accessed Mar. 31, 2014).
 4. *Id.*
 5. *Id.* See also Thomas Jefferson, *The Virginia Act for Establishing Religious Freedom*, available at <http://religiousfreedom.lib.virginia.edu/sacred/vaact.html> (last accessed Mar. 31, 2014). In the American colonies, Roger Williams, who escaped religious persecution in England, fled to Rhode Island. He served as the colony's President, and founded what would become the first Baptist Church in the United States (U.S.). In fact, the historical record credits Williams rather than Jefferson with the phrase "the wall between church and state." See Roger Williams, available at <http://www.wallofseparation.us/the-origins-of-wall-of->

Further along this same road, the theories of liberal neutralists, such as Stuart Hampshire, Ronald Dworkin, and Bruce Ackerman, stand firm, defending the wall that Jefferson built.⁶ According to them, and to the political liberalism of John Rawls, which mentored the neutralist school, religion is a conception of the good about which the state must remain agnostic.⁷ While most theorists add layers and thickness to the wall between church and state with the earth they busily excavate elsewhere, and for other purposes, Robert Audi has painstakingly constructed piece by piece the most careful and comprehensive edifice dividing church and state in contemporary political philosophy.⁸

Back again at the fork in the road, President James Madison, Jr. cleared the way for the second spur. On this route, instead of a wall, he posted a rule — the state may aid religious groups in society as long as it does so equally.⁹

separation/ (last accessed Mar. 31, 2014). In the 20th Century, the image appeared in the decision *Everson v. Board of Education*. See *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) (citing *Reynolds v. United States*, 98 U.S. 164 (1878)).

6. See Stuart Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY 23–55 (1978); RONALD DWORKIN, A MATTER OF JUSTICE 181–200 (2001); & BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).
7. See Stanford University Center for the Study of Language and Information, John Rawls, available at <http://plato.stanford.edu/entries/rawls/> (last accessed Mar. 31, 2014) [hereinafter John Rawls].
8. Joseph Raz describes a strong conception of neutrality as follows — “No political action may be undertaken or justified on the ground that it promotes an ideal of the good nor on the ground that it enables individuals to pursue an ideal of the good.” Religion is a paradigm case of such an ideal. Joseph Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, in MIDWEST STUDIES IN PHILOSOPHY VII 1982 92 (Peter A. French, et al. eds., 1982). Kent Greenawalt’s works are fine examples of a liberal neutralism explicitly dealing with religion and politics. See KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1991) & PRIVATE CONSCIENCES AND PUBLIC REASONS (1995). Finally, Robert Audi’s works include *Religious Commitment and Secular Reason: A Reply to Professor Weithman*, 20 PHILOSOPHY AND PUBLIC AFFAIRS 66, 66–76 (1991) and *Religion and the Ethics of Political Participation*, 100 ETHICS 386, 386–97 (1990). See also ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE (1997). His crowning contribution on the subject is *Religious Commitment and Secular Reason*. See ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000).
9. See Edward Tabash, The True Meaning of the Establishment Clause (A Position Paper From the Center of Inquiry Office of Public Policy) 4, available at <http://www.centerforinquiry.net/uploads/attachments/establishment-clause.pdf> (last accessed Mar. 31, 2014) & JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 45–56 (2011).

Madison took the non-establishment clause of the First Amendment to mean that houses of worship and structures of state may occupy the same territory, as long as the state treated its pious neighbors all alike.¹⁰ Constitutional lawyers persisted in Madison's footsteps, and christened the road he conceived "non[-]preferentialism."¹¹ Legal scholars today describe the doctrine as a commitment to state impartiality vis-à-vis religious institutions, and to the incremental achievement of inter-religious equality.¹² According to non-preferentialists such as U.S. Supreme Court (U.S. S.C.) Justice William H. Rehnquist, legislation and state policy awarding aid to religious groups is constitutional if it is given without preference, that is, equally.¹³ Such aid is permissible even when only religious groups are eligible to receive it.¹⁴

Thus, in American political and legal thought, religious toleration demands one of two things — a wall or a rule. The wall separates church and state. The rule requires the state to treat religious groups equally. Of the liberal Lockean tradition's two trajectories, the first is usually known as "secularism."¹⁵ The second is known, by constitutional lawyers, as "non[-]preferentialism."¹⁶ In the following pages, this Article proposes, in preliminary form, a theory, which will hopefully progress further along the second of the two paths. The Author calls this nascent theory "equidistance."

In labeling thus a point on the road, the contours of which are as yet known best by legal scholars, the Author wants to attract the attention of political theorists to a novel way of thinking about church and state. As the roster of players on the secular street reflected, political theorists have most often turned towards the fork inaugurated by Jefferson, veering away from

10. See WITTE, JR. & NICHOLS, *supra* note 9, at 45-56.

11. 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 1109 (Paul Winkelman ed., 2006).

12. See *generally* Nonpreferentialism, available at <http://usciviliberties.org/themes/4227-nonpreferentialism.html> (last accessed Mar. 31, 2014) & LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986).

13. In *Wallace v. Jaffree*, Justice Rehnquist stated that "[t]he Establishment clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing non-discriminatory aid to religion." Actual aid of this sort, in the American case, includes tax exemptions for religious organizations as well as direct subsidies. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (J. Rehnquist, dissenting opinion).

14. *Id.*

15. See Sanford Kessler, *John Locke's Legacy of Religious Freedom*, 17 *POLITY* 484, 484-503 (1985).

16. See Nonpreferentialism, *supra* note 12.

that opened by Madison. And yet, the Author submits that if political theorists venture down the latter, they may learn an important lesson from the lawyers' intuition that the state should be impartial towards, rather than categorically separate from, religious groups and discourses.

The lawyers might learn something too. Political theorists can add to the largely juridical debate on church and state. Political theorists can imagine themselves outside of the four corners of the constitution, unbound by the tandem religion clauses of the First Amendment, even as they might seek to later bring the Author's conclusions into line with constitutional interpretation. The Author has greater freedom to entertain new configurations, and to subject them to normative and specifically political analysis. They also have the tools to refine the meaning of equality and impartiality cropping up in Madison's and the legal language. Also, as political scientists, they have access to empirical and social science findings largely absent from legal theory concerning "church" and state. The theory regulating the interaction of religion and state is not, to understate the case, bereft of implications for the spread and deepening of democracy.

The reasons for thinking again about state and religion — and not just about churches standing in for faiths exercised in architecture bearing no steeple or cross — are not only theoretical. Migration and the resultant mingling of formerly separate creeds and their adherents have disseminated widespread challenges to secularism, and spawned potentially legitimate claims to religious freedom asserted against the secular state, whether these claims are asserted by Muslims, Jews, Christians, or members of burgeoning new faiths and sects.¹⁷

Dissent, activism, violence, terror, and war in the name of religion prompt some to say that now is the time, more than ever, to vigorously defend secular ideals. And yet that is precisely the challenge that the Author wants to take up — to imagine and assess different, and some more intimate, configurations of state and religion — couplings the secular wall would block, sometimes with reason and sometimes without. The Author wants to reflect on alternative arrangements without neglecting the imperative of curbing the excesses of zealotry and clashing orthodoxies.

This Article proposes that the idea of equidistance is not only a distinct way of thinking about religion and state, but also one which aims to incorporate the wisdom of secularism, and to recognize when enforcing a divide between religious and political institutions is the best, if not the only, way of managing the danger the politicization of religion can pose, both for the integrity of a faith and for those outside it, or any other.

17. See Tariq Modood, *Secularism in Crisis? Muslims and the challenge of multiculturalism*, available at <http://www.abc.net.au/religion/articles/2012/08/08/3563265.htm> (last accessed Mar. 31, 2014).

II. EQUIDISTANCE PROPOSED

In addition to non-preferentialism, equidistance draws from the insights of two theorists — Nicholas Wolterstorff's consocialism¹⁸ and Joseph H. Carens' idea of evenhandedness.¹⁹ The core intuition shared by equidistance and each of its three predecessors is that the state must treat religious groups impartially. Equidistance articulates it as follows — the state must maintain an “equidistant” position in relation to all religious groups under its jurisdiction.²⁰ It must not show preference or favoritism for any particular religious group over any other.²¹

Equidistance presupposes no barrier separating state and religious groups; “distance” may also be read as “proximity.”²² Impartiality, showing no preference or favor, or, conversely, no prejudice or bias, against any particular religious group, is a comparative rather than an absolute standard. While the state may recognize or aid one religious group, it can only do so if it accords recognition or assistance to every religious group, and does so equally. Equidistance, like the non-establishment clause of the First Amendment, neither condemns nor condones state aid and recognition for religious groups.²³ It is a constraint in the form of a condition — if the state aids one religious group, it must provide equal aid to every religious group.

Contrary to the supposition, secularism is the first and best option for all faiths and societies even when the only practicable arrangements necessitate settling for something less than ideal. Equidistance seeks to take into account the diversity of societies and the way in which separating the religious and the political can unnecessarily compromise religious freedom. In order to achieve these ends and to afford fuller protection to religious freedom,

18. Responding to the tendency in American liberal scholarship to discuss the type of reasons (e.g., public or private, with religious reasons or appeals in the latter category) that a citizen or leader may cite in justifying or promoting a candidate, policy, or law, Nicholas Wolterstorff, arguing against Robert Audi, explains consocialism as imposing “no moral restraint on the use of religious reasons. And second, it interprets the neutrality requirement, that the state be neutral with respect to the religious and other comprehensive perspectives present in society, as requiring impartiality rather than separation.” AUDI & WOLTERSTORFF, *supra* note 8, at 115.

19. See Joseph H. Carens, Justice as Evenhandedness, available at <http://www.india-seminar.com/1999/484/484%20carens.htm> (last accessed Mar. 31, 2014).

20. See Karl-Heinz Ladeur & Ino Augsberg, *The Myth of the Neutral State: The Relationship Between State and Religion in the Face of New Challenges*, 8 GERMAN L. J. 145, 145-46 (2007).

21. *Id.*

22. See SCOTT MORRISON, SECULARISM REVISED: ARAB ISLAM, RELIGIOUS FREEDOM AND EQUIDISTANCE 213 (2013).

23. *Id.* at 165.

equidistance encompasses a range of models. Models directly govern state conduct. Principles supply the normative justification for the adoption of that model in a particular case.²⁴ Only empirical information and instrumental rationality are needed to derive models. Deducing principles requires specifically moral reasoning.²⁵ Equidistance is meant to be a principle. It selects the model, which will, under empirical circumstances, satisfy the impartiality condition. Equidistance encompasses secularism as one model among several. The models among which equidistance selects are four: separation (model I); accommodation (model II); equal aid and recognition (model III); and establishment (model IV).

III. MODELS

Using a few examples from actual countries and controversies, the Author will sketch the essential meaning of each model. The citation of a country does not imply that it satisfies equidistance or any other normative standard. It only means that it displays some features that help elucidate a model. Naturally, a complete account would enter into more specificity than the Author can hope to provide here.

A. Model I: Separation

The essential idea of the Separation Model is that religious influence on the state must be minimized, regardless of the demands of religious groups, and that the state should as much as possible refrain from interfering in the affairs of religious groups.²⁶ This implies that the state cannot provide aid or recognition to religious groups as such, although it may accord the same benefits and recognition to such groups that it does to non-religious groups.²⁷ The state treats all religious groups equally by remaining aloof from all of them, declining any demand for influence and assistance, no matter which religious group may make it. In terms of doctrine in the American context, decisions such as *Everson v. Board of Education*²⁸ and the “strict separationist” doctrine,²⁹ in contrast with the later accommodationist stance

24. See Kaarlo Tuori, *Legal Science as/and Social Science*, in LEGAL SYSTEMS AND LEGAL SCIENCE 130 (Marijan Pavcnik & Gianfrancesco Zanetti eds., 1997).

25. In similar fashion, Rawls stipulated that his principles of justice as fairness govern the design of institutions, contra the common mistake of applying them directly to judge the distribution of wealth and opportunity in a given society. JOHN RAWLS, *THEORY OF JUSTICE* 61 (1971).

26. MORRISON, *supra* note 22, at 147.

27. *Id.*

28. *Everson*, 330 U.S. at 18.

29. Stephen Monsma, *The Presidency and the Supreme Court*, available at [http://www.cpjustice.org/stories/storyReader\\$498](http://www.cpjustice.org/stories/storyReader$498) (last accessed Mar. 31, 2014).

of the Burger Supreme Court in the 1980s,³⁰ with its more accommodating stance, provide meaningful examples.

B. Model II: Accommodation

The Accommodation Model allows the state to provide financial and legal benefits or exemptions for religious groups as such, by virtue of their religious character.³¹ These benefits could include state support for the maintenance of places of worship, tax breaks, or suspension of laws for religious practices.³² The state may actively protect religious practices, such as the wearing of religious apparel in public schools or (public or other) places of employment.³³

In recent years, the U.S., with its legal and tax exemptions for religious groups, is a good example of the accommodation rather than the separation model.³⁴ With the exception of the (largely ceremonial) establishment of a state church, the British model also cleaves to the accommodation model.³⁵

30. See, e.g., *Stone v. Graham*, 499 U.S. 39, 42 (1980) & *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-25 (1976).

31. MORRISON, *supra* note 22, at 148.

32. For example, peyote use by native American groups and the Sikh practice of carrying the kirpan, which non-Sikhs would not be permitted. See The Leadership Conference on Civil and Human Rights & The Leadership Conference Education Fund, Native American Religious Freedom, available at <http://www.civilrights.org/indigenous/religion/> (last accessed Mar. 31, 2014) & Pew Research Center, Sikh-Americans and Religious Liberty, available at <http://www.pewforum.org/2009/12/03/sikh-americans-and-religious-liberty/> (last accessed Mar. 31, 2014).

33. See, e.g., Laura Barnett, Freedom of Religion and Religious Symbols in the Public Sphere (A Background Paper Submitted to the Library of Parliament of Canada) 1-2, available at <http://www.parl.gc.ca/content/lop/research/publications/2011-60-e.pdf> (last accessed Mar. 31, 2014).

34. See James W. Corbitt, Jr., *Constitutional Law — The Establishment Clause and Property Tax Exemptions for Religious Organizations*; *Walz v. Tax Commission*, 397 U.S. 644 (1970); 12 WM. & MARY L. REV. 679, 679-82 (1971); & IRS, Tax Information for Churches and Religious Organizations, available at <http://www.irs.gov/Charities-&-Non-Profits/Churches-&-Religious-Organizations> (last accessed Mar. 31, 2014).

35. See Alice Donald, Religion or belief, equality and human rights in England and Wales (An Unpublished Report Submitted to the Equality and Human Rights Commission) 14-35, available at http://www.equalityhumanrights.com/uploaded_files/research/r184_final_opt.pdf (last accessed Mar. 31, 2014).

C. Model III: Equal Aid and Recognition

The Equal Aid and Recognition Model implies not only aid, as in accommodation, but also some degree of state recognition of religious groups, and mutual influence between the state and societal religious groups, constrained by the norm of impartiality.³⁶ Hence, if the state provides financial support for the construction and/or maintenance of houses of worship, it must provide funds to all religious groups demanding such support. And it must do so in the same proportion.³⁷ Examples include Germany, with the public corporation status accorded religious groups,³⁸ and Denmark, with its national church.³⁹ In the Netherlands, religious groups have the legal right to establish confessional schools, as well as universities and hospitals using public funds.⁴⁰

The Lebanese confessional system, with its effort to leverage and counterbalance the influence of Christian and Muslim sects is a further example.⁴¹ Confessionalism in Lebanon affords a more robust role for diverse religious groups to actively participate in politics, than in the cases of Denmark or Germany.⁴²

In what sense does the state treat religious groups impartially, that is, equally, in the accommodation and equal aid and recognition models? Carens' evenhandedness emphasizes the need for "a sensitive balancing of competing claims for recognition and support[.]"⁴³ Such a balance is exactly

36. MORRISON, *supra* note 22, at 179.

37. Proportionality here could be per capita. For example, Norway provides direct financial support to religious groups in proportion to their membership. JAMES A. STORING, *NORWEGIAN DEMOCRACY* 4 (1963).

38. See Pluralism Project, *International Portrait: Germany* (2010), available at <http://www.pluralism.org/reports/view/469> (last accessed Mar. 31, 2014) & EDWARD J. EBERLE, *CHURCH AND STATE IN WESTERN SOCIETY: ESTABLISHED CHURCH, COOPERATION AND SEPARATION* 76 & 142 (2011).

39. Hans Raun Iversen, *Religion in Denmark*, available at <http://denmark.dk/en/society/religion/> (last accessed Mar. 31, 2014).

40. Sophie van Bijsterveld, *Religion and the Secular State in the Netherlands*, in *RELIGION AND THE SECULAR STATE: NATIONAL REPORTS* 524-25 & 535 (2010). The state has in fact provided generous subsidies for recent Muslim immigrants, according to Jørgen S. Nielsen. JØRGEN S. NIELSEN, *TOWARDS A EUROPEAN ISLAM* 61 (1999).

41. Alicia Parseghian, *Lebanon's Transition to Stability and Openness* (An Unpublished Paper Submitted to the American College of Greece-Institute of Diplomacy and Global Affairs) 9, available at http://www.acg.edu/sites/default/files/pdfs/01_LEBANON%20THESIS.pdf (last accessed Mar. 31, 2014).

42. *Id.*

43. Carens concerns himself with "culture and identity." Carens, *supra* note 19. The Author assumes that religion is reducible to neither, and that it represents a

what is needed to uphold equidistance. But how? No neat theoretical mechanism can guarantee the infallible achievement of such a balance. And it is difficult to conceive any single institution possessing the knowledge and objectivity to determine egalitarian distributions, or one capable of formulating any fixed calculus by which a cacophony of religious claims can be carefully measured, weighed, and arbitrated. In the absence of a definitive formula or institution, a glance at some possible practical solutions will help clarify the meaning of equality relevant to equidistance.

The resources the state may allocate are either fungible or not. One method of allocating state funding, consistent with models II and III, would present citizens an opportunity to voluntarily affiliate themselves (e.g., on tax or census forms) with a religious group. The state could then award financial assistance to these groups in proportion to their membership. In the case of state resources that are not fungible, such as official status or recognition, how can the balance be achieved? Political competition and institutional representation of religious groups may be the only way to begin to deal with competing claims. For example, creating consultative counsels representing religious groups could go some distance in making religious claims more manageable in the hands of their ultimate arbiter, which remains, in models II and III, the state.⁴⁴

D. Model IV: Establishment

Religious authority can be transformed into political authority. The authority of religious figures and groups goes beyond symbolic recognition or establishment (as in, for example, the British case), to include influence in law and policy. Essentially, the state recognizes one or more faiths or religious groups as official, as the religion of the country and/or the state. When multiple faiths exist in a society, the state must treat these faiths equally in the sense that it provides the same official status to all, and may

distinctive dimension of human life, which individuals express, construct, and perpetuate in the media of culture and identity.

44. The state cannot serve this function if it is coterminous with religious structures of power, as is consistent with model IV. A distinction between two types of justice will help elucidate the meaning of equality in models II and III: perfect and pure procedural justice. In the former, the criterion for distribution exists prior to the allocation. In the latter, in lieu of such a fixed metric, justice depends on the adherence to a correct procedure, and the fairness of the system of institutions and rules which make the allocation. Equidistance may require the employment of either or both of these types, where “justice” is read as “equality,” in models II or III. Rawls made the distinction famous in a discussion of theories of justice, in general. RAWLS, *supra* note 25, at 84-89. Brian Barry also discusses the salience of this distinction in the context of equidistance. See BRIAN BARRY, *POLITICAL ARGUMENT: A REISSUE WITH NEW INTRODUCTION* 94-100 (1995).

represent each group, in proportion to its membership, in consultative or legislative functions. Alternatively, the establishment model permits giving privilege to a single faith when only that religious faith exists in society.⁴⁵ While religious freedom, as a separate liberal principle, continues to restrain the state from coercion of religious belief and practice, equidistance by itself places no constraints on the aid and recognition of a singular faith, even to the point of wholly conflating religious and state authorities, in a manner tantamount to theocracy.

Whether single or multiple faiths compose society, under the establishment model, law codes may incorporate or consist in religious law, and eligibility requirements for political office may include religious tests. The closest approximation of a theocracy, which displays some characteristics of this model in the contemporary world is the rule of the juriconsult (*Vilayat-i Faqih*) in Iran.⁴⁶ The fluctuating constitutional, legal, and political recognition of the Islamic faith in Pakistan and a range of Arab states may or may not constitute establishment.⁴⁷ Syria and Egypt, for instance, while seeking ideological support from their affiliation with Islam, are better characterized as accommodative regimes, where the actual holders of power do not depend upon their religious credentials or learning to buttress their claims to authority.

As the diverse cases alluded to here imply, which of the four models best conforms to equidistance depends upon the particularity of each society. In the following section, the Author identifies three key empirical conditions that together determine which of the four models above can best achieve the impartiality equidistance requires.

IV. THREE STATE AND SOCIETAL QUALITIES

What equidistance implies in a particular country depends upon three features of that state and society: first, the degree of religious homogeneity or heterogeneity of society, that is, the *number of religious groups* (axis z); second, the *societal demand* for the involvement of religious groups in political processes (axis x); and third, the ability of the state to treat religious groups impartially if it should aid or recognize any of them, which the Author calls *state capacity* (axis y).

45. MORRISON, *supra* note 22, at 151.

46. Oxford Islamic Studies Online, *Vilayat-I Faqih*, available at http://www.oxfordislamicstudies.com/article/opr/t125/e2459?_hi=0&_pos=15 (last accessed Mar. 31, 2014).

47. See Pew Research Center, *Mapping the Global Muslim Population*, available at <http://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population/> (last accessed Mar. 31, 2014).

A. Axis Z: Number of Religious Groups

As the principle of equidistance stipulates, religious *groups*, not *faiths*, as such (e.g., Christianity, Judaism, Islam, etc.) are the objects of state treatment which are bound by the norm of impartiality.⁴⁸ Thus, in a heterogeneously Christian society, there may be different sects, even among Protestant Christians, such as Evangelical, Baptist, and Lutheran, among others.⁴⁹ These sects may further divide themselves into churches or smaller groups who have a sense of collective identity or interest. In elaborating equidistance, care must be taken not to impose a reductive simplicity on the reality of contemporary religious life. At no point in history have these groups, which appear to share qualities characteristic of religion, been so plural as they are today, as attested by the proliferation of New Age groups, Wiccan covens, personal cults or deities, religions of indigenous peoples, and so forth. Axis z corresponds to the total number of such groups in society.

B. Axis X: Societal Demand

This Axis is composed of an aggregation of different elements, although these are not, for the simplifying purposes of the diagram drawn in the next section, counted separately.⁵⁰ One factor is the number of individuals involved in religious groups who seek a closer relationship between their faith and political processes. If religionists accept traditional secularism, with its characteristic mutual exclusivity of the state and religion, the demand is low. Similarly, if society is primarily composed of atheists or believers whose religious adherence can best be characterized as cultural, as opposed to theological, the societal demand is low. At the other extreme, if the religious believers in a society reject traditional secularism as inconsistent with their faith, and they view political involvement as essential to the existence and continuity of their faith, societal demand is high.

In the intermediate range, believers find compromise options, where the state makes some concessions towards religious groups (short of recognizing any groups as official), acceptable and consistent with their religious duties and beliefs. Religionists may view state aid as beneficial, although they do not regard its absence as frustrating their religious freedom. In this way, societal demand captures a quantitative element (the number of those calling for a closer relationship between religion and state), as well as two qualitative aspects of societal demand — the intensity of the belief (whether heeding societal demands constitute a lost benefit, or an actual violation of religious conviction which does violence to the faith); and the content of the religious

48. MORRISON, *supra* note 22, at 154.

49. See Introduction to Protestantism, Denominations, available at <http://protestantism.co.uk/denominations.html> (last accessed Mar. 31, 2014).

50. MORRISON, *supra* note 22, at 155.

belief, that is, the extent or degree of religious participation in political processes sought by religionists. If most religious followers seek political recognition for their faith, but only of a symbolic rather than effective nature, this diminishes the aggregate societal demand.

C. Axis Y: State Capacity

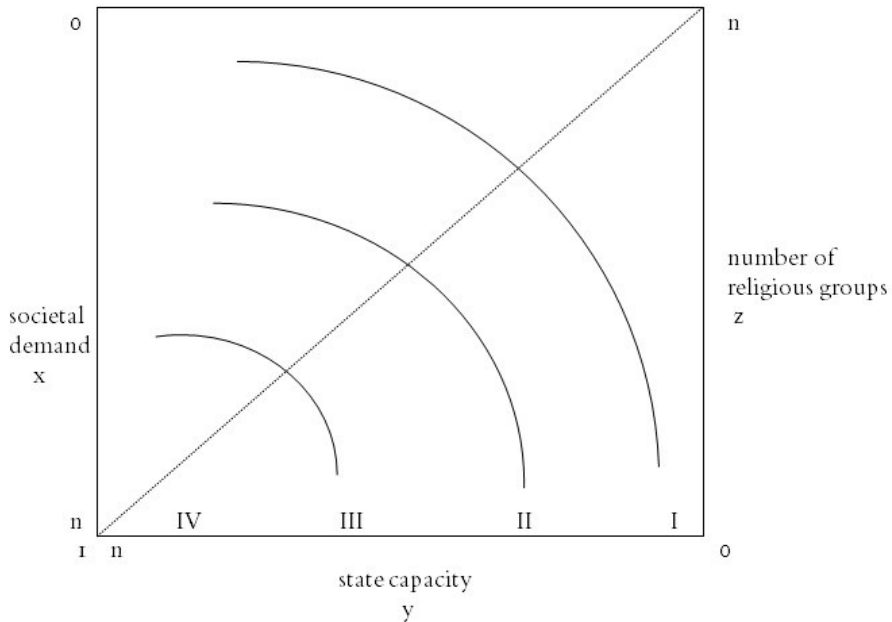
This Axis is related to the common political science conception of state capacity, as the efficacy of the state, its ability to monitor and control societal activities, enforcing laws and policies, and preventing or punishing their violation.⁵¹ However, in this context, capacity refers specifically to the ability of the state to recognize and/or aid religious groups without showing preference or favoritism. In other words, it is the capacity of the state not only to positively aid and recognize (up to the point of establishing one or more religious group as official), but also to do so in a manner, which does not display prejudice against any religious group. State capacity tends to diminish with an increase in the number of religious groups in society. Conversely, the smaller the number of religious groups in society, and the more similar these groups are (especially with regard to their demands for involvement in political processes), the less state capacity is needed in order to support official aid and recognition of religion. In other words, if religious groups are similar and few, the state can more readily maintain an impartial relation between societal religious groups, even if it aids or recognizes them, as adopting models III or IV would require.

V. DIAGRAMMING EQUIDISTANCE: FOUR MODELS AND THREE AXES

Plotting a country on the x, y, and z axes demarcating these three societal conditions determines which of the models I, II, III, or IV, are required by the principle of equidistance.⁵²

51. *Id.* at 156.

52. *Id.* at 157.



Since there can be an indefinite, but not an infinite, number of religious groups in society, the third dimensional z axis has an endpoint, labeled “ n .”⁵³ In order for equidistance to apply, there must be at least one religious group in the society, so z ranges from 1 to a maximal endpoint n .⁵⁴ Societal demand and state capacity are also finite and range up to n , starting from 0, where no group demands a say in political processes, and the state would be unable to treat competing religious groups equally if it permitted recognition or participation in political processes.⁵⁵

Under conditions of the highest societal demand and a correspondingly high state capacity, the norm of impartiality requires religious establishment.⁵⁶ The z -axis encompasses the assumption that single or multiple religious establishments are possible only when the number of religious groups is relatively small. If a state listed 20 or more different religious groups in legislation or in its constitution, according them the status of official religious creeds or groups, the significance of such a status would rapidly diminish to nothing.

Moving along the x and y axes, as societal demand and state capacity diminish, and the number of religious groups increases, equidistance calls for a more distant relation between religious groups and the state, with

53. *Id.*

54. *Id.*

55. *Id.*

56. MORRISON, *supra* note 22, at 157.

recognition falling short of establishment in model III, accommodation in model II, and the norm of mutual exclusivity or separation characteristic of secularism in model I. In the absence of greater capacity, the state can only maintain impartiality by following the separation model. To do otherwise would increase the probability of favoritism. Alternatively, if state capacity is high, but societal demand for religious involvement in politics is low, anything other than the separation model would constitute state indoctrination, or foisting religious beliefs and practices on reticent citizens, in a manner inconsistent with religious freedom.

While the Author has laid out four models for the regulation of the interaction of the state and religious groups, these models each serve the single principle of equidistance. They provide the means to the end of achieving state impartiality towards religious groups. This Section emphasized some of the empirical causal relationship, which, in combination with equidistance, determines what model is appropriate in a given setting.

VI. ARGUING FOR EQUIDISTANCE

The first part of this Article outlined, quite elliptically, the meaning of the principle of equidistance and explained the societal conditions which must be taken into account in selecting one of the four models encompassed by the principle. In this second part, the Author argues for equidistance, contrasting it with, and criticizing, secularism. He also advances the moral justification which is needed to differentiate a principle from a model, as the Author stipulated and will elaborate in the next Section.

A. A Universal Principle, Not a Single Model

This Article contends that secularism is best understood as a model. The Author can discern no reason why the separation of religion and the state is intrinsically right. However, as a model, secularism does not need to provide the normative reasons as to why it is appropriate. The justificatory task falls to a principle. That is, a model requires the support of a principle for justification.

In turn, a principle requires a range of models. Given the diversity of countries, in terms not only of their religious composition, but also the state's regime type, degree of democracy or autocracy, and capacity, a principle that possesses only one model for regulating religion and the state will have limited applicability and little ability to take into account religious and culture differences. And yet, equidistance is an effort to formulate a single principle, which possesses universal validity, as a result of the range of models it subsumes. The advantages of a universal principle are not only theoretical — elegance, simplicity, comprehensiveness, and so forth. They are also moral. If liberal tenets, such as religious toleration, are taken to be

universal, then the principle, which expresses and incorporates them, must also be universal.

The distinction between principles and models grants equidistance both universality and sensitivity to circumstance. Such flexibility is a virtue because a degree of societal relativity is a necessity, from both normative and practical perspectives. Secular separation is ill-suited to some societies because the religious beliefs and practices of members of those societies make the imposition of a secular model not only difficult to achieve, but also normatively unacceptable due to the violence to religious freedom which it would do. Consequently, the question of whether religious and political institutions should interact — and if they should, in what ways — must be determined by societal conditions, with the three sketched in the diagram featuring prominently among them, even as the universal constraints of equidistance govern such interaction.

B. Protection of Liberal Rights, Not Negative Neutrality

Liberal neutralists charge the state with neutrality in a negative sense — to take no position on conceptions of the good.⁵⁷ They translate the neutrality requirement into secularism, rendering religious and state institutions parallel, like two lines that never meet.⁵⁸ Religious believers from a variety of faiths and contexts criticize this translation.⁵⁹ They contend that secularism is not, in fact, neutral towards conceptions of the good as neutralists claim.⁶⁰ Rather, secularism itself presupposes a Christian, more specifically, Protestant delineation of religion, and embodies the values and positive theological premises of that creed.⁶¹

57. Michael Bailey, *The Varieties of Democratic Experience*, in FAITH, MORALITY, AND CIVIL SOCIETY 69 (Dale McConkey & Peter Augustine Lawler eds., 2003).

58. See Professor the Lord Plant of Highfield, Professor of Divinity, Gresham College, Rights, Law and Religion in a Liberal Society — Lecture One, Lecture at Barnard Inn's Hall, Gresham College, Gresham College (Jan. 28, 2014) (transcript available at <http://www.gresham.ac.uk/lectures-and-events/rights-law-and-religion-in-a-liberal-society-lecture-one> (last accessed Mar. 31, 2014)) & David McIlroy, Is Secular Law possible?, available at <http://www.theosthinktank.co.uk/comment/2013/06/11/is-secular-law-possible> (last accessed Mar. 31, 2014).

59. See McIlroy, *supra* note 58 & Julian Baggini, 'A secular state must be neutral' — what does that mean exactly?, available at <http://www.theguardian.com/commentisfree/2012/feb/16/what-mean-secular-state-neutral> (last accessed Mar. 31, 2014).

60. McIlroy, *supra* note 58 & Baggini, *supra* note 59.

61. The Author will not make that argument here, although he would agree that some ideologies, such as secular humanism, do affirm religion or state separation as a conception of the good. The Author investigated this and other Sunni

Negative neutrality is an impossible ideal. This is not in itself a reason to dismiss it, but it does limit the practicable prescriptions that it can yield, diminishing its utility as a guide to political thought and action. However, the argument this Article wants to make is that negative neutrality is an ideal in disharmony with the broader liberal tradition and its priorities. The reason for this is that respecting liberal rights, most relevantly for present purposes, the right to freedom of religion takes precedence over state neutrality. A substantive list of liberal rights and freedoms, such as that enumerated in the American Bill of Rights does not entail liberal neutrality.⁶² On the contrary, this Article submits that liberal neutrality actually fails to respect liberal rights. As the Author will argue in the next Section, neutrality violates the right to freedom of religion in many instances. This Article posits that equidistance is more loyal to a traditional list of liberal rights, when these rights are interpreted as constraints on the state.

While perfectionist liberals do not seek neutrality and maintain that liberalism encompasses substantive values and conceptions of the good,⁶³ they also support secularism. They agree with the neutralists that the state should avoid entanglement with religion, and that only arguments grounded in suitably “public” reasons, should be admitted or employed by the state.⁶⁴ Therefore, state officials may not justify state actions by referring to religious norms.⁶⁵ The Author rejects the perfectionist grounds for secularism as well. Requiring state discourses to be free of conceptions of the good is sometimes inconsistent with religious freedom, when religionists hold their religion as the proper basis for their and their co-religionists participation in the political system. As will be seen in the next Section, the Author does not take the right to religious freedom to be unlimited. He submits, however, that the

Muslim critiques of Secularism in his work *Secularism Revised: Arab Islam, Religious Freedom, and Equidistance*. See MORRISON, *supra* note 22.

62. See U.S. CONST. amends. I-VIII.

63. John Stuart Mill, with his celebration of intellectual improvement and human perfectability, propounds such a substantive and non-neutral liberalism. See Colin Heydt, John Stuart Mill (1806-1873), available at <http://www.iep.utm.edu/milljs/> (last accessed Mar. 31, 2014). As a more recent example, according to William A. Galston, the liberal state should concern itself with the virtue of its citizens, their culture, and justice. He wrote that “[l]iberalism cannot, as many contemporary theorists suppose, be understood as broadly neutral concerning the human good. It is rather committed to a distinctive conception of the human good, a conception that undergirds the liberal conception of social justice.” WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 18 (2002).

64. John Rawls, *supra* note 7.

65. *Id.*

categorical rejection of religious reasons as improper goes too far, thus unnecessarily truncating religious freedom.

Equidistance maintains that the process of justifying government action may, if it does not result in favoring some religious groups over others, rely on religious appeals and reasons. For example, if the government of a religiously homogeneous society employs religious discourses, but respects liberal rights as side constraints, the state's actions are consistent with equidistance. Or, in a religiously plural but uniformly monotheistic or deistic society, justifications appealing not to sectarian but nevertheless to religious core commitments common to the array of beliefs and religions in the society would also be consistent with equidistance.

The thrust of this argument, then, is that a substantive conception of rights, as individual entitlements, which constrain state action, better accords with the liberal tradition than neutralism or existing versions of liberal perfectionism. Both neutralists and liberal perfectionists support secularism, albeit for different reasons. However, as the next Section aims to demonstrate, neither of them adequately values one particular liberal right — the right to religious freedom.

C. Religious Freedom

“Religious freedom” is an empty formulation in the absence of the content actual religious believers supply. Religious believers of all varieties converge on some common practices, such as the construction and maintenance of houses of worship, regular meetings at these locations, meditative practices such as prayer, whether it be individual or collective, and methods of collecting resources and funds to support their projects and practices.⁶⁶ Thus, barring or impeding them from meeting, organizing, soliciting resources, and so forth, deprives them of freedoms, religious and other.

While not all religious practices are common to every faith, and not all infringements of religious liberty take the form of actual intervention or punishment, equidistance expresses the intuition that the state must not favor particular religions over others when it determines the allowable scope of religious freedom. If some religions are regarded as the template by which the meaning of “religious freedom” is determined, then that conception of religious freedom is inadequate. As with a right to freedom of thought or expression, the relevant factor in determining the scope of religious freedom — what ideas or language or practices it will permit and protect — is not the

66. See The Pew Research Center, U.S. Religious Landscape Survey Religious Beliefs and Practices: Diverse and Politically Relevant (An Unpublished Report Produced by the Pew Research Center) 36, 44, & 41, *available at* <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf> (last accessed Mar. 31, 2014).

content of that thought or language, but the compatibility of its expression with the equal rights of others. The right to freedom of religion does not accordingly require religious beliefs or practices to be conformed to some pre-existing conception of the scope of religion or religious freedom.

Secularism systematically prejudices groups who seek a more expansive political role for their faith than secularism permits, without any such prejudice or rights violation occurring against other groups who view their religion as apolitical. Such an institutionalized and persistent feature of a political system contrasts sharply with one where the state is open to religious participation and influence, as a matter of policy and custom, and sensitive to religious beliefs, but which on some occasions excludes or marginalizes a particular religious group. Systematic disadvantaging is distinct from episodic inequities and *ad hoc* unfairness, which inevitably occur, even in good faith, whether from lack of information, errors in reasoning, or the bluntness of policies enacted across a wide and variable domain, among others.

As can be seen, equidistance incorporates and, under specified conditions, ratifies the separation model, which resembles secularism. However, before doing so, it admits to consideration the other three models, which permit a more robust political role for religious groups than secularism would allow. When equidistance calls for the separation model, it does so in the interests of approximating impartial treatment of religious groups. Alternatively, equidistance may require the equal aid and recognition model in which the state permits the insertion of religious discourses and the participation of religious figures as such in political processes. In these instances, equidistance goes further than secularism can in satisfying the interest in respecting religious freedom.

The right to religion that equidistance is intended to respect is not necessarily a positive right, that is, an entitlement born by religious groups to resources and goods distributed by the state. If religious groups attempt to acquire political influence or power by democratic or other means recognized in the political system at hand and are prevented from doing so by the state on the grounds that their success would violate the secular separation, no positive right is needed to reject this outcome. Equidistance, as in this case, may be better able to respect religious freedom in the negative sense, not by providing resources to religious groups, but by staying out of the way if such groups acquire power and influence.

When secularism results in respect for religious freedom, freedom of speech, thought, and action — it does so accidentally. It measures reality using an entirely different metric: one which has nothing to do with religious freedom or any other liberal right *per se*. As long as religious and political institutions are kept separate, the requirements of secularism are satisfied. However, as this Article aimed to show, such a separation can be

inimical to individual liberty and freedom. If it happens that the members of society and their religion do not want to take actions, which run afoul of the system of secularism in effect (e.g., seeking state support for religious education or associational activity), secularism “respects” religious freedom. But this “respect” is accidental. It is incidental to the model, because it is a product of the environment, rather than the model.

Because equidistance embraces multiple arrangements of religion and state, rather than the single model offered by secularism, it is better able to respect religious freedom — both more fully in a singular instance, and also in a wider range of cases, where religious faiths and their demands are more diverse.

D. Fluid Rather Than Fixed Constraints on Religious Involvement in Politics

Secularism implies fixed constraints, actions which the state cannot take, or politically significant actions which religious groups cannot take, such as the enforcement of religiously-based norms, when these norms do not have adequate secular justifications.⁶⁷ What determines whether a state conforms to secularism? Its observance or violation of set institutional divisions is the decisive consideration. While these secular divisions and constraints may evolve over time, they are, at any given moment, non-negotiable. For example, when a decision prohibiting public school prayer comes down from the U.S. SC,⁶⁸ it is understood as a standing prohibition, a fixed constraint, notwithstanding the reality that it could be modified or discarded over time.

Although the model equidistance ratifies may require institutional separation, and in such an instance, actions taken on the authority of equidistance *via* the model it selects may *prima facie* suffer the same limitation of fixity — there is a crucial difference. Alternative arrangements, which do not suffer these limitations, receive consideration under the auspices of equidistance. The review of other models implies that, if equidistance selects the separation model, no other model could have been projected to avoid this limitation.

According to equidistance, no particular state action or institutional arrangement can be ruled out simply by considering the action or arrangement itself, or because it violates a content-based restraint — e.g., against school prayer.⁶⁹ If secularism (construed not as the separation model, but as an independent principle) and equidistance concur that a particular

67. See McIlroy, *supra* note 58 & Baggini, *supra* note 59.

68. See, e.g., *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 316–17 (2000); *Lee v. Weisman*, 505 U.S. 577, 597–99 (1992); & *Engel v. Vitale*, 370 U.S. 421, 430–36 (1962).

69. *Id.*

law or policy cannot be enacted by the state, the reasons for this conclusion will differ. Secularism may reject a law requiring school prayer because the state is doing the bidding of religious groups and sanctioning particular religious practices. If equidistance rejects such a law, it cannot be for this reason. Rather, equidistance could rule such a law impermissible because, for example, other religious groups are opposed on religious grounds to such acts of worship, or on the grounds that, if permitted, such actions would be tantamount to state partiality towards some faiths.

In short, equidistance better reflects the actual dynamic character of society, and the changes public opinion and social realities inevitably undergo over time.

E. Plying Between the Charybdis of Strict Secularism and the Scylla of Religious Extremism

The secular lens tends to refract religion and politics as black and white — erasing the spectrum of gray ranging between them. Equidistance permits a more nuanced scrutiny of the intermediate hues — those ranging between complete separation and the deleterious coalescence of state and religion. Contrary to the view that any involvement is dangerous or harmful, mutual influence and cooperation are possible and, the Author suggests, sometimes beneficial. The principle regulating religious involvement in politics should at minimum be open to this possibility, rather than dismissing any involvement *pro forma*.

Equidistance fills the silence secularism leaves in the intermediate zone between the separation and the total identity of religious and political authorities. Maintaining equal distance from religious groups does not only imply granting aid and recognition. It may also require the state to limit religious manifestations in the public and political sphere, as the model of separation, and also of accommodation, demonstrate. For example, a highly activist religious organization may seek to maximize its influence by heightening its media visibility or deepening its relationships with political parties. If this effectively results in state partiality for this group at the expense of others, equidistance requires the state to limit the activities of that group. In sum, the purpose of equidistance is the opening and theorizing of a wider field for religious discourses and organizations, in which their potential contributions to individual and collective life can be as fully realized as is consistent with state impartiality for religious groups.

VII. FROM TOLERATING RELIGIOUS DIFFERENCES TO TOLERATING RELIGION, WRIT LARGE

Although not purporting to elaborate a complete theory, this Article has taken a measured step or two down the path first opened by James Madison

with his reading of the non-establishment clause.⁷⁰ Constitutional law constructions of non-preferentialism, together with the political theory contributions of consocialism⁷¹ and evenhandedness⁷² comprise the sources of the impartiality standard of equidistance.

Cleaving to the non-preferentialist byway detracts not in the least from the wisdom of the message born along that other road of religious toleration, the thoroughfare excavated by Jefferson and paved by liberal neutralists. Equidistance seeks to recognize the value and even, under some conditions, the indispensability of secularism. However, in aspiring to be a principle, a proposition which determines the appropriate model and supplies the moral justification for it, equidistance also encompasses other models, up to and including secularism's antithesis — religious establishment. Equidistance selects the model that best allows the state to treat, in deed and word, each religious group without privilege or prejudice.

In Locke's letter, published concurrently with the cessation of violent religious repression and persecution in England, Christian scripture and theological argument grounded the call for making clerical and civil powers mutually exclusive.⁷³ John Locke did not restrict himself to "public" reasons.⁷⁴ According to secularism's contemporary defenders, his appeal would, consequently, have been improper. While they would no doubt have agreed with Locke's conclusions — and, in fact, the impressionistic intellectual history in the beginning of this Article casts them as Locke's heirs — they would dismiss the scriptural references and theological premises supporting those conclusions. However, to censure or dismiss latter day John Lockes emerging elsewhere in the world and in other faiths would be deeply unfortunate. The present, and in all probability, future political and social climate, with its intermingling of diverse religious faiths, wrought by flows of population and the increased American projection of power into majority Muslim societies, imply that deliberation on state and religion can no longer confine itself to an American (constitutional) framework, nor even to a predominately Christian milieu.

Arguing within a religious tradition such as the Protestant Christianity that infused Locke's letter,⁷⁵ and allowing religious discourses a full range of play, even if they should venture into the public and political sphere, may be the only way to fully respect another deeply held liberal commitment, that of religious freedom. The arguments of this Article are, as it were, secular.

70. See WITTE, JR. & NICHOLS, *supra* note 9, at 45-56.

71. AUDI & WOLTERSTORFF, *supra* note 8, at 115.

72. Carens, *supra* note 19.

73. See Locke, *supra* note 2.

74. *Id.*

75. *Id.*

They speak to liberal and humanist convictions. Nevertheless, equidistance seeks to update the Protestant conception of religion inherent in Locke's letter.⁷⁶ The principle labors to clear a space for diverse faiths' claims, even as it judges these claims by a notionally universal standard of religious toleration.

In Locke's England, religious themes and rituals occupied a central place in social and individual consciousness and behavior.⁷⁷ The strata of society at risk from coercion and domination, as in Locke's case, identified themselves with a religious faith.⁷⁸ References to the divine permeated the discourses of the ruling offices and institutions.⁷⁹ The adherents of dominant sects, indeed, religion writ large, needed no protection. For this reason, in Locke's epoch, religious toleration meant toleration of religious differences, those differences that divided religions, and, within single faiths, one sect from another.⁸⁰

While observers of contemporary popular discourses witness an emergent global religiosity reaching a magnitude not so disparate from that of Locke's time, political theory has yet to appreciate this sea change for what it really is, and to recognize how it should inform normative reasoning on "church and state." This is not to say that scholars should acquiesce to religionists' demands for political empowerment. On the contrary, it confers the responsibility of differentiating those manifestations of religion that advance human purposes and flourishing from those that impede or reverse it. Equidistance is an attempt to undertake this responsibility. Building a wall in minds and on the ground may no longer satisfy this responsibility, nor stem the tide.

What arrangement of state and religious groups most adequately satisfies the liberal commitment to religious toleration? In answering, let us return to the tradition initiated by Locke, but with a difference. This Article is one attempt to extend and update the meaning of religious toleration itself, from toleration of religious differences, to the toleration of religion.

76. *Id.*

77. David L. Wardle, *Reason to Ratify: The Influence of John Locke's Religious Beliefs on the Creation and Adoption of the United States Constitution*, 26 SEATTLE U. L. REV. 291, 294 (2002) & Stanford University Center for the Study of Language and Information, John Locke, available at <http://plato.stanford.edu/entries/locke/#LocRelTol> (last accessed Mar. 31, 2014) [hereinafter John Locke].

78. LOCKE, *supra* note 2 & Dr. Harold Damerow, The Seventeenth Century, available at http://faculty.ucc.edu/egh-damerow/17th_century.htm (last accessed Mar. 31, 2014).

79. Parliament, Church and Religion, available at <http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/religion/overview/church-and-religion/> (last accessed Mar. 31, 2014).

80. *Id.* & LOCKE, *supra* note 2.