Brian Leiter’s new book, Why Tolerate Religion? is not exactly about toleration, at least as that topic is traditionally understood. It is mostly about religious accommodation. The book begins with a story about a Sikh schoolboy whose religion requires him to wear a dagger, a kirpan, even when there is a law prohibiting carrying weapons in school. The story is meant to raise a question about whether the Sikh should be exempted from the law even though other boys who feel equally strongly about carrying knives—perhaps equally conscientiously, only not on religious grounds—remain subject to the prohibition. Leiter wants to ask: “What are the principled reasons why the state should exempt religious claims of conscience from the burden of its laws?” (14).

He seems to think this is a question about toleration, though he must know that most theories of religious toleration do not come close to requiring believers to be exempted from generally applicable laws like the law about carrying knives. John Locke is an example: Locke doesn’t talk about knives, but he explicitly denies that the principle of toleration requires that practices of ritual slaughter, for example, should be exempted from otherwise generally applicable laws about food hygiene and the treatment of animals. For Locke and for others like Pierre Bayle and James Madison, toleration is about whether states should support religion (e.g., through some sort of establishment) and whether they should use their coercive power for the purpose of requiring certain religious beliefs and practices and prohibiting others. In other words, toleration is about whether there should be laws directed toward religion, not about whether religion should have privileges in regard to the burden of ordinary laws that are directed to some other purpose. Laws directed toward religion might include rules requiring (or forbidding) people to hold certain beliefs, outlawing apostasy, imposing taxes or tithes to support religion, banning religious minorities from conducting public ceremonies or processions, or banning them from proselytizing. One might expect a book titled Why Tolerate Religion? to engage with matters such as these, for there are many countries in the twenty-first century that have laws of these kinds, and it is usually taken to be an implication of toleration that laws of this kind are illegitimate. But Leiter has next to nothing to say on such issues. (An exception is a rather confusing set of comments about religious establishment at the end of the book [115 ff.].)

So there is a distinction between religious toleration, as traditionally understood, and religious exemptions from ordinary secular laws. Both are interesting topics, but Leiter offers little or nothing to clarify the distinction between them. Near the beginning of the book, he says he is addressing toleration rather than state neutrality, and he says that, in “post-Enlightenment secular nations (of which the United States may still be one),” neutrality is less important than the question of “the principled reasons why the state should exempt religious claims of conscience from the burden of its laws.” He insists that the latter question is properly a question of toleration since it asks whether the state should “suspend its pursuit of the general welfare in order to tolerate (i.e., ‘put up with’) a conscientious practice of a minority of its citizens that is incompatible with it” (14–15).
He does also talk about “liberty of conscience”—a phrase he associates with Rawls and with Mill. But Leiter does not define this term—unless a quotation (6) from Article 18 of the Universal Declaration of Human Rights is supposed to amount to a definition—nor does he distinguish it with any clarity from the sense of “toleration” that (for him) includes accommodations. Sometimes he uses the phrase “mere toleration” as if that encompasses liberty of conscience but falls short of religious accommodations. He considers the suggestion (attributed to Martha Nussbaum) that toleration is too grudging and too weak (72), but he does not consider what toleration (in this sense) is and how it differs from the toleration he is considering. Sometimes he even uses the term “toleration” in scare quotes to convey this idea. But, as I have said, mostly the term is supposed to include accommodations as well as liberty of conscience. It is very confusing. One is never entirely clear at various stages of the book what Leiter is arguing for (or against).

I think what he mainly wants to show is that there are no good principled arguments for religious accommodations. I say “principled arguments,” for he says he is not interested in instrumental arguments for toleration—for example, arguments to the effect that it is a good idea to exclude pacifists from military service because their presence will be disruptive of military discipline. Nor is he interested in John Locke’s main argument—that government lacks the right means for bringing about intolerant ends” (12)—though since this is an instrumental argument for religious toleration in the traditional sense and not an instrumental argument for religious accommodations, it would seem to be irrelevant for Leiter’s purposes anyway. He says too that he is not interested in the argument that governments are not competent to make correct judgments about religion (11–12). But again it is not clear why these arguments would even come up if the issue were religious exemptions as opposed to toleration in the traditional sense.

Like many others, Leiter has doubts about whether a case can be made for religious accommodations that is not also a case for conscientious accommodations generally, whether these are based on a belief in God or not. So his definition of “religion” is crucial. There is an intriguing discussion in chapter 2, where Leiter says—quite reasonably—that “we want to identify religion in such a way that we can see why it has some moral . . . claim on special treatment” (30), even if ultimately we reject that claim. He does this by identifying three features of religious beliefs: (i) they generate “categorical demands on action . . . that must be satisfied . . . no matter what incentives and disincentives the world offers up,” (ii) they are based on faith and “do not answer ultimately . . . to evidence and reasons as these are understood in other domains concerned with knowledge of the world,” and (iii) they provide “existential consolation” in regard to suffering and death (34 and 52). Leiter doesn’t think ordinary morality satisfies this definition, since (i), apart from a handful of Kantians, most people’s morality does not exhibit anything like the “categoricity” that religious laws exhibit, and (ii) morality is either not a matter of belief at all or—if one takes a cognitivist/realist approach—it is not insulated from ordinary evidence and reasons (49–51). One could quibble with the definition and these applications of it, but the more serious problem is what Leiter does with his conception of religion.
He says he is interested in whether there are good principled arguments in favor of giving special protection to religion. The principled arguments he addresses are epistemic arguments and moral arguments based on respect. Let us take epistemic arguments first. Again the poorly structured character of the book is a problem. It is not clear what an epistemic argument for religious accommodation could possibly be: what sort of epistemic case for allowing the Sikh boy to carry his *kirpan* does Leiter have in mind to consider (and refute)? It turns out that when he discusses epistemic arguments, Leiter has in mind the case for toleration in the traditional sense. He says that arguments of this kind emphasize “the contribution that tolerance makes to knowledge” (19), and he cites J. S. Mill’s suggestion in *On Liberty* that we are better off epistemically if we allow freedom of thought. However, given the second element in Leiter’s definition of “religion,” he is pretty quick with such epistemic arguments. If a religion is a body of belief deliberately insulated from the ordinary apparatus of reason and evidence, why should a rational person expect epistemic benefits to accrue from the protection or privileging of such beliefs?

Unfortunately, in developing this case, Leiter ignores the fact that both in the early modern world and in recent times, toleration arguments are directed primarily at religious authorities. Religious authorities (e.g., in Islamic states) deny that they are obligated to tolerate religious beliefs other than their own. Rebutting that denial—showing that they have good reason to tolerate, say, Jewish and Christian beliefs—might well have an epistemic aspect to it. But it will be relative to the episteme of the people to whom the argument is addressed. If one is going to eschew scientific methods, then presumably one thinks there are nonscientific ways of learning, and these might include ways of learning from other bodies of belief that also eschew scientific methods. The argument then would be that the methods—such as they are—by which religious truths are garnered and religious understandings improved will benefit from the toleration of religious traditions currently held to be false (by those to whom the toleration argument is directed). I don’t see at all how this argument can be ruled out. Maybe Leiter has a response to it, but if so he didn’t put it in his book. We, as outsiders to the religious enterprise, might have no interest in such possibilities. But historically, the case for toleration has been made from inside the religious orientation—from the premises of Locke’s Christian faith, for example, or Spinoza’s Jewishness. Or if it is made by a nonbeliever, it is still oriented to people who are believers, trying to show that they would be better off by their own lights (including their own epistemic lights) if they did not try to suppress religious beliefs that they regard as wrong.

The most interesting part of *Why Tolerate Religion?* is Leiter’s consideration of moral arguments based on respect. He uses Stephen Darwall’s well-known distinction between recognition-respect and appraisal-respect to figure out the sort of respect that religion should command on his definition. So far as recognition-respect is concerned, Leiter veers between two positions. On the one hand, he says that recognition-respect presupposes that we already know what morality requires us to do about religion since “it requires only that one honor whatever moral requirements are placed on one by the existence of other persons” (71). On the other hand, Leiter seems quite happy to say that recognition-respect
requires liberty of conscience or “mere toleration,” as he rather confusingly uses that phrase.

What about appraisal-respect? When we respect someone in this sense, we draw attention and respond appropriately to certain merits or values exemplified by them or their conduct, which others may or may not share. Does appraisal-respect for religion require that it be accorded special treatment? For Leiter, this amounts to asking whether there is something especially valuable about religion that might be lost if it is not exempted from otherwise generally applicable laws. Or as Leiter puts it: “Do matters of conscience that issue in categorical demands on action and are insulated from reasons and evidence, but which also produce existential consolation, have a special kind of value that she should appraise highly or merely tolerate?” (82). As far as I can tell, he thinks the answer is negative or inconclusive. He even toys with the idea that religious beliefs might deserve negative appraisal-respect because of the harm that they do, but then he pulls back: “much more empirical evidence would actually be required to support that conclusion” (84).

However, maybe value is not the issue; maybe the issue should be one of concern, and maybe it should also be an issue of fairness. The best case I have seen in favor of religious exemptions focuses on the special hardship that a believer may experience in submitting to an otherwise generally applicable law compared to the experience of nonbelievers. This hardship may enter into the possibility of exemptions in the following way. (This is an argument I developed in Jeremy Waldron, “One Law for All: The Logic of Cultural Accommodation,” Washington and Lee Law Review 59 [2002]: 3–34, 18–22.) Suppose one figures that a given legislative objective does not require an all-or-nothing approach: there may be room, as it were, for an exemption. For instance, a law protecting certain species of wild animal might admit of an exemption for indigenous peoples’ hunting ceremonies or regulations protecting the historic character of an urban district might admit of an exemption for the modern redesign of a church. If there is room for exemption in these and other cases, then we have to ask how fairly to distribute the benefit of such exemption. In Leiter’s example of the rule about knives in schools, it may be an open question about whether there is room for an exemption from generally applicable weapons laws, but if there is, we can imagine an argument to the effect that the Sikh boy should get the benefit of it because otherwise he suffers a heavier burden from the law compared to his secular classmates, for he is obliged to violate at the behest of secular law an uncompromising and nonnegotiable religious obligation.

Leiter briefly considers arguments along these lines in the final chapter of the book. He does not say much about the phenomenology of the hardship involved here. Obviously it has to do with the first feature of his definition of “religion,” though it may also involve elements of accountability to a transcendent deity, which Leiter excludes from his characterization of religion on the grounds that it is unfair to Buddhists (28). I wish this element had been left in play because, without it, it is much more difficult to appreciate the quality of the hardship that religious believers face in complying with certain otherwise generally applicable laws and to see why it might be fair to give preference to members of religious groups over others when exemptions are available. Leiter thinks it is unfair, but he has to concoct an artificial case to reach this conclusion—the
case of a rural boy’s family tradition of carrying knives, passed down from father to son (2 and 93). He says knife carrying for the rural boy is a matter of his “identity as a man in his community” (2), which will be destroyed if his ability to carry his knife is abridged (2–3). Maybe the case is set up by stipulation to be exactly identical with the case of the Sikh boy so far as the implication of religious obligation with “a unique sense of individual and personal identity” is concerned (32). But that stipulation may be uninteresting if it does not characterize any real cases or if cases of religious identity have features that distinguish them in various ways—important as matters of concern or fairness—from secular identity. The difficulty here is that Leiter has more or less ruled out any exploration of the distinctiveness of religious identity, by saying early on that an identity element should not be included in the definition of religion because identity can be formed in other ways (32–33).

This is a poorly organized book, and it does not really present any well-structured arguments. In a blurb on the back of the book, Christopher Eisgruber says that “every serious scholar of religious toleration will have to contend with Leiter’s bold claims.” That would have been so if Leiter had proceeded less precipitously to the question that interests him and then focused on it more steadily—if, for example, he had first identified the classic arguments for toleration and criticized them and had then gone on to argue that neither the classic tolerationist arguments (such as they are) nor any other principled arguments can make a case for religious accommodations. That would have been a bold and bracing argument. But poor structure and lack of clarity with definitions make it harder to see what is at stake in any of the arguments and what position exactly Leiter is counselling us to take.

Jeremy Waldron
New York University School of Law and All Souls College, Oxford


There’s been enough renewed interest in republicanism over the past thirty years that we can call it a “republican revival.” If you know about this revival, it’s probably through the Quentin Skinner cum Philip Pettit excavation of a third way between Isaiah Berlin’s conceptions of negative and positive freedom. For republicans, Skinner and Pettit tell us, freedom is (or at least requires) nondomination. Living without domination requires neither the absence of interference nor the actualization of ideals associated with positive liberty—autonomy, self-mastery, and so on. Suppose I want to drink less, but I just can’t sober up. So I hand over my liquor cabinet’s key to a friend, on the understanding that she will only return it after a day’s notice. This is one of Pettit’s favorite examples. He thinks it shows how interference doesn’t always compromise freedom. If I beg you for the immediate return of my key, and you refuse as per my instructions, you interfere with me, but you don’t reduce my freedom because you interfere on my terms. Interference makes me less free only when it isn’t on my terms—such interference is “arbitrary”