DEFENDING AMERICAN RELIGIOUS NEUTRALITY

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Introduction

The American law of freedom of religion is in trouble, because growing numbers of critics, including a near-majority of the Supreme Court, are ready to cast aside the ideal of religious neutrality. This book defends the claim, which unfortunately has become an audacious one, that American religious neutrality is coherent and attractive.

Two factions dominate contemporary discussion of these issues in American law. One, whom I'll call the radical secularists, tend to regard the law of the religion clauses as a flawed attempt to achieve neutrality across all controversial conceptions of the good—flawed because it is satisfied with something less than the complete eradication of religion from public life. The other, whom I'll call the religious traditionalists, think that any claim of neutrality is a fraud, because law necessarily involves substantive commitments. They believe that there is thus nothing wrong with frank state endorsement of religious propositions: if the state is inevitably going to take sides, why not this one? One side regards religion as toxic and valueless; the other is untroubled by the state's embrace of an official religion. Neither sees much value in the way American law actually functions.

Yet America has been unusually successful in dealing with religious diversity. The civil peace that the United States has almost effortlessly achieved has been beyond the capacities of many other generally well-functioning democracies, such as France and Germany. Even if the American law of religious liberty were entirely incoherent, it might still be an attractive approach to this perennial human problem. There is, however, a logic to the law that its critics have not understood.

Prominent scholars of religion have ridiculed President-elect Dwight Eisenhower's 1952 declaration: "Our form of government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is."[1] Eisenhower nonetheless revealed a deep insight into the character of American neutrality. This book aims to recover that insight.

Contrary to the radical secularists, First Amendment doctrine treats religion as a good thing. It insists, however—and here it parts company with the religious traditionalists—that religion's goodness be understood at a high enough level of abstraction that the state takes no position on any live religious dispute. It holds that religion's value is best honored by prohibiting the state from trying to answer religious questions.

American religious neutrality has over time become more vague as America has become more religiously diverse, so that today (with the exception of a few grandfathered practices) the state may not even affirm the existence of God. This is not the kind of neutrality toward all conceptions of the good that many liberal political theorists have advocated, but it is the best response to the enormous variety of religious views in modern America. It is faithful to the belief, held by the leading framers of the First Amendment, that religion can be corrupted by state support.

Many aspects of present American law in this area are puzzling. Some kinds of official religion are clearly impermissible, such as official prayers and Bible reading in public schools. Laws such as a ban on the teaching of evolution are struck down because they lack a secular purpose. Yet at the same time, "In God We Trust" appears on the currency, legislative sessions begin with prayers, judicial proceedings begin with "God save the United States and this Honorable Court," Christmas is an official holiday, and the words "under God" appear in the Pledge of Allegiance. Old manifestations of official religion are tolerated, while new ones are enjoined by the courts: the Supreme Court held in 2005 that an official Ten Commandments display is unconstitutional if it was erected recently, but not if it has been around for decades. There is confusion about faith-based social services, public financing of religious schools, and the teaching of "intelligent design."

All this, I will argue, makes sense. The key is understanding the precise level of abstraction at which American law is neutral toward religion.

This book offers new answers to three questions: What conception of neutrality is relied on in the interpretation of the Establishment Clause of the First Amendment? Is it coherent? Is it defensible?

The First Amendment of the United States Constitution says "Congress shall make no law respecting an establishment of religion, or abridging the free exercise thereof." The interpretation of this provision has been controversial for a long time, and indeed may be ripe for revolution. A growing number of writers, including several Supreme Court justices, have argued that religion clause doctrine is both incoherent and substantively unattractive. They propose to replace it with a new set of rules that are far friendlier to official endorsement of religion.

If these proposals are adopted, the result would be heightened civil strife, corruption of religion, and oppression of religious minorities. One proposal, for example, is to permit states to endorse general principles of Abrahamic monotheism. Official religious pronouncements not only brand as outsiders anyone whose beliefs do not conform to the official line; they tend to produce religion of a peculiarly degraded sort. If the state gets to discern God's will, we will be told that God wants the reelection of the incumbent administration. Another proposal is that religious activities should be eligible for direct funding so long as there is a plausible secular reason for doing so. Such funding for religious entities, particularly when those entities are relied on to provide public services such as education, aid to the homeless, prison rehabilitation, or drug treatment, can easily lead to a situation where the only option is a religious one, and people are bullied into religious activities. The most radical proposal would discard the requirement that every law have a secular purpose. Some religious justification is available for nearly anything that the state wants to do to anyone. Permitting such justifications would devastate many constitutional protections that have nothing to do with religion.

And this exorbitant price will have been paid for nothing. Present doctrine already allows for what the doctrine's critics most value: state recognition of the distinctive value of religion. The law treats religion as something special in a broad range of legislative and judicial actions. What the state may not do—what the doctrine properly forbids it to do—is declare any particular religious doctrine to be the true one, or enact laws that clearly imply such a declaration of religious truth.

Religious liberty in American law has for decades been understood in the language of neutrality. The decision barring official Bible readings in the public schools is only the most prominent example.[2] Neutrality is a ubiquitous theme in Establishment Clause decisions spanning more than half a century.[3] One prominent scholar has concluded that neutrality is "[p]erhaps the most pervasive theme in modern judicial and academic discourse on the subject of religious freedom."[4] For a brief period, in the 1970s and early 1980s, it appeared that the idea of neutrality would be a master concept both of the constitutional law of religion and of liberal political philosophy more generally.

Its reign was short, however. It quickly came under attack, on two grounds. First was the charge of incoherence: political theorists objected that any government must necessarily rely upon and promote some contestable scheme of values, so neutrality is impossible.[5] The charge of incoherence was also raised against the idea of neutrality in the Supreme Court's religion jurisprudence. This objection focused on a deep tension in the Court's position, between the idea that religion ought to be accommodated and the idea that government should be neutral between religion and nonreligion.[6]

The idea of neutrality was also blamed for substantively bad results. A neutral state would be disabled from pursuing real goods, and so its citizens' lives would not be as good as they could be.[7] Moreover, the requirement of state neutrality was deemed hostile toward religion, producing a "naked public square" in which the public is deprived of urgently needed moral resources.[8]

Today the constitutional law of religion is in disarray, because a growing number of legal scholars and Supreme Court justices are impressed by these claims. Steven D. Smith concludes that the quest for a neutral theory of religious freedom "is an attempt to grasp an illusion."[9] Thomas Hurka declares that in political theory, "it is hard not to believe that the period of neutralist liberalism is now over."[10]

These criticisms grow out of a larger consensus that the American law of religious liberty makes no sense. It has been called "unprincipled, incoherent, and unworkable,"[11] "a disaster,"[12] "in serious disarray,"[13] "chaotic, controversial and unpredictable,"[14] "in shambles,"[15] "schizoid,"[16] and "a complete hash."[17]

This book will argue that the critics are mistaken. Neutrality is a valuable and useful idea. It works well as a master concept in the theory of

the religion clauses. If the concept of neutrality is properly understood, it can resolve the deepest puzzles in contemporary religion jurisprudence.

The critics of neutrality are right that the concept is indefensible when it is understood at the highest possible level of abstraction. Yet neutrality has a persistent appeal. Even the most sophisticated critics of neutrality acknowledge that modern political life requires some degree of abstraction away from controversial conceptions of the good. Almost no one regrets the state's refusal to take a position on the metaphysical status of the Eucharist. Neutrality's continuing power demands explanation.

The answer is that neutrality is available in many forms. The First Amendment stands for one such specification. That specification has done its work well.

There is, indisputably, a deep coherence problem in First Amendment law. The Court has interpreted the First Amendment to mean that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[18] But the Court has also acknowledged that "the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion."[19]

Accommodation of religion as such is permissible. Quakers' and Mennonites' objections to participation in war have been accommodated since colonial times. Other such claims are legion. Persons whose religions place special value on the ritual consumption of peyote or marijuana (or wine, during Prohibition) seek exemption from drug laws. Landlords who have religious objections to renting to unmarried or homosexual couples want to be excused from antidiscrimination laws.[20] Churches seeking to expand sometimes want exemption from zoning or landmark laws. The Catholic Church wants to discriminate against women when ordaining priests. Jewish and Muslim prisoners ask for Kosher or halal food. These scruples have often been deferred to, and religious objectors have frequently been exempted from obligations that the law imposes on all others.

There is considerable dispute about whether the decision when to accommodate ought to be one for legislatures or courts, but that debate rests on the assumption, common to both sides, that *someone* should make such accommodations. The sentiment in favor of accommodation is nearly unanimous in the United States. When Congress enacted the Religious Freedom Restoration Act (RFRA), which attempted to

require states to grant such exemptions, the bill passed unanimously in the House and drew only three opposing votes in the Senate.[21] After the Supreme Court struck down the act as exceeding Congress's powers, many states passed their own laws to the same effect.[22] Many of those opposed to judicially administered accommodations, such as Supreme Court Justice Antonin Scalia, think that it is appropriate for such accommodations to be crafted by legislatures.

Each of these measures raises the same dilemma. If government must be neutral toward religion, then how can this kind of special treatment be permissible? It is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection. Some justices and many commentators have therefore regarded the First Amendment as in tension with itself. Call this *the free exercise/establishment dilemma.*

This apparent tension can be resolved in the following way. Begin with an axiom: the Establishment Clause forbids the state from declaring religious truth. A number of considerations support this requirement that the government keep its hands off religious doctrine. One reason why it is so forbidden is because the state is incompetent to determine the nature of this truth. Another, a bitter lesson of the history that produced the Establishment Clause, is that the use of state power to resolve religious controversies is terribly divisive and does not really resolve anything. State involvement in religious matters has tended to oppress religious minorities. Finally, there is a consideration that is now frequently overlooked, but which, I will show, powerfully influenced both the framers and the justices who shaped modern Establishment Clause doctrine: the idea that establishment tends to corrupt religion. These considerations mandate a kind of neutrality. The state may not favor one religion over another. It also may not take a position on contested theological propositions.

It is, however, possible, without declaring religious truth, for the state to favor religion at a very abstract level. *Texas Monthly v. Bullock*, for example, invalidated a law that granted a tax exemption to theistic publications, but not atheistic or agnostic publications. Justice William Brennan's plurality opinion said that a targeted exemption would be appropriate for publications that "sought to promote reflection and discussion about questions of ultimate value and the contours of a good or

meaningful life."[23] Justice Harry Blackmun thought it permissible for the state to favor human activity that is specially concerned with "such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong."[24] What is impermissible is for the state to decide that one set of answers to these questions is the correct set.

But the state can abstain from endorsing any specification of the best or truest religion while treating religion as such, understood very abstractly, as valuable. That is what the state in fact does. That is how it can accommodate religion as such while remaining religiously neutral. The key to understanding the coherence of First Amendment religion doctrine is to grasp the specific, vaguely delimited level of abstraction at which "religion" is understood.

What in fact unites such disparate worldviews as Christianity, Buddhism, and Hinduism is a well-established and well-understood semantic practice of using the term "religion" to signify them and relevantly analogous beliefs and practices. Efforts to distill this practice into a definition have been unavailing. But the common understanding of how to use the word has turned out to be all that is needed. Courts almost never have any difficulty in determining whether something is a religion or not.

The list of reported cases that have had to determine a definition of "religion" is a remarkably short one. The reference I rely on here, *Words and Phrases*, is one of the standard works of American legal research, a 132-volume set collecting brief annotations of cases from 1658 to the present. Each case discusses the contested definition of a word whose meaning determines rights, duties, obligations, and liabilities of the parties.[25] Some words have received an enormous amount of attention from the courts. Two examples, "abandonment" and "abuse of discretion," drawn at random from the first volume of this immense compilation, each exceed one hundred pages.[26] "Religion," on the other hand, takes up less than five pages.[27] The question of what "religion" means is theoretically intractable but, as a practical matter, barely relevant. We know it when we see it. And when we see it, we treat it as something good.

This vagueness has much to be said for it. This book is not an essay in comparative law, but here I will merely note two regimes that have tried a different approach. France's insistence on a more uncompromising

secularism has produced the notorious and apparently unending headscarf controversy, which has bitterly alienated not only Muslims, but also Jews and Sikhs.[28] Italy's attempt to evenhandedly fund all religions requires that each religion have some official leadership to receive and disburse the money. Because Italian Muslims are in fact diverse and fragmented, the government finds itself in the embarrassing predicament of either refusing recognition to Islam or recognizing the largest faction, which represents only a small minority and is associated with anti-Semitism and violence.[29] By refusing all official recognition of specific religions, either positive or negative, America has avoided these difficulties.

THIS BOOK STRADDLES TWO FIELDS OF STUDY: law and political theory. When each of these disciplines addresses the law's treatment of religion, it cannot do its work well unless it is informed by the other. The difficulties that ensue from a failure to grasp the particularity of American practice are revealed in the work of two leading thinkers on opposite sides of the political spectrum, philosopher John Rawls and Justice Scalia. Neither of them appreciates the unique kind of neutrality instantiated in American law.

Rawls is the best-known exponent of a liberal theory that aims at neutrality toward all controversial conceptions of the good. He claimed that the "intuitive idea" of his theory was "to generalize the principle of religious toleration to a social form."[30]

A well-ordered society, for Rawls, "is a society all of whose members accept, and know that the others accept, the same principles (the same conception) of justice."[31] The aim is a stable basis for mutually respectful political life in a society that is profoundly divided about the good life. Political liberalism is first and foremost a response to a problem: "How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"[32]

Rawls's well-known answer is the original position and the decision procedure modeled in *A Theory of Justice*. That procedure generates a conception of justice that is designed to exclude from the outset controversial conceptions of the good. "Systems of ends are not ranked in value"[33] in the original position, because the parties do not know their

conceptions of the good. Those conceptions of the good simply do not figure into reasoning about the justice of the basic structure of society.

Rawls evidently thinks that abstracting away from all controversial conceptions of the good life is the only reliable path to social unity. In modern societies, there is so much normative pluralism that the only overlapping consensus that is consistent with respectful relations is that constructed without any reference to the actual normative views of members of society. Political liberalism, he argues, should be free-standing, so that it "can be presented without saying, or knowing, or hazarding a conjecture about, what [comprehensive] doctrines it may belong to, or be supported by."[34] "[T]he political conception of justice is worked out first as a freestanding view that can be justified *pro tanto* without looking to, or trying to fit, or even knowing what are, the existing comprehensive doctrines."[35]

Rawls aspires to "civic friendship," in which we the citizens exercise power over one another on the basis of "reasons we might reasonably expect that they, as free and equal citizens, might reasonably also accept."[36] Reasonable people understand that others won't accept their comprehensive views. "Putting people's comprehensive doctrines behind the veil of ignorance enables us to find a political conception of justice that can be the focus of an overlapping consensus and thereby serve as a public basis of justification in a society marked by the fact of reasonable pluralism."[37] The path to actual civic friendship leads through reasonable terms of cooperation.[38]

This approach may possibly work under certain circumstances, but they are likely to be as unusual as the circumstances in which it is safe to drive a car while blindfolded. If you want civic friendship, you need to learn what your fellow citizens think before you propose terms of cooperation. T. M. Scanlon explains why the strategy of surveying actual comprehensive views would not be satisfactory to Rawls. "It would be impossible to survey all possible comprehensive views and inadequate, in an argument for stability, to consider just those that are represented in a given society at a given time since others may emerge at any time and gain adherents."[39] This book will show, however, that a consensus built around the convergence of a contingent set of actual views may last a long time.

Rawls is right that we should generalize from the practice of religious toleration. But before we can do that, we must understand the practice

of religious toleration. A political philosophy informed by this history will be better able to think about how to achieve the aspiration that Rawls articulates so well.

Justice Scalia is also concerned about the terms of cooperation in a pluralistic society. He thinks that the answer is a generalized monotheism: "[N]othing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek." Such a broad monotheism is also a solution to the free exercise/establishment dilemma. The way out of that dilemma is to relax the requirements of disestablishment: "[O]ur constitutional tradition . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ.)"[40]

This revision would free the Court's reading of the religion clauses from self-contradiction. But it does not work, because it discriminates among religions. Scalia frankly acknowledges that ceremonial theism would entail "contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs."[41] Yet he once wrote: "I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others."[42]

Not all religions believe in "a benevolent, omnipotent Creator and Ruler of the world." The Court held long ago that the Establishment Clause forbids government to "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[43] The membership of the latter has been steadily growing in the United States. Scalia is driven to this thin state-sponsored religious discrimination because he thinks that there is no other coherent answer to the free exercise/establishment dilemma, no other way to foster civic unity. His desire to bring coherence to this area of the law is admirable. But he does not appreciate the fluidity of neutrality.

The civic friendship to which Rawls aspires, the reconciliation of free exercise and establishment to which Scalia aspires, can be, indeed already is being, achieved, but on different terms than either of them imagines.

My analysis of modern religion clause doctrine goes only part of the way toward answering the critics. I have thus far addressed the incoherence objection, but there remains the allegation of normative unattractiveness. Here there are two sets of objections from different directions. One objection is that this conception is hostile to religion and opposed to its flourishing. The other is that this conception is *too* friendly to religion, and that it is unfair for the state to give religion as such special treatment. The answer to both is that the First Amendment is not hostile to religion, because it treats religion as a distinctive human good. And because it is not unreasonable to treat it as such a good, it is not unfair to single it out for special treatment.

This analysis has doctrinal implications. The most pressing controversies in the courts revolve around three questions. First, should religiously based exemptions from generally applicable laws be determined by the courts or the legislatures? Second, may government directly fund religious activity, so long as the principle that determines who gets the funding is not itself religious? And third, is it appropriate for citizens to seek to enact laws based on their religious beliefs? The analysis offered here has something to contribute to all three debates.

The first question presupposes (what hardly anyone doubts) that it is appropriate for *someone* to enact exemptions. Exempting Quakers from the draft, or Native Americans from the criminalization of peyote, is uncontroversial; the arguments are about who ought to draw those lines. The question also presupposes that it is possible to distinguish those cases in which special treatment of religion is required, as in church governance cases, from those in which it is forbidden. But how can these accommodations have a secular purpose? They seem flatly to contradict the secular purpose requirement. Such accommodations are therefore always susceptible to a charge of favoritism toward religion, while any failure to accommodate—or even judicial deference to legislative decision making about accommodation—is susceptible to a charge of callous indifference to religion.

Religious exemptions can, however, easily be consistent with the support of religion-in-general so long as the government does not discriminate among religious views when it provides such exemptions. The decision whether to treat religion specially involves balancing the good of religion against whatever good the generally applicable law seeks to pursue. That balancing is a matter of judgment, not reducible

to any legal formula. The argument for giving these judgments to the judiciary is that courts hear cases one at a time and so are confronted, as legislatures usually are not, with concrete situations. On the other hand, the contestable nature of the value judgments that are involved suggests that courts should not have the last word on these matters. The regime we now have is one in which, with respect to federal law and the law of more than half the states, courts are instructed by legislatures to balance on a case-by-case basis, but the results that courts reach can be revisited and overridden by legislatures.[44]

The second question, that of neutrally allocated government funding for religious activities, is now urgently relevant, because in *Mitchell v. Helms*,[45] a four-justice plurality of the Supreme Court suggested that a valid secular purpose can validate a program that directly aids religious activities. The argument is that equal access is as neutral as anything can be. But there is a danger that such programs will lead to religious oppression, by in effect creating a union of church and state that oppresses nonadherents of the majority creed. Thus, for example, a school voucher program, such as that which the Court upheld in *Zelman v. Simmons-Harris*, could lead to a situation in which the only good schools in a given area are pervasively religious, thereby forcing parents who want a decent education for their children to accept a religious education from a denomination whose doctrines they reject. Forced religious indoctrination is one of the core evils that the Establishment Clause is aimed at preventing. The Court declared that the program it approved in that case provided "genuine opportunities . . . to select secular educational options,"[46] but it did not make clear that this was a constitutional requirement.[47]

Here the requirement of religious neutrality reaches its limits. Because the requirement is so weak, the *Mitchell* plurality is wrong to think that this requirement could provide the answer to, for example, the school voucher question. The requirement can do only limited (albeit important) work. To make that requirement the center of Establishment Clause analysis would in practice nearly read the clause out of the Constitution altogether. But whether more is necessary depends on the impact upon religion of whatever funding program is put in place. Assessing the significance of impact is, once more, a matter of discretion that does not lend itself to general rules. The account offered here explains why some aspects of Establishment Clause law are unavoidably