The Agnostic Age

Law, Religion, and the Constitution

PAUL HORWITZ

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THE AGNOSTIC AGE

To my parents, Marvin and Yvonne Horwitz

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read his work. Equally apparent to me are his kindness and generosity, expressed many times but notably in his early invitation to present a portion of this book at Columbia. For this and much else besides, I owe him a debt beyond words.

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But for my parents, Marvin and Yvonne Horwitz, this book would never have been written. There is nothing agnostic about their faith in me. Their love and support has sustained me over a lifetime. I dedicate my first book to them with love and gratitude.

INTRODUCTION

What is truth? said jesting Pilate, and would not stay for an answer.

—*Francis Bacon*[1]

It is a sad thing for the human race that Pilate went out without waiting for the answer; we should know what truth is.

—*Voltaire*[2]

Most scholars of law and religion have something important in common with Pontius Pilate, and an important difference. Here is the common point: Like Pilate, they throw up their hands at the question: "What is truth?"[3] And here is the difference: At least Pilate was willing to ask the question. Not so with today's leading theorists on freedom of religion. Indeed, if there is any single question they are most likely to flee, it is the question of religious truth—the question of the nature of the universe, the existence of God, and our own fate after death. That question, and how to approach it, is the subject of this book.

This is, perhaps, a somewhat sour note on which to begin a book about law and religion. There are, after all, perfectly good reasons to avoid this question. If the state is not in the business of declaring religious truths, these scholars might say, neither are they. Their job is to explore the boundaries between law and religion. That job is hard enough already. To take on the confounding question of what religious truth *is* would doom them to failure from the start. Any question that has managed to challenge all of us across the whole span of human existence is surely too deep for mere lawyers.

Better, then, to lay the question to one side and focus on the practical questions that already occupy us: What role does the state play in people's religious lives? When can a religious individual seek or win an exemption from laws that apply to others, but that would severely restrict his or her own religious practices? When can the state endorse religious ideas and practices, and when must it fall silent? When can it subsidize religious groups, and when are these groups forbidden to seek the same privileges that any other group may win in the political process?

1. Francis Bacon, *Of Truth*, in *The Essays* 61 (John Pitcher, ed., Penguin Books 1985) (3d ed. 1625).

2. *Voltaire, Voltaire's Philosophical Dictionary* 282 (2007) (1764).

3. John 18:38. In general, quotes from the Bible in this book are taken from the King James Version.

Against this practical justification for deferring the question of religious truth, however, there is an opposing concern. Questions of religious freedom ultimately cannot be satisfactorily answered without at least some attempt to grapple with the broader question of religious truth. In this simple fact lies much of what we have seen in the realm of law and religion scholarship: dissatisfaction, approaching a state of utter misery.

The Religion Clauses of the First Amendment are deceptively simple. They read, in just sixteen words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." But these two clauses—the Establishment Clause and the Free Exercise Clause—have occasioned endless debate and confusion. It is so common and so obligatory nowadays to begin any serious work on law and religion in the United States by describing this confusion that the computers of American law and religion scholars might as well come with a macro key to save them the time and trouble of hunting down the usual sources. Instead, a keystroke would vomit forth words and phrases like "incoherent,"[4] "chaotic, controversial and unpredictable,"[5] "in shambles,"[6] "schizoid,"[7] "confused,"[8] and "a complete hash."[9] And that is just what law and religion scholars are likely to say when they are feeling generous. On bad days, they may say something *really* unpleasant.

It is our happy fate as legal scholars to have a very convenient scapegoat for this state of affairs: the United States Supreme Court. The Court cooked this dog's breakfast, we may say; we're just serving it up. The Court's members, when they're especially candid (or when they are describing each other's work), are happy to shoulder the blame. So Justice Antonin Scalia has said of his brethren that they have "made such a maze of the Establishment Clause that even the most conscientious government officials can only guess what motives will be held unconstitutional."[10] Justice Stephen Breyer has attempted to make a virtue of necessity, arguing that the Supreme Court's opinions on religion form a landscape riddled with inevitable "difficult borderline cases" in which there is

4. Mark V. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 247 (1988).

5. Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine*, in *Law and Religion* 63, 64 (Rex J. Adhar ed., 2000).

6. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1246 (1994).

7. Ronald Y. Mykkeltvedt, *Souring on Lemon: The Supreme Court's Establishment Clause Doctrine in Transition*, 44 Mercer L. Rev. 881, 883 (1993).

8.Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 Geo. Wash. L. Rev. 672, 674 (1992).

9. Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 Tex. L. Rev. 577, 578 (1996).

10. *Edwards v. Aguillard*, 482 U.S. 578, 636, 640 (1987) (Scalia, J., dissenting).

"no test-related substitute for the exercise of legal judgment."[11] For a Supreme Court Justice, that is the politely worded equivalent of Bette Davis's famous warning in *All About Eve*: "Fasten your seat belts—it's going to be a bumpy night."[12]

But we should not blame the courts. The incoherence of religious freedom jurisprudence is just a symptom of a disease suffered equally by law and religion scholars and the Supreme Court. To be more specific, the disease is an allergy: an allergy to questions of religious truth.

It is certainly not the case that law and religion scholars avoid questions of religious truth because they all share the same religious viewpoint. Nor, despite frequent accusations to the contrary, is it that law and religion scholars, even at our most liberal law schools, all share an aversion to religion. There is plenty of diversity among law and religion scholars. Their primary tendency is neither religious belief nor hostility to religion. It's a reluctance to talk about religious truth *at all*.

THE AGE OF CONTESTABILITY

Outside the legal academy, in contrast, contemporary public dialogue is bursting with talk about God and religious truth. In recent years, a number of best-selling polemical writers have argued against the existence of God and for the absurdity and irrationality of religious belief. The argument advanced by these writers has been labeled "the New Atheism."[13] Proving the Newtonian literary dictum that for every argument in publishing that sells well, there will be an equal and opposite reaction, the New Atheists have been met at the ramparts by an equal number of vociferous defenders of religious belief. Call them the "New Anti-Atheists."[14] These critics argue that what is new about the New Atheists is mostly how little they know about religion, and how impoverished their arguments are in comparison to those of the "old" atheists—influential writers like Freud, Feuerbach, Marx, and others. In any event, the battle between the New Atheists and the New Anti-Atheists has been well and truly joined in the contemporary public square.

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11. *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment).

12. *All About Eve* (20th Century Fox 1950).

13. *See, e.g.*, Christopher Hitchens, *god is Not Great: How Religion Poisons Everything* (2007); Richard Dawkins, *The God Delusion* (2008); Daniel C. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (2006); Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (2004). Because I am averse to undue cutesiness, I will generally refer to Hitchens' book as *God is Not Great* from now on, ignoring his insistence on using a small-case "g."

14. *See* Chapter Four. For the use of the label "New Anti-Atheists," see The New Yorker, August 31, 2009, at 8 (table of contents description of a book review published in this issue by James Wood, *God in the Quad*, at page 75).

Public interest in the question of God's existence hasn't been this hot since *Time* Magazine prematurely published His obituary over 40 years ago.[15]

What are the reasons for the sudden resurgence of public interest in the ultimate question of God's existence? There are two principal causes for this explosive growth. One is the complex status of religion and religious belief in what Charles Taylor has called our "secular age."[16] The phrase, as used here, does not mean that God has disappeared from the stage and we are all living in a post-religious environment. Whatever *Time* Magazine, along with many serious academics of the mid-1960s, may have thought would happen to religious belief in America, the United States remains, by and large, a resolutely religious country.

What has changed is the social context in which religious belief exists. If Western society was once a milieu in which "it was virtually impossible not to believe in God," in our own age, "faith, even for the staunchest believer, is [now only] one human possibility among others."[17] We live in an age in which religion is very much alive, but also highly contestable. On the one hand, the profusion of faiths within the American landscape gives an extraordinarily rich picture of what it means to be religious. On the other hand, it is now possible to imagine life without religious belief at all. Three centuries of post-Enlightenment thought and liberal democratic development have made it possible—indeed, unexceptional—for people to be securely atheistic in their worldview, or, if they do believe in God, to give the matter little thought in their daily lives. In individual lives, God may be everything from a delusion to a bit player to a constant and powerful presence. In society as a whole, however, God is merely an option.

Surprisingly, the very fact that religion is now just an option makes it all the more important. In a society like our own, in which religion was once part of the common social fabric, and most people subscribed to relatively tame variants on what we have come to call "Judeo-Christianity," the very fact that our religious beliefs were so shared and widespread made them relatively unimportant, or at least uncontroversial.[18] But religion plays a very different role in what we might call "an age of contestability."[19] In this environment, precisely *because* religion is of fading importance to some people, it is of increasing importance to others. The very question of religious belief has become a flashpoint. Religious truth, once relegated to the background, is now firmly in the foreground of public discussion.[20]

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15. *See Time*, April 8, 1966 (asking, on the front cover, "Is God Dead?").

16. Charles Taylor, *A Secular Age* (2007).

17. *Id.* at 3.

18. *See generally* Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. Memphis L. Rev. 973 (2009).

19. *Id.* at 976.

20. *See id.; see also* Mark Lilla, *The Stillborn God* 3 (2007) ("[W]e are again fighting the battles of the sixteenth century–over revelation and reason, dogmatic purity and toleration,

Although law and religion has not yet done much to confront the question of religious truth, it has been greatly affected by the question of religion's fate in an age of contestability. Law is one of the main areas in which Americans fight over what it means to be religious or irreligious. Once, Americans were widely religiously observant, and the struggles were largely internecine disputes over whether the state could redistribute income from one (Christian) denomination to another. It was a time in which James Madison could argue forcefully against the taking of so much as "three pence . . . for the support of any one [religious] establishment."[21]

Now, after several decades of struggle on and off the courts, a delicate détente prevails, and there is, relatively speaking, less controversy over this issue than there once was.[22] The primary battleground has shifted to questions of religious symbolism.[23] When can the Ten Commandments be placed on public property?[24] Does their erection require the same access to public space for other religious

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inspiration and consent, divine duty and common decency."). *Cf.* Christian Smith, *American Evangelicalism: Embattled and Thriving* (1998) (arguing that evangelicalism in the United States has grown not in spite of, but because of, its engagement and struggle with our increasingly pluralistic society).

21. James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 5 *The Founders' Constitution* 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987).

22. Much of this controversy reached its denouement when the Supreme Court ruled in favor of the possibility of "vouchers" for religious schools, and for evenhanded distribution of federal funds to religious schools, in two cases early in this century. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000). These cases were the culmination of two decades of Court decisions focusing increasingly on equality as the lodestar of Establishment Clause decisions involving funding questions. The voucher decisions leave many questions to be decided. *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, Zelman's *Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917 (2003); Mark Tushnet, *Vouchers After Zelman*, 2002 Sup. Ct. Rev. 1. It is fair to say, however, that the caselaw in this area is more stable now than it has been for some time, and less controversial.

23. *See, e.g.*, Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 Wm. & Mary L. Rev. 771, 771 (2001) (arguing that the "emerging trend" in Establishment Clause litigation is "away from concern over government transfers of wealth to religious institutions, and toward interdiction of religiously partisan government speech"); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 Harv. C.R.-C.L. L. Rev. 503 (1992).

24. *See, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

monuments?[25] When can students,[26] lawmakers,[27] and others pray in school, at legislative sessions, and in other public places? When can government display religious symbols on its own land, and when will either the speech or the property be treated as private?[28] When can universities deny sponsorship to student groups with strong religious beliefs?[29]

And the list goes on. In an age of religious contestability, the most heated battles are being fought not over how government spends, but over what government *says* about the role of religion in public life. Both those who believe that religion is a fiction and those who believe it is a vital force are caught up in a battle of symbols over these beliefs.

All of these legal battles are ultimately only one front in a larger cultural war. These individual skirmishes are both a part of that war and a reflection of it. The war is a larger debate about the relationship between religion and liberal democracy. Should religious arguments be forbidden in public political debate? Does their persistent presence in our public political dialogue demonstrate that we live under the threat of a looming theocracy, as some believe? Or does what some see as the exclusion of religious arguments from public discussion demonstrate the creeping hold of "secularism" over public debate, with the consequence that religious believers are (or believe they are) excluded from polite society and left at the mercy of an increasingly degraded culture?

This cultural war is often fought by proxy. For example, in book after book, Americans argue over the religious beliefs of the Founding Fathers and what those beliefs say about the religious or secular nature of the United States.[30]

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25. *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

26. *See, e.g., Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); Paul Horwitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in* Adler v. Duval County, 63 U. Miami L. Rev. 835 (2009).

27. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983). For cases involving legislative prayers at the local level, demonstrating the unsettled nature of this area, see, *e.g., Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005); *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998). *See generally* Christopher Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 Minn. L. Rev. 972 (2010).

28. *See, e.g., Salazar v. Buono*, 130 S. Ct. 1803 (2010) (upholding the display of a Latin cross atop Sunrise Rock in Mojave National Preserve, on land transferred by federal legislation to a private organization); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (upholding the display of a cross by a private organization on public land).

29. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

30. *See, e.g.,* Steven Waldman, *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America* (2008); Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* (2006); David L. Holmes, *The Faiths of the Founding Fathers* (2006); Alf Mapp, *The Faiths of Our Fathers: What America's Founders Really Believed* (2005).

Some argue that we always have been and remain a "Christian nation."[31] Others argue that, whatever the individual beliefs of the founding generation may have been, ours has always been a "Godless Constitution."[32] Still others argue that whether or not we were once a Christian nation, the profusion of religious beliefs and nonbeliefs in our own age means we are one no longer—and they proceed to argue over whether this is cause for celebration or concern. The legal battles over religious symbolism are thus just a reflection of a wider argument over the relationship between religion and liberal democracy.

But there is another reason for the resurgence of interest in all these questions, and it adds extra fuel to a fire that would already have burned quite well on its own. That is the fact that we are now living in a post-9/11 world. Whatever compromises Americans had reached over religion, and however trivial or symbolic their debates may have seemed, the fall of the Twin Towers made clear that religion is hardly a spent force. To be sure, the causes of terrorism are complex. But there can be no doubt that religion helped inspire and direct the forces that tore a hole out of New York City and Washington, D.C. The events of September 11 were a reminder of just how powerful religion can be in shaping people's lives and actions, for good or ill. The fallout from that day has shown us how fraught and fragile the relationship between religion and liberal democracy can be.

This is not just an American dilemma. If anything, the fact that religious wars in the United States are still largely fought only on symbolic grounds is a testament to just how well the American cultural landscape has weathered the rise in tension between the claims of religion and those of secularism. But ours is not the only corner of the world in which those controversies occur. As events across the world—from Western Europe to the Middle East—have shown, Americans are living through only one piece of a global dilemma.[33]

That dilemma has turned our thoughts back to questions of religious truth. For example, Sam Harris, who was an anonymous graduate student before his best-seller *The End of Faith* catapulted him to notoriety, traces the genesis of his book directly to 9/11.[34] Susan Jacoby, the author of the New Atheist tract *Freethinkers*, says much the same thing.[35] Indeed, the very fact that these books sold so well demonstrates powerfully just how much 9/11 helped redirect our public conversation toward questions of religious truth. If we are fighting a religious war, after all, it would help to know on whose side God stands, if any—or

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31. *See* Stephen McDowell, *America, A Christian Nation?* (2005).

32. *See* Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State* (2005).

33. *See, e.g.*, Jürgen Habermas, *An Awareness of What is Missing*, in Jürgen Habermas et al., *An Awareness of What is Missing: Faith and Reason in a Post-secular Age* 15, 19 (2010).

34. *See* Harris, *supra* note 13.

35. *See* Susan Jacoby, *Freethinkers: A History of American Secularism* 2–3 (2004).

whether, as John Lennon sang, there would be "nothing to kill or die for" if we could imagine "no religion."[36]

In short, public attention in our age of religious contestability has not only focused on an array of issues concerning the nature of religion and its relationship to liberal democracy, but more fundamentally still on questions of religious truth itself. But if the urgency of these questions has reached a fever pitch, their intractability has not changed at all. That more people may be willing to argue over whether God exists, and that more people now see this as a valid question rather than an unthinkable one, does not give us any greater traction in figuring out whether he (or He—or She, They, or It) does, in fact, exist. Thousands of years of experience, reflection, debate, and sometimes bloody conflict have barely even sharpened the terms of the debate,[37] let alone resolved it.

WHY TRUTH MATTERS (EVEN TO LAWYERS)

In fairness, there *are* good reasons for law and religion scholars to avoid the subject of religious truth. We law and religion scholars can play at theology and philosophy if we have to, but at bottom we are, like all lawyers, primarily pragmatists and problem-solvers, not dealers in abstraction. (This may explain why most law and religion scholars are so haphazard in their understanding of theology or philosophy—and why, in fairness, theologians and philosophers are often equally clumsy in their understanding of law.) We are plainly in no better position than anyone else to resolve the ultimate questions of life. Anyway, that is not our job. Our job is to try to reach workable solutions to the problems of the day.

Indeed, a law and religion scholar might say our job is to come up with suggestions about how best to deal with conflicts between religion and the social order without even *attempting* to answer those deeper questions. Constitutional lawyers are proceduralists: good at coming up with rules and standards, not so good on deep and imponderable questions like the existence of God. So our marching orders are clear: We should try to arrive at a reasonable lawyerly way of addressing conflicts between law and religion, and leave the deep thoughts about God to our colleagues in religious studies departments, or to the individual conscience.

The problem is that unless and until we are willing to confront the questions of religious truth that lie at the heart of our public struggles over the relationship

36. John Lennon, *Imagine, on Imagine* (Capitol Records 1971).

37. For an example of this, see Jennifer Michael Hecht's history of religious doubt, which demonstrates how long the primary arguments for and against God's existence have been around, and how little they have changed. *See* Jennifer Michael Hecht, *Doubt–A History: The Great Doubters and Their Legacy of Innovation from Socrates and Jesus to Thomas Jefferson and Emily Dickinson* (2004).

between law and religious belief, our inheritance will be the very incoherence, the hollowness, that we are apt to find in the pages of Supreme Court decisions and law reviews.

Both courts and scholars have attempted to get around questions of religious truth—but, finally, without much success. For example, we may try to avoid some of these questions by simply giving a broad definition to religion, making it little different from any other strong system of belief.[38] At that point, however, religion can mean anything at all and nothing in particular. Moreover, any definition that broad is likely to result in a watered-down set of legal protections for religious belief.

Similarly, we could try to turn the discussion away from matters of religious truth by arguing that religion is nothing special. We could reject the notion "that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions."[39] We could prefer the seeming doctrinal elegance of some general legal principle that is untethered to religion itself, and rely on it to do all our work in a neat fashion. Such is the case with Christopher Eisgruber and Lawrence Sager, who have argued that the Religion Clauses can be rationalized under a principle of "equal liberty."[40] But this solution, which suggests that the best way to think about law and religion is not to think much about religion at all, ends up feeling like *Hamlet* without the Prince.[41] In any event, it cannot satisfy everyone. Some poor soul (so to speak) in the audience is bound to raise her hand and ask, "But what if religion *is* a unique, and uniquely deserving, category of human experience? What if it is *true*?"

In short, religious truth cannot be swept under the rug. All the warps and woofs in the fabric of religious freedom, all the inconsistencies that lead us to exclaim that law and religion jurisprudence is incoherent, stand as a silent but implacable reproach to all of us, judges and scholars alike, who toil in this field. They are an unstated but stark reminder that, in the end, we cannot help but confront Pilate's question.

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38. *See, e.g., United States v. Seeger*, 380 U.S. 163 (1965) (interpreting a statutory provision concerning conscientious objectors which required a belief "in relation to a Supreme Being" to include any sincere belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption"); *United States v. Welsh*, 398 U.S. 333 (1970) (treating moral and ethical beliefs as qualifying for the same statutory exemption).

39. Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 6 (2007); *see also* Brian Leiter, *Why Tolerate Religion?*, 25 Const. Comment. 1 (2008).

40. *See* Eisgruber & Sager, *supra* note 39.

41. *See, e.g.*, Chad Flanders, *The Possibility of a Secular First Amendment*, 26 Quinnipiac L. Rev. 257, 258 (2008).

CONSTITUTIONAL AGNOSTICISM

That is the project of this book. Lest I be struck by lightning or worse (say, book critics) for my presumption, let me be clear. I cannot and do not attempt here to answer the question of God's existence, let alone assign him to a particular denomination. Similarly, although I will have a good deal to say about the arguments of both the New Atheists and the New Anti-Atheists, I do not take a side in that battle once and for all, aside perhaps from finding it increasingly tedious. Although the title of this book is *The Agnostic Age*, and it has much to say about agnosticism and its role in the current debate over religious truth, this is still primarily a book for lawyers and citizens who are interested in how to reach a workable accommodation between law and religion, and between religion and liberal democracy—an approach I call "constitutional agnosticism." I hope the book will also be of interest to students of religion, not least because it argues that the questions those students ask are of crucial importance to the conflicts between religion, law, and liberal democracy. But it does not presume to tell the individual what he or she should believe about God.

Instead, this book is about how the individual—especially public officials like judges and legislators, but individual citizens as well—should think about religion *as* an officeholder or citizen. This is ultimately a book about religion's place in the public sphere, and it offers conclusions about how we, as participants in that sphere, should think about religion and its relationship to law and politics. Our views as citizens and officeholders may correspond to our own religious views, but they need not do so. We can assume that when Justice Scalia, who is politically conservative, defended the First Amendment right to burn the American flag,[42] he was not hoping to put a torch to Old Glory on the steps of the Supreme Court at the earliest opportunity.[43] In the same way, we can reach conclusions about how we should think about religion and religious truth as citizens and public officials that may not match up exactly with our own deepest conclusions about religious faith. This book is an argument about the importance of religious truth, but it is not an argument for or against some particular religious truth. Instead, it is about the best way of thinking about religion and religious truth as *constitutional* actors: as judges, public officials, and citizens.

That takes care of the "constitutional" part of constitutional agnosticism. Now for "agnosticism." The argument of this book is that public officials and others should adopt what I call an "agnostic habit" with respect to questions of religious

42. *See Texas v. Johnson*, 491 U.S. 397 (1989).

43. Not that he could, under prevailing Supreme Court precedent. *See United States v. Grace*, 461 U.S. 171 (1983) (permitting expressive activities on the sidewalks surrounding the Supreme Court, but not on the grounds of the Court itself).

truth, and their relationship to the conflicts between the obligations of religion and the demands of the wider society.

What agnosticism means is a tricky question. The English writer T.H. Huxley, who is generally credited with coining the term, offered an early and influential definition, although, as we will see, it is not the one we will use here. Huxley's definition treated agnosticism as the principle that because we *cannot* know whether God exists or not, we should neither believe nor disbelieve in him.[44]

This form of agnosticism has often been viewed as a decidedly tepid thing. In the popular understanding, it is just the "middle ground between theism and atheism,"[45] a way station and nothing more. One writer has suggested that an agnostic might be one whose position is taken "out of mere politeness or in some circumstances from fear of giving even more offence."[46] If so, it is a remarkably unsuccessful strategy. The middle of the road is, after all, the place where you can be hit by traffic from both directions. So it is with agnosticism. For anyone who has taken a strong position for or against the existence of God, nothing can arouse contempt more easily than a person who seems only to be refusing to fish or cut bait.

Huxley's definition of agnosticism, however, is *not* the definition that animates this book. There is more to the brand of agnosticism I describe in this book—what I call the "new agnosticism"—than that. The new agnostic's refusal to venture a final conclusion on the existence or nonexistence of God is not just a passive deferral, or a failure to screw one's courage to the sticking place. It is an adamant position of its own.

There are varieties of agnosticism, of course, just as there are varieties of theism and atheism. Some agnostics *are* just lukewarm atheists; others *are* just theists with commitment issues. But the brand of new agnosticism I champion here is different. If we are to find its meaning, we must look beyond philosophy to literature, in which doubt finds some of its most resonant and pregnant possibilities. At least since the Romantic era, agnosticism has in fact been one of the characteristics of great art, and the artist has been an agnostic par excellence.[47]

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44. *See generally* T.H. Huxley, *Agnosticism and Christianity and Other Essays* (Prometheus Books, 1992).

45. Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. Rev. 120, 128 (2008).

46. J.J.C. Smart, *Atheism and Agnosticism, in Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu.entries/atheism-agnosticism.

47. Which means, in fairness, that the "new agnosticism" is not entirely new. I call it by that label partly to distinguish it from other forms of agnosticism, such as the nineteenth century brand of agnosticism advocated by writers like Huxley; partly to set it against the New Atheists and the New Anti-Atheists; and partly to emphasize the particular qualities of the new agnosticism, such as its emphathetic capacity, that I argue are particularly well-fitted to contemporary conditions, and that I draw on in defining and arguing for constitutional agnosticism. As this book makes clear, however, the "new agnosticism" draws on deep sources in history and tradition, both religious and otherwise. *See* Chapter Three.