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Religion Interfacing with Law and Politics

Three Tired Ideas in the Jurisprudence of Religion

Where Do We Begin?

THE DERIVATION OF THE WORD “religion” is unclear, but many scholars believe that its Latin root is *religare*, which means “to bind.”¹ Based upon this derivation religion may, in possibly its broadest sense, be understood to comprise those beliefs that bind together one’s understanding of all reality. Religion, thus interpreted, is synonymous with the worldview within which one thinks, works, and relates to others.

A problem occurs when there are many diverse religions represented in a single geographical population. Worldviews collide, with conflicts, often deadly ones, resulting. Our founding fathers were cognizant not only of the significant link between religion and virtue, on which any republican government ultimately rests, but also of the dangers posed by warring religious factions. The Bill of Rights addressed the subject as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These guarantees comprise our first freedoms.

The principles by which the United States Supreme Court interprets our first freedoms are, simply put, its jurisprudence of re-

ligion. Constitutional scholars have, in recent years, lamented the state of religion jurisprudence. One has called it a “muddle,” while another has labeled it a “mess.”² I agree with their negative assessments, but I do so for reasons they probably would not accept.

The purpose of this article is to shine a light on three distinct ideas that lie at the heart of the Court’s jurisprudence of religion. The ideas are tired but unfortunately remain pivotally significant. As long as the outcomes in religion cases are predicated upon them, confusion is bound to ensue. At the risk of being branded a constitutional heretic, maverick, or radical, I may as well show my hand all at once rather than piecemeal. The jurisprudential ideas that have occasioned enormous mischief and for which I have low regard are separationism, neutrality, and coercion.

*Separationism: Where Is There,
and How Can There Be, “a Wall”?*

Thomas Jefferson, in his famous letter to the Danbury Baptist Association, spoke of “a wall of separation between church and state.”³ This celebrated metaphor does not appear in the Constitution. The trope, in fact, was not constitutionalized in establishment jurisprudence until approximately a century and a half later, when Justice Hugo Black rediscovered it in the case of *Everson v. Board of Education*.⁴ He stated, “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’”⁵

In evaluating Jefferson’s phrase, the most immediate question that comes to mind is “How pervasive is the state?” The way in which one answers will determine the place left for the church and religion in public life. However one may decide to respond to the question, doing so involves him or her not primarily in law but in politics. Separationism, a doctrine that lies at the heart of church-state relations in this country, has no meaning independent of politics. A Lockean and a Marxist, for example, will not interpret the

separation of church and state in the same way, precisely because their respective views of the state drastically differ. For one, the state is generally limited and minimally intrusive, while for the other the state is involved in virtually every aspect of one's life. One's political vision, pure and simple, will determine the respective portions of the apple belonging to God and to Caesar. The meaning of Jefferson's metaphor, which has become synonymous with the Establishment Clause, radically varies depending upon the politics of the one interpreting it.

That the meaning of separationism is legally ambiguous was borne out by the outcome in *Everson* itself. The question in the *Everson* case was whether it is constitutionally permissible for tax revenues to defray the cost of transporting children to parochial schools, and the Court answered affirmatively. The *Everson* doctrine had no sooner been stated than it was used as a permit to tax citizens in order to provide free transportation to students attending sectarian schools. Justice Jackson, in a thoughtful dissent joined by Justice Frankfurter, observed that "the undertones of the [majority] opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."⁶ Exactly! The *Everson* result was not in accord with the doctrine as stated. Justice Black thought that, aside from throwing parochial schools a small bone, he had sounded the death knell for federal aid to any church-supported activity. For this reason, he described the outcome in *Everson* as a "Pyrrhic victory" for Catholics.⁷ He was obviously engaging in a bit of political sleight of hand.

Justice Jackson's observation also rings true for *Everson's* progeny. One need only consider cases like *Board of Education v. Allen* (which upheld a New York statute providing that public school authorities lend textbooks free of charge to sectarian schools), *Wolman v. Walter* (upholding portions of an Ohio statute providing that the state may at taxpayers' expense supply textbooks, testing and test-scoring services, diagnostic services, and therapeutic services

to parochial schools, but striking down portions of the same statute providing that the state may fund field trips for parochial school students and supply instructional materials and equipment to their schools), and *Mueller v. Allen* (which upheld a Minnesota statute allowing taxpayers to deduct expenses, such as tuition, textbooks, and transportation, incurred in providing for the education of their children, although parents of students in sectarian schools were the primary, perhaps only, beneficiaries of the statute).⁸ It is unnecessary, for our purposes, either to dissect the intricacies of the Court's reasoning in these cases or to criticize the results. The point is that these cases, along with many others, illustrate not only that church and state are far from being walled off from each other, but also that where one places the wall depends upon the political proclivities of the jurists who are involved.

But my critics may counter this observation by stating that such decisions indicate only that the boundary between the two spheres is improperly safeguarded, not that it is incapable of being preserved if the Court were willing to do so. The argument, in other words, is that church and state could be separated if only the Court were willing to dig in its heels and do it. Again, I beg to differ. Even when the Court attempts studiously to separate the two realms, as it did in *Walz v. Tax Commission of the City of New York* (where it upheld against an establishment challenge the tax exemption for religious property used for religious worship), it finds that it cannot do so.⁹ Justice Douglas spoke for many when he reframed the question in *Walz* by asking “whether believers—organized in church groups—can be made exempt from real estate taxes, merely because they are believers, while nonbelievers, whether organized or not, must pay the real estate taxes.”¹⁰ Justice Douglas's dissent underscored the inescapable conclusion that “the financial support rendered here is to the church, the place of worship.”¹¹ His dissent also served to emphasize, if unwittingly, another stubborn fact: concerns of church and state are congenitally related and cannot be separated except in the most legally contrived, factitious manner. A tax exemption is

a monetary advantage, while tax imposition is a penalty. In neither case is separation a feasible option because the Court's decision will either advantage or penalize the church.

Separation of church and state is nothing other than a legal fiction. As much as we might desire to do so, it is impossible to compartmentalize religious concerns. What is taught in public schools about the origin and development of life, what is preached by Muslim (and other) clerics about the state, and what the circumstances are under which the Decalogue can be displayed on public property are but a few examples of issues falling unavoidably under the provenance of both church and state.

My critics may indignantly and incredulously ask, "So are you advocating the absurd position that the Court turn its back on an accepted staple of religion jurisprudence?" The answer is both yes and no. Few in this country desire to live in a theocracy where there is an officially established church, especially when that church is not their own. Yet in his famous essay, "Civil Religion in America," Robert Bellah has astutely pointed out that "the separation of church and state has not denied the political realm a religious dimension."¹² To divest our political system of the religious is to strip it of "the motivating spirit of those who founded America . . . and [which] has been present in every generation since."¹³ One can hardly compromise this character of the national consciousness without attempting to reinvent the country. The problem with the concept of separationism, as advanced in *Everson*, is that it is sublimely oblivious to Bellah's insight and blithely undertakes this reinvention project, which is sadly destructive to any sense of national community in the country. Separationism, as it is presently envisioned, includes a thoroughly secularized politics. Any public recognition of God or of immortality is at worst verboten and at best in poor taste.

There is an additional point that deserves careful attention. Philip Hamburger, in a brilliant historical work on the subject, points out that the active espousal of separationism was rare prior to the beginning of the nineteenth century and that Jefferson's separation-

ist view shocked the Danbury Baptists.¹⁴ As evidence of this fact, his famous letter to them was virtually buried for half a century prior to its eventual publication. The Baptists, Hamburger suggests, did not want to be identified with the radical notion of “a wall of separation.” Their cause was disestablishment, not separation.¹⁵ Indeed, this was the case throughout the seventeenth and eighteenth centuries. The preponderance of the founders were concerned that one religion not be privileged over others. They were not concerned—in fact it was out of the question for them—that politics be a godless activity. It was not until Roman Catholic immigrants to this country increased exponentially, between 1830 and 1850, that fears of papal power fuelled a widespread call for separation. Fringe groups like the Ku Klux Klan took up the banner, and one of their number was none other than a young, ambitious attorney from Birmingham, Alabama, named Hugo Black.¹⁶ Only after Justice Black’s nomination to the Supreme Court was confirmed by the Senate did his ties to the Klan become an issue.

To summarize thus far: separationism is a legal fiction that serves as a ruse for an underlying political point of view. This fiction (1) is impossible to implement, (2) would be unwise to implement (even if one could) in light of the American experience, and (3) was not generally favored anyway prior to the nineteenth century and, then, primarily as a response born of fear and prejudice against Roman Catholics. One must wonder why judges and citizens still pay homage and genuflect to this notion.

Neutrality: Is There a View from Nowhere?

Justice Black’s majority opinion in *Everson* not only constitutionalized Jefferson’s metaphorical “wall,” but also served as the bellwether for another problematic concept, that of neutrality. The two concepts complement each other; for if the state exists in a domain separate from the church, it follows that the state may leave matters of religion to the religious and may take its seat comfortably above

any dispute regarding religious and moral matters. This facile formulation appears to have been precisely what Justice Black had in mind when he wrote that the First Amendment “requires the state to be a *neutral* in its relations with groups of religious believers and non-believers: it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.”¹⁷ Really!

In a recent law review article, I have analyzed the notion of neutrality.¹⁸ Time and space will not allow a recapitulation of that discussion here. The crucial point of it is that neutrality is an instrumental, or second-order, value. This means that it is always in furtherance of some other value. One may illustrate this principle by again turning to Locke and Marx. If an individual adopts a *laissez-faire* approach to trade, neutrality will stand for little or no state intervention. If, by contrast, one adopts a socialist theory of commercial activity, neutrality will include a heightened degree of state involvement in the means of production and in concerns of distributive justice. One’s political agenda is crucial to how neutrality is defined. The term has no independent meaning.

A mundane example demonstrates the difficulty inherent in the concept. Suppose there are two children who desire to play with a particular toy, and a conflict ensues between them concerning who will get to play with the toy first. One child is older and stronger than the other. Her physical prowess and maturity are sure to result in her triumph over the younger, weaker child. The question for the children’s parents is whether to intervene in behalf of the younger, weaker child or to stay out of the conflict altogether. If the parents fail to intervene, they will insure the triumph of the older child. If they do intervene, they will act in behalf of the younger one. In neither instance are they neutral in any objective, independent sense. And so it is with the affairs of state; there is no objectively neutral ground. At the risk of sounding like a cynical and jaded old attorney, the idea of neutrality is little more than a ruse by means of which the judiciary’s first-order political agenda is obscured from

public view. When Supreme Court justices begin to use the word “neutrality,” look out!

When the Court, in *Bob Jones University v. United States*, decided that a fundamentalist Christian university’s tax exemption could be removed when the university promoted segregation between races, the decision was hardly a neutral one.¹⁹ The Court took a position in favor of some values over others. It favored the promotion of racial integration over the freedom of religion. Never mind the fact that the university and those who supported it understood themselves to be communally bound under God to a “separate, but equal” ideology.

Likewise, when the Court, in *Employment Division of the Oregon Department of Human Resources v. Smith*, held that Native Americans who smoked peyote as part of an age-old religious ritual and were fired from their jobs as a result could be denied unemployment compensation since their actions were in violation of a statute that was “a valid and neutral law of general applicability,” one must ask, “‘neutral’ according to whose political agenda?”²⁰ Such a statute was certainly not neutral with respect to the religious rituals of Native Americans! To argue otherwise would be like admitting that the Court would have been neutral toward Christians if it had upheld a ban on sacramental wine during the Prohibition era.

The notion of neutrality is worse than useless because it serves to perpetuate the false idea that a state is capable of occupying a safe, secure haven above the fray of conflicting religious and moral beliefs and that it is no more a friend or foe to one than to another. That is not true now, nor has it ever been true. The sooner our jurisprudence of religion is relieved of this fatuous notion the better.

Coercion: Should Dissenters Fashion Policy?

The last weasel word on which I will comment is, in some respects, the most troublesome of the three. It has been bandied about in religion jurisprudence, with ever increasing frequency

and consequence, for over fifty years. The word is “coercion.” It has loomed especially large in the Court’s school prayer decisions. In *Engel v. Vitale*, the Court’s majority, speaking again through Justice Black, declared unconstitutional a twenty-one-word nonsectarian prayer adopted by the New York State Board of Regents for public schoolchildren who were given the choice whether to recite it.²¹ Justice Black was clear that coercion was not an element in a prima facie case of Establishment Clause violation; it was enough that New York was involving itself in the furthering of religious beliefs. Yet he insisted, “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”²²

The same reasoning was apparent in *Abington Township School District v. Schempp* in which the Court held devotional Bible reading and recitation of the Lord’s Prayer in a public school classroom to be a violation of the Establishment Clause.²³ Reemphasizing that coercion is not a constitutive element of an establishment offense, Justice Clark, writing for the majority, opined that when a state prescribes a religious devotional exercise for schoolchildren, it is coercive, even when students engage in it voluntarily.²⁴

In *Lee v. Weisman*, the Court was faced with the prospect of a rabbi offering a nonsectarian prayer during a graduation commencement exercise and held that such a practice would constitute a violation of the Establishment Clause.²⁵ The Court’s reasoning, in this case, turned entirely upon the concept of coercion. The Court emphasized that “government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”²⁶

Elsewhere I have tried painstakingly to analyze the concept of coercion in religion jurisprudence.²⁷ A small portion of that analysis may be duplicated here. The first and foremost point to be made about the concept of coercion is that it, much like those of separationism and neutrality, must always be understood relative to politi-

cal ideology. Political values determine the relevance and applicability of its meaning. It is beyond dispute that constraints are necessary in order to give structure to and to define the boundaries of any society. The constraints that one dislikes and with which he or she disagrees are labeled “coercive.” Constraints that are thought to be constructive and helpful, such as a lifeguard prohibiting a child who cannot swim from diving off the high board, or a police officer pushing an elderly person out of the path of an oncoming bus, are by contrast regarded as charitable and benevolent.

To take a prominent historical example: in the South during the Civil War, black people had no rights pursuant to prevailing Southern ideology and, hence, could not be coerced. It would make no sense to speak in a Confederate state of the coercion of slaves. Yet in the North during the same period, black people were viewed as persons with rights, and slavery was condemned as diabolically coercive. Whether one viewed black people as coerced depended solely upon the way in which he or she answered another question: are slaves people or property? The issue could then only be resolved by an appeal to political ideology.

What does this observation have to do with religion? The connection is clear enough: societal constraints, especially those concerning controversial issues, such as whether a woman is entitled to an abortion, whether a physician may prescribe a lethal drug to aid one in the taking of her life, or whether same-sex couples can marry, have an undeniable religious and moral dimension. If I am correct that politics and religion cannot be separated in any absolute sense, then there is no position of neutrality that the state can occupy in its determination of such controversial issues. It follows that some individual, or groups of individuals, are sure to experience the state as coercive in its determination of such issues.

For purposes of this discussion, it is well to underscore four objective elements of coercion. They are (1) the coercer, (2) the instrument he or she uses to coerce, (3) the coerced, and (4) the coerced’s resultant behavior.²⁸ For example, an employer (the coercer) may

threaten to demote (the instrument) an employee (coercee) unless she signs a false affidavit, which she does (resultant behavior). These four elements are present in every act of coercion.

There are likewise nonobjective aspects of coercion, such as permission, will, choice, wish, and intent. These characterize the relationships between the objective elements. Nonobjective aspects must be considered in order to determine whether the phenomenon of coercion actually exists. Consider again our employer-employee relation. If the employee readily consents to signing the false affidavit, that is, freely gives herself permission to do so, then the employer's threat is inconsequential, and one of the objective elements of coercion is absent. Yet because it is impossible to distinguish between permission and dissent if neither is explicitly or tangibly communicated, permission is a nonobjective aspect of coercion.

The "will," another nonobjective aspect of the phenomenon, is "an abstraction for one's disposition, capacity, or power to effect a reason or to determine an action."²⁹ If this disposition, capacity, or power of the employee were not operative during the employee's transaction with the employer—if, for example, the employee was medicated with a drug that destroyed her volitional power during the time in question—the employer's threat would again be inconsequential and would nullify one of the necessary elements of coercion. Coercion always involves a tension between opposing wills resulting from the application of an instrument, which is in turn met by resistance (and failure) from the coercee.

One may now ask whether, according to this account, coercion was present in *Engel*, *Abington School District*, and *Lee*. The evidence suggests that the religious exercises in *Engel* and *Abington School District* were engaged in voluntarily. No child was compelled against his or her will or by fear of the imposition of any penalty whatsoever to participate. Parents who disagreed with the practice were free to keep their children from engaging in it. Coercion was not present.

In *Lee*, the situation was admittedly different from that of the other two cases. The setting was a graduation ceremony, in which any student who desired to participate would listen to a rabbi's non-sectarian prayer. But does being subjected to an individual's religious speech (a prayer) necessitate the overcoming of the listener's will? If so, must we not patronizingly assume that whatever, if any, oppositional views that listeners may hold to such a prayer are so fragile and weakly supported that the prayer is sufficient to overwhelm their volition and to induce in them a response contrary to their own belief? I find myself in agreement with Charles Krauthammer, who made the same point with characteristic eloquence.

Some Americans get angry at parents who want to ban carols because they tremble that their kids might feel "different" and "uncomfortable" should they, God forbid, hear Christian music sung at their school. I feel pity. What kind of fragile religious identity have they bequeathed their children that it should be threatened by exposure to carols?

I am struck by the fact that you almost never find Orthodox Jews complaining about a Christmas creche in the public square. That is because their children, steeped in the richness of their own religious tradition, know who they are and are not threatened by Christians celebrating their religion in public. They are enlarged by it.

It is the more deracinated members of religious minorities, brought up largely ignorant of their own traditions, whose religious identity is so tenuous that they feel the need to be constantly on guard against displays of other religions—and who think the solution to their predicament is to prevent the other guy from displaying his religion, rather than learning a bit about their own.³⁰

One may protect the rights of dissenters, and do so in the highest and most noble tradition of our liberal republic, without giving them the equivalent of a heckler's veto over the rights of the majority. Such a veto power invariably amounts to social and political rule

by a minority, and a comparatively small one at that. Community bonds, fostered by devotional exercises in public places, need not be fractured because of the protestations of a few. Their right to religious freedom can be protected without infringing upon the same right owed to the majority.

Summary: Why Not Recast the Jurisprudence of Religion?

A vibrant jurisprudence of religion is possible without staking it to the doctrines of separationism, neutrality, and coercion. All three notions comprise, at least implicitly, pillars of what is known as classical liberal philosophy, which is indebted to the inspiration of thinkers like John Locke, Immanuel Kant, and John Stuart Mill. I do not wish to be interpreted as derogating these and other valuable contributions to the cause of individual liberty. Nor do I desire to be charged with discounting the enormous importance of the right to dissent.

One point of this article is that the doctrine of separationism is impossible to effect, especially for a religious person. A traditional religion, like Judaism, Islam, or Christianity, ties together all components of one's worldview and so is not a phenomenon that can be relegated to a private sphere of activity or experience. Religion, and the virtue that it teaches, pervades all of reality, and attempting to divorce religion from the affairs of state has, at least for a religious person, the gravest consequences for both.

The concept of neutrality, which falsely assumes that the state stands above religious and moral disagreement, is misguided for the same reason. The concept presupposes a kind of dichotomy between the political and religious and ignores the fact that there is no view a state can take except from a particular place, which in turn always represents one set of concrete values over others.

Finally, the notion of coercion is simply the term that judges and other citizens use to describe what happens whenever the state adopts religious and moral values with which they disagree. Constraints that are disliked are "coercive."

These three concepts are no longer useful, if indeed they ever were. It is time to recast the jurisprudence of religion without resorting to political legerdemain. It is time to discard empty judicial clichés as well as the tired, confusing jurisprudence of religion they continue falteringly to bolster. It is time to speak openly and frankly about political values and the manner in which competing religious and moral visions shape them. It is time for a new jurisprudence of religion.

Notes

1. See *Lactantius, Divine Institutes*, bk. 4, ch. 28, at <http://www.newadvent.org/fathers/07014.htm>. The idea, as Lactantius, a fourth-century Christian apologist expressed it, is that those who are “bound” (*religati*) to God through piety are religious (*religiosus*).
2. Michael W. McConnell, “The Religion Clauses of the First Amendment: Where Is the Supreme Court Heading?” in *1990 First Amendment Law Handbook*, James L. Swanson et al. ed. (St. Paul, MN: West Group, 1997), 269. For a basic introduction to some of the jurisprudential problems presented by religion, see L. Scott Smith, “The Constitutional Meanings of ‘Religion’: Explorations in Definition and Theory,” *Temple Political & Civil Rights Law Review* 14 (2004–05): 89–142. See also Frederick Mark Gedicks, *The Rhetoric of Church and State* (Durham, NC: Duke University Press, 1995), 4.
3. *Jefferson’s Wall of Separation Letter of January 1, 1802*, at <http://www.usconstitution.net/jeffwall.html>.
4. *Everson v. Board of Education*, 330 U.S. 1 (1947).
5. *Id.* at 15–16.
6. *Id.* at 19 (Jackson, J., dissenting).
7. Phillip Hamburger, *Separation of Church and State* (Boston: Harvard University Press, 2002), 462.
8. *Board of Education v. Allen*, 392 U.S. 236 (1968); *Wolman v. Walter*, 433 U.S. 229 (1977); *Mueller v. Allen*, 463 U.S. 388 (1983).
9. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 ((1970).
10. *Id.* at 700 (Douglas, J., dissenting).
11. *Id.* at 704.
12. Robert N. Bellah, “Civil Religion in America,” in Robert N. Bellah, *Beyond Belief: Essays on Religion in a Post-Traditionalist World* (London: University of California Press, 1970), 171.
13. *Ibid.*, 172.

14. Hamburger, *Separation of Church and State*.
15. *Ibid.*, 21, 164.
16. *Ibid.*, 422–34.
17. *Everson*, 330 U.S. 1, 18 (emphasis added).
18. See L. Scott Smith, “‘Religion-Neutral’ Jurisprudence: An Examination of Its Meanings and End,” *William & Mary Bill Rights Journal* 13.3 (2005): 815.
19. *Bob Jones University v. United States*, 461 U.S. 574 (1983).
20. *Employment Division of the Oregon Department of Human Resources v. Smith*, 494 U.S. 872, 879 (1990).
21. *Engel v. Vitale*, 370 U.S. 421, 423–24 (1962).
22. *Id.* at 431.
23. *Abington Township School District v. Schempp*, 374 U.S. 203 (1963).
24. *Id.* at 207.
25. *Lee v. Weisman*, 505 U.S. 577 (1992), no. 90-1014, 1992 U.S. LEXIS 4364.
26. *Id.* at *17 [quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)].
27. See L. Scott Smith, “From Typology to Synthesis: Re-Casting the Jurisprudence of Religion,” *Capital University Law Review* (2005–06).
28. I am profoundly indebted to Alan S. Rosenbaum, *Coercion and Autonomy: Philosophical Foundations, Issues, and Practices* (Westport, CT: Greenwood Press, 1986), 37.
29. *Ibid.*, 55.
30. Charles Krauthammer, “Just Leave Christmas Alone,” *Washington Post*, December 17, 2004, A33.