Journal of Law and Religion 32, no. 3 (2017): 491–522 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2017.46

BOOK REVIEW ROUNDTABLE

A DISCUSSION OF KATHLEEN A. BRADY'S *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE*

The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence. By Kathleen A. Brady. Cambridge: Cambridge University Press, 2015. Pp. 354. $39.99 (paper). ISBN: 978-1107016507.

KEYWORDS: religion clauses, free exercise, establishment, neutrality

THE DISTINCTIVENESS OF RELIGION: AN INTRODUCTION

KATHLEEN A. BRADY
Senior Fellow, Center for the Study of Law and Religion, Emory University

The Free Exercise and Establishment Clauses of the First Amendment have traditionally been understood to entail distinctive treatment of religion, both special protections for religious exercise and unique limitations on government involvement with religion. In recent decades, however, this view has been challenged in court decisions and among scholars. As America grows more secular and religious and nonreligious convictions are increasingly seen as interchangeable, many have questioned whether special treatment is still fair. Numerous scholars now favor a powerful new paradigm that places equality of treatment between religion and nonreligion at the center of religion clause thought.

In its recent decisions, the Supreme Court has made clear that religion will continue to be treated differently under the First Amendment. Indeed, even among scholars, equality has rarely been embraced as the sole First Amendment value, and those who have made it foundational have struggled to reconcile the principle of equality with instances where special protections or disabilities seem intuitively compelling. Religion is distinctive in a constitutionally relevant way. As yet, however, we lack a convincing account of why and how this is so.

Many proponents of special treatment have offered justifications that point to features of religious belief and practice that seem unique but are, in fact, shared by secular commitments. For example, religious convictions are deeply important to adherents, central to personal identity, and answer ultimate questions, but secular commitments can share these characteristics. Likewise, both religious and nonreligious belief systems and related institutions can contribute to the formation of public values and public virtue; function as a buffer and check against overweening state power; or, less favorably, undermine civic peace where there is competition for government benefits and resistance to government rules.

Other proponents of special treatment identify something unique about religion, but their arguments rest on controversial theological premises or otherwise lack persuasive force in an

increasingly secular and pluralistic community. For example, a number of scholars defending special protections for religious exercise have repeated James Madison's famous argument that religion involves a duty to the Creator that "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[1] However, this argument has been rejected as sectarian–and many today would reject any argument, including historical arguments, based on religious beliefs. Thus, religion clause scholarship remains preoccupied with equality. We keep talking about equality; yet we cannot move beyond equality, because we lack a persuasive account of why and how religion is different in a way that matters for First Amendment purposes.

The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence seeks to develop such an account and to explore the implications of religion's distinctiveness for religion clause decision making. The argument begins, paradoxically, with James Madison's famous statement about the priority of conscience and builds on this starting point to include a full range of founding-era views about the relationship between religion and the state. Founding-era views reflect and express what makes religion unique, but focus on the controversial nature of eighteenth-century Christian theism has impeded broader understanding of the founders' insights. Drawing upon study in the fields of theology, philosophy and phenomenology of religion, and comparative religion, this book seeks to articulate founding-era views in a way that can be understood and appreciated by those of different religious traditions and none at all.

When those in the founding era debated about religious liberty and drafted and ratified the First Amendment, what they had in mind was the relationship between persons and the ground or source of all that is. While distinctive, religion has its roots in the shared human experience of creatureliness or finitude. We find ourselves in a world that we have not made and can barely control. As we ask questions about this world and about human purposes, we confront its ground or source as a question or concern. The existence of the divine may be rejected, but the idea remains, and for religious believers, the ultimate power by which everything exists is not just a question or concern but is present to them as a very real part of their lives. The believer also experiences the divine as something good and trustworthy. The believer worships, yields, bows down, loves. The believer is in a relationship with the divine, and salvation, liberation, or fulfillment inheres in some form of union or communion with the divine. This relationship is what was at stake for those who drafted and ratified the religion clauses and what is still at stake for most religious believers today, and it makes religion something unique.

Not all Americans are religious believers, but appreciating what is at stake for believers does not require faith. It only requires an openness to the possibility that religious experience can be real, revealing, and salvific in the way that believers envision. If we are open to this possibility, what mattered to those in the founding era should still matter to us today. Even if we reject this openness for ourselves, such a rejection cannot ground our construction of the religion clauses. Such an assumption is at odds with the historical foundations of the First Amendment, the beliefs that most Americans continue to hold, and with human capacities, propensities, and realities. It would be unstable. Not all of us are religious believers, but there are aspects of human personhood that make faith possible and, indeed, likely.

For those in the founding era, several implications followed from the nature of religious belief. Religion is a supremely important human concern, essentially voluntary rather than something that can be coerced, critical for the moral foundation of American self-government, and especially

1 James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), in *The Papers of James Madison*, ed. Robert A. Rutland and William M. E. Rachal (Charlottesville: University of Virginia Press, 1973), 8:299.

https://doi.org/10.1017/jlr.2017.46 Published online by Cambridge University Press

vulnerable to civic division and strife when linked too closely with government. From these implications followed a series of more specific principles, including liberty of conscience in matters of religious belief and practice, separation of church and state, equality among religious sects, the inevitability and desirability of religious diversity, and the compatibility of some forms of contact between religion and government with the principle of separation. Those in the founding era often disagreed about how far to take these principles and how to understand their requirements in specific contexts, and their views evolved over time. However, they shared the same core values, and common purposes and concerns animated them.

This book advocates drawing on these shared principles to inform a new framework for religion clause decision making that makes space for equal treatment of religion and nonreligion, but recognizes more primary values. Courts should refer to these principles as they develop the subsidiary doctrines that guide decision making in specific types of cases. They should also define and apply these principles in light of the common purposes and concerns that lay behind them and in view of the conditions of modern American society.

This framework is illustrated in the context of current controversies regarding protections for individual religious conscience. The focus of the book is on the individual religious believer and the state. The implications of the proposed framework include a robust right of exemption when the government substantially burdens practices essential to the believer's relationship with the divine, a supplemental minimally protective right for other conflicts, and generous room for legislative and administrative protections where accommodations are not required. Free exercise will have limits, and part of the project in this book is to develop a strong right of exemption that is also feasible and administrable and fairly treats those from different religious traditions.

Additionally, the proposed right is designed to push religious believers and government officials to work together in good faith to resolve as many conflicts as they can through extrajudicial solutions that meet the needs of both parties. Such solutions are often possible, even when critical government interests are at stake, and a well-constructed approach to religious accommodation will give believers and state officials strong incentives to reach such compromises.

Nowhere have fairness concerns regarding religion been greater than in the context of protections for religious conscience. This book argues that religion is distinctive and that this distinctiveness provides unique reasons for protecting religious conscience. Contemporary demands for equal treatment miss these differences, but they also reflect the intuition that secular moral commitments are worthy of respect and protection. This intuition is correct, but the book ends with a surprising conclusion. Appreciating religion's distinctiveness affords stronger foundations for protecting both religious and secular commitments.

TREATING RELIGION DIFFERENTLY

THOMAS C. BERG

James L. Oberstar Professor of Law and Public Policy, University of St. Thomas School of Law

Are there convincing grounds for the law to treat religion differently from other human activities and concerns? When, if ever, does religious freedom call for exempting religious activity from the burdens imposed by generally applicable laws? Should courts require such exemptions under the Constitution, or should the matter be left primarily to legislatures? How should constitutional law treat claims of deeply felt secular conscience that conflict with the law?

https://doi.org/10.1017/jlr.2017.46 Published online by Cambridge University Press