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BOOK REVIEWS

The Cambridge Companion to the First Amendment and Religious Liberty

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This book is a welcome addition to the burgeoning literature addressing current challenges to religious liberty. The fifteen distinguished contributors reflect perspectives ranging through philosophy, religious studies, history, political science, and law and legal philosophy. Although a majority of the contributors would like to see a greater civic role for religion in the United States, the essays are based on varied assumptions and reflect diverse perspectives. It is striking, for example, that these authors all support religious liberty, but in many cases implicitly define it differently. This volume provides readers with a useful range of viewpoints on both the history of religious liberty in the U.S. and major contemporary controversies. Because the issues addressed are disparate both among and within some of these contributions, this review will proceed thematically.

Although the contributors agree upon the centrality of religion to human existence, they differ in their explanations. Owen Anderson holds that the United States was founded upon the natural religion that is presupposed by any revealed religion. Because natural reason is necessary for faith, it provides the meaning that is the overall goal of religious belief. To Janice Tzuling Chik, religion is neither simply a species of belief nor a moral attitude, but a distinctive form of human activity oriented toward the transcendent. The ethical obligations of religion, unlike secular ones, are rooted in an agent's ultimate intention of honoring God. Religion is therefore special and deserves protection. For John Finnis, religious liberty is a special right because only religion seeks truth *about* truth. Religious conscience seeks fidelity to truth, not to oneself or to one's authenticity. Gerard V. Bradley holds that religion should be supported and set apart as special because it is a *public* good, as well as an aspect of self-definition within the private sphere of social life. Therefore, we must favor and encourage religion, reconnecting it with a search for truth that is available to reason.

A number of essays concentrate upon the history of religious liberty. Anthony Gill (no relation) addresses the often-overlooked fact that the free exercise of religion or

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deregulation of the religious marketplace can serve economic and political interests as well as spiritual ones. Rulers want to retain power, increase their revenues, and promote economic growth, all of which may be enhanced by religious freedom. In England, political reasons existed for the government to encourage dissenters to leave, and this in turn provided a basis for the religious diversity that developed among the colonies. Glenn A. Moots in fact notes that the need for economic development or trade in Carolina and New Jersey discouraged the enforcement of religious uniformity there. Moots concludes after surveying the various colonies, however, that for many believers not attached to established churches, free exercise was generally the "thin gruel" of negative liberty, the obtaining of which often required jumping through various hoops (p. 177). According to Chris Beneke, for example, the 1780 Massachusetts Constitution stated that individuals would not be penalized for worshipping in accordance with their consciences, but then authorized the legislature to require church support and attendance, clarifying that protected religion meant only Christianity. To one commentator, says Beneke, this constitution was like a "cow that gives a full pail of milk and then kicks it over" (p. 158).

Turning to the First Amendment more specifically, Beneke argues that although it always implied that some religious accommodation was expected, the framers established the Constitution on a primarily secular foundation. Michael D. Breidenbach observes that the Constitution's Article VI (no religious test) implicitly provided a nonestablishment clause before the First Amendment. Congress rejected traditional religious patronage rights such as that of approving bishops, but it did protect religious organizations' abilities to fulfill their religious missions. Both Both Beneke and Breidenbach mention the funding of Christian missions to Native Americans. Breidenbach argues, however, that for some, their purpose was not necessarily proselytization, but rather to curry favor with them—in modern terms perhaps a secular purpose. Jonathan Den Hartog argues that any historic wall of separation was a one-way wall, or one that insulated religious groups from public interference but allowed religious influence upon politics and policy. Finally, Donald L. Drakeman argues that under the rubric of the "New Originalism" concerning the public meaning of language at the time, the First Amendment was designed neither simply to prohibit the founding of a national church nor to shut down any governmental activity concerning religion. Rather, under a federalism interpretation, it was meant to accord jurisdiction to the states over church-state issues.

Several contributors address the history of the First Amendment but in ways that shed light upon contemporary issues. Vincent Phillip Muñoz contrasts the natural right to the free exercise of religion with modern moral autonomy exemptionism. As he interprets James Madison, although individuals exercise exclusive sovereignty over the fulfillment of their religious obligations, they do not have a right to exemptions from the burdens of civil law. Government is to remain neutral toward or noncognizant of religion. Ruling on exemptions means that the government is taking authoritative notice of religion as it balances individual autonomy against competing rights and interests. The right to disregard laws that impede one's religious obligations is not a constitutional right to a presumed exemption, contrary to the views of those such as Michael McConnell. Exemptionism may expand religious liberty, but it also increases state power.

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Paul E. Kerry maintains that the framers entertained no unified position regarding the relationship between church and state. Describing Steven D. Smith's contrast between religious or providentialist and secularist understanding of American history (*The Rise and Decline of American Religious Freedom*, Cambridge, MA, 2014), Kerry agrees with Smith that both strands have informed scholarship and jurisprudence. Is religious liberty an individual right, or should it shore up social morality and therefore the state? (David Sehat, *The Myth of American Religious Freedom*, New York, 2011) The First Amendment may have originated to ensure the rights of a (religious?) majority, but over time it has functioned to protect vulnerable minorities.

This elucidation of two strands of interpretation continues in several other contributions. Steven D. Smith asserts that current attacks on legal accommodations for corporate religious freedom, whether for for-profit companies such as Hobby Lobby or for churches such as Hosanna-Tabor, reveal "an increasingly intense opposition to religious freedom itself" (p. 334). Supreme Court rulings in this area are to him "yawningly unadventurous" (p. 240). Notably, Smith discounts the third-party effects of such rulings, as all accommodations, religious or nonreligious, including exemptions for conscientious objectors to military service, exert effects on third parties. One could note, however, that some third-party effects are much more attenuated than others.

Zoë Robinson, however, holds that jurisprudential interpretations of religious liberty during most of U.S. history have shored up constitutional majoritarianism at the expense of religious minorities. *Hosanna-Tabor*, *Hobby Lobby*, and *Trinity Lutheran* have more recently ensured that generally applicable law "imposes no burdens, yet provides equal benefits" by according rights to institutions that are unavailable to individuals (p. 247). Although roughly between 1960 and 1979 the Supreme Court expanded individual free exercise through cases such as *Sherbert v. Verner*, cutbacks occurred in subsequent cases such as *Goldman v. Weinberger*. Cutbacks also occurred in establishment judgments through interpretations of *Lemon v. Kurtzman* in that laws that were facially neutral were not deemed to violate the establishment clause. The implication here is that these cutbacks in establishment cases actually aided religion by withholding negative judgments on these laws, often to the detriment of individual petitioners. Together these changes reflected majoritarian sentiments, whether by narrowing free exercise or by expanding what was permissible under the establishment clause.

Finally, Marc O. DeGirolami also identifies two strands in current jurisprudence concerning the separation of church and state. In one, Christianity is precious and deserves a position of independent authority at least partly insulated from the state. In the other, Christianity is irrelevant or obnoxious, and any cultural or political connections to the state should be repudiated. Even when based upon the values of equality and nondiscrimination, this second position is not a neutral one, he argues, as an insistence upon the equality of Christianity and nonreligion in effect suppresses Christianity and its foundational role in American law and politics. When religious interests win under the current rubric of equal access, for DeGirolami this implicitly represents a pyrrhic victory. As in *Trinity Lutheran*, in which public funds were allowed for the resurfacing of a religious school's playground, religious justifications take a back seat when winning arguments must be framed in secular terms.

The remainder of this review will focus upon issues that arise in several of the contributions. The first, a specific issue, concerns DeGirolami's point that religious

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justifications should not have to play second fiddle to secular ones. Bradley, for example, deplores the fact that in *West Virginia Board of Education v. Barnette* (1943), the Supreme Court secularized our understanding of the Constitution. Instead of granting an exemption from saluting the flag to the Jehovah's Witness children involved, it released petitioners more generally from any endorsement of orthodoxy. Orthodoxy, he maintains, is a matter of mere opinion, not of truth, and therefore should not be placed on the same plane. Similarly, draft exemption cases such as *United States v. Seeger* rendered religious claims as "opaque reports of someone's self-understanding" (p. 449). These sorts of decisions to Bradley represent moral agnosticism rather than a search for moral truth. In sum, he agrees with the decision but believes it should have been decided on different grounds. As an aside, he also worries about the government censoring those who live in accordance with religious moral truth if these truths appear bigoted to those who disagree. It should be noted, however, that *Masterpiece Cakeshop* ruled in favor of the baker who would not design cakes celebrating same-sex weddings because a member of the Colorado Civil Rights Commission had made statements denigrating religion.

Muñoz also questions nonreligious grounds for court decisions in addressing *The Church of Lukumi Babalu Aye v. City of Hialeah* (1993). Although the city had outlawed the Santeria religious practice of animal sacrifice, the Supreme Court ruled that the city could not forbid the killing and eating of animals as part of a religious rite when they could be killed and eaten for secular reasons unless the prohibition were narrowly tailored to advance a compelling interest. The city ordinance was not neutral when it forbade a religious practice but not a similar secular one. The problem for Muñoz is not the decision's substance, but that the court balanced the natural right to the free exercise of religion against possibly competing state interests, instead of simply striking down the ordinance as a violation of a natural right outside the government's jurisdiction. If this had happened, it would not have been an exemption from a state-imposed burden.

An interesting point about both *Barnette* and *Lukumi* is that neither of these decisions granted a religious exemption to anyone. Regarding *Lukumi*, one could argue that in striking down the ordinance, the court simply declared its indifference to or noncognizance of the purposes, secular or religious, for which animals were killed. Because the city had imposed a *burden* on a permitted practice because of its religious nature, the court simply removed that burden, rather than according a *benefit* to Santeria because of the religious nature of its practice—although to Christopher L. Eisgruber and Lawrence G. Sager, "the distinction between removing a burden and conferring a benefit is vanishingly thin" (*Religious Freedom and the Constitution*, Cambridge, MA, 2007, p. 25). To constitute a religious exemption, the context would have to be such that killing animals in any sort of ritual manner whatsoever is against the law. Similarly, in *Obergefell v. Hodges* (2015), the court did not grant an exemption to same-sex couples, but instead leveled the playing field to afford the same opportunities to same-sex couples that traditional couples already enjoyed. Concerning *Barnette*, a dissenting justice deplored the fact that children had been granted an exemption from the flag salute during wartime. But here again, not only Jehovah's Witness children but students in general were released from any state compulsion to publicly affirm their political loyalty, a universalization of an individual right that many view as positive.

This point raises a second, more general issue. Many of the contributors hold that because religion is special, it should hold a place superior to other kinds of conscientious beliefs and that religious accommodations, often but not always in accordance with majority views, should be justified by religious reasons. Others hold that religious minorities and individuals have often received and sometimes still receive inequitable treatment. The rise of Christian nationalism, however, complicates these issues further. Some conservative Christians portray themselves as if they were an embattled minority although they are of the nation's majority religion. Perhaps it is Christianity's loss of preeminence among an increasing diversity of belief systems that engenders this thought process. Yet the legal recognition of this diversity, one might argue, no more renders Christianity or religion in general irrelevant or obnoxious than the awarding of civil rights to people of color rendered white people irrelevant or obnoxious—although some white Christian nationalists would disagree. For DeGirolami, equal access afforded to religious claims along with secular ones has harmed Christianity by rendering religious reasons irrelevant to religious claims to equal treatment. But under equal access, religious claims have been successful where they failed under strict separation. If religion, and Christianity in particular, are special, is it not a positive development that they advance under equal access, even if this justification is the wrong one in the view of some religious advocates?

Perhaps there is yet another way to formulate two possible strands in our jurisprudence. According to the first strand, we have leveled down, treating religion as no better than any other constellation of beliefs. According to the second strand, we can level up, according deference to more such constellations. Secular claims may exert moral force equal to that presented by religious claims. Although Finnis and Bradley criticize this perspective, this volume might have included a contribution supporting it. As diallog about the proper role of religion continues to emerge, however, the contributions to this book will positively inform our discussions.

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Guardian of the Wall: Leo Pfeffer and the Religion Clauses of the First Amendment

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Leo Pfeffer is widely regarded as the most influential 20th-century advocate for a strict separationist interpretation of the First Amendment's religion clauses. From his perch as