

***The Constitution of Religious Freedom: God, Politics, and the First Amendment.* By Dennis J. Goldford. Waco, TX: Baylor University Press, 2012. pp. xii, 264. \$44.95 cloth**

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John Ragosta

Virginia Foundation for the Humanities

Dennis Goldford's *The Constitution of Religious Freedom* powerfully endorses separatism, explaining that separation of church and state is not only sound policy in a diverse nation but also the only way rationally to understand the Establishment and Free Exercise Clauses of the First Amendment. One might well ask if there is anything else to be written on the topic, but the continuing flow of ink suggests otherwise (albeit in some cases ink might have been saved). Eschewing a historical analysis (about which more later), Goldford provides a welcome review of text and political theory.

Written in the style of a series of lectures, *Constitution of Religious Freedom* concludes: First, one must distinguish carefully religion and religious freedom; the First Amendment protects the latter. Second, the argument that "the secular itself is religious ... undermine(s) the intelligibility of the religion clauses" (240). Third, religion was (and is) such an important matter to citizens that the only means to protect it was (and is) for government to "not take a position," leaving religion to the individual (what early Americans termed the "voluntary principle").

The first issue is fairly framed: "is the purpose of the religion clauses the protection and special position of religion in the American constitutional scheme, or ... the protection and special position of religious freedom" (51)? The former supposes government "act[s] as a protector of and advocate ... put[ting] the weight of government approval behind religion" (57). The danger in that is the tyranny of the majority or Madisonian factions, with the author providing an extended (and probably unnecessary) discussion of American religious diversity (63–75). The centrality of protecting minority interests, though, is critical, and the linkage between an ahistorical denial of minority interests and narrow interpretations of the First Amendment should be explored further. The First Amendment must be understood to protect not "*religion* but *religious freedom*" (46), not coincidentally "contributing to the vitality of religion"

(60, 152). The two must be carefully distinguished; thus, while the “bitterest religious conflicts often are not between religion and nonreligion but between religion X and religion Y” (29), the referenced conflicts arise between religious people who do not believe in separation and those who (with nonreligious people) do, a dispute about religious freedom, not religion.

The author discusses at length what he terms the Christian Right’s “radical Establishment Clause jurisprudence:” If all governmental systems are founded on religious beliefs and secular humanism is a religion (as loose language from the Court suggests (99)), then secularism is not neutral. Goldford effectively attacks both premises: While governments stand on principles, not all principles are religious; if they were, the First Amendment’s religion clauses would make little sense (90). Further, while the U.S. government is secular (not taking a position on religion), it is not secularist (rejecting any transcendent being in favor of the primacy of man) (14). Still, greater clarity is needed on public discourse and secularity: A secular government does not keep the public square “naked” of religion, using Richard John Neuhaus’ term (100), and while “church/state integrationists disagree comprehensively with the separationist perspective that religion is at heart a private, individual matter” (239n9), separatism does not mean excluding religion from the public square, so long as it is not a government exercise.

The religion clauses, then, must mean that government cannot take a position, “nor do anything that amounts to taking a position,” on religion (15). Goldford goes to some length to distinguish his position from the idea of neutrality, in particular the argument that neutrality need only be among religions, i.e. non-preferentialism. Yet, the Court (other than Justices Scalia and Thomas) and historians have long dismissed non-preferentialism. Thus, while Goldford suggests that a tax credit for attending church would pose a difficult problem for non-preferentialists (210), such a program would obviously not be neutral between religion and irreligion. What Goldford refers to as “thick” neutrality is close to his position, but the “concept of neutrality or equal treatment obscures [the] fundamental constitutional principle” that religion is special (210), so special that government had to leave it alone (191). Goldford’s government may “not take a position” on religion is more felicitous. This word-smithing, though, should not obscure the substantive issue: Is neutrality necessary in law and in fact (e.g. in tuition tax credit cases)?

Unfortunately, in providing an excellent political science analysis, the author, gratuitously, seems to endorse others' faulty history. Quoting Vincent Philip Muñoz argument that "no single church-state position ... can claim the exclusive authority of America's founding" (40), Goldford concludes that the multiplicity of Founders' views makes a "historical consensus" impossible and abjures reliance on history (37). The question is not whether all Founders shared an understanding of religious liberty; rather, the question is whether a particular view was central to development and understanding of the First Amendment. Historical agnosticism is problematic. First, such an approach encourages bad history. While Justice Scalia cites the use of prayer by both George Washington and Thomas Jefferson (39), contextualization makes clear that Washington's public prayers were always non-sectarian and rarely official and Jefferson (who matters far more for these purposes) rejected any official prayer as unconstitutional. To the objection that there is "no certain way of knowing even how truly representative [individuals] were of ... public understanding" (40–41 n58), one can look to who was relied upon in constitutional debates, political speeches, Congress, and the press. That "many writers in the founding period" thought only Protestantism needed to be protected (citing Justice Story) (42–43) does not mean that such a position lay at the root of the First Amendment (and Story is a poor source on religious freedom). When academics abandon a field to hack-historians, bad history can infect the public mind. While Goldford's political science is very useful, and reaches a very Jeffersonian conclusion, poor history should not be sanctioned. Second, the author misses numerous opportunities to support his analysis with relevant historic facts. For example, his extended discussion of coercion might well have quoted Jefferson's 1808 objection to official religious activities resulting in "some degree of proscription perhaps in public opinion." (Compare 231, citing Tocqueville on tyranny of public opinion.)

The author has a penchant for extended substantive notes (with which this author sympathizes), but they can be distracting. Thankfully, Baylor University Press uses footnotes rather than endnotes. Goldford, while occasionally repetitive, also provides powerful descriptors of complex constitutional doctrines, especially distinguishing the Establishment and Free Exercise Clauses: "One cannot use government to support and advance one's own religious beliefs (Establishment Clause), and one cannot use government to oppose and undermine the religious beliefs of others (Free Exercise Clause)" (14); "the meaning of the prohibition on

establishment is that government should not favor religion in general, nor ... in particular, while ... the free-exercise requirement is that government should not disfavor religion” (156).

Goldford’s book can be difficult in places, but it is a powerful political science work on the necessity of a separationist understanding of the First Amendment. This “enables us to live together peacefully with people who differ from us about what we hold to be the most important truths and values in our lives” (17). Any work to the contrary should have to answer Goldford’s arguments.

Response to Dennis Goldford’s review of *Religious Freedom: Jefferson’s Legacy, America’s Creed*

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John Ragosta

Virginia Foundation for the Humanities

Several years ago, while I was a fellow at Monticello, I had the pleasure of regularly discussing James Madison with a scholar who was working down the hall. One day I remarked that his perspective on Madison was different from anything that I had read in the historiography; he laughed and let me in on his secret: He was a political scientist, not a historian. As a junior and somewhat naïve academic, this was a revelation. Since then, I have realized how significant the academic communication gap across disciplines is, a pedagogical problem exacerbated by over-specialization within fields and the proliferation of new departments. This problem is evidenced by the differences in Professor Goldford’s and my approach to the establishment clause of the First Amendment: We both conclude that a separationist reading is appropriate: he for reasons of political science; I based on the historic record. Each approach has great value; both can benefit from the insights of the other’s discipline; neither, standing alone, is wholly adequate for all purposes.

Professor Goldford’s primary concern with my book seems to be that it never directly engages the political science question that was central to his volume, that is, not what Jefferson (or other Founders or American citizens or opinion-leaders in the 19th century) understood the First Amendment to mean, but how it is best interpreted in light of political realities, textualism,