

Religion and Fairness, vol. II: Establishment

Chapter 20

Religion Clause Skepticism

I. Introduction

This chapter and the next differ from their predecessors. Rather than concentrating on specific topics about free exercise and nonestablishment, they consider more general, theoretical, questions.

Here, we shall focus on three kinds of skeptical responses to how courts determine the coverage of the Free Exercise and Establishment Clauses.

A skeptical response, in the sense I mean, goes beyond an assertion that a case or set of cases is wrongly decided; it claims that the whole endeavor of judges deciding religion cases is undermined in some more sweeping

fashion.¹

I distinguish roughly among three forms of skepticism. First, the Supreme Court's actual performance is deeply flawed across the wide range of cases under the religion clauses; second, some fundamental impediment precludes sound, coherent judicial development of religion clause law; third, any aspiration to achieve relations between governments and individuals in regard to religion that are legitimate and sound is itself inevitably fated to failure. Saying more about each variety of skepticism as we proceed, my analysis concentrates on three critical

¹ One might distinguish skepticism about how courts can decide constitutional cases from skepticism about what constitutional standards "really mean," or how other officials should regard them. Some of the forms of skepticism we will examine refer specially to judicial performance, but most also reach questions about what the religion clauses "really mean" and how officials generally should construe them.

essays about church-state issues: books by Frederick Gedicks² and Steven Smith³ and a long article by Stanley Fish.⁴ Between them, these authors suggest most of the various complaints I discuss, but I focus on relevant possibilities,⁵ rather than fixing exactly what a particular author believes.⁶ Agreeing with certain of the skeptics' claims, I reject their far-reaching negative conclusions about what judges and citizens may reasonably aspire to achieve.

² Frederick Mark Gedicks, *The Rhetoric of Church and State*

³ Steven D. Smith, *Foreordained Failure* (New York, Oxford Univ. Pr. 1995).

⁴ Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUMBIA L. REV. 2255 (1997).

⁵ Although some positions the authors advance are limited in scope to religion clause cases and church-state relations, others are obviously relevant for other areas of law and political and moral philosophy. Much of what I write in this chapter also has broader significance, but I do not pause to develop that.

⁶ Thus, although I try not to misstate anyone's position, I do not attempt to settle what an author may mean if his essay is not clear or different passages appear to point in different directions.

II. Skepticism About Judicial Performance

The most modest of the three kinds of skepticism concerns the Supreme Court's actual performance. Urging that not only are particular cases mistakenly decided, a critic may mount one or more of the following challenges: (1) the results and opinions of religion cases, taken together, are incoherent or inconsistent; (2) the Supreme Court's reasons to support its decisions fail to explain the results; (3) the bases of the decisions, even if faithfully followed, cannot yield adequately determinate results; (4) no coherent theory or principle can explain most of the Court's decisions.

I shall devote less attention to this narrow skepticism about actual judicial performance than the other two forms of skepticism because the volume on free exercise and this volume examine at length how the Supreme Court has addressed religion cases, and various chapters in the two books indicate wide-ranging challenges to the shape of the Court's religion jurisprudence. This form of critique is the main subject of Gedicks's book, *The Rhetoric of Church and State*,⁷ but he develops an approach that differs from those of authors who urge their own preferred theories to replace the Supreme Court's misguided efforts.

Professor Gedicks's main thesis is that the Supreme Court's

⁷ Gedicks, note 2 *supra*.

dominant “discourse” has been “secular” and “individualist,” but that many of its decisions can be adequately explained only by an older “religious communitarian” discourse that allows governments to exercise their power to encourage people to accept the foundational morality of conservative religion.⁸ Gedicks concludes that were the Supreme Court to make the doctrinal changes that would render the law of the religion clauses “a coherent expression of secular individualism,” that would be highly unpopular.⁹ And, at this stage in the country’s history, “[r]eligious communitarian discourse is not a viable alternative to secular individualism.”¹⁰ The Court cannot develop a compromise position

⁸ *Id.* at 11.

⁹ *Id.* at 21.

¹⁰ *Id.* at 123.

because the two discourses are “mutually exclusive.”¹¹

According to Gedicks, decisions upholding “released-time” programs and Sunday Closing Laws and allowing publicly sponsored religious symbols, notably crèches, cannot be adequately supported by the “secular” and “individualist” rationales that the justices typically employ. Rather, they can best be explained as an accommodation to religion, a moderate support of religion by the government. Insofar as the Court’s rhetoric is explicitly accommodationist, as it was in *Zorach v. Clauson*,¹² it fits poorly with the secular, individualist approach of other cases. When the Court employs a secular, individualist rhetoric to

¹¹ *Id.* Thus, we must await the passage of time to see what the replacement of secular individualism may be. *Id.* at 125.

¹² 343 U.S. 206 (1952).

disclaim the religious significance of Sunday Closing Laws and indisputably religious symbols, its stated justifications are unpersuasive and diverge from what might be plausible bases for decision.

Gedicks claims that the Court's major doctrinal tests are subject to manipulation. In particular, the notion of neutrality can be manipulated; and Gedicks thinks, as do many other critics, that the threefold test of *Lemon v. Kurtzman* is so vague, one must look beyond it to explain results. Not only are the "secular, individualist" and "religious, communitarian" approaches unable to explain the sweep of the Court's decisions; no alternative theory can accomplish the job. Thus, on any

viable theory, many results do not fit.¹³

Given *most* of what Gedicks says about the religion clause jurisprudence, we might hope that matters could be rectified, but his account moves from critique of what the Court has done to skepticism about what it could do. His skepticism is as sweeping as it is because he denies that the Court can choose a religious communitarianism

¹³ Gedicks also argues that in more circumscribed areas, results are incompatible with each other. (We need to remember, of course, as chapter 19, among others, emphasizes, that a shift of one or two votes can change outcomes. *Results* can be incompatible even though seven or eight Justices vote for compatible results.) Prior to 2002, the Court largely denied financial aid to sectarian schools while allowing it to sectarian colleges, relying heavily on an assumption that the former, but not the latter, are pervasively sectarian. Modest examination reveals that the degree of sectarianism of many schools does not differ much from that of religious universities such as Notre Dame. If the government is not allowed to provide financial aid to religious schools, when it finances the education of most young people, that hardly represents neutrality between religion and nonreligion, which the Court has announced as a guiding principle.

approach or a secular, individualist approach and apply it consistently, or achieve a compromise between the two approaches. Gedicks also denies that we can now identify a tenable third theory. Thus, for the foreseeable future, but not necessarily forever, we will lack a coherent theory, consistently applied, for religion cases.

Gedicks is right that no single-featured, or simple, theory or principle could explain all the results that would make good sense under the religion clauses. As the volumes on free exercise and establishment show, multiple values are at stake, and these often conflict with one another. One is reduced to trade-offs among these values that are not comfortably captured by any clear formula. But if one is willing to accept

an “approach” or “discourse” in which a court enumerates relevant values and affords some idea about how it makes trade-offs, then a viable theory may well be available.¹⁴ We should not accept Gedicks’s discouraging prognosis about the Court’s religion clause jurisprudence in the past and in the foreseeable future, unless we are persuaded by some deeper form of skepticism that reveals inherent limits on what the Court can accomplish in this domain.

III. Intrinsic Barriers to Courts Developing Sound Doctrines for the Religion Clauses?

A second form of skepticism about judicial interpretation of the

¹⁴ I suspect that Gedicks does not think either that this approach counts as a discourse *or* that it would be a satisfactory way to proceed.

religion clauses discerns some fundamental impediment to development of a body of religion clause law that is sound and coherent in the manner to which judicial opinions and scholarly writings aspire. A critic in this vein may assert that: (1) standard legal sources and techniques of reason cannot provide persuasive answers to religion clause issues; (2) otherwise acceptable doctrinal formulations are inevitably broadly indeterminate in application, and central principles such as neutrality and fairness turn out to be empty or at least seriously misleading; or (3) courts cannot formulate coherent principles of decision that yield acceptable results; (4) no principles of decision for religion cases can stand free of underlying assumptions about the nature of human beings and religious truth.

Although I have treated his skepticism as being about judicial performance, not intrinsic impediments, because he believes Supreme Court decisions have brought us to the sorry state we are now in and because he holds out an uncertain hope for coherent doctrine in the distant future, Gedicks develops another line of analysis that, if sound, would sharply reduce any expectations about what a future Supreme Court could achieve. He offers a sweeping observation about legal indeterminacy: “Any use of language, no matter how specific and constrained, can always be made to appear sufficiently ambiguous to permit plausible arguments leading to mutually inconsistent interpretations. Constitutional interpretation exemplifies this thesis of linguistic indeterminacy, and no amount of doctrinal refinement is likely

to reduce the indeterminacy of any constitutional test.”¹⁵

This is a considerable overstatement of any plausible thesis about indeterminacy. If all that Gedicks meant was that every linguistic formulation leaves some cases on the edge of what the formulation covers and that context plays a significant role in how words are understood, one could hardly quarrel; but he seems to deny that words of rules ever constrain, no matter what the context. That thesis is implausible, as I try to show elsewhere at length.¹⁶ Briefly, and by way of example, given our legal culture’s present understanding of “ordinary income,” I cannot reasonably argue that my university salary is other than ordinary income

¹⁵ *Id.* at 45.

¹⁶ KENT GREENAWALT, *LAW AND OBJECTIVITY* (New York, Oxford Univ. Pr. 1990).

for tax purposes. If statutory and administrative rules can constrain and can require particular answers to some legal questions, so also can judicial doctrines. Some doctrinal tests are indeterminate across a broad range of cases; other tests are more determinate. If this is so, judges can revise an approach to make it more or less determinate. To use a Fourth Amendment illustration, the old doctrine that electronic surveillance without any physical trespass did not constitute a “search” was highly determinate; the doctrine that replaced it—that electronic surveillance can constitute an unconstitutional search if it infringes reasonable expectations of privacy¹⁷—was less determinate. And, in the area of church-state law, the rule of *Employment Division v. Smith* that claims

¹⁷ See *Katz v. United States*, 389 U.S. 347 (1967).

of free exercise confer no special rights for those who violate ordinary laws is more determinate than the compelling interest test that *Smith* displaced.¹⁸

We cannot generalize about whether doctrinal refinements increase or decrease the range of determinacy, understood as yielding fairly clear results for concrete circumstances. But we definitely cannot assume that the degree of determinacy will remain exactly the same for church-state law regardless of the doctrinal tests that the Court employs.

Steven Smith has devoted a book to showing the impossibility of

¹⁸ This is true despite considerable indeterminacy about just when the rule of *Smith* applies.

the court's developing adequate legal principles regarding religious freedom.¹⁹ He presents a twofold argument that ordinary legal sources fail to give guidance and that no overarching theory of religious freedom is satisfactory in the right way. Along the way, he tackles the concept of neutrality, suggesting that it can never be a helpful guide to preferring one approach over another. Smith thinks that the aspiration to a principle or principles of religious liberty is doomed to failure, that we should settle for what he calls a prudential approach²⁰ and should ask ourselves whether the courts might profitably play less of a role than they do now in circumscribing church-state relations.

¹⁹ Smith, note 3 *supra*.

²⁰ Although I am not sure whether Smith would regard my suggested approach as principled or prudential, probably it falls on the prudential side of the line, despite analyses of particular problems that carry heavier doses of principle than Smith thinks wise.

The more narrowly legal aspect of Smith's skepticism peculiarly concerns the federal religion clauses; in its exact form, it does not apply to most federal constitutional issues or to the religion clauses of states. As we have seen in Chapter 2, Smith suggests that the enactors of the religion clauses aimed *only* to assign the subject of religion to the states.²¹ The clauses had *nothing* to say about how the federal government conducted itself within federal domains. Chapter 2 indicates my disagreement with that thesis; the language of the First Amendment and the surrounding history indicate that both religion clauses restricted the federal government within federal domains. Even if Smith were correct about the original understanding of the religion clauses, by the

²¹ *Id.* at xxx.

time of the Fourteenth Amendment when most states' constitutions had both free exercise and nonestablishment provisions, people viewed the federal religion clauses as embodying substantive rights; these could be carried forward against the states.

Two other legal sources on which a modern Supreme Court could rely are its own precedents and state court decisions about the meaning of state constitutional provisions regarding religion. If the states had coalesced around versions of free exercise and nonestablishment, that was a source to which the Supreme Court could have turned to understand federal provisions. Now, of course, it has its own precedents. Smith might respond to the last point that if the Court has made up

principles of religious freedom without justifying them in existing legal sources, that can hardly produce a satisfactory claim to legitimacy. But in a system in which constitutional precedents, even when misguided, count for the future, this kind of self-generation in the Court's past could underlie its justifiable reliance in the present.

Various legal sources, understood in a suitably complex way, provide greater potential than Smith acknowledges for discerning adequate constitutional principles for religious cases. Were present doctrines and decisions as confused and as incompatible with one another as Gedicks and Smith both suppose, existing legal sources might be a poor guide to clear, coherent, defensible principles. However, part

of the burden of these two volumes on the religion clauses is that the Court's decisions and doctrines, though many are subject to sharp criticism, have a degree of coherence that is greater than most critics concede.

IV. Can Recognizably Sound Relations Between Church and State Be Realized?

We now turn to a still deeper, third variety of skepticism, one that challenges any aspiration to realize sound relations between government and individuals and organizations as respects religion. A critic may argue: (1) no principles of moral and political philosophy that stand free of particular views about religion, human nature, and the role of the

state, can resolve issues of church and state; (2) claims about neutrality or fairness are empty or misleading; whether a person sees one principle as more neutral or fair than another depends on initial premises of his own that he cannot expect all other citizens to accept; (3) broad principles are no real help in resolving church-state issues because, in this domain, the best way to proceed is by a series of ad hoc judgments, adjustments, and compromises; (4) principles are no real help in resolving these issues because, on analysis, principles are employed instrumentally in light of predetermined objectives; and reasoned analysis, as distinguished from rhetoric, gives us no basis to adopt one set of resolutions of church-state issues in preference to another.

In distinguishing this form of skepticism from claims about other impediments to sound judicial doctrine, I am drawing a line between skepticism about standard legal sources and forms of reasoning and skepticism about conclusions of political and moral theory. If political and moral theory can provide a guide to desirable relations of church and state,²² judges will have one potential basis to reach good constitutional decisions.²³ If political and moral theory is unavailing, *either* because it provides no guidance that is helpful *or* because whatever guidance it

²² A theory might fail to provide helpful guidance because its conclusions do not guide or because it is intrinsically unsound.

²³ Within the domain of legal philosophy, there is an argument whether reliance on sound moral and political philosophy is an indistinguishable aspect of ordinary legal reasoning or is analytically separable from initial determination of what the law requires. Very crudely, the latter theory is that in difficult cases the law runs out, and that judges “fill gaps,” resolving issues in terms of what is a just or good result or rule of law. The former theory is that reliance on one’s best judgment about principles of moral and political philosophy is an inextricable aspect of interpreting relevant legal materials. For my purposes, this jurisprudential dispute is not crucial. All that is crucial is that some skeptics are critical of our ability to arrive at sound principles of church-state relations, quite apart from what our present law provides, and that that skepticism bears on the possibility of sound judicial conclusions.

might provide in general is not appropriately relied on by judges, then this avenue of sound judicial decision is foreclosed.

Smith recognizes that one approach to establishing principles for the religious clauses is to rely on a political theory about just and desirable relations between church and state, but he claims that no theory can be arrived at that does not itself depend on premises about human nature and true religion, that neutrality is an impossible ideal, and that we have no coherent secular theory of religious freedom. Much of Stanley Fish's critique is similarly directed, although his skepticism is more thoroughgoing than Smith's and obviously goes beyond church-

state relations to other efforts to ground moral and political principles.²⁴

We may begin with the assertion of Smith and Fish that no theory of religious freedom can stand on its own, somehow independent of assumptions about human nature, political organization, and the truth in matters of religion. Both writers discuss John Locke,²⁵ and we can understand their claims easily in respect to his theory.

In his 1689 “A Letter Concerning Toleration,”²⁶ Locke argued that

²⁴ Fish, note 3 *supra*, at xxx. Although he concentrates on liberal theorists who focus on just political arrangements rather than legal doctrines, Fish’s skepticism about just principles for church-state relations reaches the law of church and state, insofar as that law relies on theories of religious freedom.

²⁵ See Smith, note 3 *supra*, at 64–68; Fish, note 4 *supra*, at 2258–69.

²⁶ Reprinted in JOHN LOCKE: A LETTER CONCERNING TOLERATION, IN FOCUS 12, John Horton and Susan Mendus, eds. (Routledge Writers in Focus Series) (London and New York, Routledge 1991).

people cannot be coerced into believing things, that Christian belief can be religiously efficacious only if it arises voluntarily, that many subjects that have divided Christians are really matters of indifference, and that government should concern itself only with protecting life, liberty, health, and outward possessions, not with the “care of souls.”²⁷ Accordingly, people should be free to believe what they choose, to express those beliefs, and to practice religion as they see fit.²⁸ Laws cannot be *aimed* against religious practices, such as animal sacrifice, but religious practices that happen to violate laws adopted for independent reasons can be stopped. Thus, if a law forbidding the killing of calves is adopted

²⁷ However, Locke suggests that though the magistrate may not coerce about religion, he can persuade.

²⁸ There are certain apparent limits to freedom—atheists cannot be trusted to keep promises, and perhaps Roman Catholics need not be tolerated because they owe allegiance to a foreign power—but the general stance is liberty of religious exercise.

because “some extraordinary murrain” (pestilence or disease) has destroyed the stock of cattle, officials rightly enforce the law against members of a religious group that sacrifices animals.

As Fish and Smith point out, Locke’s theory depends on highly debatable premises: about the effectiveness of coercion to affect belief;²⁹ about the need for voluntary acceptance of religious truth; about the unimportance of precise nuances of doctrines and forms of worship; about the state’s responsibility to protect natural rights rather than seeing that people lead good lives; and perhaps on an implicit

²⁹ Most obviously, if adults are effectively coerced not to express a particular belief, children are not likely to arrive at that belief.

assumption that external actions are not central for true religion.³⁰

Fish and Smith argue that Locke's general approach to religious liberty depends on numerous background beliefs with which other people disagree, *and* that Locke can mount no convincing set of arguments to lead opponents to surrender their background beliefs in favor of his.

What is true for Locke, say Fish and Smith, is true for any theory of religious freedom. Their position is well captured by Fish's response to a

³⁰ Let me pause a moment over this last point. Fish claims that Locke's conclusion about the law protecting calves shows that he does not value highly forms of worship that might run up against prohibitions adopted for reasons not related to religion. "Not only does Locke . . . equate" the harms of economic disadvantage for the ordinary farmer and inability to engage in the religious ritual, he "denies the severity of the religious harm by identifying true and essential religious practice with the internal notions of mind and heart." Note 4 *supra*, at 2266–67. If Locke saw external actions as a vital aspect of religious practice, Fish implies that he would have considered whether an exemption should be given for practitioners of animal sacrifice. I am not so certain. Locke may have thought that the law could not tolerate a regime of exemptions or that no appropriate religious practices would ever raise this problem. Or, concentrating on laws directed against religious practices themselves, he may have conceded the example involving a general law that is not directed at religion without carefully considering whether an exemption would be preferable.

passage of Jeremy Waldron's, suggesting that insofar as Locke's position is developed on the basis of Christian premises, it is "insufficiently general to be philosophically interesting."³¹ Fish answers that one cannot "devise principles of such generality that they speak to the intuitions of all persons however situated . . . and are therefore acceptable to all persons, even those whose interests might be disadvantaged by their realization in public life[.]"³²

Fish and Smith are right that no theory of religious freedom can satisfy everyone, regardless of background belief. A person who is convinced (1) that only true believers will be saved, with others

³¹ Jeremy Waldron, *Locke: Toleration and the Rationality of Persecution*, in HORTON AND MENDUS, note 26 *supra*, at 98, 99, discussed in Fish, note 4 *supra*, at 2270–71.

³² *Id.* at 2271.

condemned to everlasting fire, (2) that coercion can induce true, saving belief, and (3) that governments are well situated to identify religious truth, will be unlikely to endorse as ideal anything like American notions of free exercise and nonestablishment.³³ A person who believes that the most fruitful religious experience is within a unified national community in which almost everyone worships in the same way will also find liberal notions of religious freedom uncongenial. The relevance of background beliefs is one obvious lesson of the revulsion extreme Islamic fundamentalists have to the values of our society.

What follows from the impossibility of satisfying everyone? May a

³³ However, persons with these convictions, recognizing they are in a small minority, might accept religious liberty and nonestablishment as the best they can hope for in a society in which their religious opinions are not widely shared.

society nonetheless have a justified approach to religious liberty, based either on a consensus or on sound principles? Many societies may enjoy very broad agreement among people with widely different background beliefs about basic relations of church and state. If, let us say, ninety-eight percent of the population happen to agree on these matters, perhaps they may proceed accordingly, even if no one can present a convincing argument to persuade the other two percent.³⁴

Fish and Smith, though for somewhat different reasons, would

³⁴ A crucial question in this regard is whether people can agree not only on some basic approaches, such as not establishing a state church and not restricting advocacy of religious ideas, but can also agree that resolutions of debated issues can be reached without people repairing to their own background beliefs, relying instead on shared common grounds (i.e., shared by the ninety-eight percent). I am skeptical about this possibility, and this skepticism is part of what I find less than persuasive in John Rawls's idea of an overlapping consensus that will support decisions made by reference to principles of liberal democracy. See KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 106–20 (1995); Greenawalt, *Some Problems with Public Reason in John Rawls's Political Liberalism*, 28 LOY. L.A. L.REV. 1303–17 (1995). See also Chapter 21, *infra*.

regard agreement among the ninety-eight percent as failing to provide a just resolution for many issues. The agreement is irrelevant to Fish's fundamental point, which is that the two percent end up as losers for reasons that cannot be expected to persuade them.³⁵ In respect to American society (and other Western societies), Smith would say that any such broad agreement will be abstract, too circumscribed in substantive content, to provide a cogent theory of religious freedom for resolving constitutional cases. Judges resolving actual cases, and left with a shared public understanding that is too thin to yield coherent principles, will need to refer to their own background beliefs or to other criteria, such as the original intent of those who adopted the Constitution

³⁵ However, even if the two percent want a theocratic state, they may well prefer modern religious freedom to a theocracy of a majority religion sharply opposed to their own. *See* note 15 *supra*.

or doctrines settled by judicial precedents.

Theories of religious freedom depend on background beliefs. What follows? Some of what Smith says and much of what Fish says follows does not. Smith correctly asserts that there is no univocal principle of religious freedom.³⁶ We should not move from accepting this observation to serious doubt about whether we can speak confidently of increases or decreases in religious freedom. People may have many reasons for disagreeing whether their society protects religious freedom

³⁶ Smith, at p. 11. He subsequently suggests that a theory that depends on a preferred set of background beliefs may only be a theory of tolerance, not a true theory of religious freedom. *Id.* at 73. Smith's doubt about whether a theory could be a genuine theory of religious freedom is not well-founded. Suppose a modern Baptist conception about church-state relations is that legally and politically Baptists should receive no advantage over any other religion or over nonreligious and antireligious positions, further that officials should not rely on any specifically Baptist conception when they make decisions, and further that in ordinary social life, people (including Baptists) should afford no advantage to Baptists. Although based on a Baptist conception, the theory calls on government and society not merely to tolerate other religions but to give them all the respect and liberties that Baptists enjoy.

to the appropriate degree. They might agree that approach A gives more religious freedom than approach B but disagree over whether A's sacrifice in another value, such as security, warrants adopting B. Or they might agree that A provides more religious freedom of one sort and less of another than does B—say it better protects freedom of decision for churches at the cost of liberty of individual members—but disagree about which aspect of freedom matters more. Or they might agree that A provides more religious freedom for some people at the expense of others than does B—e.g., allowing children who wish to pray in school to do so at the cost of pressure on nonconformists—but disagree over whose freedom should be protected. Finally, they might disagree whether as to the same people in the same basic respect A or B gives more religious

freedom—does A’s allowance of forced exposure to a range of religions increase or decrease a child’s freedom to choose her religion?³⁷ Only in this last instance will the disagreeing citizens actually dispute over whether a particular practice increases a particular individual’s religious freedom. Thus, debate about a desirable approach to religious freedom need not signal wide disagreement about whether we can characterize a rule or practice as increasing or decreasing the religious freedom of particular individuals in particular respects.

Much more important than what Smith says about a theory of religious freedom is what he and Fish say about neutrality and fairness.

³⁷ Even here, one might distinguish among *aspects* of a freedom to choose and achieve agreement about which aspects are promoted or set back by forced exposure.

They are right in claiming that “neutrality,” a key concept in the Supreme Court’s religion jurisprudence, cannot be self-defining. One must determine neutrality of what kind for whom in respect to what aspects of which subjects; and the path one chooses will depend on background beliefs. Thus, one person might urge that neutrality as to religion would exclude creationism from public schools, if religious conviction is the underlying basis for belief in creationism. Another might object that neutrality requires that students be exposed to creationism if they are exposed to the competing theory of evolution, a theory that rejects the religious understandings of many citizens.³⁸ In the abstract, one cannot say which approach is more neutral; judgment

³⁸ SMITH, note 3 *supra*, at 82–83, criticizes the assumption in *Epperson v. Arkansas*, 39 U.S. 97 (1968) (a decision holding invalid a law forbidding the teaching of evolution) that teaching of a secular theory about the creation of life is neutral.

on that score requires filling in a number of assumptions.³⁹ Fish says, “[N]eutrality, like any other abstraction, has meaning only with some set of background conditions; as a rule or measure it will always reflect decisions and distinctions it cannot recognize because it unfolds and has applications within them.”⁴⁰ Smith remarks, “[T]he ideal of religious neutrality is simply not coherent.”⁴¹ On the closely related topic of fairness, Fish tells us that the hope of liberals—“to establish a form of political organization that is fair to all parties—cannot possibly be realized.”⁴²

³⁹ See Chapter 9, *supra*. A more general approach to conceptions of neutrality for the religion clauses is developed by Douglas Laycock in Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul Law Review (1990).

⁴⁰ Fish, note 4 *supra*, at 2226. I am more hopeful than Fish that if people engage in close examination of their own ideas, they will be able to “recognize” crucial “decisions and distinctions.”

⁴¹ SMITH, note 3 *supra*, at 94.

⁴² Fish, note 4 *supra*, at 2256.

Let us grant right away that no schema can be established that all citizens will actually perceive to be neutral or even that they *should* find acceptable, consonant with their own background beliefs. It neither follows that “neutrality” is empty nor that no schema is fairer or more importantly neutral than any other.

Once one specifies a subject matter, “neutrality” has some minimum content. Neutral treatment of individuals or groups implies some form of equal treatment.⁴³ The idea that a government should be “neutral as to religion” has a fair amount of descriptive content. Not every conceivable approach to how the state should treat religion is well

⁴³ On the subject of whether “equality” is empty, my views are in Kent Greenawalt, *How Empty Is the Idea of Equality?* 83 COLUM. L. REV. 1167 (1983); “*Prescriptive Equality*”: *Two Steps Forward*, 110 HARV. L. REV. 1265 (1997).

cast as filling in the “empty” content of neutrality; some positions self-consciously reject neutrality in favor of other values. Thus, two people might agree that one government is more “neutral” toward religions than another, yet disagree sharply over which approach is preferable.

Philosophically inclined members of the Taliban might well acknowledge that the American government is more neutral about religion than was their regime, but they would reject neutrality as an ideal in favor of adherence to the true faith.⁴⁴ Similarly, defenders of special privileges for national Orthodox Christian churches in Eastern Europe might grant that they are choosing an approach that is less neutral than some alternatives.

⁴⁴ Of course, they *could* say that the ideal is to treat every true religion neutrally and every false religion neutrally, but to treat these two categories differently.

Another point is the more important. If one set of background beliefs is best, then the ideal church-state relations for any particular society are what that set of beliefs recommends for a society constituted as is that one.⁴⁵ If that ideal was implemented, if a society had the best form of church-state relations possible for it, and that form achieved neutrality in some sense, then everyone in the society could be treated fairly, and the best form of neutrality would be realized, although not all citizens could be expected to recognize that.

If a version of liberal political philosophy requires that everyone

⁴⁵ Some background beliefs may suggest that the government's treatment of religion should not depend on the particular culture and prevailing religious beliefs within a society; others would treat those as relevant, either because the ideal government for a society would depend substantially on its culture and religion *or* because a tiny religious minority could not expect in fact to rule a country, even if its rule would otherwise be desirable. As the next chapter reflects, I think culture and religious beliefs may matter for what relations should be between government and religion.

perceive that they are being treated fairly, or that they be presented with arguments that should convince them (with the background beliefs they have) that they are being treated fairly, we should recognize that that aspiration of fairness *is* impossible to achieve. But if that particular aspiration of fairness is impossible to achieve, should we not conclude that real fairness does not require that everyone recognize that they are fairly treated?⁴⁶ I understand, for example, that many people have background beliefs according to which controversial forms of affirmative action are unfair; but I believe nonetheless that they are fair. If it is impossible for people to agree on what is fair, we should not make such an agreement a requisite for what actual fairness entails, as Fish may

⁴⁶ This is not the occasion to explore the history of liberal political philosophy, but that history is rich, and many liberal theorists have not subscribed to the version Fish attacks.

do.⁴⁷

What I have said about neutrality and fairness, of course, hinges on the assumption that some sets of background beliefs really are better than others. These background beliefs might be what Rawls calls comprehensive views, but they could also include ideas of political philosophy that are detached from specific comprehensive views. Fish suggests powerful doubt that any set of background beliefs is really better, or identifiably better, than any other. In a revealing, if elusive, footnote he tells us, “I shall several times deny the availability of any mechanism or calculus for determining the truth about a matter. This

⁴⁷ Possibly he means only that this particular liberal aspiration to fairness is impossible to attain.

does not mean that I believe there to be no such truth, only that I believe there to be no way of flushing it out so that everyone, however situated, will assent to it.”⁴⁸

According to the least sweeping version of this passage, relevant truth cannot be flushed out so that *everyone* will assent to it. That seems right, at least in regard to many claims of truth.⁴⁹ However, people certainly do not give up talking about truth if this condition cannot be met. Most of us are highly certain about some scientific and historical facts (such as the killing of millions of Jews and other civilians in Nazi death camps during World War II), although we acknowledge that not

⁴⁸ Fish, note 4 *supra*, at 2257, n.4.

⁴⁹ There are many truths that everyone does take for granted: e.g., that $2 + 2 = 4$, and that outdoors it is brighter when the sun shines than in the middle of the night.

everyone can be expected to assent to those truths.⁵⁰ What are we to make of Fish's own thesis in his essay? It contains a set of claims about what is impossible. These are about what is true philosophically, although Fish cannot expect everyone to assent,⁵¹ given the background beliefs many people have that are fundamentally at odds with his claims.

If we lower our sights and accept that many strong arguments about what is true and not true may be valid although these arguments will not (and even hypothetically could not, under varied conditions)

⁵⁰ Perhaps my example is ill chosen. One might think that given a minimal level of intelligence and access to information, no one could reasonably deny the truth of the death camps. But what are we to say of someone who confidently asserts that Holocaust history is the product of conspiratorial control of media outlets?

⁵¹ I am offering here a variation of the common argument made against claims that truth is subjective or relative. One could respond that the claim "truth is subjective" is the one truth claim that is not subjective, and perhaps Fish can develop a similar rejoinder.

convince everyone, we revert to the possibility that one set of background beliefs might be better than any other and that human beings may have a degree of capacity to identify sound background beliefs.

We might wonder if political, moral, and religious positions are somehow different from science and history, not susceptible to discovery, not true or false, even according to a less ambitious criterion than an ability to win universal agreement.⁵² Once we understand the question as whether, and how far, human beings can grasp religious, moral, and

⁵² I once offered as a position that admits of a judgment of truth that is accessible to common human understanding: “unrestricted governance by sadists is undesirable.” GREENAWALT, *Private Consciences*, note 34 *supra*, at 26–27. The idea was that if governing sadists used their own citizenry to satisfy their sadistic inclinations, that would be bad even for sadists (except those few in power). Fish generously calls this observation “as safe as it is unhelpful.” Note 4 *supra*, at 2262. What I think it establishes in the realm of political and moral philosophy is that there is at least some room for reasoned consideration of what is right and wrong that rises above particular cultural presuppositions and personal beliefs. And if that is possible for “safe” conclusions, it may be possible for less safe ones.

political truth, we quickly see that the answer cannot be yanked out of a hat of conceptual deconstruction. It requires serious analysis of various assertions about truth or validity in these domains.

Where does all this leave us with respect to church-state relations?

Fish suggests that principles are inevitably tools of rhetoric, not devices to discern truth.⁵³ In discussing the views of David Smolin, who acknowledges that he would like to convert others to his Christian views but wants to do so “fairly,” Fish admires his candor but expresses

⁵³ *See id.* at 2319–22. He also suggests that recognition of this fact will not change our behavior. *Id.* at 2325–33. But if we are persuaded by Fish, we will understand that what really count are our objectives, the ones that we use principles to try to achieve. If we think other people are also persuaded to this understanding, might we not self-consciously calculate that contentions about principle will be less (or conceivably more) effective in achieving our objectives than we believed when we, and others, thought principles had intrinsic power? Even if we are the only ones persuaded by Fish, we might come to view principles in a different way, deciding to talk more directly about objectives, or perhaps being more self-consciously manipulative. There is no conceptual reason to suppose our behavior would be completely unaffected by the insight Fish gives us; whether we would be affected is an empirical question, and Fish offers no empirical basis for his skepticism about that.

puzzlement at his failure to take the final step of dispensing with illusory constraints of fairness.⁵⁴

Fish's treatment of Smolin reveals strikingly how unpersuasive is his dismissal of ideas of fairness. Smolin may believe that God wants true religion to flourish in an atmosphere of freedom. A government fully responsive to Smolin's concerns would support religion in ways that secular liberals reject; but Smolin does not want the law to silence dissenting religious voices. Smolin wants to spread his beliefs but according to principles of government that he deems fair to opposing views. Fish regards this as peculiar, showing a kind of failure by Smolin

⁵⁴ *Id.* at 2330–32, discussing David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991) (book review).

to carry out his full convictions. But notions of fairness might well comprise part of Smolin's overall background beliefs.⁵⁵ Ideas of fairness are part of many people's background beliefs, and principles of fairness might well comprise part of the best set of beliefs, perhaps connecting to his religious ideas about human freedom. We would be foolish to simply throw out ideas of fairness and neutrality or to suppose they are only rhetorical tools in people's pursuit of more concrete or substantive objectives. What is true for principles of fairness may well be true for other principles people perceive as restricting their pursuit of various

⁵⁵ Imagine a tennis player who is playing in the finals of a tournament she desperately wants to win. Her opponent hits a ball that the linesman calls out, but she sees clearly that the ball is in. According to her beliefs, winning is important but one should do so fairly, and she thinks (as many others do not) that taking advantage of an obviously mistaken call is unfair. She asks the referee to have the point played over (or she loses the next point on purpose to counterbalance the unfair advantage). There is nothing irrational or peculiar in her behavior. Similarly, many people think their pursuit of political and moral objectives should be constrained by notions of fairness. If all this is so, why should we assume principles of fairness are merely manipulative to other objectives?

objectives. Thus, Fish's arguments fail to sustain his extremely skeptical conclusions about developing sound principles of moral and political philosophy, principles that could in turn support the development of constitutional law.

The implications of my analysis for Smith's positions are more interesting and less clear. Smith might concede every one of my points and conclude that, given pervasive disagreements over background beliefs and our inability to go very far in resolving these, a judge will not find at hand any coherent theory of religious freedom to interpret the Constitution. Smith, in fact, does argue that secular approaches to religious freedom raise too many factual and normative problems to yield

a coherent theory. Smith might even suppose that the very best set of background beliefs, if universally accepted, would not produce coherent principles of the sort he has in mind. This best view might recognize that the notion of religious freedom involves many values, that these frequently are in competition with one another, that one can find no neat formula (except a formula too vague to be helpful) for resolving the conflicts, that desirable resolutions depend heavily on specific context, on the stage of a country's historical development, and on its religions and cultural composition. Were this to be the reality, courts might better pursue what Smith calls a prudential approach than one aiming for large principles, and they might also wisely defer to legislatures more than they do now.

Smith's most important practical conclusions may be maintained in the face of my doubts about many of his conceptual claims. But then the persuasiveness of his conclusions will depend on a careful examination of the competing political theories about religious freedom and about legal traditions in the United States, and will not be established by any more general conceptual skepticism of the sort he and Fish offer to us.

In these two volumes, we have looked at these sources. My own sense is that they provide considerably more guidance than Smith believes; but I agree with him that many, many problems of church and state are too complex to be susceptible of resolution by simple formulas.

####