Introduction

The Sacred and Profane in American Law

Austin Sarat

On January 11, 2012, the U.S. Supreme Court held that the Establishment Clause and Free Exercise Clause of the First Amendment barred suits by ministers against their churches "claiming termination in violation of employment discrimination laws."[1] Citing the so-called ministerial exception, the Court ruled that what would otherwise be actionable conduct was exempt from legal action in the relationship between religious institutions and its ministers.[2] Writing for a unanimous Court, Chief Justice John Roberts observed:

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[3]

[1] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, Docket No. 10-553 (2012), 6.
[2] Id., 13
[3] Id.

Roberts recognized that "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important."[4] However, he continued, "so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."[5]

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC is just the latest example of the way that the specter of the sacred haunts American law, even in this most resolute of contemporary secular democracies.[6] Law wants both to maintain its separateness from the world of religious faith and, at the same time, to respect religious faith and its expression. At the start of the twenty-first century, as some in the United States grapple with the seeming fragility of secular democracy in the face of threatening religious fundamentalisms, the question of the relation between law and matters of faith has gained a particular urgency.[7]

However, the proper role of religion in a secular state and the question of what accommodations law should make for religion has been an American question right from the beginning of the republic. Thus, Robert Bellah argues that religion, and particularly the idea of God, played a "constitutive role" in the minds of the American founders.[8] They relied on "a collection of beliefs, symbols, and rituals with respect to sacred things and institutionalized in a collectivity" that was nevertheless not specifically

4 Id., 21

5 Id.

6 See Martha Merrill Umphrey, Austin Sarat, and Lawrence Douglas, "The Sacred in Law: An Introduction," in Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds., *Law and the Sacred* (Palo Alto, CA: Stanford University Press, 2007), 1–28.

7 Another recent example was provided by the controversy surrounding an Obama Administration rule that would require Catholic universities and hospitals to cover contraceptives in their health care plans. Linda Greenhouse, "Whose Conscience?" *New York Times*, February 8, 2012, The Opinion Pages. Available at: http://opinionator.blogs.nytimes.com/2012/02/08/whose-conscience/, accessed April 20, 2012. See also John Witte, Jr., *Religion and the American Constitutional Experiment* (Boulder, CO: Westview Press, 2005).

8 Robert N. Bellah, *Beyond Belief: Essays on Religion in a Post-Traditional World* (New York: Harper & Row, 1970), 173. As Sanford Levinson defines the phrase, it is less inflected with religion: Civil religion is "that web of understandings, myths, symbols, and documents out of which would be woven interpretive narratives both placing within history and normatively justifying the new American community coming into being following the travails of the Revolution." See Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988), 10.

Christian in nature, and signaled a "genuine apprehension of universal and transcendent religious reality . . . as revealed through the experience of the American people."[9] In addition, writing at the start of the nineteenth century, Alexis de Tocqueville famously argued, "Religion [really, Christianity], which never intervenes directly in the government of American society, should therefore be considered as the first of their political institutions, for although it did not give them the taste for liberty, it singularly facilitates their use thereof" by directing mores and regulating domestic life properly.[10] In this view, American public life is grounded by and in Christianity as a regime of meaning and morality, and to the extent that it underwrites the secular, the two are inseparable.

The indirect relation Tocqueville posits between religious faith and American government is fundamentally at odds with the claim that the United States is indeed a "secular" democracy. As William Connolly notes in his book *Why I Am Not a Secularist*, the dominant historical narrative commonly offered to justify the maintenance of a secular public realm emphasizes the critical role played by secularization in promoting "private freedom, pluralistic democracy, individual rights, public reason, and the primacy of the state" over the church as an antidote to the destructive effects of religious warfare in the early modern period.[11] Under this stark theory of social organization, which we assimilate to the phrase "separation of church and state," the political world is one evacuated of the sacred and the metaphysical in favor of reason, tolerance, and the promotion of human well-being and justice in this life rather than the next. Connolly argues that this thin secularist view represses a richer and more inclusive range of potential intersubjective relations and obscures the

[9] Bellah, *Beyond Belief*, 179.

[10] Alexis de Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (New York: Harper & Row, 1966), 292.

[11] William Connolly, *Why I Am Not a Secularist* (Minneapolis: University of Minnesota Press, 2000), 20. See also Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: The Johns Hopkins University Press, 1993), particularly chap. 1, in which Asad argues that only in the nineteenth century did the split between religion and public power really take hold because evolutionary thought considered religion "an early human condition from which modern law, science, and politics emerged and became detached." Asad, *Genealogies of Religion*, 27. For a judicial articulation of this narrative, see *Everson v. Board of Education*, 330 U.S. 1 (1947). For a history of the idea of the separation between church and state in the United States, see Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002).

continuing subterranean connections between religion and public life that Tocqueville noted.

Those connections may be less subterranean now than at any point in the past fifty years. Yet, however much politics and religion now appear to be intermixing, it remains the case that constitutional jurisprudence requires both that distinctions between church and state be maintained and that some accommodations must be made for religious practices. The difficulty, of course, comes in defining the proper ambit of those distinctions and accommodations.[12] This book is designed to explore and illuminate such difficulties.

There is an enormously scholarly literature offering various perspectives of the law's treatment of religion.[13] Most scholars now recognize that although the U.S. Supreme Court has not offered a consistent interpretation of what "nonestablishment" or accommodation means, as a general matter it can be said that the First Amendment requires that government be neutral as among religions and (although this is more controversial) avoid preferring religion to nonbelief.[14] Yet, that rule raises questions that are addressed in *Matters of Faith: Religious Experience and Legal Response in the United States*, namely, What practices constitute a "religious activity" such that it cannot be supported or funded by government? And what is a religion, anyway? How should law understand matters of faith and accommodate religious practices?

Over 100 years ago, the U.S. Supreme Court confronted the meaning of faith and the limits of religious accommodation in a case involving an admitted violation of the law against polygamy by a member of the Mormon Church.[15] The defendant in that case, George Reynolds, claimed that he could not, and should not, be convicted of a crime against state law that conflicted with his religious beliefs and the practices mandated by those beliefs. He noted that it "was the duty of male members of . . . [the Mormon Church], circumstances permitting, to practice polygamy . . . [and] that he

[12] See Umphrey, Sarat, and Douglas, "The Sacred in Law."

[13] For an overview of this literature, see Stephen Feldman, *Law and Religion: A Critical Anthology* (New York: New York University Press, 2000).

[14] Roy A. Clouser, *Myth of Religious Neutrality: An Essay on the Hidden Role of Religious Belief in Theories* (Notre Dame, IN: University of Notre Dame Press, 2005).

[15] See *Reynolds v. United States*, 98 U.S. 145 (1878). Much of what follows is taken from Austin Sarat and Roger Berkowitz, "Disorderly Differences: Recognition, Accommodation, and American Law," *Yale Journal of Law and the Humanities* 6 (1994): 285.

had received permission from the recognized authorities in said church to enter into polygamous marriage. . . . "[16] Reynolds embraced, in his request for an exemption from the statute prohibiting polygamy, not the language of freedom or willfulness, but instead the language of "duty" and "authority." Even as he asserted the limits of the sovereign prerogative of the state, Reynolds claimed not to be free, but to be bound by a different law.

However, as the Court described Reynolds's position, his deference to "duty" and "authority" disappeared. The question before the Court was framed by then Chief Justice Morrison Waite as whether "one who knowingly violates a law which has been properly enacted [can be found guilty] if he entertains a religious belief that the law is wrong."[17] This framing was, as is readily apparent, an artful alteration of the question that Reynolds originally posed, as well as a way of framing the difference that Reynolds advocated as a threat to the law itself. Reynolds, in fact, advanced no view as to whether the law against polygamy was right or wrong in the community outside the Church of Jesus Christ of Latter-Day Saints; instead, he argued that he should be exempt from its reach, whether the law be right or wrong, because of the unresolvable conflict between state law and his religious obligations.

Waite responded to Reynolds's arguments by quoting Thomas Jefferson who said, "Adhering to this expression [the First Amendment] of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced that he has no natural right in opposition to his social duties."[18] Reynolds's claim, if it did nothing else, raised the un–Jefferson-like question of just what his social duties were, and just who could legitimately bind him to the performance of those duties. In contrast to contemporary liberation struggles that seek to expand the civic realm at the expense of the private, Reynolds argued that in the case of marriage, the state claimed an interest and authority that was too expansive and overly intrusive. Yet, here again, Waite did not take up the challenge as posed.

[16] Id., 161.
[17] Id., 162.
[18] Id., 164.

Instead, Waite merely reiterated the fact that the state did claim to regulate polygamous marriage throughout American society, and he argued that although Reynolds was free to believe whatever his conscience dictated about the morality or immorality of polygamy, he was not free to turn that belief into action. The First Amendment, Waite argued, deprived Congress of "all legislative power over mere opinion, but . . . left [Congress] free to reach actions which were in violation of social duties or subversive of good order."[19]

In the way Waite treated Reynolds's claim, we have a powerful example of a persistent strain in American jurisprudence, what Mark Tushnet calls the "reduction" principle.[20] In Tushnet's view, the Supreme Court has, throughout its history, treated religion as a private and solitary act of individual conscience. As a result, the claims of religious faith are just another expression of the kind of idiosyncratic preferences that a liberal society generates and supports. "It matters not," Waite wrote, "that his [Reynolds'] belief was part of his professed religion; it was still belief and belief only."[21] Religious belief is like any other belief with no greater or lesser claim to informing practices. And people are free to believe whatever they want; they are not free, however, to act on their beliefs.[22] All differences are, in the end, merely differences of opinion. None are to be suppressed. However, to imagine that such differences could and should be the basis

[19] Id. See also Robert Giannella, "Religious Liberty, Nonestablishment and Doctrinal Development," *Harvard Law Review* 80 (1967): 1381. Also "Burdens on the Free Exercise of Religion: A Subjective Approach," *Harvard Law Review* 102 (1989): 1258.

[20] Mark Tushnet, "The Constitution of Religion," *Connecticut Law Review* 18 (1986): 701. See also David Williams and Susan Williams, "Volitionalism and Religious Liberty," *Cornell Law Review* 76 (1991): 769. The origins of the "reduction principle" can be found in John Locke's "Letter on Tolerance," where Locke focused on religion as the object of toleration. His treatment of religion dissolved religious beliefs into subjective opinions to be confined to the private sphere. Others believe that the difference of religion is not simply the difference of opinion, but rather a belief rooted in a communal ideal through which an individual transcends that individuality and becomes part of a shared faith. See Robert N. Bellah, ed., *Emile Durkheim on Morality and Society* (Chicago: The Chicago University Press, 1975), 198 ("A philosophy may well be elaborated in the silence of the interior imagination, but not so a faith. For before all else, a faith is warmth, life, enthusiasm, the exaltation of the whole mental life, the raising of the individual above himself."). See also Thomas Jefferson ("Believing with you that religion is a matter which lies solely between man and his God . . . ."), cited in *Reynolds v. United States*, 98 U.S. 145 (1878).

[21] *Reynolds v. United States*, 98 U.S. 167 (1878).

[22] See Kent Greenawalt, "The Religion Clauses: Religion as a Conception in Constitutional Law," *California Law Review* 72 (1984): 753.

for selective exemptions from the obligations of the law would, again in Waite's words, be "subversive of good order."[23]

Here Waite reflects the classic liberal response to matters of faith. After defining questions of religious truth as questions of subjective belief that are properly confined to private lives, liberals construct the civic realm as the place where "[p]articular matters of fact are the undoubted foundations on which our civil and natural knowledge is built." Put differently, for liberals, "[t]he rule of toleration that results is thus constructed not on the principle of conscience but on the absence of worldly injury. . . ." Freedom of religion is transformed by the vocabulary of liberal toleration from a freedom to live one's life in accordance with the laws of one's religion to a freedom of worship tolerated by a civil law regime, as long as the worship respects its limits and does not result in worldly injuries.

One other example of how law deals with matters of faith, and an important contrast to Waite's judgment in *Reynolds*, is provided by Chief Justice Warren Burger's majority opinion in *Wisconsin v. Yoder*.[24] In *Yoder*, decided in 1972, another request for exemption was pressed by yet another religious group, the Amish. This time the requested exemption again seemed to challenge an important social institution – public education.

Members of the Old Order Amish challenged the Wisconsin compulsory school attendance law that required them to send their children to a certified public or private school until they reached the age of 16. The Amish refused to send their children to a state-sanctioned school after the eighth grade. This meant that most Amish children were removed from school usually by the age of 14. As a result, Jonas Yoder, Wallace Miller, and Adin Yutzy were tried and convicted of violating the compulsory attendance law.

[23] Another example of this argument is found in *Employment Division v. Smith*, 110 S.Ct. 1595 (1990). In that case, two members of a religious group, the Native American Church, were fired from their jobs because of smoking peyote in violation of Oregon law and were consequently deemed illegible for unemployment insurance. In response to their claim that they were smoking peyote at a religious ceremony in accordance with their religion, Justice Antonin Scalia's majority opinion held: "To permit this [exemption from law] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." Id., Selective exemptions from laws based on respecting differences would, Scalia argues, "overturn the order of things. . . . [I]f this is once granted, discipline will be everywhere at an end, all law will collapse, all authority will vanish from the earth and . . . each would be his own Lawmaker and his own God."

[24] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

They challenged that law claiming that it violated their rights under the First and Fourteenth Amendments. Echoing George Reynolds, they argued that compliance with the state statute would require them to violate the commands of their church and "endanger their own salvation and that of the children,"[25] and they noted that their religion required "life in a church community and apart from the world and worldly influence."[26] In addition, high school and higher education were said to be objectionable "because the values they [public schools] teach are in marked variance with Amish values and the Amish way of life; they view[ed] secondary school as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs."[27]

Yoder is one of the few cases in the American constitutional tradition in which requests for exemption from the reach of valid state laws were granted, and in which the claims of faith were apparently accommodated and recognized.[28] Through a not coincident intertextual inversion, Burger used Thomas Jefferson to turn the Amish from unrecognizable strangers into icons of Americana, just as in *Reynolds* Waite had used Jefferson to dramatize the threat of Mormon polygamy. Burger seemingly recognizes and accommodates the claim of the Amish for exemption from compulsory school laws by turning the Amish into living monuments to the Jefferson ideal of the independent farmer. "[T]he Amish communities," Burger contends, "singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of democratic society."[29] Unlike Waite's rendering of Mormon polygamy as a savage practice, and the Mormons as the savage other, which threatened government by the people, Burger figures the Amish as already

[25] Id., 209.
[26] Id., 210. See Timothy Hall, "Religion and Civic Virtue," *Tulane Law Review* 67 (1992): 87.
[27] Id., 211.
[28] Others include *People v. Woody*, 40 Cal. R. 69 (1964) (exemption for use of Peyote in an Indian religious ritual); *Frank v. Alaska*, 604 P.2d 1068 (1979) (exemption from a hunting regulation for an Indian tribe); *Sherbert v. Verner*, 374 U.S. 398 (1962) (upholding claim for unemployment compensation by Seventh-Day Adventists who refused to work on the Sabbath); and *Thomas v. Indiana Review Board*, 450 U.S. 707 (1980) (upholds claim to unemployment benefits by a Jehovah's Witness). See "Religious Exemptions under the Free Exercise Clause: A Model of Competing Authorities," *Yale Law Journal* 90 (1980): 350; Philip Hamburger, "A Constitutional Right to Religious Exemption: An Historical Perspective," *George Washington University Law Review* 60 (1992): 915.
[29] *Wisconsin v. Yoder*, 406 U.S. 225–226 (1972).

a part of "us," a vanishing, but still recognizable, aspect of an American way of life that is important to the sustenance of democracy, even as he criticizes the "requirements of contemporary society" with their relentless insistence on "conformity to majoritarian standards."[30]

Whereas the practices of the polygamous Mormons were portrayed as incompatible with the institution of marriage, the "Amish," Burger tells his readers, "accept compulsory education generally. . . . The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the 'three R's'. . . . They view such a basic education as acceptable because it does not expose their children to worldly values. . . . "[31] Burger insists that there is less difference in the Amish claim than would initially seem to be the case as he repeatedly notes that they already embrace the very values that the state seeks to promote through compulsory education.[32]

Writing at the beginning of the 1970s, Burger embraces the Amish as a living rebuke to the leftish, "hippie" values that had predominated in the previous decade. Paradoxically, then, the hippies become mediating tropes in connecting Waite's vision of the Mormons to Burger's image of the Amish. Thus, Burger needs to both praise the Amish for their difference and, at the same time, deny them their difference. As he puts it, "Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."[33]

Indeed, much of Burger's opinion can be understood as a "ceremony of regret," a lamentation at the conditions of a modernity gone bad.[34] Throughout, he refers to the Amish in terms of their longevity and their stability, and he says that they have religious beliefs to which "they and their forebears have adhered to for almost three centuries."[35] These beliefs are juxtaposed to the "values and programs of the modern secondary

[30] Id., 217.
[31] Id., 212.
[32] Burger argues that the Amish "have carried the . . . difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education." Id., 235.
[33] Id., 226.
[34] See David Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community," *Law and Society Review* 18 (1984): 580.
[35] *Wisconsin v. Yoder*, 406 U.S. 215 (1972).

school. . . . "[36] "It cannot be overemphasized," Burger writes, "that we are not dealing with a way of life and more of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children in modern life."[37] The Amish represent a timeless difference needing defense against a transient version of progress.

Unlike Waite, whose liberalism saw all asserted differences as matters of personal preference, Burger differentiates "deep religious conviction" in a community in which "religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community," from what he calls mere "personal preference."[38] The Amish are, in Burger's eyes, doubly regulated by a regime of state law to which they almost religiously adhere as well as the "strictly enforced rules" of their religion.

The opinions of Waite and Burger offer examples of two starkly different ways that American law deals with matters of faith. The former exaggerates the danger that faith can pose to lawfulness. The latter denies difference as it seems to embrace it. The threat to law posed by faith is displaced through a process of identification.

In a country notable for both its religiosity and its religious pluralism, the problem of accommodating faith and religious practice remains a vexing and vexed one. Secular democracies such as the United States appear to want to both deny the relevance of the sacred to the project of law and mask the ways in which matters of faith remain integral to it. "Religion," a term that denominates a sphere of activities set apart from law, becomes the repository of the sacred, and law the repository of the profane and a marker of the secular. Yet, modern law's relation to the sacred remains deeply ambivalent.

Matters of Faith: Religious Experience and Legal Response in the United States explores that ambivalence. Contributors examine the history of law's dealings with religion as well as whether traditional models are adequate for contemporary conditions. They focus specifically on the question of accommodation, talking about the very challenging tension between respecting religious freedom and maintaining a commitment to a legal

[36] Id., 217.
[37] Id., 235.
[38] Id., 216.