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Why Freedom of Religion?

Although freedom of religion is often presumed, its protection is heavily disputed. Why should freedom of religion be constitutionally protected when other freedoms are not? Why not protect a broader freedom of conscience, which would shelter the religious and the nonbelievers? Although the case for broader protection is often made as a theoretical matter, constitutions generally protect freedom of religion. This book examines the consequences of such protections.

The original U.S. Constitution did not contain a guarantee of freedom of religion, but such constitutional protection was soon provided in the Bill of Rights. The constitutional protection was placed alongside freedom of speech in the very first amendment, ahead of property rights, the rights of criminal defendants, and other matters. As such, freedom of religion is considered foundational to Americans.

Special respect for religious freedom is not unique to Americans. Freedom of religion is widely protected by international law (Scolnicov 2011). The 1976 United Nations International Covenant on Civil and Political Rights declared that everyone should have the right to freedom of religion. The 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination

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Based on Religion or Belief proclaimed that religion or belief “is one of the fundamental elements in . . . [a person’s] conception of life” that “should be fully respected and guaranteed.” It proceeds to lay out particular elements to be protected.

Few ask why religious freedom should be guaranteed constitutionally, but the question is a relevant one. It may be that religion is undeserving of special constitutional protection. Even if we deem freedom of religion to be worthy of such exalted status, the purpose of such protection should be relevant to the manner in which such a constitutional provision is interpreted and applied.

At the threshold one might want to define religion, so as to know what freedoms are protected. The definitional question has proven to be a challenge. Neither social science nor law has settled upon a clear definition. Many definitions “erect a canopy so large that atheism and most college sororities would qualify as religions” (Grim 2004, 7–8). Asad (1993) contends that there can be no universal definition of religion.

Leiter (2010) argues that religion has certain unique characteristics, such as the issuance of categorical (nonconsequentialist) demands on action and a reliance on faith, rather than reason or evidence, for beliefs. Feofanov (1994) employs a similar definition, as do many others. The most common definition typically relies upon a belief in the sacred or supernatural as fundamental, though some groups, such as Buddhists, have an ambiguous belief in the supernatural.

Koppelman (2010) takes issue with Leiter’s definition but concedes that no definition of religion works very well. Much like pornography, he suggests that the definition of religion is simply that “[w]e know it when we see it” (Koppelman 2010, 976). If religion is to be protected (or limited), though, it must be defined. Some contend that prevailing definitions have produced only a mess or a quagmire (Feofanov 1994). But definition is dangerous. It risks excluding true beliefs as not qualifying as religious. Sullivan (2006, 924) contends that religion cannot “be defined in such a way that it can be legally protected and maintained as separate.”

There may be no good definition of religion, but Sullivan’s view is too gloomy, and the difficulty need not be a serious problem. Disputes tend to arise only at the boundary. Thus, Europeans debate whether

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Scientology should be considered a religion or a cult. While this may be important – very important to some – the vast majority of religious freedom issues are not such boundary problems, so a precise definition is unnecessary for a general assessment of global freedom of religion. Lupu (1996, 358) notes that the “combination of cultural pluralism, pragmatism, and experience” suggests that the definitional problem is not great, as we have “conventional understandings of what constitutes religion.”

The Justification for Protecting Religious Freedom

The right to choose one’s religion is a constitutional protection not offered to other individual choices. There is no constitutional right to choose what one eats, for example, though that is undeniably important to people. Religion is an important area of individual autonomy, but so are choices of dress or vocation or countless other areas of personal autonomy. The privileged status of religion in constitutions may fairly be questioned. This is especially true when religious freedom appears to conflict with other freedoms, such as gender rights.

Brian Leiter is a legal philosopher and academic who has questioned the reason for privileging religion. He claims that no one has offered a credible principled argument for tolerating religion itself, as opposed to other personal choices. While there are ample philosophical justifications for tolerating personal differences, he says that religion may not be so special as to warrant a specific constitutional protection. He suggests that there is no principled reason for constitutions to single out religion for special legal protection.

While Leiter is especially vigorous in pursuing the point, he is not alone in the theory. Ronald Dworkin (1986) basically agrees. Christopher Eisgruber and Lawrence Sager (2007, 6) argue for “equal liberty” which denies that “religion is a category of human experience that demands special benefits and/or necessitates special restrictions.” They suggest that any deeply held concern of persons should be given equal regard, though they recognize that the history of religious violence might cause constitutions to single it out.

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Religion “may be no more important to a person’s conception of who she is than other terms based on such diverse factors as personal relationships (mother, sister) profession (engineer, lawyer), race (Hispanic, Native American), political affiliation (Republican, Libertarian), special skills (violinist, gardner), socioeconomic status (yuppie, homeless), residence (New Yorker, Westerner), or individual habits, tastes activities, interests, or loyalties (vegetarian, Cubs fan)” (Smith 1991, 203). Religion would not be the primary identifier for many and does not plainly merit special status. Some argue that religious belief “cannot be qualitatively distinguished from other belief systems in a way that justifies special constitutional consideration (Marshall 1991, 320–321). Yet others arguing to the contrary contend that religion is of unique importance to people (Greenawalt 2008).

Leiter would not deny all legal recognition to religion. But he suggests that it merits tolerance rather than respect. As a consequence, religious freedom should be more readily compromised when it conflicts with other societal interests. Hamilton (2005), making a similar argument, notes that religion is not a particular good and that religious groups should not be generally exempted from secular laws. This notion is related to a concept known as *proportionality*, which will be discussed later in the book.

Some disagree with Leiter. They contend that “religion is special” and “more than simply a peculiarly form of freedom of speech and assembly, privacy, and autonomy” (Witte 2005, 250). Perhaps religion is a uniquely important aspect of human autonomy. It has been called a “defining feature of the human personality” (Boyle & Sheen 1997, 11). For many, religion is simply more important than other aspects of personal life (Greenawalt 2008). Traditionally, religious beliefs have been considered “important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for” (Laycock 1996, 317). Other choices have not seen this response.

Religion could thus be justified as a matter of degree if not of kind. The choice of a theoretically organizing principle for one’s life may transcend one’s choice of food or clothing or other common individual daily choices (Eisgruber & Sager 1994). Thomas Jefferson declared that the constitutional freedom of religion was the “most inalienable

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and sacred of all human rights” (Smith 1991). Beliefs about religion are “often of extraordinary importance to the individual” (Laycock 2011, 951). Religious goods may be distinctive ones, more important than other material matters.

Finnis (2009) contends that religion is special in its direction of truths about humanity and the world. Religious freedom has long been justified as a “unique source of individual and personal identity” (Witte 2005, 250). But religion itself is not truly so unique as such a source of personal identity. Many people have no religious belief, but they are not without individual and personal identities; they simply find their identities in other sources, which may be constitutionally protected. Secularists have their own moral beliefs. One may find one’s personal identity in a theory such as Marxism or even racism, for example, which is not generally considered a religion. Leiter notes that religion is not grounded in reason so much as in faith, and that religion has certainly been a source of societal “bads” throughout history. Desmond Tutu (1996, xv) has declared that religion “should produce peace, reconciliation, tolerance, and respect for human rights but it has often promoted the opposite conditions.” As such, religion might not merit special protection.

The Historical Case for Freedom of Religion

The historical case for singling out religion for constitutional protection may be simply a pragmatic one. History has shown that religion has been a powerful force in the broad oppression of individuals, singling them out for death, among other sanctions. Perhaps we protect religious freedom merely because religious oppression has historically been a force of great harm and strife (Garvey 1996a). Throughout history, “governmental attempts to suppress religious views had caused vast human suffering” (Laycock 1996, 317). Because religious beliefs are so deeply felt, they lead to a particular risk of conflict (Lupu 1996). It is not accidental that religion is the oldest human right to be internationally recognized (Venter 2010). Historically, religion “is more likely to be a ground of persecution” (Nussbaum 2008, 165). Over two hundred million persons have been

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killed due to their religious affiliations throughout recorded history (Barrett & Johnson 2001). The same cannot be said about other personal choices, such as food and clothing. Most people are familiar with this history, and it is beyond the scope of this book to engage in a historical tour de force of oppression in the name of religion, but I will undertake a brief review.

The classic case of religious oppression is probably that of the Spanish Inquisition of the fifteenth century. At the outset, the Inquisition was an attempt to drive out Christian heretics, but it soon turned to the Jews, among others. Jews were arrested and tried, and hundreds or thousands were burned at the stake. Some were tortured. Many had their wealth confiscated, and large numbers fled Europe to avoid oppression. The Inquisition is a dramatic story of the consequences of a lack of religious freedom, but there are others. Pogroms against the Jewish religion are unfortunately common throughout the history of the Middle East and Europe. Russia has seen a series of anti-Jewish pogroms over the past two centuries.

Religious oppression arguably came to a head with Nazi Germany. The Holocaust saw the execution of millions of Jews, for no reason other than their religious faith. Before the killings, though, there was a steady pattern of persecution. The Nuremberg laws of 1935 prohibited, among other things, intermarriage among Jews and Christians. Jews were denied the right to vote and hold office. Jews were required to wear yellow badges when out and were confined to ghettos. The oppression steadily escalated, of course, ultimately leading to death camps.

Historic religious oppression continues to this day, often unrecognized. In 1999–2001, inter-religious violence in Indonesia caused thousands of deaths and hundreds of thousands of internally displaced persons (Sidel 2006). The nation of India has seen spasms of violence directed at Muslims and Sikhs. Hindus, in turn, have suffered at the hands of Islamists. The former nation of Yugoslavia saw a civil war resulting from violence among Catholics, the Orthodox Christians, and Muslims. Islamic nations today engage in various acts to repress the beliefs of Christians, Jews, and disfavored Islamic sects. Various nations in Africa are seeing a struggle between Muslims and Christians.

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Marty (1996, 2) suggests that the “monstrous totalitarian systems of the twentieth century, be they Fascist, Nazi, Communist, Maoist, or whatever, set out to suppress rights, beginning with those of religious people.” If in earlier times, it was more typical for one religion to repress others, a more recent phenomenon is that of irreligious autocrats repressing religious believers. Because of the strong influence of religion on people and the potentially subversive organizing role of churches, the suppression of religious freedom may be particularly vital for would-be autocrats. Thus, religious freedom may be uniquely important to humans. One suspects that few would have suffered torture and death in order to continue their eating habits, unlike their religious beliefs. The Pilgrims fled across a dangerous North Atlantic to a dangerous American wilderness to avoid an official church and religious persecution. It has been said that tolerance “has been particularly difficult to achieve in the sphere of religion” (McClosky & Brill 1983, 103). Laycock (2011, 951) suggests that it was uncontroversial to claim that “attempts to suppress dissenting religious views had caused vast human suffering and social conflict.”

Historically, the struggle for religious freedom has also been part of the fight for freedom more generally. There is a reason why freedom of religion, along with speech, is found in the very first amendment to the U.S. Constitution. “In the eighteenth century, as in preceding centuries, the efforts to gain religious liberty were central to the struggles for freedom of belief, paving the way, by argument and physical resistance, for the later struggles for democratic rights in general” (McClosky & Brill 1983, 103). Religious freedom was central to Enlightenment recognition of individual freedom (Scolnicov 2011).

In addition, religious disagreement has been a common source of conflict and death. Muslims and Christians today battle in Nigeria and other African nations. Conflict has occurred even within broadly defined religions. Protestants and Catholics fought a virtual civil war within Ireland. And, as I write this book, Sunnis and Shi’ites are engaged in a similar conflict in the Middle East. Can freedom of religious belief can help prevent such conflict?

Indeed, empirical evidence reveals that religious freedom promotes peace. The restriction of religious freedom correlates positively

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with involvement in armed conflict (Grim 2004). Religion is traditionally a source of conflict, which obviously continues in the present era. And religious conflicts may be more intractable, given the devoutness of believers. McClosky and Brill (1983, 103) suggest that tolerance has been “particularly difficult to achieve in the sphere of religion.”

The historical case of freedom of religion depends on contingency, however. While religion has been used as a source of severe oppression in the past, this need not be so in the future. Some nations (though certainly not all) appear to have transcended religious oppression. Constitutional rights are not generally grounded in historical accidents. And it may be, as later evidence in this book will show, that legal protection of religion is unnecessary to protect against such oppression of individuals. Such oppression has typically occurred in autocracies. Perhaps democratic governance provides sufficient shelter for religious freedom, so constitutional protections are simply superfluous. In addition, the historical case does not counsel universal religious freedom. A very small minority group does not likely threaten strife, and fear of violence does not necessarily argue against its oppression.

Is Religion a Particular Good?

Religion might be specially singled out for protection simply because it is uniquely important (Engel 2011). Smith (1991, 149) argues that “the religious justification is also the most satisfying, and perhaps the only adequate justification for a special constitutional commitment to religious liberty.” Conkle (2011) suggests that religious belief may be the only truly robust foundation for religious liberty’s protection. For a believer, religion is quite important, probably the most important choice of his or her life. For many, eternity is at stake, which places religious choice considerably above other individual preferences in terms of importance.

The importance of religion can be a double-edged sword, however. If religious belief is such an enormous transcendental decision, it becomes all too easy for a person to want to impose his or her particular beliefs on others, to “save their souls.” The strong

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moral belief that slavery is wrong commonly prevents people from choosing to practice human slavery. Likewise, a strong moral belief in the truth of one's religion, and the falsity of others, can readily lead to a decision prohibiting the following of the beliefs perceived to be false, which could condemn a soul to eternal damnation. Thus, the extreme importance of religious belief to many could easily form an argument *against* religious freedom, so that the "true" religion might be imposed on the people. History shows this tendency to be the case, from the Catholic Church of centuries past to Islam in some contemporary societies.

A separate case for religious freedom might be found in the claim that religious belief in general is pragmatically an affirmative good to be encouraged by the state, without the state's embracing any particular religious belief. This position does not rely on any intrinsic philosophical value of religion; it merely contends that a people's religious faith, in whatever religion, is good for those people and for society as a whole. Some have argued that, without religious belief to keep them in check, people will regress to a state of immorality. Dostoyevsky (1990, 589) warned that "... without god ... everything is permitted." Garvey (1996b, 49) argues that the "best reasons for protecting religious freedom rest on the assumption that religion is a good thing." Smith (1991) suggests that this was the foundation of the First Amendment right. Religious belief, whether true or not, could have functional value for a society.

Some conservative constitutional scholars have argued that the American First Amendment should be interpreted only to protect against discrimination among religious sects, while allowing government favoritism toward religion generally. Religion in general arguably should be encouraged. This actually parallels the law of freedom of speech. Government is free to encourage speech as a broad matter but to prohibit discrimination over the particular content of speech.

At first blush, the thesis that religion is good for society might argue against religious freedom. It might seem that, rather than religious freedom, the best way to promote religious belief in a society would be through the adoption of a compulsory and subsidized state religion, to which all citizens must belong. King Louis XIV compelled the inhabitants of Paris to attend mass or go to jail, which might

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seem an effective way of increasing religiosity. In 1646, Thomas Edwards wrote that religious toleration was “the greatest of all evils because it would bring skepticism in doctrine and looseness of life, then atheism” (Porter 2000, 105). But this position reflects a naïve vision of the role and power of government in society.

Greater religious belief may have various practical benefits for a society, calling for its encouragement. Economists have mused on the effects of religion, and Max Weber (1930) famously argued that Protestantism brought with it personal characteristics that fostered capitalist economic growth. Weber’s theory is generally not supported by research (Iannaccone 1998); nevertheless, it is plausible that religious belief could have economic consequences, as certain faiths may encourage traits such as “honesty, work ethic, and thrift” (McCleary & Barro 2006a). Attitudinal studies have found that religion appears to be good for the development of attitudes that are conducive to economic growth (Guiso, Sapienza, & Zingales 2003).

Societies with freedom of religion may encourage entrepreneurship, while “[c]losed religious systems foul economic development and stunt growth” (Malloch 2008, 51). Conversely, resources devoted to religion may be drawn from economically more productive activities, so greater religiosity might have negative economic effects. Some religious practices, such as prohibitions on consumption of certain products, cannot help the economy. In addition, the social activities common to religions may facilitate networks that are useful for economic purposes.

McCleary and Barro (2006a) studied the association of religious belief and economic well-being. They found that greater levels of religious belief were associated with statistically significant positive effects on economic growth, while higher levels of church attendance were associated with statistically significant negative effects on economic growth. Of course, belief and attendance were associated, with the results separated out in a multiple regression. So the results mean that greater religious attendance was negative when levels of belief were held constant, not that greater religious attendance was a per se negative. Still, the results suggest that religious belief is good for economic growth and that more devout belief (as expressed in more frequent religious attendance) can undermine this effect. The