

Introduction

On Thanksgiving 2014, as I stepped away briefly from the day's festivities, I joined a Twitter argument about Kent Hovind.¹ I knew very little about Hovind, but I knew that he had been convicted of and jailed for tax evasion and other financial crimes. And I knew that he had a fervent body of supporters who believed that his conviction for various financial crimes was just a cover for what the government viewed as his true crime: promoting creationism.²

Hovind had spent his professional life as a minister of sorts. In 1989, he established Creation Science Evangelism, a ministry devoted to the promotion of creationism and opposition to evolution. To promote creationism, Hovind lectured domestically and internationally. In addition, he sold creationism-related merchandise through his ministry.

In 2001, Hovind took his creationist ambitions to a new level. Not content to merely lecture, he opened Dinosaur Adventure Land ("Where Dinosaurs and the Bible Meet!"), a seven-acre theme park and museum in Pensacola, Florida. As children enjoyed dinosaur-themed rides and created their own miniature Grand Canyons, they also learned that dinosaurs coexisted with humans – in fact, according to Dinosaur Adventure Land, a pair survived the Flood on Noah's Ark.³

Though creationism was Hovind's professional passion, it was far from his only interest. Hovind was also deeply dedicated to not paying taxes.

A loose community of dedicated tax protestors exists in the United States.⁴ These tax protestors have come up with elaborate reasons why the US tax law is invalid or, at least, does not apply to them. They share their secrets with other tax protestors, assuring each other that the government has no legal authority to collect taxes from them. The tax protestors' arguments are utterly frivolous. Still, enough taxpayers believe them (or, at least, find it convenient to claim to believe them) that every year the IRS releases a list of frivolous tax arguments. Along with the list, the IRS warns taxpayers that if they refuse

to pay their taxes and defend their noncompliance using those frivolous arguments, they will face significant financial penalties and even jail time.⁵

Hovind was as dedicated a tax protestor as any. He did not file a single federal tax return between 1989 and 1996.⁶ The IRS noticed and demanded that Hovind provide them with certain financial records. He refused. In fact, in his attempts to impede the IRS's investigation, Hovind went so far as to file a lawsuit against the IRS, demanding that the court order the IRS and its agents to stop contacting and harassing him and that it order the IRS to stay off his property.⁷

Eventually Hovind shifted from merely employing frivolous tax arguments to selling them, too: in addition to its creationist merchandise, his Christian Science Evangelism began to sell books and videos that taught customers how they could avoid paying taxes, based on his tax protestor arguments.⁸

Although Hovind has proven remarkably dedicated to evading taxes, for the most part, he has not been imaginative in his tax evasion. Most of his justifications for refusing to pay taxes are entirely banal, the kinds of arguments promulgated on YouTube, in self-published books, and on sketchy websites. Tax protestors believe and trumpet these once-furtive arguments. "The federal income tax is 100 percent voluntary!"⁹ they announce proudly, which means that if they choose not to pay, there is nothing the government can do.

But Hovind's flavor of tax evasion differs from most tax protestors' in one significant way: he ultimately rests his belief that he owes no taxes – at least, to the extent anything besides bald greed underlies that belief – on his status as a Christian and a minister. He believes that something about being a religious believer makes him different from the vast majority of his fellow citizens. This difference, he believes, is itself sufficient to excuse him from paying taxes. That is, in Hovind's mind, there is something about the economics of religious practice that materially alters the secular assumptions that underlie the tax law.

Hovind's understanding of the difference that frees him from the clutches of the taxation that his fellow-citizens face comprises two parts, one descriptive and one normative. Descriptively, he argues that he is a minister and, as a minister, everything he owns belongs to God. Normatively, he argues that he should not be subject to earthly taxation on money he earns doing God's work.¹⁰

Because I will deal with these ideas of divine ownership and divine employ later in the book, it is enough here to say that even if his economic situation, as a minister and a Christian, differs from the economic situations of nonministers and the nonreligious, the differences are immaterial in determining his tax liability. That said, in his attempt to justify his nonpayment of taxes, he has

highlighted – albeit inadvertently – an important and underappreciated fact: in a number of ways, the tax law does treat religious individuals differently from those who do not practice a religion.

Under US law, religion is special. It functions within a special constitutional sphere, and scholarship on the intersection between religion and law in the United States tends to focus on that sphere. Scholars want to know if a law improperly burdens religious practice, in violation of the Free Exercise Clause of the First Amendment, or if it inappropriately favors religion, in violation of that same amendment's Establishment Clause. Scholars debate where these lines *should* fall, and courts often must resolve conflicts when religious practice collides with the state in real life.

Sometimes, the application of the Religion Clauses' goals intersect, and sometimes, upon intersecting, the goals prove incompatible. Sometimes when they intersect, an individual's right to exercise her religion will trump the Establishment Clause and requires the government to accommodate religious practices that would otherwise violate a generally applicable law. And sometimes, the Establishment Clause prevents the government from accommodating a religious practice. Courts and scholars have worked to sketch out these constitutional boundaries of accommodation, mapping both where it is required and where it is prohibited.

Even the roughly sketched contours of accommodation prove unnecessary and unhelpful in the tax context, though. In recent years, scholars and judges have pushed back against tax exceptionalism (that is, the idea that the tax law is *sui generis* and should be treated differently from other areas of law).¹¹ In its intersection with religion, though, tax law *is* exceptional. The government's interest in raising revenue is so compelling, courts have held, that the government is not obliged to accommodate *any* religious practice that is inconsistent with the tax law. At the same time, for reasons unique to the tax law, it is effectively impossible to challenge tax accommodations granted by Congress or the IRS.

And, surprising as it may sound, religion and the tax law do intersect in ways that implicate accommodation. At times, a person's religious practice may cause her to earn, hold, or spend money differently from other Americans, and in a way not anticipated by the tax law. The space between her religious practice and others' anticipated financial practices will sometimes prove advantageous for the religious believer, and sometimes disadvantageous. In some cases, the tax results seem appropriate. In other cases, they may offend our sense of justice.

Because the Religion Clauses are unlikely to come into play in deciding what (if anything) to do to accommodate religious practice in the tax

law, tax policymaking demands an extra-constitutional analysis. The question shifts from whether the government can (or must) accommodate religion to whether the government *should* accommodate religion. And to answer that question, we must have some sort of rubric that helps us evaluate tax accommodation in a systemic way.

Currently, no such rubric exists. In this book, I intend to build an analytic framework for thinking about existing and proposed tax accommodation. I will focus almost exclusively on religious individuals rather than religious institutions. Because of this focus on religious individuals, I will not cover several (important) issues of tax and religion. For example, I will largely ignore the constitutional issues attendant to exempting churches and other religious entities from taxation. The tax treatment of churches is, of course, an important topic, and one that has been broadly addressed by scholars in other places. But the manner in which the corporate income tax applies to churches is a different question, substantively and analytically, than the question of how the personal income tax treats religious individuals.

While I will address questions of constitutionality, I will spend very little time on the constitutionality of tax law provisions that treat (or fail to treat) religious individuals differently from nonreligious individuals. Those questions are also important, of course, but the Supreme Court has recognized that the government has relatively broad (albeit not unlimited) discretion to accommodate religion.¹² Beyond the government's broad discretion, moreover, is a practical consideration: even if the government crosses that constitutional line in enacting or administering the tax law, it can be difficult, if not impossible, to establish standing to challenge the accommodation.

Of course, if I only declined to address topics, this book would be remarkably short. So what *will* it do? The book will begin by laying out, in broad strokes, how the Constitution constrains lawmaking in relation to religion, as well as the place of accommodation within that constitutional regime. It will also briefly lay out the history and process of making the modern federal income tax, and will discuss the idiosyncrasies of accommodation and the tax law.

After laying this groundwork, I will tell stories of religious taxpayers. Some of these religious taxpayers (including Hovind) have tried to use their religious status to take advantage of the tax law. Others have faced additional tax burdens as a result of their religious practices. Some stories will recount how Congress, the IRS, or the courts have decided to accommodate religious practice. Others will illustrate what happens when those institutions have decided against accommodation.

By telling the stories of the tax law's religious accommodations, I hope to get past Americans' aversion to talking about taxes. Taxes are interesting and,

when they and their consequences can be laid out simply and clearly, they are even exciting. Remember Warren Buffett's famous assertion the preferential tax rate on capital gains allowed him to pay a lower tax rate than anybody else in his office, in spite of earning significantly more money than they earned?¹³ With that simple story, he crystalized a tax problem in a way that Americans could easily understand. Before Buffett's example, many Americans believed that the tax law benefited the rich. But after, they had a face and a story that told them exactly *how* the rich benefited.

Tax stories risk oversimplifying, of course: in Buffett's case, while it is true that many provisions benefit the rich, others benefit the middle class and the poor. Still, taken as a whole, Congress has been captured by the wealthy, which has allowed the wealthy to have inordinate influence over the contours of the tax law. Because Buffett reduced what could have been a complicated and offputting tax policy discussion (horizontal equity! vertical equity! progressivity! fairness!) down to a relatable and comprehensible narrative, he provided a framework that reformers can use to inveigh against specific provisions of the tax law that provide an outsize benefit to the rich. For example, this framework has allowed a robust conversation about the way that private equity and hedge fund managers get paid. Though the general public may not understand the details underlying *carried interest*, it can understand that hedge fund managers, who can earn hundreds of millions of dollars annually, are able to structure their compensation so that some large percentage of what they earn is taxed at the lower long-term capital gains rates rather than the higher rates potentially applicable to ordinary income.

While the stories alone may be the reason readers pick the book up, I hope they come away with more than just cocktail party anecdotes about religious tax accommodation. By setting these various stories next to each other, I intend to illustrate just how random and unprincipled the development of tax accommodation has been. The tax treatment of ministers has no relation to the tax treatment of Muslim homeowners, which in turn has nothing to do with the tax treatment of individuals who live in religious communes. Yet in each case, religious belief and practice underlie some economic decisions these individuals make, economic decisions that ultimately have tax consequences.

Tax policymakers, then, need a policy framework for thinking about religious tax accommodation. As I tell the stories of accommodation that exist, and as I illustrate how each of these tax accommodations developed entirely separately from every other accommodation, I will also develop such a framework for thinking about religious tax accommodation in a systemic way. Such a framework is hard – though not impossible – to imagine. In general, I assume that horizontal equity considerations – that similarly situated

taxpayers should pay similar taxes – apply, even between the religious and the unreligious. That is, for the most part, different tax treatment of the religious and the unreligious should reflect underlying economic differences between them. Generally, matters of belief and conscience do not create economic difference.

Where tax policymakers have a coherent, consistent framework from which to create or deny tax accommodations for religious taxpayers, they can ensure consistency in the treatment of religious taxpayers. Questions of accommodation, when they arise, will fit together in a coherent, reasoned way. And the tax law will be fairer to both religious and nonreligious taxpayers.

AUTHOR'S NOTE, POST-TAX REFORM

One challenge to writing a book on the tax law is that the tax law frequently changes. In the course of writing this book, I had to remember on several occasions to update sections when, for example, a new judicial opinion was issued. The changes tended to be minor, though, and nothing that I could not integrate into the book.

And then, on December 22, 2017, as this book was in the very final editing stages and I could no longer make substantive changes to it, President Donald Trump signed H.R. 1, the most far-ranging set of amendments to the Internal Revenue Code in three decades. Fortunately for my project, Congress did not amend any of the provisions that deal specifically with taxation of religious individuals. It did, however, amend some provisions that I mentioned. For example, in the conclusion to chapter 10, I explain corporations begin paying taxes at a 35 percent rate on income in excess of \$75,000, while in 2017, individuals did not hit 34 percent (the closest analogue) until they earned \$417,000. That remains true, but, as of 2018, corporations will never hit a 35 percent marginal rate. Instead, corporations will pay taxes on their income at a 21 percent rate.

I mention the new rate structure parenthetically at the end of chapter 10, and I have, I believe, caught all the other peripheral changes except one: in a number of places, I illustrate tax consequences using a 25 percent marginal rate. As of 2018, the 25 percent rate has gone away, replaced by a 22 percent rate, which is followed by a 24 percent and then a 32 percent rate. Had tax reform occurred earlier in the editing stages, I would have redone the illustrations using the 22 percent rate. The math was purely illustrative, though, and because the editing is substantively done and the examples still illustrate the point, I will pretend, for purposes of my examples, that the 25 percent tax bracket still exists, and hope that you will suspend your disbelief for those same purposes.

1

Religion and the State

Few areas of American life evoke such strong feelings as religion. Approximately 75 percent of Americans identify with a particular religion, but these 75 percent are split between various Christian, Jewish, Muslim, and other denominations. Moreover, the remaining 25 percent claim no particular religious affiliation. The different religious beliefs and practices embraced by different Americans can lead to conflict.

In the modern United States, that conflict generally does not include physical violence.¹ But it does include different views of the world, including views of the government. And, while differing beliefs and practices can introduce conflict into everyday life, these interpersonal conflicts largely pale in comparison with the conflicts engendered when religion intersects with the law. Sometimes, a religious group claims that the law must conform to its beliefs. Other times, the religious group has no interest in influencing generally applicable law, but want to be excused from obeying laws that conflict with its beliefs.

These legal conflicts appear largely intractable. While the US Constitution protects individuals' rights to practice their religion, it also limits the government's ability to discriminate in favor of or against religion. The conflict between the First Amendment's Free Exercise and Establishment clauses has launched legal, academic, and popular debate, but their contours remain hazy and indeterminate.

Providing an in-depth analysis of the Free Exercise and the Establishment clauses of the Constitution is beyond the scope of this book for a couple of significant reasons. First, the output of writing on this topic is voluminous. Scholars and judges have written articles, books, and opinions detailing the Religion Clauses both at a macro and a micro level. In a single chapter, I could not hope to respond to everything that has been written, much less do justice to the various arguments.

More importantly, though, a detailed account of the Religion Clauses is unnecessary to the work I hope to do in this book. For reasons I will discuss in the next chapter, the scope of the Religion Clauses is mostly irrelevant when it comes to the intersection of tax and religion. As a practical matter, the Religion Clauses do little to demand nor restrain when it comes to the federal income tax.

That said, the US federal income tax system is part of the constitutional government, and, even where the direct effects of the Religion Clauses on the tax law are tenuous, the tax law exists within the context of the Constitution. As a result, this chapter will provide a brief overview of the Religion Clauses, looking at both when they were drafted and how they have been interpreted and applied over the more than two centuries they have existed.

CONTENT OF THE RELIGION CLAUSES²

The first sixteen words of the First Amendment of the Constitution make up the Religion Clauses. They read that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These two clauses, read together, are meant to “prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other.”³

The Religion Clauses achieve their goal by limiting the ability of the state to help or to impede religion. The Supreme Court has explained that the Free Exercise Clause is meant to prevent the government from enacting laws that “suppress religious belief or practice.”⁴ And the Establishment Clause is popularly analogized to a wall separating church and state. While that metaphor does not fully capture the contours of Establishment Clause jurisprudence, it does serve as a reminder that, as the Supreme Court has explained, the Establishment Clause “forbids an established church or anything approaching it.”⁵

The simplicity of the Supreme Court’s description of the Religion Clauses belies their complexity and ambiguity, both in historical development and contemporary application. It serves, however, as a reasonable starting point for understanding how they operate in US law.

Even at this level of abstraction, the Religion Clauses will, in some circumstances, come into conflict with each other. Neither Clause is amenable to an absolutist reading. In evaluating religious claims, courts must both balance the religious beliefs of individual believers against the goals of the state and balance the mandate of the Establishment Clause against that of the Free Exercise Clause.⁶ And that balancing adds to the complexity and uncertainty of dealing with religious practice in a pluralistic society.

ORIGINS OF THE RELIGION CLAUSES

Although the Religion Clauses are the first provisions of the First Amendment of the Bill of Rights, there is no reason to believe that protecting religion was at the forefront of the Founders' minds in drafting the Bill of Rights. In fact, Charles Pickney, a delegate from South Carolina, proposed that the Constitution include a clause preventing the legislature from passing any "law on the subject of religion." The Constitutional Convention never acted on his proposal, likely because they found it unnecessary. Because the Constitution limited the federal government to enumerated powers, the government lacked authority over religion, even without an explicit limiting provision.

Moreover, the Constitution itself addressed religious liberty. In addition to his proposal that the legislature be prohibited from passing any law on religion, Pickney proposed to ban religious test oaths for federal offices. In this, too, he broke with a number of states that required public officials to swear particular religious oaths before they could take office. The delegates at the Constitutional Convention approved this ban on religious test oaths with little debate (although the provision provoked debate in a number of the ratifying conventions).

With the test oath ban in place, Federalists argued that the lack of a bill of rights in no way jeopardized religious liberty. They argued that the federal government lacked any right to interfere with religion and, moreover, that the variety of sects and denominations that existed throughout the country was itself sufficient to protect religious liberty. Antifederalists, who opposed the strong central government anticipated by the Constitution, did not entirely disagree. While they believed that religious test oaths were inimical to the society they wanted to establish, they also believed that banning them was an important aspect of religious liberty.⁷

In spite of the ultimate agreement on religious test oaths, Antifederalists still wanted the Constitution to include an explicit bill of rights. Even though Federalists argued that the Constitution prevented the federal government from becoming involved in religion, many of their contemporaries disagreed. Antifederalists used the lack of specific guarantees, including the lack of a guarantee of religious liberty, to attack the Constitution. Others truly believed that the country needed formal protection for religious liberty, if not for the present, then at least for a potentially more contentious future. Ultimately, it is not clear how strongly Antifederalists believed in the need for providing constitutional protection for religious liberty. While they argued that the country needed to protect religious liberty, trial by jury, and freedom of the press, the protection of religious liberty was the least important in their minds. Still, their

promotion of explicit protections for religious liberty ultimately put questions of religious liberty in the forefront of constitutional debate.⁸

In the end, religious liberty made its way into the nascent Bill of Rights. How? At least in part, thanks to James Madison, a Federalist who had argued against the need for a bill of rights during debates on the ratification of the Constitution. Virginia Baptists had recently faced religious persecution, and feared the ability of the federal government to limit their ability to preach or to tax them for the support of other religions. To secure his election to Congress, Madison had to assure them that their religious rights would be protected.

With the Baptists' support, Madison won his seat. Once elected, he made good on his promises, though it took time and effort. After Madison proposed amendments dealing with religion, he had to prod members of the committee reviewing the Bill of Rights to deal with them.⁹

It was not immediately obvious what form the protection would take. While Congress could look to various states for a model of protecting religious liberty, in many cases the actual protection provided by states' constitutions was limited. Sometimes the guarantees of religious liberty applied only to certain types of religions. Sometimes they only applied to a single religion. Notwithstanding their constitutional guarantees of religious freedom, most states allowed for the support of (some, at any rate) clergy with tax receipts. In short, to the extent Antifederalists wanted the Bill of Rights to limit the federal government's authority, they had few models for the Religion Clauses.¹⁰ Ultimately, after several iterations of language and concept, Congress included our current Free Exercise and Establishment Clauses into the Bill of Rights.

CONFLICT BETWEEN CHURCH AND STATE

For the first half-century of the Constitution, it looked like the Federalists were right about the Religion Clauses' being superfluous and unnecessary. The Supreme Court did not deal with a free exercise question under the federal Constitution until 1845, when it had to adjudicate whether a municipal law prohibiting open-casket funerals violated the Free Exercise Clause.¹¹ Even then, the Court managed to avoid on the substantive question of free exercise, holding instead that, because Louisiana had been admitted as a state, the protections of the federal Bill of Rights did not apply to its state or local laws.¹²

It took almost twice as long before the Supreme Court addressed the Establishment Clause. And between 1899, when it first adjudicated an Establishment Clause question, and 1960, it had only addressed questions of Establishment eight times.¹³