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Steven H. Shiffrin: The Religious Left and Church-State Relations

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Introduction

FEW PERSONS ARE INDIFFERENT about the role of religion in American law or politics. I have been teaching the First Amendment since 1977. Students have always been excited about issues like obscenity, libel, flag burning, racist speech, commercial advertising, and the role of money in politics. But my students become even more lively when we discuss constitutional issues like a city putting up a religious display during the Christmas season, whether a school rightly included “under God” in the Pledge of Allegiance, whether a state could fund religious schools, and whether the Amish had a right to take their children out of the schools. Often the debates between my students involve a confrontation between those who are hostile to religion and those who favor religion. Those who are hostile to religion routinely favor separation of church and state. Sometimes, however, the debate is between members of the religious Right and the religious Left: The Right favoring tight relations between church and state; the Left opposing such connections.

Although the mass media tend to ignore it, there is a strong religious Left in the United States.¹ The term *left* often is used in a way that is equated with the radical tradition in American politics. But I use the term in a more inclusive way. By *left*, I simply mean to refer to those citizens who are generally on the liberal, progressive, or “left” side of the political spectrum; by *religious Left*, I mean that these citizens arrive at liberal political conclusions in accordance with religious premises whether those premises are thought to be theologically liberal or more traditional. Twenty-four percent of Americans might fairly be classified as belonging to the religious Right, but 18 percent of white Americans belong to the religious Left, and most Latinos and African Americans are politically progressive.² The religious Left includes “a large majority of Jews, at least half of Roman Catholics, a growing number of mainline Protestants, most African American churchgoers, a significant minority of white evangelicals, and most followers of traditions other than Christianity and Judaism.”³ As John Green and Steven Wildman conclude, “The Religious Right and the Religious Left are almost exactly the same size.”⁴ My particular interest here is to focus on those citizens who favor free exercise and oppose tight connections between church and state in accordance with their religious premises. Although Green and Wildman did not ask about attitudes toward church-state relations, liberals typically oppose tight connections between church and state. Whether or not those citizens opposing tight connections between church and state precisely fit into

the Green and Wildman data, their data suggests that such citizens are not a marginal group. Given our constitutional culture, this should not be surprising.

Whatever the precise data might be, I maintain that the religious Left's position on church-state relations is superior to and more politically attractive than that of the religious Right or the secular Left. I think this advantage is understood by religious leaders like Jim Wallis and Rabbi Michael Lerner and increasingly by some left-leaning Democratic politicians whose political beliefs fit within a religious framework. But it is not understood by the mass media; it is contested by the religious Right; and the religious Left's argument has not been developed in a sustained way.

My purpose in this book is to develop that argument and to reflect upon how the religious Left should engage the religious Right and the secular Left on the subject of church-state relations. Too often people think that the subject is exhausted by an understanding of the religion clauses of the First Amendment. To be sure, debates about church-state relations in the daily dynamics of local politics are informed and sometimes bounded by the dictates of constitutional law. But much is left open. Tighter connections between church and state may well be permitted by the conservatives on the Roberts Court, but they will never be required. Within the broad limits of the Constitution, decisions about the relationship between church and state will be decided in democratic precincts—well outside the courts.

Nonetheless, an understanding of the religion clauses is crucial to understanding how to think and talk about religion and the state in American law and politics. My project here is to describe and defend a form of *religious liberalism* showing the different, but mutually supporting, forms it should take in the courts and in democratic life.

Religious liberalism is a form of liberalism that reaches liberal conclusions from religious premises. In the context of church-state relations, this means strong free exercise of religion and the avoidance of tight connections between church and state. In the democratic process, I will argue, it is appropriate and necessary for religious liberals to make theological arguments. On the other hand, government in its official actions may not make theological arguments, and that includes courts. Thus the constitutional framework of religious liberalism does not depend upon theological premises or theological arguments, but, as I discuss in chapter 7, it is thoroughly compatible with the theological premises and arguments of religious liberalism. Indeed, in my view, the best legal understanding of the religion clauses is most compatible with religious liberalism. In interpreting the religion clauses, religious liberalism opposes the system builders, those who think that it is possible to build a grand theory of freedom of religion in which problems can be solved by resort to a single value or

a small set of values. Instead religious liberalism denies that the religion clauses of the Constitution should or can be reduced to a single value or a small set of values. It believes that the religion clauses should be supported by the full array of relevant values. In supporting religious liberalism, I argue that the religion clauses are supported by pluralistic foundations. For example, I argue that the Establishment Clause serves many functions: (1) It is a prophylactic measure that protects religious liberty and autonomy, including the protection of taxpayers from being forced to support religious ideologies to which they are opposed; (2) it stands for equal citizenship without regard to religion; (3) it protects against the destabilizing influence of having the polity divided along religious lines; (4) it promotes political community; (5) it safeguards the autonomy of the state to protect the public interest; (6) it protects religion from the corrupting influences of the state; and (7) it promotes religion in the private sphere.

Second, the most underappreciated insight in the cases and the commentary is the protection of religion from the corrupting influence of the state. Concern about this influence is not new. It goes back to Roger Williams and James Madison among others. But the Supreme Court in a number of important cases, and some of the most distinguished commentators of the present day, give this concern short shrift. I will insist, however, that a major goal of the Establishment Clause is to protect religions from the state when the state is purporting to help religions. Separation of church from the state should not be considered a reflection of religious hostility or fear of religion. Separation of church and state is our Constitution's way of protecting religions from being dependent upon, co-opted, manipulated, or even strongly associated with political leaders. Government has no credentials to be entrusted with religious leadership. Separation of church and state is our Constitution's method of favoring religion.

These principles of religious liberalism are as important in American politics as they are in American law. But they are not understood by the religious Right and are neglected or rejected by the secular Left. I will argue that religious liberalism is in a far better political position to engage with and combat the religious Right than is the secular Left. Indeed, when it comes to church-state relations, much of the rhetoric of the secular Left is part of the problem, not part of the solution. Of course, Sam Harris should have a constitutional right to maintain that religion, even moderate religion, is "one of the principal forces driving us to the abyss."⁵ Christopher Hitchens has every right to claim that religion "poisons everything."⁶ But the fear of, or denigration, of religion cannot possibly be conceived of as politically attractive in a country where nearly 90 percent of the people believe in God. So long as the secular Left is believed to

dominate the Democratic Party, so long as its religious sensibilities are believed to be suspect, the Democratic Party will be on the defensive.

Simply put, the secular Left is in a poor position to make theological arguments against those put forward by some religious conservatives. As I have said, theological arguments do not belong in courts. But theological arguments are regularly introduced in democratic dialogue. In response, the secular Left bemoans the fact that the religious Right makes religious arguments in American politics. This line of argument may be useful in fund-raising appeals to select groups, but it is otherwise useless. The religious Right will not go away because it has been accused of political bad manners for introducing its arguments in the public square. The arguments of the secular Left in fact are counterproductive. They strengthen the identity of religious conservatives. Rather than arguing that religious arguments do not belong in the public square, it is better to argue against the politics and the theology of the religious Right. The religious Right assumes, but cannot demonstrate, that tight connections between religion and the state are good for religion. The religious Right supposes that the Bible authorizes tight connections between religion and the state. These are deeply problematic assumptions. Despite secular Left misgivings, the great issue in American religious politics is not *whether* religion should be promoted, but *how* it should be promoted. The religious Left believes that religion is best promoted by keeping government away from religion. Thus the secular Left and the religious Left can both agree on separation of church and state, but their paths to this conclusion are quite different. My contention is that the path of the religious Left is far more politically attractive than the path of the secular Left.

I divide the book into three parts. The first part explores the pluralistic foundations of the religion clauses. It argues at some length that Constitution does not simply protect religious equality or equal religious liberty. Deviations from religious equality might or might not violate the Constitution, and respecting religious equality does not necessarily avoid a constitutional violation. In support of this conclusion I discuss many controversial examples (although I leave the important issue of financial aid to religion for Part II) including laws prohibiting the ingestion of peyote and animal sacrifice; the government's use of religious symbols; the government's involvement with monotheistic prayer and the Pledge of Allegiance; the teaching of evolution in the public schools; government protection of conscientious objectors and those who refuse to work on the Sabbath; and government support for religion within the public schools. Given the pluralistic character of the values underlying the religion clauses and the variety of contexts in which questions about the legal status of religion arise, I conclude that equality can best be seen as one, but only one, important value in a rich and evolving tradition.

In doing so, I part company with respected commentators such as Christopher Eisgruber and Lawrence Sager who maintain that the religion clauses are simply designed to protect against religious discrimination and do not imply that religion is valuable.⁷ I argue instead that the Constitution values religion. *In God We Trust* on our money is constitutional, not because it is secular, and not because it is trivial, but because our Constitution is embedded in a dominantly monotheistic culture that values religion. It is unfortunate that the people feel a need to use government to express monotheistic views without regard for the views of Buddhists, Hindus, atheists, and agnostics, but it blinks reality to suppose that the Constitution does not favor religion.

One of the important Establishment Clause questions concerns the extent to which the state can provide aid to religious institutions. Part II of the book deepens the analysis of the multiplicity of Establishment Clause values in confronting the question whether law or policy should prevent government from providing vouchers to private schools, including religious schools. Vincent Blasi has referred to this issue as “the most vigorously contested question of church-state relations.”⁸ I once served on the Ithaca City School District Board of Education. A member of that board wisely observed that school board issues were often bitter and contentious because they involved issues that arouse strong passions: children and money. Vouchers involve not only children and money, but also religion. No wonder that emotions run high. This debate about public and private education raises important questions about the role of the state in promoting a certain kind of person and citizen, which has implications for liberal and democratic theory, the respective rights of children and parents, and the nature of religious freedom in a democratic society.

I am, of course, aware that the Court has spoken on the issue,⁹ but I will argue that it glossed over the serious constitutional questions that were raised. Indeed, I argue that the general debate about vouchers has been oversimplified. Too often the argument has been that vouchers are always good or always bad or that vouchers to religious schools either always do or always do not violate the Establishment Clause. I argue that the interests of children and the state in public education have been underestimated; indeed, I argue that there is a surprisingly strong constitutional case for the proposition that government should in many circumstances be able to *compel* adolescents of high school age, but not preadolescents, to attend public schools. No U.S. government is likely to engage in such compulsion, and there are good political reasons not to do so, but analysis of the case for compulsory public education leads to support of a strong presumption *against* vouchers, at least at the high school level. This presumption, however, is more difficult to defend when public schools are relatively homogeneous or are providing inadequate educa-

tion to poor children. Even if vouchers could generally be supported, vouchers to religious schools raise serious concerns about the appropriate principles of church-state relations in the American constitutional order. The Court has obscured these concerns by failing to recognize the full range of Establishment Clause values. But these concerns might be overcome in certain circumstances. In short, I argue that compulsory public education is sometimes constitutional and sometimes not, that vouchers are generally to be resisted, but sometimes not, and that vouchers to religious schools should ordinarily be considered unconstitutional, but sometimes not.

In Parts I and II, I explore the constitutional framework of religious liberalism, and apply the framework to a wide variety of examples from the Pledge of Allegiance to vouchers. If the conclusions in Part II about vouchers are contingent, the claims of Part III are not. In Part III, I turn from constitutional law (and the policy aspects of vouchers) to the realm of democratic politics. But the turn cannot be complete. Constitutional law strongly influences democratic politics on church-state issues. Religious liberals, however, go beyond the logic of constitutional law in the democratic forum by turning to theology. I develop the thesis that partly because of this, religious liberalism is far better equipped to engage with or to combat religious conservatism than is the secular Left. The secular Left, of course, is not homogeneous. Its attitudes toward religion might be hostile, indifferent, mixed, or cooperative. Nonetheless, its varied attempts to deal with issues of religious liberty, government use of religious symbols, and government aid to religious organizations are politically impoverished. The problem with religious conservatives is not that they participate in the political process. The problem is the substance of their theology and their politics. Indeed the two run together. If religious Americans are politically motivated by theology, then it is important to talk about theology in politics. It is important to combat bad theology with good theology.

Of course, I do not maintain that I have a pipeline to the Holy Spirit. I could be wrong about my theology and my politics. Moreover, believing that the Right is wrong about politics and theology does not suggest that it is evil or intellectually ill equipped or unworthy of respect. Indeed, it is important to identify the circumstances in which the Left and the religious Right can forge common ground (perhaps on helping the poor or protecting the environment). But fallible as my beliefs may be, I do maintain them with conviction. I believe it vital to combat the religious Right's posture on church-state relations (just as they believe it vital to combat the views of the Left).

One should not be deterred by overly precious conceptions of "public reason" or by the politically naive view that religion is a political "conver-

sation stopper.” Indeed, I will argue that political candidates rightly entertain religious views in the public forum. I will discuss the Democratic Party and maintain that if it is to be something more than the party to vote for when the alternative has become unpalatable, it must appeal to the spiritual sensibilities of the country without entertaining tight connections between church and state. But it is unreasonable to expect that party candidates would engage in the thick theological dialogue needed to counter the arguments of the religious Right. The country is too pluralistic for candidates to take such risks.

But that dialogue must take place. The religious Right cannot go unanswered, and the religious Left must lead the way. The secular Left is for the most part poorly equipped to talk about theology or to address religious sensibilities. Instead of participating in dreams of a country without religion, the secular Left needs to join with the religious Left in addressing the world that exists now and will exist in the foreseeable future. Although segments of the secular Left may believe that religion is nothing more than superstition, they need to understand that public expressions of religious hostility are politically counterproductive. Instead of dismissing the role of religion in American politics, the secular Left needs to understand that it has much to gain from an alliance with the religious Left.