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The Excessive Entanglement of Politics, Law and Religion Review Essay

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REVIEW ESSAY

THE EXCESSIVE ENTANGLEMENT OF POLITICS, LAW AND RELIGION

THE IMPOSSIBILITY OF RELIGIOUS FREEDOM. By Winnifred Fallers Sullivan. Princeton University Press 2005. Pp. 286. $23.95. ISBN: 0-691-11801-9.

HOW FREE CAN RELIGION BE? By Randall P. Bezanson. University of Illinois Press 2006. Pp. 286. $29.95. ISBN: 0-252-03112-1.

WRESTLING WITH GOD: THE COURTS' TORTUOUS TREATMENT OF RELIGION. By Patrick M. Garry. The Catholic University of America Press 2006. Pp. 230. $49.95. ISBN: 0-8132-1451-1.

MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES. By Frank S. Ravitch. New York University Press 2007. Pp. 239. $45.00. ISBN: 0-814-77585-3.

*Reviewed by Bryan K. Fair**

Not since the earliest days of the United States, during the time of James Madison's and Thomas Jefferson's fight for religious liberty in Virginia, has the intersection of politics, law and religion been so significant a question of American public policy. During the 2008 campaign, numerous presidential candidates touted their religious convictions as a core aspect of their appeals to voters. Mike Huckabee, a preacher turned politician, employed direct overtures to evangelical believers; Mitt Romney, a Mormon, was asked pointedly how his unique religion would influence the way he would govern. Barack Obama rejected the secular model of politics and made extensive appeals to his own Christian faith in winning the presidency. It appears religious viewpoints will play an increasing role in the general electorate's consideration of many of the major political issues of the day, from gay marriage and school prayer to school vouchers and abortion regulations, for many years to come.

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Moreover, for at least sixty years both establishment and free exercise claims have vexed American courts and judges, with the U.S. Supreme Court remaining sharply divided on the proper interpretation of the religion clauses of the First Amendment to the U.S. Constitution. Likewise, Congress and state legislatures have enacted numerous religious freedom statutes such as the Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act to show their displeasure with judicial opinions providing too little protection for the free exercise of religion.

One finds little consensus on the meaning of religious liberty in the U.S. today. There is no agreement on what constitutes a religious establishment or when government policies must yield to private religious practice. Presidents Bush and Obama both invoked God in major public speeches. Many political leaders have led prayer sessions during public meetings. Some state legislatures have sponsored religious activities, including installing the Ten Commandments or other religious displays in public buildings or on public grounds. Some judges have insisted on beginning judicial business with a prayer. Some school administrators begin each day with the Pledge of Allegiance and its Congressional "Under God" revision and many school events begin or end with prayers, invocations and benedictions. It is difficult to locate any organizing principle within the law of religious liberty.

For years, I have considered myself a champion of religious liberty because I believe the government should stay out of religious affairs, that government should not sponsor religious activities, and that all Americans must have equal status before government, whatever their views about matters of religious conscience and the supernatural. Said differently, a government of all the people must respect the diversity of the nation by never assuming a religious creed and by protecting religion as a private matter for individual choice.

I have been a frequent critic of American courts and lawmakers for their enormous efforts to accommodate religious exercises in the public arena. I have insisted that government stay out, but the Court has often insisted that the government must participate to protect religious liberty. My answer has been that when the government protects private religious activities it follows the constitutional command, violating neither religion clause. For me, the only times that government violates the Constitution is when *it* sponsors religious activities or when *it* interferes with private religious beliefs, without a compelling justification for doing so. Yet, the Court and lawmakers have not seen the issues in such stark and simple terms, leaving in their wake a constitutional quagmire.

Readers seeking a broader understanding of the tension between religious liberty and American law will benefit enormously from these four important books from leading religion and constitutional law scholars and theorists. Behind titles like *The Impossibility of Religious Freedom*, *How Free Can Religion Be*, *Wrestling with God*, and *Masters of Illusion,* the authors have laid bare perhaps the most divisive issue of our time.

In *The Impossibility of Religious Freedom*, Winnifred Sullivan has written an enormously interesting book about a long-running legal proceeding in Florida to explain why religious freedom in America is impossible. (8) Her book concerns the struggle of some Boca Raton residents to bury their dead consistent with their religious traditions and restrictive municipal ordinances that prohibited some of their grave site displays, which included statues, crosses, or raised monuments. (32-53) Because Sullivan was a consultant for the plaintiffs' lawyers and an expert witness at the trial, she provides a window on the conflict between religious liberty, on the one hand, and the application of secular laws through our courts, on the other. She is a keen, sensitive observer, concerned fundamentally about the failure of lawyers and judges to listen to claimants and their experts. She appears stunned that a judge or a lawyer might harass a claimant seeking to advance a free exercise of religion interest. (90-94)

Sullivan's book portrays the compelling claims of a dozen families who buried family members in a city-owned cemetery. Each family claimed that as part of their free exercise of religion, they had installed statues, headstones or religious symbols at the grave site of their loved ones. The City, however, had enacted a rule requiring that all grave markings be level with the ground. (32-52) Sullivan's writing takes the reader into the cemetery, into the lives of the survivors who sought to express their religious norms, and into the federal court that had to determine if the Florida Religious Freedom Restoration Act ("RFRA") prevented the City from enforcing its grave site regulations.

Sullivan's thesis is that religious liberty is impossible because secular laws in the United States and other parts of the world define what religion is too narrowly, because courts have no business deciding what counts as religion and what doesn't count, and because government should not declare what is or is not a substantial burden on religious exercise since when it does so it constrains religious exercise. (29-31) Sullivan explains how the federal judge and the City's lawyers rejected the plaintiffs' claim that how they chose to bury their dead was part of their free exercise of religion. (88-98) Instead, the government

described the grave markings as matters of personal preference with no significant protection under Florida law.

Sullivan illustrates how the government imposed a burden of justification on the families to prove that the grave markings were central to their religious faith. (107-09) And despite extensive expert testimony, including Sullivan's, suggesting a religious basis for the grave markings, the plaintiffs lost.

Sullivan's critique is important. Despite state and federal statutes, courts still interpret them and decide under what circumstances a religion claim is important enough to garner judicial protection. For plaintiffs, judicial standards are elusive and incoherent. Said another way, Sullivan writes, "legally encompassing the religious ways of people in an intensely pluralist society is most likely impossible." (138)

Sullivan's examination of the judicial process is only one important aspect her book. The most important contribution is her discussion of the problems of how law defines religion and through its definition impedes religious liberty. (138-59) In Sullivan's view, this is the nub of the problem. (138-48) In the twenty-first century, the meaning and understanding of religion is individual, personal and decentralized. Thus, the court and the City's lawyer framed the question improperly. Rather than asking if a particular faith required a certain style of grave markings, the court should have listened to the plaintiffs who said over and over that their religious upbringings and traditions compelled them to install certain grave markings. (159)

Sullivan's work is also remarkable because she is an expert on religion, holding a Ph.D in religion from the University of Chicago. She has also taught religious studies at leading American universities. With her exceptional background, Sullivan re-centers religious practice within the debate over the meaning of religious liberty. Readers will find the final part of the book especially engaging as Sullivan explains the difference between legal religion and free religion. (138-59) Sullivan's conclusion will also surprise many readers. She suggests that the free exercise clause and state RFRA provisions will not ensure religious liberty so long as courts define religion so narrowly. She would look elsewhere, perhaps to the equality guarantee that has expanded protection for other minorities, to secure religious liberty. (148-59)

Professor Randall Bezanson's *How Free Can Religion Be* is another highly commendable read, especially for Supreme Court watchers. While Professor Sullivan focused on one case to tell her story about the limits of religious liberty, Bezanson deconstructs eight landmark cases: *Reynolds*, *Everson*, *Yoder*, *Epperson*, *Engel*, *Smith*,

Rosenberger, and *Davey*, placing each in historical context and within a three-part jurisprudential matrix that illustrates significant shifts within the Court's reading of the religion clauses. Readers will delight in learning or recalling the great battles over polygamy, aid to religious schools, compulsory education and free exercise, evolution, school prayer, sacramental use of peyote, protection of religious speech on college campuses, and scholarships for training for the ministry.

In Bezanson's stage one, the Court articulated and developed adherence to a strict separationist theory (7-8); in stage two, Bezanson finds a Court seeking new ways to read the religion clauses and to accommodate the tension between the clauses (49-50); and finally in stage three, Bezanson finds a radically different interpretation of the religion clauses, a new awakening (147-49), perhaps the most accommodationist view in history and the least protective of free exercise claims.

Each story begins with an engrossing background on the parties: who they were; where they came from; how each controversy arose. For example, Bezanson follows George Reynolds, the lead plaintiff in one of the most famous free exercise cases in American history, *Reynolds v. U.S.*, 98 U.S. 145 (1878), as a child in London, through his introduction to the Mormon faith, his break with his family over his Mormonism, and his journey across Europe and the United States, where he settled in Salt Lake City as a clerk for Brigham Young. (10-12) Bezanson illustrates how this important test case was arranged between the federal authorities and officials of the Mormon Church and how Reynolds was asked to step forward as the plaintiff. (12-15)

Too often, Supreme Court cases lose their human aspects and are reduced to a simple rule or holding. Bezanson brings his cases to life. The reader comes to know more of the life stories and characters of the plaintiffs, their hopes and fears in becoming involved in controversial religious liberty cases. Bezanson, for example, makes it clear that Susan Epperson displayed enormous courage to become the test plaintiff in *Epperson v. Arkansas*, 393 U.S. 97 (1968). She was a biology teacher in Little Rock whose only goal was to teach her students biological science. Yet Arkansas and other states had adopted a criminal provision prohibiting teachers in state-supported schools from teaching "the theory that mankind ascended or descended from a lower order of animals," or to use any textbook that taught Darwin's theory. (80-83)

Bezanson also situates each of his stories in historical context, transporting the reader to the place and time of each decision. Thus, beyond important biographical details on the parties, Bezanson informs

the reader of who was on the Court for each of the decisions, what was happening politically within the Court and the nation, and what circumstances precipitated the litigation. So the school prayer case, *Engel v. Vitale*, 370 U.S. 421 (1962), is not just about the place of religion in American life and the right of school officials to inculcate moral values, it was about patriotism and anticommunism, as well as the place of religion in public life. (103-05)

Bezanson is a gifted storyteller, making his book an excellent read. And whether one is a novice or advanced student of the Court, every reader will benefit from Bezanson's trenchant critiques of the players in these historic controversies.

Like Sullivan's enlightened and searing analysis of the meaning of religion, Bezanson also makes an important and fresh contribution. He painstakingly dissects the oral arguments at the Supreme Court and the leading opinions of the Court. In *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), for example, the reader meets Michael McConnell, then a professor of law at the University of Chicago who represented Ronald Rosenberger, and John Jeffries, of the University of Virginia Law School, who represented the University, as well as the sharply divided members of the Court. (189-90) Bezanson is a seasoned docent. He does not overwhelm his readers or get in the way, but he does show repeatedly the effective and ineffective arguments made by advocates and how Court members press their own views of the issues.

Yet, Bezanson says his goal is not to make conclusions for his readers, but rather to point out alternative ways of thinking about the issues, rules, arguments and decisions. This book is immensely readable, but it is not light. Like Sullivan's, it is a rich journey through quite complicated questions. And, true to his goal, Bezanson raises hundreds of questions, primarily about the Supreme Court advocates and members of the Court.

Professor Patrick Garry's *Wrestling with God* is a direct attack on the Supreme Court's tortuous interpretation of the religion clauses. First, Garry asserts that the Court has construed the religion clauses to conflict with each other; the Court has misread the establishment clause too broadly and the free exercise clause too narrowly; and the Court has given greater protection to free speech than religious liberty. (18-43) Garry objects to the Court's conflation of religious liberty claims under the speech clause, arguing, "As the framers recognized, religion is not just speech. It is individual beliefs and life practices; it is forms of worship and identity; it is communal association and support." (43) Here, although Garry echoes Sullivan's critique, he goes much further to

tell the reader how he thinks each religion clause should be read.

Garry's model of interpretation "would recognize that the two religion clauses—exercise and establishment—are in fact two aspects of a single, unified religion clause that seeks exclusively to protect religious liberty." (12) For Garry, establishment is not a check on religion or a guardian of secular society, but "a protection for the institutional integrity of religious organizations (whereas the exercise clause focuses on the protection of individual religious freedom)." (12)

Professor Garry is highly critical of most of the Court's jurisprudence, especially its use of the wall of separation metaphor, as well as its application of endorsement or neutrality tests. Garry implies that the Court's various interpretive methodologies may "contribute to a marginalization of religion in society." (44) He relies on Daniel Dreisbach, the late Chief Justice William Rehnquist, and Justice Arthur Goldberg, among others, to argue that the Court has simply misread Jefferson's letter to the Danbury Baptists, which included the famous line about a wall of separation between church and state. (45-52)

Although Garry concedes that, in establishment clause jurisprudence, both the endorsement and neutrality tests were judicial improvements over the religion-hostile *Lemon* test, neither is without defects. The endorsement test "diverts the courts from the essential focus of the establishment clause—state interference in the institutional autonomy of religious organizations—and turns it instead to all the possible perceptions of various religious expressions made on public property." (68) Similarly, "the neutrality doctrine implies that religion is neither distinct nor distinctly important, despite that [sic] fact that religious liberty is the first freedom mentioned in the Bill of Rights." (86) Garry insists that those who wrote the religion clauses intended neither an overly broad establishment clause nor government neutrality or indifference to religion. (86)

Professor Garry recalls significant historical examples from the eighteenth or nineteenth century to argue that the Court has veered far from the constitutional history and intent of the religion clauses. (87-106) Here too, Garry asserts that the wall of separation metaphor contradicts the relationship between religion and government in the eighteenth century. (89-90) He illustrates that religious establishments were extant through the middle of the nineteenth century, with the only relevant tradition an "overwhelming agreement that government could provide special assistance to religion in general, as long as such assistance was given without preference among sects." (95) Rather than follow constitutional history, Garry writes, "the Court used this wall of

separation to institutionalize a growing social animosity to religion. And in doing so, the Court inverted the status of religion." (106)

For Garry, in the media, in popular culture, in education, and in other areas of American life, cultural elites have declared war on religion-based morality. (108-27) He explains, "a crusade has evolved to create a kind of civil religion out of a particular political agenda." (126)

In his concluding chapters, Garry is the most ambitious. First, he returns to his running critique of the establishment clause, arguing that it protects religious institutions from unwanted governmental intrusion, but was not intended to protect government or secular society. (145) Again, Garry argues forcefully that the Court has overstated the establishment clause, while understating the primary position of the free exercise clause. (134-39) Second, Garry re-affirms the case for nonpreferential favoritism of religion and a theory of religious accommodation. (158-64)

Garry's book will appeal greatly to readers seeking an unapologetic defense of government support for religion. One weakness of the book is that Garry does not always distinguish carefully between private religious speech and government-sponsored religious activities. Another drawback is that, although he wisely includes cases from different courts around the country, he treats all cases, at all levels, as if they carry the same weight.

Garry's book is a valuable read, even for observers like me who disagree with many of his premises or interpretations. Although I do agree with him that religion clause jurisprudence is incoherent and under-protects religious liberty, we disagree on the particulars. Despite the interesting read, I continue to think the religion clauses prohibit government aid to institutions that teach religion. I cannot agree that the framers sought only a nonpreferentialist policy. Garry's conclusion seems inconsistent with both what Madison and Jefferson wrote and accomplished in Virginia. Madison was clear that a true religion did not need the aid of government.

In the end, I think Garry's book will resonate with a few members of the Court, but I doubt that it will carry a majority of even the most conservative justices. It is freighted with a provocative vision of how to reconcile the religion clauses, but it is unclear why his more expansive interpretation of free exercise is better than what he defines as a main problem, namely the Court's expansive interpretation of the Establishment Clause. I would be more convinced by an interpretation that allows both clauses to have constitutional significance.

Frank Ravitch's *Masters of Illusion* sounds a similar critical chord to the other books by rejecting the Court's application of principles of originalism and neutrality. (ix) His normative solution is a new facilitation test: "government action that substantially facilitates or discourages religion violates the establishment clause." (168) Ravitch's challenge is to establish that yet another test will improve the Court's religion clause jurisprudence in ways superior to prior tests.

Professor Ravitch begins with a simple assertion: "the use of various narrow principles that ebb and flow based on context will lead to more consistency and more interpretive transparency than reliance on broad but illusory principles." (ix) In his view, "concepts such as neutrality, liberty, and hostility are highly malleable, and they lend little more than rhetorical justifications for decisions based on other principles." (1) Specifically, Ravitch argues that neutrality and hard originalism have no useful role in religion clause interpretation. (7)

Ravitch claims that since historical arguments over the framers' intent in most cases cannot be resolved in favor of one side or the other in religion clause interpretation debates, it would be much better to abandon such illusory claims of interpretive objectivity. Instead, he argues, judges choose historical accounts that best suit their goals in particular cases. (4) Ravitch asks what the "underlying bases [are] for choosing a given historical account and [whether] any of these bases help obtain a better understanding and interpretation of the religion clauses regardless of the historical accounts." (5)

Ravitch is equally suspicious of neutrality, arguing that it does not exist in the religion clause context because such claims of neutrality cannot be proven given that neutrality "is inherently dependent upon the baseline one chooses to use in describing it, and thus it does not exist apart from these baselines." (13) Ravitch asserts that calling a result neutral may "obfuscate the nature and value of other principles that undergird an argument, or may unnecessarily prop up those principles." (20) Claims to formal or substantive neutrality then are misnomers. "Since there is no neutral foundation or baseline that can be used to prove that something is truly neutral, neutrality is nothing more than a buzzword. . . ." (26) Ravitch reviews the Court's application of its neutrality principle to several landmark decisions, including *Zelman, Good News* and *Smith,* concluding that in each case the problem with neutrality is that "One person's neutrality is another's discrimination or favoritism, and if a court proclaims something to be neutral, there is no way of proving the proclamation to be true." (28-29) An important aspect of Ravitch's critique is that even where he agrees the Court

reached the correct result, such as in the equal access cases like *Good News*, he nonetheless takes issue with the Court's neutrality claims. (30-32)

All four books, therefore, demonstrate the widespread dissatisfaction with the Court's religion jurisprudence. What no author appears accurately to envision, however, is what comes next. Each day the nation becomes more religiously diverse. At the same time, the Court appears unwilling to accommodate its diversity, and the commentators offer little more. I await a Court that can protect all citizens' religious freedom without favoring religion as the Court currently does.