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Introduction to The Agnostic Age: Law, Religion, and the Constitution

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INTRODUCTION

What is truth? said jesting Pilate, and would not stay for an answer.

—Francis Bacon[1]

It is a sad thing for the human race that Pilate went out without waiting for the answer; we should know what truth is.

—Voltaire[2]

Most scholars of law and religion have something important in common with Pontius Pilate, and an important difference. Here is the common point: Like Pilate, they throw up their hands at the question: "What is truth?"[3] And here is the difference: At least Pilate was willing to ask the question. Not so with today's leading theorists on freedom of religion. Indeed, if there is any single question they are most likely to flee, it is the question of religious truth—the question of the nature of the universe, the existence of God, and our own fate after death. That question, and how to approach it, is the subject of this book.

This is, perhaps, a somewhat sour note on which to begin a book about law and religion. There are, after all, perfectly good reasons to avoid this question. If the state is not in the business of declaring religious truths, these scholars might say, neither are they. Their job is to explore the boundaries between law and religion. That job is hard enough already. To take on the confounding question of what religious truth *is* would doom them to failure from the start. Any question that has managed to challenge all of us across the whole span of human existence is surely too deep for mere lawyers.

Better, then, to lay the question to one side and focus on the practical questions that already occupy us: What role does the state play in people's religious lives? When can a religious individual seek or win an exemption from laws that apply to others, but that would severely restrict his or her own religious practices? When can the state endorse religious ideas and practices, and when must it fall silent? When can it subsidize religious groups, and when are these groups forbidden to seek the same privileges that any other group may win in the political process?

1. Francis Bacon, *Of Truth,* in *The Essays* 61 (John Pitcher, ed., Penguin Books 1985) (3d ed. 1625).

2. *Voltaire, Voltaire's Philosophical Dictionary* 282 (2007) (1764).

3. John 18:38. In general, quotes from the Bible in this book are taken from the King James Version.

Against this practical justification for deferring the question of religious truth, however, there is an opposing concern. Questions of religious freedom ultimately cannot be satisfactorily answered without at least some attempt to grapple with the broader question of religious truth. In this simple fact lies much of what we have seen in the realm of law and religion scholarship: dissatisfaction, approaching a state of utter misery.

The Religion Clauses of the First Amendment are deceptively simple. They read, in just sixteen words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." But these two clauses—the Establishment Clause and the Free Exercise Clause—have occasioned endless debate and confusion. It is so common and so obligatory nowadays to begin any serious work on law and religion in the United States by describing this confusion that the computers of American law and religion scholars might as well come with a macro key to save them the time and trouble of hunting down the usual sources. Instead, a keystroke would vomit forth words and phrases like "incoherent,"[4] "chaotic, controversial and unpredictable,"[5] "in shambles,"[6] "schizoid,"[7] "confused,"[8] and "a complete hash."[9] And that is just what law and religion scholars are likely to say when they are feeling generous. On bad days, they may say something *really* unpleasant.

It is our happy fate as legal scholars to have a very convenient scapegoat for this state of affairs: the United States Supreme Court. The Court cooked this dog's breakfast, we may say; we're just serving it up. The Court's members, when they're especially candid (or when they are describing each other's work), are happy to shoulder the blame. So Justice Antonin Scalia has said of his brethren that they have "made such a maze of the Establishment Clause that even the most conscientious government officials can only guess what motives will be held unconstitutional."[10] Justice Stephen Breyer has attempted to make a virtue of necessity, arguing that the Supreme Court's opinions on religion form a landscape riddled with inevitable "difficult borderline cases" in which there is

4. Mark V. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 247 (1988).

5. Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine,* in *Law and Religion* 63, 64 (Rex J. Adhar ed., 2000).

6. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1246 (1994).

7. Ronald Y. Mykkeltvedt, *Souring on Lemon: The Supreme Court's Establishment Clause Doctrine in Transition*, 44 Mercer L. Rev. 881, 883 (1993).

8.Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 Geo. Wash. L. Rev. 672, 674 (1992).

9. Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 Tex. L. Rev. 577, 578 (1996).

10. *Edwards v. Aguillard*, 482 U.S. 578, 636, 640 (1987) (Scalia, J., dissenting).

"no test-related substitute for the exercise of legal judgment."[11] For a Supreme Court Justice, that is the politely worded equivalent of Bette Davis's famous warning in *All About Eve*: "Fasten your seat belts—it's going to be a bumpy night."[12]

But we should not blame the courts. The incoherence of religious freedom jurisprudence is just a symptom of a disease suffered equally by law and religion scholars and the Supreme Court. To be more specific, the disease is an allergy: an allergy to questions of religious truth.

It is certainly not the case that law and religion scholars avoid questions of religious truth because they all share the same religious viewpoint. Nor, despite frequent accusations to the contrary, is it that law and religion scholars, even at our most liberal law schools, all share an aversion to religion. There is plenty of diversity among law and religion scholars. Their primary tendency is neither religious belief nor hostility to religion. It's a reluctance to talk about religious truth *at all*.

THE AGE OF CONTESTABILITY

Outside the legal academy, in contrast, contemporary public dialogue is bursting with talk about God and religious truth. In recent years, a number of best-selling polemical writers have argued against the existence of God and for the absurdity and irrationality of religious belief. The argument advanced by these writers has been labeled "the New Atheism."[13] Proving the Newtonian literary dictum that for every argument in publishing that sells well, there will be an equal and opposite reaction, the New Atheists have been met at the ramparts by an equal number of vociferous defenders of religious belief. Call them the "New Anti-Atheists."[14] These critics argue that what is new about the New Atheists is mostly how little they know about religion, and how impoverished their arguments are in comparison to those of the "old" atheists—influential writers like Freud, Feuerbach, Marx, and others. In any event, the battle between the New Atheists and the New Anti-Atheists has been well and truly joined in the contemporary public square.

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11. *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment).

12. *All About Eve* (20th Century Fox 1950).

13. *See, e.g.*, Christopher Hitchens, *god is Not Great: How Religion Poisons Everything* (2007); Richard Dawkins, *The God Delusion* (2008); Daniel C. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (2006); Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (2004). Because I am averse to undue cutesiness, I will generally refer to Hitchens' book as *God is Not Great* from now on, ignoring his insistence on using a small-case "g."

14. *See* Chapter Four. For the use of the label "New Anti-Atheists," see The New Yorker, August 31, 2009, at 8 (table of contents description of a book review published in this issue by James Wood, *God in the Quad*, at page 75).

Public interest in the question of God's existence hasn't been this hot since *Time* Magazine prematurely published His obituary over 40 years ago.[15]

What are the reasons for the sudden resurgence of public interest in the ultimate question of God's existence? There are two principal causes for this explosive growth. One is the complex status of religion and religious belief in what Charles Taylor has called our "secular age."[16] The phrase, as used here, does not mean that God has disappeared from the stage and we are all living in a post-religious environment. Whatever *Time* Magazine, along with many serious academics of the mid-1960s, may have thought would happen to religious belief in America, the United States remains, by and large, a resolutely religious country.

What has changed is the social context in which religious belief exists. If Western society was once a milieu in which "it was virtually impossible not to believe in God," in our own age, "faith, even for the staunchest believer, is [now only] one human possibility among others."[17] We live in an age in which religion is very much alive, but also highly contestable. On the one hand, the profusion of faiths within the American landscape gives an extraordinarily rich picture of what it means to be religious. On the other hand, it is now possible to imagine life without religious belief at all. Three centuries of post-Enlightenment thought and liberal democratic development have made it possible—indeed, unexceptional—for people to be securely atheistic in their worldview, or, if they do believe in God, to give the matter little thought in their daily lives. In individual lives, God may be everything from a delusion to a bit player to a constant and powerful presence. In society as a whole, however, God is merely an option.

Surprisingly, the very fact that religion is now just an option makes it all the more important. In a society like our own, in which religion was once part of the common social fabric, and most people subscribed to relatively tame variants on what we have come to call "Judeo-Christianity," the very fact that our religious beliefs were so shared and widespread made them relatively unimportant, or at least uncontroversial.[18] But religion plays a very different role in what we might call "an age of contestability."[19] In this environment, precisely *because* religion is of fading importance to some people, it is of increasing importance to others. The very question of religious belief has become a flashpoint. Religious truth, once relegated to the background, is now firmly in the foreground of public discussion.[20]

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15. *See Time*, April 8, 1966 (asking, on the front cover, "Is God Dead?").

16. Charles Taylor, *A Secular Age* (2007).

17. *Id.* at 3.

18. *See generally* Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. Memphis L. Rev. 973 (2009).

19. *Id.* at 976.

20. *See id.; see also* Mark Lilla, *The Stillborn God* 3 (2007) ("[W]e are again fighting the battles of the sixteenth century–over revelation and reason, dogmatic purity and toleration,

Although law and religion has not yet done much to confront the question of religious truth, it has been greatly affected by the question of religion's fate in an age of contestability. Law is one of the main areas in which Americans fight over what it means to be religious or irreligious. Once, Americans were widely religiously observant, and the struggles were largely internecine disputes over whether the state could redistribute income from one (Christian) denomination to another. It was a time in which James Madison could argue forcefully against the taking of so much as "three pence . . . for the support of any one [religious] establishment."[21]

Now, after several decades of struggle on and off the courts, a delicate détente prevails, and there is, relatively speaking, less controversy over this issue than there once was.[22] The primary battleground has shifted to questions of religious symbolism.[23] When can the Ten Commandments be placed on public property?[24] Does their erection require the same access to public space for other religious

inspiration and consent, divine duty and common decency."). *Cf.* Christian Smith, *American Evangelicalism: Embattled and Thriving* (1998) (arguing that evangelicalism in the United States has grown not in spite of, but because of, its engagement and struggle with our increasingly pluralistic society).

21. James Madison, *Memorial and Remonstrance Against Religious Assessments,* reprinted in 5 *The Founders' Constitution* 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987).

22. Much of this controversy reached its denouement when the Supreme Court ruled in favor of the possibility of "vouchers" for religious schools, and for evenhanded distribution of federal funds to religious schools, in two cases early in this century. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000). These cases were the culmination of two decades of Court decisions focusing increasingly on equality as the lodestar of Establishment Clause decisions involving funding questions. The voucher decisions leave many questions to be decided. *See, e.g.,* Ira C. Lupu & Robert W. Tuttle, Zelman's *Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles,* 78 Notre Dame L. Rev. 917 (2003); Mark Tushnet, *Vouchers After Zelman*, 2002 Sup. Ct. Rev. 1. It is fair to say, however, that the caselaw in this area is more stable now than it has been for some time, and less controversial.

23. *See, e.g.,* Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 Wm. & Mary L. Rev. 771, 771 (2001) (arguing that the "emerging trend" in Establishment Clause litigation is "away from concern over government transfers of wealth to religious institutions, and toward interdiction of religiously partisan government speech"); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 Harv. C.R.-C.L. L. Rev. 503 (1992).

24. *See, e.g., Van Orden v. Perry,* 545 U.S. 677 (2005); *McCreary County v. ACLU of Ky.,* 545 U.S. 844 (2005).

monuments?[25] When can students,[26] lawmakers,[27] and others pray in school, at legislative sessions, and in other public places? When can government display religious symbols on its own land, and when will either the speech or the property be treated as private?[28] When can universities deny sponsorship to student groups with strong religious beliefs?[29]

And the list goes on. In an age of religious contestability, the most heated battles are being fought not over how government spends, but over what government *says* about the role of religion in public life. Both those who believe that religion is a fiction and those who believe it is a vital force are caught up in a battle of symbols over these beliefs.

All of these legal battles are ultimately only one front in a larger cultural war. These individual skirmishes are both a part of that war and a reflection of it. The war is a larger debate about the relationship between religion and liberal democracy. Should religious arguments be forbidden in public political debate? Does their persistent presence in our public political dialogue demonstrate that we live under the threat of a looming theocracy, as some believe? Or does what some see as the exclusion of religious arguments from public discussion demonstrate the creeping hold of "secularism" over public debate, with the consequence that religious believers are (or believe they are) excluded from polite society and left at the mercy of an increasingly degraded culture?

This cultural war is often fought by proxy. For example, in book after book, Americans argue over the religious beliefs of the Founding Fathers and what those beliefs say about the religious or secular nature of the United States.[30]

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25. *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

26. *See, e.g., Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); Paul Horwitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in* Adler v. Duval County, 63 U. Miami L. Rev. 835 (2009).

27. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983). For cases involving legislative prayers at the local level, demonstrating the unsettled nature of this area, see, *e.g., Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008); *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276 (4th Cir. 2005); *Wynne v. Great Falls*, 376 F.3d 292 (4th Cir. 2004); *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998). *See generally* Christopher Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 Minn. L. Rev. 972 (2010).

28. *See, e.g., Salazar v. Buono*, 130 S. Ct. 1803 (2010) (upholding the display of a Latin cross atop Sunrise Rock in Mojave National Preserve, on land transferred by federal legislation to a private organization); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (upholding the display of a cross by a private organization on public land).

29. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

30. *See, e.g.,* Steven Waldman, *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America* (2008); Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* (2006); David L. Holmes, *The Faiths of the Founding Fathers* (2006); Alf Mapp, *The Faiths of Our Fathers: What America's Founders Really Believed* (2005).

Some argue that we always have been and remain a "Christian nation."[31] Others argue that, whatever the individual beliefs of the founding generation may have been, ours has always been a "Godless Constitution."[32] Still others argue that whether or not we were once a Christian nation, the profusion of religious beliefs and nonbeliefs in our own age means we are one no longer—and they proceed to argue over whether this is cause for celebration or concern. The legal battles over religious symbolism are thus just a reflection of a wider argument over the relationship between religion and liberal democracy.

But there is another reason for the resurgence of interest in all these questions, and it adds extra fuel to a fire that would already have burned quite well on its own. That is the fact that we are now living in a post-9/11 world. Whatever compromises Americans had reached over religion, and however trivial or symbolic their debates may have seemed, the fall of the Twin Towers made clear that religion is hardly a spent force. To be sure, the causes of terrorism are complex. But there can be no doubt that religion helped inspire and direct the forces that tore a hole out of New York City and Washington, D.C. The events of September 11 were a reminder of just how powerful religion can be in shaping people's lives and actions, for good or ill. The fallout from that day has shown us how fraught and fragile the relationship between religion and liberal democracy can be.

This is not just an American dilemma. If anything, the fact that religious wars in the United States are still largely fought only on symbolic grounds is a testament to just how well the American cultural landscape has weathered the rise in tension between the claims of religion and those of secularism. But ours is not the only corner of the world in which those controversies occur. As events across the world—from Western Europe to the Middle East—have shown, Americans are living through only one piece of a global dilemma.[33]

That dilemma has turned our thoughts back to questions of religious truth. For example, Sam Harris, who was an anonymous graduate student before his best-seller *The End of Faith* catapulted him to notoriety, traces the genesis of his book directly to 9/11.[34] Susan Jacoby, the author of the New Atheist tract *Freethinkers*, says much the same thing.[35] Indeed, the very fact that these books sold so well demonstrates powerfully just how much 9/11 helped redirect our public conversation toward questions of religious truth. If we are fighting a religious war, after all, it would help to know on whose side God stands, if any—or

31. *See* Stephen McDowell, *America, A Christian Nation?* (2005).

32. *See* Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State* (2005).

33. *See, e.g.,* Jürgen Habermas, *An Awareness of What is Missing*, in Jürgen Habermas et al., *An Awareness of What is Missing: Faith and Reason in a Post-secular Age* 15, 19 (2010).

34. *See* Harris, *supra* note 13.

35. *See* Susan Jacoby, *Freethinkers: A History of American Secularism* 2–3 (2004).

whether, as John Lennon sang, there would be "nothing to kill or die for" if we could imagine "no religion."[36]

In short, public attention in our age of religious contestability has not only focused on an array of issues concerning the nature of religion and its relationship to liberal democracy, but more fundamentally still on questions of religious truth itself. But if the urgency of these questions has reached a fever pitch, their intractability has not changed at all. That more people may be willing to argue over whether God exists, and that more people now see this as a valid question rather than an unthinkable one, does not give us any greater traction in figuring out whether he (or He—or She, They, or It) does, in fact, exist. Thousands of years of experience, reflection, debate, and sometimes bloody conflict have barely even sharpened the terms of the debate,[37] let alone resolved it.

WHY TRUTH MATTERS (EVEN TO LAWYERS)

In fairness, there *are* good reasons for law and religion scholars to avoid the subject of religious truth. We law and religion scholars can play at theology and philosophy if we have to, but at bottom we are, like all lawyers, primarily pragmatists and problem-solvers, not dealers in abstraction. (This may explain why most law and religion scholars are so haphazard in their understanding of theology or philosophy—and why, in fairness, theologians and philosophers are often equally clumsy in their understanding of law.) We are plainly in no better position than anyone else to resolve the ultimate questions of life. Anyway, that is not our job. Our job is to try to reach workable solutions to the problems of the day.

Indeed, a law and religion scholar might say our job is to come up with suggestions about how best to deal with conflicts between religion and the social order without even *attempting* to answer those deeper questions. Constitutional lawyers are proceduralists: good at coming up with rules and standards, not so good on deep and imponderable questions like the existence of God. So our marching orders are clear: We should try to arrive at a reasonable lawyerly way of addressing conflicts between law and religion, and leave the deep thoughts about God to our colleagues in religious studies departments, or to the individual conscience.

The problem is that unless and until we are willing to confront the questions of religious truth that lie at the heart of our public struggles over the relationship

36. John Lennon, *Imagine, on Imagine* (Capitol Records 1971).

37. For an example of this, see Jennifer Michael Hecht's history of religious doubt, which demonstrates how long the primary arguments for and against God's existence have been around, and how little they have changed. *See* Jennifer Michael Hecht, *Doubt–A History: The Great Doubters and Their Legacy of Innovation from Socrates and Jesus to Thomas Jefferson and Emily Dickinson* (2004).

between law and religious belief, our inheritance will be the very incoherence, the hollowness, that we are apt to find in the pages of Supreme Court decisions and law reviews.

Both courts and scholars have attempted to get around questions of religious truth—but, finally, without much success. For example, we may try to avoid some of these questions by simply giving a broad definition to religion, making it little different from any other strong system of belief.[38] At that point, however, religion can mean anything at all and nothing in particular. Moreover, any definition that broad is likely to result in a watered-down set of legal protections for religious belief.

Similarly, we could try to turn the discussion away from matters of religious truth by arguing that religion is nothing special. We could reject the notion "that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions."[39] We could prefer the seeming doctrinal elegance of some general legal principle that is untethered to religion itself, and rely on it to do all our work in a neat fashion. Such is the case with Christopher Eisgruber and Lawrence Sager, who have argued that the Religion Clauses can be rationalized under a principle of "equal liberty."[40] But this solution, which suggests that the best way to think about law and religion is not to think much about religion at all, ends up feeling like *Hamlet* without the Prince.[41] In any event, it cannot satisfy everyone. Some poor soul (so to speak) in the audience is bound to raise her hand and ask, "But what if religion *is* a unique, and uniquely deserving, category of human experience? What if it is *true*?"

In short, religious truth cannot be swept under the rug. All the warps and woofs in the fabric of religious freedom, all the inconsistencies that lead us to exclaim that law and religion jurisprudence is incoherent, stand as a silent but implacable reproach to all of us, judges and scholars alike, who toil in this field. They are an unstated but stark reminder that, in the end, we cannot help but confront Pilate's question.

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38. *See, e.g., United States v. Seeger*, 380 U.S. 163 (1965) (interpreting a statutory provision concerning conscientious objectors which required a belief "in relation to a Supreme Being" to include any sincere belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption"); *United States v. Welsh*, 398 U.S. 333 (1970) (treating moral and ethical beliefs as qualifying for the same statutory exemption).

39. Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 6 (2007); *see also* Brian Leiter, *Why Tolerate Religion?*, 25 Const. Comment. 1 (2008).

40. *See* Eisgruber & Sager, *supra* note 39.

41. *See, e.g.*, Chad Flanders, *The Possibility of a Secular First Amendment*, 26 Quinnipiac L. Rev. 257, 258 (2008).

CONSTITUTIONAL AGNOSTICISM

That is the project of this book. Lest I be struck by lightning or worse (say, book critics) for my presumption, let me be clear. I cannot and do not attempt here to answer the question of God's existence, let alone assign him to a particular denomination. Similarly, although I will have a good deal to say about the arguments of both the New Atheists and the New Anti-Atheists, I do not take a side in that battle once and for all, aside perhaps from finding it increasingly tedious. Although the title of this book is *The Agnostic Age*, and it has much to say about agnosticism and its role in the current debate over religious truth, this is still primarily a book for lawyers and citizens who are interested in how to reach a workable accommodation between law and religion, and between religion and liberal democracy—an approach I call "constitutional agnosticism." I hope the book will also be of interest to students of religion, not least because it argues that the questions those students ask are of crucial importance to the conflicts between religion, law, and liberal democracy. But it does not presume to tell the individual what he or she should believe about God.

Instead, this book is about how the individual—especially public officials like judges and legislators, but individual citizens as well—should think about religion *as* an officeholder or citizen. This is ultimately a book about religion's place in the public sphere, and it offers conclusions about how we, as participants in that sphere, should think about religion and its relationship to law and politics. Our views as citizens and officeholders may correspond to our own religious views, but they need not do so. We can assume that when Justice Scalia, who is politically conservative, defended the First Amendment right to burn the American flag,[42] he was not hoping to put a torch to Old Glory on the steps of the Supreme Court at the earliest opportunity.[43] In the same way, we can reach conclusions about how we should think about religion and religious truth as citizens and public officials that may not match up exactly with our own deepest conclusions about religious faith. This book is an argument about the importance of religious truth, but it is not an argument for or against some particular religious truth. Instead, it is about the best way of thinking about religion and religious truth as *constitutional* actors: as judges, public officials, and citizens.

That takes care of the "constitutional" part of constitutional agnosticism. Now for "agnosticism." The argument of this book is that public officials and others should adopt what I call an "agnostic habit" with respect to questions of religious

42. *See Texas v. Johnson*, 491 U.S. 397 (1989).

43. Not that he could, under prevailing Supreme Court precedent. *See United States v. Grace,* 461 U.S. 171 (1983) (permitting expressive activities on the sidewalks surrounding the Supreme Court, but not on the grounds of the Court itself).

truth, and their relationship to the conflicts between the obligations of religion and the demands of the wider society.

What agnosticism means is a tricky question. The English writer T.H. Huxley, who is generally credited with coining the term, offered an early and influential definition, although, as we will see, it is not the one we will use here. Huxley's definition treated agnosticism as the principle that because we *cannot* know whether God exists or not, we should neither believe nor disbelieve in him.[44]

This form of agnosticism has often been viewed as a decidedly tepid thing. In the popular understanding, it is just the "middle ground between theism and atheism,"[45] a way station and nothing more. One writer has suggested that an agnostic might be one whose position is taken "out of mere politeness or in some circumstances from fear of giving even more offence."[46] If so, it is a remarkably unsuccessful strategy. The middle of the road is, after all, the place where you can be hit by traffic from both directions. So it is with agnosticism. For anyone who has taken a strong position for or against the existence of God, nothing can arouse contempt more easily than a person who seems only to be refusing to fish or cut bait.

Huxley's definition of agnosticism, however, is *not* the definition that animates this book. There is more to the brand of agnosticism I describe in this book—what I call the "new agnosticism"—than that. The new agnostic's refusal to venture a final conclusion on the existence or nonexistence of God is not just a passive deferral, or a failure to screw one's courage to the sticking place. It is an adamant position of its own.

There are varieties of agnosticism, of course, just as there are varieties of theism and atheism. Some agnostics *are* just lukewarm atheists; others *are* just theists with commitment issues. But the brand of new agnosticism I champion here is different. If we are to find its meaning, we must look beyond philosophy to literature, in which doubt finds some of its most resonant and pregnant possibilities. At least since the Romantic era, agnosticism has in fact been one of the characteristics of great art, and the artist has been an agnostic par excellence.[47]

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44. *See generally* T.H. Huxley, *Agnosticism and Christianity and Other Essays* (Prometheus Books, 1992).

45. Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. Rev. 120, 128 (2008).

46. J.J.C. Smart, *Atheism and Agnosticism, in Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu.entries/atheism-agnosticism.

47. Which means, in fairness, that the "new agnosticism" is not entirely new. I call it by that label partly to distinguish it from other forms of agnosticism, such as the nineteenth century brand of agnosticism advocated by writers like Huxley; partly to set it against the New Atheists and the New Anti-Atheists; and partly to emphasize the particular qualities of the new agnosticism, such as its emphathetic capacity, that I argue are particularly well-fitted to contemporary conditions, and that I draw on in defining and arguing for constitutional agnosticism. As this book makes clear, however, the "new agnosticism" draws on deep sources in history and tradition, both religious and otherwise. *See* Chapter Three.

Indeed, the primary text for the new agnosticism is not that of a philosopher or a theologian, but a poet.[48] The new agnosticism I argue for here draws on John Keats, who argued that the artist must display what he called "negative capability"—the ability to remain "capable of being in uncertainties, Mysteries, [and] doubts."[49] The artist who displays true negative capability is nimble at "entertaining and even multiplying doubts indefinitely"; he "manages to project himself sympathetically into the positions occupied by his many and varied characters[,] . . . to be all of them and none of them, to be nowhere and everywhere."[50] This capacity to remain in a state of suspension has been called "an element of intellectual power[,] . . . of seeing the full force and complexity of the subject."[51] It has been described as a quality that "is essential for any creative artist, whether writer, poet, composer or painter."[52]

But the same quality of negative capability can be an equally essential element of great judgment, political leadership, or citizenship. Above all, it denotes the ability to occupy, as fully and empathetically as possible, the varied worldviews of our fellow citizens, even at those moments when their worldviews come into the sharpest conflict with each other and with our own perspectives. The result, when we carry the lessons of the new agnosticism forward into the realm of law and religion, is what I call *constitutional agnosticism*: a sense of the capacity of judges, public officials, and citizens to engage empathetically with their fellow citizens' perspectives on questions of religious truth, rather than trying to avoid those questions altogether—and the *necessity* of their doing so. As with the new agnosticism, it requires intellectual power. It is no easy task. But it may be a crucial one, if we are to negotiate the fault lines between law and religion without prematurely taking one side or the other, or disappearing into the crevasses between them.

I discuss the new agnosticism in greater detail in Chapter Three, and constitutional agnosticism in greater detail in Chapter Five. For now, I offer four central points by way of preview and for the sake of emphasis.

First, in arguing for *constitutional* agnosticism, I am not arguing that we must become *religious* agnostics. This book is primarily about the relationship between law and religion, and between religion and liberal democracy, not about religion itself. Because these subjects, in my view, cannot be discussed meaningfully

48. Not for nothing did the poet Percy Bysshe Shelley call poets the "unacknowledged legislators of the world," although it is just possible that a hint of self-regard had something to do with it as well. *See Percy Bysshe Shelley, A Defence of Poetry and Other Essays* 45 (2004) (1840).

49. John Keats, *Letters of John Keats* 43 (Robert Gittings ed., 1970).

50. Stanley Fish, *Unger and Milton*, 1988 Duke L.J. 975, 1005.

51. Daniel J. Kornstein, *The Double Life of Wallace Stevens: Is Law Ever the "Necessary Angel" of Creative Art?*, 41 N.Y.L. Sch. L. Rev. 1187, 1280 (1997).

52. *Id.*

without confronting questions of religious truth, I do contribute to those larger debates. I argue that the agnostic perspective has been given too little attention in the pitched battle between the New Atheists and the New Anti-Atheists. Too often, these antagonists have traded volleys across a vast no-man's land without stopping to consider whether that middle ground has something to offer. Readers who have come to this book out of an interest in the larger questions of religious truth, and who are unsatisfied by both poles of the current debate, might find something attractive about the vigorous and empathetic new agnosticism I argue for here.

But I am still ultimately arguing only for *constitutional* agnosticism. Constitutional agnosticism ought to be attractive to citizens and officials who want to find a workable common ground between the needs of the church and those of the state. Crucially, it ought to be attractive *regardless* of their individual religious beliefs. This is an ecumenical book, and I hope to reach two audiences in particular. The first is what we might call conventional liberals: those who either have a residual sense that religion is untrue, or who believe that there is or may be a religious truth, but see that question as either irrelevant or best avoided where church-state issues are concerned. In those cases, according to this view, we must reason together while laying questions of religious truth aside. I hope to convince those readers that we *cannot* avoid those questions—that given the plural nature of the beliefs that abound in our own age, we must confront the issue of religious truth, and that any approach that relies on a purported common ground of "reasonableness" in fact ends up smuggling in a host of religious truth-claims. Just as important, however, is my other audience: readers with strong religious views for *or* against the existence of God, who after all constitute a majority of the population. To those readers, I say that it should be possible to come away convinced by the arguments of this book without altering one's own religious beliefs or disbeliefs.

Second, the brand of constitutional agnosticism I argue for here *is* a kind of conclusion about questions of religious truth. It would be teasing, at least, to argue that law and religion needs to address questions of religious truth, and then offer up a position that seems to back away from doing just that. (Although law and religion scholars are experts at precisely this kind of two-step.) The constitutional agnosticism I argue for here *does* offer a distinct perspective on questions of religious truth. This perspective holds that these questions cannot be answered with finality. But that is *not* the same as avoiding them altogether. It is precisely that strategy of avoidance, I argue, that characterizes most judges' and legal scholars' approach to religious truth, and that has led to the state of confusion and dissatisfaction that permeates the theory and practice of the Religion Clauses of the First Amendment. Constitutional agnosticism believes that these questions have to be confronted head-on rather than avoided, even though it argues that the best way to confront them is with the capacity to live with and among uncertainties, mysteries, and doubts that Keats extolled.

Third, in many respects, constitutional agnosticism best responds to the spirit of our own age. We live in an age of contestability, an age in which we not only see a variety of responses to questions of religious truth—different faiths, atheism itself, and so on—but in which we are aware that each of these responses is *possible*. Charles Taylor calls this a secular age. As the title of this book suggests, however, it might be more appropriate to call it an *agnostic* age. Perhaps more than we may realize, constitutional agnosticism offers a way of thinking about questions of religious truth, and about the conflict between church and state, that is better suited to our own age than the conventional approaches to these questions.[53]

Finally, constitutional agnosticism is *not* the current position of the courts, or of most legal scholars. For decades, both courts and legal scholars in the area of law and religion have used buzz words that, at first glance, might resemble the agnostic perspective. Words and phrases like "equality," "neutrality," and "equal liberty" are the coins of the realm in current law and religion jurisprudence. A writer arguing from one of these perspectives might be tempted to put down this book at once, concluding that she is *already* a constitutional agnostic.

She would be wrong to do so. (Although, if she has already paid for the book, I'm willing to live and let live.) Prevailing approaches to law and religion that purport to be neutral, or to hold religious and non-religious beliefs alike in equal regard, routinely fail to do anything of the sort. The perspective they ultimately offer tilts clearly, if (sometimes) unconsciously, in favor of the secular. Faced with the difficult conflicts that form the "hard cases" of law and religion—questions such as how we are to treat a parent who, for religious reasons, wishes to withhold lifesaving medical care from a minor child—they ultimately decide in favor of the state, in a way that privileges a distinctly secular vision of human goods. Sometimes they are candid about what they are doing. More often, they are blind to the full implications of their decision. They believe they have remained staunchly "neutral" when they have actually favored one side of the debate.

Such a decision might be the right one. But it is not neutral. What, from the perspective of constitutional agnosticism, ought to be genuinely wrenching decisions, "hard cases," are from this perspective all too easy. The state wins, and not an ounce of doubt, uncertainty, or regret is involved. One thing readers of this book should take away is a deepened sense of the tragic choices involved in conflicts between law and religion.[54] Readers of this book should gain a renewed

53. In her book *Working on God*, Winifred Gallagher offers a somewhat similar observation, arguing that "neoagnostics"—"well-educated skeptics who have inexplicable metaphysical feelings"—are "America's most subdued, neglected religious group, yet they are one of its most powerful." Winifred Gallagher, *Working on God* xiii–xiv (1999).

54. Marc DeGirolami has written valuably on this point in an as-yet unpublished manuscript. *See* Marc O. DeGirolami, *Tragic Historicism* (draft manuscript, 2010).

appreciation for the kinds of conflicts that really are, or should be, hard cases in law and religion.

Hard means *hard*. It does not mean we should always reach the opposite conclusion. It may be that the constitutional agnostic will reach the same results as the resolutely liberal or secular judge. The state *may* still intervene to give a sick child a blood transfusion or other lifesaving medical assistance. It *may* still deny some claims of conscience by religious believers, no matter how deeply and sincerely they are held. I think some results *should* change, and at times I will argue strenuously that the courts have gotten the balance between church and state wrong. Still, even under a regime of constitutional agnosticism, one that emphasizes the importance of the possibility that religious claims that come into conflict with the needs of the state are not only important, but *true*, the religious believer will still sometimes lose.

And that, too, is a lesson of this book. For, although the individual agnostic can refuse indefinitely to reach a final conclusion on questions of religious truth, judges, lawmakers, and citizens do not have the same luxury. Judges must judge; lawmakers and citizens must make decisions, in real time. The kind of empathetic negative capability that comprises constitutional agnosticism will require the state to accede to religious needs more often than the state currently does. But in any viable system of liberal democracy, at times the state and its largely secular needs will have the final word.

What constitutional agnosticism suggests is that, like the agnostic who fully appreciates the compelling arguments of both atheism and theism even as she refuses to join one side or the other, we should be clear about the tragic choices this position entails. We may conclude on some occasions that the state must prevail without believing that the state is *right*. Constitutional agnosticism argues for a new way of thinking about the balance between law and religion, and between religion and liberal democracy more broadly. In some cases, it counsels in favor of different outcomes with respect to church-state conflicts than the ostensibly "neutral" courts might reach today. But it also concludes that there may be no perfect, final agreement between church and state. Constitutional agnosticism is an important and valuable ideal, and it has many important and achievable implications in practice. Like all ideals, however—and perhaps like agnosticism itself—it is tortuously difficult and perhaps impossible to attain in full. That, too, can be an important lesson.

THE PLAN OF THE BOOK

Part One of this book lays the ground for constitutional agnosticism. In Chapter One, we examine in detail the dilemma that religion faces in liberal democracies like our own. Our society has reached an uneasy accommodation between religion and the state by relying, sometimes explicitly and sometimes implicitly, on general

liberal principles. We might think of liberalism as a treaty, a way of reaching a truce between the forces that engaged in bloody religious conflict in Europe for centuries. What I call the "liberal treaty" or the "liberal consensus" has come under pressure, however, and that accommodation has become increasingly fragile.

The liberal consensus has come under attack from both the religious and the secular sides of the divide. Religion's pressure on liberal democracy has grown dramatically in recent years. That is apparent when we look at some of the obvious sources of this pressure: domestically, the rise of Christian evangelism and the so-called "Christian right,"[55] and globally, the rise of radical forms of Islam and the violence that has come in their wake. But liberal democracy is under pressure as well from many of what we might consider the more "moderate" faiths, whose renewed vigor and increasing interest in taking public stands on controversial political questions has contributed to what José Casanova calls the "deprivatization" of religion in modern life.[56]

At the same time, the liberal consensus is under attack from the liberal or secular side of the divide as well. Liberal democracy has long sought an accommodation with religion by avoiding questions of religious truth and focusing instead on values like religious "freedom" and "neutrality." But the rise of public religion has led some liberals to call for a redrawing of the boundaries between religion and state. We see this, for example, in France and the Netherlands, where liberal states have argued for an increasingly militant form of secularism and sought, literally and figuratively, to strip the veils that insulate religion from the mandates of the state. The New Atheism itself, with its more direct attack on religion and its combative stand on questions of religious truth and toleration, is another symptom of the unraveling of the liberal consensus. Finally, the liberal tradition is under a more subtle and far-reaching attack from with its own borders, as thoughtful writers from within the liberal tradition have called liberalism into question and explored its limits and pretensions.

In describing the collapse of the liberal consensus, I may be accused of launching a full-scale attack on the political philosophy of liberalism. I will indeed have many critical things to say about the difficulties of the liberal project along the way. That is not my primary aim, however. As I make clear in Chapter One, my main target here is not liberalism at the abstract level of political philosophy, but the liberal consensus as it has been widely, and crudely, understood and employed in public discussion.[57] At that level, even committed

55. And, potentially, the religious "left" as well. *See, e.g.,* Steven H. Shiffrin, *The Religious Left and Church-State Relations* (2009).

56. *See generally* José Casanova, *Public Religions in the Modern World* (1994); *see also* José Casanova, *Public Religions Revisited,* in *Religion: Beyond a Concept* 101 (Hent de Vries, ed., 2007).

57. *See* Mark Tushnet, *A Public Philosophy for the Professional-Managerial Class*, 106 Yale L.J. 1571, 1572–73, 1586–89 (1997).

philosophical liberals may well agree that there are many reasons to think that the liberal consensus is in a weakened state. Whether more sophisticated forms of liberal philosophy are stronger than the general public understanding of liberalism, or whether those forms of liberalism are also fatally flawed; whether those sophisticated forms of liberalism are, in fact, wholly consistent with constitutional agnosticism, or whether, regardless of the virtues or flaws of various forms of liberalism, there are reasons to prefer the language of "constitutional agnosticism" to the usual language of academic debates over liberalism—all of these are important questions. But I put them off until the last chapter. For now, it is enough to say that Chapter One's description of liberalism's fragile state is directed at liberalism as it is popularly understood, not as its most sophisticated advocates may understand it.

Chapter Two narrows the focus to law and religion itself. It surveys the central doctrinal approaches to the Free Exercise and Establishment Clauses of the First Amendment, and argues that these approaches, whatever their practical merits, are intellectually inconsistent and ultimately incoherent. It examines the theories of religious liberty proposed by some of the most prominent law and religion scholars. Most of these writers have tried to bring consistency to law and religion by focusing on a single liberal principle like liberty or equality. A few *have* offered specifically religious justifications for religious freedom, although those justifications are unlikely to command widespread support. Others have offered a more eclectic grab-bag of approaches. This chapter shows that they have ultimately been unsuccessful in bringing order to the landscape of law and religion—or have purchased order at too high a price. For these writers, the worm at the core of the apple is religious truth. Unless we are willing to confront more directly the question of religious truth that lies at the heart of our struggles over law and religion, our proposals will be built on a fractured and flawed foundation.

Part Two introduces constitutional agnosticism to the mix. Chapter Three starts off this discussion by describing religious agnosticism itself. The brand of "new" agnosticism I offer here is not a form of disbelief, or even simply of refusal to believe. Instead, it argues that certainty on matters of religious truth *may* (not *must*) ultimately be unattainable, and that one approach to this prospect is to suspend judgment on these questions, or at least to introduce a note of doubt and humility to one's conclusions.

This strategy is not unique to agnostics themselves, and committed religious believers and nonbelievers should not flinch at it too quickly. As I show in this chapter, a rich tradition of doubt and agnosticism flows through Western culture. One important part of this tradition is its manifestation not just in philosophy, but in art and literature, in which we have inherited an especially rich, complex, and empathetic form of agnosticism from the Romantic artistic tradition. Another important contribution to the agnostic tradition can be found within religion itself, which, despite the way in which the New Atheists present

it, has often made doubt a central part of its own tradition. In short, there are reasons to conclude that the kind of new agnosticism I describe here is well within the reach of most citizens in our own age, whatever their religious beliefs may be.

Chapter Four offers a brief but important digression. It surveys the heated debate between the New Atheists and the New Anti-Atheists. The New Atheists, commendably, confront directly the central questions of religious truth that lie at the heart of our debates over the role of religion in a liberal democracy. Unfortunately, that's about where the applause ends. The New Atheists have taken an astonishingly counter-productive approach to these questions. Far from bringing about the civil peace that they insist is their ultimate goal, the New Atheists' strident writing, and their monolithically negative views on religious belief, threaten to make the debate all the more protracted and bitter. Some of the evidence for this can be found in the responses of their opponents, who regularly meet shrillness with shrillness. What should be an enlightening dialogue is becoming a tedious standoff. Agnosticism deserves its own round in this debate, rather than being treated with barely disguised contempt or condescension by both sides. On a broader social level, if not at the level of individual belief, agnosticism, or at least the form of new agnosticism I describe, can be a sounder approach, one that calms the waters without avoiding the vital question of religious truth.

At the very least, the empathetic brand of agnosticism I describe in this book acknowledges a truth about human experience that some of the most strident New Atheists, and their opponents as well, either stumble over or deny. Most of us, including many atheists, are able to acknowledge and appreciate the importance of spirituality and religion in individual life, and sometimes to make a meaningful imaginative leap into the mental space of religious believers (and vice versa). Anyone who is capable of appreciating the profound presence of the sublime in our lives—whether in religious experience or through art, literature, poetry, and natural beauty—is capable of sharing the sense of awe and mystery that lies at the heart of religious belief. That imaginative leap dissolves the borders between theism and atheism, between belief and unbelief.

It is a virtue of our often fragile status as people living in the midst of an agnostic age that we are capable of making these leaps, of flitting back and forth over the increasingly permeable borders of belief. As destabilizing and disorienting as this can be, it also gives us the gift of being able to experience something of the inner lives of others. Agnosticism, empathetically and sensitively practiced, thus not only disclaims any conclusions about religious truth, but is capable of understanding and sharing a sense of the profundity of religious belief as religious individuals experience it—and, conversely, of seeing the stark and lonely beauty of a world without God. This perspective respects the fervor of the combatants in the war over religious truth. But it offers the possibility of a truce, or at least a cooling of tensions, in our long-running culture war.

Chapter Five builds on this vision of empathetic agnosticism, and begins the work of putting it together with law and religion, to form what I call constitutional agnosticism. Our focus shifts from agnosticism as a personal belief system to *constitutional* agnosticism as a working rule for judges, lawmakers, and citizens in a pluralistic liberal democracy who face conflicts between religion and the state. I argue that, rather than subscribing to particular truth claims about religion, and instead of trying to avoid and evade these questions altogether, public actors in our society should cultivate an agnostic habit. That is, when approaching questions of church-state conflict, they should attempt to remain genuinely agnostic on questions of religious truth, but in a manner that attempts to make the imaginative leap into the mind of the other (usually the religious believer, but potentially the nonbeliever too) that Keats had in mind in his description of negative capability. This chapter also demonstrates the ways in which the current approach of the courts and many law and religion scholars is not truly agnostic, but rather either shies away from questions of religious truth altogether or smuggles in a set of conclusions that ultimately give an unfair advantage to secular interests.

Although constitutional agnosticism is especially important for judges, it is not a rule for judges alone. In many circumstances, lawmakers, too, might benefit from the agnostic habit in public deliberation and decision-making. They are not required to abandon or set aside their own religious views—something that has been proposed by some liberal theorists but that is contrary to our constitutional values and counterproductive. Still, lawmakers often face competing interests in their public deliberations, interests that involve deep claims of religious belief or nonbelief. An agnostic habit might enable them to negotiate this treacherous terrain in a way that is ultimately more successful and more respectful to everyone.

Similarly, private citizens emphatically should not be required to leave their religious (or irreligious) beliefs at the door when entering the public square. Like everyone else, however, they need to find ways of coexisting in a deeply diverse and religiously pluralistic society. Adopting the agnostic habit may enable them to enter into a richer and more sensitive public dialogue with their fellow citizens. It may help them to consider controversial questions and conflicts from the perspective of the other, without having to sacrifice their own beliefs.

Part Three puts constitutional agnosticism to work. My principal focus here is on the Religion Clauses—the Free Exercise Clause and the Establishment Clause—of the First Amendment.[58] Although I will point to some controversial cases that I think were wrongly decided, I do not argue in these chapters for a wholesale rewriting of current Religion Clause doctrine. That doctrine, on the

58. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const., amend. 1.

level of results if not reasoning, as often as not gets things right, albeit for ultimately unsustainable reasons. Rather, I argue that constitutional agnosticism can lead us to a smarter, stronger, richer, and more sensitive understanding of what is going on in these cases.

Chapter Six considers the law of the Free Exercise Clause of the First Amendment, which prohibits Congress (and, through the Fourteenth Amendment, state and local governments as well) from infringing on the free exercise of religion. Perhaps the most controversial development in the Free Exercise Clause in the last twenty years has been the Supreme Court's shift away from a legal regime that—in principle, if not always in practice—gave substantial protection to religious believers whose faith-based obligations come into conflict with the law, even if the law was not directed at those religious believers. In a controversial 1990 case, the Supreme Court held that any "neutral" and "generally applicable" law that incidentally placed a burden on the exercise of religious belief would no longer present a basis for a free exercise challenge.[59]

It is fair to say that most law and religion scholars consider this case to have been a disaster for religious liberty. I agree with them. It is also fair to point out that a number of law and religion scholars have come to believe that the Court was right. They argue that the Free Exercise Clause does not require, and society could not long tolerate, a legal regime that gives religious believers an "out" where any generally applicable law is concerned, allowing them, say, to ingest peyote or refuse to pay taxes. The Court's decision in this case is still controversial. It has been met with a vigorous, if not completely successful, response from Congress and the state legislatures, which have provided additional protections for religious believers in limited areas, even where generally applicable laws are involved.

Despite those defenses of a regime of "neutrality" toward religion, a constitutionally agnostic approach to the Free Exercise Clause counsels in favor of strong constitutional accommodations for religious belief. At the very least, this approach helps us to understand the full weight of the pressures felt by our fellow citizens who confront laws that conflict with their religious beliefs and practices. If we do not try to occupy and appreciate the perspective of those who face these conflicts, we will not be able to comprehend just why these believers find even some generally applicable laws impossible to obey, and we will not be able to properly balance their needs against the genuine—if often exaggerated—needs of the state. Those who have argued that there is no place for empathy in the judicial role are wrong;[60] if judges are to understand the stakes involved in

59. *Employment Division v. Smith*, 494 U.S. 872 (1990).

60. Most recently, that argument has been made by those who opposed the confirmation of Supreme Court Justice Sonia Sotomayor. *See Nomination of Judge Sonia Sotomayor to be an Associate Justice of the United States Supreme Court: Hearings Before the Senate Committee on the Judiciary*, 111th Cong. (2009).

free exercise cases, they must understand those claims from *within* the believer's perspective, not just from a narrowly secular perspective.

At the same time, constitutional agnosticism is not for judges alone. It is equally important that citizens and lawmakers adopt the agnostic habit. If they adopt a genuine and empathetic habit of agnosticism, imagining the needs of religious believers from those believers' own perspective, they might be more willing to grant legislative accommodations to religious believers, and thus reduce the tension between religious obligations and generally applicable laws without the courts having to step in.

Beyond this general topic, the Free Exercise Clause involves a wide range of conflicts between religious and legal obligations, and this chapter explores a number of them. I move here from what we might label the "easy" free exercise cases to the "hard" cases. Constitutional agnosticism offers an important change in perspective on these issues. The current approach of courts and legal scholars sometimes privileges secular values while purporting to remain "neutral" on questions of religious truth. This leads them to view what should be easy cases as hard ones, and what should be hard cases as easy ones.

An example of the latter category is the set of cases dealing with blood transfusions and other life-saving medical treatment for children, ordered against the religious objections of their families. This is an area in which, understandably, the law heavily favors the state. The medical treatment cases are viewed as easy cases from the perspective of the average judge or citizen.

From the constitutional agnostic's perspective, however, these are among the hardest cases confronted by the courts (and by lawmakers, who face the question whether to grant exemptions from general laws concerning manslaughter and child abuse or neglect). A long tradition, stretching back at least to God's command to Abraham to sacrifice his son Isaac, shows the power of the conflict between the needs of the state and the needs of one's faith at the borderlands of life and death. For the constitutional agnostic, these are cases in which the stakes are just as high for the religious believer as for the state. I do not argue that religious believers should always win in these cases, although I do believe courts should do all that they can to avoid setting these cases up for total conflict and an inevitable victory for the state. But I do suggest that if courts and lawmakers took seriously their obligation to remain agnostic with respect to questions of religious truth, these cases would be far more difficult, and involve far more tragic choices, than they are currently understood as presenting.

Chapter Seven moves from free exercise conflicts back to the world of money and symbols that constitutes one of the primary battlegrounds in our modern culture wars. This is the world of the Establishment Clause of the First Amendment, which forbids any law "respecting an establishment of religion." The Establishment Clause is perhaps the primary field in which questions of religious truth are contested in our legal and political culture. It is also the area of legal doctrine that has been most vulnerable to charges of incoherence and inconsistency.

In the Establishment Clause, there are two primary concerns: issues of government funding for religion, and cases involving symbolic alliances between religion and government, such as cases involving the Pledge of Allegiance, public displays of the Ten Commandments, and school prayer. The current state of the law, more or less, allows government to aid religious organizations financially so long as those groups are treated on an equal basis with non-religious groups, but is much more strict in barring any effort by government to come down symbolically on the side of one religious "truth" or another.

I agree with many of the decisions in both areas. But I argue in this chapter that a constitutionally agnostic approach makes better sense of these cases, and brings more coherence to the field, by confronting rather than avoiding the question of religious truth. Although I largely affirm the current state of Establishment Clause law, I argue that some decisions—particularly those involving longstanding practices like the inclusion of the phrase "under God" in the Pledge of Allegiance—may be impossible to justify when viewed from a constitutionally agnostic perspective.

If Part Three moves from a general perspective on religious truth and church–state conflict to the more specific legal issues raised by the Religion Clauses of the First Amendment, Part Four draws together the lessons of the book by moving the focus outward again. This Part examines the potential problems with the constitutionally agnostic approach to law and religion.

These concerns deserve serious consideration. No approach to law and religion can resolve once and for all the tensions between law and religion. But a soundly constitutionally agnostic approach—one that does not avoid questions of religious truth but instead seriously, empathetically, and *agnostically* confronts them—may still have many benefits. It can bring greater consistency and coherence to our resolution of the pressing controversies surrounding church–state relations. More broadly, it may help ease the tensions that have arisen in the broader public debate over the role of religion in public life—tensions that are evident not only in the war between the New Atheists and the New Anti-Atheists, but more generally in the endless struggle between religion and liberal democracy.

In the final analysis, while constitutional agnosticism can help ease the tensions in our public and legal dialogue, it is not a panacea. Ultimately, we must look beyond specific issues in law and religion to the central and unavoidable question for any liberal democracy, particularly in our own age: whether religion and liberal democracy are simply irreconcilable, and whether questions of religious truth are doomed to prove unresolvable, even in a society whose officials and citizens do their level best to adopt the agnostic habit.

Although an agnostic approach promises to lend a good deal of clarity and calm to these difficult questions, it is still only a partial and imperfect solution. Religion remains in serious conflict with both law and the broader claims of the liberal democratic state. Religious belief makes claims that ultimately cannot achieve a perfect compromise with the needs of the state. Conversely, liberal

democratic states have needs that cannot be perfectly reconciled with those of religious believers. These tensions are written into the DNA of liberal democracy. They cannot be completely resolved without remaking society itself—if, that is, they can be resolved at all. We must resign ourselves to the fact that we live in an imperfect world, filled with unbridgeable conflicts and tragic choices.

Still, we need not live utterly without hope and without any prospect of reaching a better, more sensible and sensitive way of talking about and dealing with these conflicts. By confronting rather than avoiding the question of religious truth, constitutional agnosticism promises to salve the wounds of our culture wars, offers sounder resolutions of the many conflicts between church and state, and helps us to coexist, imperfectly but better than we do now, in a pluralistic society that is filled with endless varieties of religious and non-religious experience.