Galston on Religion, Conscience, and the Case for Accommodation

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Bill Galston approaches the question of religion's specialness in his characteristic careful and modest way[1] He is quite aware of the difficulties the topic raises, and he takes pains not to minimize them or to over-claim. Bill's bottom line is that religion *is* special as a constitutional category but not so special that other belief systems cannot seek shelter under religion's protective constitutional tent.

Bill confronts at the outset two objections to religion's constitutional specialness. The first is that religion is not a determinate category, one with necessary and sufficient criteria that define it. It may be a category of family resemblance, much like Wittgenstein's games. But even if so, the lack of a determinate definition is not fatal to the specialness claim.

The second objection comes from *Smith*[2]: religion is no longer treated as constitutionally special by the Court. To which Bill responds, first, I don't agree with *Smith*; and second, even if I did, religion would still be special under the Establishment Clause. For government *can* establish secular doctrines even if not religious ones. So religion *is* special, *Smith* notwithstanding.

But as I said, Bill disagrees with *Smith.* For if *Smith* held sway, government could ban sacramental wine. And the Free Exercise Clause would be idle if that were true. So the clause must mean that government

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1. William Galston, *Religion, Conscience, and the Case for Accommodation*, 51 SAN DIEGO L. REV. 1045 (2014).

2. Emp't Div. v. Smith, 494 U.S. 872 (1990).

has to overcome a presumption in favor of religious practices when it passes laws that burden those practices.

Rejection of *Smith* and assertion of religion's specialness will not lead to anarchy. Religious authority and political authority can coexist even if the activities they regulate partially overlap. Even if treating religion as special contradicts neutrality among theories of the good, the Constitution as is does not have to be interpreted as certain secular liberals believe would be normatively ideal.

So far, Bill is pretty solidly in the camp of those who support the pre-*Smith* free exercise regime. That regime was messy, but who says constitutional decision making must be tidy?

Bill, however, endorses not only the specialness of religion under the free exercise clause but also the *Seeger*[3] test that would include beliefs that occupy a place similar to that occupied by God in theistic religions. Bill would grant eligibility for a free exercise accommodation to anyone who believes he is commanded by his conscience to do what the law says he shouldn't or not do what the law says he should.

Let me respond to Bill's quite humane and moderate approach to religion's constitutional status along two axes. First, how does his approach fare as an exposition of the meaning of the Constitution's text? Looking only at the First Amendment's two clauses, I conclude that religion is special in the sense that the federal government is constitutionally forbidden to meddle with it. It may not establish a national church nor disestablish any of the state established churches. Moreover, it may not forbid the exercise of any religion. It is, in short, constitutionally disabled from dealing with religion as such. Religion is the province of the state governments, not the federal government, according to the First Amendment.

How, if at all, did the enactment of the Fourteenth Amendment change things? It is difficult to see how it changed things for the federal government, but did it change things for the states under either the privileges or immunities clause or the due process clause of section one? The states had all eliminated established religions by the 1830s, more than a generation before the enactment of the Fourteenth Amendment. But would the Fourteenth Amendment have compelled them to do so if they had not? And was free exercise part of the Fourteenth Amendment, and, if so, what was its meaning when incorporated?

Bill does not deal with these questions, nor shall I. But the alternative to analyzing religion's specialness and its normative implications as a matter of constitutional interpretation is doing so as a matter of political theory. And within political theory, the most acute issue regarding the

3. United States v. Seeger, 380 U.S. 163 (1965).

treatment of religions is that of the toleration of error. How should a government treat those who disagree with its legal demands on religious grounds—grounds that the government necessarily views as mistaken (else it would not have enacted the laws in question)?

The problem of the toleration of religious error becomes more acute as the government's writ reaches farther and farther into the lives of its citizens. The larger the scope of government regulation, the more likely the conflict with minority religious convictions. And the problem is compounded the greater the number of religious sects, as their sheer number makes it difficult for government to avoid coming into conflict with religiously-motivated conduct.

Here are some reasons why political theory might require government to tolerate religious error. The first is maintaining civil peace. The European wars of religion were the principal reason historically for endorsing the toleration of religious error in term of belief and it remains as well a reason for accommodating error in term of conduct.

A second reason for tolerating religious error in terms of accommodating conduct is sympathy with the torment faced by those who object to the law's commands. They might be tormented by their consciences if they regard compliance as morally wrong. They might be tormented even more if they believe the conduct is morally wrong and a violation of God's commands. Or they might fear God's wrath because they believe the conduct commanded by the law is disrespectful to God. (In all three of these cases, the assumption is that neither one's conscience nor God will forgive the transgression because it was legally coerced.) Finally, the conduct commanded by law might be thought to be a threat to one's very identity, identity that is bound up with religious observances that the law precludes.

A third reason that political theory might give for religious accommodations is a somewhat Millian one.[4] Although government believes its commands to be just, notwithstanding the religiously-based dissent, it admits the possibility that it might be in error. Accommodating religious objectors preserves these sources of alternative points of view, which in time government may conclude are correct. (If government has a truly compelling reason for not accommodating the religious dissenters, that indicates that the dissenters' views cannot possibly be correct. We

4. *See* JOHN STUART MILL, ON LIBERTY Ch. 2 (A. Castell ed., 1947).

can know for certain that sacrificing virgins in the volcano cannot be what God commands.)

So these are some reasons why political theory might dictate that religious dissenters be accommodated even though, by enacting the laws to which the dissenters object, government indicates that it believes the dissenters err. If political theory justifies religious accommodations, however, then when government acts on the basis of political theory, is it establishing a religion? Bill argues, in support of *Seeger*, that claims of conscience derived from moral theory can qualify for accommodations under the Free Exercise Clause.

But the two religion clauses in the Constitution use the noun "religion" only once. So if claims of conscience derived from a moral theory can qualify for exemptions under the Free Exercise clause, then when government acts to implement a moral theory and its commands, why is it not establishing a religion? For if I have a deep seated belief that some civil policy is wrong, and my belief is one equivalent to a religious belief, then why should I not regard the government as establishing a religion, and a false one at that?