Dear Readers:

This is a lengthy excerpt from my work-in-progress, Constitutional Agnosticism, which is under contract with Oxford University Press. It is still a decidedly rough draft, so please excuse the incomplete cites and so on.

I have provided three sections: 1) the introductory chapter; 2) an excerpt from chapter three, which defines the brand of agnosticism that is central to the book; and 3) chapter five, which specifically discusses constitutional agnosticism. I welcome your comments and questions on any part of this material, and of course would be happy to send more to anyone who is interested. If you are pressed for time, the introductory chapter lays out the argument and plan of the book in considerable detail. I look forward to seeing all of you.

Best,

Paul

CONSTITUTIONAL AGNOSTICISM

PAUL HORWITZ

Associate Professor of Law
University of Alabama School of Law

phorwitz@law.ua.edu

Draft of January 15, 2010

INTRODUCTION

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

-- Francis Bacon[1]

Neither twenty centuries of Roman civilianism nor twenty decades of American constitutionalism have brought the positive state any closer to answering Pontius Pilate's question, "What is truth?"

-- Jim Chen[2]

The lonely voice of youth cries 'what is truth?'

-- Johnny Cash[3]

Pilate's Disciples

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 their hands up at the question: "What is truth?"[4] And here is the difference: Pilate was at least willing to ask the question. Not so with today's leading theorists on freedom of religion. Indeed, if there is any single question from which they are most likely to flee, it is the question of religious truth. 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 delineate the boundaries between law and religion. That job is already hard enough. To

---

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

2 Jim Chen, *Of Agriculture's First Disobedience and its Fruit*, 48 Vand. L. Rev. 1261, 1332 (1995).

3 Johnny Cash, *What is Truth?* (CBS Records 1970).

4 John 18:38.

take on the confounding question of what religious truth *is*, a question that has challenged us all across the whole span of human existence, would doom them to failure from the start.

Better, than, 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 their own religious exercise? 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?

Against this practical justification for deferring the question of religious truth, however, there is a countervailing concern. Questions of religious freedom ultimately *cannot* be satisfactorily answered without at least some attempt to grapple with the broader question of religious truth. I suspect that my colleagues are well aware of this. And in this simple fact lies much of what we have seen in the realm of law and religion scholarship: dissatisfaction, nearly approaching a state of utter misery.

It is so common and so obligatory nowadays to begin any serious work on law and religion, at least in the United States, on this note of dissatisfaction 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. It would, with a keystroke, vomit forth words and phrases like "incoherent,"[5] "chaotic, controversial and unpredictable,"[6] "in shambles"[7] (referring to the state of

---

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

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

7 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).

Religion Clause jurisprudence), "schizoid,"[8] "confused,"[9] and "a complete hash."[10] And that's just what law and religion scholars are likely to say when they're feeling generous. On bad days, they might just say something unpleasant.

It's 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 the hash, we could say; we're just serving it up. And the Court's members, when they're feeling especially candid (or when they are describing each others' work), are just as 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."[11] And Justice Stephen Breyer has famously attempted to make a virtue of necessity, arguing that the Supreme Court's opinions on religion are a landscape riddled with inevitable "difficult borderline cases" in which there is "no test-related substitute for the exercise of legal judgment."[12] 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."

But, as the old saying goes, our fault may lie not in our judicial stars, but in ourselves.[13] The incoherence in religious freedom jurisprudence that just about everyone seems to agree is a feature of the Court's work in this area is 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.

---

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

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

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

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

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

13 William Shakespeare, *The Tragedy of Julius Caesar*, I, ii, 138-40.

It's 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 in the heart of our most liberal law schools, all share an aversion to religion. If that picture was ever true (which I doubt), it no longer is. No, the primary viewpoint of law and religion scholars is neither religious belief nor hostility to religion. It's the refusal to talk about religious truth *at all.*

God-Talk and the Age of Contestability

Where law has failed to say much about religious truth, however, our current public dialogue is bursting with talk about God and religious truth. In recent years, a flurry of best-selling polemical books have argued against the existence of God and for the absurdity and irrationality of religious belief. Religious believers, they have argued, are not only wrong, but dangerous too. The arguments made in these books has been labeled "the New Atheism."[14] Proving the Newtonian literary dictum that to every argument in publishing that sells well there will soon 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."[15] These critics argue that what is new about the New Atheists is mostly how little they have read and how impoverished their arguments are in comparison to those of the "old" atheism – arguments made by venerable writers like Freud, Feuerbach, Marx, and others. In any event, the battle between the New Atheists and the "New Anti-Atheists"[16] has been well and truly joined in the contemporary public square. Public interest in the question whether or not God exists has

---

[14] *See, e.g.,* Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (2007); Richard Dawkins, *The God Delusion* (paperback ed. 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* (2005).

[15] *See, e.g.,* [add cites]

[16] *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).

not been as hot since *Time* Magazine prematurely published His obituary over 40 years ago.[17]

What are the reasons for the sudden resurgence of public interest in the ultimate question of God's existence? There are, I think, two principal causes for the explosive growth of interest in these questions. One is the fascinating status of religion and religious belief in what Charles Taylor has called our "secular age."[18] The phrase, as used here, does not mean that we truly live in a *secular* age, in the sense 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 in the years to come, the United States remains a resolutely and substantially religious country.

What has changed is the social context in which religious belief occurs. 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."[19] We live in an age in which religion is very much alive, but also very much contestable. It is possible to imagine living a religious life, and the explosion of faiths within the American landscape – a dizzying array of sects, denominations, and cults, all of them multiplied beyond counting by individual variations on each, borrowings from all of them, and "hot" and "cold" degrees of religious faith and fervor – means that our picture of what it means to be religious has become extraordinarily rich and complex. At the same time, as Taylor writes, 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.

---

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

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

19 *Id.* at __.

Somewhat counter-intuitively, the very fact that religion is now just an option makes it all the more important. In a society – like our own, only a few short decades ago – in which religion was part of the common social fabric, and most of those religions were 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. But religion plays a very different role in what we might call "an age of contestability."[20] 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, precisely because some now deny its importance altogether, becomes a flashpoint: the very question of religious belief, once relegated to the background, is now firmly in the foreground of public discussion.[21]

Although law and religion has not been much affected (yet) by the question of religious truth itself, it has been very much 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. That war is, in keeping with the cultural and identity-oriented nature of this debate, increasingly one of symbols. Once, Americans were widely religious and observant and the struggles were largely internecine ones over whether the state could redistribute income from one (Christian) denomination to another. This was an age in which James Madison could argue forcefully against the taking of so much as "three pence . . . for the support of any one [religious] establishment."[22]

Now, after several decades of struggle in and out of the courts, a delicate détente prevails, and there is, relatively speaking, less controversy over this issue than there once

---

[20] Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. Memphis L. Rev. 973, 976 (2009).

[21] *See id.*

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

was.[23] The primary battleground has now largely shifted to questions of religious symbolism.[24] When can the Ten Commandments be placed on public property?[25] Does their erection require the same access to public space of other religious monuments?[26] When can students,[27] lawmakers,[28] 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?[29] And the list goes on . . . and

---

[23] Much of this controversy reached its denouement when the Supreme Court ruled in favor of the possibility of "vouchers" for religious schools in two cases. *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 lodestone of Establishment Clause decisions involving funding questions. Of course, 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 still fair to say, however, that the caselaw in this area is more stable now than it has been for some time, and less controversial.

[24] *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).

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

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

[27] *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).

[28] *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. _ (2010).

[29] *See, e.g., Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *cert. granted sub nom. Salazar v. Buono*, 129 S. Ct. 1313 (2009) (challenging display of Latin cross atop Sunrise Rock in Mojave National Preserve, on land which was subsequently transferred by federal legislation to a private organization);

on. In short, in an age of religious contestability, the most heated battles are being fought not over how government spends, but over what government *says*, or is seen as saying, about the role of religion in public life. Those who want to believe that religion is a fiction and those who believe it is a vital force, well aware that both views coexist in an up-for-grabs world, are reduced to fighting over who will win a war of symbols over these beliefs.

All of these legal battles are ultimately only one front in a larger war. These skirmishes are both a part of that war and a reflection of it. That war is a larger social debate about the relationship between religion and liberal democracy. Precisely because it is now seen as one among many possible belief systems, religion has become increasingly valuable to some and the subject of increasing disdain from others. Arguments rage over the precise role of religion in our political and social culture. Do religious arguments belong in public political debates? Is religion a forbidden basis for arguments in public discourse, and does its persistent presence in public debate demonstrate that we live in some kind of theocracy, as some secularists believe? Or does what some see as the frequent 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 at the mercy of an increasingly degraded culture?

All of these debates are present in our daily lives. They are fought directly and by proxy. The war over religious symbols is one of those proxies. Another is the ongoing debate, in book after book, about the religious beliefs of the Founding Fathers and what these beliefs say about the religious or secular nature of the United States.[30] Some argue that we

---

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (challenging display of cross by private organization on public land).

[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).

always have been and remain a "Christian nation."[31] Others argue that, whatever the individual beliefs of the founding generation, ours has always been a "Godless Constitution."[32] Still others argue that whether or not we have been a Christian nation, the profusion of religious beliefs and non-beliefs in our own age means we are one no longer, and 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, one whose traces can be found everywhere one looks.

The unsettled and contestable nature of religious belief in a society in which religious belief and nonbelief are equally plausible and are forced to live in an uneasy coexistence would be reason enough for the explosion of public discussion and controversy over questions of religious truth, and of the role and nature of religion in liberal democracies, that we have seen in legal battles over religious symbols, cultural wars over the role of religion in public life, and larger debates about religious truth between the New Atheism and its adversaries. But there is one other reason for the resurgence of interest in 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 between religion and non-religion, and however attenuated and symbolic their debates may have seemed, the fall of the Twin Towers brought home, literally and crushingly, the fact that religion is hardly a spent force. To be sure, the causes of terrorism are rich and 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. 9/11 was a potent reminder of just how powerful a force religion can be in shaping people's lives and their actions, for good or ill. And ever since, the fallout from that day has served as a constant reminder of just how fraught and fragile the relationship between religion and liberal democracy can be.

---

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

32 *See* Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (1996).

This is hardly just an American dilemma. In fact, the terrible events of 9/11 notwithstanding, the fact that religious wars in the United States are largely fought only on symbolic battlegrounds is a testament to just how well our cultural compromises have succeeded in mediating between the claims of religion and secularism. But as events across the world – from Western Europe to the Middle East – have shown, ours is not the only corner of the world in which debates rage between religious and secular individuals and values. We Americans are living through only one piece of a global dilemma.

The global realization that religion continues to play such a dramatic and potentially violent role in people's public lives has been one of the influences that has turned our thoughts back to questions of religious truth. For example, in his best-selling book, *The End of Faith*, Sam Harris traces the genesis of the book directly to 9/11.[33] He is far from the only person to feel this way. Indeed, the very fact that his book sold so well is a testament to the ways in which 9/11 helped direct our public conversation back to questions of religious truth. If we are fighting a religious war, after all, it would help to know on whose side, if any, God stands – or whether, as John Lennon sang, there would be "nothing to kill or die for" if we could imagine "no religion."[34]

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. The fact that more people may be willing to argue over whether God exists, and the fact that more people may now see this as a perfectly comprehensible 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,

---

33 *See* Harris, *supra* note __, at __.

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

and sometimes bloody conflict have barely even sharpened the terms of the debate,[35] let alone resolved it.

Why Truth Matters (Even to Lawyers)

I pointed out early on that there are good reasons for law and religion scholars to avoid the subject of religious truth, and the inability to convince anyone on either side of the debate is an excellent one. 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 we are so haphazard in our understanding of either theology or philosophy – and why, in fairness, theologians and philosophers are often equally haphazard in their understanding of law.) We are plainly in no better position than anyone else to resolve the ultimate questions of life, and that is not our office anyway. Our job is to try to reach workable accommodations to the problems of the day.

Indeed, precisely because no one can resolve these questions to anyone else's satisfaction, a law and religion scholar might say, it is our job to come up with suggestions about how best to deal with conflicts between religion and the social order without even *attempting* to answer those questions. Constitutional lawyers are proceduralists: good on forming and proposing 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 dealing with conflicts between law and religion, and leave the deep thoughts about God to our colleagues across the way in the religious studies departments, or to the consciences of individuals.

---

35 For an example of this, see, for example, 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).

The problem, though, 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 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. Too much ultimately turns on these questions to make our resolutions of small-bore issues of legal doctrine especially satisfying, as long as we avoid these larger matters.

Of course, both courts and scholars have attempted to get around these questions of religious truth – but, finally, without much success. For example, we could try to escape some of these questions by simply giving a broad definition to "religion," making it little different from any other strong system of belief.[36] At that point, however, "religion" means something close to 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 denying that religion is anything special – denying "that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions."[37] 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."[38] One can sympathize with those who conclude that this neat solution ends up feeling like *Hamlet* without the

---

[36] *See, e.g., United States v. Seeger,* 380 U.S. 163 (1965) (defining a statutory provision concerning conscientious objectors which required a belief "in relation to a Supreme Being" as including 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).

[37] Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 6 (2007); *see also* Brian Leiter, [cites].

[38] *See* Eisgruber & Sager, *supra* note __.

Prince.[39] In any event, this solution, neat as it is, cannot satisfy everyone as long as some poor soul (so to speak) in the audience raises her hand and asks, "But what if religion *is* a unique and uniquely deserving category of human experience?"

In short, and as I will show in greater detail below, we cannot get around the question of religious truth.[40] It is not leaving, and it cannot be swept under the rug. All the warps and woofs in the fabric of religious freedom jurisprudence, all the inconsistencies that lead us to exclaim that law and religion is inchoherent, stand as a silent but implacable reproach to all of us, judges and scholars alike, who toil in this field, an unstated but stark reminder that, in the end, we cannot help but confront Pilate's question.

Constitutional Agnosticism

That is the project of this book. Lest I be struck by lighting, or worse (say, book reviewers), for my presumption, let me be clear, though. I cannot and do not attempt here to answer the question of God's existence, let alone assign Him to a particular denomination. Although I will have a good deal to say about the arguments of both the New Atheists and their antagonists, I do not take a side in that battle once and for all. 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. I hope it will 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 and law and liberal democracy. But it does not presume to tell the individual what he or she should believe about God.

Instead, as the title of this book suggests, *Constitutional Agnosticism* is about how the individual – especially public officials like judges and legislators, although its arguments

---

39 *See, e.g.,* Chad Flanders, *The Possibility of a Secular First Amendment,* 26 QLR 257, 258 (2008).

40 This point is also made by Steven D. Smith in his superb book on the Religion Clauses, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995).

may apply in different ways to individual citizens as well – should think about religion *as* office-holders and citizens. This is ultimately a book about religion in the public sphere, and so it offers conclusions about how we, as participants in that sphere, should think about religion. Our views as citizens and office-holders may correspond to our views as individuals, to the dearest truths of our own hearts, but they need not do so. We can assume that when Justice Antonin Scalia, who is generally seen as a political conservative, argued in defense of the First Amendment right to burn the flag,[41] he was not arguing in its favor because he hoped to put a torch to Old Glory on the steps of the Supreme Court at the nearest available opportunity.[42] 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 our own religious faith. This book is an argument about the best way of thinking *constitutionally* about religion and religious truth.

That takes care of "Constitutional." Now for "Agnosticism." The argument of this book is that the public perspective that public officials and others should take with respect to questions of religious truth, and their relationship to the conflicts between the obligations of religion and the demands of the wider society, is an agnostic one. Although I will have a good deal more to say in the course of this book about what that means, for now we can offer up a definition of agnosticism that was proposed by the English writer T.H. Huxley, who is generally credited with coining the term. Huxley wrote that an agnostic "is someone who not only is undecided concerning the existence of God, but who also thinks that the question of God's existence is in principle unanswerable. We cannot know whether or not God exists, according to an agnostic, and should therefore neither believe nor disbelieve in him."[43]

---

41 *See* [Johnson cite].

42 Not that he could, under prevailing Supreme Court precedent. *See* [cite].

43 [cite]

Agnosticism has often been viewed as a decidedly tepid thing. In the popular understanding, it is just the "middle ground between theism and atheism"[44] – 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."[45] 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 coming from both directions. So it is with agnosticism. For a person who has taken a strong position for or against the existence of God, nothing can arouse contempt, or more-in-sorrow-than-in-anger condescension, more easily than a person who seems only to be refusing to fish or cut bait. For these people, the agnostic may evoke about the same emotions we may feel when confronted by someone who sits in his car at the unloading zone at the airport . . . and sits. And sits.

But there is more to genuine agnosticism – and more to the *constitutional* agnosticism that is the subject of this book – than that. The committed agnostic's refusal to venture a final conclusion on the existence or non-existence 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, not a compromise.

There are varieties of agnosticism, of course, just as there are varieties of theism and atheism. Some agnostics are indeed just lukewarm atheists; others are theists with commitment issues. But the brand of agnosticism I champion here, and the one that forms the basis for this book, fits neither of these descriptions. If we are to find its deepest meanings, 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 great capacities of art, and the artist has been an agnostic *par excellence.*

---

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

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

Indeed, the primary text for the kind of agnosticism that I argue must underlie "constitutional agnosticism" is not that of a philosopher or a theologian, but a poet.[46] The brand of agnosticism I argue for here is closest to that of 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."[47] The artist who displays true negative capability – Keats had Shakespeare in mind – is capable of 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."[48] As Lionel Trilling has observed, the strength of character that is required for this kind of agnosticism – this remaining perpetually in uncertainties, mysteries, and doubts – is considerable. The rare artist who is capable of true negative capability, far from demonstrating a lack of the courage of his convictions, must draw on great inner resources. Negative capability, in this view, depends "upon the strength of one's sense of personal identity. Only the self that is certain of its integrity and validity can do without the armor of systematic certainties."[49]

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."[50] It has been described as a quality that "is essential for any creative artist, whether writer, poet, composer or painter."[51] And it can be an equally essential element of great judging, or political leadership, or citizenship. It denotes the ability to occupy, as fully as possible, the varied worldviews of our fellow citizens, even at those moments when their worldviews come into the sharpest

---

46 Not for nothing did the poet Percy Bysshe Shelley call poets the "unacknowledged legislators of the world," although it is just possible a hint of self-regard had something to do with it as well. *See* [cite].

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

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

49 Lionel Trilling, *Introduction* to *The Selected Letters of John Keats* 29 (__) (quoted in Daniel Markovits, *Legal Ethics From the Lawyer's Point of View*, 15 Yale J.J. & Human. 209, 279 n.135 (2003)).

50 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).

51 *Id.*

conflict with each other and with our own worldviews. It is no easy task. But it may be a necessary one, if one wishes to negotiate the faultlines between law and religion without prematurely taking one side or the other, or disappearing into the crevasses between them. It is also the stringent, demanding, uneasy – and, perhaps, finally impossible – perspective I argue for in this book.

What constitutional agnosticism means, precisely, will be presented in greater detail in Chapter Five of this book. For now, it will be important for my argument to make four central points, which I offer now as IOUs to be redeemed in due course. First, I want to reiterate that to argue for constitutional agnosticism is not to argue that we must be agnostics personally. Although this book is primarily about law and religion, and religion and liberal democracy, rather than about religion itself, it does argue that these subjects cannot ultimately be discussed meaningfully without confronting questions of religious truth; so I do want to contribute to those larger debates. In those debates, I believe 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 territory has more to offer than can be found in their own encampments. Readers of this book who have come to it through an interest in larger questions of religious truth, and who have found themselves dissatisfied by both poles of the current debate, might find something to content themselves with in the vigorous and empathetic agnosticism I argue for here.

But I am still ultimately arguing only for *constitutional* agnosticism. That perspective may be attractive – may, indeed, present itself as the only attractive alternative – to individuals, both judges and others, who want to find a workable common ground between the needs of the "church" and those of the "state." And it may be attractive *regardless* of their individual religious beliefs. *Constitutional Agnosticism* is an ecumenical book, and I hope its readers will include people with strong religious views for or against the existence of God. Some of them might decide to linger a while longer in the precincts of

agnosticism. But it should be possible to come away convinced by the arguments of this book without altering one's own faith (or lack of faith).

Second, as I hope I have made clear, 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, if not more, 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 I suspect that we law and religion scholars are experts at precisely this kind of two-step.) So let me be clear that the constitutional agnosticism I argue for here *does* offer a distinct perspective on questions of religious truth. That this perspective happens to hold that these questions cannot be answered in a final way is not the same thing as avoiding these questions altogether. It is that strategy of avoidance, I argue, that has characterized 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 ultimately also argues that the best resolution of these questions is the capacity to live within and among uncertainties, mysteries, and doubts that Keats extolled.

Third, in many respects constitutional agnosticism best responds to and comports with the spirit of our own age. We will examine this claim more closely in Part Two of the book. For now, it is worth reminding readers what I have already said: that 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*. Because we often and increasingly think of our own views as mutable, these are also possibilities *for us*; we can change our minds and choose to switch from one set of beliefs about religious truth to another. Charles Taylor, as we have seen, calls this a secular age. But it might be more appropriate, we will see, to call ours an *agnostic* age. In that sense, constitutional agnosticism is quite consistent with the underlying beliefs, and the