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## “A TROUBLESOME RIGHT”: THE “LAW” IN DWORKIN’S TREATMENT OF LAW AND RELIGION

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### INTRODUCTION

Ronald Dworkin’s final book, *Religion Without God*, is a gloriously compact treatment of a massive subject. Perhaps *the* massive subject. Its first sentence is, “The theme of this book is that religion is deeper than God.”<sup>1</sup> The last chapter is titled “Death and Immortality.”<sup>2</sup> This is, in short, a book about eternity and the human condition. These are not small subjects, and Dworkin deals with them grandly. It is an extraordinary last testament.

I have discussed Dworkin’s treatment of these larger issues elsewhere.<sup>3</sup> Other contributors here deal with them as well. My focus here is much more mundane. In one brief chapter, Dworkin descends from the empyrean, more or less, to examine the *law* of religious freedom.<sup>4</sup> My goal here is to assess critically the accuracy and persuasiveness of that chapter.

Without rehashing an old debate or sharing too many cherished lines from that debate, one can acknowledge that Dworkin received many sharp criticisms for his jurisprudential approach in general and his treatment of individual cases and doctrines in particular. His *modus operandi*, wrote one of his more vocal critics, was to “argue[] baldly that constitutional law is and should be a department of applied moral philosophy.”<sup>5</sup> That approach was “too abstract for a case-based legal system” like ours.<sup>6</sup> Beyond the philosophizing, there was “little texture to Dworkin’s analysis of legal issues.”<sup>7</sup> His writings showed “little interest in the words of the Constitution, or in its structure . . . , or in any

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<sup>1</sup> RONALD DWORKIN, *RELIGION WITHOUT GOD* 1 (2013).

<sup>2</sup> *Id.* at 149.

<sup>3</sup> See Paul Horwitz, *Dworkin’s Jisei*, COMMONWEAL, Feb. 7, 2014, at 26 [hereinafter Horwitz, *Dworkin’s Jisei*]; Paul Horwitz, *The Sublime Dworkin*, JOTWELL (July 23, 2013) [hereinafter Horwitz, *Sublime Dworkin*], <http://conlaw.jotwell.com/the-sublime-dworkin>, archived at <http://perma.cc/AXT7-WXJV> (reviewing Ronald Dworkin, *Religion Without God*, N.Y. REV. BOOKS, Apr. 4, 2013, at 67).

<sup>4</sup> See DWORKIN, *supra* note 1, at 105-47.

<sup>5</sup> Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321-22 (2002).

<sup>6</sup> Richard A. Posner, *Conceptions of Legal “Theory”: A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377, 387 (1997).

<sup>7</sup> *Id.* at 380-81.

extended body of case law, let alone in the details of particular cases. His implicit legal universe consist[ed] of a handful of general principles embodied in a handful of exemplary, often rather bodiless, cases.”<sup>8</sup>

All quite right, in my view. This is not to deny that he was one of the most eminent and important legal philosophers of his time. So he was, a point on which even his critics agree.<sup>9</sup> I dare say that outside certain nonlegal circles, his views on constitutional legal issues grew less relevant to current debates.<sup>10</sup> That is eventually true for all of us, if we are very lucky. But, as *Religion Without God* shows, to the end (and after), Dworkin continued to write in a clear and illuminating fashion on broad issues involving current concerns, not to mention eternal ones. On the details of the law and even the broad outcomes of cases, however, he was a less reliable or convincing guide. Or so I will argue here.

Let me first give Dworkin his due, however.<sup>11</sup> The problem the chapter centers on – whether there is a principled “justification for offering religion a right to special protection that is exclusive to theistic religions,”<sup>12</sup> and if not, what the scope and nature of “freedom of religion” should look like – has consumed a great deal of attention recently. It figures heavily in contemporary freedom-of-religion scholarship.<sup>13</sup> And it has played a significant role, sometimes explicitly but more often implicitly, in recent statutory and constitutional church-state cases as well.<sup>14</sup> Dworkin’s treatment of this

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<sup>8</sup> Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 435 (1992).

<sup>9</sup> See, e.g., Richard A. Posner, *Reply to Critics of The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1796, 1796 (1998) (calling Dworkin “the leading scholar of jurisprudence in the English-speaking world”).

<sup>10</sup> See Horwitz, *Sublime Dworkin*, *supra* note 3 (“[Dworkin’s] loss was of less moment, perhaps, to current work in constitutional law and theory. Dworkin’s missiles against the current Supreme Court, which continued to land in the pages of the *New York Review of Books*, were more than merely transatlantic missiles; they seemed to have been launched from another time and place altogether.”).

<sup>11</sup> On that score, I must point out that the quote I use in the title of this piece – “a troublesome right” – is in fact incomplete. Dworkin proposes in *Religion Without God* that we treat freedom of religion as a part of a “general right to ethical independence” rather than as a “troublesome special right” involving a “high hurdle of protection and therefore [a] compelling need for strict limits and careful definition.” DWORKIN, *supra* note 1, at 132-33. The elision is of little importance as far as the title is concerned. But I would not want Dworkin’s argument to be misunderstood.

<sup>12</sup> *Id.* at 117.

<sup>13</sup> See, e.g., Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770 (2013) (reviewing BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013)); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

<sup>14</sup> In the Supreme Court’s recent ministerial exception case, for instance, the Government took a position similar to Dworkin’s here, arguing that while religious institutions might invoke freedom of association against particular applications of federal employment

problem, which is driven by his argument in the first part of the book that a “belief in a god is only one possible manifestation or consequence of [a] deeper worldview” that we could call “religious,”<sup>15</sup> is interesting and provocative.

Dworkin’s legal conclusions are admittedly hard to disentangle from the broader tapestry of argument he offers in *Religion Without God*. Some may find this a virtue and a necessary consequence of the insistence in his last books on the “unity of value,”<sup>16</sup> under which, as one critic describes it, “all of our evaluative commitments have to finally cohere . . . not just morality, but also politics, law, aesthetics, prudence, . . . you name it.”<sup>17</sup> Others may consider it a shortcoming, one that impairs its usefulness for law and legal doctrine.

Again, one must be fair. In his “Religious Freedom” chapter, Dworkin examines how his view that we should “adopt[] a conception of religion that is deeper than theism” plays out “as a matter of political morality as well as philosophical depth,”<sup>18</sup> not as a humdrum, if difficult, question for non-Herculean lawyers and judges. Given his unified theoretical approach, however, his approach must perforce play out either completely or not at all. Those who are not convinced by the unity of value, by his broader thoughts on nontheistic religion, or by his broader argument that religious freedom should be principled rather than historically, textually, or pragmatically based,<sup>19</sup> will find it hard to draw any useful piecemeal advice from Dworkin’s book. Dworkin’s greatness rested in his talents at the wholesale level, not in offering retail goods. Those who are not inclined to buy his wares in bulk will go home with empty hands.<sup>20</sup>

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discrimination laws, there was “no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). The Court unanimously rejected this position, calling it “untenable,” “remarkable,” and “hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.” *Id.* The case thus suggested that religion *is* “special” as a textual matter. But it did not and could not resolve the question whether it is special as a principled matter, or of what constitutes “religion,” a “religious” claim, or a “minister” in the first place.

<sup>15</sup> DWORKIN, *supra* note 1, at 1.

<sup>16</sup> RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 1 (2011).

<sup>17</sup> Don Herzog, *Cute Prickly Critter with Presbyopia*, 110 MICH. L. REV. 953, 959 (2012) (reviewing DWORKIN, *supra* note 16). “Presbyopia,” you will be happy to learn, “is a condition in which[, with age,] the lens of the eye loses its ability to focus, making it difficult to see objects up close.” *Presbyopia*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/001026.htm> (last updated June 2, 2012), *archived at* <http://perma.cc/LD8K-SD7G>.

<sup>18</sup> DWORKIN, *supra* note 1, at 109. I would have thought “breadth” or “scope” would be the right word here, not “depth.”

<sup>19</sup> See, e.g., *id.* at 109-16.

<sup>20</sup> Cf. Edward B. Foley, *Requiem for Hercules*, 18 CONST. COMMENT. 463, 478 (2001)

## I. DWORKIN'S DEMOTION OF RELIGIOUS FREEDOM

There is one broad exception to this, and it will serve as a vehicle for briefly summarizing Dworkin's argument before moving to some of the specifics of his legal discussion. The question he asks is simple enough. Constitutional provisions guaranteeing religious freedom are often taken to involve some form of theism. "Should this fact of common understanding be decisive in determining who is entitled to the protection the various documents declare?"<sup>21</sup> His answer, unsurprisingly to those who are at all familiar with his work,<sup>22</sup> is "no." Arguments from text, history, and policy are "inadequate to justify a basic [constitutional] right."<sup>23</sup> We must find a *principled* "justification for offering religion a right to special protection that is exclusive to theistic religions"<sup>24</sup> – one that does not make the law "silly or arbitrary"<sup>25</sup> and that treats freedom of religion as "a human right, not just a useful legal construction."<sup>26</sup> In Dworkin's view, it is difficult, if not impossible, to provide a principled basis for confining such a right to theistic religion.<sup>27</sup>

The alternative is to "expand that right's scope to reflect a better justification."<sup>28</sup> We might thus "declare that people have a right in principle to the free exercise of their profound convictions about life and its responsibilities, whether derived from a belief in god or not, and that government must stand neutral in policy and expenditure toward all such convictions."<sup>29</sup> But, he rightly observes, "no community could possibly accept that extended right."<sup>30</sup> It would quickly run into insuperable problems: "Once we break the connection between a religious conviction and orthodox theism,

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(reviewing RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000)) (arguing, in light of the author's own experience as a government litigator, that normative constitutional law scholarship should be less Herculean and more incrementalist and evidence based, and concluding, "[W]e cannot expect answers on Big Questions, and so [we] necessarily must search for answers to smaller ones").

<sup>21</sup> DWORKIN, *supra* note 1, at 108.

<sup>22</sup> See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1-38 (1996); Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 134-35, 138 (1997) (reviewing DWORKIN, *supra*; DENNIS PATTERSON, *LAW & TRUTH* (1996)).

<sup>23</sup> DWORKIN, *supra* note 1, at 111.

<sup>24</sup> *Id.* at 117.

<sup>25</sup> *Id.* at 109.

<sup>26</sup> *Id.* at 111. Those who question whether there is any difference between the two will have gotten off the bus long before.

<sup>27</sup> See *id.* at 110-16.

<sup>28</sup> *Id.* at 117.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

we seem to have no firm way of excluding even the wildest ethical eccentricity from the category of protected faith.”<sup>31</sup>

Moreover, once we add in the nonestablishment rule, we run into further tensions. For Dworkin, nonestablishment means that “government must stand neutral in policy and expenditure toward all such convictions.”<sup>32</sup> And “an exemption for one faith from a constraint imposed on people of other faiths discriminates against those other faiths on religious grounds.”<sup>33</sup> This is a difficult gauntlet to run. In the end, “the constitutional requirement that government not choose defeats itself.”<sup>34</sup>

I must depart from the role of impartial summarizer for a moment. If Dworkin is right in his description of the nonestablishment norm, it can *only* be as a matter of principle. As a matter of practice – one that some think can be justified as a decent marriage between high principle and local (that is, American) history and culture<sup>35</sup> – it is far from clear that either of the Religion Clauses demand this kind of rigid neutrality. Nor should we accept Dworkin’s assumptions about what “discrimination” entails uncritically.<sup>36</sup> Dworkin’s concerns that requiring the government “not [to] choose among religions”<sup>37</sup> leads to incoherence are real ones.<sup>38</sup> But it should be noted that some of the tensions that Dworkin exploits here to undermine a “special right”<sup>39</sup> to religious freedom are, if not of his own making, then at least a product of his own largely undefended definitions.<sup>40</sup> We should certainly not accept them uncritically as statements of *law*.

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<sup>31</sup> *Id.* at 124.

<sup>32</sup> *Id.* at 117.

<sup>33</sup> *Id.* at 125.

<sup>34</sup> *Id.* at 128.

<sup>35</sup> See generally PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* (2011); ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013).

<sup>36</sup> See, e.g., Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in *LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS* 194 (Austin Sarat ed., 2012).

<sup>37</sup> DWORKIN, *supra* note 1, at 128.

<sup>38</sup> See, e.g., Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 885 (2009); Steven D. Smith, *Barnette’s Big Blunder*, 78 CHI.-KENT L. REV. 625, 645-47 (2003). Like Koppelman, I think this concern is real but less troubling in practice than in principle. See, e.g., HORWITZ, *supra* note 35, at 193.

<sup>39</sup> DWORKIN, *supra* note 1, at 133.

<sup>40</sup> Cf. Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1077-83 (2010) (discussing the method of argument by “persuasive definitions” (citing Charles Leslie Stevenson, *Persuasive Definitions*, 47 MIND 331, 331 (1938))); Posner, *supra* note 6, at 379 (accusing Dworkin of engaging in “persuasive definition with a vengeance” elsewhere in his work).

Nevertheless, there are pieces of this argument that are important and useful whether one accepts all of Dworkin's general principles or not. As I said, there *are* concerns about the viability of a workable principle of freedom of religion under a strict regime of government neutrality. We may reasonably doubt that this is what American law requires in practice, occasional broad statements by the Supreme Court notwithstanding.<sup>41</sup> But we cannot deny that the question of neutrality has bedeviled church-state law for a long time. Dworkin's arguments concerning the problems with limiting freedom of religion to theistic faith also describe a genuine dilemma for freedom-of-religion jurisprudence. Neither of these insights are new. Both have been dealt with better and in more detail by others.<sup>42</sup> But they are presented neatly here.

Let us stipulate that Dworkin has presented a real problem with freedom of religion. If such a freedom is limited to theistic faiths, it excludes too much. If it is expanded beyond that scope, it is unworkable and self-contradicting. What is his answer to this dilemma?

In a word, it is to demote religious freedom. Freedom of "religion," now broadly defined, should be treated as "a very general right to what we might call 'ethical independence,'" under which the "government must never restrict freedom just because it assumes that one way for people to live their lives . . . is intrinsically better than another."<sup>43</sup> The government, however, may limit that right for many other reasons, such as "to protect other people from harm . . . , or to protect natural wonders, or to improve the general welfare."<sup>44</sup> It should not be treated as a "special right" that the government may not infringe absent a compelling interest.<sup>45</sup> It should be treated, in short, as an equality rule for "religion," capable of some creative application to be sure, but nothing more.<sup>46</sup> Any "religious" claims against government action may be overcome by a "neutral . . . justification for any constraint."<sup>47</sup> No compelling interest is needed.

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<sup>41</sup> See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice.").

<sup>42</sup> See, e.g., *supra* note 13 and accompanying text.

<sup>43</sup> DWORKIN, *supra* note 1, at 129-30.

<sup>44</sup> *Id.* at 130-31.

<sup>45</sup> *Id.* at 131. It is not entirely clear how this would translate into the usual doctrinal language of standards of review. It would seem that Dworkin would submit such claims to a form of rational basis review, albeit one in which certain reasons are treated as illegitimate justifications for a law. See *id.* at 131-34. But the point is not entirely clear. Cf. Frank I. Michelman, *Foxy Freedom?*, 90 B.U. L. REV. 949, 961-72 (2010) (reviewing DWORKIN, *supra* note 16) (asking how Dworkin's theory of ethical independence would cash out in terms of the American doctrine of tiers of scrutiny, and wondering "whether, in view of the apparent entailments for legal doctrine, the value of respect for ethical responsibility can plausibly be said to *exhaust* what 'liberty' stands for in one particular liberal culture").

<sup>46</sup> See DWORKIN, *supra* note 1, at 134.

<sup>47</sup> *Id.*

What we appear to have, in short, is the rule in *Employment Division v. Smith*.<sup>48</sup> To that, however, we must add two additional limitations. First, Dworkin offers a tricky – not arbitrary, surely, but certainly difficult to navigate – description of those reasons that will satisfy his conditions for rational justification of a law that infringes on the general right of ethical independence. The government cannot infringe that right simply because it believes that people who act one way and not another “are better people.”<sup>49</sup> For example, the government “*may* not” – he means *must* not – “forbid logging just because it thinks that people who do not value great forests are despicable.”<sup>50</sup> But other reasons, ostensibly not tied to condemnation of independent ethical choices, are fine – the government “may protect forests because forests are in fact wonderful[,] even though none of its citizens thinks a life [spent] wandering among them has any value.”<sup>51</sup> This distinction would not, one suspects, have been much consolation to the plaintiffs in *Lyng v. Northwest Indian Cemetery Protective Ass’n*.<sup>52</sup>

Second, *Smith* permitted legislative accommodation of religion.<sup>53</sup> As a matter of political morality, at least, Dworkin would impose additional constraints.<sup>54</sup> Congress’s decision to reverse the result in *Smith* through the passage of the Religious Freedom Restoration Act<sup>55</sup> (RFRA) was a mistake – not just because RFRA was overbroad, or discriminated in favor of religion,<sup>56</sup> but because Congress was wrong *on the facts*. “The general right [of ethical independence] does not protect the use of a banned hallucinogenic drug when

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<sup>48</sup> 494 U.S. 872, 879 (1990) (holding that Free Exercise claims for accommodation from laws that burden religion must yield where a law is neutral and generally applicable).

<sup>49</sup> DWORKIN, *supra* note 1, at 130.

<sup>50</sup> *Id.* (emphasis added).

<sup>51</sup> *Id.* at 131.

<sup>52</sup> 485 U.S. 439, 456-58 (1989) (rejecting a Free Exercise claim challenging a government decision to permit timber harvesting and road construction in an area of national forest traditionally used for religious purposes by members of three Native American tribes, who asserted that this use of the lands would effectively destroy their ability to practice their religion altogether).

<sup>53</sup> *See Smith*, 494 U.S. at 890.

<sup>54</sup> *See DWORKIN, supra* note 1, at 134-35.

<sup>55</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (2012)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

<sup>56</sup> That, however, is a part of Dworkin’s calculus. *See DWORKIN, supra* note 1, at 135 (“If the Native American Church is entitled to an exemption from drug-control laws, then [followers of Aldous Huxley, who wrote of the benefits of taking mescaline,] would also be entitled to an exemption, and skeptical hippies would be entitled to denounce the entire drug-control regime as a religious establishment.”). Others share the view that legislative accommodations for religion should not discriminate, without believing that it would be wrong to accommodate the peyote use at issue in *Smith*. But Dworkin’s disagreement with RFRA, as we have seen, does not appear to rest on nondiscrimination grounds alone.

that use threatens general damage to the community.”<sup>57</sup> Thus, “the Court [in *Smith*] was wrong as a matter of political morality and Congress wrong.”<sup>58</sup> The government may engage in *some* accommodation, provided it is sufficiently broad.<sup>59</sup> In general, however, the “priority of nondiscriminatory collective government over private religious exercise seems inevitable and right.”<sup>60</sup> So what we really have, once Dworkin is done, is *Smith* without legislative accommodation.

## II. EVALUATING DWORKIN’S DEMOTION PROPOSAL

Dworkin calls his proposal “radical.” Referring to his position that “rational, nondiscriminatory laws” may require churches to “restrict their practices,” he asks his readers, “Do you find that shocking?”<sup>61</sup> This is a rhetorical question, of course. An author who uses it, like an amusement park that calls its most popular ride the “Deathtrap,” seeks to intrigue and attract, not to repel.

In any event, Dworkin’s position is not especially shocking. In the ministerial exception case, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Government argued, as one article has summarized it, “not only that the ministerial exception is not rooted in the religion clauses at all, but that the religion clauses provide no additional protection to religious institutions from antidiscrimination laws beyond those already afforded by the Court’s expressive-association cases.”<sup>62</sup> Other amici, representing a host of law professors, some of them law and religion scholars, similarly argued that the case should be dealt with under the rubrics of freedom of association or freedom of speech, not through the Religion Clauses, while making clear that any such associational claims must show a close connection to expression.<sup>63</sup> As already discussed, some strong arguments have been made that, as a matter of principle (but not necessarily as a matter of constitutional text or actual practice),<sup>64</sup> there is no good reason to treat religion as “special” for

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See id.* at 136.

<sup>60</sup> *Id.* at 137.

<sup>61</sup> *Id.* at 129, 136.

<sup>62</sup> Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, 2012 CATO SUP. CT. REV. 307, 319 (citing Brief for the Federal Respondent, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553), 2011 WL 3319555).

<sup>63</sup> *See* Brief of Amici Curiae Law and Religion Professors in Support of Respondents, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), 2011 WL 3532698. We take our cases as we find them when working as advocates, of course. But it is worth noting that the primary case relied upon by the amici and others as proof that churches *might* be entitled to *some* protection, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), is one many of them have roundly condemned elsewhere.

<sup>64</sup> *See, e.g.*, Schwartzman, *supra* note 13, at 1426 (“As a legal matter, however, we



constitutional purposes.<sup>65</sup> Some have seen in the rise of such arguments a trend toward radical “secular egalitarianism” that threatens religious freedom as we know it.<sup>66</sup> Others, somewhat less apocalyptically, still argue that “[f]or the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion *in principle*—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.”<sup>67</sup> His position is increasingly popular – certainly enough so that it has lost the power to shock.

But is this position right or wrong? Its accuracy and persuasiveness rest substantially on three things: its statements about current law, the initial moves by which Dworkin clears the ground for it, and its applications. All three are weak. That does not necessarily make Dworkin’s position wrong. But it certainly undercuts the power of his argument.

The first element, the accuracy of his statements about current law, is the least important. It is striking how little presence actual cases have in the chapter. But this is, after all, an argument for an ideal, principled version of religious freedom. Still, sparse though his treatment of the cases may be, careful and accurate description of those cases would have strengthened Dworkin’s credibility, and eased concerns that a “moral reading”<sup>68</sup> of the Religion Clauses, or of any other portion of the Constitution, is too far afield from actual legal practice to be of much use to lawyers and judges – that the devil is in the lack of details.

Take Dworkin’s brief mention of *Torcaso v. Watkins*.<sup>69</sup> Dworkin says that “[i]n its *Torcaso* decision, the Supreme Court listed, among religions meeting the test it had in mind, humanistic societies that are explicitly atheistic.”<sup>70</sup> The statement is accurate; to Dworkin’s credit, he emphasizes that the Court in this footnote statement was referring to humanist *societies*, not to secular humanism in general, a point that often escapes notice.<sup>71</sup>

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cannot ignore the constitutional text we have inherited. And so the idea that religion must be special is unavoidable. The text simply makes it so. But when we confront the moral question—‘Is religion special?’—the answer is far more difficult.”).

<sup>65</sup> See *supra* notes 24-40 and accompanying text.

<sup>66</sup> See generally STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* (2014).

<sup>67</sup> Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 407 (2011).

<sup>68</sup> See generally DWORKIN, *supra* note 22.

<sup>69</sup> *Torcaso v. Watkins*, 367 U.S. 488 (1961).

<sup>70</sup> DWORKIN, *supra* note 1, at 123 (referencing the Court’s decision in *Torcaso*, 367 U.S. at 495 n.11, where the Court recognized several “religions in this country which do not teach what would generally be considered a belief in the existence of God,” such as “Buddhism, Taoism, Ethical Culture, Secular Humanism and others”).

<sup>71</sup> See Eduardo M. Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 797 n.37 (1997).

But it is unlikely that the Supreme Court believed then, let alone now, that secular humanism or any other “nontheistic conviction[]”<sup>72</sup> constitutes religion for all purposes in the Religion Clauses.<sup>73</sup> In striking down a state oath law that barred atheists from serving in public office, the Court emphasized that the government cannot impose requirements that “aid all religions as against non-believers,” or “aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”<sup>74</sup> This statement was grounded in the Establishment Clause and its rule of nondiscrimination. It did not treat “humanist societies,” let alone “humanist” *beliefs*, as the equivalent of religion for all purposes, especially under the Free Exercise Clause. Nor is it necessary to do so for all Establishment Clause purposes. What is important is that the government is barred from teaching “propositions *about* religion,” whether positive or negative, and “whether or not [the] adherents of the negative views . . . could be said to practice a religion.”<sup>75</sup> Dworkin’s quote is accurate enough. But in the context of his book, he encourages a broader reading of *Torcaso* and the surrounding doctrine than the case requires. In general, we should be cautious about his use of actual law.

So much for that. What about the foundational pieces of Dworkin’s argument – the criteria he sets in place for a proper approach to religious freedom, and the criticisms he makes of alternatives to his proposed demotion of religious freedom, without which that demotion would be less necessary and thus less persuasive? Although he scores some important points and makes his argument eloquently, there is reason for skepticism about this argument, too.

Part of the problem here is his penchant for argument by persuasive definition. Recall that he begins by setting the following condition: “We must reject any account of the nature or scope of religion that would make a distinct right to religious freedom silly or arbitrary.”<sup>76</sup> He argues that this is best accomplished “by adopting a conception of religion that is deeper than theism,”<sup>77</sup> by which he evidently means “broader,” not “deeper.” Because it becomes more difficult to avoid absurd results under a definition of freedom of religion that is both highly protective and highly capacious in scope, this criterion ends up buttressing his case for demoting freedom of religion altogether.

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<sup>72</sup> DWORKIN, *supra* note 1, at 123.

<sup>73</sup> See, e.g., Richard M. Esenberg, *Must God Be Dead or Irrelevant: Drawing a Circle That Lets Me in*, 18 WM. & MARY BILL RTS. J. 1, 31 & nn.207-10 (2009) (collecting lower court cases rejecting “allegations of an ‘establishment’ of secularism”).

<sup>74</sup> *Torcaso*, 367 U.S. at 495.

<sup>75</sup> Kent Greenawalt, *Teaching About Religion in the Public Schools*, 18 J.L. & POL. 329, 337 (2002) (emphasis added) (citing Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433, 1456-73 (1999)); see also HORWITZ, *supra* note 35, at 223-74.

<sup>76</sup> DWORKIN, *supra* note 1, at 109.

<sup>77</sup> *Id.*

There *are* good reasons to adopt a capacious understanding of “religion” and “religious freedom,” and they do lead to concerns about the resulting regime. But we might notice two things about Dworkin’s move here. The first is his elision of “religion” and “religious freedom.” What constitutes “religion” is a question for scholars of religion. What constitutes “religious *freedom*” is a legal question. How broadly or narrowly we define religion when considering that question will depend on considerations quite distinct from those that concern religion scholars. If our definition results in judicial underenforcement relative to the full universe of potentially “religious” beliefs, that will hardly be unusual for law, which practices the art of the possible.<sup>78</sup> As it turns out, despite the broader conceptual questions raised by this issue, courts do not seem to have too much practical difficulty dealing with definition-of-religion questions sensibly.<sup>79</sup> The real question will be whether there are good reasons to limit the scope of “religion” within the legal practice of “*freedom of religion*.”

That is the second thing to notice about Dworkin’s move. One would have thought that a broad range of justifications for the basic contours of modern freedom of religion jurisprudence – in particular, its desire to provide meaningful protection for religion and, consequently, to limit the scope of beliefs or practices to which that protection applies – would satisfy the requirement that those justifications not be “silly or arbitrary.”<sup>80</sup> Outside the veil of ignorance, one might suppose that text and history alone would suffice as adequate justifications. Dworkin acknowledges that history has its claims here.<sup>81</sup> But he concludes that neither history nor “policy arguments about the need for peace” are enough “to justify a basic right.”<sup>82</sup> This rejection allows him to set off on the road of abstractions of “political morality” and “philosophical depth,”<sup>83</sup> defining freedom of religion so broadly that his ultimate proposal to demote religious freedom becomes a foregone conclusion.

We hardly need to travel all the way down that road. Indeed, beyond a bare minimum of theorization, we need not travel more than a few steps. An approach to freedom of religion – to its scope and limits – that starts with text, history, and a few basic principles will indeed raise questions of consistency,

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<sup>78</sup> Cf. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (discussing and defending judicial underenforcement of constitutional norms); Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583 (2011) (applying this concept to the law of the Establishment Clause).

<sup>79</sup> See, e.g., Andrew Koppelman, *Religious Establishment and Autonomy*, 25 CONST. COMMENT. 291, 294 n.12 (2008).

<sup>80</sup> DWORKIN, *supra* note 1, at 109.

<sup>81</sup> See *id.* at 110-11.

<sup>82</sup> *Id.* at 111.

<sup>83</sup> *Id.* at 109.

coherence, and imperfect application. But it will be far from “silly or arbitrary,” by any reasonable definition of that term.<sup>84</sup>

In this short space I cannot address all the other problems with Dworkin’s foundational arguments. In any event, though I have attempted above to offer an impartial description of those arguments and not a critical one, for many readers description will be tantamount to criticism. It is perhaps best to say simply that, as we have just seen, many of those arguments build on sweeping assertions that we need not accept as uncontroversial. We need not accept uncritically the notion that “the interpretation of basic constitutional concepts” demands a deep level of attention to “matter[s] of political morality as well as philosophical depth.”<sup>85</sup> Knowing that religious voluntariness is a major part of post-Reformation Western thought, we need not accept that freedom to worship the god of one’s choice is “over-inclusive” because “tolerating atheists can lead *only* to a god’s anger.”<sup>86</sup>

Nor, despite the fact that he raises a genuine issue here, need we accept all the struts supporting Dworkin’s argument that religious freedom doctrine as it stands is fatally self-contradictory.<sup>87</sup> Dworkin is an elegant writer. It sounds plausible enough to say about religious accommodations that “an exemption for one faith from a constraint imposed on people of other faiths discriminates against those other faiths on religious grounds.”<sup>88</sup> If you believe this, then there is indeed a problem of contradiction.

The problem is less grave, however, if we do not apply this general principle in an absurd manner. Even if we extend a right to use hallucinogenic drugs to anyone who has a strong religious or quasi-religious conviction about its use, does that really discriminate “on religious grounds[] against those who only want to get high”?<sup>89</sup> Is it really fatally self-contradictory to teach evolution, while not teaching creationism, because evolution is *consistent* with a religious

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<sup>84</sup> Similarly, Dworkin argues, with good reason, that an extension of freedom of religion to include any “profound convictions” will be untenable. *Id.* at 117. But he offers as his first example the problems that would result from providing strict protection for the “religious” freedom of “those many people who in the popular phrase ‘worship’ Mammon,” treating material success as a goal of “transcendent importance.” *Id.* I do not wish to belittle his broader point here, but the example is silly and a useful reminder of how little we should rely on turns of phrase in developing serious arguments. “Serious worshipper[s] of Mammon,” *id.* at 120, if they exist (I have not met any who meet his description), do not present genuine difficulties of application that would justify adopting a prescription – the demotion of religious freedom to an easily overcome idea of “ethical independence” – that Dworkin himself calls “radical.” *Id.* at 129. This may just be one area in which judges manage things better than philosophers.

<sup>85</sup> *Id.* at 108-09.

<sup>86</sup> *Id.* at 112 (emphasis added).

<sup>87</sup> *See id.* at 124-28.

<sup>88</sup> *Id.* at 125.

<sup>89</sup> *See id.* at 126.

view that God does not exist?<sup>90</sup> The difference between the plaintiffs in the first hypothetical may turn on the substantiality of the burden involved, and treating different burdens differently is not discriminatory. In the second case, teaching evolution as a dominant explanatory theory in biology is sensible in itself, and does not require the teacher to "proceed to atheist or theist conclusions."<sup>91</sup> The existence of genuine conceptual problems here<sup>92</sup> does not require us to undo the good along with the bad, any more than we are required to demote the Speech Clause because free speech law "discriminates" in favor of political speech and against criminal conspiracies.

I have suggested so far that the problems Dworkin raises concerning the law of freedom of religion are genuine, but that the gloss of abstraction in his argument overstates these problems and gives an undue air of inevitability to his demotion proposal. If his demotion proposal were a good one in itself, good enough to make the transition costs worthwhile, we might still be willing to accept the proposal. With suitable reservation, Dworkin suggests that it is. Of the broader subject of his book, he writes, "If we can separate God from religion," we might be able to lower the heat of, or even eliminate, the ongoing culture wars that embroil religion and politics.<sup>93</sup> Conceding that the ambition is "utopian," he adds, "But a little philosophy might help."<sup>94</sup> Similarly, he suggests in his chapter on the law of religious freedom that "the general right to ethical independence give[s] us the protection that, on reflection, we believe we need,"<sup>95</sup> and that his approach can satisfactorily and persuasively address the church-state legal issues raised by the culture wars.<sup>96</sup> He observes that this is probably "too much to hope."<sup>97</sup> But he intimates that his approach is not only required as a matter of political morality, but potentially capable of persuading others, including average citizens and not philosophers, on both sides of the culture wars.

It is not. None of the conclusions he lays down, thoughtfully but imperially, is strongly or clearly compelled by his general principles. And none of the

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<sup>90</sup> See *id.* at 126-28.

<sup>91</sup> Kent Greenawalt, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 388 (2003). Dworkin allows as much later in the book. See DWORKIN, *supra* note 1, at 143-44.

<sup>92</sup> See, e.g., HORWITZ, *supra* note 35, at 223-74.

<sup>93</sup> DWORKIN, *supra* note 1, at 9.

<sup>94</sup> *Id.* at 10.

<sup>95</sup> *Id.* at 133.

<sup>96</sup> See *id.* at 137 (proposing to "put our new hypothesis—that the general right to ethical independence gives religion all the protection appropriate—to a more concrete test by considering the heated controversies of [the culture] wars in its light"); *id.* at 146-47 (suggesting, albeit somewhat unclearly, that the principles represented both by the book as a whole and by his chapter on the law *could* bring a larger number of individuals together on common ground).

<sup>97</sup> *Id.* at 147.

specific solutions he offers to various legal and political problems involving religion would gain any purchase at all in the culture wars – not one.

Take a couple of examples. Dworkin suggests that it might be acceptable for the government to finance “Catholic adoption agencies that do not accept same-sex couples as candidates, on the same terms as financing agencies that do, . . . provided that enough of the latter are available so that neither babies nor same-sex couples seeking a baby are injured.”<sup>98</sup> He contrasts this with Congress’s decision to reverse the Supreme Court’s specific decision in *Smith* with respect to an accommodation for religious peyote users, which he says was wrong because it “would put people at a serious risk that it is the purpose of the law to avoid.”<sup>99</sup>

As an application of principle, this is questionable, at least once actual facts and values on the ground are applied. Applying the same principles, many people, and certainly those who are most attentive to and passionate about these issues, would conclude that the first accommodation *was* harmful, regardless of the numbers involved or the adequacy of the available alternatives, because it would send a message of abridgement or disparagement of “full and equal citizenship in a free society.”<sup>100</sup> Conversely, the argument for a religious (however defined) exemption for peyote use is that the drug is unpleasant enough and safe enough, and its use is rare enough, that such an exemption would *not* “put people at a serious risk that it is the purpose of the law to avoid.”<sup>101</sup> As a matter of principle, then, neither conclusion is compelled by Dworkin’s framework. As a matter of politics, the question is even more dubious. Would any common ground be achieved in the culture wars by refusing on principle to grant exemptions to a few in the case of peyote, while drawing courts and legislatures alike into the most heated battleground of those wars by accommodating a refusal to allow same-sex adoptions?

To take another example, it is not clear how one demonstrates that “[e]thical independence does condemn official displays of the insignia of organized religions on courthouse walls or public streets unless these have genuinely

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<sup>98</sup> *Id.* at 136.

<sup>99</sup> *Id.*

<sup>100</sup> Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 650 (2013) (citing *Pleasant City Grove v. Summum*, 555 U.S. 460, 482 (2009) (Stevens, J., concurring)); see also Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1343-45 (2011). These articles address same-sex marriage, not adoption. I draw on them not to suggest that they have a particular view on the latter question, but simply to suggest that it would not be hard to make an argument, from within Dworkin’s approach, that a significant harm is involved in funding adoption agencies that refuse to accept same-sex couples as candidates.

<sup>101</sup> DWORKIN, *supra* note 1, at 136; see, e.g., Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 474-77 (2012) (discussing the spread of such exemptions); Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 715 (2005) (“[P]eyote is unpleasant to use and therefore has not generated widespread popular demand.”).

been drained of all but ecumenical cultural significance.”<sup>102</sup> That is more or less how the law stands today. But it has not really eased the culture wars. On the contrary, to say that a religious display has nothing more than “ecumenical cultural significance” is itself a provocation in the culture wars. It leads the combatants on one side to emphasize the continuing religious nature of the display and their offense at it. And it moves the combatants on the other side to proliferate the number of displays,<sup>103</sup> while insisting that the display is both genuinely religious *and* a fundamental part of American culture, or describing such displays as secular and ecumenical while offering the broadest possible winks to their audience. The temperature has gone up, not down.

And another: Dworkin writes that “moment of silence” laws satisfy his principle of “[e]thical independence . . . unless the legislative record displays an intention specifically to benefit theistic religion.”<sup>104</sup> Why is intent relevant here? The ethically independent individual’s decision how to use that moment of silence is not affected by the legislature’s own preference for prayer over meditation.

Similarly, in considering the teaching of intelligent design in public schools, why is it relevant that those who proposed the law “were acting not primarily for purely academic motives” but in the spirit of what Dworkin calls “a national campaign of the so-called religious right to increase the role of godly religion in public life”?<sup>105</sup> Teaching intelligent design may well be constitutionally problematic, but what contribution does legislative intent make to *Dworkin’s* evaluation? It is true that he believes that “[e]thical independence . . . stops government from restricting freedom only for certain reasons and not for others.”<sup>106</sup> But that limitation applies, with some justification, to government arguments defending *infringements* on individual choice. To the extent that advocates of intelligent design propose that it be taught *in addition to* standard evolutionary theory, can this example really be called a restriction on freedom?

And so on. Again, my point is not that none of Dworkin’s proposals make sense, either under current approaches to religious freedom or under his proposed rule of “ethical independence.” I agree with some and disagree with others. While they may be broadly consistent with his approach, however, none of them are clearly compelled by it. If his goal is to ease contradictions in current law and lend clarity and integrity to our treatment of freedom of

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<sup>102</sup> DWORKIN, *supra* note 1, at 138.

<sup>103</sup> For example, the Alabama legislature recently debated a bill that would allow the display of the Ten Commandments in public buildings. See Kyle Whitmire, *Ten Commandments Bill on Way to Alabama Senate After Passing out of Committee*, AL (Feb. 27, 2014), [http://blog.al.com/wire/2014/02/ten\\_commandments\\_bill\\_on\\_way\\_t.html](http://blog.al.com/wire/2014/02/ten_commandments_bill_on_way_t.html), archived at <http://perma.cc/4A4G-PXQW>.

<sup>104</sup> DWORKIN, *supra* note 1, at 140.

<sup>105</sup> *Id.* at 142-43.

<sup>106</sup> *Id.* at 131.

religion, he falls short. And to the extent that he harbors a broader hope, however faint, that his proposal might cool the culture wars, that hope is obviously misplaced. “[A] little philosophy”<sup>107</sup> will not help.

#### CONCLUSION

All of this is a little harsh. It is certainly a far cry from “*de mortuis nil nisi bonum.*” As I have written elsewhere, there is much to admire in *Religion Without God*.<sup>108</sup> In its highest flights and most eloquent moments, and especially in its evocation of a common human yearning after mystery and wonder<sup>109</sup> – a sense of the universe as “awe-inspiring and deserving of a kind of emotional response that at least borders on trembling”<sup>110</sup> – Dworkin’s final book is a fine monument to the man and his life. We might best think of it that way, treating the chapter on law and religion as a mere tangent. Given his insistence on the unity and universality of value and its application to law, however, I do not think Dworkin would have accepted such a partition. Call it, then, a lovely but flawed monument.

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<sup>107</sup> *Id.* at 10.

<sup>108</sup> See Horwitz, *Dworkin’s Jisei*, *supra* note 3.

<sup>109</sup> See, e.g., DWORKIN, *supra* note 1, at 1-4, 6, 11-12, 19-20.

<sup>110</sup> *Id.* at 20.