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MODERNITY, RELIGION, AND THE PUBLIC SPHERE

Stephen M. Feldman*

Steven H. Shiffrin, *The Religious Left and Church-State Relations* (Princeton U. Press 2009). Pp. 256. $35.00.
Winnifred Fallers Sullivan, *Prison Religion: Faith-Based Reform and the Constitution* (Princeton U. Press 2009). Pp. 304. $30.60.

For many decades, Americans have openly disagreed about the role that religion should play in public debate. Liberals (or progressives) typically maintain that religion should be either banished or confined to only a secondary role in public discussions about our communal goals. Most famously, John Rawls argued that, in a democracy, political "questions of basic justice" should be resolved in accordance with "public reason."[1] As conceptualized by Rawls, public reasons are those that "may reasonably be accepted by other citizens as a justification of [political] actions."[2] Since citizens in a pluralistic society often subscribe to different and even conflicting "comprehensive doctrines," including religious doctrines, such comprehensive doctrines generally cannot be the basis for public reason.[3] Put in other words, secular reasons should be offered in any public debate because religious convictions are likely to inhibit the free and open discussion and negotiation that democracy demands.[4]

Many conservatives vehemently disagree with this liberal viewpoint. Richard John Neuhaus insisted that religion should play an unencumbered role in public life. All citizens should have an equal right to express their opinions in the public square, whether those opinions are religious or secular. Thus, citizens should not be forced to reformulate their religious positions in secular terms as a precondition to entering public debate.[5] From the conservative side, the liberal position requires religious Americans to sacrifice the root source of their values; secular reasons cannot possibly substitute for religious convictions. Meanwhile, liberals usually see the conservative position as urging a return

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1. John Rawls, *Political Liberalism* 214 (2d ed., Colum. U. Press 1996).
2. *Id.* at xliv.
3. John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 765-766 (1997).
4. For examples, see Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, in *Law and Religion: A Critical Anthology* 69 (Stephen M. Feldman ed., N.Y.U. Press 2000); Abner S. Greene, *The Incommensurability of Religion*, in *Law and Religion: A Critical Anthology* 226 (Stephen M. Feldman ed., N.Y.U. Press 2000); William P. Marshall, *The Other Side of Religion*, in *Law and Religion: A Critical Anthology* 96 (Stephen M. Feldman ed., N.Y.U. Press 2000).
5. Richard John Neuhaus, *The Naked Public Square* (2d ed., Wm. B. Eerdmans Publg. Co. 1986).

to theocratic rule consonant with the Middle Ages.

Steven H. Shiffrin, in *The Religious Left and Church-State Relations*, and Winnifred Fallers Sullivan, in *Prison Religion: Faith-Based Reform and the Constitution*, both challenge this liberal-conservative dichotomy.[6] They suggest that we have reached this liberal-conservative impasse partly because of the forces animating modernity. Late-stage modernists generally have insisted that the only path to knowledge lay in experience: the empirical study of external reality.[7] This commitment to empiricism ineluctably engendered, at least among intellectuals, an acceptance of ethical relativism: if knowledge must be grounded on experience, then ethical values seemingly could not be verified. Modernists, thus, drove a wedge between facts and values. Individuals could and did assert values, but scientists (and social scientists) could not empirically test the validity of those values.[8] Liberals or more precisely, secular liberals - typically associate with empiricism and social science, while conservatives often emphasize values, especially values drawn from religion.

These are fascinating and provocative books. By questioning modernity and its implications, the authors encourage readers to reconsider some basic notions of religious freedom and the separation of church and state. While each author approaches these topics in unique ways, they agree on a crucial point: as a practical matter, religion cannot be banned from the public sphere. Part I of this Review explores Sullivan's argument, while Part II examines Shiffrin's position. Part III is a brief conclusion.

I. SULLIVAN ON PRISON RELIGION

Sullivan focuses on one lower-court case, *Americans United for Separation of Church and State v. Prison Fellowship Ministries* ("*AU v. PFM*"),[9] involving an Establishment Clause challenge to a faith-based rehabilitation program instituted in an Iowa prison. The State of Iowa and PFM reached an agreement whereby PFM would introduce and run a program, the InnerChange Freedom Initiative ("IFI"), in one of the state's prisons (the Newton facility). Prisoners from throughout the Iowa system could sign up for the IFI program; if accepted, they would be transferred to Newton. The federal trial court ultimately concluded that the program violated the Establishment Clause, and the Eighth Circuit Court of Appeals affirmed.[10]

Sullivan devotes a substantial portion of her book to describing how the PFM and IFI organizers and workers perceived their program and how the prisoners themselves experienced it. She draws extensively from the trial transcript so as to provide accurate

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6. Steven H. Shiffrin, *The Religious Left and Church-State Relations* (Princeton U. Press 2009); Winnifred Fallers Sullivan, *Prison Religion: Faith-Based Reform and the Constitution* (Princeton U. Press 2009).

7. Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* 24-26, 108-115 (Oxford U. Press 2000).

8. *See* Leo Strauss, *Natural Right and History* 36-78 (U. Chi. Press 1953) (criticizing the modernist fact-value dichotomy). For a classic presentation of the fact-value dichotomy and a discussion of its importance in social science, see Max Weber, *The Methodology of the Social Sciences* (Edward A. Shils & Henry A. Finch eds. & trans., Free Press 1949); Max Weber, *From Max Weber: Essays in Sociology* (H. H. Gerth & C. Wright Mills eds. & trans., Oxford U. Press 1946).

9. *Ams. United for Separation of Church and St. v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006), *aff'd in part and rev'd in part*, 509 F.3d 406 (8th Cir. 2007).

10. *Id.* at 934. The part reversed by the Eighth Circuit focused on the remedy and not on the substantive issue of whether the program violated the Establishment Clause.

descriptions. Part of her point is that the organizers and workers, on the one side, and the prisoners, on the other, sometimes agreed and sometimes disagreed, often in significant ways, about the point of the program. PFM and IFI leaders consistently claimed that they were Christians but not evangelical Christians. They insisted that they were non-threatening: they were not attempting to pressure or coerce the prisoners (or anyone else) to accept particular sectarian beliefs or practices; rather, they were promoting and teaching universal values that everybody and anybody could and would accept, if given the opportunity.[11]

In trial testimony and official statements, PFM and IFI representatives claimed to teach Christian and universal values simultaneously; they would not acknowledge any potential tension or conflict between these claims (between Christianity and universalism). Thus, on the one hand, the second president of PFM explained as follows: "[W]hat we have always been about . . . is the transformation of lives through Jesus Christ."[12] On the other hand, the IFI Field Guide emphasized that the program was "built on six values—integrity, restoration, responsibility, fellowship, affirmation, and productivity."[13] The current Newton warden testified that IFI

> "is a values-based program that has Christ-centered biblical teaching. The teaching is a mechanism to the values-based instruction, just as if they had done the Dr. Seuss education program. That is another method of reaching and achieving the same goals." In other words, one can reach these goals through the Cat in the Hat or through Jesus.[14]

Yet, numerous prisoners testified that they were, in fact, threatened by the program's religious content and message. Catholic prisoners, for instance, were told that they should rely on the IFI supplied Protestant Bible rather than the Catholic Bible. One Catholic prisoner elaborated as follows:

> I and many others had asked the same question, and the answer was, no, not on their time. You can do what you wanted and study what you wanted on your time. But let me remind you, he was pretty strict on saying that their program was intense, seven days a week, 24 hours a day; and I felt that was the key telling me that, no, I would not have no time for such things as a Catholic priest coming in or any possible services that I could go to that.[15]

Sullivan's most important point, though, revolves around the nature of religion and the relationship between religion and government. Sullivan explains that for most of the modern era, religion and government were driven apart, with government becoming disenchanted. "Modernity has . . . resulted in the continuing elaboration of two domains, the religious and the secular. Until quite recently, the relationship between the two has been understood to be primarily embodied in the formal bureaucratic division of labor between church and the state."[16] But partly because of the separation of church and state, religion has become increasingly nonbureaucratic and, in a sense, deinstitutionalized; this development is particularly true of Protestant denominations. For many Americans,

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11. Sullivan, *supra* n. 6, at 64-65.
12. *Id.* at 69 (emphasis omitted).
13. *Id.* at 155.
14. *Id.* at 161 (commenting on warden's testimony).
15. *Id.* at 35 (citation omitted).
16. Sullivan, *supra* n. 6, at 7.

Sullivan explains, "religious authority [now] resides in the individual."[17] Moreover, despite the development of a secular realm, including government, people still need a source of values in their lives. Indeed, the fact-value dichotomy underscores this need: people might derive knowledge of facts from science and social science, but these empirical approaches do not provide values. Where do values come from? In many instances, people seek to derive their values from religion.[18]

A transformed religion, then, has filled a void engendered by the modernist worldview itself. Over time, modernity and the traditional separation of church and state turned many people to religion as a source of values while simultaneously changing religion into a more internal and individualized phenomenon. Sullivan writes, "In a sense, each person is on his own."[19] And today, we have reached a point in late modernity (or postmodernity) where, according to Sullivan, the traditional concept of separation of church and state often seems nonsensical. She ruminates on "the impossibility of isolating religion."[20] When religion is concentrated inside the individual rather than in bureaucratic institutions, religion is everywhere, and the courts become powerless to banish religion to some separate realm.[21] These developments, Sullivan continues, illuminate Supreme Court Establishment Clause decisions emphasizing individual choice and governmental neutrality.[22] For instance, in *Zelman v. Simmons-Harris*,[23] the Court upheld a school voucher program that allowed parents to use public money to help pay for private-school education, including at religious schools.[24] The majority opinion stressed that, under this program, parents retained "private choice" to decide where they would spend their vouchers;[25] thus, the government itself always remained neutral (merely providing money for parents, who then decided whether to use it at public or private schools, including religious ones).[26]

Sullivan argues that the prison epitomizes the altered relationship between religion and government and the problems presented for Establishment Clause constitutional doctrine. Modernity not only shaped the current manifestation (or institution) of religion, it also engendered the institution of the prison; the prison itself, as a form of punishment, is a distinctly modern development.[27] Yet, in some prison settings, such as at Newton, religion and government have become so intermixed that the dividing line between the institutions has blurred. Sullivan takes the PFM and IFI "dual claim" to be both Christian and universal "seriously, not simply as a cynical, manipulative strategy to circumvent the commands of the First Amendment."[28] Thus, for example, the PFM and IFI defendants

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17. *Id.* at 181.
18. *Id.* at 173-176.
19. *Id.* at 174.
20. *Id.* at 8.
21. Sullivan, *supra* n. 6, at 230-233.
22. *Id.* at 224-226.
23. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
24. *Id.* at 662-663.
25. *Id.* at 649-653.
26. *Id.* at 648-663.
27. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans., Vintage Books 1977).
28. Sullivan, *supra* n. 6, at 153.

refused to avail themselves of expert testimony because a claim to religious expertise would contravene their Protestant Christian beliefs: each individual supposedly can testify as to his or her own experience of Christ without expert (priestly) guidance. Similarly, the defendants could not fathom how they could violate the Establishment Clause when they represented a Protestant Christianity that, from their standpoint, was the very antithesis of an established (bureaucratic) church.[29] Indeed, the IFI rehabilitation program not relying on a traditional religious bureaucratic apparatus worked so closely within prison (state) bureaucratic structures that IFI staff "seemed unsure about whether IFI [was] a part of the church or the state."[30] Ultimately, while Sullivan approved of the lower court rulings - in fact, she testified as an expert on behalf of Americans United for Separation of Church and State, which challenged the IFI program - she nonetheless suggests that such programs might be constitutional under Supreme Court doctrine.

> The Supreme Court seems to be saying that it is not the business of the courts, armed with the establishment clause [sic], to prohibit religious entrepreneurs from contracting to do this [rehabilitation] work on a par with secular social service providers, as long as the clients - the prisoners - make such choices voluntarily.[31]

II. SHIFFRIN ON RELIGIOUS LIBERALISM

While Sullivan believes that the forces of late modernity (or postmodernity) are undermining the coherence of traditional First Amendment jurisprudence, Shiffrin more willingly accepts the contours of current doctrine. He nonetheless challenges the liberal-conservative dichotomy, arising from modernist premises, because it all-too-often translates into a confrontation between the secular and the religious. Shiffrin wants to reexamine religiosity and to explain how we often fail to recognize a religious liberalism. Once we recognize the existence of religious liberalism, we can discern important ramifications for First Amendment jurisprudence.

What is religious liberalism? "Religious liberalism is a form of liberalism that reaches liberal conclusions from religious premises."[32] Religious liberals, who can come from a variety of religions,[33] will reach many (though not all) of the same conclusions as secular liberals, but, in many instances, religious liberals will work from different premises and construct different arguments. Shiffrin adds that "[i]n the context of church-state relations, [religious liberalism] means strong free exercise of religion and the avoidance of tight connections between church and state."[34] Moreover, religious-liberal citizens can and should make theological arguments in democratic debates, but governmental officials, including judges, should never rely on religious arguments to justify public policies.[35] In other words, Shiffrin argues from a religiously liberal standpoint that citizens can inject religious values into the public square.[36] Finally, in an important

29. *Id.* at 141-142.
30. *Id.* at 222.
31. *Id.* at 226.
32. Shiffrin, *supra* n. 6, at 2.
33. *Id.* at 1.
34. *Id.* at 2.
35. *Id.* at 2, 107-108.
36. *Id.* at 108-109.

empirical point, Shiffrin emphasizes that while the media bombards us with stories of the religious right and we almost never hear about the religious left the number of religious liberals is nearly as large as that of the religious conservatives.[37]

Hence, Shiffrin underscores that a person who is religious is not necessarily conservative. Religious conservatives "belong to theologically conservative religious traditions and entertain politically conservative views."[38] Religious liberals might entertain the same theologically conservative views, but they are politically liberal. Exactly because of the political strength of religious conservatives, though, religious liberals can provide sustenance for liberalism in ways that secular liberals cannot provide.[39] In combating religious conservatives, religious liberals can do more than attempt to banish or denigrate religious arguments, as secular liberals are apt to do. Religious liberals can speak the same language as religious conservatives: religious liberals can argue why religious conservatives, first, get the theology wrong and, second, use the theology to reach the wrong political conclusions.

Many secular liberals, according to Shiffrin, construct grand theoretical schemes that build from a single foundational principle or value, such as equality. It is that favored secular value, then, that the First Amendment religion clauses supposedly protect. For instance, Christopher Eisgruber and Lawrence Sager argue that the Free Exercise clause is animated by the principle of "equal regard."[40] Equal regard "demands that the interests and concerns of every member of the political community should be treated equally, that no person or group should be treated as unworthy or otherwise subordinated to an inferior status."[41] But the religious liberal finds such a focus on a single (typically secular) principle to be inadequate; the religious liberal will instead likely recognize the importance of multiple values. This pluralistic outlook then leads the religious liberal to emphasize that the Establishment and Free Exercise Clauses each protects a plurality of values and interests. Shiffrin summarizes as follows:

> [T]he Free Exercise Clause is supported by seven values: (1) it protects liberty and autonomy; (2) it avoids the cruelty of either forcing an individual to do what [he or] she is conscientiously obliged not to do or penalizing her for responding to an obligation of conscience; (3) it preserves respect for law and minimizes violence triggered by religious conflict; (4) it promotes equality and combats religious discrimination; (5) it protects associational values; (6) it promotes political community; and (7) it protects the personal and social importance of religion.[42]

Having articulated these seven Free Exercise values, many constitutional theorists would struggle to shoehorn these same values to fit the Establishment Clause. There ought to be, one might suppose, at least some consistency or coherence between the two religion clauses. But Shiffrin resists this urge to unify. True, he finds that the Establishment Clause, too, is animated by seven values, and some of those values overlap with the

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37. Shiffrin, *supra* n. 6, at 1.

38. *Id.* at 97-98 (emphasis omitted).

39. *See id.* at 100-101 (discussing secular liberals).

40. Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in *Law and Religion: A Critical Anthology* 200, 203 (Stephen M. Feldman ed., N.Y.U. Press 2000).

41. *Id.*; *see* Shiffrin, *supra* n. 6, at 104 (discussing Eisgruber and Sager).

42. Shiffrin, *supra* n. 6, at 12; *see id.* at 20-23 (elaborating Free Exercise values).

Free Exercise values, but they are not identical.

> [T]he Establishment Clause is also supported by seven values: (1) it protects liberty and autonomy, including preventing the government from forcing taxpayers to support religious ideologies to which they are opposed; (2) it stands for equal citizenship without regard to religion; (3) it protects against the destabilizing influence of having the polity divided along religious lines; (4) it promotes political community; (5) it protects the autonomy of the state to protect the public interest; (6) it protects churches from the corrupting influences of the state; and (7) it promotes religion in the private sphere.[43]

When compared to secular liberals, religious liberals are more likely to recognize how the religion clauses protect multiple values exactly because they recognize the importance of religion. Most secular liberals maintain that the separation of church and state protects government from religion. From this secular-liberal perspective, religious political activity, such as from the religious right, seems likely to corrupt government. Shiffrin, though, resurrects Roger Williams's argument that the separation of church and state protects religious institutions.[44] While secular liberals are most likely to argue that the Establishment Clause protects either equality, liberty, or societal stability, religious liberals believe "that religious liberty is particularly important."[45] Religious liberalism, therefore, "would protect and separate religion from associations with government on the ground that tight connections with government are bad for religion."[46] Shiffrin adds that religion "is not just another lifestyle, and tight connections between church and state get in the way of religion."[47]

Shiffrin's value pluralism leads him to endorse a type of pragmatism in the realm of First Amendment judicial decision making.[48] In deciding an Establishment or Free Exercise Clause case, courts should not focus solely on one value; they should consider the full array of relevant values. Thus, Shiffrin criticizes the *Zelman* voucher decision, where the majority emphasized only parental choice and its relation to formal governmental neutrality. Shiffrin underscores the other values that were also at stake as follows: "Vouchers in Cleveland forced many taxpayers to support religious ideologies that they opposed, had unequal impact, favored one religion in a substantial way, and ignored 'the risk that religion can be neutralized, homogenized, and secularized when it participates in governmental programs.' "[49]

Two points clarify Shiffrin's brand of pragmatism. First, Shiffrin presents more of a pragmatic than a theoretical argument in favor of pragmatism. He sees a pluralistic nation with a religious people supporting a variety of values. To ignore this fact is to blink reality. So, for instance, Shiffrin notes that some theorists envision "a nation in which one's religion or lack of religion has no bearing on one's identity as an American citi-

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43. *Id.* at 12; *see id.* at 29-34 (elaborating Establishment Clause values).

44. *Id.* at 32-34; *see also* Stephen M. Feldman, *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State* 127-131 (N.Y.U. Press 1997) (discussing Williams's ideas).

45. Shiffrin, *supra* n. 6, at 108.

46. *Id.* (emphasis omitted).

47. *Id.*

48. *Id.* at 13.

49. *Id.* at 87 (footnotes omitted) (quoting Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 Ind. L.J. 1, 22 (2000)); *Zelman*, 536 U.S. 639.

zen."[50] The problem with such theorists, Shiffrin argues, is that "they see a nation that does not exist."[51] Second, Shiffrin believes the Court should decide cases pragmatically by considering a plurality of values, but the Court should not itself be self-consciously pragmatic. To illustrate, Shiffrin considers whether the Court, if given the opportunity, should hold that having 'In God We Trust' on coins violates the Establishment Clause. If the Court were self-consciously pragmatic, it might consider the political fallout from any such decision.[52] Shiffrin rejects this approach because, from a pragmatic standpoint, he fears it would lead to an excess of caution on the Court's part. "It is not clear that a Court armed with pragmatic concerns would have had the nerve to desegregate schools, outlaw prayer in schools, or recognize the burning of flags to be protected freedom of speech."[53]

III. CONCLUSION

Sullivan and Shiffrin together suggest two important insights. The first is explicit: theoretical arguments to ban or diminish the importance of religion in public debates are beside the point in practice. Because of the depth and nature of American religion, religion will necessarily be injected into public debates. Thus, discussions of religious freedom and the separation of church and state should start from this premise (or insight), rather than pointlessly contesting it.

The second insight is implicit. While they do not put it in these precise terms, they both controvert originalism. They suggest that the separation of church and state, as originally understood in this country, no longer fits the institutions of American religion and government. Americans of the framing generation were concerned with not having an established national church with an extensive bureaucratic structure, like the Church of England or the Roman Catholic Church. Indeed, one can reasonably read the Establishment Clause as originally allowing the state governments to support (or establish) one or more religions.[54] Yet, the institutions of *both* religion and government have changed so significantly over two centuries that any attempt to follow the original understanding would render the religion clauses meaningless. We need to reconceptualize religious freedom and the separation of church and state to fit our late modern (or postmodern) age.

Finally, while Sullivan's and Shiffrin's books are important and provocative, I do find problems in both. In Sullivan's book, for instance, she readily concludes that disestablishment is impossible, but she does not sufficiently explore possible alternatives (establishment of religion?). With Shiffrin, his commitment to pragmatic judicial decision making leaves us with the typical problems associated with pragmatism. Exactly because he is so willing to consider a variety of values when confronting religion-clause issues, his conclusions might seem too tepid to be convincing. When Shiffrin summarizes his

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50. Shiffrin, *supra* n. 6, at 46.

51. *Id.*

52. *Id.* at 48.

53. *Id.* at 49.

54. *See* Feldman, *supra* n. 44, at 145-174 (discussing the ramifications of the Revolution and the constitutional framing for the separation of church and state).

arguments concerning the constitutionality of vouchers, he concludes as follows: "In short, I argue that compulsory public education is sometimes constitutional and sometimes not, that vouchers are generally to be resisted, but sometimes not, and that vouchers to religious schools should ordinarily be considered unconstitutional, but sometimes not."[55] I am uncertain whether anyone will be persuaded by such a refined argument, or not.

55. Shiffrin, *supra* n. 6, at 64.

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