

ESSAY

IN CELEBRATION OF STEVEN SHIFFRIN'S *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS*

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Steven Shiffrin's *The Religious Left and Church-State Relations* is a truly remarkable book in many respects. I shall briefly note a few of its striking features, including some illustrative passages, and outline a number of its central themes, before tackling what for me is its most challenging and perplexing set of theses—the relations between constitutional and political discourse, and between religious liberals, on the one hand, and religious conservatives and secular liberals on the other.

We might well think of this as two books in one: a book about the constitutional law of free exercise and non-establishment, and a book about theories of public reason and religious discourse in our political life. Shiffrin manages to squeeze all this into 136 pages of readable, eloquent, illuminating text, relegating his underlying deep, comprehensive, and penetrating scholarship in a wide range of disciplines to 99 pages of footnotes. Given the smaller type of the footnotes and the absence of page breaks in that part of the book, I was somewhat tempted to see if the footnotes actually exceeded the text, but resisted.

Here is how Shiffrin deals with an originalist theory of constitutional interpretation as it applies to the Religion Clauses:

In assessing the appropriate relationship between religion and the state, it is vital to draw upon an eclectic mix of resources. No single source of interpretation should be regarded as dispositive. Although original intent is entitled to interpretive weight in some circumstances, it should not be primary for many reasons. Among other things, it is not clear that the original intent of the Framers was for us to follow their intent. Even if it were, the Framers themselves did not agree upon the appropriate

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relationship between religion and government. And furthermore, even if they had agreed, it is not clear that a legal theory requiring us to be bound in the twenty-first century by the will of a group of eighteenth-century white male agrarian slaveholders would have a lot to recommend it. Moreover, our whole history of constitutional interpretation testifies that precedent is a more important source of interpretation than original intent.¹

These sentences capture succinctly what others might take articles or books to assert.

In the last third of his book, Shiffrin focuses extensively on a theory of public reasons, a theory associated especially with John Rawls, that, at least with respect to fundamental issues, political doctrines, and discourse in a liberal democracy should be based on shared reasons—reasons that do not depend on religious perspectives or other “comprehensive views.”²

Before undertaking a more detailed analysis, Shiffrin writes that, in his view, “the doctrine of public reason with its precious conception of respect, its inflated worries of instability, and its narrow emphasis on a particular aspect of legitimacy is a theory at war with the needs of progressive politics.”³ He goes on to say, “Public reason disease can be fatal in American politics.”⁴ Addressing the perception of many liberals that religious involvement in politics is almost inevitably conservative, despite religious involvement in the antislavery and civil rights movements and many efforts to achieve economic justice, he responds that the notion that overall, religion has been “politically counterproductive in American life is not at all obvious. Indeed it seems to lack historical perspective and constructive imagination for the future.”⁵

Writing on controversial subjects tends to be strong on conclusions but weak on balanced appraisal, or fair-minded and indecisive. Shiffrin is exceptionally careful to recognize and accurately summarize alternative, competing positions, while still managing to express his opinions strongly. Early on he tells us he lacks “a pipeline to the Holy Spirit” and may be wrong about his theology and politics, but that, fallible as his beliefs may be, he “maintain[s] them with conviction.”⁶

Throughout the book, Shiffrin advances powerful arguments that nonestablishment is beneficial to religious vitality. Many writers of like

¹ STEVEN H. SHIFFRIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS* 12 (2009).

² *Id.* at 101.

³ *Id.* at 116.

⁴ *Id.* at 126.

⁵ *Id.* at 132.

⁶ *Id.* at 6.

mind would simply point to the health of religion in the United States and its decline in European countries with histories of established churches as nearly conclusive proof, but Shiffrin explores a range of possible historical explanations and stresses the difficulty of pinpointing the precise effect of various relations of church and state at successive stages of history.

Shiffrin approaches his subject with a rich understanding of different religious and political possibilities. His own religious convictions have evolved from fairly traditional Roman Catholic through Protestant; agnostic, with frequent attendance at Jewish services; secular humanist, with participation in a Unitarian Church; to a kind of return to Roman Catholicism as a radical Catholic or Catholic of conscience.⁷ I can testify to his comprehensive sense of positions within Catholicism. At a conference last spring when he quickly detailed six different Catholic views about claims of conscience and asked me which I thought most sound, I responded that his grasp of the subject was so much greater than mine I would leave the answer to him.

Consistent with his approach to other First Amendment issues, Shiffrin opposes system builders who would choose one overarching value as the key to interpretation and seek to have all cases decided according to their chosen value.⁸ Instead, judges should engage in a kind of pragmatic assessment in terms of multiple values, an assessment that often does not yield a conclusive demonstration of its correctness.⁹ For Shiffrin, equality is one of the values behind both free exercise and nonestablishment, but it is not the overarching value sustaining either provision. Individual liberty and autonomy are also important for both Clauses, as is the promotion of political community.¹⁰ The protection of free exercise also involves not forcing individuals to choose between conscience and legal demand, preserving respect for law and minimizing the violence of religious conflict, protecting associational values, and protecting the personal and social importance of religion.¹¹ The Establishment Clause helps to avoid religious divisions in politics, protects the state's autonomy to protect the public interest, protects churches from the corrupting influence of the state, and promotes religion in the private sphere.¹²

These last two features turn out to be critical for Shiffrin, allowing him to argue persuasively that separation of church and state actually

⁷ See *id.* at ix.

⁸ See *id.* at x.

⁹ See *id.* at 3, 29.

¹⁰ See *id.* at 12.

¹¹ See *id.*

¹² See *id.*

protects religion, as Roger Williams claimed long ago, and that it is by not promoting religion officially that the state best promotes religion.¹³

In resisting any explanations of the Religion Clauses in which equality is the key to decisions, Shiffrin contends that both Clauses do contemplate special treatment of religion, that religion may get exemptions allowed or required by free exercise that need not be available to other forms of belief and practice, and that under the Establishment Clause the state may not teach religious truth, even though it may assert positions on politics, social ethics, and personal lifestyles as sound or true.¹⁴ Although believing that “given the pluralistic character of our people” we would have a better Constitution without “what amounts to a monotheistic established religion,”¹⁵ Shiffrin nonetheless concludes that what I would call “mild” endorsements, such as the use of “under God” in the Pledge of Allegiance and “In God We Trust” on coins, are constitutionally permissible.¹⁶ Strongly rejecting any notion that these practices are really secular and not religious, he concludes that they accord with the original understanding and, more importantly, with the historical tradition of our people up to the present.

Shiffrin’s acute sense of nuance is strongly reflected in two comments about “under God.” Although accepting its presence in the Pledge of Allegiance, he urges that its use in public school classrooms creates a coercive atmosphere and should be declared unconstitutional.¹⁷ He also explicitly rejects the idea that the Supreme Court should declare the use of “In God We Trust” on coinage unconstitutional because invalidation would produce a quick constitutional amendment to overturn the decision and would undercut religious liberty overall.¹⁸ Shiffrin rightly notes both the difficulties of predicting untoward consequences and the dangers of the Court’s being understood to decide on this basis; but I was left wondering whether he believes a court is *ever* justified in reaching decisions on this basis and being less than candid about what it is really doing.

Among Shiffrin’s most interesting treatments of specific issues is his discussion of school vouchers. Surveying the value of public schools in helping to build a cohesive political community out of an incredibly diverse population, he draws the thoughtful, unfashionable conclusion that a state should even be constitutionally allowed to mandate that high schoolers attend public schools.¹⁹ He recognizes that this option would

¹³ See *id.* at 36.

¹⁴ See *id.* at 91–93.

¹⁵ *Id.* at 47.

¹⁶ See *id.*

¹⁷ See *id.* at 48.

¹⁸ *Id.*

¹⁹ See *id.* at 63–81.

be a nonstarter politically, even if his recommendation had a remote chance of becoming constitutional law; but he builds on the value of public education to question the Supreme Court's broad acceptance of vouchers for religious schools.²⁰ Voucher programs are deeply worrisome not only because of the threat to a common sense of community, but also because of the risk to the religions that are running schools. The religions' integrity to declare their beliefs and to practice as they think best will be undermined as they accept state money with conditions attached.²¹ Yet Shiffrin does not think vouchers should *always* be treated as unconstitutional. Under his multiple values approach, public school conditions may sometimes be so bad that vouchers should be deemed acceptable.²²

Shiffrin is clear that he is doing a normative constitutional analysis, and that the Supreme Court is unlikely to overturn its broad acceptance of vouchers in 2002 in *Zelman v. Simmons-Harris* in the near future.²³ Focusing on federal constitutional law, he sees the near-term practical import of his analysis as touching the political process; but I think it also has obvious relevance for how courts should treat the "Blaine amendments" that many state constitutions contain.²⁴ The language of these amendments is typically strict about not allowing public money to be used for sectarian education. Shiffrin's claims could well figure in how state courts should interpret the language of these provisions and could provide one powerful basis for federal and state courts to reject arguments that the typical application of these provisions violates the federal Free Exercise Clause.²⁵

In the first parts of the book, Shiffrin sticks to what he takes to be the traditional and correct approach to judicial interpretation and, implicitly, to scholarship about what paths judicial interpretation should follow. That is, he makes claims that do not depend on religious premises, although some of these claims do reflect insights that those with serious religious convictions are particularly likely to perceive.

In the intriguing final section of his book, Shiffrin shifts to the politics of liberal democracies and the place of public reason. In brief, he argues that assertions that citizens of liberal democracies should rely ex-

²⁰ See *id.* at 82–94.

²¹ See *id.* at 90–91.

²² See *id.* at 91.

²³ See 536 U.S. 639 (2002).

²⁴ See generally Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y (2003).

²⁵ See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004) (upholding a narrow form of exclusion for training for the ministry). For my views on this issue, see KENT GREENAWALT, *RELIGION AND THE CONSTITUTION*, VOL. 2, ESTABLISHMENT AND FAIRNESS 424–32 (2008).

clusively on public reasons for their political positions are ill-conceived.²⁶ Claims based substantially on religious perspectives and other comprehensive views are entirely appropriate.²⁷ This means, among other things, that because much of the protection of free exercise and of the boundaries of interactions between state and religion will be left to the political process, those issues are properly addressed from explicitly religious points of view.

According to Shiffrin, the religious Left, consisting of persons whose religious persuasions are connected to liberal political positions, is roughly comparable in size to the religious Right, comprised of those whose religion yields conservative political positions.²⁸ He stresses the need for the religious Left to make clear how its sense of religion bears on public issues and urges that secular liberals should, in some sense, recognize the advantages of religious liberalism.

What I wish to explore is just what such recognition might, ideally, involve, but I want first to mention two uncertainties I have about Shiffrin's position on public reason. Recognizing that complying with the constraints of public reason is significantly a matter of reciprocity—I won't rely on my religious or comprehensive view if you don't rely on yours—he rightly concludes that such an aspiration is unrealistic as long as religious conservatives find no appeal in theories of public reason and are determined to rely on their religious perspectives.²⁹ I think, but am not sure, that he also believes it would be unhealthy for people to restrict themselves to public reasons even if they might be persuaded to do so.³⁰

My second uncertainty is just how far Shiffrin, who is clear that the government itself should not rely on religious premises, thinks that political figures should refrain from explaining their actions in terms of religious convictions.³¹ Senator Edward Kennedy, who was apparently moved significantly by his Christian outlook, would provide an apt example.

Shiffrin carefully divides secular liberals into various categories, recognizing distinctions among those who are hostile to religion, those who are indifferent, those who take a cooperative attitude, and those who have mixed views.³² In the cooperative category, he places not only

²⁶ See SHIFFRIN, *supra* note 1, at 111–19.

²⁷ See *id.*

²⁸ Shiffrin is clear that he is not classifying in terms of theological positions themselves. He recognizes that a traditional theology might lead to a liberal politics. See *id.* at 1.

²⁹ See *id.* at 113–14.

³⁰ See *id.* at 117–18 (rejecting the idea that religion is typically a “conversation stopper”).

³¹ See *id.* at 115; see also Steven Shiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631, 1633 n.5 (1999) (mentioning a “strong and specific disagreement” with my view that officials should stick to public reasons in their public expressions).

³² See SHIFFRIN, *supra* note 1, at 100–01.

John Rawls but also Leslie Griffin, a Roman Catholic who agrees in the main with Rawls's public reasons approach.³³ One might add here President Obama, who has voiced views closely similar to those of Rawls in certain aspects.³⁴ I will simplify the inquiry that follows by considering two groups: secular liberals who think religion is foolish superstition that, at least in modern times, has a negative effect on human life, and secular liberals who themselves maintain religious convictions, or at least believe such convictions may be soundly based and valuable.³⁵

The implications of what Shiffrin says for the second group, secular liberals who themselves maintain religious conviction, seem fairly straightforward. Once persuaded that the claims of public reason are ill-conceived, either as a theory for our political life in the foreseeable future or as a theory for any political life, they would acknowledge the appropriate place of religious premises in political debate. These secular liberals would cease objecting to the premises of others on the ground that the premises are religious; they would feel free to employ their own religious premises; and they would welcome public contestations by religious liberals of narrow-minded religious premises that produce conservative political positions. Once convinced, these secular liberals would recognize religious liberalism as sounder than a public reasons approach. They might then think religious premises actually provide the best grounding for many liberal political positions. These secular liberals would comfortably welcome cooperation with religious liberals even if they thought nonreligious reasons better supported other liberal positions in politics, and they would easily recognize the advantage religious liberals would have when it comes to debates with religious conservatives over the effects of various state involvements with religion.

What would be a reasonable response from those liberals who think religion is foolish superstition that detracts from human life is more complicated? They might be persuaded that a theory that political life should be circumscribed by public reasons is unrealistic, but they would continue to think that all religious premises are badly misguided. They might be persuaded that the religious Left has positions on church-state relations that are "more politically attractive" than their own, but they would be unlikely to concede that they are "superior."³⁶

³³ See *id.* at 101, 214 n.28.

³⁴ See Paul Horwitz, Weekend Reading I—Religion and American Politics: Three Views of the Cathedral, http://prawfsblawg.blogs.com/prawfsblawg/paul_horwitz/page/4/ (Oct. 3, 2008, 15:30 EST).

³⁵ Of course, there are many intermediate and mixed portions, but these categories are adequate for the preliminary analysis that follows.

³⁶ SHIFFRIN, *supra* note 1, at 2.

Shiffrin at one point suggests that all fundamental premises about existence are really matters of choice,³⁷ but I don't think we could expect even enlightened religious skeptics to accept the view that reason fails to support their outlook.

To put in context my following effort to briefly cover incredibly complex questions within a modest paragraph, I agree with Shiffrin that rational thought, scientific or nonscientific, cannot settle fundamental questions of human existence, and I myself maintain, with some uncertainty, fundamental Christian assumptions as I understand them. But when it comes to specific items of doctrine, such as whether Mary conceived Jesus without sexual intercourse, I think reason plays a significant role—although an omnipotent God could have achieved a virgin birth, I don't understand why God would have chosen that course, which seems in some tension with the basic idea of Jesus being fully human. As for the yet more fundamental question of whether an omnipotent, loving God exists, the extreme suffering of some creatures who seem totally innocent of any wrongdoing is a genuine obstacle. In sum, I think our religious convictions are based on some mix of upbringing, what reason tells us, intuitions that we are incapable of reducing to reason, and psychological propensities—factors that themselves are interrelated in ways that exceed full description. As to our “choice” of convictions, many persons who deeply want to believe in a loving God and life after death find themselves incapable of doing so.

Although many secular liberals might be persuaded that reason does not *conclusively* establish that typical religious views are completely false, they are not likely to concede that their views enjoy no more support in reason than those of the devoutly religious. This creates a limit to what religious liberals can expect, and hope for, in the way of persuading secular liberals.

Shiffrin suggests that those secular liberals might well refrain from expressing their highly negative views about religion in the public sphere because those expressions undercut the cause of political liberalism by influencing people to think it is antireligious.³⁸ A secular liberal largely persuaded by Shiffrin's analysis might put the problem he or she faces like this: “I want to express my view of religion so people will, over time, become less religious. I now see that this aim of needed public education is in conflict with the near-term aim of protecting political liberalism. If I keep quiet, this may be helpful to political liberals with less controversial views, but the cost will be acquiescence in people continuing to delude themselves with religious superstition. Moreover, insofar as proper constitutional interpretation depends partly on cultural tradi-

³⁷ See *id.* at 130–31.

³⁸ See *id.* at 7.

tions over time, a further cost might be to delay development of a thoroughly secular society in which modest religious endorsements should be viewed as unconstitutional.”

Relatedly, since these secular liberals believe all religious premises and institutions are themselves fundamentally unsound, we could not expect them to think the religious liberals have answers to religious conservatives that are genuinely sounder than skeptical secular answers. We might hope for a degree of respect for religious liberals and of political cooperation, but alliances along these lines would be bound to be uneasy.

The last part of Shiffrin’s book is both illuminating and provocative. It provides a powerful basis to reject public reasons theory for the discourse of our liberal democracy. In raising the fascinating question of just how far secular liberals might defer to religious liberals, it opens up a range of possibilities that deserve continued exploration.