

An interview with

SCOTT IDLEMAN

Religion and Government— An Ongoing Experiment



The proper relationship between religion and government has been a longstanding concern in Western societies. The United States has been no exception, of course. Many of Europe's inhabitants left the Old World for religious reasons, and the various arrangements forged on this continent—including eventually the Constitution's First Amendment—were rather novel and experimental. Today, these experiments continue to play out in the forums of law and politics. In this Q & A, Marquette Law School Professor Scott Idleman, who specializes in law and religion, discusses several of these interactions and a book that he is presently coauthoring on the topic.

Why is religion such a recurring presence and force in American law and political life?

There are two principal reasons. First, for a majority of citizens, religion embodies or reflects their moral and conceptual outlook on the world. They view many if not all relationships—familial, economic, political,

and other—in reference to their foundational beliefs about God and the purpose and nature of their and others' existence. Second, political and legal issues tend to implicate many serious ethical issues that can be satisfactorily resolved only by reference to such foundational beliefs. The dignity and moral equality of all human beings, for example, is not a scientific, verifiable



(or non-verifiable) fact. Rather, it is a moral proposition that can only be embraced as a truth when it is consistent with and buttressed by one's foundational beliefs.

Will American law and politics, as a consequence, always be faced with religion-related issues and conflicts?

Yes, of that we can be sure. Perhaps to the proverbial certainty of death and taxes we should add religious issues in law and politics. Some of these issues are recurring, such as the use of public funding to support certain educational and socially beneficial functions of religious organizations. Similarly, we have seen for decades conflicts over the teaching of evolutionary natural selection in public schools and related efforts to teach alternative theories such as creationism. Other issues, by comparison, are fairly new or at least of unknown duration. For example, most legally recognized conflicts over religious symbols in public, outside of the schools—from nativity scenes in public parks to Ten Commandments monuments

on courthouse lawns—are but one or two decades old. And the challenges to the Pledge of Allegiance, the most significant of which eventually failed for lack of jurisdiction, date back only a few years.

Can you explain a bit more about the book you are writing, and what kinds of issues it specifically addresses?

It is intended to be a comprehensive treatise, presently titled *Religion and the State in American Law* and generously funded by the Lilly Endowment. The book is the brainchild of the late Professor Boris Bittker of Yale Law School, who was best known—indeed, famous among many lawyers—for his work on taxation, but who was extremely well-regarded as a scholar in general. Prior to his death in 2005, he invited me to be a co-author and we, in turn, invited Professor Frank Ravitch of Michigan State University College of Law to join us as a third author. What surprised us then, and it continues to be true, is that there does not currently exist an exhaustive and practical work on law and religion, one

that could readily be used by judges, scholars, lawyers, the media, and the public at large. One of our primary purposes, therefore, is simply to fill that void. As for issues addressed, they are numerous and wide-ranging, everything from historical perspectives to the current law on public education, prisoners' rights, criminal law and process, land use and zoning, and beyond.

It seems that when it comes to matters of religion and public life, no one is without bias or opinion. How do you attempt to address or overcome this fact in your book?

First, let me say that all three of us have relatively few axes to grind, so to speak. We are not principally litigators regularly representing clients or sides on law-and-religion conflicts, although we have occasionally signed onto amicus briefs. Instead we see ourselves as teachers and scholars whose chief function is to convey the law and the legal process in an even-handed, comprehensive manner. This is not to say—and I think it would be absurd to contend—that we are devoid of views on specific issues. This brings me to my second point, however, which is that having multiple authors can greatly reduce the likelihood that a biased or one-sided view is being conveyed. If anything, coauthorship provides a check on idiosyncrasy and partiality. Also, where divergences in our viewpoints are observed, this gives us an opportunity to examine and to note the possibility that they represent larger conceptual differences in judicial, legislative, and academic circles.

You mentioned the media as one possible audience for your treatise. What is your assessment of mainstream media coverage of law and religion issues?

In a number of ways, media coverage of religion has much improved over the past decade, due to a variety

of circumstances, and yet in other ways there remain significant deficiencies that I am not sure can ever be satisfactorily remedied. On the positive side, it does seem that religion-related articles are more prevalent in mainstream media. There is often, for example, a religion editor on the staff of major newspapers. Some of this is attributable to the not-so-complicated realization that many people who read newspapers and magazines are religious, and perhaps they would like to read things that concern their lives. Some of it is attributable, however, to increased university offerings on religion and media as well as the contributions of independent think-tanks and foundations such as the Ethics and Public Policy Center and the Pew Forum on Religion & Public Life.

That seems like a rather positive assessment, especially given your initial caveat. What exactly are the “significant deficiencies” that hinder the media’s coverage of religion?

I think at least two problems, one superficial and one more entrenched, can be identified. The first is the tendency of print media to ghettoize religion by segregating it into a “Religion Page,” typically located in the rear portion of the paper’s first section or, worse yet, in an entertainment or community events section that has very little to do with real news. Even more problematic is the exception to the rule, in which a paper will elevate a religion story to its first or second page if the story involves an allegation that a church or pastor or even a congregant has engaged in criminal or otherwise scandalous conduct. This, of course, is the nature of the news industry—if it bleeds, it leads, as they say—but such an approach gives the public an extremely skewed view of religion and public life.

A second and much deeper problem is an unrealistically ideal view of journalism itself. Consider two ideals or myths we hold about the media. One is that their robust pursuit of truth advances democratic decision-making and the public good, and the second is

that the media are neutral conveyers of facts and ideas. Both of these, of course, are patently false much of the time. First of all, the media have a vested interest in the existence, exaggeration, and perpetuation of problems or conflicts. If there were no perceived social divisiveness or apparent threats to our immediate sense of security and well-being, the news media as we know it would essentially be out of business. Secondly, as for supposed neutrality, it is well known that media coverage itself—be it “liberal” or “conservative”—actually affects the subjects or objects covered. Media folks become vested players in the game, not simply neutral observers.



The current Supreme Court, for the first time in history, has a majority of Justices (five of nine) who identify themselves as Roman Catholic. These include Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito. In your view, is there any significance to this development?

Certainly it reflects a cultural shift from an earlier era in which one’s Catholicism could have been a major hindrance. In the presidential arena, for example, this was clearly the case with Al Smith’s unsuccessful bid in 1928, though less so with John F. Kennedy’s successful election in 1960. It is interesting to note, however, that in the well over two centuries of the Court’s history, there have been only 11 Catholic

Justices, including today’s five. So, at the very least, the virulent anti-Catholicism of prior decades has markedly declined, and that fact is itself significant.

I suppose that what you’d really like to know, at bottom, is whether a Catholic majority will make a

difference in Court rulings, or at least Court dynamics. At the risk of sounding coy, I simply cannot predict these matters at this time. So diverse have been the three recent Catholic Justices—Scalia, Kennedy, and Thomas—in terms of not only outcomes but also methodology, that

it would be entirely speculative to predict what effect the addition of Roberts and Alito will have. The sense among court observers is that Chief Justice Roberts is a consensus-builder, which naturally contrasts him with Justice Scalia, who adheres to a textualist approach no matter how many or how few adherents join him. And Justice Alito, who had sardonically been dubbed “Scalito” during the confirmation process due to his similar approach to Justice Scalia’s, may pursue an entirely unique and different course over his tenure on the High Court. In short, these matters are quite difficult to predict, and I am prepared to play neither the prophet nor the fool at this point. •