

# At the Intersection of

Marquette Law School Professor Scott C. Idleman is coauthor of a new book offering a comprehensive review of the many ways that religion and government policy intersect in American law. *Religion and the State in American Law* was published in 2015 by Cambridge University Press. Many years in the making, the treatise already has been praised by experts. A prominent First Amendment scholar, Professor Paul Horwitz of the University of Alabama School of Law, described it as “magnificent,” and wrote, “If I were to recommend a very short list of essential books on religion and American law, I would first recommend my books and then, after an awkward silence, more honestly and accurately would recommend this book.” Idleman’s coauthors were Professor Boris I. Bittker, of Yale Law School, a renowned expert in tax policy who died in 2005, and Professor Frank S. Ravitch, Walter H. Stowers Chair of Law and Religion at Michigan State University College of Law.

Idleman responds here to questions from Alan J. Borsuk, senior fellow in law and public policy at Marquette Law School, based on issues raised in the book.



Scott C. Idleman

## ***In terms of the law, how is religion defined?***

For the First Amendment, as well as for many statutes, there is no authoritative, meaningful definition of religion. Courts, legislatures, and agencies are typically reluctant to define religion, perhaps fearing that a narrow definition could itself cause independent First Amendment problems, while a broad definition could unduly expand the availability or impact of the law in question.

That said, when religion does get defined by a court or other governmental entity, the tendency is to err on the side of breadth and inclusiveness. At the Supreme

Court level, this tendency was most apparent in the conscientious-objector cases arising in the context of Vietnam War conscription. There the Court adopted a functional and relatively subjective approach to religion, looking to the role that a belief system played in the life and outlook of the claimant rather than to specific tenets such as a belief in God or to objective criteria such as affiliation with a recognized religious body. And while those cases involved the construction of a federal statute, their approach has been influential in other contexts in the lower courts.

# God and Country

***“Separation of church and state” is a phrase often heard in discussions of issues involving interaction between government and religious entities. In Wisconsin, critics continue to say the voucher program that pays public money for educating children in religious schools goes against that principle, although the state supreme court ruled in 1998 that the program is constitutional. What does the phrase mean today?***

The phrase itself is not actually in the text of the First Amendment’s Establishment Clause, but it has been used, sometimes starting with “wall of,” as a metaphor under the clause. This works—to a point—because institutional separation between organized religion and the national government was an original objective of that provision.

Regarding school vouchers, the critics are correct to see a potential establishment issue where government directs money toward religious bodies, given that tax-based support of religion, particularly one religion, was a classic feature of religious establishments. Nevertheless, voucher-based school choice programs have been allowed, today in Wisconsin and some other places (and despite federal challenges), so long as the schools take part pursuant to religiously neutral criteria and so long as the ultimate decision to direct the money to a religious organization rests with parents rather than the state. (This is so even if the majority of participating schools are religious and even if the majority of parents choose to use the vouchers at religious schools.) If a different test were used—at least, say, a blanket ban on government funds being distributed to religious groups—then such programs presumably would be unconstitutional.

***As is pointed out in your book, 12 of the 13 colonies had established churches or involvement in religion before the American Revolution. “Christianity as Part of the Law of the Land” is one of the section headings in the book, describing earlier eras of American history. From a legal perspective, what is the legacy of the Christian roots of American government?***

That’s a great question, in part because variations of the “Christian America” motif periodically surface in political and cultural

debates. It is beyond question that Christianity, particularly Calvinist and other Protestant strains, influenced the founding generation’s view of human nature, of government and its limits, and of the role and content of law. And, especially at the state level in the late eighteenth and nineteenth centuries, one could justifiably have noted the influence of these strains of Christianity on the legal landscape. Some state constitutions even mention specific Christian doctrines or terms, which is not a feature of the U.S. Constitution.

Today, by comparison, it is harder to claim that Christianity manifestly informs the nation’s laws. Although we do not follow a model of affirmative secularism—what the French, who do, call *laïcité*—nevertheless our religious diversity and collective experience have moved us toward a framework of law and governance that do not support the notion that America is a Christian nation in any formal or normative sense. Of course, if we are simply speaking of the citizenry’s beliefs, then the United States is a relatively religious nation, and a largely Christian one at that. But its governmental and legal landscape is essentially nonreligious, even if it is generally congruent with the religious values of citizens. One can certainly find discrete vestiges of Christian influence, such as Sunday closing laws or Christmastime holidays. Yet these have been upheld by courts precisely because they have gradually acquired secular value apart from their original religious significance.

***“In God We Trust” on coins and “One Nation Under God” as part of the wording of the Pledge of Allegiance—what do these say about the relationship between government and religion?***

These are both clearly governmental expression, and so they pose an issue under the Establishment Clause. Such phrases are often defended as statements not about the government itself, however, but about the historical beliefs or cultural character or aspirations of the American people. A large number of Americans do in fact believe in a traditional notion of God, even though that percentage has decreased somewhat in recent years. Additionally, it is meaningful to consider the specific contexts in which these particular phrases were adopted. “In God We Trust”

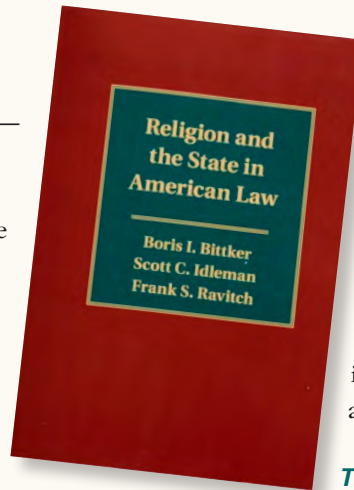


emerged on coinage during the Civil War, when many—including, most notably, Abraham Lincoln—maintained that the nation was being divinely tested or chastened. “One Nation Under God” was added to the pledge and “In God We Trust” became the national motto in the mid-1950s, in the thick of the Cold War, thereby serving as one means to distinguish the United States from the atheistic Soviet Union. Today, these phrases either have been upheld or would likely be upheld under the Establishment Clause, partly for the historical and cultural reasons I mentioned and partly because of the relatively generic, albeit monotheistic, religious concepts they embody.

***What are your thoughts on the interaction between law and religion when it comes to the Supreme Court decision last year legalizing same-sex marriage?***

There are many layers to this inquiry, so I can only scratch the surface. Regarding religious individuals and organizations, it is important to note that they, like the rest of the nation’s citizens, espouse a variety of perspectives on same-sex marriage, several of which were aired through amicus briefs before the Court. That said, it is true that many, though not all, of those espousing a conservative view of marriage do so on religious grounds. Thus the ruling raises questions in general about the continuing influence of traditional Christian and Jewish teachings on the law and also, I suspect, raises or reinforces concerns specifically for religious traditionalists about their place in contemporary culture, law, and politics. There aren’t many physical places left where one can go and form a “city upon a hill,” as John Winthrop described the Massachusetts Bay Colony, and so these citizens will somehow have to come to terms with the legal reality of same-sex marriage. This dynamic, fueled as well by the Affordable Care Act’s contraceptive coverage mandate, is exactly why the question of *exemptions* under religious freedom laws has become so contentious.

Having said this, I wish to note that it is not clear to me that the fundamental relationship between law and religion has changed or ever can change. In its same-sex marriage ruling, for example, the Court emphasizes the importance of “dignity.” If by this the Court means something nonsubjective—a moral concept apart from self-perception—it is arguably quite religious, for it purports to refer to some transcendent ethical principle, essentially in the tradition of natural law. It differs cosmetically, of course, from express reliance on a specific



scriptural injunction, but I’m not certain that it truly differs from reliance on an identifiably religious worldview. It is just a different and relatively unarticulated worldview, with its own set of implicit assumptions and philosophical propositions about human nature and, in turn, about what is best for persons and for society as a whole.

***The Associated Press reported in December 2015 results of a poll that showed more support nationwide for protecting the rights of Christians than those of Muslims, Jews, and Mormons. Donald Trump has made a major issue in the presidential race of a proposal to bar Muslims from entering the United States, at least temporarily. Is there legal argument or history to support these views?***

First, as to the poll, if the contemplated “protections” are implemented domestically by law, then any discrimination among religions will presumably violate the Establishment Clause, which may not ban such discrimination altogether but at the very least requires the government to show that the discrimination is necessary to achieve a compelling interest. And “necessary” under this test means that there is no other, less-discriminatory way to achieve the interest. It is hard to see how blanket differential treatment of entire religious groups could satisfy that standard. Indeed, it is hard even to imagine a “compelling interest” for such a law in the first place. It is true that there has been domestic religious discrimination by the government in the past, variously against Mormons and Catholics and other groups, but it was typically less direct and often bound up with other issues such as ethnicity or, in the case of Mormons, the practice of polygamy. That this discrimination may have been upheld in the nineteenth or early twentieth century, moreover, says little about its validity today. One need only compare the legality of intentional racial discrimination then and now to appreciate the point. Today’s legal environment is entirely different.

As for Donald Trump’s proposal, that’s a bit more complicated because of the traditional deference that courts have given to the federal government in the field of immigration. In addition, if the restriction is limited to noncitizens and essentially operates externally, the applicability of constitutional protections becomes less certain. That said, a categorical ban on Muslims, even

a temporary one, sends up a number of constitutional red flags, not least the Establishment Clause, which was specifically meant to limit federal meddling in the realm of religion and which, as a result, is not necessarily disabled just because the field is immigration or the affected persons are noncitizens. To the extent that citizens are affected—say, a U.S. Muslim who wishes to reenter the country—then Trump’s proposal is on its weakest ground, for a full array of constitutional issues arises, the basis for judicial deference becomes somewhat diminished, and the affected citizen would have a strong claim of standing in federal court. As for history, there have indeed been bans or quotas by nationality—most notably the 1882 Chinese Exclusion Act—as well as by ethnicity or race or even religion, such as restrictions on Jews and others under the 1924 Immigration Act. But these and similar enactments are overwhelmingly denounced today, and it would be unwise to view them as dependable precedents.

***The Kentucky county clerk who refused to issue marriage licenses to same-sex couples drew much support and said she was answering to a higher law. Does this thought carry legal validity?***

The clerk’s position strikes me as much less tenable than that of the small-business owner who, for example, declines to bake a wedding cake for a same-sex couple. In both cases, the same-sex couple will likely feel marginalized, but the clerk is uniquely undermining the general public’s confidence in government and the law, the legitimacy of which stems precisely from such confidence and the funding for which comes from people’s tax dollars. For stability’s sake, the government and the legal system must appear evenhanded in their dealings with citizens, and persons who cannot project such evenhandedness ought not to serve in government roles, at least none of any importance. In short, I think that the clerk should have complied with the federal injunction—or should have resigned, just as President John F. Kennedy said he would do were he ever unable to fulfill a duty as president because of conflicting religious obligations.

The more doctrinal answer is that, even under a broad religious freedom law such as Kentucky’s Religious Freedom Restoration Act, the clerk would presumably face a real uphill battle because of the compelling interest in having government officials discharge their legal duties and, unless state law is

changed, the need to have the clerk’s signature on marriage licenses. By comparison, the baker would have a much more plausible argument that the interest at stake—if precisely rather than generally defined—is not truly compelling or that this interest, even if compelling, could still be fulfilled by other means such as the availability of other bakeries.

***The U.S. Supreme Court ruled in June 2014, in a case brought by the owners of Hobby Lobby, that private business owners, on the basis of freedom of religion, could not be required to offer contraception coverage to employees, notwithstanding federal regulations under the Affordable Care Act. What’s your perspective on the impact of that case and how it relates to the past and present of tensions between laws and personal religious practices?***

At the outset, it is important to note the potential limitations of the ruling. First, it involved the interpretation of a federal statute—the Religious Freedom Restoration Act, or RFRA—and Congress can thus override the interpretation should it wish to do so, which is not true of the Court’s constitutional interpretations. Among other things, Congress could clarify the protective scope of RFRA, excluding for-profit entities, or it could make RFRA entirely inapplicable to the Affordable Care Act. Second, the case dealt with an objection to four abortifacient contraceptives, as opposed to all contraceptive coverage, and further the Court determined that any employees seeking these four contraceptives would still have alternative access to them at no greater cost. Finally, the ruling involved three closely held, family-run companies whose owners had undeniably sincere religious objections. It did not involve other corporate forms, and I suspect that there are not many other large companies that could demonstrate comparable religious sincerity.

At the same time, the ruling does indeed open the door to RFRA claims by certain for-profit entities, treating them as “persons” under the statute—and, because RFRA is written broadly, these claims could theoretically arise under any type or area of federal law. To date, the specific definitional holding of RFRA has not spawned significant litigation beyond the Affordable Care Act context—the Court, in fact, has another RFRA-ACA case this term—and it may take several years to gauge the full impact of the ruling.

***Just in time for the second edition of Religion and the State in American Law, perhaps?***

It is certainly a book that will require updates. ■