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Professor Fish—Why Are You Still Picking on Liberalism?

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PROFESSOR FISH — WHY ARE YOU STILL PICKING ON LIBERALISM?

Micah Schwartzman*

I.	Introduction	721
II.	How Religion Is(n't) Special	723
III.	Normative Reticence (or Nonchalance?)	727
IV.	Answering the Question.....	729

I. INTRODUCTION

Liberalism has always had its critics and its discontents, but never more than when there is an upswing of authoritarianism, populism, xenophobia, or worse. It's in these moments—and we seem to be in the midst of one—when radicals, especially but not exclusively on the right, emerge to tear down liberal principles and liberal institutions. And so now we have Adrian Vermeule, at Harvard Law School, who rejects liberalism in favor of Catholic integralism,¹ which is the idea that church—and to be precise, *the Church*—and state ought to be integrated in the pursuit of religious truth.² And we have Steven Smith, who claims, following T.S. Eliot,³ that our culture wars are best diagnosed as a conflict between traditional Christians and pagans (aka secular liberals).⁴ And Patrick Deneen has made a splash with his book, *Why*

* Hardy Cross Dillard Professor of Law, University of Virginia School of Law. This symposium contribution is a lightly edited version of remarks delivered at a conference hosted by the Floersheimer Center at the Cardozo School of Law on “Hate Speech, Fake News, and Post-Truth in the Age of Trump,” celebrating the publication of Professor Fish’s book.

¹ See Adrian Vermeule, *All Human Conflict Is Ultimately Theological*, CHURCH LIFE J. (July 26, 2019), <https://churchlifejournal.nd.edu/articles/all-human-conflict-is-ultimately-theological>; Adrian Vermeule, *Integration from Within*, AM. AFFS. (Feb. 20, 2018), <https://americanaffairsjournal.org/2018/02/integration-from-within/>; Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), <https://www.firstthings.com/article/2017/11/a-christian-strategy>. For an overview of Catholic integralism and criticism of its main ideas, see Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1042 (2019).

² See Edmund Waldstein, *An Integralist Manifesto*, FIRST THINGS (Oct. 2017), <https://www.firstthings.com/article/2017/10/an-integralist-manifesto>; Thomas Pink, *In Defence of Catholic Integralism*, PUB. DISCOURSE (Aug. 12, 2018), <https://www.thepublicdiscourse.com/2018/08/39362>.

³ T. S. ELIOT, CHRISTIANITY & CULTURE: THE IDEA OF A CHRISTIAN SOCIETY AND NOTES TOWARDS THE DEFINITION OF CULTURE 6 (1948).

⁴ STEVEN D. SMITH, PAGANS & CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC (2018). *But cf.* Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and*

Liberalism Failed.⁵ And in case you think all this is academic, while serving as President Trump’s attorney general, William Barr gave a speech at Notre Dame, in which he described a political and cultural war between traditional Christians and “militant secularists,” who seek to destroy religion and religious freedom.⁶

In these times, criticizing liberalism isn’t contrarian. And unless you are plumping for a Polish or Hungarian-style ethnoreligious nationalist state,⁷ you don’t count as edgy either. Anything less is “David French-ism”⁸—a rather bland form of Becket-Fund-style religious libertarianism.⁹

If you have been criticizing liberalism for the last twenty-some years, you are now at risk of being outflanked by “hard” antiliberals.¹⁰ In his book, *The First*, Professor Stanley Fish describes liberalism as a religion.¹¹ But that is just the beginning for contemporary antiliberals. They aren’t interested in quibbling with liberalism, in revealing its internal contradictions, or in unmasking or deconstructing its claims to neutrality. That is all merely a ground-clearing operation. The real work for antiliberals is to promote illiberal, perfectionist institutions, which will use the coercive power of the

the First Amendment, 104 MINN. L. REV. 1341, 1363–68 (2020) (criticizing antiliberal critics’ use of the concept of “modern paganism”) [hereinafter Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*]; Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 SAN DIEGO L. REV. 497, 505–09 (2019) (criticizing Smith’s reliance on T.S. Eliot’s diagnosis of cultural conflict).

⁵ See generally PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018).

⁶ William P. Barr, U.S. Att’y Gen., Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame (Oct. 11, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics> (“[M]ilitant secularists today do not have a live and let live spirit - they are not content to leave religious people alone to practice their faith. Instead, they seem to take a delight in compelling people to violate their conscience.”).

⁷ See Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 4, at 1357–58, 1426 (discussing antiliberalism in Poland and Hungary).

⁸ Sohrab Ahmari, *Against David French-ism*, FIRST THINGS (May 29, 2019), <https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism>.

⁹ Cf. Schwartzman & Wilson, *supra* note 1, at 1053–56 (“The Ahmari-French debate has exposed a rift between American religious conservatives. While some remain committed to the framework of liberal democratic politics, others are willing to embrace a ‘post-liberal’ or integralist view . . .”).

¹⁰ See STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* 88 (1993) (distinguishing between “[h]ard antiliberals [who] damn liberalism from a wholly nonliberal point of view, and “[s]oft antiliberals [who] malign liberalism verbally, but when faced with practical choices, reveal a surprising fondness for liberal protections and freedoms”); see also Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 4, at 1356–59 (discussing the “antiliberal revival” and describing various antiliberal theories).

¹¹ STANLEY FISH, *THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP* 147 (2019) (“It is tempting to describe the struggle [between transcendent religion and liberalism] as one between technological fiat and rational common sense . . . but it would be more accurate to frame it as a struggle between different theologies.”).

state to promote the (religious) good, without any fuss or embarrassment about respecting liberal rights and principles.¹²

When I first read Professor Fish's earlier book, *The Trouble with Principle*,¹³ it was against the backdrop of debates about liberal neutrality. John Rawls had published *Political Liberalism* several years earlier,¹⁴ and looking across both politics and philosophy, one could say that a certain kind of liberalism was either well ensconced or perhaps ascendant. But now the ground has shifted, and with the rise of antiliberalism, both at home and abroad, the objections that liberalism is incoherent, that it has no principle, that it is politics all the way down, that there are no right, or fair, or just answers—all these claims resonate rather differently. Now that there are both philosophical and institutional alternatives to liberalism on offer, it is not enough to show off liberalism's defects, its conceptual warts, or even its deeper flaws, conceits, and fictions. In this antiliberal moment, we have to ask the practical question: given what we care about—or, let me make this personal: given what *I* care about—is there some better way of doing things? Is there another way to think about free speech, or freedom of religion, that does better than liberalism? There certainly are proposals out there. And for all the critical attention that we have paid to liberalism, perhaps it is time to subject competing views to similar levels of scrutiny.¹⁵

In the rest of my comments, which are set against the background of antiliberalism's re-emergence, I focus on Professor Fish's discussion of religious freedom in *The First*. I argue that he does not pay sufficient attention to recent changes—some might say transformations—in the special treatment of religion under the First Amendment. I then criticize his reticence to take sides in specific debates about religious free exercise. And I conclude by offering a speculative answer, however unlikely or surprising, to the question that I have posed in the title of these remarks.

II. HOW RELIGION IS(N'T) SPECIAL

An important theme—perhaps even the central argument—of *The First* is that there are no liberal principles that help to make sense of the First

¹² See Schwartzman & Wilson, *supra* note 1, at 1061–66 (discussing integralism's rejection of the liberal values of freedom, equality, and fair social cooperation); Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 4, at 1425 (discussing antiliberalists' support for a politics of religious perfectionism).

¹³ See generally STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* (1999).

¹⁴ See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

¹⁵ For some initial efforts in this direction, see Schwartzman & Wilson, *supra* note 1, at 1061–66; Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 4, 1356–81; see also CÉCILE LABORDE, *LIBERALISM'S RELIGION* 15–41 (2017).

Amendment. In Chapter 4 of the book, Professor Fish makes the provocative claim that “the Religion Clause of the First Amendment Doesn’t Belong in the Constitution.” The reason is that the Religion Clauses¹⁶—the Free Exercise Clause and the Establishment Clause—purport to give special treatment to religion. The Free Exercise Clause, at least as some have interpreted it, gives special protection to religion by requiring exemptions from otherwise neutral and generally applicable laws. And the Establishment Clause imposes special disabilities by prohibiting government support for religion, whether that support is symbolic or financial.¹⁷

Professor Fish says that treating religion as special, in either of these ways, contradicts the core liberal idea of viewpoint neutrality, which is that the government has no business favoring or disfavoring speech based on its content.¹⁸ More fundamentally, he argues that the Religion Clauses represent the intrusion of a religious or theological perspective into a constitutional structure that is, in fundamental respects, incompatible with the claims of religious believers.¹⁹ From a religious perspective, duties to God are categorical and transcendent. No conflicting duty or claim can override or outweigh them. But no system of law can give religious believers unfettered liberty to act according to their convictions. As Justice Scalia said in *Employment Division v. Smith* (the peyote case)²⁰ and as Chief Justice Waite said in *Reynolds v. United States* (the Mormon polygamy case)²¹ a century earlier, the result would be anarchy.²² There is a clash of religious versus secular values, and there is no way to resolve this tension. The two perspectives are incommensurable.²³ Any attempt to adjudicate between them is either dishonest, purporting to provide a principle where there is none, or it is political, in the sense of one side imposing its values on the other. Professor Fish claims the latter is better. It’s all politics, all the way down.²⁴

¹⁶ Professor Fish refers to one “Religion Clause,” but I follow the conventional practice of referring to two such clauses, as described above.

¹⁷ See Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1355–56 (2012).

¹⁸ See FISH, *supra* note 11, at 118.

¹⁹ *Id.* at 146–50.

²⁰ *Emp. Div. v. Smith*, 494 U.S. 872, 888 (1990) (“Any society adopting such a system would be courting anarchy . . .”).

²¹ *Reynolds v. United States*, 98 U.S. 145, 167 (1879) (“To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”).

²² See FISH, *supra* note 11, at 134.

²³ *Id.* at 146–47.

²⁴ *Id.* at 197–98.

I have never been persuaded by Professor Fish's claim, and I am still not after reading *The First*. In my view, there is no choice but to engage in some sort of balancing between the claims of religious believers and the claims of others to equal liberty. Here I side with Cecile Laborde, Nelson Tebbe, and other liberals, who think that this approach is better justified by liberal values.²⁵ Now Professor Fish says—aha!—in making this move, you are taking sides, you are adopting one set of values over another, you are, in effect, choosing one religious view over another. To which, I have always thought the correct reply was: of course liberals have values.²⁶ No one ever claimed (or, at least, no one should have claimed) to be neutral across all values. But having a commitment to certain moral values doesn't make one religious, unless you are prepared to flatten the concepts of religion, morality, politics—all domains of normativity—into a basic category of value and then say that anyone who affirms a value is, to that extent, religious. If that's your definition of religion, then I suppose liberals are religious, but none the worse for it.

At this point, we might ask: what's wrong with flattening concepts in this way? One problem is that you are likely to miss some important features of the legal and political landscape. For example, to return to the theme of religion's specialness, you could read the discussion of religious freedom in *The First* without realizing that there has been a sea change in First Amendment doctrine over the last two decades. In the 1990s, one plausibly could have interpreted the Supreme Court as holding that religion wasn't special for purposes of receiving exemptions from generally applicable laws, but that it was special in the sense that the state could not promote religion. Now the Court seems close to having reversed itself on both of those views.²⁷ After the Court's decisions in *Hosanna-Tabor Evangelical Lutheran Church*

²⁵ See generally LABORDE, *supra* note 15; NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017).

²⁶ See Schwartzman & Wilson, *supra* note 1, at 1066 ("Every conception of liberalism contains normative commitments, both moral and epistemic values that are central to the theory and practice of liberal politics. There is no internal contradiction in recognizing those values and in defending them, as well as the institutions built upon them, from those who would tear them down.").

²⁷ See Richard Schragger & Micah Schwartzman, *Establishment Clause Inversion and the Bladensburg Cross Case*, in ACS SUPREME COURT REVIEW 2018–19 21, 24–28 (Steven D. Schwinn ed., 2019) (discussing doctrinal inversions in the context of government religious speech, state funding of religion, and religious exemptions) [hereinafter Schragger & Schwartzman, *Establishment Clause Inversion*].

v. EEOC,²⁸ *Burwell v. Hobby Lobby*,²⁹ and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,³⁰ religion might be seen as special in terms of receiving legal exemptions or at least special concern from courts reviewing government regulations.³¹ But following the holdings in *Town of Greece v. Galloway*,³² *Trinity Lutheran Church of Columbia v. Comer*,³³ and *American Legion v. American Humanist Association*,³⁴ the Court has basically gutted the Establishment Clause.³⁵ The First Amendment now imposes few, if any, special disabilities on state support for religion. Does the state want to provide direct subsidies to a church? Five justices, and maybe more,³⁶ seem to have no problem with that.³⁷ Does the state want to sponsor the central symbol of Christianity? At least under some circumstances, seven justices are fine with that.³⁸

Under the old regime, religion wasn't special for purposes of getting exemptions, but it was special for purposes of being denied state support.

²⁸ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (recognizing a “ministerial exception” from antidiscrimination laws as grounded in the Religion Clauses of the First Amendment).

²⁹ See generally *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (granting an exemption under RFRA to a for-profit company that objected to paying for contraception under the Affordable Care Act).

³⁰ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1732 (2018) (holding that Colorado violated the First Amendment by demonstrating hostility toward a wedding vendor who refused to comply with the state’s public accommodation law).

³¹ Technically, the Christian baker in *Masterpiece* did not receive a religious exemption. The Court held that the state had violated the baker’s right to free exercise by applying its public accommodation law in a manner that displayed religious hostility. See *id.* at 1731 (“The Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”). But the Court’s distortion of the animus doctrine to reach that conclusion suggests special solicitude for religious views. See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 166 (2018).

³² See *Town of Greece v. Galloway*, 572 U.S. 565, 585 (2014) (rejecting an Establishment Clause challenge to legislative prayer at the municipal level).

³³ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017) (holding that a state could not exclude religious organizations from public funding of a playground resurfacing program).

³⁴ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2089 (2019) (rejecting an Establishment Clause challenge to state ownership and display of a 40-foot tall Latin cross).

³⁵ See Schragger & Schwartzman, *Establishment Clause Inversion*, *supra* note 27, at 29 (“The entire edifice of the Establishment Clause has been collapsing, with the result that principles of disestablishment are becoming increasingly irrelevant.”).

³⁶ See *Trinity Lutheran*, 137 S. Ct. at 2022.

³⁷ See *id.* at 2026–27 (Breyer, J., concurring).

³⁸ See generally Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (2019) (discussing the Court’s lopsided, seven-to-two, voting pattern in its decision to affirm the constitutionality of the Bladensburg Cross in *American Legion*).

Under the new regime, religion is special for purposes of receiving exemptions, but not for purposes of receiving state support.³⁹

At this point, you might want to throw up your hands and say, as Professor Fish is inclined to do, “What a mess! This is just more evidence that the pendulum swings back and forth, and that liberalism is incoherent and unstable, shifting with the politics of the times.” Maybe so,⁴⁰ but observing the conceptual indeterminacy of the First Amendment doesn’t help us to understand the content or structure of the doctrine, which may shape the relationship between church and state for decades. We need more specificity about the moral values—or, as Professor Fish might say, the politics—that drive these changes. We need to know why it matters that religion is treated as special for some purposes, but not for others. Only then can we start to form some judgments about whether the Court’s conclusions make any sense.

III. NORMATIVE RETICENCE (OR NONCHALANCE?)

At the end of his discussion of the Religion Clauses, having argued that they are a “contradiction within an anomaly,”⁴¹ Professor Fish finally addresses where he stands on substantive questions of religious freedom raised under the First Amendment. On matters of both free exercise and disestablishment, he says he “could go either way.”⁴² More specifically, he tells us: “I’m fine with allowing religious monuments in public spaces. I’m fine with insisting that the public sphere be religion-free. I’m fine with letting a few bakers refuse to create cakes for same-sex weddings. I’m fine enforcing antidiscrimination laws strictly and forcing the bakers to comply.”⁴³

I have long wondered about (and occasionally tried to test) Professor Fish’s normative reticence on these issues. Or perhaps reticence isn’t the right word—maybe detachment or nonchalance? He doesn’t seem to care very much one way or another. And that is not because Professor Fish is generally nonchalant about substantive issues. Consider, for comparison, his discussion of a recent controversy involving Professor Amy Wax, who made various provocative statements that were later criticized by the dean of her law school, Theodore Ruger.⁴⁴ According to Professor Fish, Dean Ruger was

³⁹ See Schragger & Schwartzman, *Religious Antiliberalism and the First Amendment*, *supra* note 4, at 1383–92 (discussing the Court’s double standard in its treatment of religion’s specialness).

⁴⁰ See *id.* (“But that discourse [of liberal principles] is clearly under strain, creating inconsistencies that suggest a larger cultural or attitudinal shift rather than a principled application of settled principles.”).

⁴¹ FISH, *supra* note 11, at 150.

⁴² *Id.*

⁴³ *Id.* at 150–51.

⁴⁴ *Id.* at 87–94.

clearly wrong when he condemned Professor Wax's statements.⁴⁵ There are some lines that a dean should not cross, and Professor Fish tells us exactly what he thinks about that issue and why.⁴⁶ But when it comes to matters of religious freedom, he is harder to pin down. I have been trying, informally, to do this for several years now. So here goes again. Professor Fish says, "I'm fine with letting a few bakers refuse to create cakes for same-sex weddings."⁴⁷ Notice the sly quantifier—a *few*. What if it's all the bakers? What if granting religious exemptions has the effect of entirely excluding LGBT people from the market? That's one example. Another is raised by the case of *Newman v. Piggie Park Enterprises*, in which the Supreme Court unanimously rejected a First Amendment challenge by a restaurant owner, who objected on religious grounds to serving African Americans.⁴⁸ Would Professor Fish be willing to go either way on *Piggie Park*? Does his indifference to outcomes extend to that case as well? One more example: in *Hobby Lobby*, the Court granted a religious exemption to a large for-profit company that objected to paying for contraception.⁴⁹ What if it turns out that, as a result, all the women who work for that company will be denied contraceptive coverage? Now maybe Professor Fish is indifferent in this case, too. But if so, his nonchalance starts to look more like callousness because this exemption will have quite serious consequences for the lives of tens of thousands of people.⁵⁰ It seems morally unserious to say: "I could go either way. I don't really care about what happens in this case."

It is one thing to say that there is no principled way to adjudicate *Piggie Park* or *Hobby Lobby*, whereby what Professor Fish means by "principled" is that both sides will agree with the reason for the decision. But it's another to say that either outcome is fine. At some point, we have practical decisions to make, and then we have to plunk down on one side or the other. And we should have something to say about why it is we favor one over the other, even if our reasons are, in Professor Fish's sense, political.

⁴⁵ *Id.* at 90 ("Ruger was doubly wrong . . . because he forgot entirely what his job was: not to judge faculty sentiments but to protect them.").

⁴⁶ *Id.* at 90–94.

⁴⁷ *Id.* at 150.

⁴⁸ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam).

⁴⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014).

⁵⁰ See Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025, 1039–41 (2015) (surveying reasons why access to contraception is important for liberty, equality, and bodily integrity); Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U.J. GENDER SOC. POL'Y & L. 303, 336 (2014) (discussing lack of access to contraception and resulting "adverse health consequences for both women and their children").

IV. ANSWERING THE QUESTION

The First is a book of relentless questioning and criticism. Professor Fish has a fresh and seemingly endless supply of popular examples, but those acquainted with his earlier work may find his arguments, and his broader themes, familiar. And, given our current social and political circumstances, some readers may wonder, as I do: Why is Stanley Fish still picking on liberalism? My answer is that, despite all his objections, debunkings, unmaskings, provocations, and protestations, Professor Fish is a liberal. No one who really rejected liberalism would spend so much time, so much energy, so much thinking—what Professor Fish calls in the final words of his book “incessant labors”⁵¹—no one who was fundamentally illiberal would devote the better part of a life to showing us how to live honestly and candidly with the endless frustrations of a world that is still—despite the fervent wishes of so many antiliberal critics today—shaped by liberal institutions. And, unlike many of those critics, in all his work on law, politics, and philosophy, Professor Fish shows no interest in living in any other world. I might be reaching too far here, but he picks on liberalism, works on it, incessantly labors over it, because no other view is worthy of his critical powers and, I am tempted to say, his affections.

⁵¹ FISH, *supra* note 11, at 198.