When Free Exercise and Nonestablishment Conflict

KENT GREENAWALT

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Dedicated to
Brin, Andrei, and Gibson Greenawalt,
a deeply loving family

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Introduction

Basic Structure

One of the most significant provisions of our federal constitution is the beginning of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Together these clauses preclude the government from imposing a particular religion on its citizens and protect their freedom to believe and engage in religious practices as they see fit. In these respects, the clauses together can be seen as promoting religious liberty and a separation of church and state.[1] At this core, the clauses clearly coalesce. But across a fairly wide range, one can also see their actual potential coverage, and their underlying values, as in tension.

This book seeks to explore those tensions, explaining what can be said on each side and what resolution may be wisest. Two clear illustrations of tension involve ceremonial prayers carried out by the government itself in public settings and special concessions made to religious practices that are at odds with ordinary legal duties. For those and many other matters a sharp division exists between people who strongly favor religious exercise and see the scope of nonestablishment as limited and those who tend to regard virtually any favoring of religious practice as a forbidden establishment, or as another form of unacceptable denial of equality, or both.

What the Supreme Court has developed as constitutional law in this

domain is much more complicated than either of these fairly simple alternatives.[2] One cause of this is that, as the Court itself has recognized, the two clauses "often exert conflicting pressures."[3] Regrettably, a good bit of the prevailing law is genuinely confusing, whether one looks at majority opinions in individual cases or tries to put together a combination of decisions. One basic reason why neither inquiry yields clear general principles is that when we think carefully, simple straightforward answers that should apply across the board are unavailable.

One value of nonestablishment is the notion that when the government gets involved with religious matters it not only favors some religions over others. Given that public officials are not especially sensitive about religious beliefs and practices, and may be largely guided by political objectives, their involvement may well actually interfere with healthy religious choices and practices. As initially understood, this concern about state "corruption" of religion was, as Andrew Koppelman has developed,[4] mainly about protecting the liberty of Protestant outlooks favoring individual faith, but has now expanded to cover freedom of choices concerning religion more generally. Just what one sees as the core concerns about not establishing religion can affect how one sees needed free exercise and vice-versa. In what follows, I assume both a broad sense of the free exercise of religion, which includes a choice not to engage in religion, and a fairly extensive range for nonestablishment. Readers who reject one or both of these premises may not see the "tensions" I identify in quite the same way.

When one reflects on actual and arguable tensions between free exercise and nonestablishment, it is important to recognize different kinds of contexts in which those can come into play. These include judicial evaluations of constitutional requirements, assessments by other officials of constitutional limits, and evaluations of what is just and wise.

The most obvious context for considering these tensions is when a court is deciding whether a government practice violates free exercise and the government's countervailing claim is that the practice is required to avoid forbidden establishment; or the court is determining if what may violate the Establishment Clause is actually required by free exercise. But the kinds of conflicting claims can often be less stark. Suppose a challenge is made to some religious practice within the government as an unacceptable establishment of religion. The answer may be that it is supported by free exercise values although not constitutionally required for that reason. One aspect of this

book is to explore how the values may influence constitutional arguments even when they do not imply that the practice they support is constitutionally required.

Another important recognition is that court resolutions are not the only appropriate focus. There may be constitutional violations that courts will, for one reason or another, not address or not be able to discern. Legislators and executive officials should consider themselves subject to such constraints even if judicial invalidation of their choice is highly unlikely. Further, within the range of what is constitutionally permissible, these values can nevertheless come into play for what is a wise and just choice about what the law should be or how officials should behave. Finally, when it comes to private citizens, these competing values can bear on whether and why they should support possible political decisions.

The chapters that follow explore how the competing values may best be conceived in different contexts. It provides an account of present law, insofar as that is clear, and suggests what legal approaches would make the most sense. It also asks how far we should see the conflicting values in play for certain choices by citizens that are not directly controlled by constitutional restraints. The aim here is to explain things in a way that is easily accessible for nonlawyers and for lawyers whose basic work lies well outside this area.

Three cautions are worth adding at the outset. The first is that how these matters are best viewed can depend on the nature of particular cultures. As I mention briefly at certain points, some aspects of liberal democracy can have weight for all countries that fit within that category, but those aspects are not decisive about everything. Relevant among other things are the degree and virtuosity of religious beliefs and practices and a country's cultural traditions. Even in respect to a particular country, the best approaches can shift over time as the culture changes. Thus, although much of my analysis has broader relevance, what I recommend particularly is about our place and time, and may not be best either for all other liberal democracies or for a century from now in the United States.[5] What are now crucial features in the United States are that most of our citizens maintain religious beliefs, that these vary a great deal in content, and that a significant number of people are atheist or agnostic.

My second caution is that a person's overall outlook about human life in this universe is likely to have some effect on how she sees a balance of competing factors. Although particular considerations and arguments may

be acknowledged to have force by both a fundamentalist Protestant who believes everything in the Bible is literally true and by an atheist who is convinced that all religion is foolish, such persons may well differ about the degree of force these considerations carry. My aim here is to provide an account that does not itself depend on religious convictions. But for what it is worth, I consider myself a liberal Protestant, with a less optimistic view of human nature than is sometimes connected to liberal Protestantism, and with degrees of uncertainty about many aspects of the place of our lives in a larger setting.

Finally, we must all be aware that the tensions that are the main focus of this book are not the only ones that exist in constitutional analysis and related value judgments. For example, hostile negative statements about racial minorities reveal a tension between freedom of speech and equal protection. More directly for the subjects of this book, free speech and equality concerns about race, gender, and same-sex marriage come into play regarding how claims of religious freedom should be assessed. I shall mention these at various points; my focus on free exercise and nonestablishment should not be taken to downplay the comparative relevance of these other related conflicts in values.

Beyond this introduction, the book contains five following parts. The first part focuses on religious practices in government domains, including public schools. Among the narrow practices addressed are these: legislative prayers; worship and the hiring of clerics in the military and for prisons; prayers and Bible readings in public schools; the relevance of how far "ceremonial deism" indicates that religious language on coins and in the Pledge of Allegiance does not really amount to a genuine assertion of religious truth; and the status of symbols in public places and in schools.

The book's second part addresses exemptions from legal duties and financial support for religious practices. The issue about exemptions has been, and continues to be, crucial in respect to the constitutional right of women to obtain abortions, and it is now highly controversial about how far individuals and organizations should be excused from legal duties to afford equal treatment to same-sex married couples. This question sharply raises the more general issue how far harm to others should bear on the constitutionality and wisdom of an exemption. A form of exemption that is not a subject of much public debate is the priest-penitent privilege. Is it appropriate to allow clerics

not to testify about confessions made to them, and should their privilege be more absolute than that given to lawyers, doctors, and psychotherapists?

In respect to financial support, the Supreme Court doctrine has shifted over the last decades. It remains disputed both what that doctrine should be and what choices legislators should make.

One question raised by exemptions and some forms of financial aid is what actually counts as "religion," and whether it should be treated as special. These far from simple questions, addressed most fully in Chapter 8, can affect what is sensible line-drawing.

The third part addresses three special concerns about public schools. Even if they are not to engage in religious practices, how far, if at all, may they teach religion as true, teach about religion, or omit the place of religion when it is definitely relevant, as in most of history? These issues present sharp questions whether teaching moral norms or history without mentioning religion, or by failing to afford it a reasonable place, constitutes an unfair disadvantaging of the place of religion. A crucial consideration here is how far objective presentations are actually feasible and can be perceived as fair by parents.

The second concern is whether a nonreligious topic such as evolution may be omitted for religious reasons or at least supplemented by possible alternatives, such as "intelligent design," for what it may not be able to fully explain. The third problem involves what limits may, and should, exist in public schools on private communications by teachers and students about religious truth.

The fourth part explores more broadly a subject that arises across a wide range, including privileges not to comply with antidiscrimination laws. If some special treatment is to be given to religious practices or claims, should similar accordance be granted to analogous nonreligious ones? One may think similar treatment should always or sometimes be viewed as constitutionally required, although the Supreme Court has yet to say so, and two modern federal exemption laws, the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, draw the line at religion. Whatever may be constitutionally required, is it wise for legislators to treat religious and nonreligious claims similarly? I urge that here we have no simple answer, that a great deal depends on which particular exemptions are being offered.

The final part reaches substantially beyond actual legal issues and focuses

on the appropriate place of religious convictions in the making and interpreting of law. The claim that "public reasons" should be central in liberal democracies puts religion to one side in political life, but many believers will think that their religious sense of what is morally right appropriately influences their position about aid to the poor, protection of animals, and exemptions for same-sex marriage, and perhaps even military engagement. My broad claim is that "public reasons" do have an important and special role, but that it is often hard for individuals to carve these out from their more fundamental convictions, and that it is misguided to insist that they should always strenuously attempt to do so.

In what follows in this Introduction, I shall provide a brief account concerning special features of the religion clauses and of the actual defensible practices of constitutional interpretation. Those who are familiar with all this can skip over these parts, but because these matters bear very importantly on what we can expect, and hope for, from the Supreme Court, they warrant clarification for readers who are unfamiliar with the relevant controversies. In addition to describing various possibilities, I also provide a brief summary of well-established positions, and what approaches seem to me seriously misguided or wise.

The Language of the Relevant Clauses and Their Significance

In this section, we shall delve into the language of the religious and other crucial clauses, and their significance at the time of adoption. How much all that matters for existing and appropriate constitutional interpretation of modern coverage is postponed for the next part, but everyone agrees that an original understanding is of potential relevance for how a constitutional provision should now be viewed and is an essential element for understanding development over time.

We need to begin with the simple, but important, fact that when they were originally adopted, the religion clauses, like most other provisions in the Bill of Rights, applied only against the federal government. They did not constrain what states, and localities within them, could do. In fact, the states differed significantly in their treatments of religion, based partly on the groups that had lived within their original settlements.

At the beginning of the colonies that became part of the United States, both religious affiliations and attitudes toward religion varied greatly.[6] Many

of those who emigrated to America did so partly because they felt disadvantaged by the establishment of the Anglican Church in England. However, that did not necessarily mean that they rejected establishment. Whereas the Quakers in Pennsylvania were supportive of religious liberty, the conservative Protestant Christians in most of New England, although they did not allow the government to intervene with religious bodies, created a stricter form of limitations on religious practice than existed at the time in England itself. And in Virginia, which Anglicans controlled, the establishment was also stricter than in England. Maryland was a Roman Catholic colony, although one that was tolerant of other religions. Although practices and rules had altered in significant ways in the century and a half before the country's independence, six new states still had established religions in one form or another. It would be obviously misguided to assume that people generally thought that no religion should be favored by any government and that religious convictions should play no role in decisions about what the law should be.

It is true that the key framers of the Constitution, although describing themselves as religious, had liberal outlooks that basic decisions in political life should be made on grounds of independent reason, but, of course, their views would not, and should not, simply control what counts as the original understanding of the religion clauses. There are three points here, two that are obvious and one that is not. The first point is that the understandings of people subject to adopted legal rules count as well as those of the enactors. The second point is that constitutional amendments had to be approved within states. The understandings of those who ratified count as well as those of the body that proposed. Many of the necessary ratifiers were within states that retained established religions. The third possible consideration is that when the original Constitution was proposed by the constitutional convention, leaders, including James Madison, suggested that what *really* counted were the views of the ratifiers, not those of the proposers. This perspective, articulated partly to counter any political objections to the convention itself, may not have carried over to subsequent amendments proposed by Congress, but it certainly suggested that the views of ratifiers carried more than minimal significance.

Let us turn now to the language itself. Both clauses are cast in terms of Congress. One could see that as not restraining the executive branch. However, given both the early notion that Congress would dominate federal law

and that the executive powers would be quite limited; and given also the great extension over time of executive power and the range of administrative regulation in law making, it would be extremely odd to say that executive officials may do things absolutely forbidden to Congress. Applications of constitutional constraints regarding religion and free speech cast in terms of Congress have been uncontroversially applied to executive action. I will simply assume in what follows that this is obviously right although it does stretch the wording itself.

That Congress shall make no law "prohibiting the free exercise" of religion could be seen as a very limited constraint. Suppose Congress passes a law that "interferes" with free exercise, but does not actually "prohibit" it. Is that permissible? Were the constitutional language applied in this way, that would make it crucial what counts as "prohibits" and "free exercise." If a law taxes a religious practice does that "prohibit" free exercise? If the law forbids a practice outside church that the religious body believes God requires, is that part of religious "exercise"? As the law has sensibly developed, the clause has been perceived as reaching significant interferences that arguably fall short of actual prohibition. What counts as religious exercise is a more troubling question, although not typically addressed in those terms. The last section of this chapter and later chapters address that issue.

Still more critical questions about language concern the Establishment Clause. Is it about avoiding establishment itself or only noninterference by the federal government? This question bears crucially for the later application of the clause to the states, which some have objected is totally misguided. In regard to the relation between the national government and states, noninterference was obviously the original sense, as indicated by "no law respecting an establishment of religion." The federal government could neither require states to establish religion nor forbid them from doing that, since either kind of law would be "respecting" establishment. But what of the District of Columbia, federal territories, and federal agencies? I believe the language did bar establishing religion in these settings (although some of what occurred in territories with large Native American populations has been argued to be at odds with that premise).[7] A religion could not be established for the District of Columbia or within an embassy abroad. Putting this together, the clause essentially was one of noninterference regarding states and one of direct limitation for territories and institutions of the national government.

This brings us to the Fourteenth Amendment and the application of the religion clauses to all governments within the United States. The Fourteenth

Amendment was adopted after the Civil War, and southern states were required to approve it if they wanted to be represented again in the central government. Clearly the main objective was to assure at least a degree of equality for African-Americans, a great proportion of whom had been slaves. According to its language, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." At the time of adoption, it was not generally conceived that the amendment made most of the Bill of Rights applicable to the states. Probably the most natural language that might implicitly be taken as doing that, at least for "citizens," is that guaranteeing "privileges and immunities," but in the late nineteenth century the Supreme Court interpreted that provision very narrowly. When it finally mandated the coverage of most of the Bill of Rights for states in the mid-twentieth century it relied on the Due Process Clause.

That "due process" would restrict the states regarding criminal and civil procedures, and would include such things as the privilege against self-incrimination and the bar on cruel and unusual punishment, was not a stretch, but the application to substantive rights such as free speech and the free exercise of religion is much less evident. Whether this coverage was warranted as subjects of "due process" is debatable, but I shall take it for granted, since it is solidly settled in existing law and almost no one now believes states should have much greater latitude than the federal government to impose on these basic privileges.[8]

There are two special problems, however, with respect to the Establishment Clause. The first I have already mentioned. If the clause was basically about noninterference, why should states now be restricted? The best answer to this is that by 1865 no state retained a formal establishment; since the clause did bar an actual establishment by the federal government, that could then be seen as a kind of basic value concerning individual freedom of conscience that should apply to states.[9] A second problem concerns the language of the Due Process Clause, which is cast in terms of not depriving "any person of life, liberty, or property without due process." Of course, an interference with someone's "free exercise" would be an interference with "liberty," but that is hard to say about forms of establishment of religion that do not really interfere with anyone's free exercise.

Nevertheless, the Supreme Court's application of both clauses makes

practical sense, partly because discerning when an "establishment" does or does not interfere with free exercise, and therefore liberty, would be very difficult. Also, given that very few in present states wish actual establishments of the old sort, the inconvenience of trying to draw this distinction and allowing more flexibility within states is hardly warranted.

A somewhat more subtle question about the Supreme Court's ruling that the Fourteenth Amendment's "incorporates" the basic parts of the Bill of Rights as limitations on the states is how one should understand the actual coverage of those provisions. One *might* say that those who adopted that amendment took understanding at the time of the Bill of Rights to be controlling; but that is not supported by factual evidence and is extremely unlikely. The alternative is that their post-Civil War conceptions were influenced by what had happened since 1791. I will explore these alternatives as they bear on judicial interpretation in the next section. However, a conceivable approach that is not illogical is that coverage should be largely influenced by understandings at the time of adoption. This could lead to a conclusion that the restrictions on states about free speech, free exercise, and cruel and unusual punishment would be greater than those on the federal government, since the restrictions were seen as less when the Bill of Rights was adopted than in 1865. Clearly that resolution would not be practically desirable given the broad power of the federal government. Permitting it to impose punishments and limits on speech not allowed to states would be nearly illogical. If one asked what was wise in terms of latitude, it *might* be to allow states to impose limits not permitted nationally, since objecting citizens are able to move from one state to another, and different kinds of experimentation could be healthy. In any event, once it accepted "incorporation" through the Fourteenth Amendment, the Supreme Court has assumed that for basic rights the same restrictions apply to federal and state governments.

Approaches to Constitutional Interpretation

In this part, I review very quickly many of the complexities and controversies about constitutional interpretation.[10] These definitely bear on what one thinks about appropriate constitutional resolutions when conflicting values are at stake. Readers who are familiar with this subject, and readers who care about the basic values in play here but not judicial decisions, can disregard this section.

The first point here is obvious, although frequently not mentioned in discussions of constitutional rights and duties. Both legislators and those in the executive arm of government can sometimes violate the Constitution without that being determinable by judges. That can happen in four different ways, sometimes interrelated. The simplest is that the relevant facts are not accessible to judges. That can happen, for example, with many "stops and frisks"; judges cannot really determine how suspicious someone's movements were. A similar inability may exist if individual legislators are constitutionally constrained not to promote a particular religion and violate that constraint in supporting a proposed statute that will help their faith; but all that judges have before them is an adopted law that does not obviously have that purpose. A second possibility is that actual constitutionality is debatable, and courts "defer" to legislators or to an agreement between legislators and the executive branch about what is permissible. Another form of avoidance, one that has not been explicitly used for church-state issues, is that some highly sensitive issues are treated as "political questions" for which judges will not explore whether the Constitution has been violated. A fourth basis for nondetermination of substantive constitutional issues concerns standing. Judges resolve substantive claims only if someone has standing to bring a law suit. Given present doctrine, sketched in Chapter 3, no one may have standing to challenge various tax benefits accorded to religious schools or other institutions.[11] This creates the possibility that a legislative choice in this domain may be decisively unconstitutional but effectively beyond judicial resolution.

At various points in the book, I will note examples of possible constitutional violations that, for one reason or another, will be beyond judicial assessment.

Two key questions about constitutional interpretation are the comparative importance of text and intentions in relation to original meaning and how far original meaning should control present resolutions. For basic constitutional issues, the second concern has major importance, but I shall initially offer a few clarifications about the first. In recent years a number of Supreme Court justices, most notably Justice Scalia, have emphasized that what should count in statutory and constitutional interpretation is the relevant text, not what the legislative history reveals about intentions. One can defend this approach as a check on inappropriate exercises by legislators in making that history or abuses by judges who refer to that history in order to rely on their own discretion and arrive at outcomes they think best. But we