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Constitutional Law

The Religion Clauses

Second Edition

Daniel O. Conkle

Foundation Press

CONSTITUTIONAL LAW: THE RELIGION CLAUSES

Second Edition

by

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*For my parents, Louis and Berniece Conkle, who
introduced me to the law and
to religion.*

*

PREFACE TO THE SECOND EDITION

This book provides a theoretical framework for understanding and evaluating the Supreme Court's constitutional decisionmaking under the Religion Clauses of the First Amendment. It is intended primarily for legal scholars, law students, and lawyers. At the same time, the book also may be useful to a broader audience, including students in other disciplines and citizens wishing to educate themselves on this important topic of contemporary concern.

The Supreme Court's decisionmaking under the Religion Clauses is highly controversial. It also is complicated and confusing. But as this book explains, the Court's decisionmaking can be seen to have a certain coherency, if only as the product of a complex weighing of various and sometimes conflicting constitutional values.

The book begins in Chapter 1 with an introductory discussion. Chapter 2 addresses the original understanding of the Religion Clauses (and of the Fourteenth Amendment, which has been used to extend the Religion Clauses to the states), only to conclude that the original understanding cannot explain the Supreme Court's decisions. Chapter 3 then offers a brief history of American religious liberty, from the founding to the present. It suggests that the Court's decisionmaking under the Religion

Clauses has been influenced by a variety of embedded and evolving constitutional values—values such as religious equality and voluntarism; the protection of religious identity; the protection of religion from governmental contamination and of government from improper religious involvement; and the preservation of traditional governmental practices. This discussion sets the stage for the remainder of the book, which continually returns to these values as it explains and evaluates all of the major facets of the Court's constitutional doctrine.

Turning to a direct discussion of that doctrine, Chapter 4 addresses fundamental issues common to both the Free Exercise and Establishment Clauses, including the definition of "religion" and the general principle of nondiscrimination, which plays a powerful role in the Supreme Court's decisionmaking. Chapter 5 examines the Court's Free Exercise jurisprudence, emphasizing the role of discrimination in this context and highlighting the Court's treatment of claims for religion-based exemptions from nondiscriminatory laws. Chapter 6, the most extensive chapter in the book, confronts the various and complex ingredients of the Court's Establishment Clause doctrine. Like the book overall, this chapter proceeds from the general to the specific. Thus, it initially addresses the general Establishment Clause standards of *Lemon v. Kurtzman*, the endorsement test, and the coercion test, as well as the basic doctrinal concepts of tradition and accommodation. It then examines more specific areas of concern, in-

cluding religion and the public schools; religious symbolism in other contexts; and public aid to religious schools, organizations, and individuals. The final chapter, Chapter 7, offers some concluding observations, and it includes a brief look to the future.

This second edition incorporates and discusses important developments of the last five years, including the Supreme Court's controversial Free Exercise decision in *Locke v. Davey*, its decisions upholding and applying recent religious liberty statutes, and its divided rulings concerning public displays of the Ten Commandments. It also addresses the potential significance of the Court's recent membership changes, with Chief Justice Roberts replacing Chief Justice Rehnquist and Justice Alito replacing Justice O'Connor.

DANIEL O. CONKLE

Bloomington, Indiana
October 2008

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CONSTITUTIONAL LAW: THE RELIGION CLAUSES

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CHAPTER 1

INTRODUCTION

The first words of the First Amendment refer not to speech, but to religion: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” Simple enough, or so the framers might have thought.

To be sure, the basic principle of religious liberty emerged in the founding period, and, in one form or another, it has prevailed ever since. The precise meaning of religious liberty, however, was contested even in the founding period, and the passage of time has only made the issues more difficult. The First Amendment’s Religion Clauses include the Free Exercise Clause and the Establishment Clause. But what does it mean to protect the free exercise of religion? Are religious practices protected from general laws, or only from religious discrimination? What if the religious practices cause harm? Are all acts of religious conscience included? And what makes an act “religious” in the first place? What about the Establishment Clause? Disestablishment precludes the formal recognition of a government church, but what else? Does it bar the government from promoting particular religions, or even religion in general? Even through non-coercive, purely symbolic actions? Are public schools precluded not

only from leading students in prayer, but also from permitting students to conduct their own prayers at school functions or during after-school meetings? Can the government extend nondiscriminatory financial support to private religious schools and organizations? May it accommodate the free exercise of religion by exempting religious practices from general laws, or would that amount to a forbidden establishment?

More generally, by what criteria, and by what process of decisionmaking, should these sorts of questions be confronted and resolved? Viewed through the lens of the First Amendment, they are questions of constitutional law and, as a result, questions ultimately for the Supreme Court. On its face, however, the relevant constitutional text is impossibly vague and general. It requires interpretation. The Court might—and does—look behind the text to the original understanding of the Religion Clauses, but, as we will see in Chapter 2, the original understanding itself is indeterminate. It does not begin to resolve the issues of religious liberty that have engaged the modern Court.

Although the Supreme Court may be loath to admit it, the Religion Clauses in fact have required creative interpretation. This value-laden process of decisionmaking, however, has not been purely subjective. The Court's creative interpretation has been guided in part by the text and original understanding of the Religion Clauses, but in far greater part by the Court's more general identification and protection of constitutional values. Thus, in interpret-