

CHAPTER 1

Introduction

Americans should freely practice their religions, and government should not establish any religion: these are crucial principles of our liberal democracy. Although the principles themselves receive wide assent, people disagree intensely over what they signify and how they apply. Does treating religious individuals and organizations fairly mean regarding them like everyone else or giving them a mix of special benefits and disadvantages?

This book, volume 1 of *Religion and the Constitution*, concentrates on the free exercise of religion; a companion will focus on nonestablishment. These are of course the two main pillars in the Constitution's treatment of religion. Because issues about free exercise and nonestablishment intertwine, however, we need to examine various establishment concerns here, most notably problems raised by classifications along religious lines. Both volumes discuss the declaration in the Constitution's First Amendment that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹ But in each volume we shall also consider legislative choices and claims of moral and political philosophy that reach beyond constitutional constraints.

My approach to the broad subject is grounded on three fundamental assumptions. First, ideas about free exercise and nonestablishment are not reducible to any single value; a number of values count. Second, sound approaches to the state's treatment of religion cannot be collapsed into any single formula or set of formulas. For example, one pervasive issue is whether religious claims may (or must) be treated differently from analogous nonreligious claims. Against those who assert that similar treatment should always or never be required, I resist any uniform answer, arguing that a great deal depends on what kind of claim is involved. Although no ready formula is available to resolve problems about government and religion, we can identify major considerations that legislators and judges need to take into account. I sketch the most important of these considerations in a later section of this introduction, as well as outline some of the most general values or principles that underlie or motivate this book on free exercise.

Third, we can best work toward sensible approaches by addressing many discrete issues. These reveal rich variations in the state's relations with reli-

¹ U.S. Const., amend. 1.

gion and show the complexity of arriving at satisfactory treatments of practical conflicts. This undertaking from the bottom up illuminates more than does a conceptual apparatus that works downward from a few abstract principles to particular applications. Thus, the strategy of both volumes is contextual, investigating the force of conflicting values over a range of legal and political issues.

This introductory chapter outlines a few free exercise problems and lays the conceptual framework for what follows.

TYPICAL FREE EXERCISE ISSUES

The most blatant affronts to people's free exercise of religion involve hardships they suffer just because of their religious beliefs and practices. Throughout history, public authorities have imposed a wide range of penalties and disabilities on dissenters from the dominant religious faith. In one modern American case, discussed in chapter 3, the City of Hialeah adopted ordinances to ban animal sacrifice.² Their undoubted target was the unpopular practice of animal sacrifice by adherents of the Santeria religion.

The Hialeah case is unusual for modern liberal democracies. Legislators rarely discriminate overtly among religions or target religious practices. Rather, they adopt laws that are uncontroversial in most of their applications; the crucial issue then becomes whether legislatures or courts should create privileged exceptions that are based directly on a person's religious convictions or rest on some other standard, such as "conscience," that includes religious convictions but does not distinguish between them and similar nonreligious convictions.

Here are some illustrations. Should the government excuse religious pacifists, all pacifists, or no pacifists from a military draft? Given a general requirement that children stay in school up to the age of sixteen, should officials allow a religious group to withdraw their children at an earlier age, so they may undertake vocational training for their communal life? Should a state that prohibits use of peyote allow members of a church to ingest that drug as the center of their worship services? Should a law that forbids gender discrimination in employment leave untouched religious groups that permit only men to be clergy?

Less stark conflicts between religious claims and standard legal duties also arise. Prisoners would like to wear religious jewelry despite a prison ban on jewelry. A church wants to use its community house for a school that is

² *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

forbidden by zoning regulations. An Orthodox Jewish military officer wears his yarmulke in violation of a regulation that instructs personnel not to wear headgear indoors.

Conflicts between religious convictions and general laws may be indirect rather than direct. A Sabbatarian's religion requires him to close his store on Saturday. He *can* comply with that obligation *and* with a law that requires all stores to close on Sunday, but the law and his religion combine to create economic hardship, and a temptation to disregard his religious convictions.

Yet other free exercise problems arise because the law must settle disagreements between private persons. A couple divorces. The father wants to take his daughter to his church on Sunday; the mother wants to stop him, because they agreed when they married that their children would be raised as Jewish.

These and similar problems occupy this volume. Its companion analyzes establishment questions, such as these: should the government encourage or sponsor religious practice? should state schools teach about religion? should the government support religious hospitals and schools, and, if so, under what conditions? when do efforts to "accommodate" religious practices cross over the boundary to become impermissible establishments?

BASIC VALUES AND THE RELIGION CLAUSES

Protecting free religious exercise is one undoubted and fundamental aim of the Constitution's religion clauses. Many people care deeply about their religious beliefs and practices, and they feel that their religious obligations supersede duties to the state if the two collide. These basic sentiments constitute a strong reason why governments should avoid interfering with religious participation insofar as they reasonably can. Another fundamental purpose of the religion clauses is to keep the enterprises of religion and government distinct. The state should not sponsor any particular religion; in turn, it should not be controlled by religious authorities.

I should perhaps say at the outset that I believe strongly in the major values that lie behind free exercise and nonestablishment. People should be free to adopt religious beliefs and engage in religious practices because that is one vital aspect of personal autonomy, and because recognition of that freedom is more conducive to social harmony in a modern society than any alternative. I believe, further, that most people experience some transcendent dimension in their lives and that, despite the unavailability of decisive evidence, that experience reflects some objective reality. Whether the government should involve itself in promoting religious values may be arguable, but my own view is that personal autonomy is most fully recognized and the flour-

ishing of religion itself is best served if the government does not sponsor religious understandings and practices (this complex subject is mainly the concern of volume 2).

Many readers will disagree with some of these value judgments of mine. No doubt, what follows is influenced to some degree by my own fundamental understandings, but I am aiming to write in a way that does not depend directly on them. I will be making claims that rest on the country's political and legal traditions and on undeniable facts about its present condition, most particularly its religious diversity. No reader can dismiss claims about religious exercise with the observation that religious views are silly; no reader can dismiss claims about nonestablishment with the assertion that the true religious understanding is easily acquired. A serious person trying to grapple with the state's treatment of religion has to undertake a much more arduous effort to distill the nature of our country's traditions and of sound practice in modern political democracies.

These values of free exercise and disestablishment are broadly compatible, indeed reinforcing; and those who favored disestablishment at the country's founding believed that it promoted religious liberty.³ A government that awards the high officials of one religion seats in the legislature, uses tax funds to pay its clergy, and teaches its doctrines in public schools impinges on the religious exercise of dissenters. Although nonestablishment still promotes free exercise across a wide span of subjects, modern social life also throws up situations in which values of free exercise and nonestablishment lie in tension or conflict. Should the government grant its workers who worship on Saturday that day off? Doing so would undoubtedly assist their exercise of religion; but the cost may be to "establish," or at least favor, their religious motivations in comparison with nonreligious reasons, such as time with family at home, that lead other workers to want free Saturdays.

Such conflicts of value illustrate how concerns about equality and fairness pervade religion cases. Are Saturday worshipers relevantly equal or unequal to workers who want to spend Saturdays with their families? Much turns on the respects in which people are significantly equal to each other, and on when they deserve the same treatment. Such inquiries, with their implication that unequal treatment is unfair, are a major aspect of problems about religion and the state. Because arguments about equality can confuse, a few clarifications are helpful.

A conclusion that people should get "equal treatment" may flow irresistibly from the application of an independent standard or reflect a more funda-

³ The original clauses of the Bill of Rights applied only against the federal government. Some founders who wanted to prevent a federal establishment approved of degrees of state establishment of religion, and an important aspect of the Establishment Clause was keeping the federal govern-

mental notion about the equality of citizens.⁴ If one aspect of the free exercise of religion is a principle that governments cannot compel individuals to attend church, all people will equally have the right not to be compelled; but their entitlement to equal treatment simply follows from the nature of the right against compelled religious exercise. Claims about individual *equality* are redundant here, doing “no work.”

A more potent concept about equal treatment is that governments must recognize an equality of persons. Found in the Declaration of Independence, this ideal has grown in influence during the last two centuries. Although achievement has yet to match aspiration, political societies have rejected one barrier after another—class, race, ethnic origin, gender, sexual preference, physical disability—to the equal treatment of citizens. The question whether a law touching religious practice treats citizens as political equals may reach beyond the specific values of free exercise and nonestablishment.

Some equality claims about religion challenge specific lines of inclusion and exclusion that distinguish among categories of people. But other claims assert that a deep principle of equality demands differences in treatment that respond to variations in capacities, beliefs, or practices. (To take a noncontroversial, nonreligious, illustration, people now accept the deep principle that students suffering learning impairments should have opportunities equal to those of other students; this value is implemented by giving these students benefits, such as tutoring, not made available to all students.) One perspective on how equality should figure in respect to religion is that benefits for religious groups under the Free Exercise Clause should offset disadvantages under the Establishment Clause.⁵ Very often, proponents of competing resolutions of political and legal problems enlist the value of equality in their behalf; we shall try to discern which particular kinds of equality are most salient for the fair treatment of religious individuals and groups.

MULTIPLE VALUE THEORIES AND THE PROBLEM OF COHERENCE

When theorists search for a single overarching value to explicate a legal subject, almost inevitably they omit too much or provide an overarching value that is so inclusive it yields little help in resolving practical problems.

ment out of state decisions about how to treat religion. The Supreme Court has resolved that most of the Bill of Rights was made applicable against the states by the Fourteenth Amendment.

⁴ My views on the controversial subject of whether equality is an independent value are in “Prescriptive Equality: Two Steps Forward,” 110 *Harvard Law Review* 1265 (1997), and “How Empty Is the Idea of Equality?” 83 *Columbia Law Review* 1167 (1983).

⁵ Abner S. Greene, “The Political Balance of the Religion Clauses,” 102 *Yale Law Journal* 1611 (1993).

Within most legal domains, multiple values, which sometimes conflict with one another, are important. Even if we ignore the plurality of values that the concepts of free exercise, nonestablishment, and equality each embrace on their own, we see that none of these concepts can underlie a single value approach to the religion clauses. Nonestablishment cannot be the overarching value, because it is largely a means to serve free exercise. A thesis that every valid consideration reduces to free exercise is more plausible. But inquiring only whether a law threatens the religious liberty of citizens would neglect both *some* reasons for nonestablishment and the independent value of equality. A law might promote religious freedom at the expense of some unacceptable inequality among groups of citizens.⁶ And one worry about establishment is that religious leaders will have too much political authority, a concern about political integrity that is not exclusively about the value of citizens' *religious* freedom.

One reason why equality cannot serve as the single overarching value is that we need to attend to the values underlying religious freedom and nonestablishment to determine which equalities matter most. A second reason is that some sacrifices in equality may be warranted to serve those other values.⁷

Many situations in which multiple values are at stake involve difficult trade-offs that are not resolvable by any higher metric that gives much practical assistance.⁸ This truth has implications for the coherence we can expect in normative evaluation. Two people sharing the same theoretical approach may disagree about how to resolve a particular problem, and each may have difficulty explaining the exact weighting of relevant considerations that leads her to prefer the outcome she does. Someone who conceives such nuances of difference in normative appraisal will be modest about the opportunities for our practical reason to produce demonstrably correct conclusions for troublesome issues. Recognizing that the majority opinions of American courts often suffer the further liability of being produced by various compromises, such a person will hesitate to condemn judicial work as incoherent or

⁶ One might or might not conclude that every instance of this sort amounted to an establishment of religion.

⁷ A theorist might concede this much and respond that the aim, or consequence, of implementing religious liberty and nonestablishment may be to achieve an overall equal balance between religion and nonreligion. See note 5 *supra*. I am skeptical that the right balance of benefits and harms will produce such equality, but, in any event, such a broad aspiration to equality would not prove a handy guide for deciding how to treat individual problems.

⁸ To say that trade-offs should be resolved to promote overall long-term happiness or autonomy is a formula too vague to provide such assistance. Robert Audi has written sensitively, and with a considerable degree of optimism, about how we can make choices involving conflicting *prima facie* ethical duties. *The Good in the Right* 81–202 (Princeton: Princeton University Press, 2004).

irrational, a charge frequently leveled against the Supreme Court's church-state jurisprudence.⁹

A person who believes that multiple values bear on the resolution of major social and legal issues will insist on contextual evaluation. He may feel confident about which features matter most and even about particular overall assessments, without being able to offer a set of abstract principles to demonstrate the correctness of his judgments. This book's emphasis on context allows the reader to understand troubling conflicts and undertake his own critical examination of them.

This is not to suggest that the book is rootless or that it takes a radically relativist stand on moral issues. Moreover, although no simple formulas are available to resolve difficult questions about free exercise, we shall find that a similar range of considerations or factors figures for many problems. In what we might call the standard situation, to which a number of chapters are devoted, the government imposes a general constraint, and the issue is whether an exception should be made for those who have an objection based on religious convictions or on broader grounds that include religious convictions. Chapter 4, on conscientious objection, chapter 5, on use of proscribed drugs in worship services, and chapter 6, on claims to withdraw children from school at the age of fourteen, discuss variations on this standard situation that the Supreme Court has addressed. In contrast to those illustrations, a government rule, as I have noted, may generate a less direct conflict with religious exercise. If a state requires that businesses close on Sunday, that requirement can penalize those whose religion requires that they not work on Saturday.

If one focuses on religious claims to be exempted from general requirements set by the government, two obvious, crucial, factors are the strength of the religious claim and the strength of the competing government interest (whether that interest is the government's own or that of a group or individual the government seeks to protect). The relevant government interest is not simply the benefits achieved by the general law, but the interest served by not creating an exemption for those who offer religious claims to be treated differently from others whom the law restricts. Another important consideration is the administrability of a possible exemption. Can administrative officials and judges or juries understand what they need to do and apply the necessary standards of judgment to the factual circumstances with reasonable assurance? Do those standards create opportunities for fraud, and, if so, are the risks tolerable? For exceptions based on religious claims, officials typically

⁹ However, the work of courts is sometimes incoherent and irrational, even assessed generously.

must assess the sincerity of those who say they rely on their deep-seated convictions; officials must also be able to say if the claims qualify as religious.

Who is best suited to assess the strength of religious claims and government interests and to develop administrable standards? For this question of institutional competence, the basic value of free exercise and the history of adoption of the Free Exercise Clause are only of limited assistance. One may believe judges are not equipped to determine when religious claims should prevail, unless they are given highly specific guidance by legislatures, for example, by a law protecting use of peyote during worship services. Perhaps the most important chapter in the book is chapter 13, which analyzes how judges resolve issues when they have to work with a much more general standard that requires them to make the complex assessments that will determine whether to grant particular exemptions.

When legislators or judges ask whether people who do not claim religious grounds (however those are conceived) should be treated similarly to religious claimants, they must ask whether the nonreligious claims are likely to have a strength like the religious ones and whether expanding the category of those who benefit would seriously impair administration of an exemption or increase the risks of successful fraud. As we shall see, the answers to these questions differ radically for different subjects. What may be true for conscientious objections to military service may not be true for unwillingness to work on Saturday.

One overarching concern in a decision whether to limit favorable treatment to religious claimants is that the government should avoid promoting or endorsing particular religions or, more controversially, religion in general. That subject receives concentrated attention in the second volume.

As I have already noted, relatively few laws now target particular religions for unfavorable treatment or discriminate in favor of some religion as compared with others. Such laws are almost always inappropriate, and if a court is able to discern that a law is of this variety, it is almost certain to treat it as unconstitutional. The only complexity about such cases is in figuring out whether a law does target or discriminate in this way.

Most of the latter part of this volume is taken up with issues of a rather different sort. The law dictates how private enterprises and individuals treat each other. In the instance of laws that forbid discrimination on grounds of religion, the aim is both to protect workers (and others) from being discriminated against based on their religious identity and to protect their freedom to exercise their religion as they see fit. Protecting one worker's religious freedom can run up against claims of religious liberty advanced by an employer or by other workers. A grocery store owner may want to express his

Christian sentiments by having his cashiers say Merry Christmas as customers leave; an atheist or Jehovah's Witness cashier may object that uttering those words violates her religious conscience. The resolutions of these conflicts involves a comparison of conflicting interests, but one that differs somewhat from an analysis of what I have called the standard situation.

Yet another kind of issue we will examine is the resolution of disputes between private groups or individuals in which religious elements figure prominently. Two factions of a church assert a right to control a house of worship, or divorcing parties disagree about who will have custody of their children or about what religious services the children will attend. In these circumstances, a dominant consideration is that courts must avoid kinds of religious assessment that would favor some religions over others and would implicate judges in tasks for which they are ill qualified.

POLITICAL PHILOSOPHY AND DIMENSIONS OF LEGAL JUDGMENT

Resolutions and judgments about religion and the state can assume many forms. All governments implementing values of religious liberty, nonestablishment, and equality draw from moral and political principles. In most liberal democracies, governments must also respect the terms of a written constitution; in the United States, federal and state constitutions alike frame relations between religion and government,¹⁰ restricting legislative choices.¹¹

When legislators adopt statutes and judges develop constitutional rules, they aim, as I have said, to provide administrable standards of judgment. As a consequence, legislators and judges may reject an approach that, in a world of ideal knowledge and assessment, would best fulfill the values at stake, preferring instead a "second-best" approach that real human beings are better able to apply.

Judges also strive for something more, constitutional standards that relate coherently to other constitutional standards, and that flow from sound techniques of interpretation. Many disagreements among Supreme Court justices in church-state cases come down to disputes over how our federal Constitution should be interpreted. Some justices rely heavily on an "original understanding"; others (explicitly or implicitly) aim to be more responsive to mod-

¹⁰ All states have their own free exercise clauses, and the great majority have nonestablishment provisions; but the language of these typically differs from that of the First Amendment. Thus, states are limited by a combination of federal and their own constitutional provisions.

¹¹ In between lies a kind of gray area, where a legislative choice may actually violate the Constitution, but not in a manner that courts will identify and prevent.

ern social conditions and values. Although disagreements about claims brought under the religion clauses inevitably connect to broad political ideas, distinctive features of the law should caution us not to suppose that the best answer to every constitutional question will necessarily track the most sound answer in the realm of political philosophy.