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**K. Greenawalt: Religion and the Constitution, Volume 2**

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## Introduction

Two fundamental principles of American liberal democracy are that citizens should be able to freely practice their religion and that government should not establish any religion. This volume, the second of two devoted to an examination of these principles, concentrates on nonestablishment. The wording of the First Amendment of the federal Constitution that embodies that principle is “Congress shall make no law respecting an establishment of religion.” States have their own establishment clauses, and the federal provision now applies to states and localities.

An ideal of nonestablishment relates closely to a belief in free exercise, and the fairness of treating religious practices and organizations differently from nonreligious ones figures prominently in the coverage of the two principles. As we found it necessary to consider nonestablishment concerns in volume 1, *Free Exercise and Fairness*, many chapters in this volume will bring us back to the values of free exercise and the way those values should be realized in legal standards. Nonetheless, various problems about establishment are sufficiently distinctive to warrant this separate volume. As in the previous volume, we will look at legislative choices and claims of political philosophy as well as constitutional constraints.

As I have explained in more detail in the first volume, my approach to the subject is grounded on the following three premises: (1) Neither free exercise nor nonestablishment is reducible to any single value; many values count. (2) Sound constitutional approaches to the religion clauses cannot be reduced to a single formula or set of formulas, although we can identify major considerations that should guide legislators and judges. (3) The most profitable way to develop sensible approaches is from the “bottom up”—addressing discrete issues in their rich complexity and investigating conflicting values over a range of issues.

After noting some major issues, this introductory chapter comments on the scope of the federal Establishment Clause, summarizes the undisputed core of impermissible establishments of religion, analyzes the basic values that underlie nonestablishment, and briefly summarizes what follows in succeeding chapters of the book.

## SOME TYPICAL ISSUES

Establishment Clause issues have been among the most controversial decided by the Supreme Court in the last half century. It is not hard to see why. The American people remain dominantly religious, with over 90 percent affirming a belief in God, and more than half regularly active in group worship. Rulings under the Establishment Clause generate greater public concern than those under the Free Exercise Clause. Free exercise claims usually arise when legislatures or administrators have declined to make accommodations to religious minorities; most citizens care little about the acceptance or rejection of those claims. When people claim that the government is establishing religion, they typically object to measures that favor dominant religious groups. If courts uphold these claims, they are likely to vindicate some members of discontented minorities at the price of upsetting members of the dominant groups. As a consequence, decisions holding government practices to be invalid establishments tend to be particularly controversial. The Supreme Court's decisions that devotional Bible reading and prayer in public schools are unconstitutional provide striking examples.<sup>1</sup> These have proved among the Court's most unpopular rulings in the last fifty years—comparable in the negative reactions they triggered only to its invalidation of racial segregation<sup>2</sup> and its creation of a constitutional right to abortion.<sup>3</sup> In many communities, the great majority of parents want school prayer, and some districts have simply continued those practices despite the Court's determinations.<sup>4</sup>

The display of religious symbols and messages on public property constitutes another significant establishment issue. Most people in a community may welcome an expression of Christian sentiment, such as a crèche at Christmas time, on public property. They will not favor decisions forbidding such displays. And, when the Ninth Circuit Court of Appeals upheld an atheist father's challenge to his daughter's public school reciting "under

<sup>1</sup> *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Township v. Shempp*, 374 U.S. 203 (1963). In the last decade, the Court has extended these rulings to graduation ceremonies, *Lee v. Weisman*, 505 U.S. 577 (1992), and organized prayer at football games, *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>2</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>3</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>4</sup> See Marjorie Silver, "Rethinking Religion and Public School Education," 15 *Quinnipiac Law Review* 213, 215 (1995). The Court's decisions about desegregation and abortion had widespread support, as well as opposition, among individuals and organizations. Relatively few ordinary citizens may have regarded the prayer and Bible-reading decisions as protecting vital rights, although some leading religious organizations approved them.

God” in the Pledge of Allegiance,<sup>5</sup> politicians and citizens alike expressed outrage.<sup>6</sup>

Of pervasive concern in establishment litigation is the degree of assistance governments may offer to religious organizations. Until recently, financial support for religious groups that supply services that nonreligious organizations also provide, such as hospitals, adoption agencies, and soup kitchens, has produced little controversy. Religious groups, often setting up independent corporations, have participated with others in the receipt of government benefits, so long as they offer their services to all comers, do not discriminate in employment, and do not use public money for religious purposes. President George W. Bush has aimed to make greater use of faith-based organizations and has sought to allow the organizations that receive government aid greater latitude to implement their particular religious perspectives as they provide public services. Aspects of this program, most notably the proposal to allow religious groups to discriminate on religious grounds in employment, have provoked intense opposition.

The establishment issue most frequently litigated in the Supreme Court has been financial aid to parochial schools. For many years, the Supreme Court was extremely restrictive about such aid; over time it has become much more permissive. The question of whether government may offer vouchers for private education, available for religious schools among others, was the focal point of that general problem up to the year 2002. The Supreme Court’s approval of vouchers that yield substantial monetary aid for the schools themselves<sup>7</sup> has shifted attention to the status of state constitutional provisions that are more restrictive of aid.

## FREE EXERCISE AND NONESTABLISHMENT

As the volume on free exercise reveals, free exercise and establishment are in tension for a number of important issues, but in fundamental respects a

<sup>5</sup> *Newdow v. Elk Grove Unified School Dist.*, 292 F.3d 597 (2002), amended opinion by original panel after rehearing en banc denied, 328 F.3d 466 (2003). The Supreme Court declined to rule on the phrase “under God” because the father, a noncustodial parent, lacked standing. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004). Enough justices did rule on the merits to make the Court’s acceptance of “under God” seem likely in the future.

<sup>6</sup> Reports of reactions to the initial court of appeals decision include Charles Lane, “U.S. Court Votes to Bar Pledge of Allegiance; Use of ‘God’ Called Unconstitutional,” *Washington Post*, June 27, 2002, and Robert Salladay and Zachary Coile, “Judge in Pledge Case Puts Brakes on Ruling; ‘Under God’ Uproar Prompts 3-line Order for Delay Pending Full Appeals Court Hearing,” *San Francisco Chronicle*, June 28, 2002.

<sup>7</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

principle of nonestablishment supports free exercise. Historically, countries with establishments of particular churches typically engaged in outright denials of religious freedom, for example prohibiting worship not in accord with the established religion and imposing disabilities on dissenters. Even if a country avoids all such penalties for outsiders, any single established church, a church recognized as the official religion of the government, may be thought to compromise religious liberty to some degree.

We can identify the core of what it meant *not* to have an established church at the time of the Bill of Rights by reference to the institutions in England against which early Americans reacted. The Anglican Church was the state's official church, and the king was its head. Parliament had adopted the basic regulations, doctrinal statements, and liturgical forms of the Anglican Church, and participated in the designation of occupants for ecclesiastical positions. The government supported the church financially. Other forms of worship were forbidden or restricted. Bishops occupied seats in the House of Lords, as a number still do. Church courts decided various matters of civil significance. Many civil offices were open only to Anglicans.<sup>8</sup>

An *absence* of establishment entails that no particular religion enjoys official government status. Religious groups must set their doctrines, practices, and structures of internal governance for themselves, and they do not depend on government for financial support. The government cannot announce and defend particular religious doctrines, such as the Virgin Birth. It cannot make appointments to religious offices. The political rights of citizens do not depend on their religious affiliations, and religious leaders do not, by virtue of their positions, exercise civil authority.

Although active persecution in England of Protestant dissenters, Roman Catholics, and non-Christians had ended before our Revolutionary War, non-Anglicans continued to suffer various disabilities, including ineligibility for civil office. Citizens of our founding era associated established churches with serious disadvantages for those outside the fold, and leaders who strived for disestablishment regarded that as a crucial element of religious liberty.

But suppose a government forswears all such negative treatment for non-believers—neither coerces them to conform nor subjects them to disabilities. An official religion may still diminish liberty. Those who are outside the

<sup>8</sup> Judge Michael W. McConnell, in "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 *William and Mary Law Review* 2105, 2131–81 (2003), has examined six historic elements of establishment in England and the colonies, including government control of the state church, mandatory attendance at that church, prohibition of other worship, financial support, use of the church for civil functions, and bars on political participation by nonmembers. See also Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986).

church may be perceived as not quite full members of the citizenry, in the manner of members of the approved faith. In two more specific ways, an establishment may be thought to trespass on the religious consciences of nonadherents. First, requiring someone to contribute to the upkeep of a religion he does not support may violate his religious conscience.<sup>9</sup> This view faces the powerful objection that modern taxpayers inevitably contribute to various government endeavors to which they may strongly object, but perhaps there is something special about being forced to support what one believes are misguided forms of worship.<sup>10</sup>

Another way in which an establishment may violate free exercise concerns forced instruction. Even if one can worship as one chooses, one's conscience may be violated if one is instructed regularly in the doctrines of the established church. If state schools teach these doctrines to children, that infringes on the religious consciences of dissenting children and their parents.

Although the institution of an established church mainly raises questions about outsiders' religious liberty, members of the official church also suffer a diminution of liberty, because political officials exercise control or influence over their religion.<sup>11</sup>

The point is often made that countries such as England and Sweden have established churches *and* religious liberty. No doubt, a country can possess a high degree of religious liberty along with an established church,<sup>12</sup> but the maximum degree of religious freedom may be realized when no church is established. Nonestablishment promotes free exercise by removing government from individuals' choices about which religion to practice and by allowing all religious groups to worship and order their affairs as they deem best. Someone might respond that this judgment reflects a liberal view, as

<sup>9</sup> This view is urged by James Madison in his "Memorial and Remonstrance Against Religious Assessments," in Philip B. Kurland and Ralph Lerner, eds., *5 The Founders' Constitution* 82–84 (Chicago: University of Chicago Press, 1987). Indeed, Madison thought that one should not be compelled even to give money to one's own denomination. One might conclude that what Madison says about a small tax applies only to a tax instituted for the purpose of supporting religion, *not* to use of general tax funds, but Madison certainly did not express such a narrow view.

<sup>10</sup> One might think that personal convictions about blasphemy or the biblical injunction not to worship other gods are relevant. Members of one faith may think that members of another are worshipping other gods or committing blasphemy. Perhaps the state should not demand that anyone indirectly support a religion he or she abhors.

<sup>11</sup> Anthony Trollope's 1857 novel *Barchester Towers* (London: Penguin Classics, 1987) begins with the death of a bishop whose son, the archdeacon, hopes to succeed him. The son's prospects were excellent under an outgoing government but dismal under a new government, and as his father lay close to death, the son "at last dared ask himself whether he really longed for his father's death." *Id.* at 3.

<sup>12</sup> These modern examples may be somewhat misleading, because the countries have become so pervasively secular. *Religious liberty* may flourish better when an established church loses its hold on most citizens than when it remains a vital force in a society's life.

opposed both to a conviction that governments have a responsibility to follow and promote religious truth and to a communitarian understanding that religious exercise in a particular faith warrants support as part of a national culture, a perspective one finds in some Eastern European countries. My answer is that the liberal view of free exercise is dominant in American law and culture *and* that on grounds of political philosophy, it is preferable to the idea that government should carry forward the true religion and to the sense that a national faith warrants special state privilege.

What promotes religious liberty becomes more complex and debatable when governments consider providing broad financial support to religious organizations that offer valuable secular services. Nonestablishment may be best achieved if the government declines to provide such support, but if those organizations are denied aid, that may impair the religious exercise of those who run the organizations and use their services. And if the government offers comparable services itself or finances nonreligious private organizations to do so, denying aid to religious organizations may seem acutely unfair.

We have seen in our examination of various free exercise issues that government grants of special accommodations to religious claimants may seem to establish religion over nonreligion or to establish favored religions over those who do not benefit. These concerns about establishment dominate consideration of what are constitutionally permissible and wise forms of accommodation.

In its undisputed core, nonestablishment definitely promotes the free exercise of religion, but potential conflicts with aspects of free exercise exist at the outer edges of nonestablishment. Perhaps the most crucial aspect of establishment analysis is deciding when more robust versions of nonestablishment should give way to claims of free exercise enshrined in the Constitution or embodied in legislation.

### NONESTABLISHMENT VALUES

We can summarize the interrelated values lying behind nonestablishment of religion as the protection of religious conscience, the promotion of autonomy, the withdrawal of civil government from an area in which it is markedly incompetent, the removal of one source of corruption of religion and deflection from religious missions, the removal of one source of corruption of government, the prevention of unhealthy mingling of government and religion, the avoidance of political conflict along religious lines that could threaten social stability, and the promotion of a sense of equal dignity among

citizens. I shall comment on each of these in turn, and then address directly five competing approaches to nonestablishment and equal treatment. Three initial cautions may be helpful. First, because nonestablishment of religion helps to sustain free exercise, and the first volume explores values underlying the Free Exercise Clause, my treatment of those values is briefer here than is my discussion of values that more distinctly concern nonestablishment. This is not a mark of comparative importance.

Second, from the founders' era up to the present, people have disagreed about which of these values are of greatest significance and, indeed, about whether some of the values I list should count at all for judges deciding establishment cases. Not surprisingly, when members of the Supreme Court stake out different positions on this score, the justices can have different convictions about how individual controversies should be resolved. We shall see confirmation of this truth many times over in the chapters that follow.

Third, the disagreement about which values to emphasize can take the form of differential assessments of what the adopters of the First Amendment (or people at that time) believed, or of varying distillations of what judicial decisions under the Establishment Clause up to the present suggest, or of competing normative judgments of what should count in our modern liberal democracy. These three perspectives may be mixed in judicial opinions, and one often has the sense that a justice's own normative appraisal is flying under the flag of a claim about original intent or about the combined force of precedents. When an outsider—a scholar, a lawyer, or an ordinary citizen—seeks to evaluate the work of the Supreme Court, her judgment will strongly reflect her sense of the comparative importance of underlying values. Although I do not believe one can reasonably offer a neat hierarchical ordering of these values (whether in general or for particular subjects), my appraisals throughout the book evidence my own sense of how they bear on a wide range of issues. I encourage the reader to look at the problems we shall address with a thoughtful attention to these underlying values.

### **Protection of Religious Conscience**

Nonestablishment protects religious conscience. This is illustrated by the historical establishments of individual churches with which the Framers of the Bill of Rights were familiar. If a person is required to worship in a particular fashion, or may not worship at all in the way that she chooses, or may not worship in public in the way that she chooses, she does not enjoy freedom of religious conscience. The denial is real, though less severe, if she may worship

as her convictions tell her, but suffers penalties or denials of opportunities (such as eligibility for public office) as a consequence.

We should not conceive potential restrictions or disabilities as attaching only to corporate worship. A country with an established religion might allow adherents of other faiths to worship freely but not to proselytize for converts. For persons whose religious convictions tell them they should preach “the good word” (this includes many Christians), a prohibition on proselytizing is a restriction on religious conscience. The effect on potential recipients is a bit harder to categorize. If one actively seeks to learn from adherents of various religions, a ban on proselytizing by others serves to restrict one’s religious conscience. That characterization does not seem apt for the passive listener who has no thought about an alien religion until approached by missionaries. But we can say that his *autonomy* is not fully recognized if others cannot communicate their religious ideas to him. The issue of restrictions on proselytizing is a serious one within many countries, including some from Eastern Europe who wish to safeguard their traditional Orthodox Christian religions from the active missionary efforts of groups like the Church of Jesus Christ of Latter-day Saints (Mormons) and Jehovah’s Witnesses.

For most people, forced exposure to another religion would violate their religious conscience. If I am allowed to worship as I please, but *must* sit through a Roman Catholic worship service twice a week, I do not enjoy full freedom of conscience. This aspect of freedom of religious conscience is plainly implicated, if students in state schools are required or pressured into participating in rituals of an established religion.

If a person is compelled by the state to contribute financially to a religion in which she does not believe, or even to a religion in which she does believe, that infringes on her religious conscience, at least if she feels that her own convictions should dictate what religion she supports and how she does so. People may or may not feel differently if what they “contribute” is general taxes, with the government allocating some general revenues to religious organizations. And whatever some people may feel, it is arguable, as the discussion in the previous section indicates, whether they have a *reasonable* claim of conscience if the money given to religious groups is for appropriate public purposes.

Finally, if one thinks that religion is essentially not the business of civil government, one who is a member of an established church over which the government has some control may regard that control as violating his religious conscience.

### Promotion of Autonomy

In categorizing autonomy separately from religious conscience, I do not mean to suggest that a sharp line separates the two; indeed, freedom of conscience is one aspect of autonomy. But I conceive autonomy as involving unfettered freedom to choose among various options, whether or not an absence of freedom restricts one's exercise of his convictions. In this sense, even if every citizen is free to practice religion as she chooses, including the freedom to practice no religion, full autonomy of choice is limited if the government "stacks the deck" in favor of one religion or all religions. It can do this by formal recognition of a religion as "the religion" of the society (the Church of England), by other signs of favor, or by financial support. In this light, autonomy of choice is most fully realized if no religion is favored over others and if religious groups are treated similarly to relevantly situated nonreligious groups. (A qualification to this principle of similar treatment that becomes highly relevant in later chapters concerns the possibility that some religious groups operating social welfare programs, such as drug rehabilitation centers, may themselves threaten the autonomy of nonbelievers who participate.)

In thinking about autonomy and government endeavors, we need to recognize that the government promotes all sorts of points of view over others. When I was growing up, I was left in little doubt that Communism was highly disfavored, a conclusion supported by statutes and many other official government actions. In one sense, I was "free" to find Marxist Communism a sound political philosophy, but I would have needed to be a hardy resister of social pressure to do so. One can certainly say similar things now about explicitly racist and sexist beliefs. If we do not object to the government "tipping the scales" in favor of some political and moral views in favor of others, why should we be concerned with whatever modest interference with full autonomy might be generated by its favoring of some or all religions? Unless one thinks that the government should refrain from promoting political and moral views and ideas of the good life (by such measures as campaigns against drug use and smoking cigarettes), one needs to see religion as special in some way. A typical stance is that when a person's sense of her relationship to God (or gods) or to ultimate reality is concerned, the government should particularly refrain from attempted influence. This stance is based both on the essential nature of the questions religions address and on the government's incompetence to deal with them.

### **The Government's Incompetence as to Religion**

People elected to government in modern liberal democracies have no special competence in respect to religion. Indeed, their needs to focus on the exigencies of modern life and to compromise their ideals in the give-and-take of politics may render them particularly unsuited to pursue deep questions of religious understanding. Add to this that they would be under a constant temptation to favor those religions that support their political programs, or are likely to aid their reelection, or both. Centuries ago, these evident disabilities may have been thought offset by the perceived need for a government to promote a coherent religious position in order for a society not to fragment. By the time of our Constitution, this perception had been largely dispelled. In modern times, we recognize that societies (at least most societies) can well survive with a wide range of religious diversity. No need for social order serves as a counter to the incapacities of government with respect to religion.

### **Avoidance of a Source of Corruption of Religion and Deflection from Religious Mission**

If one religion is established by the government, there is a constant danger that it will be turned to serve the political purposes of the government. Two more subtle risks can go with financial support. If a particular religion is heavily subsidized by public funds, its priests or ministers may become self-satisfied and relatively passive, not needing to win a following among individual citizens. This was a danger remarked on by Adam Smith,<sup>13</sup> and it possibly may help to explain a relative lack of vitality among established churches in Western Europe. Another risk goes along with modern public support of church-related schools and welfare programs. As the degree of public financing increases, so also may the perception that services should be provided in a way that conforms with public objectives. If a religious organization becomes heavily dependent on state funds, it may find it nearly impossible to forgo that support, even when the conditions that are attached to funding begin to interfere with its own sense of practices that are called for by its religious mission.

<sup>13</sup> See Adam Smith, *Wealth of Nations*, bk. 5, chap. 1, pt. 3, art. 3, "Of the Expense of the Institutions For The Instruction of People of all Ages," William Playfair, ed. (London: W. Pickering, 1995).

### **Avoidance of a Source of Government Corruption**

If an established church is, or a group of favored religions are, very powerful, political leaders may cater to the wishes of religious leaders. Of course, if one believes that a government ideally should be the servant of higher religious purposes, this would present no problem, as long as the religious leaders had both the right religious view and decent political judgment. But a general assumption about civil governments in modern diverse societies is that political rule should be basically independent of particular religious objectives. From that point of view, established religion can be a threat to sound government.

### **Avoidance of Unhealthy Intermingling**

Nonestablishment helps religion and government to remain relatively independent. Of course, in a modern society a host of interconnections are unavoidable; but if public officials become heavily involved in the review and supervision of religious endeavors or if religious leaders end up making governmental decisions, the risks of heavy-handed interference within one domain by the other are substantial.

### **Avoidance of Religious Conflict That Could Threaten Social Stability**

It was long thought that a critical element of political stability was the domination of one religion in a society. After the Protestant Reformation, the first measure of religious freedom was that individual rulers could select the religion for their territories, not that ordinary citizens within a territory could worship as they chose. By the American Revolution, a very different understanding had developed, namely that political orders could function very well with a diversity of religious opinions. From this perspective, certainly ours today, the avoidance of conflict along religious lines is an important objective. Inevitably, some tensions will exist between adherents of different religions who believe each other to be fundamentally misguided about ultimate truth. But the tensions are bound to increase if those adherents see themselves in a struggle for state support—financial and other—and for the levers of political power. It is difficult to say how an objective so general and vague as political stability should figure in evaluation of any proposed program, but it lies in the background as one important value underlying the ideal of nonestablishment.

### Promotion of a Sense of Equal Dignity among Citizens

In addition to the concerns about autonomy and potential conflict, it is undesirable for some citizens to feel they are specially “in” because they adhere to a religion or religions that the government favors. Members of a minority (at least adults ) may be firm enough in their religious convictions, or their disbelief in any positive religion, not to have a government endorsement of a dominant faith threaten their autonomy of choice, and the minority may be too small to threaten political stability; yet if the members feel like “outsiders,” not fully accepted into the society, that in itself is undesirable. No one likes to feel excluded. And however people may feel, governments should not convey messages of exclusion. Except perhaps in the case of criminal punishment, the government should not aim to make citizens feel excluded, and even when its actions are not designed to exclude, if they generate feelings of exclusion without a sufficient justification, they may be seen as infringing a basic right to equal dignity.<sup>14</sup>

### Nonestablishment and Equality

As with free exercise, people may adopt different perspectives about nonestablishment and principles of equal treatment. One position is that in our country, with its deep religious heritage, the government may favor religion in various ways, so long as it refrains from actually establishing a church (and treats religions equally). According to a second position, the basic values of disestablishment, values for religious institutions as well as government, call on the state to accord religion less than equal treatment in many matters. The first and second positions may be combined if one thinks that religion should be favored in some respects, disfavored in others. These positions make little direct reference to equality. A third position is that the basic standard for religion and nonreligion is equality—religious ideas should be treated just like any other set of ideas and no distinctions should be drawn between religious and other groups. A fourth approach is more flexible; according to it, the overall aspiration should be to some sort of equality between religious and other groups, but this may involve favoring or disfavoring religion specially in respect to various subjects. The third and fourth positions both accept equality between religion and nonreligion as a guide, but they implement the focus on equality in quite different ways. A final,

<sup>14</sup> I mean here to distinguish justified measures, such as fighting a necessary war or desegregating schools, that might predictably make some people (pacifists or racists) feel like outsiders.

fifth, position is that both independent principles of disestablishment *and* equality have constitutional significance; courts must sometimes decide which of these to give priority. Strongly believing that establishment law cannot be reduced to any single value, I think the fifth approach is most apt. As a similar view informed discussions in the free exercise volume, that view underpins the exploration of particular problems in the chapters that follow.

Principles of equality figure more directly and uncontroversially in the assumption that the religion clauses forbid discrimination *among* religions;<sup>15</sup> when the government prefers some religions over others, that establishes the favored religions and inhibits the free exercise of the disfavored ones. As chapter 3 of the first volume retells, when Minnesota adopted guidelines that exempted most religious groups from ordinary reporting standards for charitable organizations, but did not include groups such as the Unification Church, which raised more than half their money from outsiders, the Supreme Court concluded that the state could sustain the distinction among groups only upon showing that it was needed to satisfy a compelling interest.<sup>16</sup> Applying that test as it would in an equal protection case, the Court, with only one dissenter, declared the law to be an invalid establishment.<sup>17</sup>

The principle of equal treatment among religions is now widely accepted. The more controversial principle that the government should not prefer religion over nonreligion will occupy us in many of the chapters that follow.

### DOES ESTABLISHMENT CLAUSE DOCTRINE REST ON A FUNDAMENTAL MISCONCEPTION?

In legal circles, one frequently hears the assertion that the development of Establishment Clause principles against the states rests on a fundamental misconception. Here is a succinct account of the most popular version of that claim.

<sup>15</sup> *Larson v. Valente*, 456 U.S. 228 (1982). Some have argued that the original idea of nonestablishment allowed approval or support of Christianity, in general, against other religious persuasions, a position expressed by Joseph Story in his famous nineteenth-century treatise. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting). A favored position for Christianity is now indefensible in our country of increasing religious diversity, with modern immigration laws that virtually assure (by *not* now engaging in heavy favoritism of European immigrants) that this diversity will continue to grow.

<sup>16</sup> *Larson v. Valente*, 456 U.S. 228 (1982).

<sup>17</sup> The Supreme Court reached a similar conclusion on free exercise grounds when the City of Hialeah directed ordinances against the practice of animal sacrifice by one religious group. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Although no state had an established church in the full sense when our Constitution was adopted, a number afforded supports to various religions. The original U.S. Constitution said nothing about established religion.<sup>18</sup> In providing that Congress shall “make no law respecting an establishment of religion,” the First Amendment guaranteed that issues of establishment were left to states. Congress could no more terminate a state establishment than it could establish a national religion. The Supreme Court had no basis to convert this guarantee of state power into a restriction on states.

This argument rests on at least two mistakes, explored more fully in the next chapter. Even if the original language was partly a guarantee of federalism, it was not only such a guarantee. The federal government had from the beginning certain limited domains of exclusive authority, including its own internal operations, any federal military forces, federal embassies and consulates abroad, the District of Columbia (recognized in the Constitution though not yet established), and federal territories, such as the Northwest Territory. Congress could not create a full-blown established church for these domains.<sup>19</sup>

A second flaw in the argument that the Establishment Cause cannot limit the states is its disregard of the period between the adoption of the Bill of Rights and the Civil War. By the Civil War, all states had abandoned their established churches, and many had incorporated antiestablishment language in their own state constitutions.<sup>20</sup> The post-Civil War Fourteenth Amendment was designed partly to grant citizens a protection of fundamental rights against state infringements, a protection citizens previously enjoyed only against the federal government. The Supreme Court has held that the protected rights included virtually all of the rights conferred by the Bill of Rights.<sup>21</sup> Given the broad acceptance of the nonestablishment principle for all American governments in 1866 and the close connection between free exercise and nonestablishment, Fourteenth Amendment language protecting liberty and privileges can reasonably be thought to include the Establishment Clause.

<sup>18</sup> However, it did (and does) provide that there can be no religious test for federal offices and that federal and state officeholders can affirm rather than swear an oath of office.

<sup>19</sup> One might believe that Congress could have taken some actions concerning religion in federal territories that it could not take for the whole country, but, despite some uncertainty about whether the Constitution applied to the territories, Congress probably could not have created an official church within them.

<sup>20</sup> At present, virtually all state constitutions contain antiestablishment language, although the wording typically varies from that of the federal Constitution.

<sup>21</sup> Whether the adopters of the Fourteenth Amendment really meant to “incorporate” large chunks of the Bill of Rights is debated.

Thus, despite arguments to the contrary, a powerful case exists for applying the Establishment Clause to state and local governments. But even those who reject that application must see that nonestablishment principles are rooted in state constitutions. Because state judges may interpret state documents to have more or less scope than the Supreme Court gives the federal Constitution, the rule that the federal establishment guarantee applies to the states does make some practical difference, but the issue is *not* whether states should have, or are permitted to have, strong forms of religious establishments.

In the chapters that follow, I take as a given that no state should have an established religion, and I also assume, somewhat more controversially, that limits drawn from the federal Constitution should apply in the same manner to federal and state governments.

### THE STRUCTURE OF THIS VOLUME

The remainder of this book is roughly organized according to subtopics. Chapters 2 through 4 constitute an extended introduction to later chapters dealing with discrete subject matters. Chapter 2 describes the history leading up to the Establishment Clause, and analyzes what was its originally understood content. The chapter also contains a much briefer account defending the view that the Fourteenth Amendment has properly been employed as a vehicle for making the restrictions of the clause applicable against the states. Chapter 3 traces the development of Supreme Court doctrine regarding the Establishment Clause, indicating the important respects in which restrictions discerned by the Supreme Court after World War II have been relaxed in recent years. Chapter 4 sets out four basic principles of nonestablishment as that has been conceived in the United States. Governments cannot aid particular religions as such or promulgate particular religious doctrines. Thus, a state may not single out Presbyterian churches for financial aid: it may not declare that the true meaning of Christian communion is transubstantiation. Governments also may not aid religion in general as such or support religious ideas that unite a high percentage of religious believers. These principles are much more controversial, and, as we shall see, various practices are hard to square with their rigorous application. These principles are also much more insecure than those concerning aid to particular religions. They are not accepted by a number of Supreme Court justices, as well as many scholars; and one who engages in prediction must acknowledge that their survival

into even the near future depends significantly on who is appointed to the Supreme Court.

Chapters 5 through 12 all, with one exception, concentrate on various expressions of ideas that are indisputably expressions by the government or may be attributed to the government. Chapter 5 focuses on religious words and symbols in public places, including crèches as parts of Christmas displays and copies of the Ten Commandments posted in government buildings or on public monuments. Chapter 6 deals with the delicate problem of what I call “mild endorsements,” practices, such as “under God” in the Pledge of Allegiance that appear to enlist the government in support of religious ideas, but may be defended as not doing so at all or as not doing so in a manner sufficiently coercive to make it unconstitutional. The following three chapters are about religion in public schools: devotions, such as prayer and Bible reading; teaching about religion as contrasted to teaching the truth or falsity of religious ideas; and teaching of content that rests on religious premises, as exemplified by the issue of whether creationism or intelligent design may be taught alongside evolution. Chapter 11 treats the principle that when a government makes its facilities generally available for private groups, as when a public school permits private, voluntary clubs to use its classrooms, it cannot, given applicable principles of free speech, treat religious groups less favorably than others. Chapter 12 addresses the special problems of chaplains in the armed forces and within prisons, asking whether the religious needs of service personnel and prisoners can justify forms of support that would otherwise violate the Establishment Clause.

Chapter 10 is a kind of intermezzo. It analyzes various tests and standards Supreme Court justices have used to discern whether the Establishment Clause has been violated. I have postponed this analysis until the reader has enough of a sense of how the tests and standards are employed in actual cases to grasp the nuances that this chapter considers.

Chapters 13 and 14 concern intertwined authority of religious groups and government: first, a state’s assigning what are essentially governmental decisions to religious bodies, and, second, the state’s supporting religious restrictions, as with kosher enforcement laws, and the state’s attempting to influence actions with religious significance, such as the religious divorce Orthodox Jewish husbands may or may not grant to their wives.

Chapters 15 to 17 are primarily about exemptions that may go to religious individuals or groups, treating them differently (and more favorably in a sense) than others who are subject to the law. This topic in many particular manifestations is a dominant concern of volume 1, on free exercise. Chapter 15 deals with the special issue of taxation, asking when various forms of tax

breaks for religious organizations and individuals are permissible under the Establishment Clause, and whether the permissibility of such exemptions depends on their extension to nonreligious organizations and concerns. Chapter 16 undertakes a general inquiry about religious exemptions. Are they warranted, are they (sometimes) a matter of justice, are they (sometimes) properly seen as constitutional rights, should they, or must they, be extended beyond religious claims? The following chapter seeks to find standards to determine when exemptions that might otherwise be an acceptable accommodation to the free exercise of religion are formulated in such a way that they violate the Establishment Clause.

Chapters 18 and 19 tackle a problem of great practical importance and controversy: the appropriateness of giving government financial assistance to religious groups that undertake programs that confer substantial nonreligious benefits, operating, for example, hospitals, adoption agencies, drug treatment programs, and schools. As we shall see, the existence of such aid—even substantial aid—to many kinds of programs is widely accepted, although sharp dispute arises over the exact conditions that should attach to it. The primary area of conflict in our country's history has been over aid to schools—fueled by concern over religious indoctrination and a sense that public schools play a crucial unifying function in this society. Chapter 19 is devoted exclusively to that topic.

The last five chapters are largely theoretical, addressing religion and government in legal theory and in political theory. Chapter 20 answers skeptics who claim that we lack viable principles for adjudication under the religion clauses, and chapter 21 considers three specific proposals for interpretation of the clauses. Each of these proposals aspires to be more straightforward than the Court's own serpentine course, and at least two of the three suggest radical redirection. Chapter 22 inquires about the underlying premises one might embrace that would support the basic principles of the religion clauses, and considers whether the various premises people might accept will much affect the content of the principles as they see them. The last two chapters deal more broadly with the problem of religious convictions that underpin political judgments and argument. I there provide a summary explanation and defense of my own intermediate position about whether the politics of our liberal democracy should be grounded on "public reasons," and I explore the possible implications for constitutional law of legislators relying on religious convictions when they decide what laws to enact.