

Religious Liberty: Essays on First Amendment Law

The principle aim of the establishment and free exercise clauses of the First Amendment was to preclude congressional imposition of a national church. A balance was sought between states' rights and the rights of individuals to exercise their religious conscience. While the founding fathers were debating such issues, the potential for serious conflict was confined chiefly to variations among the dominant Christian sects. Today, issues of marriage, child bearing, cultural diversity, and corporate personhood, among others, suffuse constitutional jurisprudence, raising difficult questions regarding the nature of beliefs that qualify as "religious" and the reach of law into the realm in which those beliefs are held.

The essays collected in this volume explore in a selective and instructive way the intellectual and philosophical roots of religious liberty and contemporary confrontations between this liberty and the authority of secular law.

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Religious Liberty

Essays on First Amendment Law

Edited by

DANIEL N. ROBINSON AND
RICHARD N. WILLIAMS



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Foreword

It is an ancient question at least as old as Aeschylus and Sophocles: What role should religion play in public life? The Framers of the American republic thought the matter of such importance that they addressed the issue in the Bill of Rights to the Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹ Beyond the importance of the Religion Clauses, however, there has been little agreement about their meaning since ratification. As my former colleague on the US Court of Appeals Michael McConnell points out:

The religion provision is unique among the rights-protecting provisions of the Constitution in that it has a dual aspect: It forbids both laws ‘respecting an establishment of religion’ and laws ‘prohibiting the free exercise thereof.’ What is the relationship between these clauses? Surprisingly, more than 200 years after those 16 words were added to the Constitution, that basic question remains contested.²

But is it really surprising? After all, the meanings of the Religion Clauses don’t seem obvious. What is meant by “an establishment of religion?” Is it clear when government is “prohibiting the free exercise” of religion? Madison originally proposed protection for “the full and equal rights of conscience.”³ Was that simply another way to say “the free exercise of religion,” or did the ratified language mean something narrower? Further complicating the matter, any effort to understand the meaning of the Religion Clauses must look at two periods of time: the initial ratification of the First Amendment, which was a limitation on what Congress could do regarding religion, and the ratification

¹ U.S. Const., amend. 1.

² Michael W. McConnell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution*, 3rd Edition (New York: Aspen Publishers, 2011), p. 3.

³ *Annals of Congress*, 1789, 434.

of the Fourteenth Amendment, which arguably applied the First Amendment to the states at a time when the view of state government and its relationship to religion had changed.⁴

Even the most casual study of American history shows that the meaning of the Religion Clauses has vexed judges, scholars, politicians, opinion leaders, and citizens for decades. Debates over their history, purpose, and philosophical underpinnings have been regular features of public life of the United States. But these debates have taken on a new urgency as religious life in American society undergoes dramatic change. Although some diversity of religious views was present at the founding and no doubt informed the original purposes of the Religion Clauses, the mainstream Protestantism that played such a dominant role in American life and the founding occupies more narrow ground in an American citizenry of the twenty-first century that is increasingly characterized by pluralism. In fact, the fastest growing group is those not affiliated with a religion or who reject belief in the divine altogether. The percentage of those reporting no religious preference more than tripled from 5–7% of adults who reached adulthood before 1960 to 20–30% among those who reached adulthood in the 1990s and 2000s.⁵ In 2012, one-third of adults under thirty identified as religiously unaffiliated.⁶ This increased religious pluralism in American society is thus set against the backdrop of an even more dramatic change two centuries in the making: a secular age. As described by Charles Taylor, we have moved “from a society where belief in God is unchallenged ... to one in which it is understood to be one option among others, and frequently not the easiest to embrace.” This “change ... takes us from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others ... Belief in God is no longer axiomatic.”⁷

Shifts in political ideals also contribute to changing views as to the place of religion in society. As McConnell explains, where once “[e]quality under the law meant that our rights as citizens did not depend on belonging to the right religion ... [t]oday there is a widespread sense not only that the government should be neutral, tolerant, and egalitarian, but so should all of us, and so should our private associations.”⁸ In a society where open-mindedness is glorified, faith and conviction in religious tradition are more often depreciated

⁴ Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), p. 42.

⁵ Robert D. Putnam and David E. Campbell, *American Grace: How Religion Divides and Unites Us* (New York: Simon & Schuster, 2010), pp. 122–25.

⁶ Pew Research and Public Life Project, “‘Nones’ on the Rise,” Pew Research Center, October 9, 2012, accessed January 2, 2015, www.pewforum.org/2012/10/09/nones-on-the-rise/.

⁷ Charles Taylor, *A Secular Age* (Cambridge: Belknap Press, 2007), p. 3.

⁸ Michael W. McConnell, “Why is Religious Liberty ‘The First Freedom?’,” *Cardozo L. Rev.* 21, (2000), 1243, 1259.

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and undervalued. Replacing a pluralistic understanding of neutrality is a search for a common denominator, where space is made for a multitude of different views and practices, where religion is set aside as “particularistic” and thus non-neutral.⁹

Into this fray over the role of religion in American life today, the Wheatley Institution at Brigham Young University offers this collection of essays by scholars who push back against the efforts of secularists to devalue religion and deny its benefits to society at large. They ask us to think seriously about what religious liberty should look like today. These essays are noteworthy not only for their distinguished authors, but for the breadth of their analysis, which draws upon case law, intellectual history, and philosophical analysis to make the argument that religious liberty is a distinctive freedom that remains vital to the well-being of the Republic constructed by the Framers of the Religion Clauses.

These authors reject the notion (that finds some support in recent decisions of the Supreme Court) that religious expression is but a subset of a larger category of freedom of expression that lacks any separate ground to justify its encouragement or protection. They also take on the more ominous suggestion advanced by some respected academics that there is nothing about religion that merits any protection at all.¹⁰ In this regard, these essays are of a piece with these words from Barack Obama:

[S]ecularists are wrong when they ask believers to leave their religion at the door before entering into the public square. Frederick Douglass, Abraham Lincoln, William Jennings Bryan, Dorothy Day, Martin Luther King – indeed, the majority of great reformers in American history – were not only motivated by faith, but repeatedly used religious language to argue for their cause. So to say that men and women should not inject their ‘personal morality’ into public policy debates is a practical absurdity. Our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition.¹¹

As President Obama notes, religious expression and the religious life from which it springs have been part of the warp and woof of the fabric of the American experience. The Religion Clauses of the First Amendment not only recognize the important role that religion has played in the nation’s public life, but they seek to guarantee space for a continuation of that role even as the religious landscape of the country continues to change. These essays explore the basis for that understanding, arguing against those who assert that the Clauses have outlived their usefulness.

⁹ *Ibid.* at 1262.

¹⁰ See, e.g., Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2012); Micah Schwartzman, “What If Religion Is Not Special?,” *University of Chicago Law Review*, 79 (2012), 1351–1427.

¹¹ Barack Obama, Call to Renewal Keynote Address (June 28, 2006), available at <http://obamaspeeches.com/081-Call-to-Renewal-Keynote-Address-Obama-Speech.htm>.

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Thomas Griffith

The timing of this publication is timely as fewer of today's Americans understand the first principles of religious belief and practice and their place in the constitutional structure. This volume is a significant contribution to improve understanding of the reasons for religious liberty and its importance to the well-being of the Republic and assuring its future vitality.

Thomas Griffith