

Introduction

Assessing the First Amendment and Religious Liberty in America

Michael D. Breidenbach and Owen Anderson

In 1789, when the First Federal Congress discussed James Madison's proposed constitutional amendments on religious liberty and nonestablishment, the lawmakers did not debate many of the concerns related to the First Amendment today. They did not argue over whether religious imagery should be excluded from civic spaces, or whether government should refrain from funding activities that include a religious purpose, or whether religion should be separated from politics generally. To these issues, many of the American founders had already replied with a resounding "no." Instead, the question during that sweltering summer in 1789 was more narrowly conceived: What juridical prohibitions should be placed on the federal legislature with respect to a national church and religious conscience, liberty, or exercise? After a month of deliberations, Congress agreed on the following text: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Around this text, now aged 230 years, turn today's church-state jurisprudence as well as much political, cultural, and religious discourse in America. The religion clauses remain one of the most contested constitutional texts: Free exercise and establishment clause cases are common in state and federal courts, and those that rise to the Supreme Court are often the centerpieces for contentious debates among scholars, practitioners, and the public at large. Their decisions fundamentally shape how individuals live and organizations operate. Just in the first two decades of the new millennium, the Supreme Court has decided whether students can initiate and lead prayer in public schools, whether the government can fund secular programs at religious schools and organizations, whether religious organizations can access public school facilities, whether religious imagery

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can be displayed on public property, whether an illegal substance can be used for religious purposes, whether religious organizations can exclude certain people from membership based on religious beliefs, whether corporations can obtain religious exceptions from laws, and whether businesses can deny certain services based on religious convictions. Similar questions have appeared in previous Supreme Court cases and will no doubt reappear on future dockets. The contemporary importance of the religion clauses of the First Amendment cannot be underestimated, even though their initial purpose was less ambitious than their expansive reach today.

The First Amendment is such contested territory because it relates to fundamental questions about the nature of humanity, morality, religion, government, and God. When these questions are renewed, or when novel answers are offered, changes in societal views on the content and parameters of religious liberty often follow. First Amendment cases often appear at times when fundamental values seem to be in tension. For instance, the first landmark Supreme Court decision on the free exercise clause, *Reynolds v. United States* (1879), concerned whether a federal law criminalizing plural marriage violated the religious liberty of a Mormon who considered polygamy his religious duty. Divergent views on sexual morality continue to ignite conflicts concerning religious liberty. Recent cases across the United States, including *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), have considered whether those who provide services for weddings can lawfully deny, on religious liberty grounds, those services for ceremonies celebrating same-sex unions.

Resolving these disputes requires comprehension beyond knowledge of constitutional law and legal precedents. However, Supreme Court justices rarely wrestle with fundamental questions about human nature and the transcendent and often decline to address what religion is and what it is not. This judicial modesty is in fact fatal to their jurisprudence: By punting the question of what religion is, the Court cannot reasonably judge what religious liberty, exercise, organizations, or establishments are. Part I of this interdisciplinary volume, therefore, grounds the discussion of First Amendment jurisprudence with philosophical foundations.

Owen Anderson considers areas of natural religion, reason, and presuppositional thinking with respect to the First Amendment. He argues that the right to religious liberty is grounded not on the belief that all religious knowledge is impossible, but that there are truths about God, human

nature, and individual rights knowable by natural reason, as the Declaration of Independence avers. Anderson argues that the religious liberty protected by the First Amendment applies to all persons inasmuch as all persons participate in the characteristic human search for meaning, which is the defining feature of religious beliefs and activities. This is a pursuit that requires freedom from external coercion if it is to have any coherence. Anderson's metaphysical view shows how some knowledge is possible in the realm of natural religion, how humans can access these truths through reason alone, and how greater agreement can therefore be achieved concerning religion. The value of the First Amendment lies precisely in the fact that disagreement exists, even as it was founded on the belief that some agreement is possible.

In a complementary but unique approach, Janice Tzuling Chik defines what religion is, and is not, by the human activities essential to it. By centering the question of religion's nature within action theory, she challenges the catchall account of religion – that it is simply a set of beliefs concerning the cosmos and ethics – and thus denies that religion can be reduced to a philosophy, a mere matter of conscience, or “religious atheism.” The paradigm case of religion, Chik maintains, is an activity that is ordered to a concept of superior nature, what has traditionally been called “God.” While worship is the exemplar of religious activity, all moral action can be religious, even if only in a secondary sense, as long as it is ordered to the transcendent. Religious exercise also includes voluntary act omissions – the choice not to perform an action – when the agent sincerely believes that such an action would violate his or her religious convictions. This account offers philosophical grounding to the claim, often found in free exercise clause cases, that in principle one has the religious liberty to act, or (more commonly) refrain from acting, on account of religion, even when such activities are seemingly secular, such as refraining from attending public schools, denying mandates that require certain health care, and objecting to serving in armed conflicts. The reasoning and implications of this metaphysical view of action, Chik concludes, are available to all rational beings, regardless of one's religious or nonreligious commitments.

Yet even if one agrees with Anderson that there are certain knowable truths about God, human nature, and individual rights, and with Chik that religion is defined as activities ordered to the divine, one might still object that the Constitution need not protect the liberty to hold these beliefs and perform these distinctive activities any more than it protects conscience

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rights or other human activities. John Finnis argues against contemporary legal scholars who have insisted that religion does not require special protections, privileges, exemptions, or immunities under generally applicable laws. He maintains that religious liberty is a special right because of religion's ultimate interest in and search for "the truth about truth." Religion thus transcends, incorporates, and illuminates, rather than floats at the same level as, all other truths, such as those pertaining to science and morality. This distinctive relevance demands special status in law – a status enshrined in as diverse a canon as the US Constitution, Indian Constitution, Second Vatican Council, and the European Convention on Human Rights.

The foregoing chapters point to the distinctive good of religion and the special legal protection required for its free exercise. But what are the practical applications of these philosophical views? Should there be limits to the legal protection of religious exercise? Should religion generally or some religions in particular receive special treatment or even be established as the state religion? What would governmental favor of religion entail? Throughout American history, lawmakers, religious leaders, and the general public have registered divergent, incompatible responses to these and similar questions. Part II of this volume traces these historical developments of religious liberty and church–state relations in America.

The arc of church–state relations in America did not inexorably bend toward the First Amendment. Colonies with church establishments in early America outnumbered those without establishments, and many colonial and state laws restricted religious exercise or full participation in public life to anyone who fell outside a colony's or state's defined orthodoxy. There were, of course, notable exceptions: Maryland, Rhode Island, and Pennsylvania all offered varying degrees of religious toleration during at least part of their colonial histories, but even then their religious tests and other laws restricted religious minorities from public office and other privileges. As Glenn A. Moots demonstrates, establishments and penal laws were justified, as in Europe, on the grounds that religion was vital to good government, that civil rulers had a duty to protect and promote the true faith, and that religious dissent presented not only spiritual problems but also the political problems of disunity and even treason. If religious liberty existed for religious minorities, it was at best a liberty to be left alone. Yet Moots notes that because not all Americans agreed on what true faith should be established, protected, or promoted – a fact only more

pressing as America grew from small settlements to fully functioning colonies – there were religious minorities who agitated for toleration and against their colonies' establishments. This struggle for greater liberty, Moots shows, was local, uneven, and argued mostly with Christian sources and British law, favoring Protestant dissenters more than Catholics and Jews.

The complicated picture of church–state relations and religious liberty that Moots depicts in the seventeenth century remained in the immediate context of framing the First Amendment. Chris Beneke maintains that the congressional record and available historical evidence present a messy, mysterious picture of what “free exercise” and “respecting an establishment of religion” meant. But there are some clear conclusions that may be drawn from the historical record. Free exercise at least meant the right to worship according to one’s religion, which was a more expansive liberty than simply the “right of conscience,” and which was often couched in terms of natural rights rather than a concessionary toleration. Despite its ambiguity, Beneke argues, the free exercise clause did signal greater religious liberty by not restricting it to any religion in particular and by not protecting conscience only. Moreover, the establishment clause did not, as Thomas Jefferson famously glossed, build “a wall of separation between Church & State.” While the First Amendment prohibited the federal government’s establishment of one particular religion to the detriment of others, it also allowed religious accommodations, including federally funded Christian missions in the territories as well as congressional chaplains and prayer. Beneke stresses that none of these conclusions challenges the generally secular foundation of the federal government, even as individual states maintained confessional establishments or laws.

The First Amendment was, of course, an amendment to the Constitution, and as the Anti-Federalists were at pains to point out, the original document did not explicitly protect religious liberty or prohibit the establishment of a national church. Yet Michael D. Breidenbach argues that a nonestablishment clause did exist in the Constitution before the First Amendment: the no religious test clause in Article VI. Since religious tests were the clearest manifestation of state sovereignty over religion, their prohibition in Article VI prevented an establishment of a “Church of the United States” (to use Donald L. Drakeman’s phrase), even before the First Amendment. Unlike previous oaths in Britain and the colonies, the federal oath for officeholders – codified in the first act of Congress – did not

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require a denial of specifically Catholic beliefs, yet undivided civil loyalty remained a prerequisite to securing religious liberty. When Congress later debated the First Amendment, Breidenbach shows how the establishment clause was based on what Congress had already stated in 1783: that powers in “purely spiritual” matters were “reserved to the several States, individually.” Congress had declared this principle in response to the Holy See’s request for it to approve a Catholic bishop, one of the few instances in which Congress made a policy decision concerning church–state relations before the First Amendment. In doing so, Congress had renounced one of the rights of patronage that governments traditionally held over ecclesiastical affairs. Although “an establishment of religion” could mean many things, the one element of a church establishment that Congress had already explicitly and definitively denied was the right of a government to present or approve bishops. Breidenbach explains how this context adds to the original meaning of the establishment clause, for prohibiting a “Church of the United States” did not necessarily forbid this particular right of patronage.

Even after the ratification of the First Amendment, some state establishments remained – a reminder that the nonestablishment clause was originally intended to be a federal prohibition only. Religious persecution or discrimination, too, did not abate after the First Amendment. Most religious liberty laws and enforcement were still handled on state and local levels, and the free exercise clause again pertained to the federal government only until the Bill of Rights was incorporated into state constitutions in the twentieth century. The nineteenth century, therefore, witnessed a patchwork of contradictory principles and practices concerning religious liberty among the states and federal territories. Like Beneke, Jonathan Den Hartog sheds light on the shadow that Jefferson’s wall metaphor cast onto church–state relations in America. He finds that many Protestants across political parties, ideologies, and even Union–Confederate divisions continued to believe that federal and state governments could and should promote Christianity, at least Protestant Christianity. In 1892, Supreme Court Justice Josiah Brewer declared what many Americans had believed all along: “[T]his is a Christian nation.” Freethinkers, like secularists today, bristled at such a bald statement and argued that governmental promotion of Christianity was detrimental to the United States. Even those who were sympathetic to Brewer’s assessment could not all agree about what it meant; still others worried whether they were included in it. Despite the

religious liberty that Catholics gained in the American founding, as Breidenbach shows, many Americans continued to single them out for their uncivil, potentially dangerous allegiance to the pope. Den Hartog demonstrates that Catholics still needed to prove their loyalty and protect their religious liberty, often appealing to the First Amendment. Mormons, too, presented a singular challenge to the Protestant moral establishment, particularly with the practice of plural marriage, which the Supreme Court decided had exceeded the bounds of religious liberty. If there was a metaphorical wall between church and state, Den Hartog concludes, it was one-sided: to protect general Christian faith and morality from government obstruction while permitting explicit and powerful religious influence on politics and society.

Part II of this volume closes with a critical review of landmark Supreme Court cases on the First Amendment religion clauses from the late nineteenth century to the present. Zoë Robinson notes that the religion clauses have been idealized as a vanguard against religious majoritarianism, but argues that Supreme Court decisions have often reinforced this majoritarianism. Except for a handful of significant cases during the Warren Court (1953–1969), she contends, First Amendment jurisprudence has generally reinforced the majority's political, social, economic, and religious views. If the framers of the First Amendment sought to prevent a "tyranny of the majority" concerning religion, Robinson suggests, modern jurisprudence has not on balance lived up to that ideal. Her findings in modern Supreme Court cases complement what the previous chapters detected: that America's moral establishment, if not *de jure* establishment, has privileged America's majority religions in law, politics, and the broader culture while often looking askance at those who challenge it.

Church–state issues are not the exclusive purview of the courts, however. Debates about religious liberty and church–state relations are also the concern of scholars, whose work has influenced not only the political and religious landscape but also Supreme Court decisions. To begin Part III on law, politics, and economics, Paul E. Kerry canvasses recent historical, political, legal, and philosophical interpretations on the subject and examines how certain presuppositions have informed scholars' accounts of the meaning, scope, and implications of the First Amendment. Kerry agrees with Steven D. Smith's typology of dividing First Amendment scholarship between providentialist and secularist understandings. Providentialists view America as founded on certain religious or religiously inspired

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principles and seek to favor that heritage in law, politics, and culture. Secularists, on the other hand, view America as founded on more classical sources and seek to dislodge religion from politics in order to better approximate equal rights for all. Yet Kerry also identifies a pragmatic strand that sees religious liberty as a useful, if not essential, policy in a religiously pluralistic society – a view that Anthony Gill will later characterize in economic terms. Ultimately, Kerry cautions that, in the ideologically charged battles over the First Amendment, the meaning of the text and its influences defy tidy explanations and further warns against constructing a narrative with a predetermined end for which evidence is pressed into service. Analyzing scholarly presuppositions, he concludes, can lead to a better understanding of the dynamics of religion, politics, and jurisprudence in America.

Vincent Phillip Muñoz's account of natural rights theory occupies a middle ground between these providentialist and secularist camps. He argues that the American founders advanced a natural rights view of religious liberty. They believed that this right, like all other God-given rights, is inalienable – no reasonable person would surrender it in order to enter into government – yet citizens may forfeit it if they violate the moral or civil law. Therefore, while the government does not have direct cognizance or jurisdiction over religious belief or practices, it may inflict indirect burdens on religious practices as a side effect when pursuing legitimate, limited, constitutional interests. Muñoz contrasts this natural rights theory with what he calls “modern moral autonomy exemptionism.” This second view seeks to guard against not only direct burdens on religious practices but also indirect burdens – and not only religious practices but also “conscience.” While this modern autonomy view in principle expands the protection of religious liberty, it also broadens the scope of government: As long as the government has a “compelling” interest, its acts are lawful. Under this second regime, Muñoz maintains, the best that religious dissenters can do is to appeal for an exemption, which places them again at the mercy of the government.

Scholars will continue to debate which jurisprudence guides the American constitutional order, but the very fact that religious liberty exists at all, Anthony Gill marvels, is a rare instance in human history. Employing the methods of political economy, he demonstrates that both civil and ecclesiastical leaders have compelling reasons to monopolize the religious market. Why, then, would they sunder the symbiosis of church and state?

Rather than retracing the ideological origins of religious liberty, Gill contends that civil officials in fact possess economic incentives to codify religious liberty – or, in economic language, to deregulate the religious marketplace. This was especially true in America, he argues, in which colonial leaders such as William Penn recognized that greater religious liberty could increase revenue collection, trade, immigration, and overall economic growth. Gill concludes that this pragmatic virtue was at the core of the First Amendment.

The pursuit of profit might have accounted for the rise of religious liberty for individuals, but do corporations that seek profit possess the right to religious liberty as well? Steven D. Smith argues that they do by virtue of the Religious Freedom Restoration Act of 1993 and the long-standing precedent that corporations are legal persons that can possess rights. Incorporated religious organizations also possess religious liberty, he affirms, by virtue of the ancient freedom of the church. Recent Supreme Court cases such as *Burwell v. Hobby Lobby* (2014) and *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (2012) have upheld these views, yet opposition to them betrays more fundamental normative questions about whether the government should demand that business owners forfeit their religious liberty if they choose to operate their business as a corporation and whether the government should grant special constitutional protections to religious organizations. He argues that hostility to corporate religious liberty, whether for a business or a religious organization, is part of a broader culture war that views religious liberty as an outdated, discriminatory privilege. Smith shows how yet again the Supreme Court has become a battleground where culture wars are fought – but perhaps never definitively won.

From political, economic, and legal considerations of religious liberty, the volume then turns to the establishment clause. Like Muñoz, Donald L. Drakeman employs originalism – a theory of legal interpretation based on the original meaning of the Constitution – in contrast to living constitutionalism, the view that constitutional meaning should evolve in order to adapt to the changing needs and values of the times. As Drakeman notes, interpreting the establishment clause usually divides into three groups: strict separationism, non-preferentialism, and federalism. Strict separationists, often employing Jefferson’s “wall” metaphor, argue that the establishment clause prohibits not only governmental interference directly

in the realm of religion (such as establishing a church) but also religious interference in government (such as religious images in civic buildings). Non-preferentialists, also called accommodationists, agree with the strict separationists that the establishment clause forbids a national church, but argue that the clause still allows for governmental support of religion (even over non-religion) so long as such aid does not unduly prefer one religion to the detriment of others. Finally, federalists view the prohibition of a national church as the consequence of a prior principle: that all matters pertaining to religion are within the jurisdiction of the states, not the federal government. The corollary of the federalism view is that the clause recognizes states' right to establish churches, adopt strict separationist policies, or non-preferentially support religion. The common denominator among these three dominant interpretations is that the clause prohibits the establishment of a "Church of the United States," which, Drakeman argues, is exactly how the framers and the public understood the clause – no more, no less. Because the Supreme Court has since incorporated the First Amendment at the state and local levels, he argues that the federalist interpretation, in conjunction with the no-national-religion prohibition, best articulates the original meaning of the clause.

As Drakeman and the other historians show, discussions of the establishment clause often concern whether it codified a "separation" of church and state. Marc O. DeGirolami rescues the idea of "separation" from the assumption that it is simply strict separationism. He identifies another type of separation – the ancient Christian idea of juridical separation of church and state – intended to benefit the Christian church and civil society. These two versions of separation – one that sees Christianity as a positive force in America, another that characterizes Christianity as irrelevant, obnoxious, or even dangerous – have coincided, albeit unevenly and uneasily, for much of American history. The jurisprudential shift to doctrines of equality and nondiscrimination with respect to religion is, he argues, simply a derivation of the secularist version of separation. DeGirolami insists that these modern doctrines are not neutral with respect to religion and to Christianity in particular; instead, they have sought to suppress Christian influences that have been foundational to American law and politics.

Gerard V. Bradley claims that the moral and cultural transformations diagnosed by Smith and DeGirolami, especially over sexual identity and marriage, are fundamentally altering how Americans perceive and ascribe

importance to religious liberty. Many Americans now understand religious commitments as a mere matter of self-expression, one of many possible subjective identities. In this culture war, what once was a conflict over rights is now a contest over identities, not all of which are treated equally. Bradley argues that the relegation of religion to personal identity and the further demotion of religious identity with respect to other identities threaten a core of American constitutional liberties. His conclusion to the volume is in some ways a return to its beginning: a call to restore religion as a unique public good, grounded in reason, whose exercise deserves special protection under law.

Taken together, these chapters at once show the great divisions concerning religious liberty and church–state relations, as well as the promise of a way forward. Today’s public controversies are symptomatic of deeper problems witnessed before and beyond the First Amendment. Are there truths about God knowable by reason? What is religion, and what is it not? Is religion a special good deserving of legal protection? Should governments promote, to the extent possible, religion generally or a particular religion, even to the exclusion of other religions or non-religion? What is legitimate religious dissent, and what kind of loyalty should be required to ensure religious liberty? What laws and practices might secure civil peace in light of the intractable fact of religious pluralism? Should governments grant religious toleration – a concession dispensed by political authorities who otherwise seek to promote “the one truth faith” – or should governments recognize and protect the inalienable natural right to religious liberty?

Questions concerning the taboo topics of religion and politics do not admit of easy answers. Yet the brilliance of the First Amendment is that it recognizes and protects the freedom not only to practice or refrain from practicing religion but also to discuss and debate our differences – including the meaning and significance of the First Amendment itself.