

WHY CONSERVATIVES, AND OTHERS, HAVE TROUBLE SUPPORTING THE MEANINGFUL ENFORCEMENT OF FREE EXERCISE RIGHTS

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If there are specific areas of life where the role of government should be particularly limited, religion is certainly one of those areas. It is not the government's business to interfere with or attempt to influence religious belief and practice. Democracy is a wonderful system of self-government, but religious truth is not determined through legislative deliberation or at the ballot box.¹

Unlike the remarks of the other scholars on the religious liberty panel, this Essay focuses on the Free Exercise Clause rather than the Establishment Clause of the First Amendment. It is clear that compared to the people of other western democracies, Americans are a particularly religious people.² Further, the First Amendment explicitly protects the exercise of religion. Yet American free exercise jurisprudence is shallow at best. If free exercise doctrine is compared to a fundamental right that

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1. As James Madison argued almost 225 years ago, the suggestion "that the Civil Magistrate is a competent Judge of Religious truth" must be rejected as "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages." JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 63, 65 (2002).

2. See PEW GLOBAL ATTITUDES PROJECT, AMONG WEALTHY NATIONS . . . U.S. STANDS ALONE IN ITS EMBRACE OF RELIGION (2002) ("Religion is much more important to Americans than to people living in other wealthy nations. Six-in-ten (59%) people in the U.S. say religion plays a *very* important role in their lives. This is roughly twice the percentage of self-avowed religious people in Canada (30%), and an even higher proportion when compared with Japan and Western Europe.").

is taken seriously, such as freedom of speech, the difference is apparent. The latter is robust; the former is anemic.³

Why is it that we have so much trouble taking free exercise rights seriously? There are several answers,⁴ and they sometimes cross conventional ideological lines.⁵ This Essay will briefly discuss four of them. There are many more possible answers, but these four were selected because they help to explain why conservative jurists, in particular, may be unsympathetic to federal judicial protection of free exercise rights.

First, the scope of religious practice and religiously motivated conduct in the United States is both diverse and extensive.⁶ Accordingly, it is inevitable that some religious activities will produce externalities that burden both individuals and the public interest. Thus, there are often legitimate state interests that arguably justify restrictions on religious autonomy.⁷ This means that, when adjudicating free exercise claims, courts will often have to engage in some sort of balancing process to weigh religious liberty against the state's reasons for interfering with it.

The strength of the state's reason for burdening religious conduct in particular cases is not the only problem courts confront in rigorously protecting free exercise rights. A second concern involves misgivings about the propriety of the balancing process itself. Doubts about the legitimacy of what he saw as intrinsically subjective, value-based balancing were one of Justice Scalia's central concerns when he wrote the majority

3. See Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55 (2006).

4. See *id.* at 60.

5. As an analytic and normative matter, I strongly believe that the federal courts should take free exercise rights seriously. The problems that sometimes make it difficult to enforce free exercise rights meaningfully are not insurmountable concerns. It is necessary to identify these concerns, however, before one can begin the much longer and more difficult project of convincing people that these issues can be resolved effectively. See *id.* at 60–70.

6. See BARRY A. KOSMIN & ARIELA KEYSAR, INST. FOR THE STUDY OF SECULARISM IN SOC'Y & CULTURE, AMERICAN RELIGIOUS IDENTIFICATION SURVEY (ARIS) 2008 (2009).

7. During the question and answer period after the panel presentation in which this Essay was originally presented, members of the panel discussed issues relating to the monitoring of Islamic clergy and worship services for the purpose of determining whether incitement to violence or other unlawful activity was occurring in houses of worship. Although that discussion is not incorporated into this Essay, for a brief comment on the issue, see Vikram David Amar & Alan Brownstein, *Is Monitoring Moslem Religious Services Without Particularized Suspicion Constitutional?*, FINDLAW'S WRIT, Dec. 4, 2009, <http://writ.news.findlaw.com/amar/20091204.html>.

opinion in *Employment Division v. Smith*, the case that sharply limited the scope of free exercise rights in 1990.⁸

We can question whether concerns about balancing are sufficient reasons for undermining the constitutional protection provided to religious liberty. Courts in other countries, such as Canada and South Africa, have forthrightly balanced religious liberty claims against competing state interests in a whole range of cases.⁹ In doing so, however, it is fair to say that those courts engage in what Americans would describe as a public policy analysis that is at least quasi-legislative in nature. There may be ways to limit judicial discretion in this area—just as judicial discretion has been limited in the doctrinal approaches courts have developed to protect other fundamental rights—but it is likely that some level of subjective balancing is intrinsic to a meaningful free exercise jurisprudence.¹⁰

8. 494 U.S. 872 (1990). As Justice Scalia put it in responding to Justice O'Connor's argument that the federal courts have demonstrated that they can sensibly balance religious liberty against competing state interests, "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 889 n.5.

9. See, e.g., *Multani v. Comm'n scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 (Can.); *Prince v. President of the Law Soc'y of the Cape of Good Hope* 2002 (3) BCLR 231 (CC) (S. Afr.).

10. There is a parallel here between Free Exercise and Establishment Clause doctrine. The balancing tests that are necessary if free exercise doctrine is to provide some serious level of protection to religious practice are not cost free. Their price includes indeterminacy in decision making and an opportunity for subjective, personal, value-based decisions by judges. Many scholars who support a more rigorous free exercise jurisprudence than the current *Smith* regime provides, and I include myself in this group, do not discount these costs. We, or at least I, believe that these costs are outweighed by the religious liberty benefits that result from courts taking free exercise rights seriously.

A similar analysis applies to Establishment Clause doctrine relating, for example, to government sponsorship of religious displays. Constitutional constraints that limit state sponsorship of these displays further important constitutional values. They limit the government's ability to influence religious belief through proselytizing efforts, prevent state preferentialism toward favored faiths, and protect the status and dignity of religious minorities. No fixed rule or formula provides easily predictable results when these cases are litigated in court, however. There are simply too many factors in play. As was the case with free exercise rights, proponents of serious Establishment Clause review in these cases do not discount the costs of subjectivity and indeterminacy in decision making in this area. We, or at least I, believe these costs are outweighed by the religious liberty and equality benefits that result from courts taking these Establishment Clause concerns seriously.

The third problem relates to federalism concerns. Many religious liberty issues arise in circumstances that are traditionally identified with local control, such as land-use regulation, prison administration, and public school administration. A rigorous free exercise jurisprudence would justify federal judicial intervention into these areas of decision making. Federal statutes protecting religious liberty such as RFRA,¹¹ which was struck down in part in 1997,¹² and RLUIPA,¹³ which was enacted in 2000, would also clash with state and local autonomy.¹⁴

One notable example of this clash between federalism and fundamental rights today occurs in the public schools, although in this context the conflict between federal rights and local control is more often played out under free speech auspices rather than free exercise doctrine.¹⁵ But the core issue remains the same. There is no shortage of commentary by jurists describing public education as a matter of local democratic concern rather than a federal judicial enterprise.¹⁶ Pedagogical and curricular choices are presumptively the prerogatives of parents, teachers, school boards, and school administrators, not unelected federal judges.¹⁷

Yet other jurists insist that federal judicial intervention is appropriate to protect the rights of teachers and students to practice

11. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (2006).

12. See *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

13. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc (2006).

14. See *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 135–36 (3d Cir. 2002) (describing land use law as “one of the bastions of local control, largely free of federal intervention”); Marci A. Hamilton, *The Constitutional Limitations on Congress’s Power over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional*, 2 ALB. GOV’T L. REV. 366, 370 (2009) (arguing that the “constitutional defect underneath section 2(a) of RLUIPA is Congress’s crass failure to consider the constitutional constraints on the federal government vis-à-vis state and local land use law”).

15. See Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717 (2009).

16. See, e.g., *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 371 (4th Cir. 1998) (Wilkinson, C.J., concurring) (arguing that “[t]raditionally, indeed for most of our history, education has been largely a matter of state and local concern [and not] a federal judicial enterprise”).

17. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (reiterating that “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges”).

their faith or to express religious messages during school-sponsored activities.¹⁸ The commitment to student free speech rights Justices Alito and Kennedy expressed in their concurrence in *Morse v. Frederick*¹⁹—the “Bong Hits for Jesus” case—may well have been grounded in part in their interest in protecting student religious speech. Concerns about federalism and local control, however, were conspicuously absent from their opinion.²⁰

Fourth and finally, religion is a multidimensional constitutional interest which subsumes and implicates several independently recognized constitutional values. Church-state disputes cross constitutional boundary lines. They touch on principles relating to personal and institutional autonomy, freedom of speech, and equality and antidiscrimination mandates, as well as structural concerns regarding the diffusion of power. Working out how to reconcile these sometimes overlapping and competing values to create coherent doctrine is an extraordinarily difficult job.²¹

18. See, e.g., *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting) (arguing that an elementary school violated the free speech rights of a kindergarten student when it allegedly did not post in the school hallway along with other students’ posters the picture of Jesus the child had drawn in response to a Thanksgiving assignment).

19. 551 U.S. 393, 422–25 (2007) (Alito, J., concurring) (arguing that the fact that “[t]he ‘educational mission’ of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty” justifies rigorous free speech review of restrictions on student expression rather than deference to locally elected decision makers).

20. One way to think about, and perhaps to mitigate, the tension between federalism concerns and a rigorously enforced religion clause jurisprudence is to recognize the way that protecting fundamental liberty and equality rights furthers the foundation of a federalist system. The variation in legal regimes intrinsic to a federalist system is justified in part by the ability of citizens to leave one state and take up residence in another state that they perceive to have a more favorable legal environment. By limiting state action relating to race, religion, and other personal characteristics, the Constitution restricts the range of alternative regimes available in different states. In doing so, however, it guarantees that racial, ethnic, and religious minorities will be able to change residences throughout the country, free from worries that moving to states providing a more palatable legal environment with regard to myriad social and economic conditions will be foreclosed because of legal burdens based on religion or race.

21. The Author has written extensively on the multiple values that must be taken into account to resolve church-state issues. For readers interested in this approach to understanding and interpreting the religion clauses, see Alan Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871 (1999), Alan Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO STATE L.J. 89 (1990), and Alan Brownstein, *Interpreting*

This point can be illustrated by focusing on the tension between personal autonomy and free speech values in religious liberty cases. One aspect of religious liberty reflects respect for human dignity and the autonomy of the individual. Other liberty rights that reflect a similar commitment to personal autonomy and dignity include rights related to family, intimate association, marriage, and parenthood.

One of the distinctive aspects of autonomy rights is that they are not subject to a formal equality mandate. That is, state recognition of certain kinds of autonomy interests, but not others, may constitute unequal treatment in some abstract sense, but does not raise serious constitutional concerns. Thus, the state's protection of one aspect of personal autonomy, such as the right to practice one's religion, does not require the state to protect other important autonomy interests, such as the right to pursue one's trade or vocation, to anywhere near the same extent.²²

Accordingly, legislatures need not provide accommodations of religious conduct, including exemptions from neutral laws of general applicability to other individuals whose ability to pursue their particular personal goals are similarly burdened by government regulations. To the extent that rights are grounded in personal autonomy values, the government is not required to equalize the protection or the accommodations that it provides to persons engaged in activities that they perceive to be intrinsic to their identity and personal well-being.

There is also an important speech dimension to many religious activities, such as sermons, prayer, proselytizing, and the publication of books and periodicals. To be clear, when I discuss a speech dimension to religious activities, I am not suggesting that speech is simply an incidental aspect of the practice of religion in the same way that speech is an incidental aspect of virtually every human endeavor. Religion is an independent source of moral values, and as such, it clearly plays a significant role in the marketplace of ideas.

In contrast to rights grounded in personal autonomy values, however, freedom of speech primarily serves instrumental goals.

the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243 (1999).

22. See Brownstein, *Harmonizing the Heavenly and Earthly Spheres*, *supra* note 21, at 96–98.

Accordingly, free speech doctrine does mandate government neutrality among the subjects and viewpoints of expression. Here, any attempt to exempt religious expressive activities from general regulations without providing parallel exemptions for secular speech would raise serious constitutional concerns.

The Supreme Court, in cases like *Good News Club v. Milford Central School*,²³ has held that treating religious expressive activities, such as a de facto worship service, less favorably than secular social, civic, and recreational activities constitutes viewpoint discrimination, which is prohibited by the Free Speech Clause of the First Amendment.²⁴ I do not challenge the Court's conclusion that the exclusion of a religious club from public property available to secular groups violates constitutional requirements. But the Free Speech Clause is a harsh mistress. If it violates free speech requirements for government to treat religious expressive activities *less* favorably than secular social, civic, and recreational activities, it necessarily follows that the government is similarly restricted under free speech principles from treating religious expressive activities *more* favorably than comparable secular social, civic, and recreational activities. The burden of justifying viewpoint discrimination under strict scrutiny review would apply equally in both cases.

Given this foundation, in many cases it is necessary to question whether an expressive religious activity should be characterized for constitutional purposes as an autonomy right protected by free exercise guarantees or as a viewpoint of expression protected by free speech principles.²⁵

Let us consider some examples to illustrate this point. If a religious revival meeting seeks an exemption from a general law banning loud expressive activities after 9:00 p.m. in a residential park, should that claim be rejected on the grounds that it unconstitutionally favors religious speech, or should it be accepted as a permissible accommodation of religion?²⁶ If clergy argue that

23. 533 U.S. 98 (2001).

24. *Id.* at 107.

25. Because religious activity was singled out for discriminatory treatment in *Good News Club*, 533 U.S. at 107, the Club's claim could have been successfully adjudicated under the Free Exercise Clause. Even the truncated protection provided to free exercise rights under *Employment Division v. Smith* prohibits discrimination against religious exercise. See 494 U.S. 872, 877–78 (1990).

26. There would also be an argument that an exemption for religious speech violates the Establishment Clause. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14–15

their sermons from the pulpit should be exempt from IRS prohibitions against political campaigning by 501(c)(3) organizations, would providing that kind of an exemption constitute a permissible accommodation of religious institutional autonomy, or should it be rejected as unconstitutional viewpoint discrimination favoring political messages grounded on religious belief?²⁷

The same problems arise in evaluating the constitutionality of religious liberty statutes. If RLUIPA, for example, provides special protection to the development of houses of worship for religious assembly against burdensome land use regulations and does not provide similar protection to land being developed for secular social, civic, or recreational purposes, is that a permissible accommodation of religion, or does it constitute unconstitutional favoritism for religious expressive assemblies?

This Essay does not have an easy answer to these questions. A meaningful free exercise jurisprudence, however, must confront all of these problems.²⁸ In particular, we need to establish

(1989) ("Texas' sales tax exemption for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith lacks sufficient breadth to pass scrutiny under the Establishment Clause.").

27. For a variety of articles discussing this question and related issues, see Symposium, *The Conflicted First Amendment: Tax Exemptions, Religious Groups, and Political Activity*, 42 B.C. L. REV. 733 (2001).

In analyzing questions like this one, it is important to understand that the answer will depend much more on our understanding of constitutional values and purposes than it does on our understanding of social reality. Thus, I think it is unhelpful to frame the question by asking whether a sermon from the pulpit that advocates support for, or opposition to, a political candidate or a proposed legislative enactment constitutes religious conduct or political speech. As a matter of social reality, it is both. Sermons from the pulpit that are grounded on theological beliefs are intrinsically religious in nature even though religious principles are being applied to political disputes. Protecting this part of a religious service from government interference can easily be justified in terms of religious institutional autonomy. It is also accurate, however, to describe such sermons as expressive activity that plays an important role in the marketplace of ideas.

If sermons constitute both religious exercise and speech, there is little to be gained by debating the nature of this activity. The only way to resolve the issue requires a comparative analysis of constitutional goals and values and the recognition that there may be costs to either free speech or free exercise values, depending on the solution that is adopted.

28. Although the focus of this Essay has been on free exercise issues, I do not suggest that these problems must be resolved exclusively from a free exercise perspective, in complete isolation from Establishment Clause requirements. Indeed, the exact opposite is the case. In many ways, rigorously enforced Establishment Clause mandates will support and reinforce the arguments for rigorous protection of free exercise rights. For example, if, as a doctrinal matter, we choose

lines of demarcation between the exercise of religion and freedom of speech.²⁹ We have to develop ways for courts to evaluate the free speech and autonomy values that are often intrinsic to religious practice. Unfortunately, courts today do not seem to even recognize that these problems exist. There is certainly no evidence that they are even discussing, much less attempting to resolve, them in the current case law.³⁰

to characterize sermons from the pulpit and religious activities in houses of worship as religious exercise rather than speech, we may avoid direct doctrinal conflicts. But we still will be left with the reality that providing special protection to these religious expressive activities provides a material advantage to religious viewpoints in the marketplace of ideas. That ostensible advantage, however, can be offset by Establishment Clause constraints on the state's ability to sponsor and promote religious messages and to provide funding to religious institutions.

29. For a lengthy analysis of these issues, see Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119 (2002).

30. As an example of judicial myopia regarding the complex relationship between free speech and free exercise mandates, consider Justice Scalia's unexamined and unsupported suggestion in *Employment Division v. Smith* that neutral laws of general applicability that substantially burden religious exercise might receive rigorous review if the laws also burdened a second right, such as freedom of speech, freedom of the press, or freedom of association. 494 U.S. at 881–82. If that "hybrid" rights analysis were accepted, speakers expressing religious messages would have a strong claim that they, as a general matter, deserve greater constitutional protection against content neutral speech regulations than other speakers expressing similar, but secular, messages.