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Volume 32

Number 1 *The Sixth Annual Fritz B. Burns
Lecture—Protecting Religious Liberty in the New
Millennium: Should We Amend the Religion
Clauses of the United States Constitution?*

Article 1

11-1-1998

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Recommended Citation

Kurt T. Lash, *The Status of Constitutional Religious Liberty at the End of the Millenium*, 32 Loy. L.A. L. Rev. 1 (1998).

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THE STATUS OF CONSTITUTIONAL RELIGIOUS LIBERTY AT THE END OF THE MILLENNIUM

*Kurt T. Lash**

I have the privilege of introducing the 1998 Burns Lecture Symposium—Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the United States Constitution? My role in this Symposium is to acquaint you with the religion clauses of the Constitution—where they came from—where they’ve been—and where they seem to be today. Our Symposium contributors, Professors Kent Greenawalt and Robert George will discuss just where they think the religion clauses should go in the future.

THE LAW

Let’s start with the text. The first words of the First Amendment declare that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹ This disarmingly brief phrase has been notoriously difficult to interpret—perhaps due in part to the ambiguous historical origins of the text.

In 1791, when the Bill of Rights was added to the Constitution, there was a variety of popular views regarding the appropriate relationship between religion and the government. Separationists, like James Madison and Thomas Jefferson, believed that civil government had no legitimate reason to interfere in religious matters.² Only a few years before the adoption of the First Amendment, Madison wrote his famous Memorial and Remonstrance in which he argued against a proposed Virginia tax for the support of ministers and

1. U.S. CONST. amend. I.

2. See James Madison, *Virginia Ratifying Convention*, in 5 THE FOUNDERS’ CONSTITUTION 88, 88 (Phillip B. Kurland & Ralph Lerner eds., 1987) [hereinafter 5 FOUNDERS’ CONST.]. Madison stated, “There is not a shadow of right in the government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.” *Id.*

churches.³ Not only was the proposed tax defeated, but the Virginia legislature instead passed Thomas Jefferson's Bill for Establishing Religious Freedom.⁴

The Supreme Court has long given a special place to the views of Madison and Jefferson—and the so-called “Virginia Experience”—in its efforts to identify the original purposes behind the adoption of the religion clauses.⁵ Clearly these two Founders believed that the First Amendment embraced a broad principle of separation. In his “Detached Memoranda,” Madison wrote that the Constitution forbids “everything like” an establishment of religion.⁶ Thomas Jefferson, in his letter to the Danbury Baptist Association, wrote that the religion clauses built “a wall of separation between church and state.”⁷

But, in 1791, not everyone agreed that church and state could—or ought to—remain separated. Founders like George Washington⁸ and early Supreme Court Justice Joseph Story,⁹ believed that government had a duty to promote and support the religious beliefs of the people. In fact, the idea that religious belief was essential to good government was quite common in 1791. *State* laws at the time contained everything from religious qualifications for public office, to tax assessments for churches and ministers, to criminal prosecutions for religious blasphemy.¹⁰ Indeed, the same Congress that proposed

3. See James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 5 FOUNDERS' CONST., *supra* note 2, at 82.

4. See Thomas Jefferson, *Bill for Establishing Religious Freedom*, in 5 FOUNDERS' CONST., *supra* note 2, at 77.

5. For a discussion of the case law, see Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1153 (1995).

6. See James Madison, *Detached Memoranda*, in 5 FOUNDERS' CONST., *supra* note 2, at 103.

7. THOMAS JEFFERSON, WRITINGS 510 (Merrill D. Peterson ed., 1984).

8. See George Washington, *Farewell Address* (Sept. 19, 1796), in WRITINGS 962, 971 (John Rhodehamel ed., 1997).

9. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 986 (Carolina Academic Press, 1987).

10. See, e.g., *Spiller v. Woburn*, 94 Mass. (11 Allen) 127, 129 (1866) (affirming the expulsion of a Catholic student for refusing to bow her head during the morning Bible reading in compliance with state law that required the daily reading of the Bible “without note or oral comment”); *Sellers v. Duqan*, 18 Ohio 489, 489 (1849) (holding void a contract on the ground that it was made

the First Amendment also instituted the practice of opening legislative sessions with prayers, by a chaplain, paid at taxpayer expense.¹¹

Although separationists like Madison and Jefferson and quasi-establishmentarians like Washington and Story disagreed about the proper relationship between church and state, they did find common ground on at least one matter: Regulatory power over subjects like religion, speech and the press was to be left in the hands of the state legislatures and not the federal government.¹² Thus, the First Amendment expressly restricts Congress, not the state legislatures. The Tenth Amendment, by implication, reserves power over the subject of religion to the states.¹³ In this way, the original First Amendment embraced not so much the separation of church and state, as the separation of federal and state responsibilities. The religion clauses, in other words, originally embraced the principle of federalism.

This "federalism" principle, of course, presumably was erased from the First Amendment in 1868 when we adopted the Fourteenth Amendment.¹⁴ That amendment prohibits any *state* from depriving one's liberty without due process of law.¹⁵ In the 1940s, the

on a Sunday in violation of state law prohibiting "common labor on Sunday"); *People v. Ruggles*, 8 Johns. 290 (N.Y. 1811), *reprinted in* 5 FOUNDERS' CONST., *supra* note 2, at 101 (asserting "to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse" of the right of "free, equal, and undisturbed, enjoyment of religious opinion").

11. 1 ANNALS OF CONG. 2180 (1789) (providing that "there shall be allowed to each chaplain of Congress . . . five hundred dollars per annum during the session of Congress"). For a general discussion on the history behind congressional chaplains, see *Marsh v. Chambers*, 463 U.S. 783, 786-90 (1983).

12. See Kurt T. Lash, *Power and Subject of Religion*, 59 OHIO ST. L.J. (forthcoming Fall 1998).

13. See Thomas Jefferson, *Kentucky Resolutions*, in THE LIFE AND WRITINGS OF THOMAS JEFFERSON 282, 284 (S.B. Forman ed., 1900) ("[N]o power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, all lawful powers respecting the same did of right remain, and were reserved to the states or to the people."); see also Joseph Story, *Commentaries on the Constitution*, *reprinted in* 5 FOUNDERS' CONST., *supra* note 2, at 110 ("The whole power over the subject of religion is left exclusively to the state governments.").

14. See Lash, *supra* note 5, at 1088.

15. U.S. CONST. amend. XIV.

Supreme Court interpreted the Due Process Clause to have “incorporated” the protections of the First Amendment, so that now neither state nor federal governments could infringe upon the people’s religious liberty.¹⁶

The problem, of course, was figuring out just *which* founding conception of religious liberty had been incorporated: The separationist vision of Madison and Jefferson, who viewed religion as a divisive and potentially dangerous force in public affairs, or the vision of the so-called non-preferentialists, who agreed that religious exercise should be free, but also believed that government should be free to foster and promote religious belief?

Since the Framers of the Fourteenth Amendment presumably intended to incorporate *some* principle of religious liberty, one might expect that their views would play a major role in determining which principles they meant to incorporate. In fact, the Court’s earliest opinions ignored the intent of the Framers of the Fourteenth Amendment and instead focused on the views of Madison and Jefferson as exemplifying the meaning of the incorporated religion clauses.¹⁷ But almost immediately, the separationist views of Madison and Jefferson ran head-on into long-standing historical practices like school prayer,¹⁸ equal government support of public and private education,¹⁹ and legislative accommodation of religion.²⁰ The resulting jurisprudence seemed to point in two directions at once.

From the 1960s until the 1980s, the Supreme Court judged the constitutionality of government action according to its effect—generally regardless of the government’s intent.

For example, in the 1971 case, *Lemon v. Kurtzman*,²¹ the Court struck down state educational assistance programs that aided

16. See *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

17. But see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994); Lash, *supra* note 5.

18. See *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. v. Schempp*, 374 U.S. 203 (1963).

19. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

20. See *Zorach v. Clauson*, 343 U.S. 306 (1952).

21. 403 U.S. 602 (1971).

religious, as well as secular, private schools.²² In doing so, the Court announced the infamous three-part “Lemon test”: Government actions must have a secular purpose; they cannot have a primary effect of advancing or inhibiting religion; and government regulation must not excessively entangle church and state.²³ The programs in *Lemon* were struck down because equal funding of religious institutions created the risk that education funds might be used to advance religion, and efforts to ensure that religion was not advanced would excessively entangle church and state. Thus, even if the educational program was not intended to advance religion, if the government aid had that effect—or threatened to have that effect—such aid violated the Establishment Clause.²⁴

The very next year, however, the Court seemed to require under the Free Exercise Clause what it had forbidden under the Establishment Clause. In *Wisconsin v. Yoder*,²⁵ a compulsory school attendance law had the effect of interfering with the desire of Amish parents to remove their children from public school after the eighth grade.²⁶ Applying strict scrutiny, the Supreme Court held that the state had to exempt the Amish from the law unless the state could prove that denying the exemption was the least restrictive means of pursuing a compelling state interest.²⁷ In *Yoder*, although Wisconsin did have a compelling interest in educating children, the Court held that such an interest would be adequately served by the vocational training the children would receive in the Amish community.²⁸ Accordingly, the Constitution required that the Amish be exempted from the otherwise generally applicable attendance law.

When you place *Yoder* alongside of *Lemon* you get a vague sense of vertigo. The Free Exercise Clause seemed to require special treatment of religiously motivated conduct, but the Establishment Clause prohibited special—or even *equal* treatment—when it came to the disbursement of government benefits. It began to look like the

22. *See id.* at 606.

23. *See id.* at 612-13.

24. *See id.* at 613-14.

25. 406 U.S. 205 (1972).

26. *See id.*

27. *See id.* at 214.

28. *See id.* at 221-22, 224.

two clauses conflicted with one another and, in fact, the resulting jurisprudence was rather tangled and unpredictable. Religious colleges could receive government funding, religious high schools could not; religious high schools could receive books, but they could not receive maps—thus leaving local officials wondering what to do with books containing maps.²⁹ As then-law professor Antonin Scalia wrote in 1981, the Supreme Court's jurisprudence concerning the Establishment Clause "is in a state of utter chaos and unpredictable change."³⁰

By the 1990s, however, the Court had moved away from the effects test, and towards a kind of "equal treatment" analysis under both religion clauses. For the Free Exercise Clause, the watershed year was 1990, when the Court handed down its decision in *Employment Division v. Smith*.³¹ In *Smith*, Galen Black and Alfred Smith were fired from their jobs as drug counselors after it was discovered that they had ingested peyote at a ceremony of the Native American Church.³² They were denied unemployment benefits on the ground that they had engaged in work-related misconduct.³³ The plaintiffs appealed to the Supreme Court, claiming that application of the unemployment statute in their case unjustifiably burdened their right to practice their religious beliefs. The Supreme Court, however, rejected their claim and held that neutral and generally applicable laws, in all but the narrowest of circumstances, do not require strict scrutiny under the Free Exercise Clause.³⁴ As long as such laws applied to everyone, the effect of the law on religious exercise was irrelevant.

A number of scholars and politicians viewed the Court's reasoning in *Smith* as signaling a dramatic change in the Court's protection of free exercise,³⁵ and, in an effort to reverse the impact of the

29. See George F. Will, *The Court and Prayer in Nebraska*, WASH. POST, July 12, 1983, at A17.

30. Antonin Scalia, *On Making it Look Easy by Doing It Wrong: A Critical View of the Justice Department*, in PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES 173, 173 (Edward M. Gaffney, Jr. ed., 1981).

31. 494 U.S. 872 (1990).

32. See *id.* at 874.

33. *Id.*

34. *Id.* at 881.

35. See Kurt T. Lash, *Civilizing Religion*, 65 GEO. WASH. L. REV. 1100, 1105 (1997) (reviewing MICHAEL J. PERRY, RELIGION IN POLITICS:

Smith decision, Congress enacted the Religious Freedom Restoration Act.³⁶ RFRA attempted to restore the strict scrutiny test whenever laws substantially burdened religiously motivated conduct. Last term, however, the Supreme Court struck down RFRA as exceeding Congress' power to enforce constitutional rights under section 5 of the Fourteenth Amendment.³⁷

As far as the Establishment Clause is concerned, the shift towards an "equal treatment" analysis has occurred over a series of cases—but the shift is no less dramatic. Over the past ten years or so, the Court has upheld a variety of programs that equally aid religious and secular institutions—most often when the aid is available to a broad class of beneficiaries or when the religious institution receives the aid by way of private choice.³⁸ Under this equal treatment approach, the Court has upheld government aid to religion in the form of sign language interpreters, vocational education funds, and printing subsidies for religious publications. Indeed, when it comes to private religious expression, equal treatment is not only permitted—it is required under the Free Speech Clause.³⁹

In sum, under the Court's current interpretation of the religion clauses, government may not discriminate on the basis of religion. If a law has the effect of advancing or inhibiting religion, that is a matter more for the political process than an excuse for judicial intervention.

CONCLUSION

Justice White once wrote that the Court's interpretation of the Establishment Clause "sacrifice[d] clarity and predictability for flexibility."⁴⁰ White further declared that this lack of clarity would

CONSTITUTIONAL AND MORAL PERSPECTIVES (1997)).

36. 42 U.S.C. § 2000bb-1 (1994) [hereinafter "RFRA"].

37. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2170-72 (1997).

38. See *Agostini v. Felton*, 117 S. Ct. 1997 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

39. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

40. *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

continue “until the . . . interaction between the courts and the [s]tate[s] . . . produces a single, more encompassing construction of the Establishment Clause.”⁴¹ Today, ladies and gentlemen, we stand at the threshold of a “single, more encompassing construction”⁴² of the religion clauses: The equal treatment principle. This momentary doctrinal stability affords us the opportunity to engage in an exercise of first principles—what *ought* to be contours of religious liberty under the People’s Constitution? Is the emerging principle of “equal treatment” sufficient to the task of religious liberty in the next millennium? If not, should we amend our Constitution? Or is the prospect of initiating a new round of judicial interpretation too daunting to make the game worth the candle?

It is a pleasure to present the thoughts of Professors Kent Greenawalt and Robert George on these fundamental issues of religious liberty as we enter the next millennium.

41. *Id.*

42. *Id.*