Inquiring Minds Topic – 27 March 2015

Albert E. Myers - Moderator

The role of Religion in America

Questions for discussion:

Is the United States of America a "Christian nation"

- What do the founding documents and Constitution say?
- Is the general consensus or majority faith position determinative?
- If not a "Christian" nation, should it be? Why or why not?
- If not a "Christian" nation, is it a God-respecting nation (e.g. "In God We Trust", "One Nation, Under God", etc.)

Should religion be accorded a special place in our civic life?

- Chaplains in Congress, the armed forces, prisons and gov't hospitals? (Argument for chaplains: needed for "free exercise" for those served by them)
- Prayers at legislative meetings and public events?
- Tax exemption for religious groups? – or property tax exemption limited to the worship space only? (Argument for exemption: taxation is the power to control – does this accord with the spirit of the establishment clause?)
- When and how should personal exemptions be granted – from military draft (e.g. Amish), recitation of the Pledge of Allegiance (e.g. Jehovah's Witnesses), medical procedures (e.g. Christian Scientists), work on the Sabbath (e.g. Seventh Day Adventists), etc.?
- Public school children excused from class to attend religious instruction or observances? – close public schools for Christmas, Good Friday, Passover, or other days important to a faith group? – should faith group related schools be supported, directly or indirectly, by public funds?

Most religions teach the Golden Rule and basic morality – should religion's contribution be valued by the public and, if so, how?

[Moderator's disclaimer: I am an ordained minister and served as a chaplain in a VA hospital. I managed a major faith-based agency deploying chaplains into public facilities and workplace settings, and applying grants of public funds in support of faith-based programs. My doctorate from Vanderbilt University is in theological ethics. I have great interest in the questions posed above.]

For reflection on the issues in advance of our discussion:

Establishment clause overview

. . . from the First Amendment Center (The center serves as a forum for the study and exploration of free-expression issues, including freedom of speech, of the press and of religion, and the rights to assemble and to petition the government. Founded by **John Seigenthaler,** the First Amendment Center is an operating program of the **Freedom Forum** and is associated with the **Newseum** and the **Diversity Institute.** The center has offices in the John Seigenthaler Center at Vanderbilt University in Nashville, Tenn., and at the Newseum in Washington, D.C.) - Nashville, Tenn. - September 16, 2011

The first of the First Amendment's two religion clauses reads: "Congress shall make no law respecting an establishment of religion … ." Note that the clause is absolute. It allows *no* law. It is also noteworthy that the clause forbids more than the establishment of religion by the government. It forbids even laws *respecting* an establishment of religion. The establishment clause sets up a line of demarcation between the functions and operations of the institutions of religion and government in our society. It does so because the framers of the First Amendment recognized that when the roles of the government and religion are intertwined, the result too often has been bloodshed or oppression.

For the first 150 years of our nation's history, there were very few occasions for the courts to interpret the establishment clause because the First Amendment had not yet been applied to the states. As written, the First Amendment applied only to Congress and the federal government. In the wake of the Civil War, however, the 14th Amendment was adopted. It reads in part that "no state shall … deprive any person of life, liberty or property without due process of law… ." In 1947 the Supreme Court held in *Everson v. Board of Education* that the establishment clause is one of the "liberties" protected by the due-process clause. From that point on, all government action, whether at the federal, state, or local level, must abide by the restrictions of the establishment clause.

Establishment
There is much debate about the meaning of the term "establishment of religion." Although judges rely on history, the framers' other writings and prior judicial precedent, they sometimes disagree. Some, including former Chief Justice William Rehnquist, have argued that the term was intended to prohibit only the establishment of a single national church or the preference of one religious sect over another. Others believe the term prohibits the government from promoting religion in general as well as the preference of one religion over another. In the words of the Court in *Everson*:

"The establishment of religion clause means at least this: Neither a state nor the federal government may set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion… . Neither a state or the federal government may, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

To help interpret the establishment clause, the Court uses several tests, including the *Lemon*, coercion, endorsement and neutrality tests.

***Lemon* test**
The first of these tests is a three-part assessment sometimes referred to as the *Lemon* test. The test derives its name from the 1971 decision *Lemon v. Kurtzman,* in which the Court struck down a state program providing aid

to religious elementary and secondary schools. Using the *Lemon* test, a court must first determine whether the law or government action in question has a bona fide secular purpose. This prong is based on the idea that government should only concern itself in civil matters, leaving religion to the conscience of the individual. Second, a court would ask whether the state action has the primary effect of advancing or inhibiting religion. Finally, the court would consider whether the action excessively entangles religion and government. While religion and government must interact at some points while co-existing in society, the concern here is that they do not so overlap and intertwine that people have difficulty differentiating between the two.

Although the test has come under fire from several Supreme Court justices, courts continue to use this test in most establishment-clause cases.

Lemon test redux

In its 1997 decision *Agostini v. Felton,* the Supreme Court modified the *Lemon* test. By combining the last two elements, the Court now used only the "purpose" prong and a modified version of the "effects" prong. The Court in *Agostini* identified three primary criteria for determining whether a government action has a primary effect of advancing religion: 1) government indoctrination, 2) defining the recipients of government benefits based on religion, and 3) excessive entanglement between government and religion.

Coercion test

Some justices propose allowing more government support for religion than the *Lemon* test allows. These justices support the adoption of a test outlined by Justice Anthony Kennedy in his dissent in *Allegheny County v. ACLU* and known as the "coercion test." Under this test the government does not violate the establishment clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their will. Under such a test, the government would be permitted to erect such religious symbols as a Nativity scene standing alone in a public school or other public building at Christmas. But even the coercion test is subject to varying interpretations, as illustrated in *Lee v. Weisman,* the 1992 Rhode Island graduation-prayer decision in which Justices Kennedy and Antonin Scalia, applying the same test, reached different results.

Endorsement test

The endorsement test, proposed by Justice Sandra Day O'Connor, asks whether a particular government action amounts to an endorsement of religion. According to O'Connor, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. She expressed her understanding of the establishment clause in the 1984 case of *Lynch v. Donnelly,* in which she states, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Her fundamental concern was whether the particular government action conveys "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." O'Connor's "endorsement test" has, on occasion, been subsumed into the *Lemon* test. The justices have simply incorporated it into the first two prongs of *Lemon* by asking if the challenged government act has the purpose or effect of advancing or endorsing religion.

The endorsement test is often invoked in situations where the government is engaged in expressive activities. Therefore, situations involving such things as graduation prayers, religious signs on government property, religion in the curriculum, etc., will usually be examined in light of this test.

Neutrality

While the Court looks to the endorsement test in matters of expression, questions involving use of government funds are increasingly determined under the rubric of neutrality. Under neutrality, the government would treat religious groups the same as other similarly situated groups. This treatment allows religious schools to participate in a generally available voucher program, allows states to provide computers to both religious and public schools, and allows states to provide reading teachers to low-performing students, even if they attend a

religious school. (See *Zelman v. Simmons-Harris,* 2002, and *Mitchell v. Helms,* 2000.) It also indicates that the faith-based initiatives proposed by President Bush might be found constitutional, if structured appropriately.

The concept of neutrality in establishment-clause decisions evolved through the years. Cited first as a guiding principle in *Everson*, neutrality meant government was neither ally nor adversary of religion. "Neutral aid" referred to the qualitative property of the aid, such as the funding going to the parent for a secular service such as busing. The rationale in *Everson* looked to the benefit to the parent, not to the religious school relieved of the responsibility of providing busing for its students.

Later cases recognized that all aid is in some way fungible; i.e., if a religious school receives free math texts from the state, then the money the school would have spent on secular texts can now be spent on religious material. This refocused the Court's attention not on the kind of aid that was provided, but who received and controlled the aid. Decisions involving vocational training scholarships and providing activity-fee monies to a college religious newspaper on the same basis as other student groups showed the Court focused on the individual's control over the funds and equal treatment between religious and non-religious groups.

In *Zelman v. Simmons-Harris,* the plurality decision clearly defines neutrality as evenhandedness in terms of who may receive aid. A majority of the Court continues to find direct aid to religious institutions for use in religious activities unconstitutional, but indirect aid to a religious group appears constitutional, as long as it is part of a neutrally applied program that directs the money through a parent or other third party who ultimately controls the destination of the funds.

While many find this approach intuitively fair, others are dissatisfied. Various conservative religious groups raise concerns over diminishing the special place religion has historically played in constitutional law by treating religious freedom the same as every other kind of speech or discrimination claim. Strict separationist groups argue that providing government funds to religious groups violates the consciences of taxpayers whose faith may conflict with the religious missions of some groups who are eligible to receive funding using an "even-handed" approach.

Conclusion
Although the Court's interpretation of the establishment clause is in flux, it is likely that for the foreseeable future a majority of the justices will continue to view government neutrality toward religion as the guiding principle. Neutrality means not favoring one religion over another, not favoring religion over non-religion and vice versa.

Other Perspectives

The Fading Free Exercise Clause - -Abstract

This Article uses the Supreme Court's recent opinion in Christian Legal Society
v. Martinez as a point of departure for analyzing the current state of free exercise doctrine. I argue that one of the most notable features of the Christian Legal Society (CLS) case is its almost total lack of engagement with the Free Exercise Clause. For the core of CLS's complaint was unambiguously about the declaration and exercise of religious beliefs: the group claimed that it was being excluded from campus life because it required its members to live according to shared religious principles and to subscribe to a Statement of Faith. Yet notwithstanding the clear religious basis of its claims, CLS devoted a mere two pages to the Free Exercise Clause in its brief. The Court's Free Exercise Clause analysis was similarly elliptical: the majority dispensed with the free exercise argument in a single footnote. For his part, Justice Alito did not even mention the Free Exercise Clause once in his lengthy dissent.

What accounts for this paucity of treatment? The following sections explore this question. I begin by tracing the fading status of the Free Exercise Clause from Employment Division v. Smith in 1990 to Christian Legal Society v. Martinez in 2010. I show that while the Clause has occasionally played a supporting role in Supreme Court decisions over the past two decades, it has not provided an independent basis for constitutional relief in a single case since 1993. I then suggest that the fact that the Free Exercise Clause has become so doctrinally otiose is itself an argument for reinvesting the Clause with independent meaning.

But what kind of meaning should it have? Unlike commentators who have reasoned that free exercise doctrine must either treat all citizens equally or give religious believers special privileges, I outline an approach to the Free Exercise Clause that seeks to accomplish both. Specifically, I propose that the Clause be reinvigorated to provide some exemptions from generally-applicable laws for conscientious objectors—but that these exemptions must be available to religious and secular claimants on an equal footing. To illustrate how my proposal might operate in practice, I then apply the reinvigorated Free Exercise Clause to Christian Legal Society v. Martinez itself.
I conclude that even though a reinvigorated Free Exercise Clause might not have changed the result in the CLS case, there are nevertheless strong arguments in favor of giving greater weight to the Clause in future cases.

Repository Citation

Rene Reyes, *The Fading Free Exercise Clause*, 19 Wm. & Mary Bill Rts. J. 725 (2011),
http://scholarship.law.wm.edu/wmborj/vol19/iss3/5

America is a Christian Nation – from http://ptv.org/america-is-a-christian-nation/

You're probably aware of the countless and increasing instances in which our government is ceasing to acknowledge God as our creator God and to allow any display of religious expression in the public spaces. These efforts range everything from banning nativity scenes in the town square to prohibiting the prayer using Jesus' name at high school football games.

Well, what all these efforts have in common is they are built upon the principle of the separation of church and state. Listen long enough and you'll become convinced that the foundational bedrock principle of this nation was that this nation needs to be protected from religion. I realize it is politically incorrect to say this, but it is nevertheless true. America was founded as a Christian nation.

Uncover the Christian foundation of America

Let's look and see what the record of history says. The politically incorrect truth is, the vast majority of the men that founded our nation were evangelical Christians. In fact, 52 out of the 55 signers of the constitution, the framers of the constitution, were evangelical believers. These very same men went on to form organizations like the American Bible Society, the American Tract Society, and the Philadelphia Bible Society. These men were hardly neutral toward Christianity.

Qualifications for the Constitutional Convention

Every state had their own articles of qualification for what it would take to hold office in that state and what it would take to qualify to go to the constitutional convention. Article 22 of the constitution of Delaware said … "every person who shall be chosen a member of either house or appointed to any office or place of trust shall make and subscribe to the following declaration. I do profess faith in God the Father and Jesus Christ his Holy

Son and in the Holy Ghost, one God, blest forevermore and I do acknowledge the Holy Scriptures to the Old and New Testament to be given by divine inspiration."

That is not particular to Delaware. Many of our state constitutions said the very same thing. The very same people who crafted those kind of requirements are the people who attended our constitutional convention. We are told over and over again that our country's founders were secularists, deists, sprinkled with a few Christians who came to this nation seeking above all other things to build an unscalable wall between the government and Christianity. And most importantly, they wanted to compartmentalize Christianity to the church and to the home. They wanted Christianity to have no influence whatsoever in public policy. That version of American history belongs in the same category as the story of George Washington and the cherry tree. It is complete fiction.

Testimonies from our Founding Fathers

From George Washington's diary:

"Let my heart, gracious God, be so affected with Your glory and majesty that I may discharge those weighty duties which Thou requirest of me. Again I have called on Thee for pardon and forgiveness of sins. For the sacrifice of Jesus Christ offered on the cross for me. Thou gavest Thy Son to die for me and has given me assurance of salvation."

Patrick Henry, responsible for the Bill of Rights:

"Being a Christian is a character which I prize far above all this world has or can boast."

John Quincy Adams, sixth President of the United States:

"In the chain of human events, the birthday of the nation is indissolubly linked with the birthday of the Savior. The Declaration of Independence laid the cornerstone of human government upon the first precepts of Christianity."

Separation of Church and State

What about the wall of separation between church and state? Did you know a recent poll demonstrated that 67% of Americans believe the phrase separation of church and state is found in the first amendment of the constitution? That phrase isn't found in the first amendment or anywhere else in the constitution. In the year 1800, Thomas Jefferson was the newly elected President of the United States. A group of Baptists in Danbury, Connecticut heard the rumor that Thomas Jefferson was going to establish the congregational denomination as the state denomination.

They wrote a letter to Thomas Jefferson protesting this rumor that the congregational church was going to be the state church. And so Thomas Jefferson on January 1, 1802 wrote this letter to the Baptists.

"I contemplate with solemn reverence that act of the whole American people which declared that their legislature should 'make no all respecting and establishment of religion or prohibiting the free exercise thereof thus building a wall of separation between church and state.'"

Jefferson was referring to an establishment of a denomination, not a religion. The First Amendment that prohibits government from establishing a particular religion deals with *denominations* not *faiths*. He was saying, we're not going to make one denomination the state denomination. More importantly, what I want you to see is,

Thomas Jefferson used this phrase to reassure Christians that government would do nothing to prohibit their free exercise of religion.

The Biggest Threat to Religious Liberty

Law professor Michael Koby argues that a 1990 Supreme Court ruling threatens religious freedom.

Many Christians are concerned about lawsuits that seek to remove Judeo-Christian symbolism from the public sphere, such as Ten Commandments displays in courthouses, crosses at war memorials, and the national motto — "In God We Trust" — on U.S. currency. These court cases certainly raise legitimate issues. Many Christians, however, are unaware of a 16-year-old Supreme Court ruling that poses a far greater threat to religious liberty.

Employment Division v. Smith

In 1990, the Supreme Court ruled, in *Employment Division v. Smith*, that members of the Native American Church don't have a constitutional right to use Peyote, a hallucinogenic drug, as part of their religious ceremonies if the law prohibits Peyote use generally.

This ruling may not seem like a significant threat to religious liberty since most religious groups don't encourage drug use. Moreover, in 1994 Congress passed a federal law protecting the right of members of the Native American Church to use Peyote. However, the *Smith* ruling established a precedent that could ultimately curb the religious practices of all religious groups.

This precedent pertains to what is known as the "free exercise clause." The First Amendment of the U.S. Constitution contains two clauses that guarantee freedom of religion: the "establishment clause" and the "free exercise clause." The establishment clause prohibits the government from establishing an official religion while enforcing a separation between church and state. This is the clause invoked by those who wish to remove Judeo-Christian references from the public sphere. The free exercise clause, on the other hand, guarantees the right of religious groups to operate without government interference.

Although establishment clause cases raise important issues, they don't prevent a church or faith community from following its own religious practices in its own domain. Those practices are protected by the free exercise clause, which was at issue in the *Smith* case.

Before *Smith*, the Supreme Court held that the government couldn't prevent a religious practice — even if the practice violates a generally applicable law — unless it had a "compelling interest." An example of when the government has a compelling interest is when it has required Jehovah's Witnesses to give blood transfusions to their children to protect the children's health and lives, even though their religion prohibits blood transfusions. But, in the absence of a compelling interest, religious groups were exempted from generally applicable laws. For example, the Amish were exempted from a state law requiring them to give up their home-based education in favor of formal schooling until age 16.

The Impending Threat

Smith, however, paved the way for generally applicable laws to be enforced against a religious community even when harm to the community from enforcement would outweigh the government's interest. For example, a legislature could now require churches to comply with employment laws that prohibit discrimination on the

basis of religion, gender and sexual orientation — without regard to the impact on churches' ability to practice their religious beliefs.

Of course, legislatures can choose to make exceptions for religious groups. That's why, as it stands now, most religious organizations are exempt from employment discrimination laws. But, under *Smith,* such exemptions are no longer constitutionally required under the First Amendment.

Consequently, the new rule shifted the power to protect religious freedom, in large measure, from the judicial to the legislative branch of government. And, while democratically elected legislatures are generally effective in protecting the rights of the majority, they have a mixed record when it comes to protecting the rights of the minority. Historically, courts have done a better job of that.

The question then becomes: What happens when the legislatures have majorities that are hostile to religion and decide not to accommodate religious practice under generally applicable laws? For example, what could a legislature require of an evangelical community like Biola? Might a legislature dictate who is (or who is not) hired? Who is admitted to the student body? What is taught in the classroom?

In response to such concerns about *Smith*, the U.S. Congress enacted the Religious Freedom Restoration Act (RFRA) in 1993, which restored the pre-*Smith* protection for religious liberty. While the Supreme Court has held that Congress exceeded its authority in enacting RFRA as it applied to states, the Court recently upheld RFRA as it applies to the federal government. Several states also have passed similar statutes.

Although these federal and state RFRAs do currently protect religious groups from generally applicable laws that burden them today, the shift of power to ensure religious liberty from the judicial branch to the legislative branch may pose a threat to religious freedom in the future.

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Also consider these resources on-line:

http://www.nytimes.com/2015/03/15/opinion/sunday/a-christian-nation-since-when.html

http://www.usconstitution.net/consttop_reli.html

http://www.uscourts.gov/educational-resources/get-involved/constitution-activities/first-amendment/freedom-religion/religion.aspx

http://candst.tripod.com/tableidx.htm

http://www.oyez.org/issues/first_amendment/free_exercise_religion

http://constitution.findlaw.com/amendment1/annotation05.html

https://www.au.org/resources/publications/is-america-a-christian-nation
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