Judicial Conceptions of Religious Freedom as a Human Right

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I. The history of the U.S. Free Exercise Clause

An excellent history of the "Free Exercise" clause of the First Amendment is an 80-page law review article by Professor Michael McConnell entitled "The Origins and Historical Understanding of Free Exercise of Religion." Professor McConnell explains the approaches to church-state relations before the Constitution and then looks to the views of the Framers during the ratification debates. McConnell concludes that what he calls the "Madisonian" perspective best represents the understanding of the term free exercise of religion, that such a perspective develops through religious pluralism, and thus "the Court should extend its protection to religious groups that, because of their inability to win accommodation in the political process, are in danger of forced assimilation into our secularized Protestant culture." *Id.* at 1516.

Indeed, the Framers of the first amendment honored minority religious rights even before the Bill of Rights were drafted: The Constitution holds that "no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." U.S. Const. art. VI cl. 3.

II. The first Amendment can be best understood by observing what the Framers were trying to accomplish

It was essentially an economic approach to how the federal government was to treat all religions. First, the establishment clause was to prevent Congress from establishing a nationally recognized church. Second, Congress was not to interfere with the free exercise of religion. That is, prevent a monopoly church and pass no statute that interferes with the competition resulting from the free exercise of belief.

Our constitution is not a "rights" constitution. It is a document that was created to limit the national government to protect the citizens. Even the First Amendment is a restriction of the power of the Congress. It does not create human rights-it does, however, restrict Congress in such a way that people are to enjoy religious freedom

III. The Free Exercise Clause in practice, and the state of the law today

These issues famously came to head over a three year period in the 1940s. The Supreme Court ruled that public schools could compel Jehovah's Witnesses to salute the flag and recite the Pledge of Allegiance. *Minersville School Dist. V. Goobitis*, 310 U.S. 586 (1940). While Justice Frankfurter, writing for the court, recognizes that "the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law," he concluded that the "significance of the flag" "in the development of citizenship" outweighed that right, and the free exercise right was committed to review by the

legislature rather than the courts. Justice Stone dissented from this judgment, stating that the forced salute and recitation "coerce[d] these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." He states that legislation that restricts the religious freedom of small minorities should be subject to heightened judicial scrutiny.

The Jehovah's Witnesses' resistance to the flag salute combined with the Supreme Court's stamp of constitutionality led to a wave of persecution. Hundreds of Jehovah's Witnesses were attacked, often sanctioned by local law enforcement. [Jeffrey S. Sutton, "Barnette, frankfurter and Judicial Review," 96 Marq. L. Rev. 133, 136 (2012).]

The Supreme Court reversed course just three years later. *W. Va. State Bd. Of Ed. V. Barnette,* 319 U.S. 624 (1943). There, Justice Jackson specifically rejected *Gobitis,* and concluded that compulsion is not a permissible means for achieving national unity. In a famous passage, Justice Jackson explained that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Id.* at 642. He continued that there is a "sphere of intellect and spirit" which the First Amendment reserves from all official control. *Id.*

The Supreme Court continued to wrestle with the countervailing interests of governments to enact generally applicable laws with the conscience rights of religious minorities. The Court held that a state could not restrict the extension of unemployment insurance to a member of the Seventh-day Adventist Church who could not obtain employment because of her religious obligation to forgo work on Saturday. *Sherbert. V. Verner,* 374 U.S. 398 (1963). In *Employment Divisionv. Smith,* however, the Supreme Court overruled the doctrinal test from *Sherbert,* and revived Justice Frankfurter's suggestion that free exercise claims were best left to the political process. 494 U.S. 872, 890 (1990).

Congress took that opportunity seriously, and legislatively overrode *Employment Division* with the Religious Freedom Protection Act. Pub. L. No. 103-141. Though the law was later struck down as unconstitutional as applied to the states, the heightened doctrinal test of *Sherbert* still applies to the federal government, and the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the burden is necessary to further a compelling government interest and is the least restrictive means to further that interest. 42 U.S.C. §2000bb – 1.

IV. Contemporary Free Exercise Problems

The Free Exercise clause continues to be litigated and popularly debated. For example, New Mexico penalizes religious wedding photographers who refuse to photograph same-sex

marriages based on its generally applicable nondiscrimination law. *Elane Photography, LLC v. Willock*, 2013 WL 4478229 (n.m. Aug. 22, 2013). States and municipalities have used zoning laws to target and inhibit the building of churches, synagogues and mosques in areas where there are few people of that denomination. *See, e.g.,* " LDS Church Building Massice Church in NYC Despite Neighborhood Opposition"; "Court Upholds Zoning Conditions Imposed on Residential Synagogue"; "Islamic Center of Murgreesboro," http"//en.wikipedia.org/wiki/Islamic_Center_of_Murfreesboro. Orthodox Jews and Sikhs, who are religiously motivated to wear headcoverings and grow beards, have brought litigation and administrative action to try to serve in the U.S. military despite strict dress code and facial hair restriction.

V. Conclusion

Adjudicating these issues is not simple. Legislatures should be able to draft generally applicable laws. As Justice Frankfurter pointed out, courts are not necessarily the best forum to resolve these issues: "[t]o fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people." *Gobitis*, 310 U.S. at 600. And those battles have vindicated religious liberty: an overwhelming bi-partisan majority enacted a law to restore protections of Free Exercise. Liberties are protected best when they are not merely left to the judiciary, but when the populace and legislature also respect those rights.