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THE RELIGION CLAUSES IN THE US CONSTITUTION: SOME DEBATES ON LIBERTY, EQUALITY, AND RELIGIOUS FREEDOM

In this short article, my aim is to introduce readers to some debates about religious freedom and constitutional law in the United States. I highlight a few of the enduring questions debated by political philosophers and legal scholars. For example, does the Constitution require special religious exemptions for citizens whose religious convictions put them at odds with otherwise neutral and legitimate state policy? Should the Constitution be interpreted as supporting a strict secularism or a multicultural egalitarian liberal position? What are the limits to religious freedom? To illustrate how these and related questions are debated I consider some recent work on religious freedom jurisprudence in the United States. Some legal theorists argue that the idea of religious freedom in the Constitution is based mostly on an ideal of liberty of conscience or freedom of religious belief and practice. Others claim that both liberty and equality are central to the religion clauses of the Constitution. This gives rise to debates on how best to respect the religious liberty of all citizens, including members of the many religious minorities in the US. Debates on these issues also arise in legal practice, especially when the Supreme Court must decide whether a law unfairly burdens or restricts a religious practice. By examining some important legal verdicts on the religion clauses to the First Amendment of the Constitution we can see some ways that theoretical debates about law and religious freedom are directly relevant to legal practice. These verdicts also illustrate how political values such as liberty and equality oftentimes play a significant role in how the religion clauses of the Constitution are interpreted by Supreme Court judges.

Key words: Religious Freedom, Law, Constitution, Religion, Equality.

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АҚШ Конституциясындағы дін туралы баптар: бостандық, теңдік және діни бостандық туралы кейбір пікірталастар

Автор мақалада оқырмандарға АҚШ-тағы діни бостандық пен конституциялық құқық туралы кейбір пікірталастармен таныстыруды мақсат етеді. Саяси философтар мен заңгер ғалымдар талқылайтын кейбір тұрақты сұрақтар бөліп көрсетіледі. Мысалы, діни көзқарастары бейтарап және заңды мемлекеттік саясатқа қайшы әкелетін азаматтар үшін Конституция арнайы діни жеңілдіктерді талап ете ме? Конституцияны қатаң зайырлылықты немесе көпмәдениетті эгалитарлық либералдық ұстанымды қолдау ретінде түсіндіру керек пе? Діни еркіндікке қандай шектеулер бар? Осы және оған қатысты сұрақтардың қалай талқыланатынын көрсету үшін мен АҚШ-тағы діни бостандық заңы бойынша соңғы жұмыстарды қарастырдым. Кейбір заң теоретиктері Конституциядағы діни сенім бостандығы идеясы негізінен ар-ождан бостандығы идеалына немесе діни сенім мен іс-әрекет бостандығына негізделген деп санайды. Басқалары бостандық та, теңдік те Конституцияның дінге қатысты баптарының негізі болып табылады деп мәлімдейді. Бұл барлық азаматтардың, соның ішінде АҚШ-тағы көптеген діни азшылықтардың өкілдерінің діни бостандықтарын қалай жақсы құрметтеуге болатыны туралы пікірталастар тудырады. Бұл мәселелер бойынша пікірталастар заң тәжірибесінде де туындайды, әсіресе Жоғарғы Сот заңның діни тәжірибеге әділетсіз ауыртпалық түсіретінін немесе шектейтінін шешуі керек болған кезде. Конституцияның бірінші түзетуіндегі дін баптары бойынша кейбір маңызды құқықтық үкімдерді қарастыра отырып, біз заң және діни бостандық туралы теориялық пікірталастардың заң тәжірибесіне тікелей қатысы бар екенін көреміз. Бұл үкімдер сонымен қатар бостандық пен теңдік сияқты саяси құндылықтардың Конституцияның дінге қатысты баптарын Жоғарғы Сот судьялары қалай түсіндіруде маңызды рөл атқаратынын да көрсетеді.

Түйін сөздер: діни бостандық, заң, конституция, дін, теңдік.

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Статьи о религии в Конституции США: некоторые дебаты о свободе, равенстве и религиозной свободе

В статье цель автора — познакомить читателей с некоторыми дебатами о свободе вероисповедания и конституционном праве в Соединенных Штатах. Я выделяю несколько устойчивых вопросов, обсуждаемых политическими философами и учеными-правоведами. Например, требует ли Конституция особых религиозных исключений для граждан, чьи религиозные убеждения противоречат нейтральной и законной государственной политике? Следует ли толковать Конституцию как поддерживающую строгую светскую или мультикультурную эгалитарную либеральную позицию? Каковы пределы религиозной свободы? Чтобы проиллюстрировать, как обсуждаются эти и связанные с ними вопросы, я рассмотрю некоторые недавние работы по юриспруденции свободы вероисповедания в Соединенных Штатах. Некоторые теоретики права утверждают, что идея религиозной свободы в Конституции основана в основном на идеале свободы совести или свободы религиозных убеждений и практики. Другие утверждают, что и свобода, и равенство занимают центральное место в статьях Конституции о религии. Это порождает споры о том, как лучше уважать религиозную свободу всех граждан, включая представителей многих религиозных меньшинств в США. Дебаты по этим вопросам также возникают в юридической практике, особенно когда Верховный суд должен решить, является ли закон несправедливым бременем или ограничением религиозной практики. Изучая некоторые важные юридические решения по пунктам о религии к Первой поправке к Конституции, мы можем увидеть, что теоретические дебаты о праве и свободе вероисповедания имеют прямое отношение к юридической практике. Эти вердикты также иллюстрируют, как политические ценности, такие как свобода и равенство, часто играют важную роль в том, как судьи Верховного суда толкуют положения Конституции о религии.

Ключевые слова: религиозная свобода, закон, конституция, религия, равенство.

Introduction

What are the limits to religious freedom? What role can government play in regulating and restricting religious belief and practice? Are there ways that government can legitimately support religion? These are among the most debated questions concerning religious liberty in the United State. How these questions are answered can impact religious and non-religious citizens. For example, if there are special privileges granted to religious beliefs and practices religious citizens can receive exemptions from laws that non-religious citizens must comply with. If there is a mandatory policy of military conscription (as was the case during World War I, World War II, the Vietnam War era and at other times in US history) a religious citizen whose moral convictions prohibit killing humans might be given an exemption from military service. A non-religious citizen who is committed to a moral doctrine of pacifism may face significant challenges to receiving an exemption from military service. Furthermore, if government allocates funds for education publicly funded secular schools will generally be eligible to receive such funds. Private religious schools by contrast might not be eligible on grounds that the Constitution prohibits government from sponsoring or endorsing religious beliefs or practices. Legal and political theorists debate these topics by combining theories of law with theories of politics.

Justification of the choice of articles and goals and objectives

The Religion Clauses to the US Constitution are legal principles that express political values, including liberty of conscience and a secular conception of political authority. Supreme Court verdicts on legal cases that adjudicate conflicts over religious freedom and its limits reflect legal and political value judgments. Central political values include liberty and equality. For these reasons this article relies on the following sources: Supreme Court case law, legal theory that examines the Religion Clauses to the US Constitution, and work by political philosophers. The primary justification for this multidisciplinary approach is that research by scholars from different disciplines is better suited for examining different features to religious freedom jurisprudence in the US context. To connect theoretical claims to actual legal practice, consulting Supreme Court verdicts is also essential.

Scientific research methodology

The research method used in this article is common to legal philosophy as applied to the US Constitution. By combining ideas from political philosophy, legal scholarship, and some Supreme Court cases it is possible to highlight some of the most basic and important values that inform religious freedom jurisprudence. Some scholars put little emphasis on the impact that value judgments play in legal practice. Yet the legal cases and legal scholars cited in this article illustrate why a method of examining religious freedom in the US context should also consider ideas from political philosophy.

Main part

I. The Case for A Secular Interpretation of the Religion Clauses

The First Amendment to the US Constitution contains two fundamental legal principles concerning religious liberty: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" These principles are commonly called the Establishment Clause and the Free-Exercise Clause. The basic idea underlying each is as follows. The Establishment Clause prohibits government from directly endorsing a religious viewpoint or from favoring one religious viewpoint over another. The Free-Exercise Clause guarantees the right to religious freedom.

Partly as a result of Supreme Court jurisprudence and partly as a result of legislation by Congress the interpretations of the religion clause have evolved over time. For example, although the wording of the Establishment Clause refers to a limit to the power of "Congress" in today's context the principle is understood as limited the power of government as such, including state and local government. Likewise, starting in the 20th C the Supreme Court began to interpret the right to religious liberty as a reason to give some religious citizens an exemption from a legal obligation. For example, the Court has argued that some religious citizens can ingest peyote—a strong psychedelic drug—during religious ceremonies, some religious citizens have a partial exemption from primary school education requirements, and religious citizens are permitted to wear religious symbols in the workplace even if doing so goes against a company's dress code policy.

In their recent book *The Religion Clauses: The Case for Separating Church and State,* Chemerinsky and Gillman (2020) defend two theses that support a revision to how many Americans think about religious liberty. One—and this is the more controversial claim—is that strict separation is required by fidelity to the religion clauses of the Constitution. The second is that the religion clauses are two principles respecting the same liberty. On their view many wrong turns in religion clause jurisprudence stem from a failure to recognize that the same conception of liberty underlies both the Establishment and Free-Exercise clause of the First Amendment. By contrast some recent work by egalitarian and multicultural liberal philosophers support a different interpretation of the religion clauses.

Many interpretations of the religion clauses deviate from the separationist model defended by Chemerinsky and Gillman. Exhibit A is case law. Modern legal doctrine on the religion clauses is more accommodationist than separationist. This is more obvious in the case of free-exercise jurisprudence which is dominated by a favorable stance on religious exemptions. Exemptions from education policy, labor law, health care, and drug policy are well-known examples of free-exercise verdicts that accommodate requests for religious exemptions. Yet there are also establishment cases that grant religious schools access to state monies (e.g., for infrastructure), permit municipalities to display religious symbols in public spaces (e.g., large crosses or nativity scenes in public parks), and that allow official government meetings to begin with prayers led by religious figures. Exhibit B is political resistance to a separationist interpretation of the religion clauses. This longstanding feature to American politics remains a potent factor in interpretations of the religion clauses. Many citizens bristle at the suggestion that their religious convictions should not be reflected in the political culture or that religious values ought not to be expressed through law and policy. Exhibit C is a divide between liberal and conservative conceptions of religious establishment. Liberals often favor an accommodationist interpretation of free-exercise and a separationist interpretation of establishment. Conservatives often favor an accommodationist interpretation of both religion clauses (Levy, 1986).

The primary aim of *The Religion Clauses* is to set the record straight:

…the Constitution meant to and should be interpreted as creating a secular republic, meaning that government has no role in advancing religion and that religious belief and practice should be a private matter, one where people should not be able to inflict injury on others in the name of religion (Chemerinsky and Gillman, 2020: 18).

The Religion Clauses offers a critical assessment of case law and proposes an alternative to familiar liberal and conservative positions on the religion clauses. Chemerinsky and Gillman consider four options that combine positions on accommodation and separation regarding the religion clauses. These are:

	Establishment Clause	**Free-Exercise**
1.	Separation	Separation
2.	Separation	Accommodation
3.	Accommodation	Accommodation
4.	Accommodation	Separation

Chemerinsky and Gillman, 2020: 15)

Their book is devoted to making the case for Option 1.

Chemerinsky and Gillman insist that James Madison's famous opposition to state funding for religious instruction and Thomas Jefferson's even more famous 'wall' metaphor are paradigm examples of the right view. The 'wall of separation' between church and state has been affirmed in *Everson, Vitale*, and some other Supreme Court verdicts (*Everson v Board of Education,* 1947; *Engel v Vitale,* 1962; *Town of Greece v Galloway,* 2014; *Trinity Lutheran Church of Columbia, Inc v Comer,* 2017). These cases represent of the separationist interpretation of the religion clauses that Chemerinsky and Gillman defend.

In *Everson* the Court declared, "the wall of separation" should be "high" and "impregnable." The Court also claimed that allocating public funds that could be used to subsidize the transportation of kids to religious schools would not breach the wall. The apparent conflict between the verdict and the rhetoric reflects the judgment call that state aid that benefits religious citizens does not automatically count as endorsement of religion. Viewed from the standpoint of later developments in religion clause jurisprudence, a secular purpose test can be construed as showing that the public policy under review in *Everson* does not violate the Establishment Clause. That kids exit the bus at a religious school is better construed as state support for educational opportunities rather than an endorsement of the religious affiliation of the school. What matters is whether state support for transporting kids to school is a legitimate policy. People debate whether a policy that benefits religious citizens in this way is at odds with a secular purpose test, yet *Everson* offers a version of separationism that tries to distinguish state endorsement of religion from an allocation of public goods that might be used by citizens to further their religious objectives.

Chemerinsky and Gillman also claim separationism is the best model for free-exercise jurisprudence. On their view the Free Exercise clause is a guarantee against religious bias toward religious citizens by government. For example, if a city council passes an ordinance that restricts the ritual slaughter of animals within city limits, we can scrutinize the policy by asking whether the policymakers were motivated by bias against a religious minority (*Church of the Lukumi Babalu v City of Hileah,* 1993). Evidence of religious bias is a reason to subject a policy to strict scrutiny. Yet if a neutral law imposes a burden on a religious belief or practice, and there is no evidence of religious bias, the case for accommodation is weak. In their words, "We think Justice Kennedy got it right in his *Lukumi* decision: Religious citizens cannot claim exemptions from neutral laws of general applicability, but the Court should be on guard against efforts by government officials to offer secular justifications for laws that are actually motivated by religious animus (Chemerinsky and Gillman, 2020: 126)."

Consider also *Trump v Hawaii* (2018). In this more recent case, the Court upheld a near total travel ban for nationals of seven countries, five of which are Muslim majority. Given the longstanding Islamophobia expressed by Trump and his allies, including an explicit call for a 'Muslim ban' the evidence for religious bias is incontrovertible. On Chemerinsky and Gillman's view the anti-religious discrimination requirement for religious liberty counts against the Trump administrations immigration policy. There may be other considerations in play, such as an unusually high number of bogus passports in countries covered by the immigration ban. For Chemerinsky and Gillman the best way to navigate this issue is to affirm that visa applicants are entitled to neutral but not preferential treatment regarding their religious affiliations.

Toleration and non-discrimination are legitimate bases for scrutinizing state policy. A policy may be invalidated on these grounds. That is as far as it goes. According to Chemerinsky and Gillman Religious exemptions are not essential to this aim. Moreover, religious exemptions are an objectionable form of favoritism, are not required by the conception of liberty that is the basis for the religion clauses, and they risk permitting private conscience to be a source of harm to others.

With respect to equality there are a number of avenues not explored in Chemerinsky's and Gillman's account. Here are some examples. First, equality might be understood as protecting persons

against a full range of expressive harms which include but extend beyond the examples of religious bias relevant to cases such as *Lukumi, Employment Division,* and *Trump*. Second, sometimes a religious accommodation improves the status of citizens with respect to equality without making others worse off. Third, good faith efforts to accommodate a wide range of religious belief and practice might produce results that expand protections for religious liberty without compromising the idea of a secular republic. Fourth, democratic law (Schiffrin, 2021) has equality in status as one of its aims.

II. Equality and the Religion Clauses

In this section, I consider ways that expressive harm, reciprocity on equal terms, and equal recognition are relevant to the religion clauses. Drawing on perspectives from legal and political theory, I present the view that the religion clauses are two principles respecting the same liberty and equality.

Expressive Harms. An expressive harms approach to law highlights ways that state policy sometimes creates or reinforces status inequality. In their influential account Anderson and Pildes state, "Communications can expressly harm people by creating or changing the social relationships in which the addressees stand to the communicator (Anderson and Pildes, 2000: 1528)." Social equality is central to this view. The expressive harms approach is relevant to a wide range of topics, including race, gender, LGBTQ+ rights, and immigration, among others.

A relevant example from religion clause jurisprudence is the O'Connor doctrine on establishment (*Wallace v Jaffree,* 1985). According to this view school prayer, moments of silence, and the endorsement of religious viewpoints at official public school events are objectionable; they create outsider status for students and audience members whose convictions are at odds with the policy. In this context the communicator is the state and its agents. The message conveyed to some of the addressees—citizens—is not simply that they are different, but that they are different and not equal.

Majority-minority status with respect to religious demography is also a relevant variable here. The familiar expression, 'We are a Christian nation' is a clear endorsement Christian nationalism. Nationalism in all forms is incompatible with democratic equality. It is worse when the Supreme Court asserts 'We are a Christian nation' (*Church of Trinity v US,* 1892) than when a political candidate does, and worse when a political candidate does than when a private citizen makes this claim. The expression itself is almost always objectionable, though its effects vary depending on context, and on who the speaker is. A religious demographer who compares the US to Iran might speak loosely by asserting 'America is a Christian nation and Iran is a Shia Muslim nation' when referring to population data. Yet a legislator or judge who invokes 'We are a Christian nation'(Brewer, 1905/2018) to defend a policy or verdict is committed to enacting a wrong, because at a minimum such a policy will create an expressive harm. State policies should not be a be proxy for Christian nationalism. An expressive harms assessment of state policy that affects religious minorities offers an important tool for those committed to the idea of a republic of equals; it adds an important dimension to the claim that the religion clauses require a commitment to toleration; and it can pick out objectionable cases of religious bias including the examples that Chemerinsky and Gillman highlight.

Reciprocity on Equal Terms. A neutral state policy might have a disparate impact on someone's religious liberty. Religious accommodations are a tool that can address conflicts between neutral policies which serve a legitimate state interest and the pursuit of religious obligations that may put some citizens at odds with the policy. Had the Court argued in favor of the accommodation request in *Employment Division* (1990)—a case where a Native American was fired from his job after it became known that he used peyote in a religious ceremony—it could have done so in a way that affirms the equal status of members of a religious minority for whom law poses a barrier to religious pursuits. Instead of viewing this as granting an unfair benefit to some, which is how the exemption will look from a strict separationist standpoint, we can view it as a good faith attempt to affirm the idea that citizens stand in a relation of social equality under law.

Citizens with religious beliefs and practices that conflict with state policy can in some contexts make a reasonable claim that their religious freedom is not treated the same as those for whom religious practice and law do not conflict. Majority privilege is one obvious concern; in the US Protestants are less likely to face a conflict between state policy and religious practices; law often favors the dominant group where dominance is defined as political power or access to political power; religious minorities, especially those with beliefs and practices that differ most from Christianity hold a much weaker hand when it comes to voicing objections to state

policy. The First Amendment should not side with the powerful but rather with the values that are expressed by the Religion Clauses. One way to avoid a state policy that puts a religious citizen in a bind such as, either fulfill a religious obligation or maintaining employment eligibility, is to provide legal protections that guarantee religious liberty.

When applied to free exercise, a liberty and equality approach will distinguish exemptions that create a harm or that impose an unfair burden for others from those that secure fair equality of opportunity for self-determination (Patten, 2004). We cannot expect law to be as subtle as philosophers' imaginations; and people will invariably disagree on cases where judgement must navigate considerations supporting different outcomes. Yet we can expect law to be a less blunt instrument for the realization of religious liberty and equality.

Equal Recognition. That each citizen is entitled to equal recognition under law should inform our understanding of religious liberty. What we might call an ideal of equal recognition helps fill out moral content in the idea of equal treatment. According to an equal recognition account the idea is not that everyone's values should be esteemed. Rather, the idea is equal recognition of one's status as a person and citizen. If a religious accommodation expands opportunities for self-determination without imposing harms, that is a consideration in favor of accommodation. Equal recognition offers another consideration in favor of claiming that anti-discrimination is one but not the only basis for judicial review of state policy that impacts religious belief and practice.

Conclusion

Which approach to the religion clauses should we favor, the strict separationist model defended by Chemerinsky and Gillman, or the more egalitarian view espoused by those who defend a multicultural liberalism model? How we answer this question partly depends on our understanding of religious liberty which is as much a political as a legal matter. Those who favor a secular conception of political authority can argue that to provide a fair defense of liberty for all citizens—some of whom are not religious—we should endorse a separationist model. By contrast, those who believe that well-intentioned law can sometimes impose unfair burdens on religious minorities can defend limited religious exemptions and special accommodations as a means to affirm the equal status of all citizens. Debates over religion clause jurisprudence in the US is likely to be shaped by proponents of these two approaches for the foreseeable future.

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