"FAIRER STILL THE WOODLANDS" MAPPING THE FREE EXERCISE FOREST

RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS. By Kent Greenawalt.[1] Princeton University Press. 2006. Pp. xi + 455. $39.00.

John Witte, Jr.[2]

A familiar hymn, still sung with gusto on many Sunday mornings, has a couple of choice lines that came to mind as I read Kent Greenawalt's latest masterwork: "Fair are the meadows, fairer still the woodlands."[3] Most souls brave enough to enter the First Amendment forest of religious liberty are more likely to come out shouting "foul" than singing "fair." "Foul" in the baseball sense because some of the Supreme Court's recent cases applying the First Amendment establishment and free exercise clauses keep rolling wide of the right(s) baseline. "Foul" in the olfactory sense because this First Amendment forest now has the distinct aroma of founding principles of religious liberty rotting from neglect and of novel doctrines of neutrality that just don't smell right. And "foul" in the equitable sense because the First Amendment religion clauses have been so weakened by recent Supreme Court cases that the protection of American religious liberty is falling increasingly to other legal provisions and other branches of government. It is no small irony that today Congress and state courts provide more religious liberty than the federal courts, and that the First Amendment free speech clause provides more protection for religious claimants than the First Amendment free exercise clause.

Kent Greenawalt's projected two volume series on *Religion and the Constitution* provides the reader with a clear map

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3. A line in the Silesian folk song, "Fairest Lord Jesus" viewed at *http://my.homewithgod.com/heavenlymidis2/fairest.html* (August 15, 2007).

through this dank First Amendment forest, and a cogent guide to a fairer religious liberty jurisprudence. The first volume, subtitled "Free Exercise and Fairness," is the book here under review. The second volume, on the establishment clause, is in the works. This first volume is a free standing tome that can be read without its companion. But it properly puts off some of the constitutional questions (involving issues like Sabbath law and religious tax exemptions) that implicate both free exercise and establishment clause questions. If the elegance and acuity of this first volume are any indication, you would be wise to place an advanced order for the second. These volumes are destined to become standard research guides and teaching tools for religious liberty scholars, students, and advocates alike.

The main purpose of this volume is to explore the many areas of free exercise law that have occupied federal (and sometimes state) courts, legislatures, and agencies—and to suggest reforms that will bring greater freedom, fairness, and firmness to each of these areas of law. After a brief conceptual framing and analysis of the history of the First Amendment religion clauses, Greenawalt offers a score of chapters that take up various religious liberty issues, which are distilled a bit in a brief concluding chapter. The issues include the claims of individuals to conscientious objections to military service, education, oath swearing, medical procedures, and more; their claims to special constitutional protections for religious drug use, dress, ornamentation, grooming, proselytism, Sabbath observance, sacred sites, child custody, tithe payments, and others; and their calls for special religious rights and liberties within the military, prisons, hospitals, public schools, government agencies, public forums, and private workplaces and associations. Greenawalt also takes up the claims of churches and other religious organizations to special rules to associate and incorporate, to discriminate or propagate their views on religious grounds, to protect their confidential clerical communications, to resolve their own internal disputes over property, to gain special protections in bankruptcy proceedings, and to receive tax exemptions, zoning privileges, and historic preservation immunities—and the limits on these and other claims when religious associations, through their officials or agents, engage in crimes, torts, or untoward conduct. This topical organization of the chapters (and the detailed index) makes the book valuable both as a reference for those interested in selected topics of religious liberty, and as an overview of the field that can be read cover to cover.

Most of the chapters pose the legal problematic(s) at issue, rehearse the relevant cases, statutes, and regulations on point, and then offer a critical reading—sometimes concurring in, sometimes dissenting from, often nuancing and urging improvements to the prevailing law and legal opinion on point. The book ranges well beyond traditional First Amendment free exercise issues heard by the Supreme Court. Greenawalt analyzes the full range of freedoms of private parties to exercise their religious beliefs, and the appropriate limits that may be imposed on this exercise for the sake of health, safety, and welfare of the community or the fundamental rights of others. On a number of the issues that have reached the Supreme Court, Greenawalt compares its opinions with those of lower federal and state courts, enhancing the legal complexity of the issues and the range of possibilities for their fairer resolution. The reader also gets a vivid sense of many federal and state statutes and regulations governing religion (dealing with laws of bankruptcy, health care, workplace, construction, and the like) that, for better or worse, have proceeded without much constitutional scrutiny so far.

Intermittently, Greenawalt pauses to introduce readers to the key steps of pressing a prima facie free exercise case under the First Amendment. Parties must not only meet the general standing, case and controversy, ripeness, and political question thresholds. They must also demonstrate their sincerity and good faith, and the presence of a substantial burden that has been imposed on the exercise of their religion. Greenawalt traces the shifting standards of review in different eras and areas of religious liberty law, and the ample problematics that confront courts in balancing free exercise claims against government power and balancing one party's religious rights assertions against the private rights claims of others. He also explores deeply the perennially contentious issues of legislatively and judicially created exemptions for religious claimants who meet these prima facie requirements, coming out in favor of most of them (pp. 27–34, 109–56, 201–32).

The book is written with elegance, power, and lucidity—and filled with the kind of wit, wisdom, and *Wissenschaft* that Greenawalt's readers have come to expect from his dozen earlier tomes on the constitutional and philosophical foundations of law, religion, and morality.[4] Readers cannot help but see a keen

4. *See*, among his other volumes on this topic: KENT GREENAWALT, DOES GOD BELONG IN SCHOOLS (2005); KENT GREENAWALT, PRIVATE CONSCIENCES AND

intellectual and incisive teacher at work in these pages, who knows just how to probe and push the law at propitious points, and how to map out complicated arguments so all can understand what is at stake. He makes judicious use of the vast resources at hand. He picks selectively among the hundreds of scholarly texts, addresses the main federal cases and statutes, and introduces some interesting state cases and statutes (such as those on snake handling, church tort liability, and child care and custody disputes based on religion) that have not been enough part of the mainstream of scholarship on religious liberty. And while characteristically generous and genial in his treatment of others, he does not flinch from dishing out firm rebukes and withering criticisms of courts and commentators who have strayed from the right path.

The right path of religious liberty, as Greenawalt sees it, is that government must accommodate if not facilitate "the maximum expression of religious conviction that is consistent with a commitment to fairness and the public welfare" (jacket). "I believe strongly in the major values that lie behind free exercise and nonestablishment," he elaborates in a strong early passage that sets the tone of the book.

> People should be free to adopt religious beliefs and engage in religious practices because that is one vital aspect of personal autonomy, and because recognition of that freedom is more conducive to social harmony in a modern society than any other alternative. I believe, further, that most people experience some transcendent dimension in their lives and that, despite the unavailability of decisive evidence, that experience reflects some objective reality. Whether the government should involve itself in promoting religious values may be arguable, but my own view is that personal autonomy is most fully recognized and the flourishing of religion itself is best served if the government does not sponsor religious understandings and practices (pp. 3–4).

With such a robust view of religious liberty, Greenawalt is predictably critical of those who dismiss religion as too "silly" to worry about or too sinister to protect except perhaps as a peculiar private preoccupation. "A serious person trying to grapple with the state's treatment of religion has to undertake a much more arduous effort to distill the nature of our county's traditions and

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PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY (1987).

of sound practice in modern political democracies" (p. 4; *see also* pp. 124–56). Greenawalt is equally critical of those who would wish to reduce the First Amendment religion clauses to simple formulas such as "separation of church and state," "equal treatment," or "government neutrality" toward religion. Questions of religious liberty are too complex to be judged by simple aphorisms or mechanical tests, he insists. They require a judicious balancing of "multiple values," "principles," and "doctrines" at once (pp. 5–9, 14–15)—not least the collection of religious liberty principles forged by the eighteenth-century founders: liberty of conscience, freedom of exercise, religious equality, religious pluralism, separation of church and state, and disestablishment of religion (pp. 20–22). And Greenawalt is critical of those who regard the free exercise clause as redundant of First Amendment guarantees of free speech, press, and association and Fourteenth Amendment guarantees of due process and equal protection (pp. 228–32, 387–95, 439–41). The Constitution declares that religion is a special category of liberty, he insists, and it deserves "a core of undisputed protection" not available elsewhere in the Constitution. "Neither the federal government nor states can interfere with religious belief or religious expression or with religious practice that causes no harm apart from its religious significance; no government can single out a religion for adverse targeting . . .; no government can discriminate against one or some religions in relation to other religions" (p. 440; *see also* pp. 15–25).

Constitutional scholars will not be surprised that Greenawalt's criticisms of these reductionist approaches to religion and religious liberty lead him to rebuke the Supreme Court's current reductionist free exercise law. In the 1990 case of *Employment Division v. Smith*,[5] the Court reduced the free exercise guarantee to a type of heightened rational basis review. The *Smith* Court held that laws that are judged to be "neutral and generally applicable" will pass muster under the free exercise clause, regardless of the burden cast on religion or the nature of the power exercised by government. Even a law that crushes a central belief or practice of a free exercise claimant will survive constitutional challenge if it is neutrally drafted and generally applicable to all. Only if the law is not neutrally drafted or generally applicable will government be required to demonstrate a compelling government interest that overrides the burdened free

5. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

exercise right.[6] While he properly works hard to show that the *Smith* test has not been entirely toothless, especially in the hands of some able federal judges, Greenawalt is sharply critical of this formulation of the free exercise guarantee. He views the *Smith* test as "arbitrary," "puzzling," "anomalous," "based little on original understanding" of the free exercise clause and more on "jerry-rigged" arguments, "if not ex nihilo" reasoning. For all its facile distinctions of earlier precedents and its fictional talk of "hybrid rights" exceptions, the *Smith* case is "a striking abandonment" of well-settled precedent and a "distressing" "Procrustean one-size-fits-all to the bewildering richness of religious practice and convictions" (pp. 31–33, 75–83). It introduces a "harsh, religion-blind" neutrality, and exposes a Court that "has simply given up on protecting a wide range of free exercise rights for religious minorities" and left them to seek whatever protections they can from legislators and state judges (pp. 79, 227). Greenawalt calls for *Smith* to be reversed, the free exercise clause to be restored, and the federal courts to be returned to serious protection of religious liberty for all—even those with exotic and unpopular beliefs and practices that now find rather little sympathy from legislators and state judges who tend to keep their eyes on majoritarian sentiment and the next election.

Constitutional scholars will be at least a bit surprised, however, that Greenawalt does not embrace wholeheartedly the "strict scrutiny" standard of free exercise review that *Smith* had jettisoned. This standard requires government to prove a compelling state interest and the least restrictive alternative to achieving that interest when a law or state action is challenged under the free exercise clause. It also outlaws blatant religious discrimination by government whether on the face of a statute or in its application. This strict scrutiny standard had been earlier introduced by the Supreme Court in *Sherbert v. Verner* (1963),[7] the "high water mark of free exercise" law (pp. 29, 177–83). It became (in)famous among constitutional scholars after *Wisconsin v. Yoder* (1972), the case that exempted Amish children from full compliance with mandatory school attendance laws.[8] Strict scrutiny had been the Court's standard of choice in ten free ex-

6. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (local ordinance transparently discriminating against ritual sacrifice of animals violates the free exercise clause).

7. Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise clause forbids state to deny unemployment compensation to claimant discharged from a job that would require her to work on her Sabbath).

8. Wisconsin v. Yoder, 406 U.S. 205 (1972).

ercise cases from 1963 to 1989.[9] After *Smith* announced the neutrality standard in 1990, Congress reintroduced the strict scrutiny standard in the 1993 Religious Freedom Restoration Act (RFRA), adducing *Sherbert* and *Yoder* as its prototypes.[10] In 1997, the Court struck down RFRA as applied to the states, but left it standing as applied to Congress.[11] Congress also introduced this strict scrutiny standard in the Religious Land Use and Institutional Persons Act (RLUIPA)[12] and in several other discrete federal statutes which apply to both federal and state governments. In 2005, a 9-0 Supreme Court upheld RLUIPA,[13] and lower federal courts have since upheld other federal statutes with strict scrutiny standards. A number of states have adopted this strict scrutiny standard test, too, in their state constitutional and statutory laws on religious liberty—not least in the thirteen state religious freedom restoration acts that have been issued in the past decade. And, international laws on religious liberty, like the 1966 International Covenant on Civil and Political Rights, to which the United States is a signatory, have a form of strict scrutiny review, under the human rights standards of "necessity and proportionality."[14] So, with all this support for strict scrutiny to protect free exercise rights, what gives Greenawalt pause?

Fairness is the short answer. While he agrees with the results of most federal and state cases that have used a strict scrutiny standard, Greenawalt finds that an uncritical application of this standard may well hurt the cause of religious liberty more than help it. Slavish application of this standard carries the risk of "arbitrary decision and unjustified favoritism" for popular religions, and it often burdens courts with "undeniably difficult" and "time consuming" tasks that can bring too little reward (p. 201). A strict scrutiny regime inevitably attracts many spurious if not fraudulent claims by those with time on their hands, notably, prisoners who file the majority of cases. It sometimes forces judges to review closely not only the sincerity and good faith of the free exercise claimant, but also the centrality of the belief or

9. The most recent was Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989) (state may not deny unemployment benefits to claimant who refused to take a job that might require him to work on Sunday).

10. 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1993).

11. City of Boerne v. Flores, 521 U.S. 507 (1997).

12. 42 U.S.C. 2000cc (1993).

13. Cutter v. Wilkinson, 125 S. Ct. 2113 (2005).

14. G.A. Res. 2200A (XXI), U.N. Doc. A/RES/21/2200 (Dec. 16, 1966). See comparative analysis in a recent Symposium, *The Foundations and Frontiers of Religious Liberty: A 25th Anniversary Celebration of the 1981 UN Declaration on the Religious Tolerance*, 21 EMORY INT'L L. REV. 1–266 (2007).

practice being burdened and the substantiality of the burden itself—inquiries which themselves can be deeply intrusive and injurious (pp. 109–56, 201–32). And, it must be remembered that in free exercise law, strict scrutiny is not "strict in theory, but fatal in fact," as it has been in equal protection and free speech law (p. 215, quoting Gerald Gunther). Even in the *Sherbert* and *Yoder* heyday of 1963–1989, when the Supreme Court had strict scrutiny as its stated free exercise standard, government won nearly half the cases—and in four other free exercise cases in that era, the Court simply used a different test and found for the government each time.[15] Similarly, in the early years of RFRA, government won more than 80% of the time against RFRA claimants. Still today, most RFRA and RLUIPA claimants lose, a number of them now stumbling at the preliminary inquiry of whether they even have a "substantial burden" on their free exercise rights. The strict scrutiny regime of free exercise—whether constitutional or statutory—has not been so unequivocally favorable to religious liberty as an uncritical reading might suggest, Greenawalt concludes.

In what he calls the "most important chapter in the book" (p. 8), Greenawalt thus presses for a more nuanced balancing test between free exercise rights and government power—yielding what is effectively an "intermediate standard" of heightened scrutiny for free exercise cases (pp. 201–32). (This is a standard that he would also apply as far as possible in resolving clashes between religious claimants and other private parties (pp. 326–76)). To deter unnecessary constitutional litigation, Greenawalt calls for religious liberty litigants to weigh more carefully the centrality of the belief and practice that is being burdened, and to desist from making a federal case out of manageable or avoidable burdens on discretionary religious conduct. He calls for government officials, in turn, to weigh more carefully the seriousness of the state power and program that is being implemented, and to desist from intruding on religious beliefs and practices that could easily be spared by taking a discretion-

15. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (military officer does not have free exercise right to wear his yarmulke on duty contrary to military dress code); Bowen v. Roy, 476 U.S. 693 (1986) (agency's use of social security number does not violate free exercise rights of Native American, who believes such use would impair his child's spirit); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (denying free exercise accommodation for Muslim prisoner to engage in collective Friday worship); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (construction of road through section of national forest regarded as sacred ground by three tribes does not violate free exercise clause).

ary step or two. Such mutual restraint and self-help by both sides, he argues, will keep the court dockets free from so many silly cases that have given the strict scrutiny standard such a bad name and such a modest record of success. (If only constitutional law had Rule 11-like sanctions and "frivolous litigation" penalties on both sides to make this aspiration for self-restraint stick.) To streamline the federal litigation that should go forward even after such self-restraint, Greenawalt calls on federal judges to exercise greater deference in honoring sincere, good faith claims that an "important" religious interest has been unduly burdened, and to press legislatures to work harder to find less restrictive alternatives that minimize these burdens. And he calls for courts to make judicious use of free exercise exemptions and immunities to remove the heaviest burdens on important religious interests that remain substantially burdened, despite everyone's best efforts. "Although engaging in such an exercise is indeed troublesome for courts," he admits, "this is one of those domains of law in which messiness at the edges, and uneven application" of the law to accommodate the unusual are necessary to achieve maximum fairness for all (p. 214).

Even if the balancing test can be fixed in this way, Greenawalt seems reluctant to make the First Amendment free exercise clause the only or even the principal forum for protecting the freedom of religious exercise (pp. 228–32, 387–93, 439–43). One of the ironies of the *Smith* case is that it has aided the cause of religious liberty by pressing litigants and legislators to look elsewhere in the Constitution for fuller and firmer protection—and with some notable successes. For example, despite *Smith,* religious liberty litigants have continued to find ample protection against religious discrimination under the First Amendment free speech clause.[16] And they have used the free speech, establishment, and equal protection clauses together to create a whole series of precedents that grant religious parties equal access to government facilities, forums, and even funds made available to like-positioned non-religious parties.[17] All

16. *See* most recently, Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002) (village ordinance requiring door-to-door solicitors and canvassers to obtain a permit containing one's name violates constitutional free speech and free exercise rights because of its breadth and unprecedented nature, and is not narrowly enough tailored to the stated interest of preventing fraud, crime, and privacy intrusion).

17. *See* the series of cases from Widmar v. Vincent, 454 U.S. 263 (1981) (when a state university creates a limited public forum open to voluntary student groups, religious groups must be given "equal access" to that forum) to Good News Club v. Milford Cen-

these are religious liberty byproducts of the new clause shopping catalyzed by *Smith* (pp. 228–38, 243–45, 440–43). These kinds of protections had not been much part of the strict scrutiny free exercise law before *Smith*.[18] It's a legitimate question, which Greenwalt leaves dangling, what a more rigorous and judiciously applied free exercise standard might do to these important lines of cases—subsume them, eclipse them, or reject them?

Greenawalt also leaves dangling the question—no doubt to be tied down firmly in the next volume on the establishment clause—whether statutory protections of religious liberty are ultimately adequate or even constitutional. In nearly two hundred separate pieces of federal legislation issued since the 1990 *Smith* case, Congress has built in new special exemptions, privileges, immunities, benefits, and treatments for religious parties.[19] These include not only the loudly orchestrated enactments of RFRA and RLUIPA or the recent tweaks to the familiar 501(c)(3) income tax exemptions for religious groups. They include the quite visible—and for some quite risible—International Religious Freedom Act (1998) and the various new laws on faith-based initiatives. But beyond these, largely unnoticed by the public and largely unchecked by the courts is a sprawling network of special religious rights that have been quietly stitched into federal laws governing all manner of subjects—laws of evidence and civil procedure, disability, labor, employment, unions, civil rights, interstate commerce, bankruptcy, ERISA, workplace, military, immigration and naturalization, food and drugs, prisons, hospitals, land use, and much more. And federal laws are only part of this network. State, county, city, and village laws creating special religious rights for some of these same topics, as well as for local issues like property tax, zoning, non-profit organizations, education, charity, and the like can number in the thousands—particularly in Bible Belt states.

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tral Sch., 533 U.S. 98 (2002) (a public middle school's exclusion of Christian children's club from meeting on school property after hours was unconstitutional viewpoint discrimination, and was not required to avoid establishment of religion). *But cf.* Locke v. Davey, 540 U.S. 712 (2004) (upholding a state scholarship program established to assist payment of academically-gifted students' post-secondary education expenses for all students, except those pursuing a theology degree).

18. The only cases are *Widmar*, 454 U.S. at 7, and indirectly McDaniel v. Paty, 435 U.S. 618 (1978) (state constitutional prohibition against clergy holding political office violates First Amendment rights).

19. *See* the recent series of articles by Diana B. Henriques, N.Y. TIMES, October 8-11, 2006.

The Supreme Court has long viewed narrow and well targeted special religious rights provisions in legislation as suitable accommodations of religion—that are neither mandated by the free exercise clause nor prohibited by the establishment clause.[20] In recent years, the Court has further made clear that many of these religious accommodation issues are for the legislatures, not for the courts, to decide, and for the states and not for the federal government to put in place. This small explosion of religiously favorable legislation in the past two decades is part and product of broader constitutional moves toward stronger separation of powers at the federal level, and stronger empowerment of the states.

It will be intriguing to see how this new statutory matrix of religious liberty will fare in Greenawalt's sequel volume on the establishment of religion. The indications we get from this first volume are that statutory accommodations of "important" religious interests—such as an individual's conscientious objections to military service or a church's right to resolve its own disputes or to discriminate on religious grounds in core religious employment decisions—are not only "fair" but "essential" for the protection of religious liberty (pp. 49–67, 261–89, 377–95). But tax exemptions, zoning privileges, bankruptcy priorities, evidentiary immunities and the like that touch on less essential religious interests may not be so important to religious liberty, at least at the constitutional level. They might well have to yield to other constitutional considerations, not least the constitutional prohibition on religious establishment.

If all these separate pieces of protection—federal and state, constitutional and statutory, procedural and remedial—are viewed together, one cannot resist Greenawalt's overall conclusion that religious liberty is "fairer" today than is generally admitted by many constitutional scholars who have been preoccupied with *Smith*. The issue that remains is whether all this legal complexity is necessary if the First Amendment free exercise clause is strong, and whether it is not fairer to press for a strong

20. The earliest such holdings were Gibbons v. District of Columbia, 116 U.S. 404 (1886) (allowing property tax scheme that exempted "church buildings, and grounds actually occupied by such buildings"); Arver v. United States, 245 U.S. 366 (1918) (upholding Congress's power to define conscientious objector status and Congress's restriction of the status to ordained ministers, theology students, and members of well-recognized pacifist sects). Among recent cases, see especially Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664 (1970) (upholding state property tax exemption for church property against disestablishment clause challenge).

federal free exercise clause rather than settle for a fair map through a diffuse legal regime.

My own view is that free speech, equal protection, and statutory protections of religious liberty cannot ultimately substitute for a more rigorous First Amendment free exercise clause.[21] To be sure, the development of these doctrines post-*Smith* testifies both to the ingenuity of litigants and legislators and to the flexibility of the constitutional process to accommodate the pressing spiritual needs of citizens. And to be sure, the development of these doctrines has provided some religious minorities with forms and forums of relief hitherto foreclosed to them.

These can only be temporary refuges for religious liberty, however. Speech is only one form of religious exercise; equality is only one principle that the free exercise clause protects. Even generously defined, "speech" cannot embrace many forms of individual and corporate religious exercise—from the silent meditations of the sages to the noisy pilgrimages of the saints, from the corporate consecration of the sanctuary to the ecclesiastical discipline of the clergy. Even expansively interpreted, "equality" cannot protect the special needs of religious individuals and religious groups. These needs were traditionally protected by the principles of liberty of conscience and separation of church and state and traditionally reflected in the exemptions and exclusions countenanced and created by the free exercise clause.

Moreover, statutory provisions cannot permanently substitute for constitutional principles of free exercise. A statutory scheme makes the protection of freedom of exercise considerably more fractured and chaotic than necessary—and notably uneven for groups whose religious claims are viewed with suspicion: Just ask Scientologists or Unification Church members today. It also makes the protection of religious liberty too political. It is an elementary, but essential, political reality that statutes generally privilege the views of the majority, not the minority. They are passed by elected officials who must be as vigilant in reflecting popular opinion as protecting constitutional imperatives. Too many of the recent federal statutes on religious liberty are products of special lobbying by powerful majoritarian religious groups who tend to serve their own interests through these exemptions, immunities, privileges, and earmarks. The free exercise clause, by contrast, is designed to protect the needs of the

21. These next paragraphs are distilled from my book RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2005), which provides detailed sources.

minority as much as the majority. Its provisions are enforced by appointed officials who must be more vigilant about protecting constitutional imperatives than reflecting popular opinion. The free exercise clause is designed to provide remedies for individuals and groups with insufficient political strength to have their religious views or practices reflected in or protected by statutes.

Likewise, state laws on religious liberty can supplement, but not substitute for federal laws. The growing shift in emphasis from federal to state law leaves what should be common national rights of religious liberty too vulnerable to fleeting political fashions and too contingent on a claimant's geographical location. In my view, the federal courts should provide universal and firm religious liberty protections for all American parties, no matter where they happen to reside or where they choose to file their claim. This need for a universal law on religious liberty, in the face of grim local bigotry at home and abroad, was among the compelling reasons that led the Supreme Court in the 1940s to "incorporate" the First Amendment religion clauses into the Fourteenth Amendment due process clause and make them binding on state and local governments. All those concerns over local religious bigotry and prejudice remain painfully pertinent today.

The original vision of the founders was that religion was special and that it was deserving of special protection. The founders thus placed the free exercise clause alongside the free speech, press, and assembly clauses to provide religious claimants with a special pathway to relief. Moreover, they put the free exercise clause in creative tension with the establishment clause to ensure that religious liberty received reciprocal protection. The First Amendment free exercise clause outlaws government *proscriptions* of religion—actions that unduly burden the conscience, restrict forms of religious exercise and expression, discriminate against religion, or invade the autonomy of churches and other religious bodies. The First Amendment establishment clause, in turn, outlaws government *prescriptions* of religion—actions that unduly coerce the conscience, mandate forms of religious exercise and expression, discriminate in favor of religion, or improperly ally the government with churches or other religious bodies. Both the free exercise and establishment clauses thereby provide complementary protections to the first principles of religious liberty that the eighteenth-century American founders championed—liberty of conscience, freedom of religious exercise and expression, equality of a plurality of faiths be-

fore the law, separation of church and state, and no establishment of religion by law.

One need not necessarily endorse a jurisprudence of originalism to embrace this multi-principled reading of the First Amendment religion clauses. This was also the vision articulated by the Supreme Court in the twin cases of *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947)[22] that opened the modern era of the religious liberty. In both cases, the Court worked hard to balance these basic founding principles of religious liberty, and thereby to render the free exercise and establishment clauses complementary guarantees of religious liberty. In *Cantwell*, the Court effectively read each of these principles into the free exercise clause, as well as the free speech clause as applied to religion. This First Amendment, Justice Roberts wrote for the *Cantwell* Court, protects "[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose." It "safeguards the free exercise of the chosen form of religion," the "freedom to act" on one's beliefs. It protects a "plurality of forms and expressions" of faith, each of which deserves equal protection under the law. It ensures the "basic separation" of religious and political authorities and entities. For in "the realm of religious faith, and in that of political belief," the Court wrote, "sharp differences arise."

> But the people of this nation have ordained in light of history, that, in spite of the probability of the excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of the democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.[23]

Similarly, the Court in *Everson v. Board of Education* (1947), despite using famously strong language on strict separation of church and state, struck a rather judicious balance among these founding principles of religious liberty. "The 'establishment of religion' clause of the First Amendment means at least this," Justice Black wrote for the *Everson* court. No federal or

22. Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947)

23. *Cantwell*, 310 U.S. at 303–04, 310.

state government (1) "can set up a church"—a violation of the core disestablishment principle; (2) "can force or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion"—a violation of liberty of conscience; (3) can "punish [a person] for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance"—a violation of both liberty of conscience and religious equality; or (4) "can, openly or secretly, participate in the affairs of any religious organizations or groups, or *vice versa*"—a violation of the principle of separation of church and state. Justice Black also underscored the founders' principle of religious pluralism and equality, declaring that government may not exclude "individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." Liberty of conscience, freedom of exercise, religious equality, religious pluralism, separation of church and state, and no establishment of religion were all considered part of First Amendment religious liberty in the Court's initial formulation.[24]

In this first volume, Professor Greenawalt has done noble service in calling the courts back to these founding principles of religious liberty, demonstrating the continued utility of these principles in original, hybrid, and novel forms, and in showing concretely and copiously how a multi-principled religious liberty jurisprudence can be applied to ensure a fairer law for all. I, for one, can't wait for the next volume.

24. *Everson*. 330 U.S. at 15–16.