1999

Progressive Constitutionalism: Conceptions of Interpretation and the Religion Clauses

Kent Greenawalt
Columbia Law School, kgreen@law.columbia.edu

PROGRESSIVE CONSTITUTIONALISM: CONCEPTIONS OF INTERPRETATION AND THE RELIGION CLAUSES

KENT GREENAWALT*

I. INTRODUCTION

I began working on this paper hoping to arrive at a comfortable understanding of progressive constitutionalism, from which I could then explore interesting questions regarding the interpretation of the religion clauses. As I quickly ran into thorny theoretical questions, I realized things were not so simple.

Initially, one needs a sense of what "constitutionalism" covers within the context of progressive constitutionalism. Constitutionalism might refer to whatever subject matter is covered by a written constitution, to basic structural features of a government, or to everything that is of political importance. The last usage is unedifying, even if it packs rhetorical force. Constitutionalism is not restricted to countries with written documents; for example, Great Britain has constitutional structures and conventions without a written constitution. In the United States, however, most matters that would be "constitutional" in countries without written constitutions, as well as some other subjects, are embraced by written constitutions of federal and state governments. Unless another explanation is provided, we may consider "progressive constitutionalism" in the United States as covering subjects related to our written constitutions. The term is certainly broad enough to reach criticisms of constitutions and proposals for amendments or total revisions. The term also includes interpretation of constitutions by members of the political branches as well as judges.

In this paper, I concentrate on the narrower, more typical topic of judicial interpretation. At least in regard to the religion clauses, this may be warranted because any progressive constitution would probably include something similar to the Free Exercise and Establishment Clauses, and these would be judicially enforceable to some degree.

The first part of this essay explores relations between progressive values and interpretive approaches. When I asked myself how a judge, committed to progressive values, would interpret the Federal Constitution, I was troubled by whether a progressive approach would be activist or restrained in relation to legislative authority. I concluded that how one would answer that question depends partly on the time frame one chooses for evaluation. I have ambivalently chosen to look forward roughly half a century.

The remainder of the essay argues that as far as the religion clauses are concerned, the government should adhere to the present constitutional and legislative approaches of leaving great autonomy to religious institutions,

* University Professor, Columbia University School of Law.

even when they are far from being progressive in their governance. If you agree that progressive constitutionalism faces serious problems concerning how retrogressive religious groups should be treated, and you further agree about how these problems should be resolved, then you will conclude either (a) that progressive constitutionalism is not an apt prescription for every subject, or (b) that progressive constitutionalism contains a plurality of sometimes competing values that yield treatment of religion that is unusual in comparison to the treatment of many other subjects of law.

II. PROGRESSIVE CONSTITUTIONALISM

A. Progressive Values and Interpretive Possibilities

Progressive constitutionalism is primarily an understanding of the Constitution that furthers progressive political values. Second, progressive constitutionalism involves a progressive understanding of the nature of law and constitutional interpretation.

Progressive political values include economic welfare, especially for the less fortunate; equality of treatment for persons of different genders, races, ethnic origins, religions, and sexual orientations; individual freedom to make significant life choices; nondomination; mutual concern; substantial health care; environmental protection; and, notably, a reduction in the power exercised by major private institutions, such as large corporations. Although the original progressive movement emphasized government's capacity to dispel private power in the public's interest, the twentieth century has indelibly taught the damage that modern governments can inflict on progressive values. A modern progressive who hopes that government can combat irresponsible private authority must also remain cautious of irresponsible government. In other words, progressive constitutionalism must aim to protect against dangerous government while allowing government to respond to private abuse.

Devising a progressive view of law proves more difficult than naming progressive political values. One might ask either what conception of law reflects a progressive understanding of human society or what idea of law will promote progressive political values. According to a progressive understanding of society, law is not highly rigid or cabined by some narrow original understanding. Typically, a view of law that fits a progressive social understanding will also promote progressive values, but this will not always be so. When political structures are highly unjust, as in the former Union of South Africa, a conception of law that contains a highly technical, narrow understanding of the scope of legislation may best limit the destruction of

human values by political actors.[1]

A progressive approach to constitutional interpretation recognizes that various answers to interpretive problems are often plausible. Ordinarily, it would recommend interpretation responsive to modern concerns.[2] Would such interpretation be activist or restrained?

A judge or justice may be restrained, or activist, vis-a-vis original understanding, legislative assertion, or developed judicial doctrines. Some justices have a philosophy of restraint concerning one or two of these, but not the other(s).[3] Some decisions are activist or restrained by all three criteria.[4] But frequently, what is activism by one standard is restraint by another.[5]

Progressive interpretation would not typically be wedded tightly to original understanding or prior doctrine, although when the political branches are antiprogressive, originalism, or adherence to precedents, may help stem the prevailing tide. The progressive constitutional approach toward legislative authority is more complex. In the first half of the twentieth century, progressive views were linked to judicial restraint, and the conservative Supreme Court was viewed as blocking legislative improvement of economic and social conditions. In addition, decisions by elected representatives were regarded as more progressive in their processes than judicial mandates. For the next few decades, judicial restraint in respect to economic legislation was joined with activism in reviewing legislative choices limiting civil liberties and civil rights. A philosophy expressed succinctly in the famous *Caroline Products* footnote[6] about the circumstances

---

1. *See generally* STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY (1992).

2. As Robin West has suggested, progressivism does not necessarily dictate whether one is a natural lawyer, a positivist, or an instrumentalist about law, though someone whose political and jurisprudential views are progressive will be a certain kind of natural lawyer, positivist, or instrumentalist. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM, 211-81 (1997).

3. Justice Black and Justice Scalia have claimed to be restrained tightly by original understanding, but have freely rejected received doctrines and legislative choices. Justice Harlan, for whom I worked, was relatively restrained along all three dimensions.

4. *See, e.g.*, Roe v. Wade, 410 U. S. 113 (1979) (representing activism by departing from original understanding, leaving the moorings of existing judicial doctrine, and treating as unconstitutional standard legislative approaches).

5. *See, e.g.*, City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (holding the Religious Freedom Restoration Act invalid as it applies to the states, an undoubtedly activist decision in undercutting a nearly unanimous vote of Congress; it purports to be restrained in being rooted in the original understanding of the Fourteenth Amendment). Whether one believes that its position is more in line with prior decisions than the competing view depends substantially on which prior decisions one regards as most important.

6. *See,e.g.*, United States v. Caroline Products, 304 U.S. 144, 152-53 (1938). Footnote

in which legislative choice needed a check, justified this divergence of approach.

B. Progressive Values and Philosophies of Interpretation

How exactly might a progressive arrive at a philosophy of judging for constitutional cases? How would she relate a philosophy of interpretation to political values and a conception of law? One issue is the level of abstraction between a strategy of interpretation and particular political choices. An example of the starkest position would be: "Judges should decide every constitutional case to promote progressive political values, unless the relevant legal arguments are overwhelming in the other direction." This approach might be defended in either of two ways. The first defense would be that all judging is inevitably mainly political; better that judges decide in accord with good progressive values rather than bad competing values. The second defense would be that judging should be largely political in this sense, and that progressive political values are the correct, or best, values.

Judging need not be, and should not be, as overtly political as these two defenses suggest; moreover, such unvarnished reference to unmediated political values could not undergird a philosophy of judging that will win public acceptance. Apart from their lack of respect for broader "legal values," both approaches invite a similar attitude toward judging among antiprogressives. That is, the antiprogressives can say that judging is mainly political, so judges should decide against (what they see as) undesirable progressive values. Unless our politics and judiciary are mostly progressive,

---

Four provides in pertinent part,

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced by the Fourteenth . . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. (Citations omitted). *Id.*

which has certainly not been our experience over the last three decades, blatant political judging in constitutional cases will hardly promote progressive goals. A defensible philosophy of constitutional interpretation cannot make immediate political objectives the overarching guide for particular decisions. It must provide an account of why, and when, judges should decide in accordance with progressive or other political values.

In a defensible theory of interpretation, should there be any tie between progressive (or other such) political values and a philosophy of interpretation? If so, how direct should that tie be? What is the time span one should employ for evaluating an approach to interpretation?

One conceivable answer to all three questions is that because our Constitution, at least after the Civil War Amendments, is basically a progressive document, the guiding spirit of interpretation should be progressive. This answer makes the Constitution itself the link between progressive values and constitutional decision. This answer would be good for the life of the Constitution.[7] Unfortunately for this approach, the Constitution is mixed. Some parts, such as the Equal Protection Clause, embody certain progressive values; other parts are not decidedly progressive. For some progressive values, such as environmental protection, the written Constitution has little bearing. A second problem with heavy reliance on values contained within the written Constitution is that a progressive understanding of law fits uncomfortably with having modern decisions determined by attitudes underlying a document whose crucial parts are more than a century old.

If the Constitution itself does not produce a dominant place for many progressive values, can one find another ground for making those values central in constitutional interpretation? A desirable philosophy of interpretation needs to rest on many bases besides a desirable political program; however, one appropriate standard for choosing interpretive strategies is how they will fit with desirable political programs over time.

Over how long a time? As I have already suggested, the connection between any particular interpretive strategy and assistance to a set of political values is bound to change. Judicial restraint vis-a-vis legislative choice may be best for progressive values in one era; judicial activism may be best in another. In developing a philosophy of interpretation, one might ask what standards will be best for progressive political values over the entire life of a political order, what will be best in the immediate future, or what will be best in some intermediate range.

I am tempted by the "entire life" approach, but it presents some obvious difficulties. One such difficulty is the near impossibility of making judgments about a political order that may extend centuries into the future.

---

7. Of course, the Constitution could be amended to make it less progressive or even antiprogressive.

We can make more confident assessments about the recent past and near future. A second difficulty is that the best strategies for the entire life of a political order might work unfavorably over substantial periods. One might end up defending an approach as favorable to progressive values while acknowledging that the approach is unfavorable to those values operating over the span of one's adult life. These difficulties could be ameliorated but not eliminated by a conclusion that only some progressive values, particularly equality, should help determine interpretive strategies.

Someone who focused attention on immediate consequences would, if candid, have to shift standards of interpretation with elections to political offices and with judicial appointments. The standards would be highly manipulable in terms of immediate advantage for political goals. This approach would not be quite the same as recommending decisions according to a judge's direct political evaluation, but it would be subject to similar drawbacks.

An approach that seeks continuity in interpretive strategies, but gives due respect to context and contingency in human life, as well as to historical uncertainty, might span a half century or so in order to adequately assess whether a strategy of constitutional interpretation will match progressive values.[8] If we assume (as I am not sure I do) that all philosophies of interpretation should be tied to political values in the sense I have been discussing, then perhaps we should think about relevant connections for such an intermediate past and future?[9]

III. THE RELIGION CLAUSES

Let us assume that progressive constitutional interpretation is not closely tied to original understanding or settled doctrine, that it is somewhat flexible about how much deference to give to legislatures, and that one standard for handling a broad area of law is what promotes progressive values over time. How should the religion clauses be understood?

A. How To Treat Unprogressive Religion

I see a fundamental dilemma for religious practices and government that is based on the following realities and perspectives in political and constitutional philosophy. First, insofar as the state and some private institutions dominate economic and social relations and culture in undesirable ways, religious organizations and religious belief and practice are

---

8. Michael Perry adopts a position like this in MORALITY, POLITICS AND THE LAW: A BICENTENNIAL ESSAY, 136-51 (1988).

9. WEST, *supra* note 2, at 281-89 (discussing the need to link progressive constitutionalism with legislative action as opposed to the adjudicative realm).

important counterweights. Of course, the picture is complex; however, many religious groups have emphasized antimaterialistic and anticompetitive values, or contributed significantly toward equality, or both.

Second, without doubt, some religious organizations inhibit freedom (in the ordinary secular sense) and perpetuate inequality and domination. In many religions, ordinary members are crucially unequal to clergy. Some religions allow only males to become clergy, and some teach a more comprehensive division of functions according to gender. We can speak of religious denominations as being more or less progressive in various respects; by progressive standards, many religious groups are retrogressive. A further point concerns religious emphasis on faith and tradition. Religious practice often downplays ordinary rational thought as a technique for resolving personal and social problems. If progressivism involves confidence in the ability of reason to resolve social problems, much religious life may be intrinsically at odds with progressive political philosophy.[10]

Third, some of the most hierarchical and gender-riven religions have been the most active in opposing undue competitiveness and economic inequities. I have in mind particularly recent Roman Catholic teachings in the United States about economic welfare and social injustice. No neat correlation exists between religions that are internally progressive and those that support progressive political programs.

Fourth, a strong political and constitutional tradition insists that the government should stay out of the internal life of religious groups and not favor particular forms of religious governance and practice over others. This tradition is a key component in a particular liberal view that asserts that government should not support one belief about the good life over any other. In discussions about neutrality and the good life, some liberals offer the treatment of religion as an example to be generalized: "Just as the government does not say what religion is best, it should not dictate what forms of life are best." One must be cautious not to link the fate of the example with the status of the broader claims. Even if progressivism rightly rejects neutrality about forms of the good life, the liberal resolution of the problem of religion may well be sound.

Here is the basic dilemma. If private organizations effectively constrain the freedom of individuals and perpetuate inequalities, the typical progressive prescription is that government should intervene against these private centers of power. Certainly these triggering conditions are met by many religious organizations. They constrain freedom in various ways and perpetuate inequalities. Should the ordinary progressive approach be applied to religious organizations, with government forbidding

10. Suzanna Sherry has claimed that: ". . . our Constitution does—as a matter of history—and ought to—as a matter of policy—privilege reason over faith." Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONT. LEGAL ISSUES 473, 477-78 (1996).

discrimination by them that it would not tolerate by other private institutions? Should it require that women be admitted to the priesthood, that churches and similar groups adopt democratic forms of internal governance over hierarchical ones, that parents expose children to many religious options, so that children can decide freely what religion, if any, suits them? Should government directly encourage these approaches if it does not require them?[11] Requirements or serious encouragements would intrude the state to a great degree in the religious lives of its citizens, something generally regarded as highly undesirable.

The painful dilemma that I have just described is largely responsible for why we hear so little concerning the progressive approach to church and state relations.[12] I have little difficulty concluding that the better course is for government to continue to stay out of its citizens' religious lives, maintaining the liberal resolution of that problem. I also believe that, in most respects, that resolution should be treated as constitutionally compelled. The detriment of government involvement in religious affairs far outweighs any likely beneficial promotion of progressive values in internal religious practice. Perhaps my evaluations demonstrate the limits of my commitment to progressive principles. I like to think that they show, instead, some of the complexities that any tenable progressive philosophy of government has to include.

B. Exemptions for Religious Conscience

Let me say a few words about two other religion clause problems. Should exemptions from ordinary laws for those whose religious conscience forbids compliance with such laws be constitutionally required, or allowed? One argument against exemptions is that citizens should be treated identically under the law. Another argument is that no concessions should be made to nonrational or irrational grounds for separate treatment. From the perspective of progressive values, however, the liberty to act on religious conscience, when no state interest is seriously threatened, seems more important. I put aside here issues of judicial administrability that have troubled the Supreme Court. However, either by constitutional

---

11. Insofar as the government teaches tolerance and equality in the political sphere, it may have some indirect effect on parties and attitudes within religious groups; but the production of such indirect effects is different from setting out self-consciously to alter life within religions.

12. Robert Justin Lipkin has written a thoughtful article on this subject from the standpoint of a "pragmatist communitarian" position. *See* Robert Justin Lipkin, *Religious Justification in the American Communitarian Republic*, 25 CAP. U. L. REV. 765 (1996). After a deeper and more extended analysis than mine, he reaches conclusions that are generally similar.

interpretation or legislative choice, exemptions should also be extended to people who have claims of conscience that exercise similar internal compulsion but lack any ordinary religious basis. For most circumstances, the constitutional argument for equality of conscience is powerful. If it does not derive mainly from a progressive outlook, it fits well with it.

C. Aid to Parochial Education

Aid to parochial education is a perplexing problem that raises issues how particular doctrines and outcomes should connect to political values. I begin here with two assumptions. First, children should be able to attend private schools, including religious ones, if their parents wish. Second, the government properly assists many private endeavors, such as hospitals, that perform important public functions. Helping all private enterprises, except religious ones, would involve a form of inequality not easy to justify from a progressive point of view. One can embrace each of these assumptions and still worry about general, substantial aid to private schools including religious schools. Perhaps public schools are a critical locus for promoting progressive values and for building necessary attitudes towards diversity. I believe it once was true that public schools were more likely to contribute to liberal democratic values than parochial and other private schools. That may no longer be true; however, suppose a Supreme Court Justice thinks that public schools continue to be the vital seedbed of democratic and progressive values, and that they will inevitably suffer in quality if private schools get a bigger slice of the educational pie and are able to draw a larger proportion of able students than they now do. Should that influence the Justice's decision concerning a voucher program that includes religious schools, and should she provide that as a reason in an opinion? These are hard questions. I am inclined to think that this assessment would appropriately figure into analysis to some degree, and a Justice could explicitly refer to lasting values of public schools in American life.

IV. CONCLUSION

The first half of this paper faces some troublesome questions regarding how progressive values might figure in a philosophy of constitutional interpretation. I suggest that they may play a background role but should not be the main criteria of decision in particular cases. With hesitancy, I offer an intermediate time range as the appropriate standard for gauging which interpretive approaches will cohere with progressive values.

The second half of this paper discusses the special problem of religious liberty and nonestablishment. In general, a progressive favors government interference with large, organized centers of power that perpetuate inequality and domination. Some religions fit into this category. But

religious autonomy is also an important value from a progressive point of view. I argue that, on balance, the liberal resolution of noninterference with religious activities warrants continued endorsement.