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The Concept of Religion in State Constitutions

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THE CONCEPT OF RELIGION IN STATE CONSTITUTIONS

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I. INTRODUCTION

A year and a half ago an article of mine was published on religion as a concept in constitutional law.¹ The article concerned how courts should approach decisions about whether a belief, practice, organization, or classification is religious. The article did not address, except in passing, what the constitutional standards under the free exercise and establishment clauses should be if something that is religious is aided or inhibited in some way. Since in most cases arising under the religion clauses, the presence of something

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1. Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984).

religious is not itself disputed, my article concerned only a small slice of religion cases.

My comments on state constitutional law were limited to one early sentence in a sixty-page analysis. I said, simply and boldly, "Though my discussion deals explicitly only with clauses of the federal constitution, it applies to state provisions as well."² That foolhardy simplification was sufficient to attract the attention of Professor Williams,³ who invited me to speak to you. After a few exchanges about whether I really had anything useful to say, here I am. I believe that my remarks will have some interest, but we should be aware that this subject is pretty marginal to state development of standards for religious liberty and nonestablishment.

The two central questions I address are the following:

(1) If my claims about interpreting the federal constitution are sound, are they also intrinsically sound for state constitutions that contain different language?

(2) Is it always, or sometimes, essentially self-defeating for state courts to *define religion* in a way different from what is embodied in federal law?

II. "DEFINING" RELIGION IN STATE CONSTITUTIONS

A. *My Original Article*

My basic assumption when I wrote my article was that since state provisions protect religious exercise and prohibit various forms of establishment, the approach appropriate for categorizing religion would be the same for federal and state constitutions. I was well aware that state provisions are commonly cast in different language, often much more detailed, than the federal religion clauses, but since all deal with religion, I did not see why the manner in which the courts decide what amounts to religion should be different.

The burden of my article was that courts should use an analogical approach to decide what is religion. Analogy, of course, is almost always a useful tool in categorizing under social concepts. What is distinctive about the analogical approach, as I describe it, is that courts should not assume that there are one, or two, or more, *necessary* elements that must be found if something is to

2. *Id.* at 754.

3. Robert Williams of the faculty of Rutgers Law School (Camden, New Jersey) organized the session on state constitutional law.

count as religious. Rather, they should compare the debatable belief or practice with undoubted instances of religion, and see whether it comes close enough to qualify as religious in the context of the particular legal problem presented. Thus, both solitary prayer to God and group meetings of the Ethical Culture Society could count as religious, though they may have no easily specifiable element in common.

This analogical approach to the concept of religion involves rejection of various alternatives:⁴ (1) that what is religious for constitutional purposes must necessarily involve human relations to a Supreme Being, extra-temporal consequences, or a higher reality; (2) that what is religious always involves ultimate concerns; and (3) that a basic distinction exists between how the concept of religion should be developed in free exercise and establishment cases, or that the measure of what counts as religious should be much more generous in the free exercise area than for establishment. (The analogical approach does not permit variations in what counts as religious in various legal contexts, but not on the basis of a crude bifurcation between free exercise and establishment cases.)

In the article, I urged that what the courts have actually done in federal religion cases is more adequately captured by an analogical approach than any other alternatives. I also contended that such an approach best allows case development that is consonant with the values lying behind the religion clauses. In what follows I am going to assume that both these judgments are sound, though much of what I say about the peculiarities of state constitutions and the interplay of state and federal interpretations would be relevant even if one took a radically different view of what is, and should be, the federal approach to "defining" religion.

B. The Relevance of State Language

That states often have more particular and sometimes variant substantive protections regarding religion is not by itself a threat to the thesis that the same approach to defining religion should be used for federal and state constitutions. (More precisely, as later discussion will suggest, any threat is slight and subtle.) Many states, for example, have rather strict constraints on aid to sectarian schools. The constitution of Kentucky, section 189, provides: "No portion of any fund or tax now existing, or that may hereafter

4. See Greenawalt, *supra* note 1, at 802-15.

be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."⁵ State courts have, with some frequency, interpreted such provisions to bar forms of aid, such as bus transportation and textbook loans, that are acceptable under the federal constitution. As far as present law is concerned, many of these more restrictive establishment rulings are permissible under the federal constitution; that is, a state constitutional interpretation that the state government cannot loan textbooks to parochial schools would not itself violate the federal religion clauses or other parts of the federal constitution. That state constitutional law may be more stingy about permissible assistance to religious schools than federal constitutional law, has no obvious effect on how state courts should go about deciding what is a "religious" or a "church, sectarian or denominational" school.

There is, however, a much more serious problem with my article's easy assumption that federal and state approaches to defining religion should be congruent. A significant number of states have language in their constitutions that may bear on what should count as religious. The most obvious and common feature is language that may point toward some "Supreme Being" definition of religion. In Kansas, the section on religious liberty, section 7, begins: "The right to worship God according to the dictates of conscience shall never be infringed"⁶ In North Carolina, section 13, the protection of religious liberty is introduced with the thought that, "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences"⁷ One could reasonably argue that what these state constitutions mean to protect as religious exercise, and prohibit as religious establishment, concern things that relate to God.

I do not want to suggest that this kind of language dispositively undercuts the argument that an analogical approach is more appropriate than a Supreme Being approach. One might say that, though the drafters regarded the most important forms of religions as involving worship of God, they did not mean so to circumscribe the entire range of religion. Subsequent to the language quoted above, the North Carolina Constitution, section 13, goes on to say, "no human authority should, in any case whatever, control or in-

5. KY. CONST. § 189.

6. KAN. CONST. BILL OF RIGHTS, § 7.

7. N.C. CONST. art. I, § 13.

terfere with the rights of conscience.”⁸ Perhaps these rights are broader than conscience as it relates to worship of Almighty God. (Conceivably they are broader even than religious conscience, but that is another issue.) Certainly one would need to look at all the language in the provisions of a state constitution before deciding that religion was meant to be limited to the worship of God. Even were some notion of God or a Supreme Being thought to be critical to the presence of religion, the notion of God itself could be construed in a very broad way to cover other beliefs about ultimate truth and ultimate moral obligations. In *United States v. Seeger*,⁹ the Supreme Court’s extremely broad construction of what relations to a “Supreme Being” involved, effectively eliminated a restriction intended by Congress. Similarly, ingenious state courts could handle apparently restrictive state constitutional language in the same way. Finally, a state court might candidly conclude that notions of religion must be flexible enough for modern conditions. Since any literal Supreme Being approach fails that test, interpretive expansion would meet the problem.

These summary comments are certainly not intended as a real argument for a more flexible approach. Even to begin to come to terms with the issue in any particular state would necessitate an examination of all relevant constitutional language and of social and legal history in the state. The existence of constitutional references to worship of God is not a conclusive reason to adopt a Supreme Being approach, but it might incline some state courts (or federal district and circuit courts interpreting state documents) in that direction. More generally, we can say that, as with substantive protections, variations in state constitutional language could properly influence the exact boundaries of what counts as religious for state constitutional purposes. This insight lays the ground for the second major question I address.

III. THE INTERPLAY OF STATE CONCEPTS OF RELIGION WITH FEDERAL CONSTITUTIONAL LAW

I now want to imagine a state court that is inclined to interpret the state constitution to categorize what is religious differently from what the federal constitution categorizes as religious. To sharpen the analysis, I shall engage in a number of unrealistic oversimplifications. The first two are that federal law definitely

8. *Id.*

9. 380 U.S. 163 (1965).

embodies an analogical approach and that the federal application of this approach to various sorts of cases is clear. I also assume that either the state judges consciously and knowingly apply federal law, or that review will occur in the Supreme Court. Since by the end of the day, all relevant federal constitutional principles will be brought to bear, we may disregard what state courts may "get away with" in actual cases unlikely to be reviewed.

State variance from the federal approach to defining religion could happen in one of two ways. In interpreting the state constitution, the state court might employ an approach, say the Supreme Being approach, that is basically different from the analogical federal approach, or it might apply the analogical approach differently, being more or less generous in deciding whether borderline instances count as religious. Is it going to matter to the outcome of cases that the boundaries of religion for state purposes differ from those for federal purposes? It would be convenient, if somewhat uninteresting, if a simple uniform answer could be given. But, in fact, a great deal turns on context. What follows is an enumeration of relevant variations.

A. Different Definitions of Religion With Identical Substantive Standards

The easiest cases to analyze are those in which the substantive protection given in respect to religion is the same under state and federal law. Both agree, to take a free exercise example, that a religious objection to jury service entitles one to an exemption. Both agree, to take an establishment example, that courses in religious worship may not be taught in public schools.

Case 1: The claimant in the state court has what, under federal law, amounts to a religious objection to jury service. The state concludes that the objection is not religious under the narrower state approach. The state disposition is not critical, because the claimant is entitled to relief under the federal constitution.

Case 2: A course in transcendental meditation taught in the state schools counts as religious under federal law. It is not religious under the state constitution. Again, that disposition is practically irrelevant because teaching the course violates the federal establishment clause, and the course must be dropped.

We may conclude that when state definitions of religion are narrower than federal ones and substantive standards are the same, the practical import of the state definitions is cancelled by federal protections of free exercise and nonestablishment.

Case 3: The claimant for exemption from jury service is one who does not count as religious for federal purposes, but is religious under a broader state standard. (I have so far supposed that state definitions of religion were more restrictive than federal ones, but the converse could also be the case.) This claimant does not have a federal entitlement to the exemption, but federal law permits the state to give him such an entitlement under state constitutional law. Here the state's broader definition of religion would matter in the sense of affecting the outcome of the case.

Case 4: A similar result would be reached if the state treated as religious a course that was not religious under federal law. The state's more extensive establishment bar would be permitted under federal law. The course would be dropped because of the state's broader approach to what is religious.

We conclude that ordinarily, when substantive standards are the same, a state definition of religion that is broader than the federal one will carry importance in terms of outcome.

B. Different Definitions of Religion When the State Substantive Standards Give Broader Protection

I now assume that the state's substantive standards differ from the federal ones in providing more protection. What I mean by more protection in the free exercise context is that the state gives an exemption or privilege for a concededly religious activity that would not be afforded to such an activity under federal law. More protection in an establishment case means that the state treats as impermissible some practice in relation to religion, such as textbook loans to parochial school pupils, that would be treated as permissible under the federal constitution.

If the state both defines religion more broadly and gives more substantive protection than federal law, the outcome will be affected in cases in which the state court treats as religious under state law something that would not be religious under federal law. This will be true in both free exercise and establishment cases, for the reasons already indicated, when substantive standards are identical.

We reach trickier terrain when the state's substantive protection is broader than federal protection, but its definition of religion is narrower.

Case 5: A group of pantheist earth worshippers wish to take their children out of school after third grade. They want their children to live close to nature and they sincerely assert that further

education will likely disqualify the children from participating in the kind of life called for by the precepts of their faith. The group's claim would be treated as religious under federal law, but that law does not give the claimed privilege to the most undeniably religious group, the principle of *Wisconsin v. Yoder*¹⁰ not extending to exemption from elementary school. The state court denies the state constitutional claim of the earth worshippers, on the ground that the group is not religious because it does not believe in God. The court indicates it would give a state constitutional privilege of exemption from school attendance to a group that was religious.

If it stands, the state's narrower definition of religion will affect the outcome, since the earth worshippers would have won their case had they been thought religious. The result in this case does not by itself offend federal law because the federal constitution does not give such a privilege to the earth worshippers. I do not think it matters directly that the state's basis for denial happens to be its circumscribed notions of religion *rather than* substantive rules that do not privilege such claims, whoever raises them.

But the import of federal constitutional law is not quite so simple here. Suppose the state had already given just such an exemption to an undeniably religious group, one that worships a single God, as a matter of state constitutional right. When the state court denies the exemption to the earth worshippers, it is treating differently otherwise similar claims that are both religious within the understanding of federal constitutional law. The state's disposition as to the earth worshippers does not directly violate the federal constitution, but *in conjunction* with its grant of privilege to the worshippers of such a single god, the state has created a *religious classification*. Such a classification may be suspect under federal law, and possibly the state cannot refuse to give to the earth worshippers what it has chosen to give to the other group.

Now, suppose rather that no exemption had been granted to any similar group. If the state court simply disposes of the earth worshippers as not religious, without indicating what it would do for a religious claim, we do not yet have any suspect classification. What if, instead, the court indicates clearly it would extend the privilege to a religious group, though no such claimant has yet emerged. Is the court's reasoning sufficient to give rise to a classifi-

10. 406 U.S. 205 (1972).

cation problem? I think not. Such a claimant may never come forward. The willingness to make a distinction between kinds of groups is not the same as actually making it. Though lawyers for the earth worshippers might mount a federal impermissible classification argument, probably it would lose until there are actually two otherwise similar groups that are receiving dissimilar treatment. The somewhat anomalous result, if there are some clearly religious claimants, is that the proper result for the earth worshippers' federal constitutional classification claim may depend on the timing of their suit.

Case 6: We can think of a more realistic establishment example. A state has a provision that bars all aid to religious schools, including any indirect assistance. The state courts have interpreted this to bar textbook loans that federal law permits. Nonetheless, the legislature passes a new comprehensive textbook loan program. Not wishing to overrule the earlier interpretation, but feeling discomfort over the severity of state constitutional restrictions, the state supreme court decides that only *very* religious schools are religious for state purposes, that ordinary parochial schools with many lay teachers and many essentially secular subjects do not count as religious. The court allows textbooks to go to ordinary parochial schools that are defending against establishment claims but it forbids textbooks going to a few very religious schools. Each result by itself is permissible under federal law, but what of the results together? The state is treating differently two groups of schools, both of which are religious under federal law. That classification presents a serious problem under federal law, though possibly the state may be more restrictive in respect to more heavily religious institutions. If the classification is impermissible under federal law and all schools must be treated equally, should the very religious schools get the books or the ordinary parochial schools be denied them? That will depend on some court's estimate of the comparative importance of the state policy to give books to one group and its policy to deny books to the other.

C. Different Definitions of Religion When the State Standards Give Narrower Protection

Suppose the state substantive standards give less protection than federal ones, that is, they do not afford a free exercise exemption or an establishment bar that federal constitutional law provides. In this event, the easy cases are the ones in which the state's approach to defining religion is narrower than the federal one. If a

claimant or defendant who would count as religious under federal law is treated as nonreligious under the state law, it makes no difference to the outcome, since federal substantive law, and the definitions of federal law, will be critical to whether a constitutional violation is found.

Here, the tricky cases are those in which state law gives less substantive protection but has a broader category of what counts as religious.

Case 7: Suppose the state recognizes no exemption from jury service at all. Federal constitutional law confers such an exemption on religious claimants. An applicant for an exemption is not religious under federal law but would be treated as religious by the state. At first glance, the claimant appears a loser. Under federal law he loses because he is not religious; under state law he loses because he has no substantive constitutional right. But, the claimant may have an impermissible classification argument under *state constitutional law*. (There is presumably no impermissible classification under federal law because the claimant denied relief is not religious for federal purposes.) Federal law forces the state to give an exemption to an indisputably religious claimant. If the state courts deny relief to this applicant, they are treating differently two claimants, both of whom the state recognizes as religious. As with the hypothetical earth worshippers case, it may matter if an indisputably religious claimant has actually gotten relief or would be given relief if the case arose. Even if relief has already been given to indisputably religious claimants it is questionable whether state constitutional law should treat as the basis for an impermissible religious classification, a grant of privilege that is forced on the state by federal constitutional law.

Case 8: Suppose state law permits direct grants to religious schools that federal law forbids. A grant to a school with very tenuous religious ties is challenged. The grant would be permissible under federal law which would treat the school as a nonreligious private school. The state recognizes the school as religious, but the grant does not violate state constitutional law because that law permits such grants even to indisputably religious schools. As with the jury exemption case, both state and federal claims of unconstitutionality seem to fail. But the party challenging the grant has a classification argument under state constitutional law, that the school, religious in the state's view, cannot be given benefits that must be denied (because of federal law) to other religious schools.

There is yet a further complexity I have thus far avoided. In

some instances, what the state might regard as appropriate free exercise protection, might actually constitute a violation of the federal establishment clause. Or what the state might regard as a forbidden establishment of religion might be guaranteed protection as free exercise or free speech. Suppose that the state allowance of grants to religious schools is deemed in the state to be required by free exercise. Does that matter for federal law? It might be argued that, insofar as grants go to schools that are not religious for federal purposes, the state's rationale for giving the grants is irrelevant. This argument is probably sound, but a contrary argument has some force; that if the state's reason for giving the grants is to aid religion, the grants are improper even as to schools the federal law does not treat as religious. In any event, in some cases the interaction of free exercise and establishment aspects of the constitutional standards concerning religion may come into play in ways other than the impermissible classification problems I have treated in more detail.

IV. CONCLUSION

Many of the complexities I have explored may never arise. Certainly it will be a rare case in which the distinctive strands of federal and state law will have anything like the clarity I have artificially supposed. But I think the discussion does lead us to a number of fairly solid conclusions.

State constitutional language can affect the proper approach to categorizing religion as well as the substantive protections given regarding religion, though my original position that the analogical approach is appropriate for state as well as federal law is one that I would continue to defend. When states vary from federal law in how they define religion, these variations will affect the outcome of some cases but not others. One way to avoid the complications over doubtful classifications that will sometimes arise when state definitions of religion differ from federal ones is for state courts to try to apply the analogical approach to the state constitutions in the same manner as courts do for the federal constitution. Comparative simplicity is one reason, though by no means a conclusive one, for state and federal approaches to be coincident.

This whole exercise can be seen as one discrete illustration of the complexity that arises in a federal system in which there are interacting federal and state constitutions enforced through judicial review.