Lecturer Reflection #11: June 3, 2025

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”

An excerpt from the First Amendment of the Constitution of the United States, 1791

On the 22nd of this month, a day which coincides with the feasts of Bishop Saint John Fisher and Saint Thomas More, the U.S. Catholic Bishops call the American Catholic Church to observe a Day of Religious Freedom. Despite the Free Exercise Clause of the First Amendment which I have just read, Catholics could be forgiven for wondering over the last 80 years whether that constitutional guarantee is effective and whether the Supreme Court, in particular, has required the government to privilege secularism, agnosticism or even atheism over free practice and expression of religious beliefs. Permit me to suggest that the difficulty lies in a mistaken construction of the Establishment Clause, which I also just read, an interpretation which the Court, in the past decade or so, has begun to correct. A proper understanding of what the Establishment Clause does, and does not, do was the subject of a recent book, Agreeing to Disagree, by two professors from Stanford University and the University of Georgia, which called the Establishment Clause the most misunderstood provision of the U.S. Constitution. That misunderstanding adversely affected our right freely to express and practice our religious beliefs.

Most people know that, when enacted, the Bill of Rights applied only against the federal government and not against the states. At our nation’s founding, citizens knew exactly what an establishment of religion was, because most of the early colonies had official churches, akin to the Church of England. Anglicanism was the government-mandated church in NY, Va, Md, NC, SC and Ga; Calvinism was the official church in Conn, Mass, NH and Vt. Of the earliest colonies, only Del, Pa, RI and NJ never had a state church. The six Anglican colonies disestablished their official churches during the Revolutionary War, as part of the fight against England. But did you know that Vt did not jettison its state church until 1807; Conn did not do so until 1818; Md did not do so until 1826; Maine did not do so until 1830; and Mass, the last state to have an official church, did not do so until 1833? That is 42 years after the Bill of Rights became part of the Constitution.

The historical record shows that colonial and state governments used religion to serve state purposes: specifically, to inculcate certain virtues and values that the state thought was critical for citizens to possess for government to function properly. Along with that reality sometimes came coercion of religious belief, compelled state church attendance, compelled financial support to the state church and even a religious test to hold public office. This common colonial and early national experience of government coercion in matters of religious faith is the best evidence of what the Founding Fathers thought establishment of religion meant when they placed the Establishment Clause of the First Amendment into the Bill of Rights, but against the federal government only. People in the late 18th and early 19th centuries who favored disestablishment of religion thought that state control of it harmed free religious belief and freedom of conscience, not that religion contaminated the state or secular opinion generally. Coercion was the key element. Indeed, state financial support of religious schools, universities, hospitals, orphanages and adoption agencies continued well into the 19th Century, and was not thought to work an unlawful establishment of religion. It is a fact that the 19th Century public schools movement headed by Horace Mann taught a generic version of Protestantism. Hence, bishops opened Catholic schools, in part, as a counterweight.

So when did things begin going wrong? It began with the Supreme Court’s 1947 Everson decision, which applied the Establishment Clause to the States. It did so despite two problems. First, in writing the First Amendment, the Founding Fathers specifically left the issue of government-sponsored churches to the States, not taking the issue away from them, as did Everson. Second, other language in the Bill of Rights, applied against the States through the incorporation process (the details of which I cannot cover here), involved rights that belonged to the individual, such as free speech, the right to be free from unreasonable search and seizure, and so forth. Not establishing a state church, on the other hand, was not a right held by individuals, but was simply a constraint on government. The Everson Court ignored that distinction. The Establishment Clause was a federalism provision, not an individual rights provision.

Be mindful, I am not here to argue that there should be a state church in the United States or in Ohio. I would not want to be coerced into professing another religion any more than adherents of those faiths would want to be coerced into professing Catholicism. Such coercion by anyone would violate Dignitatis Humanae, the Decree on Religious Liberty, promulgated by the Second Vatican Council in December 1965. The analytic problem is that the Supreme Court neglected the historical fact that an element of governmental coercion had been the touchstone of an Establishment Clause violation.

Later, in its Lemon decision, the Supreme Court focused not on whether the state was coercing people or using state power to induce a favored belief, but rather focused on the motives of those who set public policy. Specifically, government officials had to have a secular purpose in enacting policy, in addition to two other requirements that I will omit here. In short, the Court favored secularism over religion, in a way that many would argue directly violated the Free Exercise of Religion Clause. Applying the Lemon test produced wildly inconsistent results, the brunt of which were borne mainly by Catholic schools. For example, two cases held that states could provide bus service and non-religious books to students attending Catholic schools. But another case held that the state could not provide maps. These results caused the Catholic Senator Daniel Patrick Moynihan to quip what would the Court do with atlases, which are books of maps.

We reached bottom in a case called Nyquist, where the Court held that the state could not help Catholic schools pay utility bills, even though electricity and natural gas have no more to do with teaching religion than does bus service, which even Everson had allowed. This Nyquist “no aid” to Catholic schools rule mercifully ended when the Court finally dumped the unworkable Lemon test and switched to a government “neutrality” principle in cases called Trinity Lutheran and Espinoza. The result now is a more reasonable two-pronged rule: (1) aid programs that are neutral about religion and allow citizens to choose how to expend funds are constitutional (e.g., the Angel Scholarship Program in which individual taxpayers, rather than the State of Ohio, decide whether funds should be allocated to Catholic schools) and (2) although the state is not required to aid Catholic schools, where the state elects to aid secular private schools, it cannot discriminate and refuse similar aid to sectarian private schools because they are religious in nature.

There also have been positive Supreme Court developments in the area of Church autonomy. For example, in a case called Tabor, which involved a non-Catholic school, the Court reiterated that government may not interfere with the internal affairs of a church, repeated that government may not attempt to define proper religious doctrine and held, for the first time, that the state may not interfere with a Church defining who its ministers are. Under Tabor, government may not use generally applicable gender discrimination in employment laws to force any church into ordaining women (or, for that matter, men) and may not prevent a sectarian school from defining that its school teachers are ministers who teach religious values to their students, regardless of the subject for which the teacher is responsible. Further, the state may not interfere with whatever religious rules the church places upon those teachers, such as a Protestant sect disqualifying from teaching women who become pregnant or who have small children at home. Many may disagree with a particular church’s policies, but that question is one for the church to decide, not the state through mandatory regulation.

I lack time to discuss other permutations of Establishment Clause law, such as issues involving conscientious objection to generally applicable civil laws, prayer in public schools or issues involving religious symbols that have been standing on public property for decades (or even a century) and are now being challenged because modern secularists find them personally annoying. If you are interested in those subjects, please see me afterwards.

Suffice it to say, for our purposes this evening, that the Establishment Clause originally was intended to protect churches from government, not society from religion. Thus, contrary to much modern secular legal scholarship at the university or law school level, the Establishment Clause was never intended to privilege secularism and to ban religion from public discourse about public policy, thereby confining religion solely to private life. Rather, the Establishment Clause, properly understood, only prohibits government from coercing or inducing religious belief or practice via state power and otherwise leaves religious adherents free to appeal to the public about social policy based upon the persuasiveness, cogency and logic of their religious arguments. The state should be neutral about religion; the Establishment Clause is not a thumb on the scales of public discourse in favor of secularism. Please remember that point when observing the Day of Religious Freedom on June 22.

Worthy Grand Knight, I yield back.