Justice Brennan's Accommodating Approach toward Religion

Michael W. McConnell
Justice Brennan’s Accommodating Approach Toward Religion

Michael W. McConnell†

In the absurd polarization of American political culture, many have come to treat religion as a partisan matter. It is easy for liberals to point at religious-right events, like “Justice Sunday,” but there are equally divisive counterparts on the left. Many people on the left side of the political spectrum seem to think that religiously grounded political conservatism is not only wrong, but somehow illegitimate—an affront to public reason and the secular state. Furthermore, the political left often asserts that long-standing protections for the independence of religious institutions, such as tax exemptions and regulatory accommodations, are unwarranted special privileges. A recent four-part New York Times series, “In God’s Name: Favors for the Faithful,” even compared religious accommodations enacted by Congress to special-interest appropriations earmarks.¹

Against this backdrop, re-reading Justice Brennan’s religion decisions brings a breath of fresh air. In striking contrast to the partisans of today, Justice Brennan did not view a vigorous and publicly active religious sector as a threat to democratic values. His interpretation of the separation of church and state did not pit the religious against the secular nor favor secular ideologies over their religious counterparts. Instead, Justice Brennan sought to protect the freedom of both, and ultimately the freedom of the American people to make their own decisions about what worldviews are most persuasive. Indeed, with one glaring exception, Justice Brennan’s jurisprudence was highly protective of religious freedom and hence, in many applications, of religion.

† Circuit Judge, United States Court of Appeals for the Tenth Circuit; Presidential Professor, S.J. Quinney College of Law, University of Utah; Law Clerk to Associate Justice William J. Brennan, Jr., 1980-81.

Justice Brennan's interpretation of the Free Exercise Clause of the First Amendment is the most conspicuous example. In cases from *Sherbert v. Verner*\(^2\) to *Goldman v. Weinberger*,\(^3\) Justice Brennan maintained that even in the face of contrary laws and government regulations, religious organizations and religiously motivated individuals have a constitutionally protected right to exercise the tenets of their faith, unless the government can establish a compelling interest to interfere. This approach is the constitutional basis for special "religious benefits" the *New York Times* and others now criticize.

Justice Brennan's interpretation contrasts with that of Justice Scalia and the current Supreme Court majority. They have held that there is no free exercise right to exemption or accommodation from any "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."\(^4\) There is something to be said for both sides of this disagreement, but for the present purposes my point is that Justice Brennan did not hesitate to advocate and enforce the interpretation of the First Amendment that is most favorable to religious practice.

Justice Brennan defended one of the special "religious benefits" now particularly under attack: tax exemptions for churches and other religious bodies. In *Walz v. Tax Commission*,\(^5\) Justice Brennan wrote a concurring opinion explaining why religious tax exemptions are consistent not only with American traditions of religious freedom, but also with principles of separation of church and state.

Justice Brennan's protection of religion extended to the right of religious organizations to make autonomous decisions. In a series of cases, including *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*\(^6\) and *Serbian Eastern Orthodox Diocese v. Milivojevich*,\(^7\) Justice Brennan wrote opinions for the Court that protected the autonomy of religious denominations to structure their own governance and control their own selection of members and clergy. As in the case of free exercise accommodations, the more conservative Justices were less protective of the right of church autonomy.

Justice Brennan even applied this church autonomy analysis to civil rights law. For example, in *Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos*,\(^8\) Justice Brennan maintained that religious organizations are categorically exempt from the religious discrimination prohibitions of Title

\(^{2}\) 374 U.S. 398 (1968).
\(^{3}\) 475 U.S. 503 (1986).
\(^{7}\) 426 U.S. 696 (1976).
\(^{8}\) 483 U.S. 327 (1983).
VII of the Civil Rights Act of 1964, even for employees whose duties are not specifically religious in nature. This holding has recently become a centerpiece of the argument for President Bush’s so-called “faith-based initiative,” which would allow religiously affiliated social service providers to receive public funds, under certain conditions, without forfeiting their right to work through employees of their own religious faith.

Justice Brennan’s view of the role of the Establishment Clause also contrasts with the political left’s view of the role of religion in forming public policy. In recent years, religious participation in politics has become a flashpoint. Some argue that it is contrary to the principles of our secular republic for citizens to advocate, or legislators to enact, laws supported by religious convictions. Examples might include restrictions on government-funded stem-cell research or abortion. Justice Brennan eloquently rejected this idea. “Adherents of particular faiths and individual churches frequently take strong positions on policy issues,” he wrote, giving the following examples in a footnote: “slavery, war, gambling, drinking, prostitution, marriage, and education.”

His emphatic conclusion: the Establishment Clause “may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.”

In all of these contexts, Justice Brennan defended interpretations of the Constitution that were as favorable toward religion—and in most cases, more favorable—than the interpretations of his more conservative colleagues. This should give pause to those conservatives who think that progressive jurisprudence is necessarily a threat to religious freedom or religious values, and it should also give pause to those progressives who now advocate a jurisprudence more hostile to religion.

I mentioned earlier that there was one “glaring exception” to Justice Brennan’s generally favorable jurisprudential disposition toward religion. That exception is not, as some might think, his opposition to official school prayers. I am inclined to agree with Justice Brennan that allowing public school officials the authority to direct children in prayer is an affront to religious freedom, and likely to be harmful to religion as well. Part of the free exercise of religion is the right of parents to direct their children’s religious education, and the state has no business offering religious instruction of its own. Prayers chosen by public school boards or teachers are likely to differ in important respects from those taught at home, or, more likely, will be so watered down as to be meaningless.

The glaring exception is Justice Brennan’s consistent opposition to public funding of religious education—even when the funding is provided on an entirely neutral basis and even when it is directed to the benefit of low-income,

---

10. Id. at 641.
inner-city families. One might think, given his politics, that Justice Brennan would regard such programs as a promising means for enabling needy children to escape failing public school systems, as well as to regard the increasing willingness of legislatures to enact such programs as a welcome sign of diminishing anti-Catholic prejudice. Yet he voted consistently against every form of assistance to nonpublic education, no matter how neutral or carefully guarded against potential abuse.

During the late 1960s, the 1970s, and the early 1980s, the Supreme Court's most important project was to eliminate the vestiges of racial segregation in the nation's public schools. Unfortunately, in some communities, one of the obstacles to school desegregation was the ability of white families to move their children from desegregating public schools to mostly white, or all-white, private schools, some of them religious. My theory is that, whether consciously or not, members of the Court's majority during this time saw the withholding of funds to nonpublic schools through the Establishment Clause as a convenient backstop to prevent state subsidization of white flight.

The results of these decisions can scarcely be a coincidence. In 1971, in Swann v. Charlotte-Mecklenburg Board of Education,\(^\text{11}\) the Supreme Court for the first time ordered compulsory transportation of schoolchildren for the purpose of desegregation. That was also the year of Lemon v. Kurtzman,\(^\text{12}\) the Court's first decision holding financial aid to nonpublic schools unconstitutional. Justice Brennan was in the majority in both decisions. In 1973, in Keyes v. School District No. 1,\(^\text{13}\) the Court extended mandatory busing for desegregation to schools outside the South. In the same year, in fact the same volume of U.S. Reports, Committee for Public Liberty v. Nyquist\(^\text{14}\) announced a sweeping prohibition of public aid to nonpublic schools, on the theory that any substantial aid to the educational function of religious schools—even support for science, math, civics—a "primary effect" of "advanc[ing] religion." There was a high correlation of votes in the two sets of cases: every member of the Court majority in Lemon was also in the majority in Swann, and every member of the Court majority in Nyquist except one—Justice Powell—was also in the majority in Keyes.

In the years since Justice Brennan retired, the Court has retreated from its decisions requiring mandatory busing for desegregation, and evidence has mounted that inner-city nonpublic schools are often the most effective, and frequently the most racially integrated, educational alternatives for minority students. Perhaps it is not coincidental that the Court has relaxed its policy of no-aid separation in this context as well.

I therefore urge all those who are interested in reviving a progressive

\(^{11}\) 402 U.S. 1 (1971).
\(^{12}\) 403 U.S. 602 (1971).
\(^{13}\) 413 U.S. 189 (1973).
\(^{14}\) 413 U.S. 756 (1973).
constitutional jurisprudence for the United States to review Justice Brennan's opinions on religion. They suggest a path that is distinct both from conservatives on the Court and also from some elements on the left. Justice Brennan's decisions demonstrate that civil liberties champions do not need to be hostile toward religion, and advocates of progressive policies do not need to demonize religious political involvement.