The Free Exercise of Religion in America

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Its Original Constitutional Meaning

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Preface

This book was a long time in the making. It had its origin in my 1971 doctoral dissertation entitled *The Supreme Court and the Conflict Between Religious Liberty and Separation of Church and State*, which began with a number of citations to and quotes from legal scholars who had criticized the Supreme Court's interpretation of the religion clauses of the First Amendment ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .") for being unclear, confusing, and inconsistent. The purpose of my study was to determine if such criticism was warranted and, if so, what the Court had done to deserve it.

I concluded that although the Court's decisions and opinions based on the religion clauses had not been as problematic as some had alleged, still they had created a number of problems that could have been avoided. At the core of the Court's difficulty, I argued, was its assumption that the two religion clauses have different meanings that when applied in some cases are mutually exclusive. This had resulted in the Court's interpreting the two clauses in a way that made them in conflict with each other.

In the dissertation, I did not take a position on how the religion clauses should be interpreted. I did not, for example, argue that they should be interpreted in line with their original meaning. I simply engaged in a logical analysis of the Court's decisions/opinions to see if there were some way they could have been more coherent and less confusing. I concluded, however, that the Court's using the principle of government neutrality toward religion was the most promising way of reducing, if not eliminating, the conflict between the two religion clauses.

In my early years as a professor, because of my commitment to teaching above all else and my heavy teaching loads, I was unable to continue the kind of study of Supreme Court decisions/opinions that I had undertaken in my dissertation, but I, like many other scholars, continued to be bothered by the Court's interpretation of the religion clauses, which became even more confusing and contradictory than it was before 1971. I did, however, after a few years manage to publish a couple of law review articles on the Court's interpretation of the religion clauses.

One of them, published in 1986, in the *Wake Forest Law Review*, examined how the Supreme Court had interpreted and applied the free exercise clause in cases where persons had argued that the clause gave them a right to be exempt from obeying laws that required them to do or not do something inconsistent with what they believed their religion required of them. Basically, the article contended that because the Court's record in those cases was so inconsistent, no one could say with any confidence how it would decide future cases of that sort. Because of that article, I was invited to present a paper at a symposium on the religion clauses held at Notre Dame Law School in the spring of 1989—a paper challenging the Court's position at that time that the free exercise of religion entails a right to religion-based exemptions from valid, secular laws. In one section of that paper and for the first time in my career, I examined the original meaning of the free exercise clause of the First Amendment and concluded, on the basis of incomplete research, that it was not originally intended to guarantee a right to religion-based exemptions from generally applicable secular laws.

The paper was published in the *Notre Dame Journal of Law, Ethics & Public Policy*, in 1990, and was fairly widely read and cited by other scholars, partially because it supported the Supreme Court's holding in *Employment Division of Oregon v. Smith* (1990) that the free exercise clause does not entail a right to religion-based exemptions from valid, civil laws. As it happened, that decision, handed down before the publication of my article, definitely needed support, because the Court's opinion said nothing about the original meaning of the free exercise clause, even though, ironically, it was written by Justice Antonin Scalia, an avowed "originalist" who believed that the Court should interpret constitutional provisions as they were originally understood by the American people in the late eighteenth century. Seven years later, however, in another opinion (concurring), Scalia did present historical evidence that supported the Court's decision in the *Smith* case and in doing so cited my article, among other sources.

The Court's decision in the *Smith* case was not well received by many persons in the country, especially various leaders of organized religion, who feared that because of it, churches and other religious organizations would be subjected to too many regulations, and they lobbied Congress to pass a law that would have the effect of overruling the Court's holding in *Smith*. Congress complied and in 1993 passed the Religious Freedom Restoration Act, which gives persons and groups a statutory right to be exempt, under certain conditions, from having to obey federal laws to which they have religious objections. Because of this conflict between the Court and Congress, confusion about the meaning of religious liberty has increased significantly and is the number one threat to its vitality in America today.

As a result of the research that I did for my 1990 article, I became convinced that there was a dearth of scholarly work on the original meaning of the free exercise clause of the First Amendment (in contrast to the establishment clause), and I determined to do what I could to correct that problem. Thus, in 1994 I published an article entitled "The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription," which showed that most early Americans rejected the claims of some pacifists that they had a moral right to be excused from having to serve in the military—an article that focused on what happened in early Pennsylvania. Then with an eye on writing a book, I began researching and writing on what happened in other states that shed light on how early Americans understood the free exercise of religion, and some of that work was presented in papers at various conferences of scholars.

Then, regrettably, my project got "derailed." I began coming across relatively new works by reputable scholars that argued that one (the establishment clause) or both of the religion clauses have no normative meaning or moral content, but instead were intended simply to ensure that the states alone would have jurisdiction over religion or the power to legislate on it. More specifically, it was argued that one or both of the clauses were intended to protect the elements of religious establishments that still existed in some states, mostly in New England. As surprising and unbelievable as this interpretation was to me, even more disturbing was the fact that as time went by I discovered that more and more scholars were accepting it and attempting to buttress it.

At first, because in my own research I had encountered no evidence to support this states' rights interpretation of the religion clauses, I thought that I would be able to address it in one of the chapters of the book on which I was now working, but given the growing number of works in its defense, I soon realized that the challenge I faced was so daunting that I would have to address it in a separate book, which I began working on shortly after 2000. Published in 2011 and entitled *The Religion Clauses of the First Amendment: Guarantees of States' Rights?*, its conclusion was that there was very little, if any, historical evidence to support such an interpretation, and the reviewers of the book agreed with my conclusion. After that book was published and I retired from teaching, I was able to return to the book at hand.

Now, a few words about this book. First, ideally, any book attempting to explain the original, constitutional meaning of the free exercise of religion should start with its beginning in England, at least 150 years before the adoption of the First Amendment, when certain Baptists who were being persecuted by the government argued that government has no jurisdiction over religious matters. Then, it would explain how religious freedom was understood by Roger Williams, the founder of the colony of Rhode Island; John Locke, the great English political philosopher and author of *Letter Concerning Toleration* (1689); various ministers involved in the Great Awakening in mid-eighteenth-century America; and various ministers and lay persons who led the resistance to the Anglican Church's efforts to get itself legally established in all colonies. It would also describe the laws pertaining to religion that existed in the various colonies. Although I have written chapters on all these topics, if they had been included in this book, it would have been so long as to be unpublishable. Perhaps I can publish them as another book.

Second, this book has what some readers might consider to be an excessive number of citations to and quotations from primary sources—writings by early Americans. I have done so for two reasons. First, as explained in Chap. 2, this book was undertaken on the assumption that the religion clauses were intended to protect the free exercise of religion as it was understood in most of the states and by those who fought for the addition of the religion clauses to the Constitution. To show what that understanding was, I needed more than quotes from the so-called founders. I needed as much evidence as I could find from people in general and individuals who influenced their thinking. More generally, I do not think that histori-

ans, especially constitutional historians, no matter how well known or how eloquently they write, should ask their readers to, in effect, "take my word for it." They need to present evidence, and the more, the better.

Third, some reviewers of my manuscript thought that it was too argumentative, because I too frequently challenged the views and claims of other scholars who have written on religious liberty in early America—their interpretation either of the religion clauses or of specific persons' positions on issues. I make no apology for doing so. If a historian believes that the writings of other historians contain factual errors or conclusions unwarranted by the evidence presented to support them, I believe that it is her/his duty to point out what she/he believes to be false and unsupported in those writings—no matter how "iconic" those historians may be or how excellent their overall scholarship may be. Indeed, some of the criticisms in this book are of historians for whom I have great admiration. Still, no one "gets it right" all the time, and I expect reviewers of this book to be just as critical of me as I have been of other scholars.

Finally, some reviewers expressed disappointment over the fact that my book does not attempt explicitly to relate its findings about the original meaning of the religion clauses to current issues in America regarding how government should treat religion. I have refused to do that for several reasons. One, this book is a work in constitutional *history*, not law or jurisprudence. It was written to explain what happened in the past, and that deserves to be known, regardless of its relevance to current issues in America. Two, how early Americans interpreted the religion clauses of the First Amendment is relevant to current issues pertaining to those clauses only if persons today, including Supreme Court Justices, subscribe to the theory of constitutional interpretation known as "originalism," that is, the idea that constitutional provisions should be interpreted today as they were in early America. Most Americans today, however, do not subscribe to originalism or have a firm position on how the courts should interpret the Constitution. In order, therefore, to make the conclusions of this book relevant to constitutional adjudication today, I would need to make a case for originalism of some sort, which would require another book or at least a very long chapter in what is already a long book. Finally, those readers of this book who already subscribe to some kind of originalism should have no trouble on their own seeing the relevance of my book to various current issues/cases in "church and state." Making it easy for

them to do that is the fact that the book's Introduction explains the major issues relating to the religion clauses that have arisen in recent years and indicates that the book will explain the position that early Americans took on these same issues. By the book's end, hopefully that should be rather clear to most readers.

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