1-1-2023

American Religious Liberty without (Much) Theory: a review of Religion and the American Constitutional Experiment, 5th edition

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Journal of Law and Religion (2023), 38: 1, 126–140

BOOK REVIEW SYMPOSIUM

American Religious Liberty without (Much) Theory

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doi:10.1017/jlr.2022.52

Abstract

Discussed: *Religion and the American Constitutional Experiment, 5th ed.* By John Witte Jr., Joel A. Nichols, and Richard W. Garnett. Oxford: Oxford University Press, 2022. Pp. 464. $150.00 (cloth); $39.95 (paper); $26.99 (digital). ISBN: 9780197587614.

The author first presents an uncritical user's guide to the book, then discusses why Witte, Nichols, and Garnett should consider including key chapters of the story of US religious liberty in the next edition. The author then deconstructs the normative and methodological assumptions of the book.

Keywords: Religious liberty; history; free exercise; establishment clause; disestablishment; liberty of conscience; Supreme Court; First Amendment; constitutional law; constitutional theory

Religion and the American Constitutional Experiment is the Toyota Landcruiser of religious liberty books. Now in its fifth edition,[1] with Richard Garnett joining John Witte Jr. and Joel Nichols as a co-author, the book is the gold standard for a versatile yet comprehensive introduction to the history and doctrine of US religious liberty. It is capacious yet refined, reliable yet written with verve, accessible yet a useful resource for experts. If someone wants one book on religious liberty, this is it—and the best part is that its cost-to-value ratio is far better than an actual Landcruiser's! Unlike most products, it does many things, and it does them all well. Like every product, though, it cannot do everything, and for the most part the authors candidly and fairly conveys those tradeoffs.

Overall, the authors are descriptive, analytical, and synthetic—the reader can revel in the variety of intellectual and cultural sources of religious liberty, the diversity of ways the religion clauses of the First Amendment may reasonably be interpreted, and the myriad theories of religious liberty that Supreme Court justices have toyed with over the decades. This relatively even-handed survey will come as a breath of fresh air for most readers. Religious liberty has been on the front lines of the so-called culture wars for decades,[2] including the latest fronts on LGBT and women's rights.[3] No study of religious liberty could

[1] The first was published in 2000. Nichols joined as a co-author on the third edition, published in 2011. Subsequent citations to the fifth edition are made parenthetically by page number.

[2] *See, e.g.*, James Davison Hunter, The Culture Wars: The Struggle to Control the Family, Art, Education, Law and Politics in America (1992).

[3] *See* Paul Horwitz, The *Hobby Lobby* Moment, 128 Harvard Law Review 154 (2014); Andrew Koppelman, Gay Rights vs. Religious Liberty? The Unnecessary Conflict (2020); Same-Sex Marriage and Religious Liberty: Emerging Conflicts (Laycock et al. eds., 2008); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 University of Illinois Law Review 839.

be truly neutral, however.[4] This one is plainly pro-religious liberty and, in the final chapter, the authors unabashedly affirm the Supreme Court's current doctrinal trajectory (347). But its coverage is evenhanded, and its tone and analysis throughout are dispassionate.

In spite of its considerable value, the book is, of course, not perfect. Witte, Nichols, and Garnett deftly and judiciously cover a lot of ground, but unfortunately they omit some important legal and intellectual context for developing a more nuanced appreciation for modern constitutional doctrine. Most notably, they say little about the nineteenth century, the Fourteenth Amendment, or the political and intellectual context of Supreme Court decision making.

As noted, the authors' approach is mostly descriptive, as one would expect for a historical and doctrinal survey, but they do not hide their normative preferences. They say little about method, and what they do say is somewhat curious. All of this may be forgiven—the book is a survey of history and doctrine, not a venture into constitutional theory or methodology.

Indeed, the authors' commitment to an ecumenical and evenhanded view of religious liberty hides some of the tensions among religious liberty principles and the difficult questions about the limits of religious liberty. Witte, Nichols, and Garnett's apparent approach to constitutional decision making, though not spelled out, is consistent with both a soft form of originalism and a soft form of Ronald Dworkin's chain novel theory that courts make the best of the constitutional story in light of the Constitution's text, purpose, precedent, and the judge's normative commitments.[5] And this makes sense: both of those theories capture important facets of the way the modern Supreme Court decides constitutional cases, and the authors here, whatever their interest in interpretive theory, are first of all good lawyers.

An Uncritical User's Guide to the Book

With its title taken from Thomas Jefferson's description of "America's new religious freedom guarantees as a 'fair' and 'novel experiment'" (1), *Religion and the American Constitutional Experiment* provides an analytical narrative of the origins, constitutionalization, and doctrinal development of religious freedom in the United States. Witte, Nichols, and Garnett are mostly descriptive and synthetic as they identify and explore the intellectual, cultural, and political ideas and practices that nourished religious liberty; identify interrelated principles of religious liberty that have had purchase in constitutional law; and trace these ideas and principles through the Supreme Court's development of religious liberty doctrine. The final chapter is more overtly normative than is the rest of the book, with the authors concluding that "the United States remains 'on the right path' of religious freedom" (347).

Witte, Nichols, and Garnett argue that the founding generation, in the First Amendment and state constitutional provisions, sought to implement six principles of religious freedom that endure "as central commandments of the American constitutional order and as cardinal axioms of a distinct American logic of religious liberty" (2). The six principles are "(1) liberty of conscience, (2) free exercise of religion, (3) religious pluralism, (4) religious equality (5) separation of church and state, and (6) no establishment of a national religion" (2 and, generally, chapter 3). In providing an introduction to religious liberty, Witte, Nichols, and Garnett do an admirable job of conceptually and historically distinguishing these principles without favoring one over another, highlighting the respective roles of the principles in religious liberty argumentation, while acknowledging that they can be in conflict.

[4] *See* Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom ch. 6 (1995).
[5] *See* Ronald Dworkin, Law's Empire ch. 10 (1986).

https://doi.org/10.1017/jlr.2022.52 Published online by Cambridge University Press

They also tease out the American experiment of religious liberty chronologically. The first two chapters provide invaluable historical context, exploring the religious and political origins of religious liberty in the classical, medieval, and early modern period (9) and then the immediate cultural, religious, political, and intellectual trends that overlapped to produce the distinctively American brand of religious liberty in the late eighteenth century (35).[6] Witte, Nichols, and Garnett then give detailed consideration to the enactment of the First Amendment, with a helpful breakdown of the many plausible readings of the religion clauses.

The book's center of gravity is the authors' historical analysis of modern Supreme Court doctrine. They argue that this era is defined by three periods. The first, from 1940 to 1990, was marked by the Supreme Court's emphasis on the principle of "separationism" to enforce "both the no-establishment and free exercise guarantees of the First Amendment with rigor" (3). In the second period, from the 1980s to the 2010s, they explain, the Supreme Court articulated doctrines that involved less judicial intervention, especially in cases involving funding to religious schools and religious accommodations from generally applicable laws. The third, which they call the "emerging" era, might be considered accommodationist: "[I]n a series of strong cases beginning in 2012, the Court has greatly strengthened and systematized the religious freedom protections of the First Amendment religion clauses and of federal statutes like RFRA [Religious Freedom Restoration Act] and RLUIPA [Religious Land Use and Institutionalized Persons Act]" (5–6).[7]

In the book's final chapter, the authors wrap things up with more descriptive synthesis and a frankly normative appraisal of the state of religious liberty. They say that the founding and early Supreme Court decisions suggest three "keys" to striking the right balance between competing norms of "religious freedom and religious establishment" (343): recognizing "that religion is special and needs special protection in the Constitution" (343); promoting religious pluralism; and "appreciating and considering fully the six principles of religious liberty" (345). Their final judgment is that the Supreme Court "of late has been quietly charting a new constitutional course that has strengthened religious freedom and produced a better balance" among the six principles of religious liberty (350). In the main, though, Witte, Nichols, and Garnett provide a wide-angle lens on American conceptions of religious liberty and the development of law implementing that liberty, allowing readers to make their own judgments about the attractiveness of specific principles and judicial decisions.[8]

The narrative's strength is the authors' careful synthesis of doctrinal developments without reductionism. They sensibly divide the modern doctrinal narrative into three chapters on free exercise and five on nonestablishment. (The disparity in coverage makes sense in light of the long and winding history of establishment cases.) They restrain themselves from artificially smoothing out what has been an uneven—sometimes rocky—doctrinal path. On the whole, Witte, Nichols, and Garnett present a story that is itself subject to a great deal of ideological dispute with a laudable balance of completeness and nuance—in about 360 pages, excluding appendices and notes.[9]

[6] Some readers will recognize much of this material as also appearing in John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame Law Review 3 (1999).

[7] Other scholars have divided the eras of American religious liberty differently. *See, e.g.*, Steven K. Green, The Second Disestablishment: Church and State in Nineteenth-Century America (2010); Steven K. Green, The Third Disestablishment: Church, State, and American Culture, 1940–1975 (2019).

[8] But see, for example, page 305, where the authors assert that the Court's Establishment Clause jurisprudence has become "a bit more coherent and consistent over time, and remains built on a solid historical foundation."

[9] This is about twenty pages longer than the fourth edition (including endnotes). *See* John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment (4th ed. 2016).

https://doi.org/10.1017/jlr.2022.52 Published online by Cambridge University Press

This feat comes with tradeoffs. The fourth edition included a chapter on comparative international religious freedom;[10] the fifth nixes it to include the latest free exercise and establishment doctrinal developments (including recent cases involving sexual rights, COVID-19, and capital punishment) (183) and to beef up the chapter on church autonomy (364).[11] Although the book now includes an invaluable appendix with the names, dates, and holding of *every* Supreme Court decision on religion, the reader will not find much in the way of primary sources.[12] Other books offer compilations of primary sources, but readers looking for the key sources *and* scholarly commentary should turn to a casebook.[13]

One can of course quibble with bits of Witte, Nichols, and Garnett's synthetic claims. For instance, they say that whereas "separationists are the modern heirs of the Enlightenment and Evangelical founders, so accommodationists are the modern heirs of the Puritan and Civic Republican founders" (215). This overgeneralizes. The main distinction between what the authors describe as "Enlightenment" and "Evangelical" founders, on the one hand, and "Puritan" and "Civic Republican" founders, on the other, is that the latter believed that the government should, or at least may, inculcate religion (52, 58). Yet some cases that can be understood as accommodationist are probably best understood as animated by a motive to avoid government interference with private religious exercise rather than to inculcate religion. In fact, the case the authors use as an example of accommodationism illustrates this point (216). In *Zorach v. Clauson*,[14] the second "release-time" case, the Court held that a state may release public school students to attend religious instruction, as long as the instruction is offsite. Of course, if the government had not required the students to attend school in the first place, it would not have had to release them for such instruction. From that perspective, accommodating the religious practices of the students was simply a matter of getting out of the way, owing as much to Enlightenment and Evangelical ideals of "liberty of conscience" and "equality of faiths" (42)[15] as to the Puritan and civic republican belief that the government should *foster* religion.[16]

On the whole, though, the authors provide a comprehensive account of a convoluted area of philosophical conceptions and legal doctrine, charting the judicial implementation of the Religion Clauses across cases, time, and justices, from the tidal waves to the eddies.

Filling Out the Historical Narrative

File this section of the review under "what I would like to see in the next edition." Witte, Nichols, and Garnett omit crucial facets of America's experiment with religious liberty. The first is the nineteenth century, the flyover country of religious liberty. The second is the broader context of the Supreme Court's rise to constitutional interpretive supremacy, with adjacent disputes about judicial role, interpretive theories, and the like. Adding a modest amount of material on these topics would make the book even stronger.

[10] *See, e.g., id.* ch. 13.

[11] *See id.* ch. 12.

[12] The fifth edition does include an appendix with the drafts of the religion clauses (361). Those seeking compilations of primary resources might consult Church and State in American History: Key Documents, Decisions, and Commentary from the Past Three Centuries (John F. Wilson & Donald L. Drakeman eds., 3d ed. 2003); Religious Liberty and the American Supreme Court: The Essential Cases and Documents (Vincent Phillip Muñoz ed., 2013).

[13] *See, e.g.*, Michael McConnell et al., Religion and the Constitution (5th ed. 2022); Frank S. Ravitch & Larry Catá Backer, Law and Religion: Cases and Materials (4th ed. 2021).

[14] 343 U.S. 306 (1952).

[15] *See Zorach*, 343 U.S. at 313 ("We sponsor an attitude on the part of the government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

[16] *See id.* at 313–14 ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.").

https://doi.org/10.1017/jlr.2022.52 Published online by Cambridge University Press

What About the Nineteenth Century?

The narrative of religious liberty presented by the book leaps from the ratification of the First Amendment in 1791 to the modern era of Supreme Court individual rights review in the twentieth century. This paints a decidedly juriscentric picture of American constitutionalism, sidesteps some of the nation's most glaring religious liberty failures, and completely ignores the jurisprudential puzzle of the "incorporation" of the Establishment Clause.

The authors acknowledge that "[f]or the first 150 years of the republic, principle responsibility for the American experiment lay with the states, and not with the national government or the federal courts" (129). This is mostly right—although the "national government" engaged in a variety of practices that we would now consider to raise questions of religious liberty[17]—but it hardly justifies ignoring the first century of the experiment. The process of disestablishment, which was understood to promote the principles of religious liberty, occurred at the state level, both before and after—in some cases decades after—the adoption of the First Amendment.[18] It was during the first half of the nineteenth century that many questions about the scope of religious liberty and disestablishment were originally hashed out in policy debates at the state and federal levels, over topics ranging from the incorporation of churches[19] to the Sunday mails.[20] A growing literature is dedicated to exploring the implications of these practices and debates for the development and proper understanding of the law of religious liberty.[21] To their credit, Witte, Nichols, and Garnett do briefly discuss the tradition of state opposition to funding religious institutions beginning in the middle of the nineteenth century, but they do so only as a brief precursor to the Supreme Court's doctrine of strict separation in school prayer cases (232).

By ignoring the nineteenth century, the authors unfortunately skip over the many failures of Americans to live up to the highest ideals of religious liberty, such as the persecution of Mormons,[22] Native Americans,[23] and, in the southern states, slaves, free Blacks, and white abolitionists.[24] The nineteenth century may not have been the high-water mark for religious liberty, as Steven Smith has argued,[25] but it was a necessary precursor, politically, socially, and conceptually, to the modern law of religious liberty.

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[17] *See, e.g.*, Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 Notre Dame Law Review 677 (2020); *see also* James S. Kabala, Church-State Relations in the Early American Republic, 1787–1846 (2013).

[18] *See generally* Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776–1833 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019).

[19] *See, e.g.*, Carl H. Esbeck, *Disestablishment in Virginia, 1776–1802*, *in* Disestablishment and Religious Dissent, *supra* note 18, at 139.

[20] *See, e.g.*, Daniel L. Dreisbach, Religion and Politics in the Early Republic: Jasper Adams and the Church-State Debate 4–7 & 24–27 nn.14–33 (1996); Richard R. John, *Taking Sabbatarianism Seriously: The Postal System, the Sabbath, and the Transformation of American Political Culture*, 10 Journal of the Early Republic 517 (1990).

[21] *See, e.g.*, Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property before the Civil War*, 162 University of Pennsylvania Law Review 307 (2014); Kellen Funk, *Church Corporations and the Conflict of Laws in Antebellum America*, 32 Journal of Law and Religion 263 (2017); Lael Weinberger, *The Limits of Church Autonomy*, Notre Dame Law Review (forthcoming 2023).

[22] *See* Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America (2002).

[23] *See, e.g.*, David Wallace Adams, Education for Extinction: American Indians and the Boarding School Experience, 1875–1928 (1995); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 Stanford Law Review 773, 787–805 (1997).

[24] *See, e.g.*, Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Arizona State Law Journal 1085, 1137–38 (1995). The authors acknowledge these failures, but in an offhanded way that does not begin to wrestle with what they might suggest about the principles of religious freedom (344–45).

[25] Steven D. Smith, The Rise and Decline of American Religious Freedom 108–10 (2014) (praising the period for permitting political contestation over competing "providentialist" and "separationist" visions of disestablishment).

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Likewise, Witte, Nichols, and Garnett spend relatively little time on the legal implications of the Fourteenth Amendment, which some scholars have considered "the second adoption" of the First Amendment.[26] Witte, Nichols, and Garnett devote a whole chapter to the formation and possible meanings of the First Amendment. But all they say about the Fourteenth Amendment is that the Supreme Court "applied the First Amendment religion clauses to state and local governments via ... [its] due process clause—thereby catalyzing the development of a national law on religious liberty, enforceable in the federal courts" (130). To put it mildly, this glosses over one of the key interpretive challenges posed by the religion clauses: how a provision like the Establishment Clause that was meant in part to keep the federal government from interfering with state establishments of religion could be applied *against* the states.[27]

Scholars have posited this question from the time the Supreme Court first incorporated the provision against the states, and some Supreme Court justices have wondered the same thing.[28] Witte, Nichols, and Garnett gloss over this puzzle by noting that "[d]isesetablishment of religion, many founders argued, was ultimately the best way to ensure that all the essential rights and liberties of religion were protected" (206). Yet "many founders" favored a "mild and equitable establishment of religion"[29] and voiced their concern about national interference with state establishments.[30] They therefore drafted the clause not to prohibit establishments of religion in general, but to prohibit "Congress" from making any law "respecting an establishment of religion."[31] One need not conclude that the establishment clause was merely a jurisdictional or federalism-reinforcing provision to see that one of its purposes was to allow the states to go their own way on religious establishment. The failure of the proposed "Blaine Amendment"[32] that would have expressly applied text from the religion clauses to the states years after the Fourteenth Amendment's passage puts a fine point on the question whether any of the "founders" of the US Constitution's religious liberty provisions—whether in 1791 or 1868—*ever* meant to apply *either* of those provisions against the states.[33] A narrative of religious liberty need not take a firm view on any of these disputes, but it ought to lay them out.

Contextualizing Supreme Court Doctrine

The omission of the nineteenth century history and the puzzle of incorporation illustrates Witte, Nichols, and Garnett's supposition that the Supreme Court is the central, almost exclusive, captain of the American constitutional experiment. This is a fair reading of the twentieth century, at least, and particularly the last seventy years. It is also a typical assumption of most modern books on constitutional law, history, and theory. Yet the

[26] *See* Lash, *supra* note 24, at 1153–54

[27] *See, e.g.*, Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 33 (1998); Smith, *supra* note 4, at 26–27.

[28] *See, e.g.*, School District of Abington v. Schempp, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting); Elk Grove Unified School District v. Newdow, 542 U.S. 1, 51 (2004) (Thomas, J., concurring).

[29] *See* John Witte, Jr., *"A Most Mild and Equitable Establishment of Religion": John Adams and the Massachusetts Experiment*, 41 JournalChurch & State 213 (1999).

[30] For example, as the authors note at page 106: "Representative Harrington added a further worry that the involvement of the 'federal courts' in local laws on religion would 'be extremely hurtful to the cause of religion.'"

[31] U.S. Constitution, Amendment 1.

[32] Senator John Blaine proposed an amendment that would have expressly applied the same text as the religion clauses to the states, but would have also forbidden them from placing public funds under the control of a religious group, or from dividing funds among religious groups. The proposal failed, but many states adopted similar funding restrictions in their own constitutions. *See generally* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 American Journal of Legal History 38 (1992).

[33] *See generally id.*

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authors could do more to put the Court's constitutional doctrine-making into intellectual and political context. As it stands, the authors are almost silent on the Court's place in our constitutional order and judicial interpretive methodology. They present the development of the law in somewhat journalistic fashion, like a (very thorough) hornbook: here is what the majority said, here is what the dissent said, and here was the resulting law; now on to the next case in the doctrinal trajectory.

This picture of constitutional law is accurate enough as an introduction for the general reader and its thoroughness makes it a useful resource for the specialist, but the account of exactly what a constitutional decision is—both as a cultural artifact and as a law-creating act—could be more ambitious in at least two respects. The first would situate Supreme Court doctrine within disputes about how courts should decide constitutional questions. The second is related—it would situate Supreme Court decision making within its political context.

The history of Supreme Court enforcement of the Fourteenth Amendment has been laced with debates by justices, scholars, and elected officials about how the Court should discharge its duty to "say what the law is"[34] in cases raising a constitutional question. As Witte, Nichols, and Garnett's analysis of the drafting and text of the religion clauses so aptly demonstrates, the texts of the Bill of Rights and the Fourteenth Amendment often speak in vague terms that require judicial construction to implement. Such construction raises important questions about the separation of powers, republicanism, and interpretive method that the authors do not directly address. Should courts defer to the reasonable constitutional interpretation of the political departments?[35] Should they subject laws affecting fundamental rights—like the right to religious exercise—to a higher level of scrutiny?[36] If so, how should they determine which level of scrutiny is the most faithful way for a court to implement the First Amendment? When determining the scope of the principle or value at stake in a religious liberty case, to what sources should a jurist turn?[37] To the original understanding of the enacting public? To the "ethical" commitments of the constitutional regime as a whole?[38] To whatever will lead to the "best" reading in light of the judge's own beliefs about political morality?[39] Explaining that these questions lurk in the background of every constitutional case, and that each of the justices brings a unique perspective on them, the authors would greatly enrich their account of the many (and sometimes perplexing) tergiversations of religious liberty doctrine.

The story would be even more engrossing if the authors would situate some of the Supreme Court's religious liberty decisions more firmly in their broader political, social, and intellectual contexts. The Supreme Court is neither an island nor an oracle—no matter how free of political pressure it may strive to be, its decisions cannot help being artefacts of a time and place. In *McCollum v. Board of Education* (1948), for example, the Court enjoined a program that allowed public school children to voluntarily attend religious instruction at school during "release time" from the ordinary school day. The decision was remarkable by many standards. It was the first time the Supreme Court had invalidated a state law on the basis of the Establishment Clause. And it effectively invalidated the law in many states. To put it mildly, Americans did not uniformly greet the decision as a vindication of their constitutional commitments. Respected scholars panned it,[40] and Philip Kurland later

[34] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[35] *See, e.g.*, James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law (1893).

[36] *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[37] *See* John Hart Ely, Jr., Democracy and Distrust: A Theory of Judicial Review ch. 3 (1980).

[38] *See* Philip Bobbitt, Constitutional Fate: Theory of the Constitution ch. 7 (1984).

[39] *See* Dworkin, *supra* note 5.

[40] *See, e.g.*, Edward S. Corwin, *The Supreme Court as National School Board*, 14 Law & Contemporary Problems 3 (1949); Robert F. Drinan, *The Novel "Liberty" Created by the McCollum Decision*, 39 Georgetown Law Journal 216 (1951).

https://doi.org/10.1017/jlr.2022.52 Published online by Cambridge University Press

compared the nation's disrespect for *McCollum* with the South's disrespect for *Brown v. Board of Education.*[41] According to one study, "[b]y 1955 ... approximately 35% of the schools conducting released time programs simply ignored the Court's ruling and continued weekday religious education within public school buildings."[42] Yet Witte, Nichols, and Garnett say nothing about this political backlash or the possibility that it influenced the Court's subsequent decision in *Zorach v. Clauson* to permit "release time" programs as long as the instruction occurred off school grounds.[43] A similar story—with perhaps even more political drama—could be told about the Court's school prayer decisions.

All of these issues—judicial review, interpretive method, and political backlash—came to a head in the battle between Congress and the Court over the meaning of the Free Exercise Clause. The authors outline the convoluted events leading to the current law of religious accommodations under the Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act, but they spend virtually no ink on the political backlash to *Employment Division v. Smith*,[44] the extremity of the Court's claim of judicial supremacy in *City of Boerne v. Flores*,[45] or the disintegration of the RFRA coalition in the face of "disagreements about abortion, contraception, emergency contraception, sterilization, gay rights, and same-sex marriage."[46] A page on this story would have highlighted the political and legal stakes of judicial review and contextualized the ongoing battles over the proper interpretation of the Free Exercise Clause and RFRA.

An introduction to American religious liberty cannot do everything, and I feel somewhat churlish demanding more than the buffet already on offer in *Religion and the American Constitutional Experiment.* Yet I would gladly accept less on the doctrinal genealogy of the 1960s through the 1980s in exchange for more from the nineteenth century and more on the intellectual and political context of judicial supremacy. The Supreme Court can still be the star of the show; in fact, with a stronger supporting cast, it might give an even more convincing performance.

Deconstructing the Book's Normative Commitments

Witte, Nichols, and Garnett at times present *Religion and the American Constitutional Experiment* as nothing more than a history of religious liberty.[47] At others, they are more overtly evaluative, concluding, for instance, that the tradition is "on the right path" (347). In other words, for the most part they present "just the facts, ma'am" without editorializing, but they are also plain about their commitment: from start to finish, they are pro-religious liberty. There is nothing wrong with this approach. It is probably impossible to be truly neutral about religious liberty, so the authors have done the reader a service by making their

[41] Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 University of Chicago Law Review 1, 73 (1961).

[42] David P. Setran, *"Good Fences Make Strange Neighbors": Released Time Programs and the McCollum v. Board of Education Decision of 1948*, 39 American Educational History Journal 307 (2012).

[43] 343 U.S. 306 (1952).

[44] 494 U.S. 872 (1990).

[45] 521 U.S. 507, 536 (1997) ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed."); *see* Michael W. McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harvard Law Review 153 (1997).

[46] Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 University of Illinois Law Review 839, 846.

[47] See, for example, page 93: "We instead present this material [on 'Forging the First Amendment Religion Clauses'] as historians of the First Amendment, lifting up all the relevant data that are useful for the reader to judge what's clear and what's not so clear about the final sixteen words that comprise the First Amendment religion clauses."

https://doi.org/10.1017/jlr.2022.52 Published online by Cambridge University Press

normative commitments clear. Those steeped in postmodern theory will accept that the book's narrative arc, the authors' selection of topics, and their analysis of doctrine are all affected by this commitment. There simply is no other way to tell a story about contested norms.

The interesting questions are how far these commitments go, or ought to go. Witte, Nichols, and Garnett acknowledge that sometimes the principles of religious liberty are in tension. How should those tensions be resolved? How should conflicts between religious liberty and other important interests be resolved? Is there a difference between the ideals of religious liberty and what the Constitution (or some other legal instrument) requires? And for each of these, why? And how would we know? The book is largely silent on these important theoretical questions. To be sure, that is not a fair criticism of the book, which does not bill itself as an introduction to constitutional *theory*. Precisely because description is inherently normatively imbued, however, the book does provide tacit answers to some of these questions, for those with eyes to see.

Whose Religious Liberty?

As mentioned above, the authors trace the origins and judicial application of six principles of religious liberty. In the book's final chapter, they supplement them with five "teachings" of the current Supreme Court doctrine:

1. "religious liberty must respect tradition" (351);
2. "the principle of separation of church and state must be applied prudentially, not categorically" (354);
3. "religious freedom is both an individual and a corporate right" (356);
4. "religious persons and groups deserve equal treatment and protection in public life, public programming, and public benefits" (358);
5. "both secular and religious consciences must be free from undue and avoidable burdens imposed by the state" (359).

Witte, Nichols, and Garnett present these teachings as attempts to balance the potentially competing interests of the founding-era principles. Assuming the founding-era principles are worthwhile, how do we know the Court's "teachings" strike the right balance?

Consider the line of school-funding cases culminating in the recent decision in *Carson v. Makin*.[48] In the terms of the book, the cases raise important questions about the principle of the separation of church and state and the Court's teaching that the principle should be applied "prudentially, not categorically" (354). The Court never said the principle was categorical—the holding in *Everson v. Board of Education* made that plain[49]—so the question has always been whether it should be applied more or less strictly. In some cases, the Court has applied the doctrine quite strictly indeed. The "ministerial exemption" is a robust and categorical separation of church and state.[50] Perhaps we should chalk those decisions up to a different "teaching," that "religious freedom is both an individual and a corporate right."

In the school funding cases, though, the principle of separation of church and state has grown quite lax. At first, states could not fund religious schools at all; they could only

[48] 142 S. Ct. 1987 (2022). *See also* Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2021).

[49] 330 U.S. 1 (1947) (holding that a state may reimburse the fare for public bus transportation of students to private religious schools).

[50] *See* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012).

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provide them with generally available public goods.[51] Then, they were *permitted* to indirectly siphon funds to schools through a neutral regime of private choice.[52] Now, after *Carson*, they *must* provide religious schools with the same subsidies they provide to private secular schools. Perhaps we should chalk those rulings up to the "teaching" that "religious groups deserve" "equal treatment" in public benefits.

At the same time, however, there is a very long tradition—going back to the founding—of states having the freedom to choose whether or not to subsidize private religious education. A long-standing rationale for this freedom is that funding religious education violates the conscience of objecting taxpayers.[53] (To be sure, a federal prohibition on states funding private religious education, announced in *Everson*, was not nearly as entrenched in American tradition as the freedom of states to choose not to fund religious education.) As the authors note, the Court's cases "teach" that we should "respect tradition"—why not this one? The authors do not provide a clear answer. They do suggest that the government should fund religious groups on equal terms with nonreligious groups so long as the government is not funding a "core exercise" of religion (307). But what counts as a core exercise of religion? The Court has held that many of those who dutifully teach an array of courses in religious primary and secondary schools are to be treated, for constitutional purposes, as "ministers."[54] If their work of ministry is not a core exercise of religion it is hard to know what is.

The *Carson* decision also risks entanglement arising from conditions that states will place on the funds they do not wish to provide to religious schools. It is not hard to imagine states placing nondiscrimination conditions on hiring and admissions, and even on curriculum. Such conditions, and the government oversight necessary to enforce them, are economic levers for controlling religious schools, and will inevitably lead to further litigation about the proper bounds of church and state. None of this is to say that the *Trinity Lutheran* line of cases was wrongly decided; only that they illustrate ongoing tensions among the religious liberty "principles" and the Supreme Court's "teachings" that Witte, Nichols, and Garnett identify, tensions they do not explore as deeply as they could.

Limits of Religious Liberty?

Nor does the book provide a basis for determining the *limits* of religious liberty. Those limits may come in at least two different forms that have given rise to a great deal of academic controversy over the past decade. The first is whether religious liberty, or liberty of conscience, ought to extend to nonreligious beliefs or practices that are in the relevant sense analogous to religious beliefs and practices. Those who have argued that religion is not *special* could easily support two different implications: no conscientious objectors, religious or nonreligious, deserve accommodations because it is conscience that is not worth special consideration. Or, by contrast, they might conclude that all conscience, including nonreligious conscience, is special, and deserves accommodations in some cases. The same can be said for the implications for the Establishment Clause. In the fourth edition of the book, the authors engaged directly with then-recent works that raised these questions—questions that have been around in one form or another for decades—but in the current edition they do little to acknowledge or address them.[55] They do list as one of the "teachings" of the

[51] Everson v. Board of Education, 330 U.S. 1 (1947).

[52] *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[53] *See, e.g.*, *Everson*, 330 U.S. at 12, 16.

[54] *See* Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

[55] *See* Witte & Nichols, *supra* note 9 at 282–84; *see, e.g.*, Brian Leiter, Why Tolerate Religion? (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 University of Chicago Law Review 1351 (2012); Richard Schragger & Micah

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current doctrine that "*both secular and religious consciences* must be free from undue and avoidable burdens imposed by the state" (359, emphasis added). But without spelling out the counterarguments against the specialness of religion, they risk that the reader will see this as a non-sequitur. The Court has *never* said that the Free Exercise Clause or a statutory analogue requires an accommodation for "secular consciences." The closest it has come is reading the Vietnam draft conscientious objector provision expansively to include those with deep nonreligious moral objections to war.[56] But since then the Court has reiterated repeatedly that the Free Exercise Clause extends only to religious beliefs and practice and that statutory religious accommodations "need not come packaged with benefits to secular entities."[57]

The other limits on religious liberty are those imposed by the government's countervailing interests or the rights of third parties. The authors present plenty of cases that pit religious liberty against other important interests, whether health, safety, or civil rights, but they do not suggest a framework for balancing religious liberty against them. In many cases, they are incommensurable—it is hard to know how to weigh one value, like religious liberty, against a completely different and perhaps incompatible value, like a customer's interest in being treated equally in the marketplace. In some cases, there is no way to protect both interests. In others, there may be.[58] Some cases would benefit from an empirical analysis of the practical implications of competing rulings,[59] others may turn on principle alone. And so on.

No introduction to any constitutional doctrine should be expected to answer these questions, or even to lay out a comprehensive view of the author's basic values. Witte, Nichols, and Garnett could do a better job, though, at acknowledging that religious liberty has never been conceived in the American tradition as an absolute good, to be pursued at all costs. From Quaker oaths to Jewish Sabbaths to Mormon polygamy to Evangelical and Catholic opposition to abortion and same-sex marriage, demands for religious freedom and equality have raised difficult questions about accommodating minority religious practices that run counter to the political community's policy preferences.

Constitutional Interpretive Norms

As discussed above, Witte, Nichols, and Garnett omit the broader political, intellectual, and legal context of the Court's enforcement of constitutional rights. It is unsurprising, therefore, that they do not offer their own theory of constitutional interpretation—at least not overtly. But they do appear to be working with one, and the book would be stronger if they were more explicit about it.

In prior editions the authors were more suggestive about their interpretive methodology. Beginning with the first edition, the word *experiment* in the book's title referred not only to Thomas Jefferson's words about America's experiment with religious liberty, but also, more

Schwartzman, *Against Religious Institutionalism*, 99 Virginia Law Review 917 (2013). In the current edition, the authors present a litany of arguments against religious liberty, but these are underdeveloped and seem like hypotheticals because they are unmoored from citations to jurisprudential or scholarly arguments (349–50).

[56] *See* Welsh v. United States, 398 U.S. 333 (1970).

[57] Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) (quoting Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987)).

[58] The Court purported to be doing this in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), when it declared that the government could satisfy the interests of employees by providing their health insurance itself. *See id.* at 2781–82.

[59] *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020) (deciding, among other things, that "the State has not shown that public health would be imperiled if less restrictive measures were imposed" on houses of worship during the pandemic).

https://doi.org/10.1017/jlr.2022.52 Published online by Cambridge University Press

intriguingly, to Francis Bacon's words about how to evaluate an experiment: when it "becomes a 'kind of wandering inquiry, without any regular system of operations … prudence commends three correctives." The first step is to "return to first principles and axioms" and "if necessary refine them." The second is to assess "our experience with the experiment" in light of those principles to see where it "should be adjusted." And the third is to "compare our experiments" with those of other scientists.[60]

The fifth edition excises Bacon's theory but continues to follow his advice. The authors purport to base the religious liberty principles they identify "in several European legal traditions and eighteenth-century American texts [and modern human rights instruments] that have not been part of the conventional literature" (7). They then deploy these principles to evaluate the current constitutional doctrine and produce five more "teachings" that may be understood as refinements of the original principles. Breaking with their practice in prior editions, in the fifth, the authors do not compare the American experiment with those of other nations; perhaps that is why they no longer expressly rely on Bacon's framework.

Though the authors drop the Baconian framework, they are not entirely silent about methodology. Unfortunately, neither are they entirely clear:

> Our methodology is more expansionist than revisionist in intention. In presenting the religious freedom teachings of the founding era in broader historical context, we are not pressing an originalist agenda. We are instead pointing out what is original in the founders' work, and what is continuous with the Western legal tradition; what is clear and enduring in the final constitutional text, and what is opaque and has needed considerable expansion. The eighteenth-century historical record is too uneven and incomplete to argue for a single definition of the original intent of the First Amendment. But this historical record is too rich and prescient in religious freedom teachings to write off the founders as unimportant. (6)

Located at the outset of the book, this paragraph about methodology may be read to refer not to the authors' methodology of interpreting the constitutional text, but to their methodology of interpreting the history and meaning of religious liberty. One can imagine the two objects of interpretation running on separate tracks: the constitutional text has a meaning, and that meaning must be ascertained according to whatever methods are appropriate to interpreting that sort of text; and religious liberty, as an ideal, has a purpose, a scope, and a goal, which may or may not match up with the meaning of the religion clauses. Such interpretive dualism is a real possibility in light of the predominance of legal positivism and the turn in constitutional theory toward "interpretivism."[61]

On the whole, however, the authors give the impression that they believe they are telling one story—the religion clauses simply require religious liberty, along with all the principles and teachings religious liberty implies. The book's chapter on the formation of the religion clauses is a tour de force of imagining the possible meanings of those provisions, but it makes it clear that the authors "carry no brief for or against an 'originalist' approach to the First Amendment" (93).[62] Their motive, instead, is to "lift [] up all the relevant data that are useful for the reader to judge what's clear and what's not so clear about the final sixteen words that comprise the First Amendment religion clauses"

[60] Witte & Nichols, *supra* note 9, at 3 (quoting Francis Bacon, *The Great Instauration*, *in* The New Organon and Related Writings 3, 11 (Fulton H. Anderson ed., 1960) (1620)).

[61] *See, e.g.*, Ely, *supra* note 37, chs. 1–2.

[62] *See also* Richard W. Garnett, *Chief Justice Rehnquist's Enduring Democratic Constitution*, 29 Harvard Journal of Law & Public Policy 395 (2006) (denying, apparently with approval, that Rehnquist was "a fundamentalist, or even a thoroughgoing, principled originalist" (internal quotation marks omitted)).

https://doi.org/10.1017/jlr.2022.52 Published online by Cambridge University Press

(93). Yet nowhere do they identify a tension between the demands of religious liberty and the demands of the Constitution. For instance, perhaps religious liberty requires extending religious accommodations to nonreligious objectors on the ground that not doing so favors religious over non-religious conscience. Or perhaps religious liberty, properly understood, forbids the government from promoting American civil religion, though the Constitution apparently does not.

There seem to be a couple of things going on here, and both of them are consistent with a soft form of originalism—and, interestingly, a soft form of Dworkinianism. The authors are dedicated in the first place to ascertaining the meaning, if there is one, of the religion clauses in their historical context. They spend nearly a third of the book on the historical backdrop to the First Amendment and its possible meanings. According to most contemporary versions of originalism, doing so is a necessary precursor for ascertaining a legal provision's original meaning. The fact that the provision is vague or ambiguous—that it does not admit of a "single definition of the original intent" (6)—does not end the originalist analysis. Originalism has come a long way from Raul Burger and Robert Bork's inquiries into the "original intent" of a constitutional provision.[63] Now, most originalists believe that the appropriate object of inquiry is the Constitution's objective "original public understanding" or "original legal meaning."[64] They also acknowledge that the original understanding of a provision may be vague or open-textured.[65] So far, the authors' approach to the meaning of the religion clauses is consistent with "the new originalism."

In the second place, the authors' strategy for fleshing out the meaning of the religion clauses would find support from some self-defined originalists but not others. Most would admit that some constitutional provisions require construction because they are legally indeterminate.[66] The question is what methods, principles, or normative values should guide such construction. Some would turn to contemporary values on the ground that the founders effectively delegated construction to future generations.[67]

In *Religion and the American Constitutional Experiment*, Witte, Nichols, and Garnett's strategy for constitutional construction is fairly plain: readers should rely on founding-era principles of religious liberty to construct the meaning of the religion clauses today.[68] The principles the authors identify may be "wis[e]" (305), but they are surely contestable—especially as the Supreme Court has mixed and matched them over time. And these are the principles the book uses as a standard to assess the Supreme Court's implementation of the Religion Clauses. The reason they affirm the general trajectory of contemporary doctrine is because it "strengthen[s] religious freedom and produce[s] a better balance among America's traditional principles" (305). The authors may not be originalist in the old-fashioned sense of tilting for "a single definition of the original intent" (6), but most savvy American constitutionalists would recognize that they are engaged in a sort of soft originalism. Where the original understanding of the

[63] *See, e.g.*, Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke Law Journal 239, 247–62 (2009); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Georgetown Law Journal 1113, 1134–48 (2003).

[64] Kesavan & Paulsen, *supra* note 63, at 1144–45.

[65] *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham Law Review 453, 504, 537 (2013).

[66] *See id.*

[67] *See, e.g.*, Jack Balkin, Living Originalism 11–12 (2011).

[68] "[It is] further worth reminding ourselves of the founders' original vision of the establishment clause, and its edifying wisdom over time" (305). "Even so, the first principles of the American experiment in religious liberty can continue to provide a reliable guide in such settings even if they do not dictate precise results in resolving the many cases that will continue to arise in this perennially contested terrain" (307).

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text leaves off, the authors would supplement it with something like original constitutional principles.[69]

In what may be an embarrassment to some of the new originalists, Witte, Nichols, and Garnett's approach is also fairly consistent with a Dworkinian chain novel approach, one that resolves present constitutional disputes according to the best way to continue the story begun by the constitutional purpose and text and carried forward by precedent. A good judge will toggle back and forth between text, precedent, principle, and contemporary values to come to a "reflective equilibrium"—the right answer to the case that reflects the totality of the community's constitutional commitments.[70] Dworkin's own values tended to be liberal progressive, but his theory could be equally deployed by a judge committed to other values, such as "the common good."[71] In *Religion and the American Constitutional Experiment*, Witte, Nichols, and Garnett appear to give great weight not only to the original "principles" of religious liberty, but also to the Supreme Court's recent "teachings" about religious liberty, suggesting that their preferred approach to constitutional adjudication is something akin to Dworkin's chain novel theory. In this, perhaps they are no different than theorists like Nelson Tebbe, except that the values they believe the story must implement to continue in the "right" direction are more firmly rooted in classical liberalism than in liberal egalitarianism.[72]

My suspicion is that Witte, Nichols, and Garnett have not strongly considered the question of interpretive method. I do not say this disparagingly. They want to distance themselves from a doctrinaire form of originalism that has come in for an academic and political bruising; but in doing so they have ignored how far originalism has come in the past twenty years—far enough to incorporate their approach. They certainly do not overtly embrace the Dworkinian label, but the Baconian advice they accept *sub silentio* sounds an awful lot like the Dworkinian reflective equilibrium approach to judicial decision making. In the end, though they may be unreflective about their method, they are American constitutional lawyers, and perhaps they are just doing constitutional law as American lawyers ordinarily do it. Perhaps that simply looks a lot like a soft originalism and, at the same time, like a soft Dworkinianism, depending on which eye the reader squints through.

Conclusion

The fifth edition of the *Religion and the American Constitutional Experiment* remains a strong classroom text for an introduction to the history and law of religious liberty in the United States. Its narrative strengths far outweigh its modest shortcomings. Its values are pro-religious liberty in as ecumenical a sense as possible. Witte, Nichols, and Garnett's method is that, broadly speaking, of the American constitutional experiment itself.

The Supreme Court's current interest in religious liberty issues is both a boon and a challenge for future editions. As the Court grows more active in enforcing free exercise rights—whether in funding cases or accommodation cases—those rights will increasingly raise potential conflicts with other principles the authors identify, whether the principle of nonestablishment, of religious equality, or of the freedom of conscience—especially of taxpayers.

[69] "Even so, the first principles of the American experiment in religious liberty can continue to provide a reliable guide in such settings even if they do not dictate precise results in resolving the many cases that will continue to arise in this perennially contested terrain" (307).

[70] Ronald Dworkin, Taking Rights Seriously 156 (1978).

[71] *See* Adrian Vermeule, Common Good Constitutionalism 6 (2022).

[72] *See* Nelson Tebbe, Religious Freedom in an Egalitarian Age 26–30 (2017) (discussing reflective equilibrium).

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Perhaps no case illustrates this potential conflict more than *Kennedy v. Bremerton School District*,[73] where the Court recently held that a public high school may not discipline a football coach for praying demonstratively at the fifty-yard line after a game, even when the school believes the prayer to violate the Establishment Clause. Breathless claims that the decision is the end of the Establishment Clause are overblown, and I suspect the authors of this casebook would agree with the decision, but it highlights the inevitable tension among generalized "principles" of religious liberty, begging for a methodology for resolving them. The preferred methodology of many members of the Court increasingly appears to be originalism—in the recent gun-control case, the decision of the majority was originalist all the way down.[74] That approach may not be the best way to continue the American experiment of religious liberty, especially in light of so many years of precedent, but if it is not, in the next edition of *Religion and the American Constitutional Experiment*, Witte, Nichols, and Garnett would do well to say why.

[73] 142 S. Ct. 2407, 2433 (2022).
[74] *See* New York State Rifle & Pistol Association v. Bruen, 142 S. Ct. 2111 (2022).

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