RELIGION ON TRIAL

How Supreme Court Trends Threaten the Freedom of Conscience in America

Phillip E. Hammond
David W. Machacek
Eric Michael Mazur

A Division of Rowman & Littlefield Publishers, Inc.
Walnut Creek • Lanham • New York • Toronto • Oxford

AltaMira Press
A division of Rowman & Littlefield Publishers, Inc.
1630 North Main Street, #367
Walnut Creek, California 94596
www.altamirapress.com

Rowman & Littlefield Publishers, Inc.
A wholly owned subsidiary of
The Rowman & Littlefield Publishing Group, Inc.
4501 Forbes Boulevard, Suite 200
Lanham, Maryland 20706

PO Box 317
Oxford
OX2 9RU, UK

British Library Cataloguing in Publication Information Available

Library of Congress Cataloging-in-Publication Data

Insert CIP data

Printed in the United States of America

∞™ The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI/NISO Z39.48-1992.

[T]he American Creed facilitates the appeal from the actual to the ideal. When we talk of the American democratic faith, we must understand it in its true dimensions. It is not an impervious, final and complacent orthodoxy, intolerant of deviation and dissent, fulfilled in flag salutes, oaths of allegiance, and hands over the heart. It is an ever-evolving philosophy, fulfilling its ideals through debate, self-criticism, protest, disrespect, and irreverence; a tradition in which all have rights of heterodoxy and opportunities for self-assertion. The Creed has been the means by which Americans have haltingly but persistently narrowed the gap between performance and principle.

—Arthur M. Schlesinger Jr.
The Disuniting of America

Contents

Foreword

Religious freedom is one of America's most cherished traditions. Religious historian Sanford Cobb once referred to the American tradition of religious freedom as "America's greatest contribution to human civilization." Cobb was surely right in his assessment, as it has been the United States which has led the way in enshrining religious freedom as a basic human right, sacred in itself, which must be protected from powerful but sometimes misdirected governmental authorities. Yet the task is not as easy as it sounds. Good people disagree over the meaning of religious freedom, how best to protect religious freedom, how far persons should be given the freedom to practice unorthodox religions, whether religious pluralism is compatible with religious freedom, the degree to which government should play a role in acknowledging or promoting religion, and even whether nations themselves are religious or secular entities. Each generation of Americans is responsible for both preserving and contributing to our tradition of religious freedom. Because protecting religious freedom is difficult, there is always the danger that religious freedom is in peril. I agree with the authors that we are presently experiencing such a time when our first freedom—religious freedom—is seriously in peril. This book explains why, and tells Americans what they must do to protect their great tradition of religious freedom.

This book possesses the rare virtue of having been written for the general public. Legal professionals and scholars have been debating church-state issues for all of American history, but the insights of those debates have seldom reached the public. It is important that the public understand these debates because their votes, especially in national elections, have a powerful influence on those who make and shape law and thus on the direction of religious freedom in the United States. It is not in the halls of academia that important decisions about the direction of U.S. law are made, but in the realm of public discourse. Here, Hammond, Machacek, and Mazur address the public with their concerns about the future direction of church-state jurisprudence. I would encourage every American to read this book before he or she votes. It may have a strong influence on the persons we put into public office.

The authors believe deeply in a much maligned doctrine, the separation of church and state. They believe that the greatest liberty is afforded by leaving matters of conscience for the individual to decide, and removing government's ability to interfere with those decisions. On this point, they "take alarm at the presence in our government—indeed, on the Supreme Court, an institution charged with protecting our liberty from arbitrary laws—of some who would erode that liberty by allowing voting majorities to impose their own moral judgments—often derived from sectarian religious beliefs—on others, who would erode that liberty by allowing greater government regulation and endorsement of religion, indeed who deny the very principles from which religious liberty was derived." Indeed, what Justice Sandra Day O'Connor has referred

to as "well-settled First Amendment jurisprudence, Supreme Court decisions that once upheld church-state separation as the inviolable method of protecting religious freedom," is now being eroded, slowly and almost imperceptively, but nevertheless eroded. This process of erosion, of decline, needs to be understood, widely understood, lest we lose our way and one day discover that religious freedom is a thing of the past. This book will

do much to reawaken Americans, reawaken them to protecting the one principle—religious freedom—that has been most responsible for making America one of the great political experiments in human history.

Derek H. Davis
Director, J. M. Dawson Institute of Church-State Studies
Baylor University
Waco, Texas

Preface

Collaboration is not at all uncommon for academic writers, but this particular collaboration is unusually meaningful because it grew out of an unusually strong relationship between a mentor and two of his students. The book was conceived at a party celebrating Phillip Hammond's retirement from a remarkably productive forty-two-year academic career. During that event, for which several of Hammond's former students had returned to Santa Barbara, California, the question was raised whether he planned to continue writing after retirement. No one was surprised to learn that he would continue writing—for many of us, writing is not so much a job as a habit—and the conversation turned to possible topics. During that conversation, the suggestion was made that some of what he had already said to academic audiences ought to be said to the general public also. We had in mind his writings on church-state issues and, in particular, two recent essays on shifts in church-state jurisprudence at the Supreme Court. These form the basis of chapters 5, 6, and 7 of this book.

In retrospect, we might have expected that Hammond's reply would consist of an invitation to collaborate. Having previously collaborated with him on other projects and having developed our understanding church-state issues under Hammond's tutelage, David Machacek and Eric Michael Mazur eagerly accepted. In a sense, therefore, this book represents a passing of responsibility for a tradition of knowledge from one

generation to the next, a responsibility not merely to preserve that tradition but also to build upon it.

In many ways, the story of how this book was conceived is analogous to the story we tell in the book. We contend that the Bill of Rights was never intended to put the matter of rights to rest but rather to ensure that the debate over rights would continue beyond the founding generation; thus that Americans' understanding of their rights would continue to evolve. Indeed, the Founders thought, wisely, that the rights of the people of the United States would be *better* protected by a lively and ongoing public discourse about rights than by words on paper. The example of the declarations of rights in the state constitutions had demonstrated the futility of what James Madison called "parchment barriers" to the abuse of rights. To whatever extent a national bill of rights was going to be successful, it would be by generating among Americans a spirit of reverential respect for rights rather than by setting down in precise wording what those rights were or placing specific legal restrictions on the powers of government. The *spirit* of the Constitution and Bill of Rights was, in the minds of the Framers of American government, more powerful than the letter of the law. Although we discuss the intentions of the Framers, therefore, we do not share the mistaken belief, so common in political rhetoric today, that knowing the intentions of the Founders absolves us of thinking for ourselves about these issues.

Each generation of Americans inherits a tradition of rights and the responsibility of both preserving and contributing to that tradition. As in academic disciplines, this passing of the mantle of freedom involves both promise and peril. There is promise in that the present generation may discover new meanings of liberty or that they may correct prior misunderstandings. But there is also the risk that in passing custodianship of rights from one generation to the next something of great importance will be lost. We fear that the freedom of conscience is now in jeopardy, and we hope that this book helps to turn this perilous tide.

Introduction

In August 2003, Roy Moore, the chief justice of the Alabama State Supreme Court, defied a federal court ruling, and the consensus of his judicial peers, by refusing to remove a nearly three-ton monument of the Ten Commandments that he had installed in the rotunda of the Alabama Supreme Court building. Earlier that summer, the U.S. Supreme Court declared unconstitutional a Texas law prohibiting same-sex sodomy, a decision that liberal-minded Americans praised as ending government sponsorship of a sectarian moral code and conservatives condemned as hostility toward "traditional" religious values. A year earlier, in July 2002, the decision of a federal circuit court declared unconstitutional the practice of reciting the Pledge of Allegiance in public schools because it contains the words "under God." These events, unsurprisingly, set off controversy nationwide, as advocates for a greater role for religion in public life battled advocates of greater church-state separation.

Tellingly, people on both sides in these debates articulated their positions in terms of First Amendment protections of religious liberty. Other issues were involved, of course—issues such as the intervention of the federal government in the states and the power of courts to overrule the will of the majority. But to the minds of most Americans, the core issue was the freedom of religion, and people on both sides of these, and similar, debates saw themselves as defending the freedom of religion. There is only a very radical minority in the United States that advocates

less religious freedom—those who would dismantle the First Amendment and establish their own religion as the official religion of the nation. This book is not written for them. It is written, rather, for the overwhelming majority of Americans who believe in religious freedom but may disagree about how best to protect and preserve it.

Indeed, there are probably finer points on which we, the authors, may not fully agree. However, we have come to a consensus on the central theme of this book, which is that what the First Amendment protects is the freedom of conscience. And the purpose of this book is to explain how we arrived at this conclusion, what it means for contemporary debates about church-state issues, and why we believe it leads to the greatest liberty and justice for all, which, we assume, is the end desired by virtually all Americans.

Although scholarship led us to the argument presented in this book, we write here not as scholars but as citizens and as advocates of the separation of church and state. The considerations presented herein have led us to believe that the greatest liberty is afforded by leaving matters of conscience for the individual to decide. And we take alarm at the presence in our government—indeed, on the Supreme Court, an institution charged with protecting our liberty from arbitrary laws—of some who would erode that liberty by allowing voting majorities to impose their own moral judgments—often derived from sectarian religious beliefs—on others, who would erode that liberty by allowing greater government regulation and endorsement of religion, indeed who deny the very principles from which religious liberty was derived.

We suffer no illusions about the fact that some, having considered our position and having recognized some of its implications, will continue to disagree with us. We can only hope that their dissent will be based on a conscientious and reasoned assessment of what approach to church-state relations will best further the ideals of liberty rather than on intentional ignorance and bigotry.

This book is organized around a premise that we believe is central to American history and culture—the premise that, from

the beginning of this nation, changes in society have been mainly in the direction of greater and greater individual freedom. These changes have, of course, often been resisted, but freedoms, once won, have not been revoked except under extraordinary circumstances, such as during war when, for example, restrictions were placed on travel and rationing was imposed.

Our premise is nicely illustrated by the remarks of President George W. Bush following Senator Trent Lott's egregiously segregationist statements in December 2002 at Senator Strom Thurmond's birthday party. Bush said, "Recent comments by Senator Lott do not reflect the spirit of our country. . . . Every day our nation was segregated was a day that America was unfaithful to our founding ideals."[1] No one, we submit, would take Bush to be saying that segregation and segregationists no longer exist; rather, he is identifying a promise of freedom inherent in the founding of the United States, a promise that has been sought, partially met, and is still being pursued. Put another way, George Bush is implying that these "founding ideals" really exist, even if they are not always practiced.

There is, however, another implication in Bush's remarks that Bush himself probably does not understand—that changes made in the direction of our founding ideals cannot be reversed without violating those ideals. Thus, when Bush calls for the return of prayers to the public schools, for the deregulation of rapacious corporations, or for restrictions on women's reproductive rights, he is misunderstanding American history and culture in the same way Trent Lott does. There *is* direction to changes in American society that accord with the ideals identified in the Declaration of Independence and given organizational form in the U.S. Constitution.

We are not so naïve as to think these changes cannot be neutralized, even reversed. When that happens, however, notice will be taken and appeals to the "founding ideals" will be invoked. As Justice Sandra Day O'Connor said in her concurring opinion to Justice Antonin Scalia's majority opinion in the 1990 *Smith* decision (that ignored many prior free exercise precedents pertinent to that case), it "dramatically departs from well-settled First

Amendment jurisprudence . . . [and] is incompatible with our Nation's fundamental commitment to individual religious liberty." But that opinion was written by Justice Scalia who, as we shall see later, shows many signs of not believing in any *natural* right to religious liberty.

Nor are we "triumphalist" in imagining that America's founding ideals will fully prevail. We are guided rather by the notion that a choice made at one time will inexorably set in motion the forces that create choices to be made at a later time. The fulcrum choice at the center of our book is the 1940 *Cantwell* decision that unanimously declared the right of a Jehovah's Witness to solicit without a city license because he was *religiously* motivated. This decision overturned—in the direction of greater religious liberty—a precedent that had been followed since 1879. But this choice eventually forced onto the Supreme Court's agenda two additional issues that could not be dodged. One issue was the question of limitations. Obviously, religious motivation cannot justify just any action, but on what basis can it be limited? The second issue forced onto the Court by *Cantwell* was the question of *when* such motivation could be regarded as truly religious. Reluctant in the past to define what *is* religious, the justices came to regard conviction or conscience as the functional equivalent of religion and a characteristic that *could* be defined without entangling the Court in questions of religious truth.

Our argument is organized in three parts. First, we examine the origin of the U.S. Constitution and Bill of Rights. Since the regressive turn in current Supreme Court jurisprudence is usually carried out in the name of the Framers' "original intent," we look for what must have been the thinking of the Framers of the Constitution as they set up a tripartite government of checks and balances. We look especially at the role of the judicial branch and conclude that the Framers would applaud the expanded notion of religious liberty that emerged in twentieth-century jurisprudence.

Second, we look at the record of the judicial system from 1789 through the 1930s. We learn that the narrow understanding of the First Amendment advocated by today's regressive justices does not reflect the thinking or intentions of the eighteenth-

century Framers of the Constitution and Bill of Rights but rather reflects an understanding of church and state that emerged in the nineteenth century.

Third, we look closely at the last half century of U.S. Supreme Court decisions on church-state issues, seeing them as a critical battleground for progressives who would further expand religious liberty and for regressives who would subject that liberty to majority rule.

The resolution of these two issues in favor of an ever-expanding religious freedom—what Justice O'Connor calls "well-settled First Amendment jurisprudence"—is now under assault. Religious liberty or conscience is in jeopardy, threatened by those who in our view woefully misconstrue the course of religious freedom in America.

Notes

1. *New York Times*, 13 December 2002, 1, 22.