REFLECTIONS ON RELIGION & LAW

Reflections on Religious Liberty, Free Exercise, and Culture, With Special Attention to James Madison

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The Supreme Court's decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (no. 19-431), on July 8, 2020, serves to remind us of the highly charged nature of so-called "religious liberty," or "free exercise." Especially at issue in this case was the question of religious exemption from generally applicable laws: were the Little Sisters obliged to offer contraceptive medications and services to their employees under the terms of the *Affordable Care Act* (ACA)? By an overwhelming majority (7-2), the Court ruled that the Little Sisters were *exempt*.

The following is a modest sketch of how one might frame a novel counter-argument against at least one class of religious exemptions. Needless to say, the legal and political status of religious exemptions (*in toto*) is freighted with burdens amplified by religious passions, stirred through a long history of competing court decisions and legislation. For that reason alone, a full and proper treatment of religious exemption calls for a major investment of specialized intellectual effort. But sometimes those outside the main arenas of discourse notice certain oddities escaping the attention of insiders. It is in that spirit of a curious outsider that I offer the following reflections.

In addition to *Little Sisters of the Poor*, two related Supreme Court decisions commanded attention this past session. *Our Lady of Guadalupe School v. Morrissey-Berru* (no 19-267) and *St. James School v. Biel* (no. 19-348)—consolidated and decided together, also on July 8—were additional victories for the rights of religious institutions over individual plaintiffs. These two California cases challenged the "ministerial exception" principle in suits of wrongful dismissal by Catholic schools. *Our Lady of Guadalupe* involved a 60-year-old 5th and 6th grade teacher, Agnes Morrissey-Berru, whose suit alleged age discrimination after she was denied a contract renewal by the school. *St. James School vs. Biel* involved Kristen Biel's suit brought under the *Americans with Disabilities Act* (42 U.S.C. §12101). Biel's school did not renew her contract after she notified them of having been diagnosed with breast cancer. In the summer of 2019, she successfully challenged the "ministerial exception" principle in the U.S. 9th Circuit Court of Appeal (911 F.3d 603, 2019; rehearing en banc denied, 926 F.3d 1238, 2019); the decision was appealed to the Supreme Court, but Biel died of complications related to her cancer before the Court ruled

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on the appeal. Her husband represented her estate to the Court (Godnough and Haberman 2020; Liptak 2020; Savage 2020).

These three decisions represent the latest in the ongoing reassessment of what had until lately been considered a settled principle of religion and law: the principle of the "ministerial exception" which pits employee claims for civil redress against their corporate religious employers' claims to "exception" from such suits. These cases show how the principle of equal civil rights may now be considered threatened by the unchecked expansion of accommodations made to corporate religious bodies as a result of their rarely contested appeals to such principles as "ministerial exception." The July 2020 decisions seem to strike a blow at the principle of equal individual civil rights by expanding the range of corporate religious liberty. In the following paragraphs I shall sketch the outlines of a formal critique of the expansion of the rights of corporate religious freedom; as we will see, they reflect neither foundational American legal traditions or culture nor an adequate understanding of what religions are.

The recent spate of cases advancing corporate religious exemptions seems to have taken its rise in part as a reaction to the perceived threats to corporate religious liberty, flowing from the Supreme Court's 1990 decision in *Employment Division, Oregon Department of Human Resources v. Smith* (494 U.S. 872; see Magarian 2016: 441-442). The Smith case concerned an Oregon State Supreme Court ruling which identified possession of peyote (a Schedule 1 controlled substance) as a violation of Oregon law, but ruled that two men (Alfred Smith and Galen Black, both members of the Native American Church) who had been fired for using peyote in a religious ritual (not during work) were nonetheless eligible for unemployment compensation (*Smith v. Employment Division, Deptartment of Human Resources*, 307 Ore. 68, 1988).[1] The U.S. Supreme Court concurred with one element of Oregon Court's ruling: that Smith and Black "were denied by the State of Oregon under a state law disqualifying employees discharged for work-related 'misconduct'" even though Smith and Black claimed to possess peyote for religious use (494 U.S. 872, at 874). Oregon's restriction, however, did not directly discriminate against religious practice, but applied generally—even to the possession of peyote in religious ceremonies, such as those of the Native American Church. On that basis, the High Court rejected the Oregon State Supreme Court decision. Writing for the majority, Justice Antonin Scalia reaffirmed the Court's assertion in *Reynolds v. United States* (98 U.S. 145, 1878) that no one can refuse to comply with a religiously neutral, generally applicable law just because it conflicted with

[1] In 1988, the Supreme Court ruled that, since Oregon law did not clarify whether or not ingestion of a controlled substance constituted "possession," and thus whether or not ingesting peyote was protected by the First Amendment as a religious ritual, they had no choice but to vacate the lower court ruling and remand it for further consideration (*Employment Division, Department of Human Resources of the State of Oregon v. Smith and Black*, 485 U.S. 660). The Oregon Supreme Court subsequently ruled that, while ingestion constituted possession, the religious ritual was nonetheless protected by the First Amendment. The State of Oregon again appealed to the U.S. Supreme Court, which ruled more directly on the matter in 1990. For a full history of the case and those involved, see Epps (2009).

her religious belief. In the language of Reynolds, were such an accommodation to be allowed, it would "permit every citizen to become a law unto himself" (see *Reynolds*, at 167; *Smith*, at 879).

Recent cases—particularly *Hosanna-Tabor Evangelical v. EEOC* (565 U.S. 171, 2011) and *Burwell v. Hobby-Lobby Stores, Inc.* (573 U.S. 682, 2014)—have, in effect, challenged the Smith decision based (in part) on the strength of the federal *Religious Freedom Restoration Act* (42 U.S.C. §2000bb; hereafter cited as "RFRA"), even in the face of the 1997 Court's ruling limiting its constitutionality (*Beorne v. Flores*, 521 U.S. 507).[2] Christopher Lund has argued, however, that even before RFRA, the 1987 decision in favor of the Church in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos* (483 U.S. 327) could be seen as the true beginning of the recent movement toward greater recognition of the rights of religious corporations.

> Congress had statutorily exempted religious organizations wholesale from the federal prohibition on religious discrimination in employment. Amos asked whether such a broad exemption—which barred claims by any employee, not just those doing religious work—violated the establishment clause. (Lund 2016: 286)

Even though Amos offered the theoretical possibility that "for-profit" organizations—even religious ones—could be exempted from generally applicable laws regarding discrimination in employment. Lund identifies only one case—*EEOC v Townley Engineering* (859 F. 2d 610, 1988), also in the 9th Circuit—as having been brought (Lund 2016: 286), and in it the "for profit" organization (Townley Engineering) lost. The 2014 *Hobby-Lobby* case, however, may have been the first analogous suit to succeed, although Lund believes its prospects as a harbinger of the future are hard to judge, even with the assistance of the proliferation of state RFRAs.

The situation in *Hosanna-Tabor* differs from that in *Hobby-Lobby* in that it focuses on a dedicated religious institution, not an otherwise secular corporation, closely held by religious owners with scruples about adhering to given general laws. Cheryl Perich, a schoolteacher employed by the Hosanna-Tabor Evangelical Lutheran church, was denied reinstatement in her job after a period of illness. The church claimed Perich was a church "minister," and had been dismissed for failing to try to resolve workplace issues internally. Perich claimed that as a mere teacher, the ministerial exemption did not apply to her. Instead, she argued that she had been dismissed on the grounds of her disability, following a period of absence from her post. The Court's ruling in the church's favor reaffirmed the "ministerial exception"—in this case, the freedom of religious corporations to select and dismiss its "ministers" as they choose. In *Hobby-Lobby*, the Court ruled that, under the provisions of RFRA, the government must accommodate "closely held for-profit

[2] The Court ruled in *Beorne* that Congress overreached in applying RFRA to state matters. Nine years later, in *Gonzales v. O Centro Espírita Beneficente União do Vegetal* (546 U.S. 418, 2006), the Court used RFRA as the foundation for a religious free exercise exemption from a federal statute.

corporations" from having to abide by the mandate contained in the *Affordable Care Act* to offer contraception benefits to employees, should they have religious grounds for so doing. At the same time, less restrictive means of benefitting from the provisions of the law under objection must be available.

These cases expose a conflict at the heart of the American notion of religious liberty; namely, "religious liberty" means at least two sometimes-incompatible notions of liberty or freedom. On the one hand, as "freedom of religion," "religious liberty" means both the freedom religious corporations or institutions enjoy from political intrusion and their sovereign right to govern themselves and their membership. It is from this notion of religious liberty that the "ministerial exception" gains legitimacy. The government respects the sovereignty of religious institutions in defining orthodoxy and orthopraxy in matters of beliefs and practices, respectively. The principle of "ministerial exception," for instance, has been taken to require the courts to default to religious corporations in matters related to their right to select and dismiss their "ministers." The overarching notion at play here is "freedom of religion" or "corporate religious freedom." For the following reasons, this deference should be challenged.

First, although recent cases arguing for religious exemptions are ordinarily cast in terms of "religious liberty" or "freedom of religion," in the main they advance the interests of religious *corporations*, *institutional* freedom of religion—rather than the interests of the believer's individual conscience. I adopt the conventions of calling "corporate" religious liberty "freedom of religion," primarily because the substantive is *the religion*—an eminently institutional thing. By contrast, individual religious liberty—that is, freedom of conscience—I identify as "religious freedom." Thus, the cases dominating discussion, at least for the past thirty years or so, have been brought by religious *institutions* or *corporations*, such as *Hosanna-Tabor*, *Hobby-Lobby*, and *Little Sisters of the Poor*. But the arguments made on behalf of corporate religious freedom differ fundamentally from cases of *individuals* seeking exemption from military service on the basis of *conscience*—*individual* religious or quasi-religious conscientious objection. The U.S. Supreme Court has ruled in many cases where *individual* plaintiffs sought *individual* exemption from generally applicable laws, such as *Cox v. United States* (332 U.S. 442, 1947), *Witmer v. United States* (348 U.S. 375, 1955), *Seeger v. United States* (380 U.S. 163, 1965), and *Gillette v. United States* (401 U.S. 437, 1971), among others.[3]

Second, jurists, attorneys, and legislators alike commonly run together corporate and individual religious liberty as if their differences had no legal consequences. But these are different concepts that arose as well in different historical contexts—individual religious freedom dates from the time of the nation's founding, while an emphasis upon corporate religious freedom is of more recent origin. The failure to recognize and take into account their differences is one factor tending to prejudge disputes occurring within religions in favor of their official hierarchies.[4] Defaulting to the official hierarchy of a

[3] For case histories of individuals who sought religiously based exemptions from military aspects of naturalization, see Flowers (2003).

[4] The Supreme Court first articulated this predisposition in its decision in *Watson v. Jones* (80 U.S. 679, 1872).

religion may seem like adhering to the well-recognized foundational principle of prohibiting governmental intrusion into the inner workings of religious institutions. But the founders also sought to defend the absolute rights of individual conscience, among which would be included so-called "dissenters," without regard to exceptions. But defaulting to the hierarchy in itself constitutes governmental intrusion into the internal matters of contests with so-called "dissenters." It does so because defaulting to any party in a religious dispute is to declare who *speaks* for a religion. The prospect of wading into these turbulent waters may so fill the minds of governmental actors with dread that they immediately seek some kind—*any* kind—of "safe harbor" rather than right what seems a palpable wrong. A flight to safety will not, however, really save deciders from legal incoherence.

Third, originalism—if only in this modest version—still seeks to understand the past in terms of what would make sense to historical actors; it requires nuanced attention to the historical context of laws and legal concepts (Jones 1977; Skinner 1969). This is one reason that typical arguments about the founding generation's understanding of free exercise and / or religious liberty inevitably invoke James Madison. Of equal importance, they also consider the *cultural* milieu in which Madison's sensibilities were both understandable and prevalent.

Indeed, they already have found their way into U.S. Supreme Court opinions. There, it has been employed to bolster the case for certain interpretations of the founding generation's understanding of religious liberty, expressed typically by the term "free exercise of religion." Vincent Phillip Munoz, for instance, observes how Justice Sandra Day O'Connor's approach to the matter of free exercise takes what I will call a "cultural" turn. "O'Connor proposed," says Munoz, "to examine 'the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause.'" Pointedly, she "did not … conduct an examination of the First Amendment's text or its drafting in the First Congress." Thus, far from restricting her attention to such classic statutory documents, O'Connor asserted "that other sources that 'supplement the legislative history' could be consulted." As a result, Justice O'Connor cast a much wider evidentiary net, taking in the lived milieu of the political culture, often assumed by the founding generation. O'Connor, accordingly, "focused on the text of early American legal documents (in particular, state constitutions adopted during the Founding period), *the Founders' political practice, and the writings of the leading Founders (especially James Madison)*" (Munoz 2008: 1088-1089; emphasis added). Even in arguing against O'Connor, Justice Scalia uses her historico-contextual formula to inform his arguments. Scalia famously relies on church-state historian Philip Hamburger's article "A Constitutional Right of Religious Exemption" (1992; see Munoz 2008: 1095). Hamburger sounds the same notes as O'Connor in making a plea for greater reliance on a more context-rich database for discussions of free exercise: "Even if the Court does not adopt late eighteenth-century ideas about the free exercise of religion, we may, nonetheless, find that the history of such ideas can contribute to our contemporary analysis" (Hamburger 1992: 915). Hamburger notes that well-respected church-state scholar Michael McConnell argues that "… American constitutions subordinated civil law, whenever practicable, to each individual's personal judgment about his or her higher obligations." Hamburger takes strong exception to

McConnell's view, noting that "In fact, late eighteenth-century Americans tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws" (1992: 916).

The legitimation for this legal conviction, not surprisingly, says Hamburger, lay in the *culture* of religious, social, and political individualism.

> [B]y the last half of the eighteenth century, the notion of free exercise according to conscience was hardly a radical idea. Increasing numbers of eighteenth-century Americans asserted that an individual's relationship to the divine being was a matter of conscience and entirely personal. (1992: 933)

This cultural fact is why we must pay special heed to a conceptually distinct notion of religious liberty, one distinct from this corporate sense of the freedom of religion. I refer, naturally enough, to freedom of *individuals* to be religious (or not) as dictated by conscience. Or, as the Presbyterians of Virginia declared in 1785: "Religion is altogether personal, and the right of exercising it unalienable" (reprinted in James 1899: 237; quoted in Hamburger 1992: 933). In 1791, Rev. Israel Evans (1747-1807)—the same Rev. Israel Evans who offered the thanksgiving prayer after Cornwallis's defeat at Yorktown—preached to the New Hampshire election board:

> As the conscience of man is the image and representative of God in the human soul; so, to him alone it is responsible. In justice, therefore, the feelings and sentiments of conscience, and the moral practice of religion, must be independent of all finite beings. Nor hath the all-wise Creator invested any order of men with the right of judging for their fellow-creatures in the great concerns of religion. Truth and religion are subjects of determination entrusted to all men; and it is a privilege of all men to judge and determine for themselves. (Evans 1791: 6-7; quoted in Hamburger 1992: 933)

While this freedom is usually read only as freedom of religious belief, it also encompasses freedom to *practice* in matters of religion, such as freedom of liturgical practice. Familiar cases of "religious freedom" in action would include the Martin Luther's posting of his 95 Theses, Roger Williams' critical attitude and behavior toward the established church of the Massachusetts Bay Colony, William Penn's pacifism and assertion of free will, or the public preaching of Baptist ministers against the orders of the established Anglican church in James Madison's Virginia, and so on.

"Religious freedom" derives more broadly from cultural values such as human dignity and personal autonomy, notably championed by James Madison in his general affirmation of the freedom and sanctity of *conscience*. Madison carried forward not only the better-known views of John Locke in this regard, but also teachings of freedom of individual conscience rooted in the Scottish Enlightenment. "Conscience is the most sacred of all property …" Madison wrote in the *National Gazette*, and added to that a distinctly religious note, namely that "to invade a man's conscience" is a great crime, since a person's conscience "is more sacred than his castle …" (1792). Upon such a basis of the absolute

inviolability of conscience, Madison's "Memorial and Remonstrance against Religious Assessments" could specify that "the Religion then of every man must be left to the conviction and conscience of a man; and it is the right of every man to exercise it as these may dictate. This right is in its nature in an unalienable right" (1785). Thanks to the education Madison received from his enlightened Scots' mentors Donald Robertson and John Witherspoon, "religious freedom" is fundamentally what the U.S. Constitution asserts as both individual religious freedom—"free exercise" of religion—and the proscription against any institutional monopoly or corporate "establishment" of a religion.

Examples of the same culture of conscience are legion in the writings of the founding generation. To return to his sermon of 1791, Rev. Evans attests to the absolute sovereignty of the individual conscience in conceiving "religion" over against the right of "any order of men" of "judging for their fellow creatures"—a phrase that could conceivably include religious corporations. He then underlines the deeply intimate and individual character of a divinely controlled conscience.

> Only the Supreme Governour of mankind has a perfect right to receive the homage of the human mind; it is his peculiar prerogative to controul the consciences of men by his infinitely and equitable laws. True religion must therefore be founded in the inward persuasion and conviction of the mind; for without this it cannot be that reasonable service which is pleasing to God. (1791: 8-9)

In bringing forth testimony of emblematic members of the founding generation—such as Madison, Evans, or the Virginia Presbyterians—to the supremacy of the individual conscience in religious matters, I am not asserting the future or present absolute or exclusive primacy of individual rights, or even the rights of individual conscience in all matters of religion. Individual conscience is nonetheless essential, and even exclusively so, in circumscribing the interests of free exercise or religious liberty in the context of the First Congress's original meaning (Munoz 2008). While the notion of "free exercise" applies to <u>both</u> individuals and religious groups, the notion of "establishment" uniquely restricts religious institutions, while parallel restrictions upon the freedom of religious conscience do not seem to exist. A closer look at the thinking of critical founders in the area of religious liberty (like James Madison) shows how interrogating this asymmetry pays dividends.

On balance, Madison's example shows how a cardinal champion of religious liberty fretted over the dangers inherent in corporate freedom of religion unequaled by similar concerns about individual freedom of religious conscience. Early in the 19th century, Madison (at least twice) warned explicitly of the dangers of "Ecclesiastical Bodies" working to increase their "silent accumulations and encroachments" (see, for example, Madison 1820). Corporate religious power corrupts, Madison suggests, and *a fortiori,* corporate religious power to increase "encroachments"—exceptions and accommodations—corrupts absolutely. The precedents of the Anglican establishment in both the United Kingdom and the Virginia Commonwealth taught Madison this self-same lesson. Moreover, the Anglican establishment of Virginia's persecution of a group of <u>individual</u> Baptist ministers showed

how a religious corporation, fortified with accommodations and exceptions, would be tempted to treat those it deemed unorthodox. Further, the level of outrage in Madison's letter to his friend, William Bradford suggests that Madison's suspicion of religious institutions would not suddenly pass (Madison 1774). Indeed, on 21 February 1811, Madison sent a veto message to Congress against its attempt to approve even the simple act of "incorporation" of the Episcopal Church of Alexandria, Virginia. Explaining his suspicions in a later memorandum, Madison argued that incorporation would not only be tantamount to an "establishment," but would be unhealthy for the churches. Doing so encouraged holding and "indefinite accumulation of property … in perpetuity by ecclesiastical [c]orporation" (Madison 1820). Munoz suggests that Madison was not alone in his discomfort with "religious exceptions"; as Hamburger amply documents, virtually all founders were (1992). This may explain Munoz's claim that "… the evidence available from the First Congress suggests … that the Free Exercise Clause does not include a right to religious exemptions," whether corporate or individual. Says Munoz, this "is the interpretation most consonant with the original meaning of the Free Exercise Clause as it was understood by the First Congress" (Munoz 2008: 1120). We must steadfastly share this perspective about how today we have strayed so far from the founding principles despite the ruling since Smith from the Supreme Court.

What shall we conclude about equity in employment cases like those involving religious corporations versus individuals like Cheryl Perich, Agnes Morrissey-Berru, and Kristen Biel, among others? I believe the courts ought to give the decisions of 8 July 2020 another look and a new round of judicial review. I say this based to a considerable degree on an originalist point of view alone: "religious freedom," the rights of religious individuals, the sacrality of conscience, are central to the American foundation's notion of religious liberty in a way that *corporate* freedom of religion is not. This suggests originalist historical support for shifting away from the present practice of deferring to *corporate* religious rights back to one conceding more equitably to individual religious and civil rights. In doing so, the courts need not fear breaking precedent with the venerable "ministerial exception" by venturing into the treacherous waters of theological dispute. Even though these recent decisions did take account of the criteria of "minister," the courts still may wrongly default to the positions held by the religious corporations, as they increasingly seem to be doing, that "every employment dispute … involves doctrinal matters" or a properly "religious" role (Hill 2016: 435). This may, in large part, depend on the Court relying on a concept of religion that fails to give liturgical functions their due importance in defining religion. Not every teacher is a preacher, even one who may lead homeroom prayers beginning a school day.

Moreover, even where a teacher may also be a preacher (and therefore subject to the "ministerial exception"), the courts can hardly claim "hands off" of internal religious matters. In defaulting to hierarchies, they have *already* ventured into disputes over orthodoxy and orthopraxy. In having arguably deferred to ecclesiastical hierarchies or corporate religious boards, the courts have *ipso facto* taken sides in deciding who the "insiders" and "outsiders" are; who speaks with authentic religious authority and who is just a bothersome dissenter, and hence, whether to inhibit or promote change within a religion. The least the courts could do is to judge each case on its merits, and not automatically

insulate all employment issues from judicial review by appealing to the "ministerial exception" (Hill 2016: 436). In that way, at least, the courts would re-establish some of the balance between *corporate* "freedom of religion" and *individual* "religious (and civil) freedom."

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