No. 19-123

In The
Supreme Court of the United States

SHARONELL FULTON, ET AL.,

Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF EVANGELICALS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

CARL H. ESBECK
R. B. PRICE EMERITUS
PROFESSOR OF LAW
Hulston Hall, Room 209
820 Conley Avenue
Columbia, Missouri 65211
(573) 882-6543
esbeckc@missouri.edu

TIMOTHY BELZ
Counsel of Record
OTTSEN, LEGGAT & BELZ, L.C.
112 South Hanley, Suite 200
St. Louis, Missouri 63105
(314) 726-2800
tbelz@olblaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Should *Employment Division v. Smith*, 494 U.S. 872 (1990), be overruled because it is inconsistent with the text and the original public meaning of the Free Exercise Clause of the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE[1]

Founded in 1942, the National Association of Evangelicals is an organization of evangelical Christian denominations, institutions, and social-service providers that includes more than 45,000 local churches from 40 denominations.

SUMMARY OF ARGUMENT

When interpreting the Free Exercise Clause, the Supreme Court should be guided by the phrase's text and its original public meaning. To ascertain the latter, the Court should consider deliberations in the First Federal Congress over the bill of rights from June through September 1789. In turn, those deliberations are best understood in the context of the immediately preceding controversy over adding a bill of rights as a way of inducing states to ratify the 1787 Constitution. Federalists initially opposed a bill of rights, whereas it found support with Antifederalists who worried about too much power vested in the new central government.

When considering ratification, seven of the thirteen states voted on recommending to the forthcoming Congress amendments that would protect religious liberty. All seven amendments were without conditions.

[1] Amicus certifies this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus or its counsel has made a monetary contribution toward preparation or submission of this brief. All parties have consented to the filing of this brief.

That both Federalists and Antifederalists were willing to limit unconditionally the federal government when it came to laws burdening religious liberty made sense all around. Federalists insisted that the government contemplated by the 1787 Constitution was delegated no power to limit the exercise of religion. They saw the amendment as harmlessly denying powers never delegated. The Antifederalists wanted additional written limitations on the federal government. In their view, such an amendment would help to ensure that any power with respect to prohibiting religious exercise remained in the states.

At the onset of the Revolution, eleven of the thirteen states adopted constitutions of their own. In contrast with the Free Exercise Clause, the religious liberty provisions in these state constitutions were conditional on the claimant of the right not breaching the peace, engaging in licentious acts, and the like. Temporizing the religious-liberty right was in keeping with Lockean natural rights and was sensible because it was at the state level where all the interaction occurred between religious people and civil government. In contrast, the Free Exercise Clause's disempowering the federal government when it came to laws prohibiting religious exercise aligns with the publicly stated positions of both Federalists and Antifederalists.

Given that the plain text and its original meaning point to a Free Exercise Clause that completely disempowered the new central government when it came to laws prohibiting religion, *Employment Division v.*

Smith, 494 U.S. 872 (1990) is to the contrary and should be overruled.

ARGUMENT

Introduction

As an interpretive principle, the Supreme Court should first consider the plain wording of the Free Exercise Clause. There is more content here than commonly believed. While the text cannot conclusively resolve the case at bar involving Catholic doctrine, foster care placements, and same-sex parental homes, the text does lay down fixed parameters which limit the governmental regulation of religious practices. *See* Part I, below.

Beyond the text, courts should be guided by the original public meaning of the Free Exercise Clause. To determine that meaning, courts should draw on the debates in the First Congress from June through September 1789. *See* Part III, below. Those debates, in turn, are best understood in the context of the immediately preceding controversy in the state conventions over ratification of the 1787 Constitution, with its surge in support for a bill of rights.[2] In the course of that controversy, seven states voted on whether to forward to Congress proposed constitutional

[2] *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 508-25 (2011) [hereafter *Textualism and Originalism*].

amendments protecting religious liberty. It is no coincidence that all seven drafts were unconditional, just as the Free Exercise Clause is unconditional. *See* Part II, below.

Once reported out by Congress in September 1789, twelve constitutional amendments were sent to the states.[3] The ensuing ratification also bears on original meaning. Unfortunately, there are few surviving records that shed light on the meaning of the Free Exercise Clause as debated in the states. There are records from only two states. Massachusetts did not record any discussion about the Free Exercise Clause. The Virginia record, while scant and complex, is clouded by the posturing of Antifederalist state senators vaguely asserting that the amendments were inadequate to protect religious freedom. The claim was never made specific. The senators were stalling, and the complaints are dismissed by historians as a last stand by Antifederalists disgruntled over the loss of state powers.[4]

Just as revolutionary fighting was getting underway, the Second Continental Congress urged the colonies to declare themselves sovereign states and adopt constitutions.[5] Eleven states did so. These

---

[3] Twelve amendments were considered for ratification. The first and second proposals did not receive the requisite three-fourths affirmation, thus the Third Article was renumbered as "First Amendment."

[4] Records retained by Massachusetts and Virginia are discussed in *Textualism and Originalism* at 575-83.

[5] CARL H. ESBECK & JONATHAN J. DEN HARTOG EDS., DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE

constitutions typically addressed individual rights, chief among them being religious liberty. Unlike the unqualified wording of the Free Exercise Clause, these state constitutions often spoke of "unalienable" rights and were contingent on the religious practice in question not disturbing the peace or manifesting acts of licentiousness. *See* Part IV, below. These state approaches to religious liberty help contextualize the meaning of the Free Exercise Clause. The religious-liberty guarantees in state constitutions often had a limitation. Contrariwise, the religious-liberty amendments proposed by seven states for federal adoption were unconditional. The contrast is because states had in mind the natural rights of citizens, whereas the same states wanted to keep the new federal government—a government of limited, enumerated powers—from exercising power over something as sensitive and regionalized as religion. Unsurprisingly, the result is a Free Exercise Clause that was unconditional, thereby agreeable to Federalists and Antifederalists alike.

There are scholars who oppose (or support) *Employment Division v. Smith*, each relying on state court decisions (or their conspicuous absence) in the first half of the nineteenth century.[6] Since the Bill of Rights

---

RELATIONS IN THE NEW AMERICAN STATES, 1776-1833 (2019) 3-4 [hereafter DISESTABLISHMENT AND RELIGIOUS DISSENT].

[6] *Compare* Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) *and* Gerard V. Bradley, *Beguiled: Free*

was inapplicable, these courts followed their own state law, finding (or not) an exemption from general legislation for religious observance. This is not the path to the original meaning of the Free Exercise Clause, a task that instead entails examining the history of the making of a federal—not a state—constitutional restraint.

Part I. Text of the Free Exercise Clause

In relevant part, the First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;. . . .

Semicolons separate the amendment into three clauses, with the first clause about the dual topics of church-government relations and religious liberty.

Although ending with a semicolon, the first clause can stand alone as a complete sentence. While there is but one clause here addressing religious freedom, there are two participial phrases ("respecting an establishment" and "prohibiting the free exercise"). The longstanding convention is to refer to the phrases as the Establishment and Free Exercise Clauses. However, that nomenclature mistakes phrases for clauses. The two phrases modify the sentence's object ("no law") of the verb ("shall make").

Exercise Exemptions and the Siren Song of Liberalism, 20 HOFSTRA L. REV. 245 (1991).

The participial phrases are of equal rank, so each is independent of the other. This is not to say that the two can never overlap, but the no-establishment restraint and the free-exercise restraint give rise to separate writs. It is therefore proper—as the convention has it—to think in terms of two phrases (not clauses) denying authority ("make no law") to the sentence's subject ("Congress").

By its plain words, the Free Exercise Clause is absolute. The term "free" means without restraint. The term "exercise" entails religious practice as well as belief. "Prohibiting" still allows for Congress to make laws *protecting* religious exercise. Finally, one must first have a religion in order to "exercise" it.

In 1789, all agreed that the First Amendment, along with the other provisions of the Bill of Rights, would bind only the federal government. States were already bound by their own constitutions, which in these post-Revolutionary times Americans thought sufficient. Moreover, the Free Exercise Clause restrained Congress as to all its enumerated powers. For example, it limited the federal government concerning the regulation of the territories and District of Columbia, when adopting treaties and conducting foreign relations, in military affairs, when dealing with Indian tribes, and congressional legislation.

In summary, concerning Petitioners' Catholic beliefs about same-sex foster home placements, the issue on appeal reduces to the meaning of the words "no law . . . prohibiting the free exercise [of religion]."

Concerning a discrete but important subject matter, the words are a complete disempowerment of Congress.[7] The text tells us a few additional things about the Free Exercise Clause, but they are not relevant here. For example, religious practices as well as beliefs are safeguarded, and Congress is not barred from protecting religion only prohibiting it. So, it is proper not to stop analysis with the text. It is prudent to search for confirmation of this meaning in historical events and understandings.

Part II: The Constitution's Ratification Turns Into a Rally for a Bill of Rights

For the founding generation of Americans, both religion and religious liberty were sensitive matters. Indeed, if the 1787 Constitution had granted federal power over religion in any plenary sense, that might

---

[7] Early treatises explained "free exercise" in like terms. *See* St. George Tucker, *On the Right of Conscience; and of the Freedom of Speech and of the Press*, *reprinted in* VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 372 (1999) ("Liberty of conscience in matters of religion consists in the absolute and unrestrained exercise of our religious opinions and duties, in that mode which our own reason and conviction dictate, without the control or intervention of any human power or authority whatsoever."); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 116-17 (1825) ("It would be difficult to conceive on what possible construction of the constitution such a power [preventing free exercise] could ever be claimed by congress."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 702 (abridged edition, 1833) (Under the Constitution, "the whole power over the subject of religion is left exclusively to the state governments.").

have prevented an agreement in Philadelphia. Its inclusion in the Constitution certainly would have prevented ratification by the states.

Between December 1787 and July 1788, eleven of the thirteen states did ratify the Constitution.[8] Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut quickly did so. The momentum slowed with Massachusetts. Eventually the Bay State did narrowly ratify, as did Maryland, South Carolina, New Hampshire, Virginia, and finally New York. However, to secure these favorable results James Madison and others were forced to promise that the federal government would adopt a bill of rights.[9]

In anticipation of just such a bill of rights, several states drafted amendments to recommend to the forthcoming Congress. In the task of determining original meaning of the Free Exercise Clause, these state-recommended amendments are highly probative. They were drafted in 1788, just one year before Congress produced the Free Exercise Clause.

What follows is a chronological account of seven states proposing these amendments. Unlike the religious liberty amendments in existing state constitutions (*see* Part IV), these state-proposed amendments would restrain the federal government. The amendments are all, without fail, unconditional—as opposed

---

[8] North Carolina and Rhode Island did not ratify until after the U.S. government was implemented under the Constitution.

[9] For an account of the state-by-state ratification of the 1787 Constitution, see *Textualism and Originalism* at 508-25.

to rights limited by the public peace, acts of licentiousness, or the like. They are unqualified, just as the Free Exercise Clause is unqualified.

In Pennsylvania, Antifederalists proposed amendments to the Constitution,[10] one of which addressed religious liberty: "**The rights of conscience shall be held inviolable, and neither the legislative, executive, nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitutions of the several states, which provide for the preservation of liberty in matters of religion.**"[11] None of the amendments passed, but not because the majority disagreed with them. Rather, Federalists wanted to appear unwavering on the Constitution's overall merits.

In Massachusetts, nine amendments were recommended to Congress.[12] While some passed, an amendment protective of religious conscience did not: "**[T]hat the said Constitution be never construed to authorize Congress to infringe . . . the rights of conscience. . . .** "[13] The vote was unexplained.

---

[10] 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 545-46 (Jonathan Elliot ed., 2d edition, 1996) (1836) [hereafter ELLIOT'S DEBATES].

[11] THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 12 (Neil H. Cogan ed., 1997) [hereafter COMPLETE BILL OF RIGHTS].

[12] 1 ELLIOT'S DEBATES at 322-23.

[13] COMPLETE BILL OF RIGHTS at 12.

The amendments proposed in Maryland were all voted down. As in Pennsylvania, the proposals were not rejected because the majority disagreed with them. Rather, they were rejected because the dominant Federalists wanted to appear unflagging in support of the Constitution.[14] The religious liberty amendment reads: "**That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty.**"[15]

Because it was the ninth state to ratify, New Hampshire has the distinction of being the state that took the Constitution from mere proposal to founding document of a new nation. New Hampshire did recommend a religious liberty amendment: "**Congress shall make no laws touching religion, or to infringe the rights of conscience.**"[16]

Virginia's convention got under way June 1788. Like Antifederalists generally, Patrick Henry opposed ratification because the proposed Constitution took too much power from states.[17] The issue of religious freedom came up occasionally, and each time in reply to bald claims by Henry that the Constitution put civil liberties at risk, including the right of conscience, while possibly empowering Congress to establish a national religion. On June 25, Virginia ratified by the margin of

---

[14] LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 88 (revised edition, 1994).

[15] 2 ELLIOT'S DEBATES at 553.

[16] 1 ELLIOT'S DEBATES at 326.

[17] *Id.* at 396.

89 to 79. However, in order to secure passage, the Federalists agreed to a list of recommended amendments.[18] A motion by Henry had forty amendments, the first twenty paraphrasing Virginia's Declaration of Rights.[19] The twentieth amendment addressed religious liberty:

> **That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience. . . .** [20]

Overlapping the dates of Virginia's convention, New York commenced meeting on June 17, 1788. The delegates had full knowledge that the new government was a *fait accompli*. Was New York prepared to go it alone without her sister colonies? An Antifederalist, John Lansing, introduced several amendments as a condition of ratification, but his motion was defeated.[21]

---

[18] In Virginia, Madison received Baptist backing for the Constitution by promising a bill of rights that protected religious freedom. STEVEN WALDMAN, FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA 136-37 (2008).

[19] RICHARD BEEMAN, PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 399-400 (2009) [hereafter BEEMAN]; 3 ELLIOT'S DEBATES at 593 (Henry's motion).

[20] 3 ELLIOT'S DEBATES at 659.

[21] 2 ELLIOT'S DEBATES at 410-12.

They then were adopted as recommendations.[22] One addressed religious freedom: "**That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience. . . .** "[23]

North Carolina's convention did not assemble until July 1788. In early August, the convention voted not to ratify.[24] Thus, North Carolina joined Rhode Island as holdouts. Although ratification failed, North Carolina did propose federal amendments. Twenty amendments were to comprise a bill of rights, and twenty-six additional amendments sought to alter the frame of the federal government.[25] North Carolina's amendment with respect to religious freedom was nearly identical to that of Virginia.[26]

To summarize, all seven of these state-authored amendments intended to restrain the federal government were unconditional, just as the Free Exercise Clause is unconditional. This was no coincidence. Nor should it be a surprise. When it came to the powers

---

[22] *See* BEEMAN at 403.

[23] 1 ELLIOT'S DEBATES at 328. The adverb "peaceably" does not impose a condition on the noun "right." Unlike adjectives that modify nouns, the adverbs "freely" and "peaceably" add description to the verb "to exercise." The condition of freedom obviously comes from the government and so the peace does as well. The sense of the passage is, " . . . people have [a] right . . . to exercise their religion" in freedom and peace.

[24] BEEMAN at 404.

[25] BEEMAN at 405.

[26] 4 ELLIOT'S DEBATES at 244 (there were minor changes in punctuation from the Virginia version).

assigned the federal government, no one envisioned a government with jurisdiction to prohibit religious observance. Federalists, Antifederalists, and Americans generally had different reasons for seeking an unqualified restraint on federal power concerning religious burdens, but they sought the same end. This is the original meaning of the Free Exercise Clause.

Part III: The Free Exercise Clause in Congress, June to September 1789

Throughout the ratification debate over the 1787 Constitution, Federalists insisted that a bill of rights was unnecessary and that the fears of Antifederalists were overblown. James Wilson, a convention delegate from Pennsylvania, argued early in the ratification period that the proposed government simply was not delegated the power to disturb unalienable rights.[27] This was a government of limited, enumerated powers, he insisted. Come March 1789, that was still the position of Federalists as the First Congress assembled in New York City. Antifederalist concerns were not entirely unfounded. They pointed, for example, to the Religion Test Clause in Article VI, Clause 3, and asked why it was necessary if Congress had no authority to restrain religion.

---

[27] 1 FOUNDER'S CONSTITUTION 449 (Philip B. Kurland & Ralph Lerner eds., 1987) (Wilson's speech delivered October 6, 1787). In *The Federalist Papers* No. 84 (July 1788), Alexander Hamilton argued that by denying powers never granted a bill of rights could be dangerous by suggesting the presence of other implied powers.

The First Congress was overwhelmingly comprised of Federalists, at this point meaning simply those who had supported ratification of the Constitution as distinct from Antifederalists who opposed it. The House had forty-nine Federalists and ten Antifederalists; the Senate had twenty Federalists and only two Antifederalists.[28] There were no political parties in the formal sense, only tendencies to favor power in the central government or, its opposite, to desire retaining power in the states. Accordingly, the debates in summer 1789 were not partisan in the modern sense. James Madison, later a Republican and ally of Thomas Jefferson, was at this point in the forefront of those Federalists working to pass constitutional amendments.

While Madison was a major figure in shaping the deliberations, it is fair to say that he lost more debates than he won over the wording of the religious freedom safeguards. Further, it would be a mistake to take views that Madison expressed in other times and venues and uncritically read them into the Religion Clauses, or to refer to the Free Exercise and Establishment Clauses as Madison's work alone.

Madison's position had shifted. He still did not concede that a bill of rights was needed to thwart abuses by the national government. He continued to fear that in democratic debate religious liberty could

---

[28] ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 144 (1997). *See generally Textualism and Originalism* at 525-26.

not be secured to embrace those rejecting revealed religion.[29] Nevertheless, Madison urged the adoption of a bill of rights to assuage the fears of common Americans, to blunt the Antifederalist call for a second constitutional convention, to fulfill the demands of states that ratified the Constitution on the promise that a bill of rights would be added, to entice North Carolina and Rhode Island to join the Union, and to fulfill his campaign promise to Baptists in his congressional district.

In introducing amendments, Madison said they were "to limit and qualify the powers of the Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."[30] So starting out the task was made easier because the effort was not to agree on a comprehensive list of unalienable rights.[31] Rather, it was the more modest task of agreeing on

---

[29] 11 THE PAPERS OF JAMES MADISON 297 (William Hutchinson et al. eds., 1977) (Oct. 17, 1788, Madison letter to Jefferson).

[30] 1 ANNALS OF CONG. 454 (June 8, 1789) (Joseph Gales ed., 1834). *See* FERGUS M. BORDEWICH, THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT 115-28, 136-41 (2016) [hereafter FIRST CONGRESS].

[31] Some suggest the task was to codify Lockean natural rights. *See*, *e.g.*, Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. 369 (2016). No member of Congress suggested this was the aim, and Madison stated a different goal. There is no Lockean right to prohibit a state church, and yet the two restraints on religion were formulated as a package.

what powers were not vested (Federalists said "were never vested") in the national government by the Constitution. Thus, the amendments would be stating negatives, that is, identifying what the federal government had no power to do. This tack is further borne out by Madison seeking to interlineate the amendments into Article I, Section 9, which is where negatives on national power are cataloged.

To say that the task was made easier is not to say that Congress proceeded with ease in deciding how best to compose what we now refer to as the Establishment and Free Exercise Clauses. By the time the final amendment (numbered "Third Article") was adopted and sent to the states for ratification, the House and Senate had considered no fewer than sixteen different versions—more than for any other provision in the Bill of Rights. Then, as now, how best to organize relations between religion and government was a sensitive topic and hard work.

A. House of Representatives

On June 8, Madison introduced amendments. Those addressing religious freedom are in bold:

> Fourthly. That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: **The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.**

. . . .

> The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but **no person religiously scrupulous of bearing arms shall be compelled to render military service in person**.[32]
>
> . . . .
>
> Fifthly. That in article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit:
>
> **No State shall violate the equal rights of conscience**, or the freedom of the press, or the trial by jury in criminal cases.[33]

Only the first of these three paragraphs would survive, and that in much altered form. The first and last phrases of the first paragraph are about religious liberty, whereas the words "nor shall any national

---

[32] If the Free Exercise Clause is unconditional, then one might ask why there is separate treatment of military conscription and religious pacifism. For some time this issue had been contentious so it commanded separate debate. The refusal by Quakers to fight in the Revolution remained a sore spot with many. Madison's middling proposal was to not require pacifists to fight but leave it open for Congress to require payment in lieu of personal service. Others pressed for differing approaches. When the Senate took up the matter on September 9, the clause was dropped. *See* COMPLETE BILL OF RIGHTS at 169-76. "[R]ather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1400 (2020).

[33] 1 ANNALS OF CONG. 450-51 (June 8, 1789).

religion be established" are about church-government relations.

On July 21, Madison's proposals were referred to a Select Committee of eleven members, one from each state. Madison represented Virginia.

July 28, 1789

On July 28, the Committee reported.[34] Concerning religious freedom, the Committee proposed:

The fourth proposition being under consideration, as follows:

> Article 1. Section 9. Between paragraphs two and three insert **no religion shall be established by law, nor shall the equal rights of conscience be infringed.**
>
> . . . A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; **but no person religiously scrupulous shall be compelled to bear arms.**

The committee then proceeded to the fifth proposition:

> Article 1, Section 10, between the first and second paragraph, insert **no State shall infringe the equal rights of conscience,**

---

[34] *Id.* at 699 (July 28, 1789) (internal quotation marks omitted).

> nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases.

August 15, 1789

This was the longest day for debate in the House. Roger Sherman, a Federalist from Connecticut, thought the amendment unnecessary inasmuch as Congress had no authority whatsoever concerning religion or its establishment. This prompted Daniel Carroll of Maryland, brother to the American Catholic bishop, to rise in favor of securing rights of conscience which will little bear the touch of the government's hand.[35]

In response to a question, Madison replied:

> [H]e apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought

---

[35] *Id.* at 757-58 (Aug. 15, 1789).

> it as well expressed as the nature of the language would admit.[36]

Here Madison noted that some of the fears expressed in the state conventions were not about the overtly hostile use of the powers delegated to the federal government, but about the "effects" on "the rights of conscience" consequential to the use of such means authorized by the Necessary and Proper Clause. Therefore, the First Congress pondered how general legislation enacted pursuant to its enumerated powers "might" lead to adverse "effects" on "the rights of conscience." The feared injury—what is protected against by the text—was where such legislation would "compel men to worship God in any manner contrary to their conscience." Madison's response is that the proposed amendment would "prevent these effects," a reply at odds with *Employment Division v. Smith*.

Benjamin Huntington of Connecticut expressed concern for religious taxes paying ministers in his state, with its established church, and a federal court taking jurisdiction over a claim alleging a violation of the no-establishment phrase by his state. At the end of a long debate, however, Huntington was satisfied that a revised text ("Congress shall make no laws touching religion . . . ") made clear that the amendment was not binding on states. That revision came from Samuel Livermore, a Federalist from New Hampshire.[37] The revised text erased Huntington's concern but created

---

[36] *Id.* at 758.

[37] *Id*. at 759.

another, namely: the wide sweep of "laws touching religion."

Peter Silvester of New York feared that the words "equal rights of conscience" might tend to abolish religion. By protecting the conscience of a believer and unbeliever equally, Silvester envisioned the amendment as protecting free-thinkers—hence the remark "abolish religion." Huntington agreed, saying that to the extent the text protected equal conscience (i.e., believer and unbeliever) it patronized those who professed no religion. This objection was to find favor in the Senate.

At the end of a long day the amendment read, "The **Congress shall make no laws touching religion, or infringing the rights of conscience.**"

August 20-21, 1789

On August 20, Fisher Ames, a Federalist from Massachusetts, suggested trimming the impossibly broad "laws touching religion" to "no law establishing religion." He also introduced for the first time the "free exercise" phrase. The latter's meaning was unexplained.[38] Both features passed without opposition.

---

[38] *Id.* at 760. The term "free exercise" first appeared in colonial Maryland, and later was a Madisonian replacement for toleration (religious liberty as a concession of the state) in Virginia's 1776 Declaration of Rights. DISESTABLISHMENT AND RELIGIOUS DISSENT at 140-43, 310-11. One ambitious account has Madison enlisting Ames to advance these changes. *See* IRVING BRANDT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800 271 (1950). Because of their differences, however, it is questionable Ames would have cooperated. Marc M. Arkin, *Regionalism and*

The Third Article read: "**Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.**"

On August 21, this version went to the Senate.

B. Before the Senate

The Senate met in secret. The motions and amendments from the *Senate Journal* are available, but not the debate.

On September 3, numerous proposals were entertained bearing on both religious liberty and no-establishment. The first struck the "free exercise" phrase but kept "rights of conscience."[39] The Senate next defeated a proposal that would have restored free exercise.[40] A motion followed restoring free exercise but striking the conscience phrase.[41] The Third Article now read: "**Congress shall make no law establishing religion, or prohibiting the free exercise thereof**."[42]

On September 9, the Senate sharply narrowed the no-establishment text. The Third and Fourth Articles together combined religion with other rights. This formulation then passed the Senate. It read: "**Congress**

---

the Religion Clauses: The Contribution of Fisher Ames, 47 BUFF. L. REV. 763, 766-71, 789-91 (1999).

[39] S. JOURNAL, 1st Cong., 1st Sess. 116 (Sept. 3, 1789).

[40] *Id*.

[41] *Id*. at 117.

[42] *Id*.

shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition the Government for the redress of grievances."[43]

This version was less sweeping than that of the House concerning both no-establishment and religious liberty.

C. Conference Committee, September 22-23

Because the House and Senate versions differed, the matter went to a Committee of Conference. It entailed five Federalists and one Antifederalist, so the Federalists remained firmly in control. Madison was one of the five. No record of the negotiations exists. House members agreed to all of the Senate's amendments, except for those to the Third and Eighth Articles.[44] The Committee proposed altering these two Articles from that of either the House or Senate version.

Senator Oliver Ellsworth's notes are the best record from the Committee. His entry on the Third Article reads:

---

[43] *Id*. at 129 (Sept. 9, 1789).

[44] The Eighth Article secures a right to jury in a criminal trial.

> [T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "**Congress shall make no Law <u>respecting an establishment of Religion</u>, or prohibiting the free exercise thereof;**. . . . "[45]

With respect to no-establishment, the Committee's text ("no law respecting an establishment") favored the House version over the Senate. Something close to the broader-in-scope House version had prevailed. However, the Committee favored the Senate by adopting the stand-alone "free exercise" text rather than the broader House protection for both "free exercise" and "rights of conscience." This aligned with the August 15 objection by Silvester and Huntington. Neither chamber had been using the terms "free exercise" and "rights of conscience" as if interchangeable. Rather, the final cut-down text (" . . . prohibiting the free exercise [of religion]") read so that a rights-claimant must have a religion in order to exercise it.

In summary, a broader no-establishment restraint on Congress's power was agreed to in exchange for a narrower free-exercise restraint. Madison's hope to safeguard the conscience of the nonreligious was lost, but in return for broader meaning to what constitutes a forbidden "establishment."

---

[45] COMPLETE BILL OF RIGHTS at 8 (underline in original).

D. Final Action

The House was the first to consider the Report of the Conference Committee:

> The House proceeded to consider the report of a Committee of Conference on the subject matter of the amendments pending between the two Houses, to the several articles of amendment to the Constitution of the United States, as proposed by this House: whereupon, it was resolved, that they recede from their disagreement to all the amendments; provided that the two articles, which, by the amendments of the Senate, are now proposed to be inserted as the third and eighth articles, shall be amended to read as follows:
>
> ART. 3. **Congress shall make no law respecting an establishment of religion, or prohibiting [a** or **the]**[46] **free exercise thereof [,** or **;]**[47] or abridging the freedom of speech, or of the press, or the right of the

---

[46] The *Annals* reads "or prohibiting *a* free exercise thereof," whereas the *House Journal* reads "or prohibiting *the* free exercise thereof." *Compare* 1 ANNALS OF CONG. 948 (Sept. 24, 1789), *with* H. JOURNAL, 1st Cong., 1st Sess. 121 (Sept. 24, 1789). The record in the *Senate Journal* agrees with the *House Journal*. *See* S. JOURNAL, 1st Cong., 1st Sess. 145 (Sept. 24, 1789).

[47] The *Annals* uses a comma, whereas the *House Journal* uses a semicolon. The record in the *Senate Journal* agrees with the *House Journal*. *See* S. JOURNAL, 1st Cong., 1st Sess. 145 (Sept. 24, 1789).

> people peaceably to assemble, and to petition the Government for a redress of grievances.[48]

It passed 37 to 14 on September 24.[49] The Senate concurred September 25. Two-thirds of both chambers had now agreed.

Both sides, including Madison, expressed some disappointment with the overall substance of the amendments.[50] Yet, the final scope of no-establishment is broader than Madison's initial proposal on June 8. On the other hand, Madison was surely disappointed with the free-exercise text not covering the nonreligious.

E. Preamble

On September 29, a Preamble explaining the impetus behind the amendments was inserted into the *Senate Journal*:

> ***The Conventions of a Number of States having, at the Time of their adopting the Constitution, expressed a Desire, in order to prevent misconstruction or abuse of its Powers, that further declaratory and restrictive Clauses should be added****: And as extending the Ground of public*

---

[48] 1 ANNALS OF CONG. 948 (Sept. 24, 1789).

[49] *Id.*; H. JOURNAL, 1st Cong., 1st Sess. 121 (Sept. 24, 1789). The *House Journal* and the *Annals* list a roll call vote on the "alteration of the [E]ighth [A]rticle" but not on the Third Article.

[50] FIRST CONGRESS at 138-41.

> *Confidence in the Government, will best insure the beneficent Ends of its Institution—. . . .* [51]

The Preamble reinforces that the amendments vested no new powers in government. On the contrary, the amendments were to reassure Americans that the powers delegated to the national government in the 1787 Constitution were not to be misconstrued by imputing powers never delegated.

It is almost certainly true that members of Congress did not have fixed in their minds a fully developed concept of religious liberty. They did not have to. They believed the federal government was disempowered by the Free Exercise Clause. Congress thereby had no role in the question of when religious exercise was to be prohibited.

From the plain text as now supplemented by original meaning, a few more things about the Free Exercise Clause are apparent:

1. The Federalists were in control of the amendment process in the House and Senate, and the final product reflects their point of view. However, when it came to religious liberty the Federalists and Antifederalists had the same objective, but for different reasons. The objective was to make it explicit that the federal government had no power to burden religious exercise, leaving such a sensitive matter to continue to reside with the states.

---

[51] 1 ANNALS OF CONG. 163 (Sept. 29, 1789) (emphasis added; italics in original).

2. On August 15, the House discussed the unintended but coercive effects on religious observance by legislation such as permitted under the Necessary and Proper Clause, and Madison replied that the text was preventive. What was protected against was not just hostile laws, but also unintended effects.

3. The Free Exercise Clause vested no new powers in the federal government. If anything, it reduced the powers delegated by the 1787 Constitution. This means Congress has no power to "make [a] law" that restricts religion. Moreover, if it wants to *protect* religious exercise it has to find the power to do so delegated elsewhere in the Constitution. An example of the latter is the use of the Treaty Power in Article II, Section 2, to consummate the Louisiana Purchase with France. The treaty protects the religious liberty of French inhabitants.[52]

Part IV: Comparison with State Constitutions Adopted 1775 to 1784

In late 1775, New Hampshire and South Carolina openly broke with Great Britain, declared themselves republics, and adopted written constitutions. In 1776, Virginia, New Jersey, Delaware, Pennsylvania, Maryland, and North Carolina adopted their first written constitutions. Georgia and New York followed in 1777.

---

[52] *See* Peter J. Kastor ed., THE LOUISIANA PURCHASE: EMERGENCE OF AN AMERICAN NATION 143-44 (2002). Article III of the 1803 treaty protects the inhabitants' "free enjoyment of . . . the Religion which they profess."

South Carolina adopted its second constitution in 1778, Massachusetts followed with its first in 1780, and New Hampshire ratified a second constitution in 1784.[53]

The state constitutions safeguarded religious liberty. Unlike the unconditional wording of the Free Exercise Clause, the state protections often reflected Lockean natural rights. The text typically stated religious liberty would be temporized upon a showing that the claimant's religious practice disturbed the peace or invaded the rights of others. The revolutionary states had a long history as colonies regulating religion, and it was in the colonies—now new republics—where most all of the interaction between government and the people's religious practices took place.

These tempered state safeguards, when compared to unqualified restraints on the federal government such as the Free Exercise Clause, are suggestive concerning the original meaning of the latter. Maryland's 1776 constitution read:

> [N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour [*sic*] of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality or injure others, in their natural, civil, or religious rights.[54]

---

[53] DISESTABLISHMENT AND RELIGIOUS DISSENT at 3-4.

[54] MD. CONST. Art. XXXIII, *id.* at 314-15.

Revolutionary events were moving quickly and lawmakers did not always fully shed themselves of older vocabulary suitable to colonial status. Thus, New Jersey's 1776 constitution declared:

> [T]hat no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, . . . shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects.[55]

The 1777 New York constitution said:

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, with this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[56]

In Georgia, its 1777 constitution declared:

> All persons whatever shall have the free exercise of their religion: provided it be not repugnant to the peace and safety of the State.[57]

---

[55] N.J. CONST. Art. XIX, *id.* at 26.

[56] N.Y. CONST. Art. XXXVIII, *id.* at 129-30.

[57] GA. CONST. Art. LVI, *id.* at 234.

New Hampshire's 1784 constitution read:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, . . . provided he doth not disturb the public peace, or disturb others, in their religious worship.[58]

Similar religious-liberty clauses in the South Carolina constitution of 1778 and Massachusetts constitution of 1780 are set out in the footnote.[59] Virginia's protection of religious liberty was also conditional in its 1776 constitution, but the condition needs explaining to the modern reader.[60] North Carolina's religious liberty

---

[58] N.H. CONST. Art. I, § 5, *id.* at 356.

[59] S.C. CONST. Art. XXXVIII provided: "That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges." MASS. CONST. Art. I of the Declaration of Rights provided: "No subject shall be hurt molested, or restrained, in his person, Liberty, or Estate, for worshipping GOD in the manner and season most agreeable to the Dictates of this own conscience, or for his religious profession or sentiments; provided he doth not Disturb the public peace, or obstruct others in their religious Worship." *Id.* at 190-93 (South Carolina); *id.* at 404 (Massachusetts).

[60] After considerable back and forth between George Mason and James Madison, Virginia settled on a religious liberty clause that was contingent on the duty of good behavior. The duty is stated in Christian discourse that entails rights closely brigaded with duties. It reads: "[I]t is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other." VA.

provision adopted in 1777 is also conditional, but narrowly focused on seditious conduct.[61] The pattern of conditional religious liberty rights suffered only two outliers: Pennsylvania and Pennsylvania's three lower counties (for the first time identifying as a single unit called "Delaware").[62]

This cluster of state constitutions is useful when compared to the actions of the states as they were debating ratification of the 1787 Constitution, specifically the seven states that contemplated proposing federal constitutional amendments to the forthcoming Congress. *See* Part II, above. When states debated sending to Congress a proposed federal amendment concerning religious liberty, the text of the right was unconditional—just as the Free Exercise Clause is unconditional. Of course, the seven amendments and the Free Exercise Clause were to disempower only the federal government. Their unconditional text met the objectives of all concerned. The Antifederalists preferred that these states recommend to Congress amendments that were unconditional, as that suited their goal of expressly limiting federal power. The Federalists went along with unconditional religious liberty amendments, as they had long insisted that the federal

---

CONST. Art. 16. The multiple drafts and full story are told *id.* at 139-43.

[61] *Id.* at 106-07 (North Carolina). N.C. CONST. Art. XXXIV safeguarded religious liberty provided that nothing "exempted preachers of treasonable or seditious discourses."

[62] *Id.* at 86 (Pennsylvania); *id.* at 37, 38, 41 (Delaware).

government was not delegated any authority to prohibit religious affairs.

In summary, when the founding generation sought to restrain the states, a religious liberty clause was modestly temporized. When the same generation sought to restrain the new federal government, any religious liberty clause was without qualification. It follows that the original meaning of the Free Exercise Clause was as a complete disempowerment of Congress.

CONCLUSION

There are two ways of viewing the Free Exercise Clause. The popular way of thinking about the Free Exercise Clause is as a right expanding religious liberty. Less common is to view the Free Exercise Clause as a carve-out from the federal government's limited, enumerated powers. Both are correct, but it is the latter point of view that was on the minds of the Federalists as well as Antifederalists shortly before and during the First Congress. This contrasts with the early state Declaration of Rights protecting religious liberty. Reflecting their origin in Lockean natural law, the latter were not without some contingencies such as breaching the peace or invading the rights of others.

The proper interpretive principle for the Court is to give the same meaning to the Free Exercise Clause that was held by the First Congress and the ensuing ratifying states. In 1940, the Free Exercise Clause was

incorporated through the Fourteenth Amendment,[63] and the Court does not water down fundamental rights when applying them to state and local officials.[64] As with other unqualified texts, such as "make no law . . . abridging the freedom of speech, or of the press," out of necessity the judiciary has long applied strict scrutiny[65]—the Court's most stringent standard of review. That leaves a rigorous Free Exercise Clause restraint binding today on Respondent, City of Philadelphia, one that is incompatible with *Employment Division v. Smith*.

Respectfully submitted,

CARL H. ESBECK
R. B. PRICE EMERITUS
PROFESSOR OF LAW
Hulston Hall, Room 209
820 Conley Avenue
Columbia, Missouri 65211
(573) 882-6543
esbeckc@missouri.edu

TIMOTHY BELZ
Counsel of Record
OTTSEN, LEGGAT & BELZ, L.C.
112 South Hanley, Suite 200
St. Louis, Missouri 63105
(314) 726-2800
tbelz@olblaw.com

---

[63] *See Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[64] *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (Sixth Amendment right to unanimous verdict applicable in state as well as federal criminal trials).

[65] In practice, the Court has upheld federal laws under the Free Exercise Clause only after satisfying strict scrutiny. *See Bob Jones Univ. v. U.S.*, 461 U.S. 574, 602-04, 604 n.29 (1983) (eliminating racial discrimination in education); *U.S. v. Lee*, 455 U.S. 252, 260 (1982) (fair and efficient collection of payroll taxes); *Johnson v. Robison*, 415 U.S. 361, 383-86 (1974) (raising and supplying armed forces); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (same).