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978-1-009-28905-4 — Law and Religion in Colonial America
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Law and Religion in Colonial America

Law – charters, statutes, judicial decisions, and traditions – mattered in colonial America, and laws about religion mattered a lot. The legal history of colonial America reveals that America has been devoted to the free exercise of religion since well before the First Amendment was ratified. Indeed, the two colonies originally most opposed to religious liberty for anyone who did not share their views, Connecticut and Massachusetts, eventually became bastions of it. By focusing on law, Scott Douglas Gerber offers new insights about each of the five English American colonies founded for religious reasons – Maryland, Rhode Island, Pennsylvania, Connecticut, and Massachusetts – and challenges the conventional view that colonial America had a unified religious history.

Scott Douglas Gerber is Professor of Law at Ohio Northern University, and Associated Scholar at Brown University's Political Theory Project. He received both his Ph.D. and J.D. from the University of Virginia, and his B.A. from the College of William and Mary. He has had nine other books published. In 2022 he won the inaugural Christopher Collier Prize from the Connecticut Supreme Court Historical Society.

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The Dissenting Colonies

SCOTT DOUGLAS GERBER
Ohio Northern University

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UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,
a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of
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www.cambridge.org
Information on this title: www.cambridge.org/9781009289054

DOI: 10.1017/9781009289092

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First published 2024

A catalogue record for this publication is available from the British Library.

A Cataloging-in-Publication data record for this book is available from the Library of Congress.

ISBN 978-1-009-28905-4 Hardback

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To John Tomasi and Gordon Wood

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The citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy – a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support. . . . May the children of the stock of Abraham who dwell in this land continue to merit and enjoy the good will of the other inhabitants – while every one shall sit in safety under his own vine and fig tree and there shall be none to make him afraid.

– President George Washington to the Hebrew Congregation of Newport, Rhode Island (August 21, 1790)

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Acknowledgments

No man is an island, entire of itself.
– John Donne, *Devotions upon Emergent Occasions* (1624)

This book took a decade to complete. I have a lot of people to thank, including the many research assistants who helped over the years: Tyler Baumberger, Taylor Beckley, Maddy Burnette-McGrath, Brie Carroll, Anthony Edwards, Ian Evans, Cassidy Galbreath, Emily Hudson, Sean Lementowski, Justin Marks, Marianella Medelius, Jared Millisor, Kelly Mumaw, Ryan Phillips, Katherine Porter, Natalie Reichard, Garrett Robinson, Tim Rodes, Jessica Sink, Kenny Sturgill, Ethan Welch, Jane Williamson, and Bryce Winslow. Thanks also are owed to Ohio Northern University for paying my research assistants, and for awarding me a research sabbatical during the 2018–19 academic year, a summer scholar in 2020, 2021, and 2022, and a course reduction in the fall 2020 semester. The law librarians at Ohio Northern University provided top-notch support, and the Institute for Humane Studies awarded me a financial grant.

I am very grateful to Brown University's Political Theory Project ("PTP"), which has hosted me every summer since 2009 (except for the COVID-19 pandemic summers) and for two academic years in 2009–10 and 2018–19, and which also provided financial support for my book and sponsored a workshop about it. The many friends I have met at the PTP, including but not limited to John Tomasi, Dan D'Amico, David Skarbek, Emily Skarbek, Jason Brennan, Aly Laughlin, Katie Bonadies, Dina Egge, Mary Massed, Laura Joyce, Gordon Wood, Glenn Loury, and Steve Calabresi – not to mention the terrific post-doctoral fellows – have created an

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environment for serious academic work that should serve as a model for higher education.

I am likewise appreciative of the feedback I have received from scholars, family, and friends. I am especially thankful to the anonymous peer reviewers for Cambridge University Press and to five other scholars who read the entire manuscript: Bill Casto, David Hall, Mark David Hall, Adrian Chastain Weimer, and Gordon Wood. Additional individuals who read portions of the manuscript include: Jonathan Bean, Teresa Bejan, Mary Bilder, George Billias, Frank Bremer, Jason Brennan, Dan D'Amico, Ed Eberle, Jim Ely, Bruce French, Stanford Gerber (my father), Leslie Goldstein, Wythe Holt, Peter Jaworski, Herb Johnson, Lynne Marie Kohm, Doug Laycock, Sandy Levinson, Glory Liu, Ken Masugi, Sandra McDonald (my mother), Mike Meyerson, Mike Milks, John Neville, Nick Pellegrino, Ray Person, Steve Presser, Kim Scheppele, Tim Sellers, David Skarbek, Lee Strang, Lauri Tähtinen, Walter Wadlington, Steve Wasby, Don Wedding, Dan Wewers, Ted White, and Kay Zekany. Brian Tamanaha kindly emailed me a copy of one of his working papers about a foundational jurisprudential matter. Cecelia Cancellaro efficiently managed the review process at Cambridge University Press and strongly supported the book. Victoria Phillips ably assisted Cecelia. Jem Langworthy thoughtfully worked overtime to help solve an unexpected production problem.

I also would like to acknowledge the various audiences who heard me present parts of the project while it was a work-in-progress: the Cincinnati Colony of Mayflower Descendants; the Central States Law Schools Association's Annual Conference; the Midwest Political Science Association's Annual Conference; the Global Summit in Constitutionalism at the University of Texas at Austin School of Law; the American Constitution Society's Constitutional Law Scholars Forum at Barry University School of Law; the Federalist Society's Annual Faculty Conference; the Federalist Society's Works-in-Progress virtual mini-conference; Providence College; the Four Nations Conference at Leiden University in the Netherlands; the Plymouth, Massachusetts Public Library; the Partnership of the Historic Bostons in Boston, Massachusetts; Regent University School of Law; the Ada, Ohio chapter of the Rotary Club; the Society of Early Americanists Biennial; the Connecticut Constitution of 1818 and its Times: A Conference at UCONN School of Law; the 375th Anniversary Celebration of the First Congregational Church of Branford, Connecticut; the 2018 Conference of Quaker Historians and Archivists at the University of Massachusetts at Amherst; the University of Baltimore Law

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School; the University of Virginia School of Law; Valparaiso University Law School; The Spectacle of Toleration Conference: Learning from the Lively Experiment at Newport & Providence, Rhode Island; and the University of Toledo College of Law. I am likewise grateful to the *Catholic Historical Review*, *British Journal of American Legal Studies*, *New York University Journal of Law and Liberty*, and *American Journal of Legal History* for permission to reprint revised portions of my project that first appeared in their pages.

* * *

This book is dedicated to two distinguished professors I met, and have gotten to know well, as a visiting scholar at Brown University: John Tomasi and Gordon Wood.

John is the founding director of the Political Theory Project, an interdisciplinary research center at Brown University whose mission is to investigate – through methodological and viewpoint diversity – the ideas and institutions that make societies free, prosperous, and fair. John is an Oxford-trained political philosopher whose magnum opus *Free Market Fairness* (2012) articulates a hybrid theory of liberal justice – one committed to both limited government and the material betterment of the poor – that is so compelling that the Chilean government is trying to implement it at a policy level.[1] With respect to me personally, John graciously invited me to spend the 2009–10 academic year at the PTP so that I could complete *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787*, which Oxford University Press published in 2011. He also has invited me back every summer since; honored me with a research affiliation; and provided intellectual and financial support, including during a 2018–19 sabbatical year in which I made tremendous progress on this book. Last but not least, he made sure the PTP's workshop about the book went off without a hitch after he departed Brown to become president of Heterodox Academy.

As for Gordon, I have mentioned on other occasions that no scholar has had more influence on my own work than him.[2] The opening paragraphs of the Introduction to this book document merely the most recent example of

[1] *See* John Tomasi, Free Market Fairness (2012); Brown Professor Advising Chilean Leadership on New Political Model, www.brown.edu/news/2018-09-11/freemarket.

[2] *See, e.g.*, Gordon S. Wood & Scott D. Gerber, *The Supreme Court and the Uses of History*, 39 Ohio N.U.L. Rev. 435, 437 (2013) (debate transcript).

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this fact. Gordon is, of course, the most significant historian of early America of the present day and his books have won more awards than I can count.[3] And not only did he read every piece of this book in draft-form – twice, no less – he discussed it with me over many enjoyable lunches during my summers, and occasional academic years, at Brown.

I am proud to call John Tomasi and Gordon Wood my friends, and I am delighted to thank them publicly by dedicating this book to them.

[3] *See, e.g.*, Gordon S. Wood, https://vivo.brown.edu/display/gwood.

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A Note on Methodology

> It is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way.
>
> – John Stuart Mill, *On Liberty* (1859)

In my previous book *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787* (2011) I included a note on methodology to apprize readers that I am an academic lawyer and a political scientist who takes history seriously, and that my disciplinary focus is on texts.[4] I felt compelled to include the note because scholars – including historians, perhaps especially historians – are protective of their disciplines and they tend to be suspicious of outsiders who invade their turf. Thankfully, exceptions exist. For example, Peter S. Onuf penned a refreshing historiographic essay in the *William and Mary Quarterly* about the Constitution's bicentennial in which he reminded his fellow historians that academic lawyers and political scientists have something useful to say about the Constitution too.[5]

Historians who deviate from the prevailing historical methodology of their particular day likewise meet resistance. Perry Miller, the most celebrated intellectual historian of his time, anticipated that criticism in a foreword to a reissue of his first book, *Orthodoxy in Massachusetts, 1630–1650* (1933):

> Upon the verge of publication I am fully conscious that in the work to be offered I have treated in a somewhat cavalier fashion certain of the most cherished

[4] *See* Scott Douglas Gerber, A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787 at xxi (2011).

[5] *See* Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 Wm. & Mary Q. 341 (1989).

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conventions of current historiography. I have attempted to tell of a great folk movement with an utter disregard of the economic and social factors. I lay myself open to the charge of being so very naive as to believe that the way men think has some influence upon their actions, of not remembering that these ways of thinking have been officially decided by modern psychologists to be generally just so many rationalizations constructed by the subconscious to disguise the pursuit of more tangible ends. In part I might take refuge behind the contention that a specialized study is, after all, specialized, that other aspects of the story can easily be found in other works. The field of intellectual or religious history may, I presume, be considered as legitimate a field for research and speculation as that of economic and political.[6]

The same holds true for the "specialized study" of legal history. This book explores how the people of colonial America viewed the relationship between law and religion, and it offers new insights into their story by concentrating on law.

I also should mention that I am aware that religious historians have been developing since the late 1960s a self-described "countercanon" that emphasizes "the importance of non-Protestant religions and a wide range of historical actors – including women, Native Americans, and enslaved Africans."[7] The countercanon endeavors to "replace[] the old portrait of white Protestant consensus with narratives of dissent and pluralism."[8] Concisely put, Catherine A. Brekus, the author of the introductory essay to a 2016 workshop about "Religions in the Early Americas" sponsored by several eminent historical organizations, insisted:

If it is true that history is a dialogue between the present and the past, then what we seem most driven to understand today is no longer the religious identity of the nation but rather the meaning of individual religious experience, the religious basis for norms of sexuality and gender, and especially the long heritage of American racism.[9]

I will leave the interesting questions posited by adherents of the countercanon to social and culture historians of religion. My tenure is not in a religious studies department – the academic unit that came to

[6] Perry Miller, Orthodoxy in Massachusetts, 1630–1650: A Genetic Study xi (1933). More will be said about Miller's work in the Conclusion to this book. I long have championed methodological pluralism. *See, e.g.*, Scott Douglas Gerber, *Introduction: The Supreme Court Before John Marshall*, in Seriatim: The Supreme Court Before John Marshall 1, 12–14 (Scott Douglas Gerber ed., 1998). The Conclusion to this book explains why.

[7] Catherine A. Brekus, *Contested Words: History, America, Religion*, 75 Wm. & Mary Q. 3, 4, 35 (2018).

[8] *Id.* at 35. [9] *Id.* at 15.

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replace history departments, English departments, theology departments, divinity schools, and theological schools in said-same late 1960s as the epicenter of the academic universe for studying religious history.[10] I am a legal historian housed in a law school, and in my opinion much can be learned about the religious history of the United States by focusing on the laws that were enacted about religion in early America.[11] I am also a Ph.D.-trained political theorist, and I believe that focusing on those English American colonies that had religion in one form or other as what Montesquieu characterized as an "animating principle" can add a lot to the ever-evolving story of religious freedom in America.[12] To quote one of the anonymous peer reviewers commissioned by Cambridge University Press to evaluate this book for publication, "With all the contemporary focus on indigenous peoples and those brought here in slavery, it is well to not forget the importance of English religious dissent to the populating of North America."

[10] *See id.* at 27. Of course, the late 1960s was the heyday of the social movement opposing the Vietnam War.

[11] *See, e.g.*, Sarah Barringer Gordon, *Review Essay: Where the Action Is – Law, Religion, and the Scholarly Divide*, 18 Rel. & Am. Culture 249 (2008) (arguing that "religion scholars should pay attention to what lawyers are doing").

[12] Charles-Louis De Montesquieu, The Spirit of the Laws 21, 30 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., 1989) (1748). *See generally* Gordon S. Wood, *Benedict Arnold's "Villainous Perfidy,"* The Weekly Standard, June 1, 2018, www.washingtonexaminer.com/weekly-standard/benedict-arnolds-villainous-perfidy (suggesting that there is still much to be learned from writing history that does not focus on groups marginalized by former histories).

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