

## Introduction

Daniel N. Robinson

*I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State. (Thomas Jefferson, Letter to the Danbury Baptist Association, 1802)*

On June 14, 2015, a number of conferences and special programs were held to celebrate the 800th anniversary of Magna Carta, signed at Runnymede, and marking a significant chapter in the history of political liberty. The charter itself would bear the seal of King John – *bad* King John – but, alas, not his fidelity, for the very terms of the document were systematically violated from the first. Nonetheless, the document itself was a successful challenge to the presumption of absolute rule. Credit duly noted, it was not born full blown from the collective brow of self-interested barons.

The history leading to Runnymede is complex and far beyond the aims of this introduction. It is sufficient to look back to the celebrated conflict between Thomas Becket (1118–1170), Archbishop of Canterbury, and the widely resented King, Henry II. A major source of the conflict was the arrogation by the King of the right to prosecute clergy in secular courts. Becket claimed that the clergy stood apart from the reach of secular powers, and that only the Church could judge them for crimes. Henry’s counter relied on willingness of the previous archbishop, Theobald of Bec, who had admitted that the English custom was for secular courts to try clerks accused of crimes. Henry II’s *Constitution of Clarendon* (1164) challenged the independence of the clergy and required an allegiance to the Crown, even in defiance of Rome. Becket would have none of it and, at the hands of four Knights, would lose his head and his life in Canterbury Cathedral. Henry’s youngest son, King John, carried on the family tradition of royal overreach only to face formidable baronial power at Runnymede.

Magna Carta contains sixty-three provisions, many of them of merely local and of dated consequence, covering such momentous issues as fishing rights in the Thames (“23. All fish weirs (kidelli) on the Thames and the Medway and throughout England are to be entirely dismantled, save on the sea coast”). Clearly, the document was the work of a successor to the Archbishop of Canterbury, Stephen Langton. Among its diverse contents, it is the very first provision that summons attention here:

In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English Church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III, before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed in good faith by our heirs forever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

We see here in 1215 that Magna Carta begins with an acknowledged wall of separation between church and state, this some six centuries before Jefferson’s reassuring letter to the Baptists of Connecticut. As has been observed often, the provision grew out of attempts by both Church and Crown to gain controlling power over valued assets: land, taxing authority, rank, and standing. Less noted, however, are the doctrinal foundations on which men such as Becket relied. No less an authority than Jesus Christ had stipulated that Caesar be given his due, but that what is owed to God is different – and the two must never be confused (Mark 12:17). Also, in Romans 13, the Apostle Paul requires obedience to secular authority, for it was God’s creation and warrants fidelity within its proper sphere.

As Magna Carta begins with the immunity of religion to secular intrusions, so does the First Amendment of the U.S. Constitution forbid secular authority from imposing religious orthodoxy. This, by today’s understanding, illustrates one of the “rights” comprising that “Bill of Rights” required if all the colonies were to ratify the new Constitution. It was on August 15, 1789, that the House of Representatives struggled further with the need for and the contents of a “Bill of Rights.”

Who, after all, would oppose the clear statement of such rights? As it happens, there had been a number of principled grounds on which to question the enumeration of basic rights. Might the very act suggest that the rights in question are (merely) political? Might it be assumed that they are somehow granted as opposed to being endowed, as stated in the *Declaration*? Also, might the delineation of rights be extended to absurdity? On this point, one member of the house during the deliberations, Mr. Sedgwick, argued that the very statement of something as obvious as freedom of speech would lead to viewing

rights as trifling. To him, the effort was all too labored. Once freedom of speech is guaranteed, freedom of assembly is logically entailed. In reply, Mr. Benson contended that the wording was more or less a reminder that the Government not overstep its authorized bounds. Sedgwick's rejoinder remains a classic:

Mr. Sedgwick replied, that if the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but he would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed.

The rest, as the expression goes, is history: the troubled, often elegant, frequently confusing history of First Amendment jurisprudence.

Over and against these reservations were challenges from the Anti-Federalists, so convinced that the Constitution left far too much room for a power-seeking executive in charge of an unopposable national government. At first tepid, but then strongly encouraged by Jefferson and others, James Madison took it upon himself to draft a large number of amending clauses. After due consideration by State houses, the House of Representatives now would address a more economical collection of amendments. Thus did the House grapple with the promise that, "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."

There was a robust history behind these considerations. From the earliest colonial period, settlers in the new world had made provision for the public support of religion. Of the thirteen charters establishing the original colonies – the earliest being Virginia (1606) and the latest New Jersey (1702) – a number identified a specific form of religious worship to be supported. Virginia, New York, Maryland, North Carolina, and South Carolina were officially Anglican. Massachusetts, Connecticut, and New Hampshire were Congregational. Article XXXVIII of the Charter of South Carolina (1663) proclaims "That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." Several colonies that adopted a specific confession were nonetheless at pains to spare those of a different persuasion any civic or financial burden. Thus, North Carolina:

Article XXXIV. That there shall be no establishment of any one religious church or denomination in this State, in preference to any other; neither shall any person, on any presence whatsoever, be compelled to attend any place of worship contrary to his own faith or judgment, nor be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary

to what he believes right, or has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship (1663).

New Hampshire records its respect for the unalienable right of conscience, but then sets the qualification for public office quite narrowly:

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

Senate. Provided, nevertheless, That no person shall be capable of being elected a senator who is not of the Protestant religion ... House of Representatives. Every member of the house of representatives ... shall be of the Protestant religion ... (1639)

The Founding generation did indeed face sectarian issues, but such internecine conflicts among Episcopal, Presbyterian, and Congregationalist were of a nature that rendered the guidance and constraints of the Federal Constitution fairly transparent. The point of the First Amendment was to preclude the imposition of a national church. It remained for the constituent states to sort out the details judged to be right for their residents. The rejection of England's "Test acts" and the long and often bloody history of religious intolerance had hardened the resolve of the Founding generation against intrusion by the national government into this vital and combustible sphere of private and civic life. Much closer to home, James Madison had witnessed the intolerance permitted under the banner of Virginia's quasi-official religion. In a letter to William Bradford (January 24, 1774), he writes:

I want again to breathe your free Air. I expect it will mend my Constitution & confirm my principles. I have indeed as good an Atmosphere at home as the Climate will allow: but have nothing to brag of as to the State and Liberty of my Country ... There are at this [time?] in the adjacent County not less than 5 or 6 well-meaning men in close [Gaol] for publishing their religious Sentiments which in the main are very orthodox. I have neither patience to hear talk or think of anything relative to this matter, for I have squabbled and scolded abused and ridiculed so long about it, [to so lit]tle purpose that I am without common patience. So I [leave you] to pity me and pray for Liberty of Conscience [to revive among us].

Perhaps the most influential commentator of the age was the redoubtable Thomas Paine, his best-seller, *Common Sense*, appearing in 1776. On religious liberty, Paine could not be clearer:

As to religion, I hold it to be the indispensable duty of every government, to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith ... Suspicion is the companion of mean souls, and the bane of all good society. For myself, I fully and conscientiously believe, that it is the will of the Almighty, that there should be a diversity of religious opinions among us: it affords a

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larger field for our Christian kindness. Were we all of one way of thinking, our religious dispositions would want matter for probation; and on this liberal principle, I look on the various denominations among us, to be like children of the same family, differing only, in what is called, their Christian names.

Think of it: Various denominations differing solely in their Christian names, as might brothers and sisters in the same family. The current situation in the United States is so utterly different. Issues of marriage, child bearing, cultural diversity, corporate personhood – the list is long – have leaked into every joint of our constitutional jurisprudence and have raised the most vexing questions regarding the nature of beliefs that qualify as “religious,” and the reach of law into the realm in which those beliefs are held. Might Madison’s judgment be different in light of such diversity and complexity? Actually, there is remarkable stability in his position over a period of decades. The Madison of 1774 reappears unchanged on this matter in 1789. We find him once again in the much altered United States of 1832, just four years before his death at age 85, displaying consistency and resolve. Writing to Rev. Adams, he says:

It may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinence of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others.

For all this resolve to oppose interference in any way whatever, Madison’s protective barrier, as with Jefferson’s wall of separation, proved to be rather porous. The pores would then become veritable channels with the ratification of the Fourteenth Amendment 1868. Thus amended, the Constitution orders that, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The principal and intended effect of the Amendment was to eradicate those laws of local enclaves (including entire states) that would restrict or deny rights conferred or protected by the Federal Constitution. It was to secure for a now freed slave population protections that would reach them wherever they lived, including and especially in the recalcitrant south. “States’ Rights,” so jealously guarded at the time of the Founding, proved to be impediments to those aspirations over which a civil war had been waged. Initially conceived as a remedy for the lingering effects of slavery, the Fourteenth Amendment was progressively stretched to identify and prevent any and every official form of selective treatment. As for religion – either writ large or religion in the narrowest

sectarian sense – it could not elude the reach of the Amendment. The extent of that reach was and remains uncertain.

The Constitution was a century old before the First Amendment was applied to religious liberty. The case was *Reynolds v. United States* (98 U.S. 145, 1878) and the question pertained to polygamy. Reynolds, a member of the Mormon faith and a resident of the Utah Territory, was charged with the crime of polygamy. He understood Mormon teachings not only as permitting but as encouraging polygamy and argued that it was clearly covered by the anti-establishment clause of the First Amendment. Speaking for a unanimous court, Chief Justice Waite ruled that,

... The statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices ... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances ...

The distinction between a “mere” religious belief and those actions compelled by sincere belief must raise fundamental questions as to what constitutes the establishment of norms favoring one religion over another. However, for the full century from the founding to *Reynolds* (1878), the Establishment Clause had not reached the Supreme Court bar. Then, between *Reynolds* and *Cantwell v. Connecticut* (310 U.S. 296, 1940), a span of sixty more years was marked by comparable silence. In *Cantwell*, Jesse Cantwell and his son, both Jehovah’s Witnesses, had distributed religious materials door-to-door in a predominantly Roman Catholic neighborhood. Angry targets of the Cantwells’ religious appeal complained, and the Cantwells were charged with a breach of the peace. The Supreme Court ruled unanimously that the charge violated the First Amendment. Although they acknowledged that maintaining public order is a valid state interest, the Court determined that the aims of public order cannot restrict the free communication of views, including religious views. Apparently knocking on the doors of private residences and distributing literature – though going beyond a “mere” belief – was understood to be protected.

Uncertainties prevail when complexities multiply. In *Everson v. Board of Education of the Township of Ewing* (330 U.S. 1, 1947), we find a public school system compensating families for the cost of transporting their children to a local Catholic school, which provided supplementary instruction. Delivering the opinion of the Court, Justice Black summarizes the gravamen

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of the issues and the test New Jersey had to pass for the actions on which the lawsuit was initially based:

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools ... The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The “establishment of religion” clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion ... The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Over the years, a number of litmus tests have been fashioned by the Court to impose rhyme, if not always reason, on its findings. One of these, the *Lemon test*, was first articulated in the 1971 case of *Lemon v. Kurtzman* (403 U.S. 602). The syllabus in *Lemon* summarizes the main points:

Rhode Island’s 1969 Salary Supplement Act provides for a 15% salary supplement to be paid to teachers in nonpublic schools at which the average per-pupil expenditure on secular education is below the average in public schools. Eligible teachers must teach only courses offered in the public schools, using only materials used in the public schools, and must agree not to teach courses in religion. A three-judge court found that about 25% of the State’s elementary students attended nonpublic schools, about 95% of whom attended Roman Catholic affiliated schools, and that to date about 250 teachers at Roman Catholic schools are the sole beneficiaries under the Act. The court found that the parochial school system was “an integral part of the religious mission of the Catholic Church,” and held that the Act fostered “excessive entanglement” between government and religion, thus violating the Establishment Clause.

The *Lemon* test raises three challenges: Does a law or practice have a bona fide secular purpose? Is its principal effect one of promoting or restricting religion? Does the law or practice measurably entangle religion and government? In *Lemon*, the practice under scrutiny called for the payment for instruction given to public school students by faculty drawn from a neighboring Roman Catholic school. The course material was entirely secular and there was no evidence of actual or implied religious content. Nevertheless, Chief Justice Burger, speaking for the Court, noted that:

The language of the Religion Clauses of the First Amendment is, at best, opaque, particularly when compared with other portions of the Amendment. Its authors did not

simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead, they commanded that there should be “no law respecting an establishment of religion.” A law may be one “respecting” the forbidden objective while falling short of its total realization. A law “respecting” the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion, but nevertheless be one “respecting” that end in the sense of being a step that could lead to such establishment, and hence offend the First Amendment.

Constitutions are at a minimum words: sometimes written on a page, at other times created by judges as *lex dicta* and then stabilized by a deference to precedent. Accordingly, constitutions not only allow but unavoidably confront the vagaries of interpretation as novel cases and claims make their seasonal appearance. On some accounts, this establishes that the original constitutive principles were “organic” from the outset, such that what might have been decisive in 1800 may be impracticable – even unintelligible – in 2000. On other accounts, the constitutive principles are abiding, the task at law now requiring careful and apolitical judgment based on a competent grasp of what the principle covers alone. The criterion of “original intent” in this understanding calls not for the mind reader but for a jurist capable of identifying the intent of the principle, whatever might have been in the mind of the one who framed it. “Congress shall make no law ...” means what it says, full stop. But then how is the “establishment” of a specific religious precept to be understood? Suppose Congress authorized per capita subsidies for every member of every identifiable religious denomination, showing no favoritism toward any, while making similar amounts available to atheists and agnostics. Would this breach the wall? Is even-handedness (“fairness”) a necessary or sufficient rite of passage for the civic authority to enter the religious realm?

For there to be an attempt to establish or favor religion, there must be an agreement on what qualifies as a religion. Taking history and cultural anthropology as guides, there is little firm ground on which to rule out any community of shared convictions regarding powers, entities, or figures regarded as divine. Even the qualification of “community” raises questions about conditioning a right on the size of a group that claims it. And is there a test to assess the degree of “sharing” in order to enjoy the benefits accorded to a “community”?

One recalls in this connection the first of the public lectures John Ruskin gave on ancient Greek mythology. The lectures would be published in 1893 under the title *Queen of the Air*, treating a Victorian audience to the subtle and pervasive influence the gods of Olympus had on the very character of the Hellenic age. Ruskin begins his address with a disarming passage:

We cannot justly interpret the religion of any people, unless we are prepared to admit that we ourselves, as well as they, are liable to error in matters of faith; and that the convictions of others, however singular, may in some points have been well founded, while

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our own, however reasonable, may be in some particulars mistaken. You must forgive me, therefore, for not always distinctively calling the creeds of the past “superstition,” and the creeds of the present day “religion”; as well as for assuming that a faith now confessed may sometimes be superficial, and that a faith long forgotten may once have been sincere.

A version of this perspective is apparent in the recent decision of the Supreme Court in *Burwell v. Hobby Lobby Stores*. Delivering the majority opinion, Justice Alito underscored the complex relationship between the moral and legal precepts at work, as well as the Court’s self-imposed silence on the credibility or rational grounding of religious convictions. The plaintiffs, he notes, raise,

... a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable ... The Court’s “narrow function ... is to determine” whether the plaintiffs’ asserted religious belief reflects “an honest conviction.”

Would such a narrow function be adopted in applying First Amendment jurisprudence to cases of honor killings, slavery, female genital mutilation, polygamy, animal sacrifice? These and scores of other practices fall far from a cultural domain shaped either by Hellenism or by Judeo-Christian teaching. Nonetheless, they form part of the bedrock of contemporary religious communities, some extremely populous and even present in the United States, and all claiming to reflect “an honest conviction.” Rereading the Madison of 1832 in this light, one asks what points he might take to be “unessential” when he says that, “It may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points.”

Where is the line to be drawn when the points at issue are taken to be essential by both religion and the civil authority? Moreover, does Justice Alito’s reference to acts judged to be “immoral” implicitly endorse the view that it is solely or chiefly by way of religious convictions that moral ascriptions come to deserve special consideration? Surely there are non-religious grounds on which to assess the moral quality of an act.

These and related matters highlight the vexing questions that guided the choice of topics and authors featured here. The original plan called for a series of public lectures by the contributors, which later expanded to full chapters. Complete and ungrudging financial support by the Wheatley Institution of Brigham Young University made the entire project possible. The contributors, whether drawn from law, intellectual history, political science, or religion have all achieved standing for their scholarly contributions. Each arrived, if not with a firmly settled position on the issues addressed, then surely with a position on what the reasonable options are. By way of their words, readers are not told

what to think, but are guided as to what to think *about* when considering how First Amendment jurisprudence helps or hinders the more noble and hopeful aspirations of the founding generation.

We thank several anonymous reviewers for their excellent suggestions. Our editor at the Press, Robert Dreesen, was supportive at every stage of the work. Laura Macy's careful and constructive editing of the text was invaluable.