

Religious Liberty v. Secularity: Is the American Founding Still Useful?

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Let me begin by expressing my appreciation for this invitation from, and my great admiration for, the work of the International Center for Law and Religion Studies. The Center's global efforts to increase religious understanding and freedom in general, and to promote the rights of religious conscience in particular, have magnificent impact. I commend you for your excellent work and am very honored to be part of your proceedings today.

Of course, I cannot miss this moment to celebrate a complementary operation at Utah Valley University. Several years ago, we launched a Center for Constitutional Studies at UVU dedicated to a non-partisan, multi-disciplinary study of the development, nature, and continuing operation of American constitutionalism. It is the only center of its kind in the constellation of state schools that make up the Utah System of Higher Education, and has already hosted numerous leading scholars and practitioners from around the country and the world on a variety of topics of timely interest, including what has become an annual spring symposium on religious liberty.

The role of religion seems to be changing, and changing rapidly. Two schools of thought here are worth considering. One is the subtraction school: where religion is simply falling away and being steadily replaced with modern rationalism and science. Recent findings from the Pew Forum on Religion and Public Life show that just in recent years, there are marked increases in those who count themselves as unaffiliated, a group which ranges from self-described atheists, to those who consider themselves spiritual but do not formally engage with an institutional church. These trends are especially pronounced in the under-30 crowd, one-third of which tends to

identify as religiously unaffiliated.² Contemporary philosopher Charles Taylor offers another school of thought that minimizes, or sees limits to, the decrease of religiosity per se, but does chart our march “from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is [only] one human possibility among others...Belief in God is no longer axiomatic.”³ It seems most reasonable to me to conclude that, at least for now, both things are happening, and the actual and potential shifts for our public life are tectonic.

My assignment today was to say something about the American Founding as it may relate to the preservation of religious liberty in this contemporary situation of a rapidly changing society. I have titled my remarks “Religious Liberty v. Secularity: Is the American Founding Still Useful?” At some level, the question about whether the Founding can still be useful is a genuine one. Just as parts of America are changing so rapidly on the religious front. So, too, the veneration we have for, and attention we pay to, the Founding are not what they once were. One small, sad, and very personal anecdote in evidence of this comes from a recent talk I gave at the business school at the University of Southern California. After lecturing roughly 80 students in a senior seminar on management about some of the leadership traits of the Founders, a student came up to thank me and said that in four years of attending classes at that venerable school, he could not recall a single instance where a faculty member spoke favorably of the Founders and the Founding at any length. Some had taken the time to be quite critical, most others had just not bothered to say anything at all, presumably even in general education courses that at one point in our history would surely have included somewhere, somehow, discussions of our national underpinnings.

That said, I think the clear answer to the question of whether the Founding remains useful is a resounding *yes!* From my personal perspective, the Founding is not more important than religion, but it is more difficult to get rid of from a broader public perspective. It is an insight as old as Socrates and Plato that foundings matter a great deal, and can never quite be escaped. At a minimum, cultural recollection of such moments always shapes—at least to some degree—a contemporary society’s moral vision, sense of purpose, and capacity to act. And this is especially true in the American case, where a founding was so extensively documented, and was so filled with drama and intelligence in what proved a crucial turning point in the development of self-rule in the West. Look, even this very day, you can recast the Founding as a multi-racial hip-hop experience, and it becomes one of the hottest tickets in Broadway history.⁴ Foundings can be reimagined and reinterpreted, but, for good or for evil, they tend to remain a force. Certainly ours has.

Part of its continuing force is that each side of the religious/secular divide today still looks (if in differing degrees and ways) to the Founding as holding the early thinking and impulses of the world as they think it ought to be. And, in some ways, each side is justified. For starters, the Founding and the Founders provided a more complicated stew of competing opinions and ideas than many would care to admit. I still get a chuckle from the reaction of John Adams—one of the more religiously-minded Founders—to the wildly popular essay for independence called *Common Sense*, by Thomas Paine—one of the more secular-minded Founders. In Adams’ eyes, despite its importance in marshalling an entire nation in a cause he cared about passionately, namely separation from Great Britain, Adams publicly blasted Paine’s work as “a poor, ignorant, malicious, short-sighted, crapulous mass.”⁵ Little wonder, then, when Adams had to follow George Washington as president, and began to suffer greatly in

comparison, that Paine famously said, “Some people talk of impeaching John Adams, but I am for softer measures. I would keep him to make fun of.”⁶ In this sense, the Founding has rather understandably become something of a national Rorschach test, with folks finding in it what they want to see, perhaps especially when it comes to issues where religion, law, and politics intersect.

With that in mind, I can hardly recommend the Founding as a simple panacea for the increasingly dramatic and disconcerting conflicts erupting now over religious liberty, as well as those that sit more ominously on the horizon. But is it still useful? Absolutely. And given that parts of this country, and especially our elite leaders of education and culture, have now largely rejected religion, or otherwise neutered it of any real substance and significance, the Founding writ large may provide the last common shreds of a heritage that can still be woven together to provide a fabric strong enough to protect robust religiosity, especially those forms still audacious enough to believe that for thousands of years of human history—and even an eternity beyond that—God has actually had an opinion about how one ought to worship, live, and love.

To say how the Founding might help us decide a particular case today, it is neither my area of expertise, nor really quite possible in this setting this morning. Do not get me wrong, the Founding can and should inform positions on cases, but that work requires more time, and far more consideration of far more things for any one case, let alone several of them, than could possibly be shared at the moment. Rather, what I would like to suggest is that embodied in the Founding are several general resources still useful, perhaps even powerful, for those who have the mind to glean and the heart to employ. In particular, I recognize the remarkable gifts of context, text, and character the Founding still offers us today.

Context

There is much the Founding has to tell us about the context in which our tradition of religious liberty was developed and therefore might be preserved. Among the most important considerations is the narrative that shows that religion did more than negotiate a commitment to principles of “free exercise” of faith-based conscience. It is also the case that principles of non-establishment and separationism, as well as some of the most basic practices of what we now generally refer to as liberal democracies, were established by and for the sake of religion, perhaps as much as they were established by and for, say, schools of Enlightenment-style reason worried about (or even opposed to) religion.

For exhibit A, I turn to Puritan New England. That’s right, I want to take us to what many consider that “land of witches and witch hunters, of killjoys in tall-crowned hats, whose main occupation was to prevent each other from having any fun and whose sole virtue lay in their furniture.”⁷ You might think that turning to the ultimate bogeyman for many secularists is a strange start for any discussion of religious liberty, or any kind of liberty. But the fact is that arguably the world’s most trenchant and far-sighted commentator of American democracy, Alexis de Tocqueville, considered the Puritans the first, and in some ways most important, of this nation’s founders. Explaining that Puritanism was “almost as much a political theory as a religious doctrine,”⁸ Tocqueville reckoned that there was “not an opinion, custom, or law, nor, one might add, an event, which the [Puritan genesis did] not explain,”⁹ at least for the 19th century America he was observing. No doubt he overstates the point. But, he does show, as have others, that by grounding their civil and ecclesiastical powers in a religiously held doctrine of “mutual consent,” the Puritans made the state and even the church answerable to the people, not vice versa. To that end, one of the first moves of John Winthrop, the inaugural governor of the Massachusetts Bay Colony, was to expand the franchise, and establish and actively

encourage the participation of the people in all public affairs, the free voting of taxes, and trial by jury of peers. Out of a sense of religious mandate to understand scripture on an individual basis and follow its preeminent teachings on a communal basis, robust provisions for public education and taking care of the poor were established that went well beyond anything in England at the time.

On Winthrop's watch, Massachusetts developed a ruling, bicameral, legislative body of rudimentary checks and balances between a larger popular assembly of deputies and a smaller aristocratic assembly of assistants, anchored by a written body of fundamental liberties, making it one of the most democratic entities in the world at the time. Furthermore, spurred on by certain Calvinist teachings and the kind of persecution of Puritans experienced from England's near complete fusion of civil and ecclesiastical power, Massachusetts, under Winthrop's leadership, laid out a remarkably well-defined separation of church and state. Church discipline could not impose corporeal or civil punishment. Not a single clergyman held office (despite the fact that no actual law forbade the practice). Civil government took exclusive jurisdiction over wills, divorces, and marriage ceremonies. No ecclesiastical courts even existed. Additionally, it is Winthrop's Massachusetts that first draws—then peacefully expels—Roger Williams, whose determination to establish in Rhode Island a “hedge or wall of separation between the garden of the church and the wilderness of the world”¹⁰ even more closely prefigures the church-state position of a Jefferson a century and a half later. And all of this was wrought by religious covenant in a completely isolated, undeveloped, and threatening state of nature more than 50 years before John Locke would publish his *Second Treatise*, and a decade before Thomas Hobbes would publish *Leviathan* which recommended, at best, a secular social contract enforced by a centralized authoritarianism. All of this led Tocqueville to conclude that “in America it is

religion which leads to enlightenment and the observance of divine laws which leads men to liberty.”¹¹

Now, we should not romanticize the Puritans, as Tocqueville does to some degree. Important corrections needed to be made to the Puritan approach. By looking at them fairly, though, we can recover a fuller understanding of the Founding which explodes the myth that the Founding was simply a sometimes hidden (and sometimes not so hidden) reaction against any kind of religion with teeth in it. The Puritan influence is just one example of many that could be marshalled to show how religiously-inspired visions of what was morally right established a rich and fertile context for individual liberty to flourish in early America. The same could be said with respect to the elimination of the transatlantic slave trade, the development of the Emancipation Proclamation, and much of the best success of the Civil Rights Movement of the 60’s. This is to say nothing of the kind of illuminating work that could be done on a comparative basis, whereby America’s Founding and explicit commitment to rights, grounded in something divine, something higher and transcendent, is shown to be far more stable and conducive to reliable self-rule than does, say, the practically contemporaneous effort of the French to ground their rights in modern reason alone. Helping non- or less religious audiences see things like this hardly solves all problems, but it does make it more difficult to simply dismiss religion as either too pointless or too dangerous to be given any special status in the law, as some would like to do.

Text

Speaking of the law, it is simply impossible to calculate the debt we owe to the Founders who slowly and pragmatically concluded that, in addition to creating a unique federal system of government with checks and balances across the divisions (all of which was designed to ensure a

rule favorable to individual liberty), the Constitution needed to spell out, and thereby enshrine, a concrete protection of religious liberty.

The Constitutional Convention completed its draft Constitution on September 17, 1787. It was approved by the Continental Congress by unanimous vote on September 28 and sent to the states for ratification. Article VII of the proposed Constitution required ratification by the “Conventions of nine States.” The Constitution was ratified on July 2, 1788. Only four states ratified the document without a federal bill of rights. One of the chiefest concerns was a lack of a specific guarantee of religious liberty. The remaining states ratified the Constitution only on the condition that the first session of Congress would prepare a bill of rights to amend the Constitution to explicitly protect, among other things, freedom of religion and conscience. These states discussed and proposed provisions for a federal bill of rights, including various religious liberty clauses. Once Congress completed its work on September 25, 1791, it sent the draft Bill of Rights, including the religion clause, to President Washington the following day. After Washington signed it, it was sent to the states for ratification. The final vote needed for ratification was made by Virginia, recorded on December 15, 1791, making the amendments effective from that day forward. As this group well knows, the opening line of those key additional amendments reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹² There it sits, America’s first liberty, and the linchpin for finally ratifying the Constitution itself.

It is America’s first liberty, both numerically and substantively. As James Madison explained in his 1785 Memorial and Remonstrance Against Religious Assessments, “It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the

claims of Civil Society.”¹³ The fact the First Amendment is there, that it has special status as key to passage of the larger Constitution itself, and that it was drafted with the conviction that it has ordinal priority over the constellation of all other rights gives it tremendous heft. At a minimum, it means that, as much as some might wish it otherwise, short of some truly disastrous event, those words will remain there as long as the Constitution lasts, and will have to be dealt with, even by those who do not share its suppositions. Now, a primarily Latter-day Saint audience will be quick to recognize that simply having the right stated as words on paper does not always guarantee that it will carry out its intended effect. At the end of the day, it is simply what Madison called a “parchment barrier,”¹⁴ thus explaining why at first he did not even support a Bill of Rights. But whether out of political necessity, or reflection, or both, Madison relented and helped architect the language we now venerate and that has proved such a crucial resource, time and time again, for buttressing claims of redress against religious tyranny.

If I might paraphrase something Lincoln once said of Jefferson’s key second sentence of the Declaration of Independence, “all honor [to the Founders] who, in the concrete pressure to [establish an entirely new form of government] had the coolness, forecast, and capacity to introduce into a merely [operational] document [a fundamental right of religious liberty]... and so embalm it there, that to-day, and in all coming days, it shall be a rebuke and a stumbling-block to the very harbingers of re-appearing tyranny and oppression.”¹⁵

Now all of this does raise the question of what exactly those two clauses mean and protect. Congress actually considered 25 separate drafts of the religion clause. Of these, 10 were submitted by the states, 10 were debated in the House, five more in the Senate, and the final version came out of a joint committee of the House and Senate. There is little definitive evidence in the record against any of the drafts and few clues as to why the words were chosen for the

final version. Fortunately, you have a full conference in front of you, and a gathering of geniuses here to figure all of this out in its entirety.

Let me just make a couple of very cursory observations. First, notably absent from all 25 drafts considered is any principle of strict, absolute separation of church and state. Certainly there is no talk of some high and impregnable wall of separation—an image that means so much today but that even Jefferson himself undermined in his own inaugural address. At the time of the drafting of the First Amendment, Congress had already passed laws supporting paid chaplains for Congress from different denominations, as well as the Northwest Ordinance which contained two religion clauses, one analogous to the First Amendment’s Free Exercise Clause, and another expressly acknowledging that “Religion, morality, and knowledge [are] necessary to good government.”¹⁶ Further evidence from this first generation of national legislative activity under the Constitution that the Founders did not intend an absolute and impermeable boundary between Church and State, are the funding of chaplains in the military, various religion clauses in treaties, and passage of patently religious Thanksgiving Day proclamations.

What does seem to be meant by non-establishment, at least, is that rather than a complete emptying of the public square of anything religious, à la French-style secularism, is that public conditions foster religious equality and pluralism. Instead of trying to brush religion away entirely from anything with a public purpose, the aim was to make the country a safe place for genuinely religious voices of all stripes and varieties. This is sometimes easier said than done, but it does seem that was the intention of those who established the right. On the other hand, as far as free exercise goes, it *is* clear that the intention was enough separation between church and state so that people could do more than just think and believe what they wanted. They could also

actively live out their own religious commitments without penalty and partiality from the government to which they gave their consent and support.

This statement from Michael McConnell, director of the Stanford Constitutional Law Center and a former judge of the U.S. Court of Appeals on the Tenth Circuit, succinctly sums up the nature of these two clauses, and, more importantly, why they still stand as America's "first liberty" and must be defended as such today, even by those who do not share a religious world view. As he puts it:

"The framers of our Bill of Rights thought that religious freedom deserved double-barreled protection. Americans would have the right of 'free exercise' of their chosen faith, and government was forbidden to foster or control religion by means of an 'establishment of religion.' Today, an increasing number of scholars and activists say that religion is not so special after all. Churches are just another charity, faith is just another ideology and worship is just another weekend activity.

"All Americans—believers and nonbelievers alike—should resist this argument. ...The religion clauses of the Constitution were the culmination of centuries of theological and political debate over the proper relationship between spiritual and temporal authority. ...

"Religion is an institution, a worldview, a set of personal loyalties and a locus of community, an aspect of identity and a connection to the transcendent. Other parts of human life may serve one or more of these functions, but none other serves them all.

"To believers, the right to worship God in accordance with conscience is the most important of our rights. To nonbelievers, it is scarcely less important to be free of governmental imposition of a religion they do not accept."¹⁷

The text of the First Amendment is a grand gift from those who went before us. Understanding the nature of that gift, and the context of its creation, is just the starting point of enjoying it and preserving it. For, in the changing age in which we live, its preservation will require more than that. It will require a certain character. Once again, we might profitably look to our founders.

Character

The Founders thought and spoke often about the character of a free people. Even as they established brilliant constitutional mechanisms of counterpoise that would productively channel the inevitably self-interested ways of virtually all human beings, they knew and taught us that law and structure alone could not save us. The life of a free people requires and only flourishes with an extraordinary amount of individual goodness, decency, and initiative. The Founders recognized that the single best source for fostering such a morality of freedom was found in the broadly Judeo-Christian traditions of their day.

In his justly famous farewell address, George Washington declared,

“Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable. ...And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”¹⁸

In speaking to some officers of the Massachusetts militia, John Adams echoed the exact same sentiment:

“We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry would break

the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”¹⁹

Interestingly, this thesis has recently, if grudgingly, been acknowledged by a prominent atheist who admits “one does not have to be a religious believer to grasp that the core values of Western Civilization are grounded in religion, and to be concerned the erosion of religious observance therefore undermines these values.”²⁰

Two years ago, Elder Dallin H. Oaks gave a landmark address at a major event at UVU organized by our Center for Constitutional Studies. Despite reason for much pessimism about the future state of religious liberty in this country, he gave a talk entitled “Hope for the Years Ahead.” Toward the conclusion of that talk, he spoke in the exact vein of Washington and Adams as quoted here. To be explicit, he said, “Another way to move forward is to encourage a more general understanding of the reality that our society is not held together primarily by law and its enforcement but most importantly by those who voluntarily obey the unenforceable because of their internalized norms of righteous or correct behavior. We all have a vital interest in religion because religious belief in right and wrong is fundamental to producing the needed voluntary compliance by a large number of our citizens.”²¹

Ladies and gentlemen, as interested as we may be in politics and law, especially constitutional law, and as vital as it is to constantly and concretely deal with the political and legal issues before us, these are not the most important things. To all those of us who genuinely worry about the conditions of religious liberty in the world today and want to do something about it, we must first serve our cause by rising up and living our religion—LDS or otherwise—the very best we can. There was a time, frankly a very recent time, when the larger culture was

such that spiritual “sunshine soldiers and summer patriots”²² might have helped carry the day. But I believe those days are over. Victory will only rest in the hands of sufficient numbers of believers of all stripes who act as believers first and foremost, and live their beliefs with all their “heart, might, mind and strength.”²³ We must do all we can to make sure that our children and our grandchildren do the same. We must confidently spread the good news of gospel faith and good living to neighbors and friends alike. Together we must try to do what the best of the founding generation did. They were not perfect, and we will not be either. But surely we can try, as they seemed to try, to live with honesty and integrity, to take personal responsibility to provide for ourselves and our families, to cherish life in all its stages, to marry and stay married, to care for the poor, to establish bonds of affection even with those who disagree with us, and to always reverence the Divine as the source of our rights and all that is good in the world.

If nothing else, let such behavior start and proliferate right here, with this little band of three hundred. Such ranks worked for Gideon against overwhelming odds, and they just might work for us. This country has had more than one great religious awakening. Why not another? The residue of religion runs more broadly in this country than any other in the advanced Western world. If you think this is Matt Holland being “pie in the sky,” at least consider that the most provocative passage of the Elder Oaks talk at UVU holds out the possibility of just such a turn.

Elder Oaks quotes Professor Sorokin of Harvard University (described as one of the most creative social thinkers of the last century) who “hypothesized that major social events viewed as calamities can set in motion movements that produce exactly the opposite of the expected result. Applying that hypothesis to religious movements, Sorokin wrote:

“Calamities generate two opposite movements in different sections of the population: one is a trend toward unreligiousness and demoralization; the other is a trend toward

extreme religious, spiritual, and moral exaltation. ...The principal steps in the progress of mankind toward a spiritual religion and a noble code of ethics have been taken primarily under the impact of great catastrophes.”²⁴

Increasingly, we seem to be facing spiritual, political, social, economic, and geological calamities. Maybe the day of calamity is here. Maybe it is still ahead. Either way, it may be that such a day of calamity holds the seeds of the very success that seems to so quickly be slipping from our grasp. Regardless, if we are content to live by the fruits of the Founding, let us not shrink from the kind of character that brought the Founding forward. Let us not be surprised if a moment has come where the demands of preserving the Founding are equal to or even greater than the demands it took to erect it. With that in mind, perhaps the best closing words I can share with you come from John Jay, President of the Continental Congress; first Chief Justice of the Supreme Court; first Minister of Foreign Affairs; and Governor of New York. He was a man who knew plenty about troubles, opposition, and overwhelming odds, yet still practiced a faith, optimism, and hope for the future that helped him prevail in the present.

In an autographed letter to his wife, Sarah, he writes in 1797, “By all means...dismiss from your mind all useless apprehensions as well as all vain hopes. Let us calmly do our duty, and refer events to Providence. They who expect a gentle course of tranquility and happiness in this world, do not know the world. They expect what they will never find. Our business here is to do our duty, to be grateful for benefits, to be patient under adversity, to be resigned to the will of heaven and to console and comfort ourselves with the prospect of being placed after a few years more in a situation from which every kind of evil is excluded. Let us forever be mindful that God governs the world, that all events are under His control, and that nothing comes to pass but by His permission or appointment. These are unquestionable truths and facts, and not

philosophical reveries. Be composed therefore. Take the air, take exercise, be cheerful, strengthen your nerves, and be prepared for whatever may occur.”²⁵

I’m with John Jay, and I’m for all of you. The work to which you are committed is amongst the weightiest of our day. But remember, it is ultimately God’s work. Calmly do your duty, take the air, be cheerful, and prepare for whatever may occur. There could be no finer way to honor the Founders and preserve the sacred gifts they have bestowed to us.

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