RELIGION AND LIBERTY UNDER LAW AT THE FOUNDING OF AMERICA

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As in most good titles, virtually every word of the title assigned to me has several meanings: "religion," "liberty," "law," "founding," even "America." I shall try to unravel the words of this title and to make it meaningful, not only for the past, but for the future.

In speaking of the founding of America, we should remind ourselves that "America" was the name given in 1507 by a German geographer to the continents that, in the previous decade, had come to be called in Europe "the New World." The Italian explorer Amerigo Vespucci had succeeded in persuading Europeans that it was he, in 1497, not Columbus, in 1492, who had been the first to discover the New World. (You will recall that Columbus thought that he had reached India, and he named the inhabitants Indians!) Fortunately for us, the German geographer chose to name the new world after Amerigo Vespucci's first name and not after his last name!

It was a century later, here at Virginia Beach and at Jamestown, that English settlers first came to the New World to found a royal English colony, and thirteen years later that English Calvinists first came to Plymouth in search of religious independence.

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[*] Professor Berman departed this life on November 13, 2007, at the age of eighty-nine, as this Address was going to press. He was the Robert W. Woodruff Professor of Law, Emory University School of Law and James Barr Ames Professor of Law, Emeritus, Harvard Law School. A prodigious scholar, Professor Berman's writing manifested broad learning and deep understanding—qualities that distinguished such works as LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

Professor Berman was a father of the contemporary effort to recover the religious roots of the law and especially the Christian roots of the Western legal tradition. Readers of his work could well conclude that to apprehend law apart from its religious roots is a poor affair, blind to what gives the law its transcendence and beauty. No surprise, then, that he was a friend of Regent University School of Law. Three summers ago, Professor Berman taught at Regent as the featured lecturer in the Summer Program in Christian Jurisprudence. To the program he brought not only his learning and wisdom, seasoned with gentle grace and humility, but also the remarkable story of his own conversion and commitment to Jesus of Nazareth as God the Son, the Messiah.

It is therefore with special gratitude that Regent University Law Review publishes this Address, delivered on April 13, 2007, as part of "Liberty Under Law: 400 Years of Freedom," among the last works of a dean of legal historians, now alive, as we trust, in the presence of the Author of History.

This Address draws partly on the author's previous articles *Religious Freedom and the Challenge of the Modern State*, 39 EMORY L.J. 149 (1990); *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777 (1986) [hereinafter Berman, *Religion and Law*]; and *The Interaction of Law and Religion*, 8 CAP. U. L. REV. 345 (1979) [hereinafter Berman, *Interaction of Law*]. [–The Editors]

Of the roughly 3200 religious congregations that existed in the thirteen English colonies of North America in 1776, roughly two-thirds were either Congregationalist, Presbyterian, Baptist, or Quaker; German and Dutch Protestant congregations constituted about fifteen percent, and Anglican congregations constituted another fifteen percent.[1] Fifty-six of the roughly 3200 congregations were Roman Catholic and five were Jewish.[2]

Thus, in 1776 and later, Protestant Christianity predominated, but there was a wide pluralism within it, and Catholicism and Judaism were tolerated. In several of the seceding colonies a particular Protestant denomination was "established" with substantial political and financial prerogatives—for example, in Massachusetts the Congregational church—but even in those colonies other denominations were permitted to exist, and by the mid-1830s establishment of a particular denomination no longer existed in any state of the Union.

The pluralism of Protestant denominations in North America in the seventeenth, eighteenth, and nineteenth centuries must be understood as something more than mere diversity. Their relationships with each other were, on the whole, cooperative. There was repression of individuals of all denominations who were considered to have violated the Puritan ethic, but there was no persecution of denominations as such—not even of Catholics or Jews. Even in those colonies—and later states—where one Protestant denomination predominated, it usually interacted peaceably with other denominations and shared with them religious responsibilities.

What was universally accepted was that "religion"—by which was meant both belief in God and belief in an after-life of reward for virtue and punishment for sin—was essential to a healthy society. As George Washington said in his Farewell Address at the end of his presidency, "national morality"—the moral conduct of the American people—can only prevail if it is founded on religious belief.[3] Indeed, not only the

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[1] Jon Butler, *Why Revolutionary America Wasn't a "Christian Nation," in* RELIGION AND THE NEW REPUBLIC: FAITH IN THE FOUNDING OF AMERICA 187, 192 (James H. Hutson ed., 2000).

[2] *Id.*

[3] George Washington, The Farewell Address, Sept. 19, 1796, *reprinted in* GEORGE WASHINGTON 1732–1799: CHRONOLOGY–DOCUMENTS–BIBLIOGRAPHICAL AIDS 68, 75 (Howard F. Bremer ed., Oceana Publ's, Inc. 1967).

> Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? 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.

Founding Fathers, but also late eighteenth-century Americans generally were in agreement that republican self-government required a virtuous citizenry, and a virtuous citizenry required morality based on religious faith.

Even the free-thinker Thomas Jefferson said in his first message as President that, "the liberties of a nation [cannot] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that their liberties are the gift of God."[4]

And so to talk about the original meaning of the opening clauses of the First Amendment of the United States Constitution in terms of separation of Church and State is entirely misleading. Prohibition of federal (but not state) "establishment" of religion, yes. Federal support of "free exercise" of religion, yes.

At the state and local levels, clergy of parish churches sometimes played important political roles in their communities. Also, sermons at church services often addressed political questions. In that sense, religion interacted with government. More significantly, many of the responsibilities that are now assumed by government, whether municipal, state, or federal, were in the eighteenth, nineteenth, and early twentieth centuries assumed by religion. Education, for example, until the second half of the nineteenth century, was almost entirely the responsibility of church leaders and religious associations; indeed, one of the chief motivations of the nineteenth-century movement to establish, for the first time, compulsory public elementary schooling at the municipal level was the desire to expand, through public schools, the teaching of the Christian religion.[5] Similarly, social welfare—care of both the poor and the sick—was, until the twentieth century, more the responsibility of churches and of religious associations than of government.

Id.

[4] ISAAC A. CORNELISON, THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA: A STATE WITHOUT A CHURCH, BUT NOT WITHOUT RELIGION 93 (Leonard W. Levy ed., Da Capo Press 1970) (1895).

[5] Not until the 1820s and 1830s did local governments in the United States gradually assume responsibility for the education of youth, and that responsibility was conceived to be fundamentally religious. As Horace Mann, the great apostle of public schooling, said in 1841:

> As educators, . . . our great duty is . . . to train [all children] up to the love of God and the love of man; to make the perfect example of Jesus Christ lovely in their eyes; and to give to all so much religious instruction as is compatible with the rights of others and with the genius of our government . . . .

HORACE MANN, *Lecture V.: An Historical View of Education; Showing Its Dignity and Its Degradation*, *in* LECTURES ON EDUCATION 215, 263 (Boston, Wm. B. Fowle & N. Capen 1845).

I speak here partly from personal experience. I can testify that as recently as eighty years ago, in my childhood, if one asked whether the United States was a Protestant Christian country, the overwhelming majority of Americans would have said yes. That was certainly what I was taught as a youngster in the 1920s at the Noah Webster grammar school, a public school in Hartford, Connecticut. At weekly Wednesday morning assemblies all eight grades were brought together to say the Lord's Prayer, hear readings from the Old and New Testaments, and sing Christian hymns. I recall that when the hymn was "Onward Christian Soldiers," the few of us kids who were Jewish would sing at the top of our voices "Onward Jewish Soldiers . . . with the Star of David going on before!" Hartford, the capital of Connecticut, was a Protestant Christian city, though as increasing numbers of Roman Catholic and Jewish immigrants were moving in, the older Yankee families who ran the city were moving their residences, though not their businesses, out to West Hartford, partly in order to avoid the increase in Hartford's municipal taxes. The old historical culture of Connecticut, dating from colonial times, was rapidly disappearing.

Prior to World War I and into the 1920s, most Americans believed that the Constitution itself and, indeed, our whole concept of law, law with a capital "L," our legal principles and values, were based ultimately on the Ten Commandments, the Bible, and the law of God. The concept that our law is rooted in a religious tradition was shared not only by the Protestant descendants of the English settlers on this continent and their black slaves, but also by millions of immigrants from western, southern, and eastern Europe, a substantial proportion of whom were Roman Catholics and Jews. Indeed, throughout the entire nineteenth and into the early twentieth century, American law students studied their legal tradition from the great treatise on English law by Blackstone, who wrote, "Th[e] law of nature . . . dictated by God himself . . . is binding . . . in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."[6]

What conclusions are we to draw from this story? In view of the fundamental changes that have taken place in the twentieth and twenty-first centuries of our experience as a people, of what significance today and for the future is the fact that religion and liberty under law were considered to be closely linked at the founding of America and in the first three centuries of our history?

Within the past three generations, the public philosophy of America has shifted radically from a religious to a secular theory of law and from

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[6] WILLIAM BLACKSTONE, 1 COMMENTARIES *41.

a moral to a political or instrumental theory. Law is now generally considered—at least in public discourse—to be essentially a pragmatic device for accomplishing specific political, economic, and social objectives. Its tasks are thought to be finite, material, and impersonal—to get things done, to make people act in certain ways. Rarely, if ever, does one hear it said that law is a reflection of an objective concept of justice or of the ultimate meaning or purpose of life. Usually it is thought to reflect, at best, the community's sense of what is useful. We speak of "the rule of law," but we usually mean by it the rule of *laws*, the observance of legal rules, the supremacy of *lex*, not of *jus*, the supremacy of legal policy, not of legal justice.[7]

Likewise, in the last two or three generations, the concept of religion as something wholly private and wholly psychological—as contrasted with the earlier concept of religion as something public, something partly psychological, but also partly social and historical, and, indeed, partly legal—has come to dominate our discourse.

Moreover, we have become a new people ethnically and culturally. We are, in fact, a microcosm of the whole world, with people of every race, every religion, and every social and political philosophy.

And it is in that context that the meaning of the religion clauses of the First Amendment have changed. Now not only the federal government but also the states are prohibited from establishing a religion, and now establishment means not only preferring one denomination to all others, but giving governmental aid specifically to religion of any kind; and further, free exercise of religion can now be lawfully restricted whenever such exercise is considered to be derived from governmental aid specifically to religion. James Madison's belief,[8] generally shared in America in his time and for generations thereafter,[9] that law itself is based on a divine covenant between God and man is no longer reflected in the decisions of the courts that interpret the clauses that he drafted.

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7 It is noteworthy that all European languages except English have two words for "law," corresponding to the Latin *lex* and *jus* (for example, French *loi* and *droit*, Italian *legge* and *diritto*, German *Gesetz* and *Recht*, and Russian *zakon*, and *pravo*). In order to make a similar distinction, English has definite and indefinite articles and the distinction between singular and plural nouns, so that in English one can distinguish between "a law" or "laws," on the one hand, and "the law," that is, law as a whole, the legal system, or due process of law, on the other. One would not say due process of *laws* or Emory *Laws* School. Also, the capital letter "L" may be used, as when one speaks of a "belief in Law," to emphasize the character of law as a system of justice.

8 *See* Berman, *Religion and Law*, *supra* note *, at 787 (discussing James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *in* 2 WRITINGS OF JAMES MADISON 184–85 (Gaillard Hunt ed., G.P. Putnam's Sons 1901)).

9 *See* Berman, *Interaction of Law*, *supra* note *, at 350–51.

The American people as a whole no longer thinks of itself as a Christian people, let alone a Protestant Christian people. The majority of us worship, to be sure, in Protestant churches, but as a nation we accept a wide diversity of belief systems. Indeed, we value positively the freedom that supports that diversity, on the one hand, and that allows us, on the other hand, to struggle to reconcile our differences.

Why, then, do we meet to celebrate the founding?

Here I confess that—as a believer in tradition and in the normative significance of historical experience, and hence as a believer in the positive value of following in the faith of our ancestors, thus speaking, in that sense, as a conservative—I am torn: torn between my loyalty, on the one hand, to the tradition of our founders, who in the first two centuries of our history established a nation with a common Christian belief system, and my loyalty, on the other hand, to the tradition of their successors of the later nineteenth and twentieth centuries who fled to these shores from various forms of discrimination in other countries and were ultimately assimilated as members of a new kind of pluralist community. Indeed, James Madison himself confronted this dilemma; he wrote that "precedent and tradition" pointed to America as a "Christian nation," but that "principle," on the other hand, pointed to a land that would be "an asylum to the persecuted and oppressed of every Nation and Religion."[10]

How is this conflict of loyalties to be resolved?

The answer, I believe, is to be found partly in the common elements of the two traditions. Our earlier ancestors who came to America in the seventeenth and eighteenth centuries for freedom to practice their particular kinds of Protestant Christianity, and our later ancestors who came in the nineteenth and early twentieth centuries for economic opportunity and/or political freedom, both shared great moral virtues of faith and hope and caring, *caritas*—faith in an unpredictable and uncertain future in a new land, hope of success in overcoming a host of economic and social obstacles, and caring membership in the religious, racial, and cultural communities of fellow immigrants.

The answer is also to be found partly in the common commitment of our forbears, both Christian and non-Christian, both religious and secularist, to the creation of a social order that fosters universal spiritual values of brotherhood, values that cross all boundaries of race and creed. It is partly the search for such spiritual values that motivated settlers in the New World ever since it was founded.

And so, I would link our two national historical traditions as we play our part in helping to create a multi-national, multi-religious, multi-civilizational world order.

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[10] Madison, *supra* note 8, at 188.