
Volume 42

Issue 1 Fall 1992: *Symposium - Confronting the Wall
of Separation: A New Dialogue Between Law and
Religion on the Meaning of the First Amendment*

Article 23

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Recommended Citation

Robin Lovin, *What Kind of Freedom Does Religion Need?*, 42 DePaul L. Rev. 311 (1992)
Available at: <https://via.library.depaul.edu/law-review/vol42/iss1/23>

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WHAT KIND OF FREEDOM DOES RELIGION NEED?

*Robin Lovin**

I take my role as the theologian here with some trepidation. What I have to say is less specifically related to adjudication around First Amendment issues, but I think it sets out some background issues that need to be addressed in order to provide a more coherent understanding of how court decisions are related to religious issues. I agree with Dean Edward Gaffney's suggestion that there is an obvious, historical answer to the question we are addressing — is the First Amendment hostile to religion?¹ The First Amendment was designed to be hostile to those kinds of religion that require establishment as a condition for their survival or prosperity. That was at least one of the major motivations behind the framing of the First Amendment.² So at that time, some Anglicans and some Congregationalists correctly perceived that this was a constitutional provision directed against what they saw as essential to their religion.³ Later, the Roman Catholic community went through a similar set of questions, and then developed a new assessment that at Vatican II⁴ became normative for the Roman Catholic Church with regard to church-state issues on a global basis. In those situations, first for Protestants and then, later, for Catholics in the United States, these religious communities learned that they could live without the establishment that they thought was essential at an earlier phase in their religion. The success of the First Amendment might indeed be mea-

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1. Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263 (1992).

2. Scott Titshaw, Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L. REV. 1085, 1092 (1989). See also David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 852 (1991).

3. Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 513 (1991). See also Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 410-11 (1986).

4. During the 1960s and particularly at Vatican II, the Catholic Church liberalized many of its views. For a short discussion of Vatican II, see Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1019-79 (1991).

sured by the fact that under the constitutional conditions the First Amendment creates, religions over a period of time seem to adapt and to prosper. Indeed, they eventually develop their own religious arguments for the kind of disestablished condition the First Amendment requires. There are certainly dissents that could be entered against that kind of interpretation of our history, and there are obvious questions about how far it can be pushed. Could a Muslim fundamentalist group, for example, go through the same kind of historical development that Protestants and Catholics have gone through in this country with regard to religious establishment? But I will leave those details aside for the moment and suggest that one obvious way of thinking about the First Amendment with respect to religion is simply to join in the kind of general celebration that was characteristic of American public life about two or three decades ago — a general celebration of the prospering and growth of religion under the disestablished conditions the First Amendment creates.

Why then do we end up raising questions about hostility to religion in the First Amendment, and raising again a set of questions about the prosperity and viability of religious communities in the constitutional context the First Amendment creates? Well, I think that the question we are answering today, whether the First Amendment is hostile to religion, takes a very different form from the earlier question of whether religions can prosper without some kind of establishment or state support. The question has come to mean: Is freedom of religion inimical to authentic religious life? The new skepticism about the First Amendment comes from those who are ambiguous or who are ambivalent about the religious effects of religious freedom, those who do not see religious freedom securing the prosperity and growth of religious communities, but see it creating communities that are captive and docile to the wishes of a secular state. Here, of course, Stanley Hauerwas is the prime example in contemporary religious life and contemporary theology.⁵

The question, then, is: What notion of religion is this that raises this new set of questions? We understood the notion of religion that had a problem with the First Amendment with respect to establishment. What notion of religion has a problem with respect to religious freedom? It is certainly a kind of religion that has antecedents

5. See STANLEY HAUERWAS, *A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC* (1981).

in Western Christian and particularly Protestant traditions — in the Anabaptist movements, in the so-called left wing of the Reformation. There is a wonderful story in Roland Bainton's history of war and peace in *Christian Attitudes Toward War and Peace*⁶ about the Anabaptist community that was persecuted from place to place in Central Europe and finally found themselves living in the territory of a Count who thought these were simple, industrious, good folk.⁷ This Count offered to protect them, but they responded that they would rather move on to some place where they could be persecuted.⁸ Their understanding of the appropriate relationship with the state did not permit that kind of protection. So there are religious antecedents to the questions about religious freedom that Hauerwas and others are raising today. But I suggest to you that Hauerwas's questions are distinctly *postmodern* kinds of questions about religion and religious freedom. (It seems to me that the fact that Stanley Hauerwas has ended up in Durham, North Carolina, as the next-door neighbor of a postmodern, deconstructionist, literary theorist⁹ is probably the best evidence that we can find for a valid cosmological argument for the existence of God. This could not have happened in a random universe.)

So what's happening here? In religious thought about the First Amendment, a question about freedom has displaced the question about establishment. In other words, a postmodern question, a question of freedom, has displaced a distinctly modern one, a question of establishment. Let me expand on the difference between these two kinds of questions. The modern question, the question that raised the issue of establishment, was a question about whether society could exist with two competing centers that demanded unlimited loyalty. Now, note that that was a distinctly modern question. If you read Harold Berman's analysis of the development of law and the relationship between religion and state in the Middle Ages,¹⁰ you discover that those questions of competing ultimate loyalties did not arise in that modern way during that period. The medieval legal

6. ROLAND H. BAINTON, *CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION* 156-57 (1960).

7. *Id.*

8. *Id.* at 157.

9. The author is referring to Stanley Fish, a professor of English and law at Duke University, who champions the postmodern deconstructionist theory.

10. See HAROLD J. BERMAN, *LAW AND THE REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

system developed with multiple overlapping jurisdictions, which would sometimes come into severe conflict with one another.¹¹ But the sharply posed philosophical question of whether we could have competing centers of ultimate loyalty is a distinctly modern one. It arises as we move out of that medieval period and into a period when the modern state is forming itself and thinking about how it is going to handle those questions of competing loyalties. There was a variety of resolutions that were posed to that question of competing ultimate loyalties. Thomas Hobbes and Marsilius of Padua had one kind of resolution: You have to concentrate all authority in the state, you cannot have more than one center of power and authority,¹² so the person who controls the civil society has to be able to compel religious assent as well. But the resolution that prevailed in our constitutional system, and the one that has prevailed in the modern world generally, was the later one of Locke and then of Jefferson and the Founders of our constitutional system.¹³ It stated that we deal with these competing centers of loyalty by establishing the supremacy of an individual autonomous conscience that will adjudicate between those competing claims.¹⁴ So the modern answer to the question about the relationship between the state and religion — and those competing centers of loyalty — is that we can have both civil and religious communities and powers because really neither one of them is ultimate. What is ultimate is the power of reason located in the individual, autonomous, rational person.

The postmodern question arises as we begin to recognize that we are not in fact those autonomous, rational observers in the way that our early constitutional system and those enlightenment figures behind it presupposed. Locke's letter on toleration contains his model of how churches are started.¹⁵ The individual looks over all of the religious claims that exist in the world and decides which of those are true and then goes around and finds a bunch of like-minded

11. Harold J. Berman, *Introductory Remarks: Why the History of Western Law Is Not Written*, 1984 U. ILL. L. REV. 511, 512.

12. GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 473 (rev. ed. 1950).

13. See Hall, *supra* note 3, at 489 n.175, 494-97; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1430-31 (1990).

14. William G. McLoughlin, *The Role of Religion in the Revolution: Liberty of Conscience and Cultural Cohesion in the New Nation*, in *ESSAYS ON THE AMERICAN REVOLUTION* 197, 199-200 (Stephen G. Kurtz & James H. Hutson eds., 1973).

15. John Locke, *A Letter Concerning Toleration*, in *33 GREAT BOOKS OF THE WESTERN WORLD* 1 (Mortimer J. Adler et al. eds., 1990).

individuals and forms a church.¹⁶ Now, I suggest to you that so long as our picture of what religious freedom means is founded in that kind of modern, enlightenment, rationalist picture of what religious communities are about, we will be unable to arrive at a satisfactory arrangement to protect religious freedom by constitutional means, because the kind of freedom that is presupposed in that image simply does not exist. Part of the problem of our modern consciousness is we know that freedom does not exist.

The critical question, I suggest, now becomes whether we are going to jump from that modern position of rational autonomy all the way to Stanley Hauerwas's position that no freedom exists.¹⁷ Are we going to go all the way from a picture of complete rational autonomy to the suggestion that there is no such thing as religious freedom, that we are simply constituted by the narratives that make us up as persons, and that we are bound to that reality in which we find ourselves? If you go all the way from the modern question to Hauerwas's postmodern question, freedom becomes irrelevant except as a key to a kind of hermeneutic of suspicion. That is to say, if you believe that we are not free in the way Hauerwas thinks we are not free, what you do when you hear people talking about freedom is to look around to see what sort of coercion they are covering up. In the postmodern perspective, the idea of freedom, since it cannot be coherent in itself, has to be a key to a hermeneutic of suspicion in which you assume that people who talk about freedom are really trying to cover up some kind of coercion.

I would myself — in good, moderate, Aristotelian fashion — try to come down somewhere in the middle between the modern and the Hauerwasian position. I prefer to speak of a relative or a situated freedom that recognizes that we are shaped in inescapable ways by the communities and the histories with which we start and that also acknowledges that we are able to get a critical distance from those starting points. Having that distance, furthermore, is crucial to our own flourishing as persons, and also to the flourishing of the institutions and communities in which we are born. An adequate understanding of religious freedom would thus take seriously both the nurture of those communities of religious identity and the need to formulate and live one's individual distance from those formative

16. *Id.* at 4.

17. Stanley Hauerwas & Michael Baxter, C.S.C., *The Kingship of Christ: Why Freedom of "Belief" Is Not Enough*, 42 DEPAUL L. REV. 107, 110 (1992).

demands.

Time does not permit me to develop exactly what a jurisprudence based on that idea of freedom would look like.¹⁸ The point is that just as Bryan Hehir stated that the question of church and society has to come before the question of church and state,¹⁹ the question of the nature of human freedom has to come prior to the question of the legal status of religious freedom. If we want to ask in contemporary terms whether the First Amendment is hostile to religion, the best answer I can give is to say that the First Amendment and its jurisprudence are going to work against religion unless we can come up with a legal conception of human freedom and its social context that is adequate to contemporary religious and philosophical understandings of persons and their communities.

18. I say, "Time does not permit me," with the implication that if time did permit, I would of course be able to do this adequately. I confess that I cannot; but I think you see the point.

19. J. Bryan Hehir, *Church-State and Church-World*, 42 DEPAUL L. REV. 175, 175 (1992).