1-1-2013

Dignity, History, and Religious-Group Rights

Frederick Mark Gedicks
BYU Law, gedicksf@law.byu.edu

Dignity, History, and Religious-Group Rights

FREDERICK MARK GEDICKS*

Alan Brownstein argues that neither "human dignity" nor 18th-century history is sufficient to account for a "freedom of the Church" or other freedom of religious association in the contemporary United States.[1] Although some associations have a dignitary dimension, many (and perhaps most) do not. Professor Brownstein's focus on *human* dignity gives away the game: Corporations and associations are not human and thus cannot have "dignity" independent of their members.[2] As for 18th-century history, Brownstein shows that colonial, revolutionary, and early republican attitudes were deeply and broadly anticlerical and anti-institutional.[3]

Professor Brownstein's contribution is important. There is a common tendency among both popular and academic commentators to assimilate general 18th-century references to "religion" or "morality" or "nature's God" to institutional as well as individual religious liberty. Brownstein disabuses one of that tendency, persuasively showing that the 18th-century history is actually consistent with two narratives, only one of which makes place for a robust freedom of the church. A "freedom-of-the-church" narrative recognizes "the decentralized and laity-controlled nature of religious association in early colonial American," but also persistent colonial and revolutionary efforts "to form religious associations and

 Guy Anderson Chair & Professor of Law, Brigham Young University Law School.

1. Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 J. CONTEMP. LEGAL ISSUES 201 (2013).

2. Brownstein, *supra* note 1, at Part II.

3. Brownstein, *supra* note 1, at Parts III & IV.

develop structures in order to promote religious exercise," as in the training, supervision and evaluation of ministers, and the institution of "outreach and missionary efforts.[4]

A competing narrative, however, tells how individual religious liberty was defended by severing the individual from religious groups "which operate independently from, and are not accountable to, their members," which resonated with "struggles for congregational autonomy," "conflicts between the laity and the clergy" over church governance, virulent anti-Catholicism, association of "top-down hierarchical ecclesiastical structures with religious oppression," and a general fear of wealth and power when wielded by religious groups.[5] As Brownstein concludes, the history relating to institutional religious freedom in the colonial and early constitutional eras should give an originalist "considerable pause" at the argument that the original meaning of the Religion Clauses included something like a "freedom of the church" from government control and interference."[6]

I will restrict myself to two observations. I believe that dignity might ground a freedom of the church, though protection of the church's dignity will often come at the expense of that of its members. And as important as the 18th century is to this discussion, the 19th century may be even more crucial.

I. RELIGIOUS-GROUP DIGNITY

It is not obvious why religious institutions cannot suffer dignitary harm analogous to the harm to human dignity that grounds individual religious freedom. Dignitary harm, for example, was at the heart of the Mormon church's argument in defense of the religious-employer exemption from Title VII in *Corporation of the Presiding Bishop v. Amos*.[7] There the use of tithing funds—voluntary member contributions to the church of 10% of one's income, often made in the face of significant sacrifice and hardship—to pay the salary of a Mormon employee who did not tithe was understood by the church as an insult to its faithful members who do, even though the employee was not directly engaged in religious work.[8]

---

4. Brownstein, *supra* note 1, at 266–67.
5. Brownstein, *supra* note 1, at 266.
6. Brownstein, *supra* note 1, at 270.
7. 483 U.S. 327 (1987) (upholding religious exemption from Title VII against Establishment Clause challenge).
8. *See* Brief for Appellants at 19, *Amos*, 483 U.S. 327 (1987).

> [Some] of the money used to pay the salaries of [Deseret Gym] employees comes directly from contributions by members of the Mormon Church. In spite of church policy, the district court has ordered the church to use its monies to pay the salaries of those who do not meet its standards.

Requiring the church to use its tithing funds to pay the salary of a less faithful or less committed member undercut the narrative of sacrifice that to this day runs through Mormon religious practice.[9]

Consider a more prosaic (and wildly improbable) possibility. Suppose that the Mormon church's flagship institution, Brigham Young University, is somehow forced to open a bar on campus. No Mormon would be forced to buy its alcoholic beverages, and no BYU employee would, but it would nevertheless be institutionally demeaning to require that BYU—whose sponsoring church prohibits consumption of alcohol as a matter of faith—tolerate such behavior in the midst of its communal effort to exemplify that faith.

This, I take it, is sort of the argument that some opponents of the Affordable Care Act contraception-coverage mandate have made.[10] I disagree that the mandate constitutes a legally cognizable burden on the institutional free exercise of religious nonprofit or for-profit enterprises,[11]

Id. The employee was the custodial supervisor of a nonprofit health club operated by the church for its members and employees.

9. *See* Frederick Mark Gedicks, *Towards a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 113.

> Mormons understand and interpret the story of their founding as one of extraordinary personal sacrifice by early members in the face of violent persecution. [] Contemporary Mormons continue to see their religion as a demanding one. [] In the eyes of the church, to use tithing donations to support the economic livelihood of an unfaithful Mormon would dishonor both the sacrifice of those who pay tithing and the memory of the sacrifices of their pioneer forebears.

Id.

10. *See, e.g.*, Daniel Philpott, *Why Christians Cannot Just "Lighten Up" Over the HHS Mandate*, RELIGIOUS FREEDOM PROJECT (Dec. 17, 2012), http://berkleycenter.georgetown.edu/rfp/essays/why-christians-cannot-just-lighten-up-over-the-hhs-mandate ("To force a Catholic university, which by definition commits itself to manifesting the teachings of the Catholic Church, to promote [the use of contraceptives] is to force it to compromise its very witness to the character of life lived in fellowship with the resurrected Christ–indeed as this life might be lived by its own employees."); *cf.* Brownstein, *supra* note 1, at 270 ("[R]eligious communities experience a special kind of dignitary affront when the government commandeers resources assigned to, and donated for, the fulfillment of spiritual obligations in order to further the state's secular purposes.").

11. *See* Frederick Mark Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. (forthcoming Spring 2014), *available at* http://ssrn.com/id=2328516; Frederick Mark Gedicks, *With Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, 6 ADVANCE: THE JOURNAL OF THE ACS ISSUE GROUPS 135 (Oct. 18, 2012), *available at* http://www.acslaw.org/sites/default/files/Advance_Volume_6_Fall_2012.pdf.

but not because corporate and other group entities are incapable of suffering dignitary harms.

Professor Brownstein calls for clarification and support for "the connection between personal dignity and institutional autonomy."[12] Clarification, however, would make clear that protection of institutional dignity often comes at the expense of human dignity. This is the paradox of groups in liberal democracy: Forceful insistence that groups exist and possess rights independent of their members protects members against state oppression, but leaves them exposed to group oppression when group rights shield the group from government intervention.[13] *Amos* itself illustrates that this game is often zero-sum: Vindication of the exemption from Title VII protected the Mormon church's dignitary interest in avoiding the use of tithing funds to pay the salaries of unfaithful or less committed members, but at the expense of those members' livelihoods.

II. 19TH-CENTURY HISTORY

The standard reflex when one recurs to the history of church and state is return to the founding era of the late-18th century. One has to start somewhere, and the chronological beginning is hard to criticize. The Religious Clauses were drafted and ratified in the 18th century and constituted a remarkable innovation in western government, a "lustre to our country," in Madison's memorable phrase popularized by Judge Noonan.[14]

The problem is not that we usually start with the 18th century, but that we too often never leave it. As Justice Marshall ironically but truthfully emphasized, the current shape of our constitutional law and our country generally owes far more to the Reconstruction Amendments than it does to the oft-celebrated 18th-century founding.[15] The more important historical

---

12. Brownstein, *supra* note 1, at 270.

13. Gedicks, *supra* note 9, at 115–22.

14. JOHN THOMAS NOONAN, THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 4 (1998) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 9 (1785), *available at* http://religious freedom.lib.virginia.edu/sacred/madison_m&r_1785.html (arguing that the proposed assessment bill departed from the United States's "generous policy" of religious equality," which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens")).

15. Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (arguing that the 1787 Constitution was "defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today").

action on the freedom of the church, I believe, is in the 19th and early-20th centuries.

Founding-era anticlericalism persisted through the 19th century and well into the 20th. It is, for example, adapted to the anti-Mormonism that animated the Republican Party from its birth.[16] That animus was of course generated by polygamy, but also by the Mormons' corporatist, unified-bloc politics which were dictated by a single hierarchical cleric.[17] An anti-religious institutionalism—in truth, an unvarnished anti-Catholicism—is also evident in the attempts by James G. Blaine and others to specify the content of the general anti-establishment norm applied against the states by the 14th Amendment.[18]

Perhaps the most important development during the 19th century was the Court's off-handed, almost thoughtless inclusion of corporations within the definition of "persons" protected by the Equal Protection and Due Process Clauses of the 14th Amendment.[19] This not only ushered in the *Lochner* era that protected economic and other rights with the

16. Republican Platform of 1856, http://www.ushistory.org/gop/convention_1856republicanplatform.htm ("[I] it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism Polygamy, and Slavery.").

17. *See, e.g.*, LEONARD ARRINGTON, BRIGHAM YOUNG: AMERICAN MOSES 223–72 *passim* (1984) (detailing numerous instances in which Mormon prophet Brigham Young exercised autocratic power over Mormons and against federal authorities in territorial Utah); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 6–7, 228 (2002) (describing how anti-polygamists found Mormons fundamentally anti-democratic).

18. *See generally* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEG. HIST. 38 (1992); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995).

Named after James G. Blaine, an anti-Catholic Speaker of the House with presidential ambitions, the Blaine Amendment would have provided:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

4 CONG. REC. 205 (1875). The proposed Amendment was widely viewed as an effort to blunt growing Roman Catholic political influence, particularly Catholic efforts to obtain public funding for parochial schools. *See* Green, *supra*, at 51 n.84, 54 & n.107; Lash, *supra*, at 1147–48.

19. Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 28 (1889); Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (announcement at oral argument).

still-controversial doctrine of "substantive due process,"[20] but it survived that era to enable powerful protection of corporate and group interests today,[21] including religious group interests.[22]

In short, it is likely that pairing 19th century history with the founding-era history Professor Brownstein has already uncovered would further expose the shallow roots of contemporary religious-group rights in American constitutional history, together with the difficulty of defending them on originalist grounds.

20. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 589–90 (1897) (holding corporation entitled to due-process liberty protection of unenumerated fundamental rights); Chicago, Burlington & Qunicy R. v. Chicago, 166 U.S. 226, 262–63 (1897) (holding corporation entitled to just compensation for municipal taking of property as element of due-process liberty).

21. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010) (recognizing Speech Clause rights in corporations); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (same).

22. *See, e.g.*, Hosanna-Tabor Evangelical Church & School v. EEOC, 132 S. Ct. 694 (2012) (recognizing broad exception to anti-discrimination laws when religious congregations hire and fire leaders).