

HISTORIC FOUNDATIONS FOR RELIGIOUS FREEDOM AND THEIR INHERENT CONFLICTS

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Decades ago, when this essayist and his wife wished to transform their old bedroom into a modern “primary bedroom,” the plan was to build a bathroom right next to it from the ground up. The city inspector required the addition’s foundation to be attached so firmly to the foundation of the original house that it would be impossible for one foundation to shift without causing the same shift in the other. That directions were followed and the addition proved stable. Most people understand the need for the city ordinance which regulates new foundations for “additions.” However, when it comes to the ethical foundation for religious freedom, things are not so simple. Many distinct arguments have been historically used to support religious freedom, and some of these foundations shift in different measure and in different directions than do the foundations for the rest of our laws. Because of this, we should not be surprised that Americans who agree that religious freedom is a good idea do not all agree about how far that freedom should go.

Chief Justice Roberts presciently warned in the wake of the Supreme Court’s redefinition of marriage that the religious freedoms of many would soon come under judicial review. He warned for example that the tax exemptions of religious colleges which oppose same-sex marriage could be threatened if they continue to bar student married housing to all but traditional couples.¹

The “Equality Act” which the new president has pledged to enact could expedite this potential. This act expands the Civil Rights Act of 1964 to incorporate transgendered and homosexual citizens among the other minorities which are protected against discrimination. The Equality Act specifically removes religious people from the protection of the Religious Freedom Restoration Act of 1993 which assured religious people that they may use their convictions as a defense in court should they be sued for disassociating with values and activities that they morally oppose.² A simple reading of the Equality Act’s very specific language suggests that such protection will be lost when the Equality Act is passed.³

Most of the supporters of the Equality Act will probably say that they believe in religious freedom. Yet the goal of the act is clear. Religious artists who sell their art will lose their right to choose the themes of their art based on their religious convictions. Whether their art is baking,

¹ Obergefell v Hodges, 2015 - Chief Justice Robert’s Dissent, Justices Scalia and Thomas joining.

² Section 2: “...In particular, the Secretary of the Treasury shall ensure, to the extent permitted by law, that the Department of the Treasury does not take any adverse action against any individual, house of worship, or other religious organization on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective...” Religious Freedom Restoration Act, 1993.

³ “The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title.” The Equality Act passed the House in 1998.

flower arranging, singing, playing musical instruments, or photography – all will be forced to help celebrate same-sex marriages or suffer punishment and/or pay retributions to the offended. The contours of the coming debates over these issues are yet to be seen, but the prescience of Chief Justice Roberts is hard to deny.

This essay opened with the practical observation that a unified foundation is the best beginning for a stable building. The same is true with civil laws. Some people argue for or against broad religious freedom strictly to increase the legal outcomes they prefer for themselves. Others have a more altruistic or humanitarian approach and are willing to sympathetically engage the conversation over how one person's religious rights need to be weighed against someone else's personal rights of a different order. An analysis of the historic reasons offered for religious freedom should enlighten these discussions. If at the end of the day, people still can't agree over which foundations best support religious freedom in our shifting political landscape, at least some advancement of the debate may be gained by locating the reasons for our disagreements.

Historical Foundations for Religious Freedom

The balance of this essay will simply list and compare eight distinct arguments for religious freedom. A few preliminary remarks are necessary. First, few people give only one argument for religious freedom. As in pragmatically planned high school debates the goal in arguments over religious freedom often appears to be to win the debate, not by the logical strength of a cohesive argument but by the naked number of the individual arguments presented. In fact, the first person in the historical record to argue for religious freedom as a natural right cited many discordant arguments. The innovator's name was Tertullian (d. circ AD 250). He was a professional rhetor who became a Christian teacher in an age of religious persecution. This is what he famously said,

We worship the one god whom you all know through nature; it is his thunder and lightning at which you tremble, his blessings in which you rejoice. The rest you think are gods, but we know [they] are demons. Nevertheless it is ordained by both man-made and natural law that each person may worship whatever he wishes, nor does one man's religion either injure or benefit the next man. It is however not for religion to compel religion, which is something to be taken up voluntarily not under duress. Sacrifices are demanded only of those willing to perform them. You will render no real service to your gods by compelling us to sacrifice. For they can have no desire for sacrifices from the unwilling, unless they are animated by a spirit of contention, which is a thing altogether undivine.⁴

Here we can identify several distinct arguments for religious freedom:

1. Consistency with man-made customs
2. The weight of "natural law"

⁴ *Ad Scapulum* 2.2.

3. The lack of affect one man's religion has on another
4. The inconsistency of religious compulsion for "voluntary" worship
5. The lack of benefit to gods for religious compulsion
6. The "undivine" source of religion forced by people.

Notice how argument 5 is not really consistent with Tertullian's earlier claim that the "gods" in question here are demons. In fact, if what Tertullian really believed is true, if the "gods" really are demons, then some of the other arguments lose their force. Surely the religion of demons would intend to harm other people (so #3, #4, and #5 become mute). Like the professional debater that he was, Tertullian argued primarily for a course of action – not so much for a unified theory. Most arguments for religious freedom follow this . They value urgent action before unified theory. One of the points made in this essay is that arguments for religious freedom are often complex and, inconsistent. Since distinct arguments claim different positive outcomes for religious freedom, people who emphasize different arguments will differ on the results they expect religious freedom to produce. If the goals are really different, then the success of the policies enacted will be measured differently as well. What one person calls an infraction of religious freedom, another person will call a necessary compromise in a broader goal. What follows below is a review of some distinct arguments.

Polytheistic Theories

Polytheists are people who believe that many gods exist and that each is benevolent to a certain people group. What is said here about polytheists may well apply to the "pluralists" of our own times. Pluralists are people who may or may not believe that gods exist but who believe that the several religions available in our culture each carry truth through symbols and rites which benefit the adherents. For these reasons, we can expect that the religious policies promoted by pluralists today will be similar to those of polytheistic governments at least in some ways.

In antiquity, Cyrus the Persian (d. circ 350 BCE) allowed conquered peoples to retain their temples and worship on the condition that they invoked his name and goals in prayer. The biblical account of Cyrus' tolerance to the Jews for their religion is a good example.

²³ This is what Cyrus king of Persia says: "The LORD, the God of heaven, has given me all the kingdoms of the earth and he has appointed me to build a temple for him at Jerusalem in Judah. Any of his people among you may go up, and may the LORD their God be with them." 2 Chronicles 36:23, ESV.

One would misread this account to conclude that Cyrus had converted to monotheism. Cyrus' own inscriptions, display him as a consistent polytheist. Cyrus acknowledged the existence of the gods of people he subjugated. Cyrus also believed that these gods had helped him subjugate the people

who served them, so that now Cyrus could count on the gods as his allies.⁵ The main goal of this policy was not the recognition of the worshipping rights of people in other religions. Rather, the policy aimed to enlist the help of other religions for Cyrus' empire. It is increasingly clear in our cultural wars that some so-called "pluralists" are just as selectively supportive of religious freedoms. Pluralists may support religious freedoms as long as each religion minds its place and does not challenge the social-political agendas of the pluralists. If pluralism is the starting point, an equal protection of all religions is really counterproductive. Just as polytheists had their most difficulties with monotheists such as Jews and Christians, so pluralists today find it difficult to tolerate the religious speech and practices of non-pluralists who disagree with their progressive moral agendas. Admit it or not, "political religious tolerance" must either be selective or be a catalyst for social discord between factions.

The Pure Faith Theory

Roger Williams, the Baptist founder of the colony of Rhode Island, is most famous for his use of the pure faith theory. His argument was that religion should not be compelled because, in his words, "forc't Worshpp stincks in Gods nostrils." Williams also knew that social turmoil occurs when governments require people to worship against their consciences. He said that "enforced uniformity, sooner or later, is the greatest occasion of civil war, ravishing of conscience, persecution of Christ Jesus in his servants, and of the hypocrisy and destruction of millions of souls."⁶ So in practice, Williams' "pure faith" foundation may be said to rest upon two pillars or goals. The spiritual goal was to allow pure faith to flourish. The temporal goal was to avoid social and political turmoil so that pure faith could flourish. The question arises whether these two pillars for religious freedom could move in different directions and cause Williams' stated goal for religious freedom to become unbalanced or tilted in the direction of a favored religion.

The answer may be seen in Williams' own experience in trying to negotiate the two pillars. In spite of Williams' desire for "pure faith" his colony still found it practically necessary to ban Roman Catholics from public office and Jews from permanent residence. As far as Rhode Island's original experiment was concerned, the religious freedoms of the minority had to be compromised to achieve a social or political tranquility for the majority who Williams believed had the purest faith.

⁵ This taken from Cambridge Bible for Colleges and Schools; Ezra and Nehemiah edited by Herbert Edward Ryle, pp 4-6. Sub Ezra 1:2, available at <https://biblehub.com/commentaries/cambridge/ezra/1.htm> accessed Jan 31, 2021.

⁶ Roger Williams, Letter to Major John Wilson and [Connecticut] Governor Thomas Prentice: Sent from Providence June 22, 1670. Roger Williams, *Bloody Tenet* at <https://www.ancient.eu/article/1666/roger-williams-the-bloody-tenet-of-persecution/> [accessed 1/31/2021.]

Pacifism

Pacifism – defined here as the complete refusal to use violence against anyone to prevent or redress wrongs or to compel others toward right behavior, belief, or attitude – has been practiced nowhere long by civil governments for reasons clear enough not to mention. However, some Christian denominations have required pacifism for their members. The adherents of the Schleithem Confession of 1574 are a clear example. The opening lines of “Article V” show how these pacifists made a distinction between the violence which God ordained to be used by the state for the promotion of justice and the church’s use of warning and disassociation for the promotion of true religion.

The sword is ordained of God outside the perfection of Christ. It punishes and puts to death the wicked, and guards and protects the good. In the Law the sword was ordained for the punishment of the wicked and for their death, and the same (sword) is (now) ordained to be used by the worldly magistrates.

In the perfection of Christ, however, only the ban is used for a warning and for the excommunication of the one who has sinned, without putting the flesh to death - simply the warning and the command to sin no more.⁷

Thoroughgoing pacifists like the Swiss Brethren of 1574 base their pacifism in the command and example of Christ alone. And so Article V explains why they refused to participate in political offices that require the use of violence.

Now it will be asked by many who do not recognize (this as) the will of Christ for us, whether a Christian may or should employ the sword against the wicked for the defense and protection of the good, or for the sake of love.

Our reply is unanimously as follows: Christ teaches and commands us to learn of Him, for He is meek and lowly in heart and so shall we find rest to our souls.

As a foundation for religious freedom, however, it must be pointed out that most pacifists have found it necessary to depend on the government to use force – at least to establish temporal justice. But what can such a basis for religious freedom say when one group does something in the name of religious zeal that other groups believe to be examples of injustice? Most pacifists still call upon governments to be the (God-ordained) arbiter when justice and questionable religious practices clash. The potential tension between religious rights and other civil rights is not eliminated. Governments still must decide which “right” is more just.

⁷ Schleithem Confession, 1574.

Separation of Church and State

The foundation most helpful for establishing religious freedom according to John Locke (1634-1704) was that there should be a clear distinction between the jurisdictions of the state and of the church lest one contradict the other.

If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth.

According to Locke, each must keep to its own business. Governments were to punish only “civil matters” which Locke listed as “life, liberty, health, [etc.] Locke defined a church as “a voluntary society of men, joining themselves together of their own accord in order to the public worshipping of God in such manner as they judge acceptable to Him, and effectual to the salvation of their souls.”

Unlike modern “separationists” Locke allowed governments to promote orthodox religious ideas through teaching. Magistrates may therefore warn the heretical, but may not employ force:

[The ruler’s] Magistracy does not oblige him to put off either humanity or Christianity; but it is one thing to persuade, another to command; one thing to press with arguments, another with penalties.

In practice, Locke did not grant religious freedoms as broadly as some wished. For the sake of justice (and politics?) Locke advised that religions such as the Roman Catholic Church which taught certain doctrines should not be tolerated.

Notice the last three of Locke’s proposed censures on the list below:

1. Government should not tolerate “opinions contrary to human society, or to those moral rules necessary to the preservation of society”.
2. Government should not tolerate churches which teach that contracts with unbelievers (i.e. with non-Catholics) may be broken at will.
3. Government should not tolerate those churches that teach that excommunicated kings lose their crown (i.e. if excommunicated by the Catholic Church).
4. Governments should not tolerate churches that pledge allegiance to other crowns (i.e. to the Pope.)

Today, Locke’s foundation of “separation” for religious freedom has shifted for many. Against Locke, many believe that it is a violation of the separation principle for government to promote a religion. Others may want more freedom of speech to churches than Locke allowed but would

still be in favor of enforcing all legal contracts, etc. In any case, Locke's foundation is an example of how the foundations for religious freedom do sometimes shift with the times.⁸

The Free Market Principle

Adam Smith is famous for arguing that free economic markets lead to better commodities at better prices. Less famous is Smith's similar argument for religious freedom. According to Smith, religions that are politically supported will unjustly appease the government and be less responsive to the people who are compelled by government to align with those religions. In today's vocabulary, Smith would say that compelled religion becomes less "user friendly." Smith speculated that if religious teachers were freed from political support they would become more friendly toward others. Some may turn to zealous machinations to inspire a following out of fear, but eventually the majority of teachers would realize the benefit of rational and reasonable appeals. Religious options would multiply in the absence of regulation. No one sect would dominate. The leaders of each sect would become more congenial than is typical for the leaders of state supported churches. Smith thought he saw this kind of "free market" of religion operating in the colony of Pennsylvania, and he approved of its social outcome.⁹

Smith himself appeared indifferent or agnostic regarding sectarian religious claims. In religion, Smith preferred an abundance of reason and a scarcity of fanaticism and superstition. He also confessed a confidence in an "invisible hand" that guides mankind through providentially engrained sentiments and circumstance toward mankind's flourishing.¹⁰ In many respects Smith's tone matches the similar perspective of his American contemporary, Thomas Jefferson.

Optimism for the Discovery of Truth

⁸ According to the Supreme Court in *Everson v Board of Education* (1957) "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. ----- In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' [...] The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Everson v. Board of Education*, 330 U.S. 1, 15-16 and 18, (1947).

⁹ Adam Smith, *Wealth of Nations* 5.1.3.

¹⁰ Before he died, Smith, either in humility or expediency, burned all of his lectures and essays on religion on the grounds that they did not really advance the conversation. A review of his work on ethics suggests that he accepted divine providence as beneficent for mankind. Seventeen years before Smith suggested that an "invisible hand" guides free markets toward mutual sufficiency, Smith claimed that people have been providentially given moral sentiments and "are led by an invisible hand to share out life's necessities And so without intending it, without knowing it, they advance the interests of the society · as a whole·, and provide means for the survival of the species." *The Theory of Moral Sentiments* (1759) 4.1.

Jefferson seems to have shared some of Adams' hopes for religious freedom, but Jefferson also claimed that religious freedom was the best course for the discovery of religious truth. Jefferson acknowledged the need for government to keep citizens from disturbing one another's peace, but he did not think governments should do this by regulating religious speech. He spoke clearly to this point in his proposed Statute for Religious Freedom for Virginia.

[I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.¹¹

Jefferson did not believe religious freedom mandated a completely secular government. Jefferson believed that government should voice the most basic religious opinions of the people. The drafts he proposed for his most famous pieces of legislation offer undeniable proof for this. Jefferson would have government say through his Declaration of Independence that "the laws of nature & and of nature's god" grant nations a standing in the world – and that "all men are created equal & independent..." His draft of Virginia's Statute for Religious Freedom claimed that "Almighty God hath created the mind free" and that this God is "lord of both body and mind..." One wonders if the secularists who hide behind Jefferson know how much their ground has shifted from Jefferson's.

The next theorist, like Jefferson also argued for the broadest of freedoms for religious speech, but his argument unlike Jefferson's is not based on a hope of arriving at the truth.¹²

Agnostic Humanitarian Utilitarianism

Mill did not agree with Smith or Jefferson that innate ideas or moral sentiments are a sufficient foundation upon which to build religious freedom. Philosophically, Mill was more of an empiricist. He believed that people acquire ideas through experience and training. Mill thought that since we have no common innate and true religious ideas we are left to do the best we can through debates and practical experiments over what works best for the happiness of mankind.

¹¹ Virginia Statute for Religious Freedom. Jefferson began his draft in 1777. Virginia adopted it in 1779.

¹² Jefferson believed the truth could be known. He and the legislators closed his bill for religious freedom in Virginia with a bold claim upon the truth, "...we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right."

Mill's fullest argument for free religious speech is rooted in agnosticism rather than a hope for absolute truth. He listed four lines of argument for free speech:¹³

1. **Government is fallible.** Any speech made illegal could still be valuable.
2. **All errors have an element of truth.** If untruths are suppressed we may miss the elements of truth they contain.
3. **Debate identifies reasons.** Even true beliefs become blind prejudices when reasons are forgotten.
4. **Debate strengthens conviction.** Convictions grow stronger when sustained in debate.

Though Mill promoted broad human happiness as the utilitarian goal of ethics and even promoted a "religion of humanity" to replace the "revealed" religions, at the end of the day Mill was a theological agnostic. Our own society's postmodern trend in that direction has great affinity with Mill. Postmodernism tends to deny "metanarratives" which unite all mankind into one story. Like Mill it pursues broad happiness more than truth.

One final foundation which shares this pragmatic bent has often been used and candidly admitted, though it is arguably more of a concession to necessity than a noble pursuit of either justice, truth, or pure religion. Social peace seems to be the primary objective.

The Social Disruption of Determined Zealots

The Protestant movement by the sheer size of its constituency brought to many religious dissidents the practical ability to reciprocate the violence they received. Much of the sad story of Europe's 16th and 17th century is stained by the blood of religious people killed by other religious people in the name of religion. The St. Bartholomew's Massacre (1572) killed thousands of French Huguenots in one day. The Huguenots killed their thousands as well. In the wake of this violence Jean Bodin argued that a degree of religious freedom is necessary because zealots disrupt the peace without it. He argued that when a discordant religious sect becomes too strong to be suppressed, the sect "is to be suffered, which without the hazard and destruction of the state cannot be taken away; The health and welfare of the Commonweale being the chiefe thing the law respecteth."¹⁴ Recent events in America have shown in some cases at least that social disturbance can be a very effective tool for political influence. To accommodate both the "Occupy Wall Street" and "Black Lives Matter" protests Mayors have suspended reasonable ordinances when the mobs proved too

¹³ These are a paraphrase of the four arguments Mill listed in *On Liberty*, (1859) at the close of "Chapter 2, Of the Liberty of Thought and Discussion."

¹⁴ Jean Bodin *The Six Bookes of a Commoneale*, facsimile reprint of the English translation of 1606, corrected and supplemented in light of French and Latin texts. Ed. Kenneth Douglas McRae (Cambridge, MA: Harvard University Press, 1962), book 3, chapter 7.

difficult to suppress. More to the point, the Amish were granted exemptions to compulsory education only when they proved their appeal was religiously motivated by willingly going to jail for it.¹⁵ The judges wisely decided that it would be better for Amish teenagers to work on their farms than it would be for their parents to go to jail. Religious accommodations in dress codes and religious symbols are being offered to determined Muslim school children today that were regularly denied to less determined Christian school children not long ago. Social disruption is a catalyst for political change, and has been an incentive at times for religious freedom.

Conclusion

Religious freedom is still a broadly accepted motto in America, even if our current debates over what it means can be divisive. The most urgent need for clarity will probably appear as religious people attempt to distance themselves and their businesses from the progressive moral agenda of the transgendered and homosexual communities soon to be granted protected “minority status.” The shifting sands supporting our society’s moral culture make it difficult to find solid ground for the old concept of “religious freedom” when it comes into conflict with other newly claimed “rights.” A united voice would be a good thing for people of faith to find. However, a successful united voice for the religious right cannot be crafted without a careful conversation with the progressive left. The kind of rancor, and political hatred that has characterized politics lately has not improved any citizen’s confidence in government, politicians, the press, or even in their neighbors with whom they disagree. Religious conservatives will lose credibility if they are unwilling to talk “with” (not just “to”) their neighbors.

A good place to start would be to discern what kind of religious freedoms the historic foundations for religious freedom would support in today’s current conflicts. Here again are these foundations along with some questions for further discussion:

1. Polytheistic Theories - Will pluralists, the modern counterpart to polytheists, mirror the ancient policies and tolerate only those religious voices and religiously guided practices which help them advance the goal of their own progressive “empire”?
2. The Pure Faith Theory – Will such an argument win the current political fight? Yes, as soon as our lawmakers are more interested in “pure faith” than they are in insincere compliance. How much hope is that?
3. Pacifism – If the religiously conservatives lovingly turn the other cheek while they practice and preach their convictions, will their ideological opponents follow suite and be willing to suffer disassociation because of their moral choices and actions?

¹⁵ Wisconsin v. Jonas Yoder, 406 U.S. 205 (1972).

4. Separation of Church and State – To which jurisdiction belongs the religiously guided business decisions of the private citizen? How will our government figure out the appropriate jurisdictions of government, of the church, and of private citizens in this matter?

5. The Free Market Principle – Would a lack of political involvement in the current dispute force the participants toward rational discussions and congeniality?

6. Optimism for the Truth – Would truth win the day in the context of “free argument and debate” even in our very pluralistic society? Can we cultivate a hunger and hope for the truth so that Jefferson’s argument for religious freedom has its full appeal in our society?

7. Agnostic Humanitarian Utilitarianism – Even under the burden of agnostic skepticism, is the best laboratory for a workable solution still the one that gives all hypotheses a chance? Or, would perspectives on the world be improved by muting religious people or by requiring religious artists to celebrate and promote themes by their art that are contrary to their religious convictions?

8. The Social Disruption of Determined Zealots – Would the courts allow religiously motivated artists to disassociate from the practice of actions they deem immoral if they willingly went to jail for it? Is the claim of the religious right really religiously motivated without their willingness to suffer for their right to disassociate? Time will tell what the law will say. What should we say in the mean time?