The Myth

Is there religious liberty in America?

by Kevin J. “Seamus” Hasson

THERE IS, PERHAPS, NO OTHER AREA of American life in which we claim to be so thoroughly united. And there is almost certainly no other area in American life in which we are, in fact, so vexingly divided.

Ask nearly anyone if there’s religious liberty in America and you’ll get some version of The Myth: The Pilgrims came from England in search of religious freedom. They found it in Plymouth Colony, took a break for Thanksgiving Dinner, then somebody passed the First Amendment and we all lived happily ever after. Push back ever so slightly and the cognitive dissonance will begin. The culture war? Yes, well, we all would be living happily ever after if it weren’t for the crazies who just don’t get it and are trying to shove—pick either (a) “separation of church and state” or (b) “their religion”—down our throats.

Ask either set of “crazies” whether it’s really true that they oppose religious liberty? More dissonance. Nobody will ever admit to opposing religious freedom for all. On the contrary, everyone will steadfastly insist they absolutely love the stuff—which is why they are so nobly defending it against the unscrupulous fanatics on the other side.

Pose the big questions, extreme dissonance. Where does religious liberty come from? Why, it’s a natural right that the First Amendment gives us. And just what does it protect? Social harmony, by allowing—pick either (a) “only the true religion” or (b) “no religion whatsoever”—to be expressed in public culture.

In short, as a society, we’re at wits’ end. We assume we must understand something so basic to our heritage as religious freedom. But when we actually take a look at it, all the philosophical and legal lines seem to blur and to overlap each other. Let’s face it: when it comes to religious liberty, we really don’t know what we think.

That is a very precarious position to be in. The cognitive dissonance might be vaguely laughable if these questions weren’t so urgent. But our growing religious diversity makes them not just urgent, but positively dire. If we were living in the Vatican City State, or perhaps in a remote mountain village in Utah, we would likely not find ourselves having to debate the origins and meaning of religious freedom. The fact is, however, we are living in the most religiously diverse society in the history of the world. It is becoming more diverse by the day. And some of our new neighbors seem deadly serious about their beliefs. Literally. Now more than ever, it is essential that we know what we think about religious liberty.

A quick tour of our history will reveal the sources of our present confusion. It will demonstrate that The Myth is, well, a myth. There has never been a golden age of religious tranquility in America. There has always been religious competition, even on board.
There has never been a golden age of religious tranquility in America. There has always been religious competition, even on board the *Mayflower* itself. There always will be.

who have a built-in thirst for truth and goodness, and find ourselves duty-bound to embrace and express the truth and goodness we think we know. Learning from our historic failures will also point the way forward. As we’ll see, religious liberty is not now, and never has been, the recipe for eliminating religious competition. On the contrary, it’s the built-in rule-book for how the game is played.

We’ll also discover the roots of judicial confusion over religious freedom. At the end of the day, we’ll see that, legally, religion in America is a lot like sex, race, or ethnicity in America. We don’t deal with diversity by pretending we are all male. We don’t deal with it by pretending we are all white. We don’t deal with it by pretending we are all Irish. Why should we have to deal with religious diversity by pretending we are all agnostic?

Our Story So Far

The nickel tour of religion in America really does start with the Pilgrims. They just look a little different than they did in your second-grade Thanksgiving pageant. For one thing, their halos need a little adjusting.

The Pilgrims came from England, yes, but largely by way of Holland. The leaders aboard the *Mayflower* had fled from England to Holland ten years earlier, and were no longer being persecuted. In Holland, they enjoyed all the toleration they could have wished for, and then some. Their great enemy now was assimilation. As their leader, William Bradford, related in his journal, “owing to a great licentiousness of the youth in that country,” and to the “ manifold temptations of the place,” their children were being corrupted. In deciding to leave Holland for the American wilderness, they were not fleeing persecution at all, but permissiveness.

Nor were they seeking religious freedom in some abstract sense. They were largely after real estate on which to build their own little colony, a refuge where they could be free from the corrupting influences of the impure and could govern themselves according to their own vision of the truth. Think of them as Amish Calvinists. The great irony was that in order to be able to afford fleeing impurity, they had to accept the terms of the London financiers who were backing their adventure. Those terms included demands that the Pilgrims bring along with them experts in dealing with the various technical challenges a new colony could be expected to face. In short, they had to bring impurity along in order to leave it behind.

The result was a prickly voyage aboard the *Mayflower* as the “Saints,” which is what the Pilgrims called themselves, squabbled with the “Strangers,” which was how they referred to everybody else. It’s easy to envision the scene. There, in the hold of a cramped ship, sat two stubborn groups, arms crossed, grimly eyeing one another. The Saints were dismayed. They had fled England for Holland, and now Holland for the wilderness, all to get away from impurity—and impurity had tagged along. Now what? For their part, the Strangers were glum. They

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had left their homes and their country not out of any great spiritual motive, but simply because this was the best job they could find. And, here they were, stuck on a boat with a bunch of holier-than-thou zealots. And soon they would all go off to live in the woods together. Great. Just great. How could this possibly work?

There, in miniature, is the question we still face: How do you live together with people when you disagree with them about what life means in the first place? The answer the Pilgrims came up with was vintage 17th century: The way to live together with people you disagreed with was by suppressing the heretics. Social harmony demanded a religious monopoly.

Throughout its early history, Plymouth Colony established state–supported churches, which all residents were required to attend and to support with their taxes. What’s more, only members of those churches could vote or hold public office in the colony. But one could not simply join those churches at will. Membership was controlled by the churches themselves. The result was that, at one point in the colony’s history, fully 3,000 people attended the official churches in Plymouth and supported them with their taxes. But only 230 of them could vote or hold public office. And when an Anglican cleric showed up and tried to organize a competing Sunday service, he was promptly deported.

Plymouth was also a highly controlled culture. The difference between October and December of 1621 is striking. In October, the Pilgrims held what has come to be known as the first Thanksgiving, an event that lasted several days and featured a modest feast, along with marksmanship contests and “other recreations.” Two months later, however, “on the day called Christmas Day,” Governor Bradford wrote in his journal, he called Plymouth residents “out to work.” That was because, for Pilgrims, December 25 was nothing special. Christmas was, they thought, a “papist innovation,” which they refused to celebrate. And since they didn’t celebrate it, nobody else could either.

Now, not everyone agreed. Some newly arrived colonists objected that “it went against their consciences to work” on Christmas, so Governor Bradford grudgingly excused them “until they were better informed” and led the veteran colonists away to work. That arrangement lasted until lunch. Returning from the fields, Bradford was horrified to discover that newcomers “in the street at play, openly” engaged in various sports. That is, they were doing exactly what the Pilgrims had done two months earlier. But this wasn’t the Pilgrim-proclaimed Thanksgiving. This was that papist Christ’s Mass.

Fully 3,000 people attended the official churches in Plymouth and supported them with their taxes. But only 230 of them could vote or hold public office. So the governor confiscated their sports equipment and told them if they wanted to celebrate Christmas “as a matter of devotion” they could do so privately in their homes, but there should be no “gaming or reveling in the streets.” And so began, and quickly ended, the opening battle in the now nearly 400-year war over Christmas in America.

This was no isolated tantrum. A generation later, the colony formally outlawed Christmas for 22 years. (The English Puritans did the same when they seized power there under Cromwell. One result was the carol, “The 12 Days of Christmas,” which sang in code—partridges and pear trees and so forth—of the 12 outlawed feast days between Christmas and Epiphany.) Once again, for the Pilgrims, social harmony required silencing competing religions, not just in their preaching and worship services, but even in their cultural efforts.

But if the Pilgrims were strict, their next-door neighbors, the Puritans in the Massachusetts Bay Colony, were positively ruthless. They were different from the Pilgrims. Where the Pilgrims just wished everyone would leave them alone, the Puritans wanted to be noticed. They meant for their colony to be the “shining city on a hill” that would so edify and shame the British Protestants that they would repent in sackcloth and ashes and become Puritan themselves, whereupon the Bay Colonists would return to England in triumph. Needless to say, with that vision they could not afford to tolerate any heresy.

So when they heard of the Quaker movement that had erupted in England in the 1650s, the good Puritans of Massachusetts Bay grew alarmed. The Quakers, who recognized no religious authority except that of the Inner Light in their souls, were antithetical to Massachusetts Bay Puritans. The
Inner Light had been known to lead Quakers in colorful ways, even requiring some of them to turn up naked at Anglican services, shouting “hypocrisy!”

The Puritans were appalled and decided to preemptively outlaw Quakerism in case any such people, naked or otherwise, ever attempted to come to Massachusetts Bay. Eventually, however, the Inner Light prompted a steady stream of Quakers to appear in the colony and to refuse to be silenced or deported. The good Puritans were aghast and met in session after session of their legislature, enacting ever more rigorous laws in an attempt to deter the Quakers. Nothing worked. First they held that Quakers who returned after being banished were to be severely flogged. Then, when that proved ineffective, they held that recalcitrant Quakers were, for a first offense, to have their left ears cut off, then, for a second offense, their right ears. For a third offense, they would have their “tongue bored through with a hot iron.” That, too, failed to deter them. So the Puritan legislators passed yet another law specifying that itinerant Quakers were “to be banished upon pain of death.” But not even that sufficed. So, on July 1, 1660, Mary Dyer, who had returned four times to preach against the Bay Colony (not counting the two trips she made to preach against the colony in New Haven), was solemnly hanged on Boston Commons.

The Quakers, though, still continued to come and to be hanged, until the King stepped in to demand an end to the executions.

Mary Dyer’s death certainly shatters The Myth of the golden age of religious liberty. But it does something even more important: It starkly poses a critical question: Why didn’t she have it coming? The duly elected legislature had duly enacted the statute. She had notice of the statute. She knowingly and willingly violated the statute. She was lawfully arrested and properly tried. Why shouldn’t she hang?

Of course, on its face, this is a preposterous question. You cannot execute people merely for preaching. True enough. But on a deeper level the question remains, why? Why can’t you? It can’t be that it was illegal; hanging her was legally required. It can’t be that it was unconstitutional—there wasn’t a Constitution yet. So, if Mary Dyer didn’t have it coming, why didn’t she? Isn’t religious liberty just a legal question like any other?

Other early colonists, less homicidal (and more Christian) than the Puritans, had various responses to this question. Roger Williams, who founded Rhode Island after he had himself been banished from Massachusetts Bay, argued that people had religious liberty because it was the will of God. He was surely right, if ahead of his time. (The vast majority of Christians today would agree with him.) Unfortunately, his argument, based as it was on a theological premise, convinced only those who shared that premise. Put differently, when you announce that something is true because God told you so, you will naturally only convince people who are prepared to believe that God talks to you. And, sure enough, Williams’s vision of religious liberty lacked staying power. Within about a generation, new leaders of his Rhode Island Colony were barring Jews there from voting.

William Penn, the Quaker-founder of Pennsylvania conceived of his colony as a refuge for persecuted believers of all sorts the world over. He even advertised for them in Europe. He too was appalled at the Puritans’ logic. But he too had largely a religious argument for religious liberty and it too faltered when challenged. Before long, the colony was demanding oaths and military service from even its pacifist Quaker citizens. Similar disappointments occurred in the other refuge colonies of Maryland and Carolina. There was a growing belief that people were entitled to religious freedom, as well as an ever more insistent question: Why?

James Madison eventually answered the question, about a century later, in masterful form. Drafting portions of the Virginia Declaration of Rights, Madison wrote that people were entitled to religious freedom because of how they were made. “[R]eligion, or the duty which we owe to our Creator and the manner of discharging it,” he wrote, “can only be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience.” In other words, we are rational creatures who are required by our consciences to embrace what we believe to be true. And if
we each have a natural duty to follow our consciences, then we each must have a natural right to follow our consciences. The Virginia Declaration made similar arguments for freedom of speech, etc. The principle for each was the same: there are certain fundamental rights that follow from human nature. These “natural rights” form the standard against which our laws are to be measured, and are not themselves created by the law.

That argument carried the day in the Virginia legislature during the spring of 1776, and Thomas Jefferson’s echo of it, that all “are endowed by their creator with certain inalienable rights,” carried the day throughout the colonies that July 4th.

It was an argument that both men continued to make after Independence—both in state and federal law. Thus, Jefferson premised his Bill for Establishing Religious Freedom in Virginia largely on the idea that “Almighty God hath created the mind free.” And Madison in his famous Memorial and Remonstrance against Religious Assessments in Virginia expanded on his earlier argument. He held that religion “must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.” What’s more, Madison wrote that religious freedom was an “unalienable” right—a right that could not even be voluntarily surrendered. Why? For two reasons: First, “it is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. 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 argument was similar in its conclusions to the one Roger Williams had formulated. But, crucially, it followed from a different premise. Williams’s argument was essentially a theological one: God had revealed religious freedom to be his will. Madison’s argument was different. It presupposed the existence of the creator, true, but it was not so much an argument about who God is, as it was about who we are. Madison’s point is that from the contours of our humanity we can derive moral limits on the state’s authority over us. So, our minds’ built-in thirst for the truth and our hearts’ built-in hunger for the good, combined with our consciences’ insistence that we live according to the true and the good as we know them, have potent implications. They mean, Madison said, that we have the “freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin.” And, he added, they likewise mean that people who disagree with us must have the same freedom to follow their consciences as we have to follow ours.

Now, what is the practical consequence of declaring something a natural right? Well, among other things, it’s supposed to remove the subject from the rough and tumble of legislative give and take. But things didn’t always quite work out that way. Legislators could be fickle back then, too. And there was a certain cognitive dissonance about rights even from the beginning. Jefferson was shrewd enough to realize that. So, in a celebrated postscript to his Bill for Establishing Religious Freedom, he wrote that, while one legislature obviously could not effectively “restrain the acts of succeeding” ones-yet-this law would “declare” that any future legislation “to repeal...or to narrow” it would “be an infringement of natural right.” In other words, since he couldn’t force future legislators to respect natural rights, he would try to shame them into it. Then, as now, sometimes that worked and sometimes it didn’t.

There were other struggles as well, notably the thorny question of how to secure natural rights in a federal constitution that left most authority completely in the hands of the individual states to begin with.
The result was a muddle. The Framers alluded to natural rights in the Preamble, which speaks of “securing” the “blessings of liberty.” And in the 18th century, “blessings” was not a term thrown about lightly. “Blessings” did not appear by some sort of metaphysical spontaneous combustion: they were the gift of a Blessor. But the argument was muted. The Constitution spoke in lowered tones about religion because most of its drafters believed religion to be a subject properly regulated by state, not federal, law.

An easy place to see that point is Article VI, which deals with a variety of miscellaneous subjects. Two of its provisions concern religion and, ironically, are juxtaposed to one another. The Oaths Clause provides that either an “oath or affirmation” will suffice for federal or state officials to pledge their loyalty to the Constitution. This was to accommodate the religious consciences of Quakers who are forbidden by their faith from swearing oaths.

The very next clause, however, is the Test Clause which forbids religious tests for public offices or trusts “under the United States.” That is, it forbids religious tests for federal offices. What about state offices? Didn’t the Constitution protect state office holders from having to take religious test oaths as well? No, it didn’t. In fact, it couldn’t. All but two of the original states themselves had religious tests for public office and wanted to keep them. So the Constitution couldn’t be against all religious tests, just federal ones. The result was cognitive dissonance, as the rhetoric of natural rights overlapped with the give-and-take of legislative compromise.

Following publication of the original, unamended Constitution, Madison and Jefferson carried on a lively debate over whether to add a bill of rights. Each argued that his position would better protect natural rights. Madison thought that religious liberty would fare better with no bill of rights at all. His argument was a simple one: If you subject a natural right such as religious freedom to the legislative sausage grinder, the compromise that will emerge will inevitably be disagreeable. Better to simply appeal to the pure natural rights themselves. Nevertheless, Jefferson won the day with pragmatism: Such hopes were unreliable, he thought, concluding that “If we cannot secure all our rights, let us at least secure what we can. Half a loaf is better than no bread.”

The process went forward, with Madison proposing drafts that would have had the First Amendment protect religious liberty from state as well as federal interference, only to watch them get shot down, one after the other. The same political realities that forced the original compromise in Article VI insisted on the same compromise in the Bill of Rights. So, when it was first enacted, the First Amendment banned only federal action. Individual states remained free to keep their established churches, if they wanted (Massachusetts kept its established church until 1832), or to have complete disestablishments (like Virginia), or anything in between if they wished. Congress was powerless to intervene. And so, because it could neither override a state establishment with its own disestablishment, nor override a state’s chosen disestablishment with its own establishment, “Congress [could] make no law respecting an establishment of religion.”

Similarly, the Congress was barred from enacting legislation that was uniquely disabling to members of certain faiths. That is, Congress could not do to Quakers what the individual states had done in barring their preaching, penalizing their refusal to take oaths, or their refusal of service in the militia. Congress could thus “make no law…prohibiting the free exercise of religion.” And the Free Exercise Clause, like the Establishment Clause, did not apply to state action but only to federal action. In 1842, for example, New Orleans fined a Roman Catholic priest named Fr. Permoli fifty dollars for violating a city ordinance that prohibited displaying a corpse during funeral rites. Fr. Permoli’s defense was that the ordinance violated the Free Exercise Clause of the First Amendment. The Supreme Court bluntly rejected that argument, stating that “the Constitution makes
no provision for protecting the citizens of the respective States in their religious liberty; this is left to the States’ constitutions and laws; nor is there any inhibition opposed by the Constitution of the United States.”

Now, natural rights theory was present in the Bill of Rights, too, as it had been in the unamended Constitution. If anything, it was slightly more prominent. The Ninth and Tenth Amendments had been added specifically to deny the proposition that the rights enumerated in the Constitution were all the rights there were. So there was still a natural right to religious liberty. There was just no way of federally enforcing that right against state violations of it. Whatever else may be said of such a fine distinction, it was often drowned out in the popular din.

Left free to persecute if they wished, many states continued to crack down on minority faiths. Vermont, for example, required in its constitution that all state office holders must “hold and profess the Protestant religion,” thus excluding Jews and Catholics among others. Many state constitutions included similar provisions and a majority would go on to add Blaine Amendments, which targeted Catholics for economic discrimination. There were literally religious riots in several cities, notably in Philadelphia (where both sides had cannon) and in Manhattan.

Perhaps most damaging of all was the cognitive dissonance that was engendered by continuing to use the rhetoric of natural rights while the states continued persecutions that by any measure violated those rights. Thus, for example, when George Washington wrote his famous letter to the Touro Synagogue, he said of religious liberty that “it is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural right.” But as the next 150 years would demonstrate, Jews in America suffered official anti-Semitism to one degree or another in virtually every state, and this was considered perfectly lawful. So while toleration was no longer “spoken of,” it was the best that could practically be hoped for. While natural rights were trumpeted they were almost always disrespected to one degree or another.

**Where Are We?**

But those were the bad old days, right? The Supreme Court has fixed that problem, hasn’t it? Yes, but only relatively recently. And sometimes the cure is almost as bad as the disease. In its zeal to ban state persecution of religion, the Supreme Court announced in the 1940s that the religion clauses of the First Amendment would henceforth be “incorporated” into the word “liberty” in the 14th Amendment, which had been enacted in the wake of the Civil War, and which provided that “no person may be deprived of life, liberty or property without due process of law.”

At the time, it no doubt seemed an elegant solution. The difficulty that soon emerged, however, was that this worked a major amendment into the Establishment Clause, taking what had been merely a structural provision, one that decided which branch of government, federal or state, got to decide on certain issues, and transformed it into an individual right **without ever changing its wording**. Now, how do you interpret a law when the only thing you know for sure about it is that it no longer means what it says? Answer: You look for other sources of meaning to pour into it. And that is exactly what the individual Justices of the Supreme Court have been doing for the last 60 years since incorporating the Establishment Clause. They have not been able to settle on one stable meaning for the Establishment Clause. In fact, they haven’t even been able to settle on where to look to find one.

Over the last 60 years there have been three enduring factions on the Court that have survived several complete changes of the Court’s personnel. One faction (e.g., Douglas and Stevens) essentially looks to philosophical secularism to supply meaning to the Establishment Clause. An opposite faction (e.g., White and Scalia) looks to history. Meanwhile, a third faction (e.g., Powell and O’Connor) seems to have looked largely at the ceiling, sometimes voting with the secularist faction and sometimes with the more traditionalist one. (It is too early to tell whether this third faction endures in the Roberts Court.) The result has been theoretical chaos, joined to practical iconoclasm. A more or less constant majority of the Court has remained committed to scouring religion from public culture, without ever quite knowing why it must do so.
Where Do We Go From Here?
What to do? Change our constitutional analysis. And return to Madison's vision as regards the broader natural right to religious liberty itself.

As for the Constitution, we should stop asking the incorporated Establishment Clause questions it can’t reliably answer and ask them of the Free Exercise and Equal Protection Clauses instead. The Free Exercise Clause, unlike the Establishment Clause, protected an individual right to begin with. It thus poses none of the difficulties for incorporation that the Establishment Clause does. Like the Speech Clause, or the Press Clause, the incorporated Free Exercise Clause now bans states from prohibiting the “free exercise of religion” just as it has long banned the federal Congress from doing.

The Constitution, while it codifies some protections for religious liberty, does not exhaust the natural right to religious liberty itself.

Moreover, the Equal Protection Clause of the 14th Amendment may be used in a principled way to regulate government distinctions on the basis of religion, just as it regulates government distinctions on the basis of race and ethnicity. Race, ethnicity, and religion are all so-called “suspect categories.” That is, they are all human qualities that the government may base legal distinctions on under only the most rigorous conditions.

The analogy to race and ethnicity would also provide much-needed clarity in the annual battles over Nativity scenes and menorahs, etc. Government cultural displays with religious elements could simply be treated the same way we treat government cultural displays with racial and ethnic elements. March 17 passes in peace every year without anglophiles seeking to enjoin St. Patrick's Day parades as Irish supremacist plots. Similarly, African-American History Month goes peacefully every February without European Americans attempting to block it as a racist power grab.

No court would take seriously the claim that the St. Patrick's Day parade is merely a foretaste of ethnic cleansing to come. Nor would judges stand for an argument that African-American History Month is but the opening chapter of apartheid. Similarly, courts applying an Equal Protection approach to religious freedom could finally admit that Christmas or Hanukkah decorations are not the harbinger of a new St. Bartholomew's Night.

In short, Free Exercise and Equal Protection analysis together could protect individual rights while providing a level playing field for religious competition in a scrupulously principled way. Unlike the incorporated Establishment Clause, the legal language of each of those clauses still means what it says.

Would changing our constitutional analysis like that finally usher in the golden era of religious liberty? No, of course not. There would no doubt be unforeseen consequences here, too. Moreover, much about current free exercise law would also have to be reformed, so as not to reduce religious liberty merely to even-handedness. But it would be a big step forward, by taking a big step back from the court’s current search-and-destroy mission for religion in culture.

But there is an even bigger step we can take, and one that does not require us to change the Supreme Court’s mind. We as a people must realize that not all solutions are constitutional ones. The Constitution, while it codifies some protections for religious liberty, does not exhaust the natural right to religious liberty itself. This is perhaps the more important insight from James Madison’s thought. We’ve seen how he advanced natural rights theory. Now let’s focus on how he thought natural rights relate to legal ones.

Simply put, he didn’t think legal, or even constitutional, rights could limit the reach of natural rights. Or, even more bluntly, the First Amendment does not provide all the religious freedom there is. On the
contrary, both in the Virginia legislature when he was battling a bill to publicly fund clergy, and later in life, when he was inveighing somewhat more quixotically against funding congressional chaplains, Madison did not hesitate to invoke a broader natural right to religious freedom against a law that was permitted by the state or federal constitution itself.

In his famous “Memorial and Remonstrance Against Religious Assessments,” Madison was faced with having to argue against a bill that was clearly permitted by the religious freedom provision of the Virginia Declaration of Rights. Madison knew that only too well. He had drafted that part of the Declaration of Rights and in his draft he had attempted to outlaw government support for the established Anglican Church in Virginia, only to see that effort fail. To Madison’s chagrin, the majority of the legislature, although happy to declare a right to religious freedom, nevertheless had insisted on maintaining the privileges of the established church. Thus, Madison knew, perhaps better than anyone, that the Virginia Declaration of Rights, which did not bar state funding of even one church, could certainly not be read to bar the funding of all churches. The law was clearly against Madison’s position. Nevertheless, in the “Memorial and Remonstrance,” he gamely argued that the natural right to religious freedom itself prohibited such statutes. And he carried the day.

Similarly, in his less-famous “Detached Memorandum,” written during his retirement, Madison argued that government funding of congressional chaplains was improper. He thought it should be held to violate the First Amendment (a position that even the modern Supreme Court has rejected). Failing that, he said, funding chaplains should be discontinued because it violates the “pure principle,” or natural rights of religious liberty itself. The point is not whether Madison was right or wrong on chaplains. Rather, the point is that well after the First Amendment had become law he saw no problem with advancing a natural rights argument for religious freedom.

Neither should we. We should take Madison up on his insight and insist on our natural right to religious freedom even where it is outside the protection of written law. This does not mean urging on the federal courts extra-constitutional bases for their decisions. It does mean, however, that other branches and levels of government may take into account legitimate claims for religious liberty in making their own decisions.

How would that work? Let’s take an example. A frequently heard criticism of the Supreme Court’s current Free Exercise doctrine is that it’s so narrow it wouldn’t even protect a first-communion class from a summons for under-age drinking. And perhaps that’s so. But if a local DA should foolishly seek to prosecute children on that basis, other government entities could ride to the rescue under the natural right to religious liberty. The members of the Grand Jury, for example, could and should refuse to convict. The state court judge could and should dismiss any indictment they did bring as “shocking to the conscience of the court.” The trial jurors in the case could and should refuse to convict in any case that made it that far. And, in all events, the local legislators could and should intervene in the nonsense, by passing legislative exemptions for under-age sipping of communion wine, and by impeaching the prosecutor.

In sum, we need to reform both our constitutional law and our self-understanding. Religious expression—even from competing faiths—is not some sort of allergen in the body politic. It need not, and cannot, be outlawed. On the contrary, because the religious impulse is natural to human beings, religious expression is natural to human culture—and deserving of legal protection.

So, is there religious liberty in America? Yes, but not really because of the Pilgrims. And only partially because of the Constitution. What’s more, once you resolve the cognitive dissonance you find it’s not really at the service of social harmony either, although it usually helps it. There is religious liberty in America because there are human beings in America. And human beings have natural rights.

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