
Religion and the Constitution

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The American Myth of Religious Freedom, by Kenneth R. Craycraft, Jr.
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This book provides a good example of the distortion of reality, not to mention mind-torturing confusion, that occurs when political documents—in this instance, the religious clauses of the First Amendment and the writings of Locke, Jefferson, and Madison—are viewed through sectarian glasses and without regard to the multi-layered historical context in which they were created.

The author does occasionally stumble onto a valid point, as when he notes the impossibility of implementing a term like “freedom of speech” or “freedom of religion” in an abstract, or merely procedural, way. Rather, such terms, as put into actual practice, derive their concrete meanings from the ultimate purpose or worldview of those employing them. Hence, “religious freedom,” as defined and put into practice by post-modernist liberals, will not—because it cannot—affect everybody neutral-

ly. It is no more possible for secular liberals, who recognize no ultimate criterion of truth or goodness beyond the radically free individual “conscience,” to enforce a notion of “religious freedom” that affects equally both those who share their secularist worldview and those moved by very different ethical and epistemological visions, e.g., traditional Christians, than would be the case if the roles were reversed. According to Craycraft, “religious freedom,” as enforced by the liberal state in conformity with recent Supreme Court decisions, anathematizes orthodox religious believers.

In contemporary American politics, such believers are marginalized. They are discriminated against in publicly financed education, and they are told that the expression of their moral beliefs is not welcome on an equal basis with secularism in political or cultural debate. In the name of

“religious freedom,” the liberal state systematically persecutes not only orthodox religious believers, but even agnostics and atheists who happen to agree with them on issues of public morality such as abortion or norms of acceptable sexual practice. Liberalism is intolerant toward orthodox Christianity and other traditional religions; accordingly, Craycraft concludes, echoing Stanley Fish, that liberalism, defined by its adherents as the indiscriminate practice of tolerance, is not in fact liberal.

This much is accurate, if a bit obvious. Where Craycraft goes blatantly, irritatingly, maddeningly wrong is in conflating the ethos of contemporary liberalism with the original intent of the First Amendment and of the Constitution as a whole. Nothing could be further from the truth. The religion clauses of the First Amendment are as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” In 1947 the Supreme Court, in *Everson v. Board of Education*, ruled, taking a phrase from Jefferson, that the First Amendment’s establishment clause had erected a “wall of separation” between church and state. That ruling opened the way for a series of decisions that, in effect, have established secularism as the official religion of the United States in the second half of the twentieth century. Far from conforming to the original intent of the amendment, however, as Craycraft argues, these decisions have more nearly stood the will of the framers on its head.

We have it from no less an author-

ity than Chief Justice William Rehnquist that there “is simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation’ that was constitutionalized in *Everson*.” In its 1985 ruling in *Wallace v. Jaffree*, the Supreme Court struck down an Alabama statute providing for a moment of silence in public schools for meditation or prayer. Writing in dissent, Rehnquist, then an associate justice, provided the most comprehensive historical record ever given in a Supreme Court decision concerning the intent of the framers of the First Amendment’s religion clauses.

Pointing out that Jefferson was in France at the time the First Amendment was passed by Congress and ratified by the states and that his “wall of separation” phrase was a “misleading metaphor” tossed off in a “short note of courtesy, written fourteen years after” congressional passage, Rehnquist observed that Jefferson “would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religious Clauses” By contrast, Madison, who had joined with Jefferson in the battle for enactment of the Virginia Statute of Religious Liberty of 1786, was a member of the First Congress, where he played a leading role in passing the Establishment Clause. But the First Amendment’s legislative history, including the significant contributions of Madison, presents “a far different picture of its purpose,” Rehnquist continued, “than the highly simplified ‘wall of separation between

church and State.”

Rehnquist showed, based on the House proceedings, that Madison was the most important architect in the House, “but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution. During the ratification debate in the Virginia Convention, Madison had actually opposed the idea of any Bill of Rights. His sponsorship of the Amendments in the House was obviously not that of a zealot believer in the necessity of the Religion Clauses, but of one who felt it . . . would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.” That Madison did not intend the First Amendment to prohibit the states from maintaining a religious establishment at their discretion is plain. Thus, at one point when the proposed wording under consideration was that “no religion shall be established by law,” Madison proposed amending it to say “no *national* religion shall be established by law.”

It seems indisputable, wrote Rehnquist, that Madison “saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.” The First Amendment did not prohibit the government from aiding all Christian denominations evenhandedly. That this was the consen-

sus of the First Congress, said Rehnquist, is evidenced by its passage, during the very period when the First Amendment was under consideration, of a resolution calling upon President Washington to proclaim a “day of public thanksgiving and prayer” and by its reenactment of the Northwest Ordinance of 1787. A key provision: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall ever be encouraged.”

Rehnquist noted, moreover, that for nearly a century Congress routinely “appropriated public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson’s treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe’s Roman Catholic priest and church.” And he pointed to Joseph Story, from 1811 to 1845 a Supreme Court justice and during much of that time a Harvard law professor. In his comprehensive treatise on the Constitution, published in 1845, Story wrote:

Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have

created universal disapprobation, if not universal indignation. . . .

Rehnquist's conclusion, based on the historical record:

The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the position that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson* [emphasis added].

Though never mentioning Rehnquist, Craycraft concedes the existence of much of the historical evidence compiled by the jurist but dismisses it as irrelevant. Craycraft agrees with the following passage from *The Lustre of Our Country*, by Judge John T. Noonan, Jr.:

what free exercise meant to Mr. Madison was not what it meant to the First Congress that petitioned the president to set a day of thanksgiving to God; created chaplaincies; and made grants of public property for the support of religion. It is plausibly argued that for many members of the First Congress the restrictions of the First Amendment were jurisdictional: the federal government was barred from interfering with religion because religion was within the power of the several states. In the absence of a national consensus on the proper relation of government to religion, the nation was taken out of the question; the states were left to

make their own choices (89).

We have seen that this goal of leaving the question to the states was the reason for the Establishment Clause given in debate by Madison himself. But no matter, says Craycraft. Neither the precise wording of the First Amendment, nor its meaning as understood by the members of the First Congress and of the ratifying state legislatures, nor even Madison's own explanations during the congressional proceedings has weight. All that counts is that, according to him, Madison and his friend Jefferson, both deeply influenced by Locke, desired to establish non-religion as the basis of the American regime. And whether this alleged desire of theirs "fully carried the day by the letter, it is the spirit of religious liberty at the heart of the First Amendment" (88).

Hence, Craycraft argues, contrary to Rehnquist, the Supreme Court's interpretation of the First Amendment, since *Everson*, as fostering irreligion is in accord with the original intent of the religious clauses, while the more accommodationist stance toward religion taken by the courts during the republic's first century and a half amounted to some form of judicial activism (73).

Craycraft's account is problematic for at least two reasons. First, in matters of constitutional interpretation, what is controlling is the constitutional wording on its face. Only if the *prima facie* language is ambiguous is it permissible to look to the legislative history for guidance. In those cases, moreover, the overall consensus achieved through parliamentary

compromise is determinative, not the more extreme, perhaps even unspoken, desires of certain parties to the debate—desires for which sufficient votes were unavailable. Consistent with Craycraft’s reasoning, the Supreme Court could—in keeping with “original intent”—strike down the state governments or erect a monarchy in Washington. Why? Because these were the stated preferences of Alexander Hamilton, who, with Madison, was a leading framer, champion of ratification, and co-author of the *Federalist*.¹

Second, even if one were to accept for argument’s sake the writings on religion of Locke, Jefferson, and Madison as coextensive with the original intent of the First Amendment, that would in no way justify, as Craycraft maintains, the secularist prescriptions laid down by the Supreme Court in its line of opinions following *Everson*. Although the religious thought of the three writers in question might be called “progressive” for the times in which they lived, by today’s standards they would be, on questions of church and state, to the right of such as Pat Buchanan, Dr. Laura Schlessinger, or the Christian Coalition. Both Locke and Jefferson held, for instance, that atheists should not be allowed to serve on juries—a far cry from the First Amendment depicted in recent Supreme Court rulings but thoroughly consistent with Rehnquist’s conclusions in his *Wallace* dis-

sent.

It is important to keep in mind that Locke, Jefferson, and Madison were primarily political thinkers. Their writings were not dispassionate works of philosophy or theology but rather “tracts for the times,” i.e., they usually were intended to influence short-term policy views and should be interpreted accordingly. When *qua* political thinkers they discussed “freedom of conscience,” they had in mind the absence of coercion defined as threats to life, property, or civil standing. Yet Craycraft, by means of selective quotes often taken out of context, attempts to impute to these thinkers notions of religious freedom that are of much more recent vintage. These include support for the “unencumbered self” proffered by Michael Sandel and the radically free conscience posited by postmodernists—i.e., a “conscience” free of duties, whether to God or man, that transcend one’s narrow self.

Craycraft notes that Locke, in his *Letter Concerning Toleration*, focuses “almost exclusively” on the historic tendencies within Christianity toward coercive force and religious persecution. But, he says, “this is a tactical rhetorical move designed to obscure the more fundamental strategy of denying (on the grounds of natural right of conscience) the legitimacy of internal ecclesiastical authority” (40). “For Locke ecclesiastical officers have no more business minding the religious affairs of men than do political officers” (41). Craycraft goes on to say that “Locke denies the very possibility of orthodoxy.” Locke’s state-

¹ Reported in James Madison, *Notes of Debates in the Federal Convention of 1787* (Columbus: Ohio University Press, 1966), 134.

ment that “every one is Orthodox to himself,” says Craycraft, “does not mean merely that every man is convinced of the rightness of his own opinion Rather, for Locke every man is orthodox to himself, since conscience is by nature radically free, and religion by nature radically private” (45). Craycraft attributes to Locke—and to Jefferson and Madison—the notion that the individual conscience is radically free, so that “neither the state, nor the church, nor God has authority or even concern over the state of man’s soul” (95). Their desire to allow freedom of conscience on doctrinal matters and in choice of denomination stems from “religious indifference,” the belief that doctrinal differences are irrelevant because there is no truth in such matters, Craycraft adds. Similarly, he accuses Locke of denying both the possibility of “truth as understood through revelation” (44) and the idea that churches have anything of value to offer toward salvation, such as sacraments, that is not available to the individual without benefit of membership in a church (48, 52).

All of the above and much more that Craycraft asserts is inaccurate. Locke certainly does not deny that man is subject to God’s commands, nor, as Craycraft contends, does he ultimately reduce moral failure—the failure to obey God’s laws—“to being intolerant of other men’s opinions” (44). In Locke’s state of nature (which he posits not as an actual description of historical reality but as an analytic and heuristic tool), men are pre-political but they are not, as Craycraft

seems to believe, unsocial (75). Rather, in the state of nature, men frequently violate justice because they are fallen creatures and the state is not available as an effective enforcement vehicle. Nevertheless, the obligation to observe justice is present because God has so willed it. “For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they, made to last during his, not one another’s Pleasure.” Nor, as Craycraft argues, is justice in the state of nature merely the negative one of not violating other men’s rights (79). God forbids men to harm one another (except as punishment for violating natural justice), but he also prohibits suicide.²

Far from denying the existence of revelation or the efficacy of grace in helping men to know the truth, Locke writes that, before Christ’s coming, “human reason unassisted failed men in its great and proper business of morality,” leaving the world in “darkness and error But the clear revelation he [Christ] brought with him dissipated this darkness, made the one invisible true God known to the world.” Locke is anything but indifferent concerning the relation between doctrine and salvation. Based on his reading of scripture, Locke believes that there are two requirements for salvation: justification by faith in Christ as the Messiah and repentance,

² John Locke, *Two Treatises of Government*, II, § 6.

which entails a sincere effort to know and obey God's laws. "These two, faith and repentance, i.e. believing Jesus to be the Messiah, and a good life, are the indispensable conditions of the new covenant, to be performed by all those who would obtain eternal life." These doctrines Christ made "fundamental," says Locke. They must be believed for salvation. The "other parts of divine revelation" also must be obeyed if believed or understood as true, but groups differ "in the interpretation and meaning of several texts of Scripture, not thought fundamental. In all which, it is plain, the contending parties on one side or the other are ignorant of, nay, disbelieve the truths delivered in holy writ. . . ."³

While acknowledging that God makes known the truth through revelation as well as natural reason, Locke stresses that men may be mistaken about whether a belief actually comes from revelation, and if so, whether it is from God. Notwithstanding Craycraft's flat assertion that, "[f]or Locke, conscience cannot err" (45), Locke cautions that "the strength of our persuasions is no evidence at all of their own rectitude . . . men may be as positive and peremptory in error as in truth."⁴

Having misconstrued Locke on such fundamental issues as the existence of divine revelation, man's subordination to God's law in the state

of nature, and the possibility of an errant conscience, Craycraft interprets Madison and Jefferson through the same distorted lens. From their description of the right of free conscience as unalienable and not subject to "the *dictates* of other men" (75, emphasis added), Craycraft ascribes to them the belief that men should be free from all external influence, not only from other men, including clergy, but even from God himself in the form of grace. Further, Craycraft takes their belief in freedom of conscience to mean that men and women have no duty to obey God (80). Yet it is clear from their writings that, for both Jefferson and Madison, conscience, by its very definition, is the obligation to seek out God's will and to obey it. According to Madison, for example, freedom of conscience is not the right to do as we please but, rather, the "freedom to embrace, to profess, and to observe the Religion which we believe to be of divine origin," while refraining from denying "an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us" (emphases added).

Craycraft's misreadings of all three thinkers are so numerous and so thoroughgoing that they can only be explained by an ulterior motive. What that motive seems to be is a desire sweepingly to condemn the religious tradition embodied in the United States Constitution as "anti-theological" (42) without ever stating explicitly his main objection to that tradition, circa 1789: that it did not privilege one Christian confession in particular—Catholicism.

³ John Locke, *Locke Selections*, ed. Sterling P. Lamprecht (New York: Charles Scribner's Sons, 1928), 57-59.

⁴ *Ibid.*, 20-21.

It would of course be absurd to expect the Constitution to have given special recognition to Catholicism. Not only were Americans overwhelmingly Protestant when the First Amendment was adopted but that had been true of their ancestors for more than 200 years. Yet, because most if not all framers of the First Amendment—and, a fortiori, Locke, Jefferson, and Madison—did not wish to give legal preference to Roman Catholic doctrines over those of other Christian denominations, Craycraft paints them anachronistically as proponents of anti-theism and post-modernism. (To avoid the appearance of special pleading Craycraft frequently points to “orthodox” Christianity as the object of his concern, but the major example of “orthodoxy” that he cites over and over is Roman Catholicism, and not once, so far as this reader could determine, does he provide an example of a non-Catholic denomination that meets his definition of “orthodox.”)

In fact, Locke was explicit about the relationship of church and state that he favored, and it was poles apart from the secular state, with its enforced acceptance of perverse behavior, that the courts have imposed on contemporary Americans. Locke noted that “the articles of religion are some of them practical and some speculative.” The latter, comprising “articles of faith . . . which are required only to be believed,” should not “be imposed on any church by the law of the land” for two reasons. First, it is impossible to compel people to believe what they do not actu-

ally believe; they can feign a belief that they do not hold but what counts to God is what men genuinely believe in their hearts. Second, since the purpose of government “is the temporal good and outward prosperity of the society,” there is no reason for government or private persons to interfere with an individual’s doctrinal beliefs, since those beliefs affect his soul but not that of his neighbors.⁵

Though Locke called, in effect, for a “wall of separation” between church and state concerning issues of speculative belief, he explicitly rejected such separation when it came to the “practical” articles of religion, i.e., those which “influence the will and manners.” Because a “good life, in which consists not the least part of religion and true piety, concerns also the civil government,” Locke had no compunctions against the state’s encouraging—and even enforcing by law—standards of moral behavior that were endorsed by all of the major Christian denominations of the time.⁶ These standards would have included, e.g., prohibitions of licentiousness, blasphemy, or public drunkenness. Far from favoring government-mandated secularism, Locke stated: “Lastly, those are not at all to be tolerated who deny the being of God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist.”⁷ No outlawing of prayer in public schools here.

⁵ *Ibid.*, 46-48.

⁶ *Ibid.*, 48-49.

⁷ *Ibid.*, 50.

What the framers, Madison among them, actually did, without doing violence to Locke, was establish a government which, at least at the national level, allowed individual choice concerning doctrines on which the Christian denominations were divided, while giving broad support to the views, particularly on moral *behavior*, that all of the major Christian denominations professed in common. As Justice Story explained in 1845:

The real object of the [first] amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. . . .

The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues;—

these never can be a matter of indifference in any well ordered community. . . .

Now, there will probably be found few persons in this, or any other Christian country, who would deliberately contend, that it was unreasonable, or unjust to foster and encourage the Christian religion generally, as a matter of sound policy, as well as of revealed truth. In fact, every American colony, from its foundation down to the revolution, . . . did openly, by the whole course of its laws and institutions, support and sustain, in some form, the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the states down to the present period, without the slightest suspicion, that it was against the principles of public law, or republican liberty [*Commentaries on the Constitution of the United States*, Vol. II].

Such is the meaning of the First Amendment intended by the framers, recent Supreme Court decisions notwithstanding. In contending otherwise, this book does no service to the truth, the Church, or the Constitution.