

## The Perils of Religious Liberty

By *Yuval Levin* on March 30, 2016

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On January 24, 1774, the young James Madison, twenty-two years old and two years out of Princeton, wrote an exasperated letter to his college friend William Bradford, who lived in Pennsylvania. In Virginia, Madison wrote, a season of intolerance had dawned. "That diabolical, hell-conceived principle of persecution rages," and perfectly well-meaning men of religion were finding themselves imprisoned for expressing any deviation from the views of the dominant Anglican Church. He told his friend that he had "squabbled and scolded, abused, and ridiculed so long" about this that he had no more patience for the fight. "So I leave you," he concluded, "to pity me and pray for Liberty of Conscience to revive among us."

Of course, Madison ultimately did more than beg for pity and prayer. He made religious liberty a foremost cause of his political action. And he enshrined in our Constitution, and so etched in our national consciousness, a principled and practical commitment to that liberty that has helped us remain a free society ever since.

These days, however, many religious and moral traditionalists in America can easily relate to the young Madison's anguished plea for pity and prayer—or at the very least for a revival of liberty of conscience. In our time, too, a season of intolerance has dawned. Over the past few years, the Obama administration has actively worked to isolate, vilify, and intimidate opponents of abortion, for instance, making it increasingly difficult for them to run a business or operate in the public square in accordance with their convictions. The Supreme Court, meanwhile, has declared the traditional understanding of marriage anathema, and left wide open many vexing questions about the standing of individuals, groups, and institutions who continue to uphold that understanding.

Major corporations have launched brazen attacks on communities seeking to carve out spaces for competing views on such questions. The key organs of popular culture have declared dissenting views on sexuality and marriage unfit for polite conversation, setting off occasional high-profile witch hunts against dissenters and enabling an environment of intimidation well beyond those. Prominent academics and civil liberties organizations have raised the prospect of stripping churches of their tax exemptions and pursuing litigation to require private companies and civic groups to be led and staffed by people who pledge allegiance to the moral creed of the left. Major newspapers have begun to put the phrase "religious freedom" in scare quotes, as if everybody understands that it is just a cover for bigotry abusing the sacred name of liberty.

Much of this might have seemed unimaginable even a decade ago, and that sudden collapse in our standing in society has left many traditionalists reeling. For some, this dark turn offers proof that the American project of virtuous democratic capitalism has always been inherently untenable: Ever

since the nation's founding, if not since the dawn of the Enlightenment, the liberal society has been at war with its own moral foundations, they argue. It is now on the verge of demolishing them altogether, and the only real question is why it has taken so long. Now that the reckoning is upon us, we need to seek refuge for traditional ways of life where we can and accustom ourselves to the manners of exiles in our own society.

Others, on the contrary, see the rise of an oppressive, progressive anti-traditionalism as a kind of betrayal of the principles underlying the American experiment and the practice of American life as we have known it. To them, recent years have involved a sharp break from our political tradition, and they call for a recovery—not only of our moral order but of our constitutional order, too.

Social conservatives in both groups have turned to religious liberty—whether as a shield or as a sword, as a means of guarding orthodox communities from the corrosive decadence of the broader culture or of reasserting the proper bounds of public power. Religious liberty has therefore become the foremost public priority of social conservatives, and the importance of that first freedom has taken center stage in our case to the larger society.

This makes sense, of course. It is right that we should turn just where Madison did in the face of this new persecution. Religious liberty is plainly essential for the endurance of our free society and for the protection of the rights and freedoms of the many millions of Americans who dissent from the caustic Gnosticism that increasingly dominates our culture. The cultural revival we yearn for is only imaginable if we fight now against the suppression of dissenting views on moral questions.

But the unavoidable appeal to religious liberty is not without dangers of its own. The emphasis we are compelled now to put upon our first freedom risks distorting the moral message of religious and social conservatives in a number of important ways, and in the process undermining our case for liberty and tolerance. A deeper appreciation of the nature of that message could help us understand and minimize these dangers, and might also bring us to a deeper appreciation of religious liberty itself.

Key to such an appreciation will be taking note of the always uneasy relationship between theory and practice, or principle and action, in the life of a society. Both broad streams of traditionalist - responses to the contemporary climate of oppression—those who say our troubles are an extension of liberal principles and those who say they are a betrayal of those principles—tend to jump too quickly from theory to practice, and so to treat the lived experience of our society as a kind of working out of philosophical premises. Needless to say, however, the actual life of a society is not just a playing out of principles. It is an experience of living together, in community and in conflict, within boundaries set by our moral and philosophical commitments but also under conditions determined by our vices and virtues, our character, our circumstances, and the habits of our variegated culture.

Both of the major camps of social conservative reaction to the challenges of the last few years are right in part: We have always had to struggle against the inclination of our liberal society to

furiously pound itself into what Edmund Burke called “the dust and powder of individuality,” and to resist its elevation of choice above commitment. And we have always engaged in that struggle in part by calling upon the ideals of our founding—principles of both republicanism and liberalism, natural law and common law—and by carving out space for family and community, commitment and responsibility, using the tools provided by our Constitution.

The distressing threats to religious liberty in recent years have therefore been both an extension of and a break with the principles of American liberty, because those principles are themselves not perfectly coherent. But these threats implicate not only our principles but our life together in practice, and it is in light of that practice that both the absolute necessity of a commitment to religious liberty and the dangers involved in such a commitment become most apparent.

For that reason, we might best reflect on those dangers by considering two arenas in which theory meets practice in the life of our society. One is the law—and the question of religious liberty is in an important sense, of course, a legal question. The other, and surely the most significant arena where abstract philosophy must interact with concrete experience, is community life—where principle and practice come together on a personal, human scale.

The legal arena is where the case for religious liberty seems most straightforward and securely rooted. The First Amendment to the Constitution declares that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These sixteen glorious words make for a sword, a shield, and a banner for today’s beleaguered believers. They seem to safeguard the right of every American to live by his convictions. But let us consider what they really demand, and on what grounds.

Our first instinct in the legal battles spawned by the progressive excesses of the last few years is to reach for the free exercise clause, which after all exists to protect religious people’s ability to live out their faiths in practice. It is easy to see why that seems like the right tool: Free exercise jurisprudence has frequently involved the crafting of prudential exemptions and accommodations—precisely the carving out of spaces—that could allow religious believers to act on their convictions even in the face of contrary public sentiments or (up to a point) public laws. In their present circumstances, many religious traditionalists would surely benefit from such prudence and protection.

But the logic of free exercise is, at the same time, highly individualistic, while the problems traditionalists now confront are frequently communal or (in the deepest sense) corporate problems. The free exercise clause offers a defense of religious freedom rooted in a defense of individual conscience and in turn in the broader liberal logic of individual rights. And those roots run deep.

The English tradition of religious toleration, which is the source of our legal ideal of the free exercise of religion, arose in the wake of long and bloody religious wars to secure some peace among conflicting sects by keeping individual belief out of the state’s reach. This was done in a nation with a strong established church, so that the freedom enabled by religious toleration at its origins was a

freedom of private worship and belief for dissenters, but not quite a freedom of common action in the public square. Religious freedom was a very liberal liberty—a freedom afforded to individuals to keep them out of one another’s hair and so to keep the commons peaceful and orderly.

Indeed, the exigencies of England in the early Enlightenment meant that this toleration was itself selective: It was intended to protect Protestant dissenters and Jews but to offer less protection to Catholics, and this aim meant that toleration quickly took on a particular form with troublesome implications for our own situation.

Perhaps the most blatant, if not comical, illustration of this ambiguous character of English toleration at its origins can be found in John Milton’s noble case for freedom of thought and expression, which was also among the first explicit statements of the English mode of toleration. Milton’s *Areopagitica*, published as a letter to Parliament in 1644, in the midst of the English Civil War, was an impassioned case against censorship and the oppression of thought. When Milton applied his arguments to religion, though, he put the matter this way:

Yet if all cannot be of one mind—as who looks they should be?—this doubtless is more wholesome, more prudent, and more Christian that many be tolerated, rather than all compelled. I mean not tolerated popery, and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpate, provided first that all charitable and compassionate means be used to win and regain the weak and the misled.

Tolerate all, but not Catholics. Even the greatest statement of the early Enlightenment’s tradition of toleration, John Locke’s 1689 “Letter Concerning Toleration,” which is much more subtle on this point, draws a distinction that’s relevant today.

Locke argues there is no reason to ban the belief and profession of any article of faith, since beliefs can’t do any harm. “If a Roman Catholic believes that to be really the body of Christ which another man calls bread, he does no injury thereby to his neighbour. If a Jew does not believe the New Testament to be the Word of God, he does not thereby alter any-thing in men’s civil rights.” Individuals may believe what they wish.

But *institutions* formed around such beliefs were not to be similarly tolerated if they were to exist for a purpose beyond the mere expression of faith. This was especially a problem for Catholicism, which is a uniquely institutional religion. And Locke intended it to be such a problem. Catholic beliefs could be tolerated, but the institutional existence of the Church, and its hierarchy answering to the pope (a foreign prince, Locke says), could not. The Act of Toleration, enacted by Parliament in 1689, set out the same distinction, which remained an element of English law until well after America’s independence.

This tradition of toleration, therefore, established a highly individualistic understanding of the right of conscience and of the protection of religious practice. Thus the particular question that has been at the heart of a lot of our religious liberty cases in the past few years—the question of whether

institutions in the corporate form are entitled to religious liberty—is not a new question for our political tradition, and the answer that tradition has often offered it is not always friendly to the cause of contemporary traditionalists.

In 2012, when the Obama administration first proposed the so-called HHS mandate, requiring employers to provide insurance coverage that included free access to contraceptive and abortive drugs, it provided an exceedingly narrow religious exemption from the rule that echoed some of the distinctions first made in these earliest incarnations of the English tradition of toleration. An organization could only count as religious, the regulation asserted, if “the inculcation of religious values is the purpose of the organization,” if it “primarily employs persons who share the religious tenets of the organization,” and if it “serves primarily persons who share the religious tenets of the organization.”

This would effectively mean that only houses of worship, or institutions that otherwise serve the direct expression or inculcation of articles of faith, are to be granted religious liberty. Essentially no religious charities could qualify, no hospitals or schools, no adoption agencies—let alone private institutions run by religious people in the service of their convictions.

Religious practice, in this understanding, involves the profession of faith, but it does not extend to participation in the broader life of the society. It is essentially a private intellectual exercise. Freedom of religion here serves the ends of the liberal society, but it is not quite a constraint on the reach and power of that society over its members.

The case law arising out of the free exercise clause has long involved broadening such narrow definitions, which has resulted in requirements for accommodations of various sorts for religious people in the public square. Accommodations for religious institutions have been somewhat more rare, and accommodations for private businesses owned by religious people all the more so. In this tradition, religion has rarely been treated as one of the things people do together.

And yet, there is in our tradition of religious liberty a set of arguments and categories better suited to the kinds of challenges religious people now confront. These arguments see religious liberty as demanding some essential limitations on the reach and power of liberalism itself, but they also point out the limits of religious liberty as a *legal* principle and affirm its breadth and reach as lived - *communal* practice.

James Madison was among the original architects of such arguments. In his 1785 “Memorial and Remonstrance against Religious Assessments,” written eleven years after his anguished letter to William Bradford, Madison put the point this way:

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 duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.

Religious liberty, in this view, is therefore not quite a liberal liberty. It is not a freedom to do what you want, but a freedom to do what you must. It describes a duty of society to retreat and give its members space to act on what they deem essential; an acknowledgment not of a human liberty or right, but of a human obligation that precedes the social obligation and so shapes it.

Madison also recognized that near the core of religious liberty is the freedom not to be coerced into doing that which your religion prohibits you from doing. He proposed that a liberal society should make room for a moral code that comes with *constraints*. Indeed, he seems to suggest that a society that refuses to allow its citizens to be constrained by their religious convictions is an unacceptably coercive society.

But Madison advanced this case not in the service of a protection of the free exercise of religion but rather in opposition to the establishment of religion. His point was that no one ought to be compelled to affirm as true a religious tenet he took to be false and that no one should be compelled to participate in a religious rite that violated his own understanding of his religious obligations. He was making what we would now recognize as a non-establishment argument, one that was not exactly an extension of the traditional Anglo-American case for toleration. Like the establishment clause of the First Amendment, which Madison authored a few years later, it was a Madisonian addendum to the Lockean ideal of liberal toleration in a society with an established church.

Yet it is also the essence of the argument that, say, a wedding vendor who wants to remain free to refrain from participating in a same-sex wedding would advance. The question of the definition of marriage is, for many people, a fundamentally religious question. It is also a civil question in our country. But some religiously orthodox wedding vendors are finding themselves compelled by the civil authorities to affirm an answer to that question that violates their religious convictions on the subject, and some religious institutions—from universities to social service agencies to private companies owned by orthodox believers—are finding themselves forced to take part in the enactment and enforcement of a moral code they are obliged to reject.

They would like to be relieved of that compulsion, but that can't happen, they are told, because the larger society's understanding of the moral life overrules the understanding prescribed by their religious convictions. If they want to participate as business owners or service providers in the life of that society, they must give ground. They are more like religious believers under compulsion in a society with an established church than like believers simply denied the freedom to exercise their religion. Only now the compulsive state religion, or at least our new civil religion, is supposed to be progressive liberalism.

Of course, liberalism is not literally becoming a religion—but it is approaching the question of society's moral order from the point of view of a dominant, established power that expects to command formal assent to its views in the public square. People are allowed to believe what they want, but when they act together in public, they must abide by the beliefs of the established order.

That liberalism is not an actual religion means the establishment clause will not generally avail contemporary traditionalists as a legal tool; arguments in court must continue to make the most of the free exercise clause, which offers us vital protections. But Madison's argument against religious establishment speaks powerfully to our situation, and can help those traditionalists understand it better.

For one thing, it brings into sharper relief the distinction between individual and communal religious liberty. In calling for keeping our national life free of the overbearing power of one church, Madison was not suggesting that we should have no churches at all, but rather that we should have many. And by withholding public sanction from any one set of religious institutions, his approach makes it possible for many religious institutions, not just many religious individuals, to populate our public life.

Madison's implicit assumption, and that of the entire tradition of religious toleration until the last few decades, however, was that religious diversity and conflict would involve competing sects that differ on some important questions of doctrine and practice but nonetheless share in common a basic Judeo-Christian orientation that is also, in very broad terms, our society's implicit civil religion. The erosion of that common soil, that common culture, is the essence of our modern condition.

That erosion is also why an individualist understanding of religious liberty is now less adequate, and more dangerous, than it might once have been. Differences of dogma in an essentially Christian society mostly call for giving individual believers the room for distinctions of belief while allowing genuinely distinct (and inevitably very small) religious minorities broader latitude. Differences of fundamental moral premises in a society no longer unified by basic moral assumptions call for more than that. They require us to carve out broad protected spaces for traditional culture as such—for a way of life, not just a set of beliefs. And that means they require us to carve out spaces for communities, not just individuals.

In some important respects, moreover, carving out room for cultures and communities still shaped by a basic Judeo-Christian orientation is about more than protecting religious minorities. It is about sustaining our liberal society itself, and about producing the kinds of free citizens it needs. It is essential to the revival of a liberal society worthy of the name.

Modern liberalism assumes and requires a society with a certain moral foundation, but it does not always reinforce that foundation, and increasingly it undermines it. This is what critics who argue that liberalism has always been driving toward a self-destructive moral chaos have in mind. And yet, American liberal democracy has nonetheless always made available the tools to nurture those essential moral foundations of freedom. This is what critics who argue that today's progressive radicalism is a betrayal of the American tradition have in mind. The fact that both are right means that it is up to us to use the tools at our disposal to sustain that moral culture, and to cultivate in its soil a generation that will yearn for revival.

That is, without question, a much taller order than what Madison imagined his approach to religious liberty would be required to support. Indeed, his commitment to religious liberty was at least as much a function of his worry about domineering religious sects imposing themselves on the public square as of any concern about a loss of society's fundamental moral character. But the foundation he established is nonetheless available now as a bulwark for traditionalists, if we are willing to make the most of what it offers and build on it.

That work must be practical, not just conceptual. And it will need to be more than legal work. Our vital commitment to religious liberty must not blind us to this basic, daunting fact: Religious liberty is as much a product as a precondition of our free society. For that society to endure in a culture at war with the very foundations of its freedom will require more than space for alternatives. It will require filling that space with actual living alternatives—moral communities that help us see what our freedom is for.

Community life is therefore the second arena in which we can appreciate the perils and the necessity of religious liberty.

As a practical matter these days, religious liberty is essential not so much because it protects people's ability to believe and say certain things but because it protects people's ability to live a certain way. That way of living—shaped by memory, bounded by tradition, directed to the future, formed to meet obligations both sacred and profane, and ultimately answerable to permanent truths—cannot be embodied in the practice of lone individuals, because at its essence it is *about* relational commitments. It describes a culture, and so can only be given concrete form in a community.

Therefore, in practice, religious liberty now frequently describes the freedom of a community to live in accordance with a moral vision shared among its members. This understanding of the practical meaning of our first freedom makes it easier to see why the practice it protects so easily outgrows the narrow bounds of the exercise of religion as envisioned by our legal system. And it also helps us see why religious liberty should be so controversial today. Everything about this idea of a morally meaningful community is now countercultural.

The very notion that a moral vision should be embodied in community life and relational obligations, rather than in the choices of any given individual, is a direct challenge to the ethic of expressive individualism that animates our popular culture. And the notion that culture can be local and communal, and so not merely popular, argues against the (closely related) centralizing tendencies of modern progressivism. This vision therefore pushes against both individualism and centralization, and seeks human flourishing in the fertile space between them.

Forcing the case for this kind of living moral alternative into the narrow confines of an argument that is just about religion and liberty makes the treasure we seek to protect seem smaller and less significant than it truly is. And it causes traditionalists to underplay what we have to offer.

For one thing, to articulate that case above all in the parlance of religious liberty is to approach our society defensively. We thereby risk appearing to our neighbors to be a plaintive and inward-looking minority asking to protect what it has and to be left alone. But what social conservatives “have” is a vision of the good and a deep conviction that it would be good for everyone and therefore ought to be made as widely available as possible.

That doesn’t mean we can avoid first defending ourselves. A truce on the social issues has never been an option—and it surely isn’t now. But it does mean we should be more than defensive, and should always be careful to highlight the nature and the appeal of what we are defending, and so of what we are offering—the larger human good in the service of which some constraints on our individual will and power are required.

The struggle for religious liberty is crucial as a means of making possible a more-than-defensive approach to the broader society. It is a prerequisite for the essential work of social conservatism. Its goal is to keep open the space in which cultural conservatives might appeal to their neighbors. Yet it must not substitute for that appeal.

This may be the greatest peril we face in championing religious liberty—the danger that our call for sustaining a space for living out our moral vision might be mistaken for an argument that the sustaining of space for ourselves is itself the essence of our moral vision. As Richard John Neuhaus warned three decades ago, in demanding exemptions, protections, and accommodations, we need to be careful not to be understood as champions of universal non-judgmentalism, or of a naked public square.

The risk of giving that impression has grown great in the circumstances we now confront. In February 2012, at the height of the battle over the HHS mandate, William Thierfelder, the president of Belmont Abbey College, was interviewed by the *Washington Post* about the school’s legal fight against the mandate. Thierfelder wanted to be certain that people understood the limits of the claim his school was making, but in the process he exposed some of the dangers inherent in couching moral arguments entirely in the defensive terms of religious freedom. He told the *Post* reporter:

We’re not trying to tell anybody else how to live their lives. I, personally, I would hope people don’t seek abortions, but we’re not saying that. We’re being asked to violate our religious beliefs in our Catholic home.

He was right, of course. And he was also wrong. He was defending his institution, first and foremost, as he must. But the idea that a Catholic university is not in the business of telling anybody else how to live their lives can’t be quite right. It may not seek to compel people to live by its moral vision, but it does seek to persuade them to do so. It surely cannot serve its mission if it is not allowed, itself, as a Catholic home, to abide by Catholic convictions. But its mission inevitably looks outward.

Social liberals are right to see institutions like Belmont Abbey as competitors for the souls of the young. If understanding our case as above all a matter of protecting religious liberty rights means that social conservatives don't think or talk that way anymore, then we are in great trouble.

This means we need to see that we are defending more than religious liberty: We are defending the very idea that our government exists to protect the space in which various institutions of civil society do the work that enables Americans to thrive, *and* we are defending the proposition that this work involves moral formation and not just liberation from constraint. That is an entire conception of the meaning of a free society that goes well beyond toleration and freedom of religion. It is ultimately about the proper shape and structure of American life.

Making that clear—to ourselves and to others—will require an emphasis not just on the principles involved (be they religious liberty or subsidiarity or the freedom of association), but also on the actual lives of our actual, concrete communities. It will require that we turn more of our attention homeward, away from raging national controversies and toward the everyday lives of our living moral communities—toward family, school, and congregation; toward civic priorities and local commitments; toward neighbors in need and friends in crisis. It will require us to see that we need to build more than protective walls; we need to build strong, thriving, attractive communities.

The purpose of fighting to defend religious liberty is therefore not only defensive but also missionary: It is to allow the orthodox to meet their obligations, and to show the country a better way in practice. And that better way can only be embodied in real, living communities.

Only such communities can model appealing alternatives to the lonely decadence of the popular culture's ideal of the life of a young American. Only such communities can create meaningful norms of responsibility and commitment that can help their neighbors see why family matters and what it can make possible. Only such communities can demonstrate how meaningful progress can be rooted in collective remembrance rather than just individual desire, ambition, preference, or choice. Only such communities can give rise to a new generation committed to living out the virtues, or seeking out the wisdom of our moral and intellectual traditions, or continuing the struggle for a free society and a more just world. Only such communities can embody for the broader culture the large, capacious vision of the good made possible by moral restraint and traditional ways of life—the vast and beautiful “yes” for the sake of which an occasional narrow or stern “no” is required.

This broader understanding of what we seek to defend should make social conservatives both more and less political than we have tended to be: We should be more political in that we do more than occasionally resort to legal appeals to protect our own freedom of action. We also must advance a compelling vision of society rooted in mediating institutions and a government that exists to sustain them.

We should be less political, however, in that we need to invest more of ourselves in those institutions. We need to build appealing subcultures rather than advance our own version of the

Great Society or spend all of our energy on roiling national debates that stand far apart from the everyday experience of those Americans who could most benefit from what we have to offer.

With such a commitment to a genuine “pluralism of communities” (in Robert Nisbet’s phrase), we would not treat our inheritance with contempt by insisting that our political tradition has always been headed for self-destruction. And we also would not appeal to any simple confidence that our political ideas, if only fully put into effect, would by themselves resolve the crisis we confront.

Instead, we must seek solutions at the juncture of principle and practice—where ideals are turned into action in our everyday lives. The law can help us sustain the room we need to find those solutions, and our noble political tradition can reinforce the argument for freedom understood as chosen virtue. But ultimately, it is in the institutions and relationships in which we learn to make those virtuous choices—in the family, the school, the synagogue and church, the civic enterprise, the charitable venture, the association of workers or merchants or neighbors or friends—that the fate of our experiment in moral freedom will be decided. We would be wrong to think that fate has long been sealed, one way or another. It is up to us.

What James Madison described as “that diabolical, hell-conceived principle of persecution” remains a primary obstacle to realizing this vision of the free society. It has reared its head again in our time, and religious liberty can once more help us push it back. But we would be wise to remember that we require more than the freedom to be virtuous. We require the will, and the spirit, and the faith, and the humility, and the wisdom to be virtuous, too. We require a culture of flourishing, which will only endure if we never stop building it.

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