

William & Mary Law Review

Volume 29 (1987-1988)
Issue 1 1787: *The Constitution in Perspective*

Article 17

October 1987

Civil Religion and Constitutional Legitimacy

David A.J. Richards

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

Repository Citation

David A.J. Richards, *Civil Religion and Constitutional Legitimacy*, 29 Wm. & Mary L. Rev. 177 (1987), <https://scholarship.law.wm.edu/wmlr/vol29/iss1/17>

Copyright c 1987 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

CIVIL RELIGION AND CONSTITUTIONAL LEGITIMACY

DAVID A.J. RICHARDS*

Sanford Levinson conceives the American commitment to constitutional law as our civil religion,¹ and asks whether or why we should—in this bicentennial year—sign onto the Constitution, as amended. In these remarks, I take objection to the way in which Levinson poses the question of constitutional legitimacy, although I sympathize with the personal and political motives that underlie his rather tortured struggle toward constitutional legitimacy as a regulative ideal of much of the most principled political discussion that still exists in this country. My objection focuses on Levinson's conception of civil religion as the best interpretation of the American constitutional tradition and our relationship to it.

Initially, there are intractable interpretive problems with understanding the Founding itself as a specifically religious—as opposed to a social or economic or politically constitutive—moment. As Levinson acknowledges,² the text of the Constitution, in contrast to some of the state constitutions (which the Founders quite clearly had in mind as comparative “experimental”³ benchmarks⁴), is a studiously secular document. Its grand opening invokes not

* Professor of Law, New York University. A.B., Harvard University, 1966; D. Phil., Oxford University, 1970; Member, New York Bar. The author acknowledges with thanks a generous research grant from the New York University School of Law Filomen D'Agostino and Max E. Greenberg Faculty Research Fund.

1. Levinson, *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113 (1987).

2. *Id.*

3. For example, at the Virginia ratification convention, Madison observed: “I can see no danger in submitting to practice an experiment which seems to be founded on the best theoretic principles.” 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 394 (J. Elliot 2d ed. 1836). At the South Carolina Convention, Charles Pinckney admitted that “[o]ur Constitution was in some measure an experiment,” and that he “considered it the fairest experiment ever made in favor of human nature.” 4 *id.* at 262. On the pervasive background literature that shaped these experimental attitudes, see H. COLBURN, THE LAMP OF EXPERIENCE (1965).

4. See generally W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (R. Kimber and R. Kimber trans. 1980).

God, but "We, the people,"⁵ article VI quite clearly forbids any religious qualifications whatsoever on federal office,⁶ and the Bill of Rights contains the most radical constitutional separation of secular and religious authority yet innovated by the mind of man.⁷ Moreover, the dominant political philosophy of the American constitutional constructivists—at both state and federal levels—was remorselessly secular and empirical in the spirit of the political science of Harrington,⁸ Montesquieu,⁹ and Hume.¹⁰ There is an extraordinary spirit of chastened empiricism in the deepest American constitutional thinkers of the period—for example, John Adams of Massachusetts and James Madison of Virginia. Adams thus opened his great *Defence of the Constitutions of the United States* by characterizing the work of the American constitutional constructivists as follows:

It will never be pretended that any persons employed in that service had . . . interviews with the gods, or were in any degree under the inspiration of heaven, any more than those at work upon ships or houses, or labouring in merchandize or agriculture: it will for ever be acknowledged that these governments were contrived merely by the use of reason and the senses. As Copley painted Chatham, . . . as Godfrey invented his quadrant, and Rittenhouse his planetarium; as Boylston practised inoculation, and Franklin electricity. . . .¹¹

And Madison—although he probably rejected Hume's religious skepticism and certainly rejected his attacks on Lockean con-

5. U.S. CONST. preamble.

6. *Id.* at art. VI.

7. *Id.* at amend. I.

8. See J. HARRINGTON, *OCEANA* (Hyperion reprint ed. 1979) (based on 1924 reprint of 1656 original). For lucid commentary, see Z. FALK, *THE CLASSICAL REPUBLICANS* 52-89 (1945).

9. See B. MONTESQUIEU, *THE SPIRIT OF LAWS* (T. Nugent trans.) (J. Pritchard 2d ed. 1897) (1st ed. 1748). For commentary, see T. PANGLE, *MONTESQUIEU'S PHILOSOPHY OF LIBERALISM* (1973).

10. See, e.g., D. HUME, *That Politics May be Reduced to a Science*, in *ESSAYS: MORAL, POLITICAL AND LITERARY* 13-28 (Oxford ed. 1963) [hereinafter *ESSAYS*]. For commentary, see D. ADAIR, *FAME AND THE FOUNDING FATHERS* 93-106 (1974); D. FORBES, *HUME'S PHILOSOPHICAL POLITICS* (1975); D. MILLER, *PHILOSOPHY AND IDEOLOGY IN HUME'S POLITICAL THOUGHT* (1981).

11. J. ADAMS, *1 DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES* xvi (London 1787-1788).

tractarianism and inalienable natural rights¹²—notoriously followed Hume¹³ and Harrington¹⁴ in regarding religion itself as yet another locus of faction,¹⁵ the corruptive tendency of groups to degrade and diminish the interests and rights of outsiders to the group,¹⁶ and argued for corresponding constitutional constraints on its force—both the procedural constraints of federalism¹⁷ and separation of powers¹⁸ and the substantive constraints of the religion clauses of the first amendment.¹⁹

Indeed, the antiestablishment and free exercise clauses of the first amendment are, in my judgment, best read interpretively as a novel experiment in the construction of the republican public morality required to sustain an enduring republican polity.²⁰ That experiment was a repudiation of the alternative Erastian conception of civil religion familiar to the Founders in the classical republican tradition elaborated by Machiavelli²¹ and Rousseau.²² The challenge to all republican theorists after the ancient world was to understand whether and how republican political practice could exist in a nonpagan world; in particular, in the world of commitment to the Judaeo-Christian religion synthesis. After all, the great historical examples of republican rule—Athens, Sparta, Rome, Carthage, and the like—were all pre-Christian or pagan societies, and the

12. See, e.g., J. MADISON, *Memorial and Remonstrance*, in *THE MIND OF THE FOUNDER* 6-13 (M. Myers ed. 1981).

13. See D. HUME, *Of Parties in General*, in *ESSAYS*, *supra* note 10, at 54-62.

14. See J. HARRINGTON, *supra* note 8, at 55.

15. See *THE FEDERALIST* No. 10, at 79, 84 (J. Madison) (C. Rossiter ed. 1961). On Hume's influence on Madison, see D. ADAIR, *supra* note 10, at 93-123. For penetrating recent commentary on the argument of *THE FEDERALIST*, see M. WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* (1987).

16. See *THE FEDERALIST* No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961).

17. See *THE FEDERALIST* No. 10 (J. Madison).

18. See *THE FEDERALIST* No. 51 (A. Hamilton or J. Madison).

19. See U.S. CONST. amend. I, cl. 1-2. See also T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 134-48 (1986).

20. For a more expanded exploration of these themes, see D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 95, 97-98, 235-39, 244-47 (1986). For a more recent investigation along the specific lines suggested here, see Richards, *Religion, Public Morality, and Constitutional Law*, in *NOMOS: RELIGION, MORALITY, AND THE LAW* (forthcoming).

21. See N. MACHIAVELLI, *THE PRINCE AND DISCOURSES* 145-60 (M. Lerner ed. 1950) (1st ed. 1513).

22. See J. ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 129-41 (G. Cole trans. 1950) (1st ed. 1762).

reawakening of interest in republican theory and practice in the Renaissance naturally posed the question whether and how republicanism could be squared with Christian commitments.

The classical republican answer by Machiavelli, Rousseau, and Marx²³ was, I believe, the Erastian conception of civil religion, an established church controlled by state power to appropriately emancipatory ends. On this analysis, the great defect in the relationship of church and state since Constantine was the independence of the church from state control, and its consequent capacity to corrupt republican aims and values by theocratically defined ends. This view is naturally, although not inevitably, linked to the kind of anticlericalism familiar to Europeans from republican Venice and Florence and the associated classical republican tradition revived by Machiavelli.²⁴ On this view, Judaeo-Christian values, whatever their truth value, are intrinsically dangerous, and must be cabined and tamed to the ends of secular authority by the assertion of supreme secular authority over religious life on the model of Roman or Spartan civil religion.

The religion clauses of the first amendment rest, I believe, on a different analysis of how Judaeo-Christian belief and republican values interconnect. On this view, reflected in the classical writings on toleration of Pierre Bayle²⁵ and John Locke,²⁶ the essential moral message of Christian belief—namely, the democratic liberty and equality of all persons—was profoundly supportive of republican values of equal liberty under law, but had been corrupted from its proper supportive role by Constantine's wholly heretical and blasphemous establishment of Christianity as the church of the Roman Empire.²⁷ The problem was not that Constantine had opted for the wrong form of established church—one subordinat-

23. See K. MARX, *On the Jewish Question*, in KARL MARX: EARLY WRITINGS 1-40 (T. Bottomore trans. 1962) (1st ed. 1843).

24. See W. BOUWSMA, *VENICE AND THE DEFENSE OF REPUBLICAN LIBERTY* 1-51, 417-638 (1968).

25. 2 P. BAYLE, *Philosophique Commentaire sur ces parole de Jesus Christ "Contrain-les d'entree,"* OEUVRES DIVERSES DE MR. PIERRE BAYLE 337-560 (1727).

26. J. LOCKE, *A Letter Concerning Toleration, A Second Letter Concerning Toleration, A Third Letter for Toleration, A Fourth Letter for Toleration*, in 6 THE WORKS OF JOHN LOCKE 1-574 (1823).

27. For a further elaboration of this argument at some length, see D. RICHARDS, *supra* note 20, at 89-102.

ing secular to religious authority—but that he had wedded religious to secular authority *at all*. Locke accordingly argued for the limitation of state power to secular ends not primarily because of any anticlerical or antireligious commitment to secularism as such—of the sort one finds, I think, in Machiavelli, Voltaire, and Marx²⁸—but in order to preserve the essential emancipatory moral truths of Christian belief—namely, democratic equality under law—from their corruption by secular incentives.²⁹ For Locke, as for Roger Williams,³⁰ Isaac Backus,³¹ Thomas Jefferson,³² and James Madison,³³ the consequences of the failure thus to separate secular and religious authority had been the devastating historical fact that historical Christianity since Constantine had been a crucial support of the profoundly unjust forms of feudal and absolute monarchies that had been the governing political norm in the West since the fall of the Roman Empire.³⁴ Jefferson and Madison accordingly innovated the American antiestablishment tradition³⁵ as an expression of the familiar American union of equally intense personal religiosity *and* republicanism: the discourse of political life must be limited to the general goods of life, liberty, and prop-

28. See N. MACHIAVELLI, *supra* note 21, at 149-53; K. MARX, *supra* note 23, at 9-17; F. VOLTAIRE, *PHILOSOPHICAL DICTIONARY* 485-89 (P. Gay trans. 1962) (1st ed. 1764).

29. See J. LOCKE, *supra* note 26, at 1-58.

30. See R. WILLIAMS, *The Bloody Tenent of Persecution*, in 3 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* (S. Caldwell ed. 1963).

31. See ISAAC BACKUS ON CHURCH, STATE AND CALVINISM: PAMPHLETS, 1754-1789 (W. McLoughlin ed. 1968).

32. See T. JEFFERSON, *Virginia Bill for Religious Freedom*, in 2 *THE PAPERS OF THOMAS JEFFERSON, 1777-1779*, at 545 (J. Boyd ed. 1950).

33. See J. MADISON, *supra* note 12, at 5-13.

34. Thomas Jefferson, author of the *Virginia Bill for Religious Freedom*, argued this way under the influence of both Kames and Bolingbroke. See H. KAMES, *ESSAYS ON THE PRINCIPLES OF MORALITY AND NATURAL RELIGION* 136-49 (R. Wellek ed. 1976); L. BOLINGBROKE, 3 *THE WORKS OF LORD BOLINGBROKE* 373-525 (F. Cass ed. 1967). In effect, the history of Augustinian intolerance in the West had corrupted Western ethics, including a proper understanding of the ethics of the Gospels, by speculative theology. See A. KOCH, *THE PHILOSOPHY OF THOMAS JEFFERSON* 9-39 (1957). On Augustinian intolerance, see D. RICHARDS, *supra* note 20, at 86-88. For Jefferson's own linkage of religious persecution with moral and religious corruption, see the preface to his *Bill for Religious Freedom*, T. JEFFERSON, *supra* note 32, at 545-46. In his later life, Jefferson subscribed to Joseph Priestley's views on the corruption of true Christianity. See generally T. JEFFERSON, *JEFFERSON'S EXTRACTS FROM THE GOSPELS* 14-40 (D. Adams ed. 1983). Jefferson's own attempts at Bible criticism were actuated by his desire to distinguish the gold from the dross.

35. See D. RICHARDS, *supra* note 20, at 111-16.

erty that all persons (of diverse religious and philosophical perspectives) could agree on, not because those goods define the ultimate meaning of life, but precisely because they do not. That is, they are neutral resources that persons, on terms of democratic equality, may develop in pluralistically incommensurable ways in pursuit of personal visions of ultimate religious or philosophical value in living.³⁶ In short, the limitation of state power to secular ends and the harms defined by the frustration of those ends³⁷ preserved the democratic equal liberty essential to republican politics, true ethics, and pure religion.

For these reasons, Levinson's conception of civil religion, which ill fits all these features of the 1787 Founding, does not do justice to the central fact of the American constitutional consciousness: the distinctive authority claimed by the 1787 Constitution, as amended. That authority is self-consciously *not* a religious authority, although it is, of course, influenced by the models of religious authority—in particular, covenant theology³⁸—that shaped the American moral and political mind. Our continuing commitment to its authority is not well explained by acts of constitutional faith, of the sort that Levinson's account calls for. Indeed, the Founders of the United States Constitution precisely would *not* have regarded an act of faith as, in principle, an object of legitimate state authority, for if only faith could mediate assent to the American Constitution, we lack precisely the kind of egalitarian appeal to secular reason on which our constructivist Founders so brilliantly insisted in, for example, the *Federalist* papers³⁹ as the ground for the legitimacy of the Constitution. For the same reason, our continuing commitment to the authority of their great work, as amended, should not and does not require acts of faith. It requires

36. *See id.* at 118-21.

37. Both Locke and Jefferson quite clearly state the harm principle. *See* J. LOCKE, *supra* note 26, at 34, 36-37, 40, 51; T. JEFFERSON, *Notes on the State of Virginia*, in THOMAS JEFFERSON: WRITINGS (Library of America 1984). "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." *Id.* at 285.

38. *See* A. McLAUGHLIN, *THE FOUNDATION OF AMERICAN CONSTITUTIONALISM* 3-29, 63-84 (1932); D. RICHARDS, *supra* note 20, at 52-63, 104-10.

39. *See* A. FURTWANGLER, *THE AUTHORITY OF PUBLIUS* (1984).

instead the same kind of egalitarian justification of state power to the constitutional community of principle over time.⁴⁰

This approach to constitutional legitimacy looks in a quite different direction from Levinson's fideistic pledge of allegiance. We look not to faith, but to a complex interpretive inquiry into how and why the continuing authority of the Constitution, as amended, turns on highly abstract interpretive arguments of principle that impute to the text the kind of egalitarian justifiability that a republican community of free and equal persons requires as the justification of state power. I cannot here investigate these themes as fully as they require.⁴¹ It suffices, for present critical purposes, to note that the investigation is crucially an *engaged* interpretive one in which one comes to understand that our most authoritative practices of constitutional interpretation are driven by the kinds of arguments of egalitarian justifiability that are familiar in our constitutional culture from 1787. We impute to the text connotative over denotative meaning, and reach for higher levels of abstract connotative meaning, because such interpretive practices better justify the Constitution on the terms of egalitarian secular reason, which is the foundation of constitutional legitimacy.

I see very little difficulty in this approach for the kinds of constitutional allegiance problems that Levinson invokes; namely, the legitimation of slavery by the 1787 Constitution and the trivialization of constitutional commitment by *Schneiderman v. United States*.⁴² The sense that slavery was severely in tension with much else in the constitutional design existed, of course, from the beginning.⁴³ Slavery was blatantly inconsistent, as abolitionists were to note in the nineteenth-century debates, with the motivating political philosophy of natural rights of the American democratic experi-

40. I develop this thought at greater length in Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986). See also R. DWORKIN, *LAW'S EMPIRE* (1986).

41. See Richards, *supra* note 40.

42. 320 U.S. 118 (1943). See Levinson, *supra* note 1.

43. At the Constitutional Convention, for example, Madison observed that mentioning the slave trade in the Constitution "will be more dishonorable to the National character than to say nothing about it in the Constitution." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 415 (M. Farrand ed. 1911).

ments.⁴⁴ Certainly, the Reconstruction amendments elaborate standing constitutional principles in a more principled way than the 1787 Constitution, and may themselves therefore be regarded as an interpretive as much as an innovative fact. And the exclusion of Marxists from citizenship is surely not so much a trivialization of constitutional allegiance as the principled elaboration of the kind of constitutional commitment to equal liberty that drove Jefferson and Madison to tolerate the intolerant, including Catholics and atheists, both of whom Locke excluded from the scope of universal toleration.⁴⁵ The arguments of political exclusion in *Schneiderman* are, I believe, the twentieth-century versions of the comparable arguments used against the subversives of seventeenth- and eighteenth-century thought, arguments clearly rejected by Madison and Jefferson and comparably worthy of rejection today on the same grounds of basic constitutional principle.⁴⁶

I have objected to Levinson's interconnected accounts of civil religion and constitutional legitimacy largely on interpretive grounds, but for me another ground for larger political worry is in his approach to these matters. Specifically, Levinson's leap of faith in the Constitution comes too easily. It occurs at the end of a largely skeptical essay, posing various reasons to doubt that the Constitution is worthy of an egalitarian liberal's signature today. His skepticism then ends in a leap of animal faith in the basic political decency of the constitutional design. But he has not given us good reasons for his Kierkegaardian leap, which, of course, subverts the rationality and internal coherence of his entire project.

This leap of faith also suggests a malign danger in Levinson's approach, a too-easy readiness to acquiesce in the surely suspect proposition that the American constitutional tradition is isomorphic with all the claims of the best contemporary theories of liberal egalitarian political, social, and economic justice. I, for one, doubt that proposition very much indeed, although I am open to argument on the point. I believe, for example, that something like

44. This philosophy was stated, for example, in the Declaration of Independence. See generally R. COVER, *JUSTICE ACCUSED* (1975).

45. For Locke's exclusions, see J. LOCKE, *supra* note 26, at 45-47 (Catholics), 47 (atheists). For commentary on Jefferson's rejection of these exclusions, see D. RICHARDS, *supra* note 20, at 112.

46. I develop this argument at greater length in D. RICHARDS, *supra* note 20, at 178-87.

Rawls's difference principle, suitably interpreted, is probably the best theory of economic justice currently available,⁴⁷ and it is the one that informs my own commitments on a large range of questions of domestic and international distributive justice.⁴⁸ I am not at all clear, however, that this theory of economic and social justice uniquely fits the American constitutional tradition. I can understand, although I cannot subscribe to, the interpretive sense of constitutional theorists like Epstein⁴⁹ who believe that this and other less demanding theories of redistributive justice are, in fact, inconsistent with the Constitution.

Constitutional law and political morality, although often complementary, are sometimes in tension, and I think it may be very important to the progress of our political morality as a people that the tension not be too easily and uncritically relieved. Levinson's approach exemplifies these difficulties: he combines liberal skepticism about the Constitution with an ultimately fideistic allegiance to the Constitution's basic liberal decency. He thus fails to explain adequately why, in fact, much constitutional law is a profoundly legitimate interpretation of political liberalism as a distinctive political theory, nor has he focused our attention on its limits as a vehicle of liberal justice.

That is the price we pay for the constitutional romanticism of Levinson's skepticism and animal faith, a romanticism far from the world of the Founders. The Constitution, I believe, was written in a different style. It is closer to the classicism of Haydn than the agonies of Mahler. We need, both interpretively and critically, to recapture that world, to understand our liberal roots not in the false community of civil religion, but in one of human history's great constructivist achievements of secular reason.

47. See J. RAWLS, *A THEORY OF JUSTICE* 75-108, 258-332 (1971).

48. See D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 106-47 (1971).

49. See R. EPSTEIN, *TAKINGS* (1985).