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## HOW HIGH A WALL? ORIGINALISM AND THE SEPARATION OF CHURCH & STATE

SEAMUS HASSON *vs.* JAMES NICKELS\*

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**MR. HASSON:** Thank you for having me. I'm going to tell you some stories and ask you some questions. The first story is my favorite.

In 1989, there was a Japanese Tea Garden in Golden Gate Park in San Francisco like Japanese tea gardens everywhere in the world—landscaping, monuments, and *feng shui*. It was neat, orderly, manicured, and well-laid-out. Except for one thing. There was an abandoned parking barrier at the back of the Tea Garden. It was nothing other than a bullet-shaped lump of granite that some crane operator late on a Friday didn't want to haul back to the garbage heap, but it messed up the *feng shui*. For four years this parking barrier stood there, and park-goers sent increasingly irate letters to the powers-that-be, saying, The parking barrier in the Tea Garden is ugly; would you kindly remove it? Bureaucrats being bureaucrats, nothing happened until one day in 1993.

That day, a New Age group looked at the parking barrier and declared it a manifestation of the Hindu god Shiva, and began worshipping it. Whereupon, the exact same bureaucrats who couldn't remove an eyesore sprang into action, announced that they had a constitutional duty to avoid violating the separation of God and state, and hauled it away. The New Agers sued for the return of their deity, and the park ranger said, We have thousands of these things; it's not worth fighting over. You can have it, provided you worship it in private someplace else.

Now, think about that. If ever there were a religion that didn't threaten to coerce anyone, it had to be parking barrier worship. Who can mistake parking barrier worship for an officially established religion, even in San Francisco? Who's going to think that you have to raise taxes for the parking barrier? Who's going to worry their kids are going to convert to parking barrier worship? If so, close the park. If you can come and worship the shrubbery, why can't you come and worship the parking barrier? Because, said the park ranger, religion belongs in private and the park system is civil.

In my book *The Right to be Wrong*, the park rangers represent one set of villains in the debate over religious liberty—the people who say that in the name of freedom, we have to banish people's truth claims. Andrew Sullivan is an arch-park ranger. He says truth claims are such volatile things that we can't allow them out in public. We have the private realm with respect to religious freedom.

There are park rangers everywhere. In Hillsmere, New Jersey, park rangers banned Valentine's Day from public schools in the name of separation of church and state, because it's named after St. Valentine, and that is a truth claim: St. Valentine was a saint. A twelve-year-old boy who has a crush on a twelve-year-old girl in Hillsmere, New Jersey has to send her a "Special Person Card" that says February

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14th is "Special Person Day." In Lansing, Michigan, you can't have an Easter bunny because that violates separation of church and state and the rabbit is a "Special Bunny." In Arlington, Virginia, the public library, for one year before the court laughed it down, replaced the Easter Egg Hunt with the "Spring Egg Roll."

Then there are the Pilgrims, that other group of villains. We have Pilgrims and park rangers. Why the Pilgrims? Because the enduring myth of American society is that Pilgrims came here looking for religious freedom, found it, and we have all lived happily ever after. That's wrong on all three points. They weren't, they didn't, and we haven't.

There were arguments about religion aboard the Mayflower. The pilgrims weren't fleeing persecution, at least not the majority of them. The majority had come from Holland. They left England ten years earlier and had all the freedom they wanted in Holland. Their kids were assimilating because Holland was a tolerant place, and they were fleeing permissiveness.

In order to flee permissiveness, come to the wilderness, and build their commune where they could live in full purity, they had to get financial backers in London who required them to bring military experts, building tradesmen, and so forth. The Pilgrims were very idealistic but kind of incompetent. In fleeing Holland for the wilderness to get away from the impurity, they had to bring impurity with them. Imagine their frustration.

And imagine the other people's discomfort. They're not leaving their country for some great spiritual reason but because it's the best job they can find. Here they are, stuck on a small ship with zealots. They had absolutely no fun whatsoever, and they're all headed to the wilderness together.

The Pilgrims call themselves the Saints, by the way, on account of modesty. They called the others the Strangers. They were diplomatic, too. The Saints quickly outvoted the Strangers, set up established churches, and banished the Anglican clergy that came over to try and separate the church.

In October 1621, a remarkable thing happened. The culture war over Christmas erupted. It's been raging ever since. That month, we had what would develop into "the first Thanksgiving." It lasted several days. It was recorded in the Pilgrim's journals as being full of marksmanship contests and other sports. It was festive, inasmuch as Pilgrims could be. Six weeks later, it's December 23rd and a shipload of even more Strangers show up. The Pilgrims are overjoyed; yet more impurity has arrived. Two days later, December 25th, William Bradford is banging on the door and saying, Get up; it's time for work. They say, Work? It's Christmas. He said, Not in this colony, it's not.

The Pilgrims thought Christmas was a heretical feast. Because they couldn't find it in the reading of the Bible, they couldn't celebrate it. Not only could you not celebrate it as a Pilgrim, you couldn't let other people celebrate it in public. Bradford reports in his journal that it was against the

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Strangers' "good consciences to work on Christmas." Bradford assented that it may be a question of conscience and excused them until he could be fully or better informed. That lasted until about lunchtime, when he found them playing the same games in the streets that Pilgrims had played on Thanksgiving. But this isn't the Pilgrim's official culture; this is that heretical counter-culture, Christmas. He confiscates their sports gear and tells them, If you want to celebrate Christmas as a matter of devotion, celebrate it privately in your home; there will be no reveling in the streets. Who ever heard of reveling at home? The reason that they reveled in the streets is because reveling is a communal activity.

Pilgrims said that truth required them to restrict other people's freedoms. Not only could they not celebrate traditional, heretical things in public, nobody else could either. It looks like we have plenty of park rangers around. We've still got plenty of Pilgrims around, people who want to protect the "true faith." There are Muslim Pilgrims, Christian Pilgrims, Hindu Pilgrims . . . all sorts of Pilgrims. The culture war is a shooting war, metaphorically speaking, between parts of the truth. If you get freedom, you have questions of freedom and truth again. What's the solution?

Here's another story about the Pilgrims' next-door neighbors, the Puritans of Massachusetts Bay. It's about 30 years later, 1656. The Quakers movement had erupted in New England. Quakers were considered the most radical offspring of the Reformation because they didn't believe in clerical *or* Scriptural authority. They believed only in the authority of the Inner Light, God's invisible presence in your soul. So they would do whatever they felt like. The Inner Light, as you can imagine, is vastly unpredictable. It led to Quakers turning up naked at Anglican services, shouting, "Hypocrisy!" The Bay Colony wanted nothing to do with people like that.

Remember when you read the *Scarlet Letter* in high school? Hester Prynne had to have a scarlet "A" sewn on her cloak for committing adultery. She actually got off easy. In the real Massachusetts Bay Colony, they branded it on your skin—on your wrist for a first-time offense, then your cheek for a repeat offense. If you were a glutton, you got a G; if you were a drunkard, you got a D; an adulterer, you got an A. This was a place that didn't tolerate dissent.

The Quakers were coming, so they decided to outlaw Quakers. In 1653, Quakers who turned up were flogged and thrown out of the Colony. Quakers turned up, the Puritans kicked them out, and they came back because they saw the light. The Puritans said the law's too lenient. They passed a new law in 1657: if they flog you and kick you out and you come back, for the first offense they cut off your left ear. For the second offense, they cut off your right ear. For the third offense, they bore your tongue through with a hot iron. Three men, John Rous, Christopher Holder, and John Copeland, lost their ears in Boston perfectly lawfully, and they came back because the Inner Light told them to.

It's now 1657 or 1658 and the Legislature thinks its leniency is still a problem. They passed another law that said: if you show up, we'll flog you and kick you out; if you come back, we'll kill you. Mary Dyer came back four times,

and so on Boston Common, she was duly and lawfully hanged, one of three Quakers. The King got word of this and said we won't have this. Send the Quakers over here. We'll take them and you won't have to kill them. So they repealed the death penalty, but they passed another statute called the Cart's Tail Law. Quakers were stripped naked from the waist up, tied to a cart's tail, and dragged through the town while being flogged, until they got to the border of the colony.

There's the story. Here's the question. Why didn't Mary Dyer have it coming? The legislature duly enacted the statute. She knowingly and willingly violated the statute. She violated it; why shouldn't she hang, if she was guilty? It was legally required. It's not because it was unconstitutional; there wasn't a constitution. Why shouldn't they do it?

While you're thinking, let me tell you another story. To avoid the "long ago and far away" feeling people seem to have about things that happened in the Colonies, let's fast-forward a little bit to the nineteenth-century.

The Vermont Constitution has a provision that says all officeholders must "hold to profess the Protestant religion." You can be any kind of Protestant you want; you just can't be Catholic, an atheist or a Jew. You couldn't be a Catholic because they were presumably loyal to the Pope and you couldn't trust them. You couldn't be an atheist because they were thought to be undeterred by the future prospect of damnation; you couldn't trust them. The Jews were just implicitly untrustworthy, as a matter of sheer anti-Semitism. It was an exclusion of who's out. Let's say you're the Secretary of State for Vermont, and a Catholic, a Jew, and an atheist show up and want to register for the election. What do you do? Do you enforce the law? Do you refuse them under the law? If the law says you must be anti-Semitic, may you be? While you're thinking of that, here's a third story.

It's now 1995 and in China Gedhun Choekyi Nyima, a six-year-old boy has just been arrested. He's been in prison or in custody for ten years. He's now sixteen and still in custody. All indications are he's going to be in custody for the rest of his life. He's not even alleged to have committed a crime. He's being held simply because he's believed to be the reincarnation of the Panchen Lama, who's the number two guy after the Dalai Lama. The Tibetan Buddhists revere him as such, and the Chinese government fears him as such. When the NGOs and the State Department denounced China for this outrage against religious liberty, China's response was always the same: You're interfering with internal affairs. Question: Why aren't they right?

Question: Why didn't Mary Dyer have it coming? The law said she may be executed, but why aren't they right? It's the same question. Across faiths and across time is the question of where religious liberty comes from. If you think it comes from the state, or if you think it comes from culture, or if you think it comes from pragmatism, then you're going to think that Mary Dyer had it coming, the Vermont Constitution was alright, and the Chinese are still right.

If you don't think those things, then you must agree with James Madison that religious liberty comes from

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something other than law or culture. The traditional way of describing it is that James Madison was relying on natural law. Even the U.N. Declaration of 1955 made the claim that there's something about who we are inside.

Religious liberty follows from our experience of thirsting for the truth about anything and everything, yearning for the ultimate truth, yearning for the good. Conscience is driving us to seek the truth and the good, driving us to embrace the truth and then spread it from the top of our lungs. We need that for a free country, and I will argue that the only place to spread that truth is in public; otherwise you'll wind up hanging the Mary Dyers of the world.

The Pilgrims and the park rangers are both wrong. The park rangers are wrong for saying that religious liberty comes from the state, and the state can take it away. The pilgrims are wrong for saying it comes from their version of the truth, and only that version of the truth is allowed in public. The real truth—the truth about who we are as human beings, the fact that we need to seek the good and the right—demands freedom. We can embrace truth publicly, and still be free.

**PROFESSOR NICKEL:** Let's start with the attractive idea, suggested by Mr. Hasson, that humans yearn to know the truth and find the good. We should not overstate this idea since many humans are comfort-lovers and are not much concerned with what is true and good. But at least a lot of us have the sense "that we're somehow incomplete without that truth, unfailingly thirsty without that good, and we long to find it." Those of us who feel that way can sometimes be troublemakers. We argue about what is true and good, and we disrupt the peace of the comfortable with our preaching, arguing, and proselytizing.

Accepting that humans yearn to know the truth and find the good has not tended, historically, to lead to religious liberty. Instead, it has often led to attempts to create areas of religious and social uniformity in which particular visions of the true and good can be lived and taught. We band together with our co-religionists, those who have settled upon the same truth or the same view of the good, and try to get our own territory where we can have a religious or ideological monopoly.

My own ancestors were Anabaptist Mennonites, and since they were always small in number and—as pacifists—unwilling to fight, they could not impose their religion and way of life by force. Instead they often fled from one country to another in hopes of finding some place where they could have their own little territory where they'd be left alone so that their version of Christianity could be the dominant religion in the region. I think their desire to have a region in which their preferred religion ruled represents a very strong human tendency. And maybe it was okay to combine the political and religious orders when there was a lot of territory and groups could go off by themselves and have their own religion and way of life. It got harder when human populations became larger and land for new settlements scarce. Then it became necessary to coexist with people who weren't your co-religionists, or who weren't

even your religious cousins, but who were really quite different religiously and culturally.

For a complete justification of the human right to freedom of religion, we probably have to go beyond Mr. Hasson's conception of what people are like and add another idea, namely fair terms of social cooperation in a diverse society where people have to live, work, and interact in spite of their religious and ethical disagreements.

We may arrive at the idea of fair terms of cooperation with people who have different ideas after failing to conquer or destroy those people. Long periods of religious war can teach tolerance. Or maybe at some point some our ancestors became too civilized and humane to be willing to kill and conquer in order to promote their religion. Either way, we end up needing to find a way to live together with people who have different visions of the true and the good. How to live together peacefully and successfully comes to have great practical importance.

But it may be more than just practicalities. Religious tolerance may become a matter of principle. In spite of the fact that I have fastened onto the wrong beliefs or values, you may be willing to tolerate me and count me as a full citizen. You recognize me as a human being who has as much claim to membership, liberty, and participation as those who share the beliefs and values you endorse.

The grounds of tolerance may be (or include) a commitment to fairness for all residents of the country. It requires us to identify terms on which we can all coexist as equals and pursue our visions of the true and the good, while being successful and productive as a society and also avoiding falling back into suppression and violence. Finding, accepting, and living by fair terms of cooperation is a difficult matter, and we should not be surprised by (or ashamed of) the fact that we find it difficult, and by the fact that we still have disagreements about how exactly to do it.

The First Amendment protects the free exercise of religion and says that Congress shall make no law respecting an establishment of religion. I think that we're now pretty good on the free exercise part. The wisdom of religious tolerance has been widely accepted in the United States. Free exercise is, as John Rawls says, a fixed point in our moral and political sensibilities.

Harder for us, though, is what exactly to make of the Establishment Clause. Its core is obvious, I think, because if we go too far in establishing a religion we're going to infringe free exercise. If government uses legal coercion to force people to join, support, and profess a particular religion then we do not have free exercise. Free exercise supports the prohibition of establishment, but only so far. Brazil and Britain are religiously free countries even though they have established churches. How far the separation of church and state should go remains a difficult question.

**PROFESSOR WEINSTEIN:** Thank you, Professor Nickel. Mr. Hasson, I'm going to take the two minutes yielded by my colleague, Professor Nickel, to take up where you left off about the Establishment Clause.

There are two clauses in the First Amendment that have common interests, but maybe some tension as well.

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Mr. Hasson gave us some examples of some absolutely silly overreactions to the Establishment Clause within the schools, examples where they have gone way, way too far. I don't know where Mr. Hasson comes out on this, but I just want to emphasize that this other clause, this anti-establishment clause, does have an important value that it's trying to accomplish as well. When you're considering the role of religion in the public square—I'm not arguing that it should be nil—you have this countervailing problem of when the government gets involved in promoting that, how do people who are not in the majority religion feel about their citizenship?

**MR. HASSON:** Thank you for your presentations. There's hardly been a Christmas Eve, which I celebrate, or Hanukkah, which I don't celebrate, that my organization hasn't been in court defending a nativity scene or a menorah, or both. There has never been a St. Patrick's Day that I've been in court fending off an Anglophile trying to enjoin St. Patrick's Day parades as an Irish supremacist plot. I have never once been in court in February with Anglo-Americans saying that African-American History Month was a racist power event. I've never once represented a Croatian-American organization trying to enjoin a Serbian-American event.

The 14th Amendment standard for equal protection puts every bit as stringent restrictions on government ethnic preferences and racial preferences as the Establishment Clause does on religious preferences. So why should we sue each other over nativity scenes and menorahs and not sue each other for official city parades on St. Patrick's Day? It's because we have common sense.

Everybody knows that this is not a case of ethnic preference or ethnic cleansing. It's an ethnic dimension of the culture of some of the citizens and the mayor being a mayor. He's not wearing a green tie to make a statement about Irish supremacy. He's wearing a green tie because he's the mayor, and he's doing what mayors do when people celebrate. It should be the same thing when he lights the Hanukkah menorah. He's not testifying to the miracle of the oil; he's lighting a lamp. If you were to put a time-lapse photographer in front of a reasonably active City Hall in most places in America, you'd see flags going up and down and parades going back and forth and displays being erected and taken down. You would realize that none of these things are being foisted upon anybody. These are things that are a celebration of the religious and ethnic cultures of different people. Not everyone celebrates Christmas or Hanukkah. Not every one celebrates St. Patrick's Day, either. One of the skills you need in a democracy as opposed to a religious society is the ability to listen respectfully to things that you disagree with.

You can cross the line and become coercive, and public schools are a natural place for that to happen. We don't want the government picking our religion or our kids' religions, because, after all, they're the same people who brought you the DMV and the IRS. We can do without a coach or a homeroom school teacher leading us in prayer.

Now we get to a trickier thing, and that's the Pledge of Allegiance, which my organization defended for a variety of

clients. The original Pledge of Allegiance, without "one nation under God", was challenged by Jehovah's Witnesses in the 1940s, in the *Barnette* case. It reads so much like a Free Speech case that it's easy to lose sight of what was at stake. To Jehovah's Witnesses, the flag is an idol. Raising it and saluting it was idolatry. That is to say, it's exactly the same thing for them as it is for Michael Newdow with the phrase "one nation under God".

The question becomes why is pledging allegiance different? How is it remedied simply by being able to sit down while everybody else pledges allegiance? When it's an official prayer, which I don't want, the remedy is shutting the whole thing down. Where on the line of things between the Pledge of Allegiance and prayer does the remedy shift from just being able to sit out without needing to silence everybody else? That's the interesting question, and it's always been a hard one. Democracy is knowing how to draw the line and knowing who should draw the line.

What I'm about to say is uncontroversial, but there's a controversial premise. The Establishment Clause was a crummy compromise at the beginning. There was a reason. The Executive wasn't going to amend the Constitution, and the Oaths Clause and the Religious Test Clause appear right next to each other. The Oaths Clause says that officials of the federal and state governments, when they take their oath of allegiance to the Constitution, neither swear nor affirm it. The reason for that was Quakers couldn't take oaths. They built that combination right into the Constitution so Quaker officials of the federal or the state government could take them.

The next words out of the Constitution's mouth are, No religious tests shall ever be employed for any office or trust under the United States. Why are there oaths of office for the federal and state levels and a religious test ban just for the federal level? Because eleven states had religious tests for public office, like the Vermont one I told you about, and they wanted to keep them. They weren't opposed to a religious test; they just wanted their legislature imposing their religious tests on their people, not somebody else's legislature imposing a different religious test on them. The unamended Constitution was set up to leave the question of full reign on religious legislation to the states, which is how we wound up with religious rights in Philadelphia and Manhattan and with religious tests for public office, the Blaine Amendments, and all sorts of things. It was a bad time, and it was a bad year. It was the crummy way to set things up.

The First Amendment didn't change that. It was a crummy compromise that said, "Congress shall make no law respecting the establishment of religion." It didn't say the states couldn't, but it said Congress couldn't make a law respecting the establishment of religion; it couldn't make a law that imposed the federal establishment over Virginia's disestablishment. There were eleven out of thirteen states that had state tests, excepting New York and Virginia. Virginia didn't want to be opposed to federal establishment. Massachusetts had a state establishment; it didn't want to be overruled by federal disestablishment. So Congress could do neither of those two things. It could make no law respecting the establishment of religion.



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That left the states free to persecute, and they did. In the twentieth century, the Supreme Court fixed that by incorporating the Establishment Clause through the Due Process Clause, and the liberty of the due process clause. That solved one practical problem but it created another. Now the First Amendment meant something, but the only thing you know for sure about it is it meant something different from what it said. It said, “Congress shall make no law respecting the establishment of religion,” but it now meant that public school teachers couldn’t do things.

Part of the problem is that the Justice Stevenses of the world say that it was clear from a rigorously philosophical perspective that we can’t do anything that has anything to do with religion. Justice Stevens has never in his career voted on the pro-religion side of a case that wasn’t unanimous. Neither the Establishment Clause nor the Free Exercise Clause is a statutory provision. It amazes me. The Justice Scalias of the world say if you look at the history, there’s a lot you can do. They not only disagree about what the First Amendment means, they disagree on where you look to find out. It’s a mess.

My only proposal is that the Establishment Clause, incorporated, makes no sense. It’s sort of an idiom. We should stop asking the question and we should let the Free Exercise Clause theory prevail today. The Free Exercise Clause itself precludes establishment because establishment ignores people’s consciences. James Madison used the word “free exercise” as the shorthand for the natural right to religious liberty. If I were on the Court, I would say free exercise means the right to embrace religious expression, the right to embrace, not to express; the right to be free from establishment.

There are a lot of other things that aren’t managed with the Court that will be managed with Miss Manners. That’s how one is able to get along in society.

**PROFESSOR NICKEL:** There at the end, an interesting disagreement emerges. Insofar as we need to find contemporary grounds for the Establishment Clause I would suggest that we view it as sketching terms of fair accommodation between groups who have different religious perspectives and who, of course, bring those religious perspectives with them into the public sphere. So I suggest that we ask what’s fair, what’s workable, what, as Professor Weinstein suggests, will allow people to feel like full citizens? What set of workable arrangements would affirm everyone’s full citizenship, even if they’re not part of the cultural mainstream?

**MR. HASSON:** We are not in disagreement. I just want to distinguish between what is a good idea and Miss Manners, and what is the constitutional role.

