

"Religion and Jacksonian America"

Schmoozers,

I've been spending a great deal of my time lately working on the two volumes of Gillman, Graber and Whittington, *American Constitutionalism* (Oxford University Press, forthcoming), and Mark says I don't advertise it enough – so let me kill two birds with one stone. Please find below a partial (and rough) excerpt from the religion section of the Jacksonian era chapter. *American Constitutionalism* is a “casebook” organized historically (thus a chapter on the Jacksonian era) and by broad issue areas (in this case, “religion” and subdivided by establishment and free exercise). I offer for your consideration some materials on religious freedom “in its forgotten years,” one might say. I'll refrain from adding my own interpretation and comment. I'll just note that I think these give an interesting different angle on debates over the meaning of religious freedom and the concerns that might drive the politics and normative thinking around religious freedom than what we normally get by focusing on the postwar period.

Keith

A. RELIGION

The Jacksonian period was a time of substantial religious ferment. The Second Great Awakening, with its rise of Christian evangelism and revivalism, extended from the founding period through the beginning of the Jacksonian era. Christianity and unconventional religious beliefs and practices took on new salience in American society and politics. Baptists, Methodists and Presbyterians all gained converts. New non-denominational churches came into existence, and entirely new religious movements and utopian communities were founded such as the Mormons, the Millerite movement (that gave rise to the Seventh Day Adventists and Jehovah's Witnesses) and the Oenida Community. At the same time, the country saw a wave of significant immigration of Catholics, primarily from Ireland. In 1833, Massachusetts was the last state to abandon its financial support of churches, ending formal religious establishment in the United States.

Politics and religion readily mixed, even after the end of established churches. Religious fervor gave rise to a various moral reform movements including Sabbath-keeping, temperance, anti-gambling and anti-prostitution efforts, prison and asylum reform, antislavery and women's rights movements. Many of these movements had a voluntarist element, aimed at social reform, but they often had or developed a legislative agenda as well. Nativism and school reform movements were often closely allied to these moral reform movements as well. The national political parties kept their distance from many of these reform movements, but they had substantial influence in the states and localities. But ethnic and religious groups were the basic building blocks from which both of the major political parties built their organizations and voting base. The Whigs absorbed many of the evangelical Protestants, while the Catholics joined the Democrats. As a consequence, the Whigs, along with various single-issue third parties, became the party of moral reform, while the Democrats often campaigned on the slogan of “freedom of religion.”

1. ESTABLISHMENT

William Leggett, Thanksgiving Day (1836)¹

*Proclamations declaring days of thanksgiving, prayer and fasting had been common in the colonies and in the early republic. They came from religious leaders and political leaders, from town councils and governors and presidents. They were often ad hoc declarations, celebrating everything from a military victory to a successful harvest. By the early republic, state governors routinely declared a day of thanksgiving in November, following President George Washington's example. Presidents after Jefferson had largely stopped doing so, however, and Andrew Jackson had publicly explained that he did not want to "disturb" the "complete separation" of religion from the federal government by issuing such proclamations.*²

William Leggett was a libertarian newspaper editor and iconoclastic leader of a radical Jacksonian faction in New York. His political editorials were largely applications of his central principle: "Governments possess no delegated right to tamper with individual industry a single hair's-breadth beyond what is essential to protect the rights of person and property."³ Like other Jacksonians, he feared that government would be used to favor some interests in society over others, and he was vigilant in denouncing any suggestion that government might move beyond its proper bounds.

Thursday, the fifteenth of the present month, has been designated by Governor Marcy, in his annual proclamation, as a day of general thanksgiving throughout this state. This is done in conformity with a long established usage, which has been so generally and so scrupulously observed, that we doubt whether it has ever been pretermitted, for a single year, by the Chief Magistrate of any state in the Confederacy. The people, too, on these occasions, have always responded with such cordiality and unanimity to the recommendation of the Governors, that not even the Sabbath, a day which the scriptures command to be kept holy, is more religiously observed, in most places, than the day set apart as one of thanksgiving and prayer by gubernatorial appointment. . . . Against a custom so venerable for its age, and so reverently observed, it may seem presumptuous to suggest an objection; yet there is one which we confess seems to us of weight, and we trust we shall not be thought governed by an irreligious spirit, if we take the liberty to urge it.

In framing our political institutions, the great men to whom that important trust was confided, taught, by the example of other countries, the evils which result from mingling civil and ecclesiastical affairs, were particularly careful to keep them entirely distinct. Thus the Constitution of the United States mentions the subject of religion at all, only to declare that "no religious test shall ever be required as a qualification to any office or public trust in the United States." The Constitution of our own state specifies that "the free exercise and enjoyment of religious professions and worship, without discrimination or preference, shall forever be allowed in this state to all mankind;" and so fearful were the framers of that instrument of the dangers to be apprehended from a union of political and religious concerns, that they inserted a clause of positive interdiction against ministers of the gospel, declaring them forever ineligible to any civil or military office or place within the state. . . .

No one can pay the most cursory attention to the state of religion in the United States, without being satisfied that its true interests have been greatly promoted by divorcing it from all connection with political affairs. In no other country of the world are the institutions of religion so generally respected, and in no other is so large a proportion of the population included among the communicants of the different Christian churches. . . . It is impossible to conjecture, from any data within our reach, the amount of the sum annually paid by the American people, of their own free will, for the support of the ministry, and the various expenses of their religious institutions: but it will readily be admitted that it

¹ Excerpted from William Leggett, *A Collection of the Political Writings of William Leggett*, vol. 2 (New York: Taylor & Dodd, 1840), 113.

² See also, David P. Currie, *The Constitution in Congress: Democrats and Whigs* (Chicago: University of Chicago Press, 2005), 144.

³ Leggett, *Collection of the Political Writings*, 1:163.

must be enormous. These, then, are the auspicious results of *perfect free trade in religion*—of leaving it to manage its own concerns, in its own way, without government protection, regulation, or interference, of any kind or degree whatever.

The only instance of intermeddling, on the part of the civil authorities, with matters which, being of a religious character, properly belong to the religious guides of the people, is the proclamation which it is the custom for the Governor of each state annually to issue, appointing a day of general thanksgiving, or a day of general fasting and prayer. We regret that even this single exception should exist to that rule of entire separation of the affairs of state from those of the church, the observance of which in all other respects has been followed by the happiest results. It is to the source of the proclamation, not to its purpose, that we chiefly object. The recommending a day of thanksgiving is not properly any part of the duty of a political Chief Magistrate: it belongs, in its nature, to the heads of the church, not to the head of the state.

It may very well happen, and, indeed, it has happened, in more instances than one, that the chief executive officer of a state has been a person, who, if not absolutely an infidel or skeptic in religious matters, has at least, in his private sentiments and conduct, been notoriously disregarding of religion. What mockery for such a person to call upon the people to set apart a day for returning acknowledgments to Almighty God for the bounties and blessings bestowed upon them! But even when the contrary is the case, and it is well known that the Governor is a strictly religious man, he departs very widely from the duties of his office, in proclaiming, in his gubernatorial capacity, and under the seal of the state, that he has appointed a particular day as a day of general thanksgiving. This is no part of his official business, as prescribed in the Constitution. It is not one of the purposes for which he was elected. If it were a new question, and a Governor should take upon himself to issue such a proclamation for the first time, the proceeding could scarcely fail to arouse the most sturdy opposition from the people. Religious and irreligious would unite in condemning it: the latter as a gross departure from the specified duties for the discharge of which alone the Governor was chosen; and the former as an unwarrantable interference of the civil authority with ecclesiastical affairs, and a usurpation of the functions of their own duly appointed ministers and church officers. . . .

If such a proceeding would be wrong, instituted now for the first time, can it be right, because it has existed for a long period? Does age change the nature of principles, and give sanctity to error? . . . But what is wrong in principle must continue to be wrong to the end of time, however sanctioned by custom. It is in this light we consider the gubernatorial recommendation of a day of thanksgiving; and because it is wrong in principle, and not because of any particular harm which the custom has yet been the means of introducing, we should be pleased to see it abrogated. We think it can hardly be doubted that, if the duty of setting apart a day for a general expression of thankfulness for the blessings enjoyed by the community were submitted wholly to the proper representatives of the different religious sects they would find no difficulty in uniting on the subject, and acting in concert in such a manner as should give greater solemnity and weight to their proceeding, than can ever attach to the proclamation of a political governor, stepping out of the sphere of his constitutional duties, and taking upon himself to direct the religious exercises of the people. We cannot too jealously confine our political functionaries within the limits of their prescribed duties. We cannot be too careful to keep entirely separate the things which belong to government from those which belong to religion. The political and the religious interests of the people will both flourish the more prosperously for being wholly distinct. The condition of religious affairs in this country fully proves the truth of the position; and we are satisfied it would receive still further corroboration, if the practice to which we object were reformed.

Lyman Beecher, *A Plea for the West* (1835)⁴

⁴ Excerpt from Lyman Beecher, *A Plea for the West*, Second Edition (Cincinnati: Truman & Smith, 1835).

A prominent Presbyterian minister and seminary leader, Lyman Beecher spent much of his career in Boston and Cincinnati. The father of Harriet Beecher Stowe, the author of Uncle Tom's Cabin, Beecher himself became roiled in controversy for opposing a movement of his students in favor of abolitionism and opening the seminary to black students. But he was also known as an advocate of reform causes, including temperance and nativism. His anti-Catholic sermon in Boston in 1834 helped spur the infamous burning of a convent there.

In this pamphlet, Beecher looked to what would be necessary to secure the success of American expansion and settlement of the western frontier, its "civil and religious prosperity." He proposed a system of proper educational institutions if the West (places like Ohio, Illinois and Michigan) were to be made like New England. For Beecher, education and religion went hand in hand. Like many in the east, he was particularly concerned about the rising tide of Catholic immigrants and whether they were being properly assimilated into republican mores. The "common schools" movement got a boost during this period as public schools to educate the native-born and immigrant alike were created, especially in the northeast (another of Lyman's daughters, Catherine, was a leader in promoting public schools and training female teachers for them). Reading from the Protestant Bible was a contentious part of common school curriculum.

The West is a young empire of mind, and power, and wealth, and free institutions, rushing up to a giant manhood, with a rapidity and a power never before witnessed below the sun

It is equally clear, that the conflict which is to decide the destiny of the West, will be a conflict of institutions for the education of her sons, for purposes of superstition, or evangelical light; of despotism, or liberty.

. . . .

The thing required for the civil and religious prosperity of the West, is universal education, and moral culture, by institutions commensurate to that result – the all-pervading influence of schools, and colleges, and seminaries, and pastors, and churches. . . .

Experience has evinced, that schools and popular education, in their best estate, go not far beyond the suburbs of the city of God. All attempts to legislate prosperous colleges and schools into being without the intervening influence of religious education and moral principle, and habits of intellectual culture which spring up in alliance with evangelical institutions, have failed. Schools wane, invariably, in those towns where the evangelical ministry is neglected, and Sabbath is profaned, and the tavern supplants the worship of God. Thrift and knowledge in such places go out, while vice and irreligion come in.

. . . . A land supplied with able and faithful ministers, will of course be filled with schools, academies, libraries, colleges, and all the apparatus for the perpetuity of republican institutions. It always has been so – it always will be.

. . . .

. . . . There is no danger that our agriculture and arts will not prosper: the danger is that our intelligence and virtue will falter and fall back into a dark minded, vicious populace – a poor, uneducated reckless mass of infuriated animalism, to rush on resistless as the tornado, or to burn as if set on fire of hell.

Until Europe, by universal education, is delivered from such masses of feudal ignorance and servitude, she sits upon a volcano, and despotism and revolution will arbitrate her destiny.

. . . .

Consider, also, that the mighty resources of the West are worse than useless, without the supervising influence of the government of God.

To balance the temptation of such unrivaled abundance, the capacity of the West for self-destruction, without religious and moral culture, will be as terrific as her capacity for self-preservation with it, will be glorious. But all the moral energies of the government of God over men, are indissolubly associated with "the ministry of reconciliation." The Sabbath, and the preaching of the gospel, are

Heaven's consecrated instrumentality for the efficacious administration of the government of mind in a happy, social state. . . .

The great experiment is now making . . . whether the perpetuity of our republican institutions can be reconciled with universal suffrage. Without the education of the head and heart of the nation, they cannot be

This danger from uneducated mind is augmenting daily by the rapid influx of foreign emigrants, the greater part unacquainted with our institutions, unaccustomed to self-government, inaccessible to education, and easily accessible to prepossession, and inveterate credulity, and intrigue, and easily embodied and wielded by sinister design. . . .

But if, upon examination, it should appear that three-fourths of the foreign emigrants whose accumulating tide is rolling in upon us, are, through the medium of their religion and priesthood, as entirely accessible to the control of the potentates of Europe as if they were an army of soldiers, enlisted and officered, and spreading over the land; then, indeed, should we have just occasion to apprehend danger to our liberties. It would be the union of church and state in the midst of us. The church and state both in Europe, and the pliant colonial church here. Her priesthood educated under the despotic governments of Catholic Europe, and dependent for their office, support and honors upon a foreign temporal prince This would, indeed, be a church and state union – another nation within the nation – the Greek in the midst of Troy.

. . . .

But before I proceed, to prevent misapprehension, I would say that I have no fear of the Catholics, considered simply as a religious denomination, and unallied to the church and state establishments of the European governments hostile to republican institutions.

Let the Catholics mingle with us as Americans and come with their children under the full action of our common schools and republican institutions, and the various powers of assimilation, and we are prepared cheerfully to abide the consequences. . . . It is no ecclesiastical quarrel to which we would call the attention of the American nation.

. . . .

One thing more only demands attention, and this is the extension of such intellectual culture, and evangelical light to the Catholic population, as will supercede implicit confidence, and enable and incline them to read, and think, and act for themselves. . . .

George Badger, Senate Report on Congressional Chaplains (1853)⁵

Throughout the Jacksonian period, Congress received petitions calling for the abolition of chaplains for Congress and the army and navy. From the days of the revolution onward, each Congress had appointed a chaplain, paid like other congressional officers by federal appropriation, to minister to members and open sessions with a prayer. Objections to this long practice were sometimes raised by members of Congress as well, but these were generally lonely voices. The petitions on chaplains were routinely sent to the judiciary committees, which usually issued a brief report stating that no action should be taken. On occasion, however, a committee issued a more elaborate report justifying the practice. One of these was produced by the North Carolina Whig Senator George Badger. Earlier in his career, Badger had been a state judge and Secretary of Navy, and shortly before issuing this report he had been nominated to the U.S. Supreme Court by President Millard Fillmore (the lameduck nomination was tabled by the Democratic Senate).

Badger's report laid out a particularly clear interpretation of the establishment clause and emphasized the lack of conflict between chaplains and constitutional prohibition on an established church. Other reports put greater emphasis than did Badger on historical precedent. Vermont Whig

⁵ Excerpt taken from *Report on the Abolition of the Office of Chaplain*, S. Rept. No. 376, 32nd Cong., 2nd Sess. (1853).

James Meacham in the House of Representatives, for example, dwelled on that early history and dismissed the fear of a union of church and state as “entirely imaginary.” The systematic disestablishment of churches in the states and the diversity and jealousy of religious sects to be found in the United States suggested that “the tendency of the times is not to a union of church and State, but is decidedly and strongly bearing in the opposite direction. . . . It seems to us that the men who would raise the cry of danger in this state of things, would cry fire on the thirty-ninth day of a general deluge.” Besides, “there never was a deliberative body that so eminently needed the fervent prayers of righteous men as the Congress of the United States.”⁶

. . . .
The clause speaks of “an establishment of religion.” What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, and its meaning is to be ascertained by ascertaining what that establishment was. It was the connection with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. . . . If Congress has passed, or should pass, any law which, fairly construed, has in any degree introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any of these obnoxious particulars – endowment at the public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communities – such law would be a “law respecting an establishment of religion,” and, therefore, in violation of the constitution. But no law yet passed by Congress is justly liable to such an objection. Take, as an example, the chaplains to Congress. . . . Now, in this, no religion, no form of faith, no denomination of religious professors, is established in preference to any other, or has any peculiar privileges conferred upon it. The range of selection is absolutely free in each house amongst all existing professions of religious faith. There is no compulsion exercised or attempted, upon any member or officer of either house, to attend their prayers or religious solemnities. No member gains any advantage over another by attending, or incurs any penalty or loses any advantage by declining to attend. The chaplain is an officer of the house which chooses him, and nothing more. . . .

It is said, indeed, by the petitioners, that if members of Congress wish any one to pray for them, they should, out of their own means, furnish the funds wherewith to pay him, and that it is unjust to tax the petitioners with the expense of his compensation. . . . If carried out to its fair results, it will equally apply to many other accommodations furnished to members of Congress at the public expense. We have messengers who attend to our private business, take checks to the bank for us, receive the money, or procure bank drafts, and discharge various other offices for our personal ease and benefit, unconnected with the dispatch of any public function. . . . And of those who belong to either house of Congress some have not the means to procure such accommodations for themselves. Where, then, is the impropriety of having an officer to discharge these duties? . . .

. . . .
The whole view of the petitioners seems founded upon mistaken conceptions of the meaning of the constitution. This is evident -- if not from what we have said, from this consideration – that, from the beginning, our government has had chaplains in its employment. If this had been a violation of the constitution – an establishment of religion – why was not its character seen by the great and good men who were coeval with the government – were in Congress and in the Presidency when this constitutional amendment was adopted? Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by this amendment, to prohibit “an establishment of religion” such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as

⁶ *Chaplains in Congress and in the Army and Navy*, H. Rept. No. 124, 33rd Cong., 1st Sess. (1854), 5, 6-7.

legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to his care.

....

Donahoe v. Richards, 38 Me. 379 (1854)

The creation of “common” or public schools was controversial in the early republic. A variety of moral reform movements flourished in the early Jacksonian period, fed by religious fervor and concerns about immigration, urbanization, and industrialization. Common schools promised to prepare the next generation to be productive, responsible citizens and to counter the influence of parochial schools, which taught alien doctrines under the guidance of a foreign corps of instructors.

The reading of the Protestant Bible was a routine and controversial feature of the common school curriculum. A number of state courts heard, and rejected, challenges to Bible reading under state constitutional provisions protecting religious liberty. This case from Maine arose when the 15-year-old Bridget Donahoe was expelled from school for refusing to read the English Protestant version of the Bible, which the Catholic Church regarded as sinful. She offered to read from the Catholic-sanctioned Douay Bible but was refused. The Supreme Judicial Court of Maine unanimously upheld the expulsion. The Court upheld the complete discretion of the school committee to select texts for instruction and to expel disobedient students. It also upheld against constitutional objection the particular selection of the English Bible as a textbook. Government schools could use the Bible for literacy and moral instruction (it was the legal duty of all instructors to teach their charges “love of country” and such virtues as industry, chastity and temperance), so long as it did not use it for theological instruction. Government officials could choose to accommodate religious dissenters, but there was no right to religious-based exemptions from generally applicable rules. In cases ranging from polygamy to witnesses refusing to take the stand on their Sabbath day to individuals violating Sunday laws, state judges had denied that religious liberty required exemptions. The courts reemphasized that doctrine in the Bible-reading cases.

Chief Judge APPLETON for the Court.

....

.... The question therefore, is whether, if the Legislature should by statute direct any version of the Bible to be read in schools, and should impose the penalty of expulsion, in the case of refusal, such statute would be a violation of the constitution.

The use of the Bible as a reading book is not prohibited by any express language of the constitution.

Is its use for that purpose in opposition to the spirit and intention of that instrument?

If it be not, if it be a book which may be directed within the spirit and meaning of the constitution, to be used in schools, it is obvious that its use may be required of all; for a regulation which any scholar [i.e., student] may violate with impunity would cease to have the force and effect of a rule.

....

The common schools are not for the purpose of instruction in the theological doctrines of any religion, or of any sect. The State regards no one sect as superior to any other – and no theological views as peculiarly entitled to precedence. It is no part of the duty of the instructor to give theological instruction – and if the peculiar tenet of any particular sect were so taught it would furnish a well

grounded cause of complaint on the part of those, who entertained different or opposing religious sentiments.

But the instruction here given is not in fact, and is not alleged to have been, in articles of faith. No theological doctrines were taught. The creed of no sect was affirmed or denied. The truth or falsehood of the book in which the scholars were required to read, was not asserted. No interference by way of instruction, with the views of the scholars, whether derived from parental or sacerdotal authority, is shown.

The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief, than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmance of the pagan creeds. . . . No one was required to believe or punished for disbelief, either in its inspiration or want of inspiration; in the fidelity of the translation or its inaccuracy--or in any set of doctrines deducible or not deducible therefrom.

. . . .

The clause in the constitution upon which reliance is specially placed, is, that "no one shall be hurt, molested or restrained in his person, liberty or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship." The object of this clause was to protect all--the Mahomedan and the Brahmin, the Jew and the Christian, of every diversity of religious opinion, in the unrestrained liberty of worship and religious profession, provided the public peace should not thereby be endangered nor the worship of others obstructed. It was to prevent pains and penalties, imprisonment or the deprivation of social or political rights, being imposed as a penalty for religious professions and opinions.

. . . .

Another clause in the constitution, upon which reliance is placed, is, "that no subordination nor preference of any sect or denomination to another shall ever be established by law."

This clause obviously provides for the equality of all sects, and forbids the preference of one over another. . . .The selection of a school book is no preference within this clause. The choice is left entirely to the popular will. One set of town officers may make one selection, and another may make an entirely different one. The most unrestrained liberty of choice is given. It would be a novel doctrine that learning to read out of one book rather than another, or out of one translation rather than another, of a book conceded to be proper, was a legislative preference of one sect to another, when all that is alleged is, that the art of reading only was taught, and that without the slightest indication of or instruction in theological doctrines.

If this were to be regarded as a legislative preference, much more must those laws, by which the Sabbath is established as a day of rest, in which labor, except for necessity, is prohibited being done, be regarded as a subordination of the religious views of all other sects to those holding that day sacred. Indeed this very objection has, in many States, been raised against the constitutionality of such laws. . . .

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If the claim is, that the sect of which the child is a member has the right of interdiction, and that any book is to be banished because under the ban of her church, then the preference is practically given to such church, and the very mischief complained of, is inflicted on others.

If Locke and Bacon and Milton and Swift are to be stricken from the list of authors which may be read in schools, because the authorities of one sect may have placed them among the list of heretical writers whose works it neither permits to be printed, nor sold, nor read, then the right of sectarian interference in the selection of books is at once yielded, and no books can be read, to the reading of which it may not assent. Because Galileo and Copernicus and Newton may chance to be found in some prohibitory index, is that a reason why the youth of the country should be educated in ignorance of the scientific teachings of those great philosophers? If the Bible, or a particular version of it, may be excluded from schools, because its reading may be opposed to the teachings of the authorities of any church, the same result may ensue as to any other book. If one sect may object, the same right must be granted to

others. This would give the authorities of any sect the right to annul any regulation of the constituted authorities of the State, as to the course of study and the books to be used. . . .

. . . . The real inquiry is, whether any book opposed to the real or asserted conscientious views of a scholar can be legally directed to be used as a school book, in which such scholar can be required to read. The claim, on the part of the plaintiff, is that each and every scholar may set up its own conscience as over and above the law. It is the claim of an exemption from a general law because it may conflict with the particular conscience.

. . . . The Legislature establishes general rules for the guidance of its citizens. It does not necessarily follow that they are unconstitutional, nor that a citizen is to be legally absolved from obedience, because they may conflict with his conscientious views of religious duty or right. To allow this would be to subordinate the State to the individual conscience. A law is not unconstitutional, because it may prohibit what a citizen may conscientiously think right, or require what he may conscientiously think wrong. The State is governed by its own views of duty. The right or wrong of the State, is the right or wrong as declared by legislative Acts constitutionally passed. It may pass laws against polygamy, yet the Mormon or Mahomedan cannot claim an exemption from their operation, or freedom from punishment imposed upon their violation, because they may believe, however conscientiously, that it is an institution founded on the soundest political wisdom, and resting on the sure foundation of inspired revelation. It may establish a day of rest, as a civil institution, though the effect of it may be to deprive the Jew of one sixth of his time, for purposes of labor or of business.

. . . . The trust conferred upon those who have the superintendence of our public schools is hardly inferior in importance to that of the administration of the government. Indeed, the government itself depends in no slight degree upon the education of those by whom it is hereafter to be controlled. Amid the various and conflicting differences on moral, political and religious subjects, there is need of mutual charity and forbearance – of mutual concession and compromise. Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools, which are alike open to the children of the rich and the poor, of the stranger and the citizen. It is the duty of those to whom this sacred trust is confided, to discharge it with magnanimous liberality and Christian kindness. While the law should reign supreme, and obedience to its commands should ever be required, yet in the establishment of the law which is to control, there is no principle of wider application and of higher wisdom . . . than a precept which is found with almost verbal identity in the versions which, from education and association, are endeared to the respective parties in litigation, "All things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets."

2. FREE EXERCISE

Congressional Debate on Sunday Mails (1829)

In the early republic, the United State Post Office transported and delivered (that is, made available in the post office) mail every day of the week, including Sundays. The "Sunday mails" was one of the most persistent issues involving freedom of religion at the national level during the Jeffersonian and Jacksonian period. Congress routinely received petitions calling for Congress to respect the Sabbath and end the Sunday mails. These petitions were referred to committee. The committees usually produced

brief reports leaving it to the Postmaster General to maintain regulations that would balance the needs of the post office and the sensitivities of religious observers. Two of the more elaborate and influential committee reports were produced in 1829, one from the House and one from the Senate. The Senate report was authored by outgoing Kentucky Democrat Richard Johnson (he would later serve as Martin Van Buren's vice president), and is better remembered to history for its civil liberty inclinations. Samuel McKean, a Democrat from Pennsylvania who would go on to serve in the U.S. Senate, authored the House Report and shows a somewhat more accommodating sensibility. Johnson's report won the endorsements of some state legislatures at the time, and the pace of petitions on the Sunday mails slowed for a time. But the Sunday mails issue was later revived as part of a broader movement in support of national Sabbath-keeping that carried into the late nineteenth century.

Memorial from Newark, New Jersey on Sunday Mails⁷

That your memorialists conscientiously believe that the people of these United States, in their national capacity and character, constitute a Christian nation. If a Christian nation, then our Government is a Christian Government, a Government formed and established by Christians, and therefore bound by the word of God, not at liberty to contravene his laws, nor to act irrespectively of the obligations we owe to Him. That the Government of the United States was formed under the influence of Christian principles, is most emphatically proved by the protection it secures to the right of conscience in matters of religion, and in denying Congress the power of passing any law prohibiting the free exercise thereof. . . . And yet, it is just such an influence, (indirectly, at least) exercised by Congress, of which your memorialists would respectfully complain. Should your honorable body pass a law, saying that no man shall be concerned in the transportation of the mail, or be the keeper of a post office, who did not religiously observe the Christian Sabbath, would it not be a flagrant violation of the constitution, and justly excite the cry of religious persecution? But when Congress pass a law requiring the secular concerns of Government to be transacted on the Christian Sabbath, do they not, in effect, say to the people, You must give up your religious notions about the sanctity of the Sabbath, or you shall have no share in the honors or emoluments of office? . . . Must not a Christian postmaster either abandon his *religion* or his *office*? and is this religious liberty? Your memorialists respectfully conceive that that alone is "religious liberty" which permits a man, in perfect consistency with his religious feelings, to enjoy all the rights, privileges, and immunities of an American citizen; and among those rights, is, that of serving his country in any situation in the Post Office Department for which his talents and integrity qualify him. . . .

Memorial from North Carolina

That, in a Christian community, where all the chartered rights and political institutions, as well as the legislative provisions of the country, recognize the authority of the Christian religion, your memorialists deem it unnecessary to employ any reasoning to prove that Sabbath breaking is sinful. They beg leave, therefore, in the exercise of a constitutional right, and under the influence no less of a patriotic than of a moral sense of duty, with great deference and respect, to remonstrate against the transportation of the public mails, and against post office duties, on the holy Sabbath.

The practice of thus violating one of the express commands of God having the sanction of the constituted authorities of the Government assumes a national character, and may be justly called a national sin – the awful consequences of which are so often detailed in the sacred volume.

That the labor here commanded of is a profanation of the Lord's day, none, it is believed, will deny, unless there be found in it some overruling necessity to constitute an exception to the Divine mandate. But your memorialists can perceive no compulsion or indispensable need for such labor

Senate Report on Sunday Mails ("Johnson Report")⁸

⁷ Excerpt taken from *Sunday Mails*, H.R. Rept. No. 87, 21st Cong., 1st Sess. (1830).

Mr. Johnson, of Kentucky, made the following report:

That some respite is required from the ordinary vocations of life, is an established principle, sanctioned by the usages of all nations, whether Christian or pagan. One day in seven has also been determined upon as the proportion of time; and, in conformity with the wishes of the great majority of citizens of this country, the first day of the week, commonly called Sunday, has been set apart to that object. The principle has received the sanction of the National Legislature, so far as to admit a suspension of all public business on that day, except in cases of absolute necessity, or of great public utility. This principle the committee would not wish to disturb. . . . It should, however, be kept in mind that the proper object of government is to protect all persons in the enjoyment of their religious as well as civil rights, and not to determine for any whether they shall esteem one day above another, or esteem all days alike holy.

We are aware that a variety of sentiment exists among the good citizens of this nation on the subject of the Sabbath day; and our Government is designed for the protection of one as much as for another. . . .

With these different religious views the committee are of the opinion that Congress cannot interfere. It is not the legitimate province of the Legislature to determine what religion is true, or what is false. Our Government is a civil and not a religious institution. Our constitution recognizes in every person the right to choose his own religion, and to enjoy it freely, without molestation. . . .

The transportation of the mail on the first day of the week, it is believed, does not interfere with the rights of conscience. The petitioners for its discontinuance appear to be actuated from a religious zeal, which may be commendable if confined to its proper sphere. . . . They appear, in many instances, to lay down as an axiom, that the practice is a violation of the law of God. Should Congress in their legislative capacity, adopt the sentiment, it would establish the principle that the Legislature is a proper tribunal to determine what are the laws of God. . . . If this principle is introduced, it will be impossible to define its bounds. . . .

Under the present regulations of the Post Office Department, the rights of conscience are not invaded. Every agent enters voluntarily, and, it is presumed, conscientiously, into the discharge of his duties, without intermeddling with the conscience of another. Post offices are so regulated as that but a small proportion of the first day of the week is required to be occupied in official business. . . . While the mail is transported on Saturday, the Jew and the Sabbatarian may abstain from any agency in carrying it, from conscientious scruples. While it is transported on the first day of the week, another class may abstain, from the same religious scruples. The obligation of Government is the same to both of these classes; and the committee can discover no principle on which the claims of one should be more respected than those of the other, unless it should be admitted that the consciences of the minority are less sacred than those of the majority.

It is the opinion of the committee that the subject should be regarded simply as a question of expediency, irrespective of its religious bearing. . . . Congress have never legislated upon the subject. It rests, as it ever has done, in the legal discretion of the Postmaster General, under repeated refusals of Congress to discontinue the Sabbath mails. . . .

The petitioners do not complain of any infringement upon their own rights. They enjoy all that Christians ought to ask at the hand of any Government – protection from all molestation in the exercise of their religious sentiments.

House Report on Sunday Mails (“McKean Reports”)⁹

⁸ Excerpt taken from *Sunday Mails*, Sen. Rept. No. 74, 20th Cong., 2nd Sess. (1829).

⁹ Excerpt taken from *Sunday Mails*, H. Rept. 75, 20th Cong., 2nd Sess. (1829).

Mr. McKean . . . reported:

. . . .

The committee believe that a proper observance of the Sabbath is calculated to elevate the moral condition of society. In accordance with the recorded example of the Creator of the Universe, and enforced by scripture precepts, one day in seven should be abstracted from ordinary business, and devoted to moral and religious exercises. . . . It has made them better citizens, and better men in all the relations of society, both public and private.

The institution of the Sabbath is respected in various operations of our Government. In the halls of legislation, the courts of justice, and the executive departments, except under peculiar emergencies, business is suspended, not by legal provision, but by force of public opinion. Restraints imposed on the consciences of individuals by human laws, sanctioned by severe penalties, have always failed to produce reformation. They have generally, if not always, made men worse instead of better. . . .

The committee, therefore, as citizens and legislators, would be ready to repel any attempt to bring the consciences of men under legislative control in this country. A disposition to do so can never proceed from the pure principles of Christianity.

. . . . It is not considered by the committee that the petitioners ask the introduction of any new principle into our laws, but the extension of one which has already been recognized. In the policy of the measure desired, the committee believe the petitioners are mistaken, but they do not consider the attempt made by them as tending to form the justly odious combination of church and state.

. . . .

A well-regulated mail establishment is an indispensable requisite to a free Government, and to the commercial, agricultural, and manufacturing interest of an enterprising and growing people. Every buyer and seller should be informed of the state of the market, at home and abroad, with the greatest possible certainty and expedition. This can only be accomplished through the operations of the mail . . . Every part must harmonize like a well-regulated machine

On the other branch of the case, that of postmasters being compelled, by law, to keep open their offices and deliver letters, newspapers, &c., on the Sabbath, this the committee believe, is not absolutely necessary for the successful transaction of any branch of business. . . . It is believed that the statute books contain no provision, except in the instance of postmasters, requiring the performance of official duty on the Sabbath.

In conclusion, the committee earnestly recommend the repeal of so much of the eleventh section of the post office law . . . as requires postmasters to deliver letters, newspapers, &c. on the Sabbath.

John Hughes, Speech on the School Question (1840)¹⁰

New York City was one of the flash points in the debate over the creation of “common” or public schools. Catholic Bishop John Hughes arrived in New York just as these debates were heating up and quickly became a leading voice on behalf of Catholic immigrants, state funding for parochial schools, and against exclusive government support for the public schools, which he regarded as subversive of Catholicism. He argued that both the specific practices of the common schools (such as reading from the King James Bible) and the taxation of Catholic parents to support the common schools that they did not use interfered with the ability of Catholics to freely practice their religion. This speech was delivered to a Catholic audience, as church leaders tried to develop a common position on the school question. The parochial schools were unsuccessful in their quest to get funding from the state.

. . . .

¹⁰ Excerpted from John Hughes, *Complete Works of the Most Rev. John Hughes*, ed. Lawrence Kehoe, vol. 1 (New York: Lawrence Kehoe, 1866), 41.

. . . . The policy of statesmen might be bad, while their intentions were good, and that the policy of this system was bad would be seen, by reflecting how it operated in religious belief. They wished a common education, because education is one of the greatest of blessings, and they knew no religious denomination would have their consciences tyrannized over. They exclude all sectarianism, so called; but they have here a secret power of deceit, which, wherever they go, operates on the young mind. Now, this system was manifestly not essential to the preservation of the United States, or of this State; and what were its bearings on the inhabitants of the State? . . . [W]hen they reflected that all morality was founded on religion, and that this was an attempt to make man moral on the basis of education without religion, he would ask what could be the harvest that such culture would produce, and he replied, time alone can proclaim and determine. For his own part, he was of opinion though it was not nominally infidelity, that it was practical infidelity, and that, instead of sectarianism, they would have those with no feeling in favor of religion; that the bearings of the system were to produce men with no feeling but of indifference for religion, unless, perhaps a feeling of contempt for religion. The wise, the immortal WASHINGTON . . . said, "Beware of the man who attempts to inculcate morality without religion." . . .

[A] Catholic could not conscientiously approve this system, if he were an enlightened Catholic, and understood his duty to his God and the principles of his religion, and remembered that education comprehended the mysterious development of the young mind, with its three-fold faculties of will, memory, and understanding. The inculcation of knowledge is only part of an enlightened system of education; a training of the WILL is as necessary as the cultivation of the other faculties of the mind, and as the Common School system is in this respect deficient, he repeated that a parent who understood that system, and had a knowledge of his religion and of his own responsibility, would never submit to it. The Catholic primitive, continuous, perpetual church never recognized the principles of leaving the mind of a child without religious culture until it grew up. . . . Therefore, he said, this common school system was Protestant, but it was not the system Catholics could adopt with their children, because they gave religious instruction to their children as a duty which was imperative, while Protestants were independent of religious education, and were of opinion that it was best to have religion to come at some uncertain period, when a change of heart would occur, and a person was to "join the church." . . .

He contended for the right of conscience, and for the sacred right of every man to educate his own children; and when these are the consequences that follow this system of Common School education, he asked if it were just to tax such a man for its support, while its tendency was to draw away the mind of his child from the religion which he professed and which he desired to teach him. The question was a simple one, and he was sure they would see but very little difference between it and the question of tithes for the support of the Protestant church in England and Ireland. To be sure, in those countries they had not excluded the Catholics from the churches: they said, our churches are open; we have provided them expressly for your benefit; if you don't come, it is your own fault; but whether you come or not, you must give us your money. . . . He did not ask for the Catholics anything that was not just; that was not constitutional. All laws of the country – all constitutional laws – are necessarily founded on the principle which secures to every man his religious rights, and if any law trenches on that right, he asserted that it was not, and could not be constitutional. . . .

But, as he had a book used in these Common Schools with him . . . he would read one of its amiable little chapters to show its insidious and dangerous tendency and to illustrate the system. . . .

"They have a right, too," answered the father, "*to worship God as they please*. It is their own business and concerns none but themselves."

"But has not God ordered particular ways of worshiping him?"

Why the child appears to have much more sense than his father. (Laughter.)

"But has not God ordered particular ways of worshiping him?"

"He has directed the mind and spirit with which he is to be worshiped, but not the manner. *That is left for every one to choose. All these people like their own way best.*"

And this to children, you observe. . . .

Let there be granted to the Catholics a fair and just proportion of the funds appropriated for the Common Schools, provided the Catholics will do with it the same thing that is done in the Common Schools, and leave no reason to complain that the system is not followed. If they will do that they will take away the Catholic's cause of anxiety for his children.

Theodore Parker, "The Law of God and the Statutes of Men" (1854)¹¹

*In the years leading up to the Civil War, the obligations of religious conscience were debated with new intensity. Preachers and politicians argued over whether there was a "higher law" that trumped statutes and Constitution and that should guide the behavior of citizens and public officials. New York Whig William Henry Seward launched his career in the U.S. Senate and established himself as a leader of the national antislavery movement with his "higher law" speech opposing the slavery in the territories: "The Constitution regulates our stewardship; the Constitution devotes the domain to union, to justice, to defense, to welfare, and to liberty. But there is a higher law than the Constitution, which regulates our authority over the domain, and devotes it to the same noble purpose. The territory is a part . . . of the common heritage of mankind, bestowed upon them by the Creator of the universe. We are his stewards."*¹²

Seward's speech gave particular prominence to the language of the higher law, and his argument proposed that the obligations to God and mankind as a whole trumped the obligations to Union or particular American interests. More controversial still, however, was the suggestion that religious believers might be obliged to disobey laws supporting slavery, including the federal Fugitive Slave Act of 1850, which required private individuals to aid in the recapture of escaped slaves. Theodore Parker was a Unitarian minister in Boston whose intellectual circle included William Lloyd Garrison, Ralph Waldo Emerson, and Elizabeth Cady Stanton. He was a supporter of John Brown's efforts to launch a slave revolt in Virginia and advocated active resistance to the laws of slavery.

. . . .

Now see the relation of the individual to the Statutes of men. There is a natural duty to obey every statute which is just. It is so before the thing becomes a statute. The legislator makes a decree; it is a declaration that certain things must be done, or certain other things not done. If the things commanded are just, the statute does not make them just; does not make them any more morally obligatory than they were before. The legislator may make it very uncomfortable for me to disobey his command, when that is wicked; he cannot make it right for me to keep it when wicked. All the moral obligation depends on the justice of the statute, not on its legality; not on its constitutionality; but, on the fact that it is a part of the natural Law of God

Now then, as it is a moral duty to obey a just statute because it is just, so it is a moral duty to disobey any statute which is unjust. . . . Here in disobedience, there are two degrees. First, there is passive disobedience, non-obedience, the doing nothing for the statute; and second, there is active disobedience, which is resistance, the doing something, not for the statute, but something against it. Sometimes the moral duty is accomplished by the passive disobedience, doing nothing; sometimes, to accomplish the moral duty, it is requisite to resist, to do something against the statute. However, we are to resist wrong by right, not wrong by wrong.

There are many statutes which relate mainly to matters of convenience. They are rules of public conduct indeed, but only rules of prudence, not of morals. Such are the statutes declaring that a man shall not vote till twenty-one; that he shall drive his team on the right hand side of the street It is necessary

¹¹ Excerpt from Theodore Parker, *Additional Speeches, Addresses, and Occasional Sermons*, vol. 2 (Boston: Little, Brown and Co., 1855), 179.

¹² *Cong. Globe*, 31st Cong., 1st Sess. (1850), app. 265.

that there should be such rules of prudence as these; and while they do not offend the conscience every good man will respect them; it is not immoral to keep them.

....

So the moral value of a statute is, that while it embodies justice it also represents the free conscience of the nation. Then also it is a monument of the nation's moral progress, showing how far it has got on. It is likewise a basis, for future progress, being a right rule for moral conduct. But when the statute only embodies injustice, and so violates the conscience, and is forced on men by bayonets, then its moral value is all gone; it is against the conscience. If the people consent to suffer it, it is because they are weak; and if they consent to obey it, it is because they are also wicked.

When the foremost moral men make a statute in advance of the people, and then attempt to enforce that law against the consent of the majority of the people, it is an effort in the right direction and is educational; then I suppose the best men will try to execute the law, and will appeal to the best motives in the rest of men. But even here, if ever this is attempted, it should always be done with the greatest caution, lest the leader should go too fast for his followers, undertaking to drag the nation instead of leading them. . . . A grown father, six feet high, does not walk five miles the hour with his child two years old; if he does, he must drag his boy; if he wants to lead him he must go by slow and careful steps, now and then taking him over the rough places in his arms. That must be done when the law-maker is very far in advance of the people; he must lead them gently to the right end.

But when a wicked statute is made by the hindmost men in morals, men far in the rear of the average of the people, and urging them in the wrong direction; when the statute offends the conscience of the people, and the rulers undertake by violence to enforce the statute, then it can be only mean men who will desire its execution, and they must appeal to the lowest motives which animate mean men, and will thus debase the people further and further.

....

I know very well it is commonly taught that it is the moral duty of the officers of government to execute every statute, and of the people to submit thereto, no matter how wicked the statute may be. This is the doctrine of the Supreme Court of the United States of America, of the Executive of the United States; I know very well it is the doctrine of the majority of the Legislature in both Houses of Congress; it is the doctrine of the churches of Commerce; — God be praised, it is not the doctrine of the churches of Christianity, and there are such in every denomination, in many a town; even in the great centers of commerce there are ministers of many denominations, earnest, faithful men, who swear openly that they will keep God's Law, come what will of man's statute. This is practical piety; the opposite is practical atheism. I have known some speculative atheists. I abhor their doctrines; but the speculative atheists that I have known, all recognize a Law higher than men's passions and calculations; the Law of some Power which makes the Universe and sways it for noble purposes and to a blessed end.

Then comes the doctrine: — while the statute is on the books it must be enforced. It is not only the right of the legislator to make any constitutional statute he pleases, but it is the moral and religious duty of the magistrate to enforce the statute; it is the duty of the people to obey. So in Pharaoh's time it was a moral duty to drown the babies in the Nile; in Darius' time to pray to King Darius, and him only; in Herod's time to massacre the children of Bethlehem; in Henry the Eighth's time to cast your Bible to the flames. Iscariot only did a disagreeable duty.

It is a most dreadful doctrine; utterly false! Has a legislator, Pharaoh, Darius, Herod, Henry the Eighth, a single tyrant, any moral right to repudiate God, and declare himself not amenable to the moral Law of the Universe? You all answer, No! Have ten millions of men out of nineteen millions in America a right to do this? Has any man a moral right to repudiate justice and declare himself not amenable to conscience and to God? Where did he get the right to invade the conscience of mankind? Is it because he is legislator, magistrate, governor, president, king?

. . . . It is only justified on the idea that there is no God, and this world is a chaos. But yet it is taught; and only last Sunday the minister of a "prominent church" taught that every law must be executed, right or wrong, and thanked the soldiers who, with their bayonets, forced an innocent man to

slavery. No matter how unjust a statute is, it must be enforced and obeyed so long as it is on the Law Book!

....
. . . . When the nation is willing to accept a statute which violates the nation's conscience, the nation is rotten. If a statute is right, I will ask how I can best obey it. When it is wrong, I will ask how I can best disobey it, — most safely, most effectually, with the least violence. . . .

....
All around us are monuments of men who, in the name of Truth broke the priest's creed, defied the king's statute in the spirit of Justice. . . . All New England is a monument to the memory of those men who trusted God's Higher Law, and for its sake put an ocean three thousand miles wide between them and their mothers' bones. It is this which makes Plymouth Rock so dear. Our calendar is dotted all over with days sacred to the memory of such men. . . .

There is one thing which this Bible teaches in almost every page, and that is reverence for the Higher Law of God. The greatest men who wrote here were only men; to err is human, we all learn by experiment, and they were mistaken in many things; but all teach this, from the littlest to the greatest, from Genesis to Revelation, — Religion before all other things, Reverence for God above all! It was that for which Jesus bowed his head on the Cross, and "sat down at the right hand of God."

There is an Infinite God! You and I owe allegiance to Him, and our service of Him is the keeping of every Law which He has made; — keeping it faithfully, earnestly, honestly. That is Religion, and to those who do it, on every thundering cloud which passes over their heads, He will cast his rainbow, girdling it with sevenfold magnificence of beauty, and on that cloud take them to His own Kingdom of Heaven, to be with Him forever and forever.