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# Religion as excuse upends Constitution

By Ernest Dumas

Tirades over religious liberty since the U.S. Supreme Court legalized same-sex marriages nationwide have awakened the ghost of James Madison, the author of the constitutional doctrine on the matter, and it isn't happy that his effort to protect religious inquiry in America is being corrupted.

The restless shade is said to be particularly disturbed that even the dissenting Supreme Court justices joined the hubbub and invoked religious freedom against gay marriages, since it was Madison who also had insisted that the court have the power to adjudicate the constitutionality of laws passed by Congress and the states, and since his name was on the case (*Marbury v. Madison*, 1803) that firmly established the court's power to do that.

It was Madison, with an assist from his ally Thomas Jefferson, who insisted upon the establishment clause in the Bill of Rights because he did not want to see the United States emulate European governments that had allied with one church or another and punished dissident religionists. As minister to France during the French Revolution, Jefferson saw how the revolutionaries that he admired beheaded the statuary of saints at the great cathedrals, a measure of revenge on the Catholic Church for the pope's alliance with the monarchy.

Madison and Jefferson had seen it happen in their native Virginia, where the Anglican church was official. Lutherans and Baptists could not get a license from the government to preach and were jailed when they preached anyway. Madison and Jefferson battled to stop taxation to support the Anglican church and to amend the laws to keep the government neutral on religion. Then they did the same with the national government, finally settling for a simple clause in the First Amendment.

But the new battle cries of religious freedom are for something quite different from the free inquiry and thought that Madison and Jefferson imagined they were protecting. The current take, in the wake of the marriage movement, is that government can undertake no law in any field that could abrade some belief or prejudice that someone claims is supported by his or her church's dogma. In the case of marriage, it is the Old Testament passage where God wants his chosen people to kill practicing homosexuals. So the government violates the believers' religious freedom when it says it will recognize the marriage of people of the same sex.

This version of religious liberty has a long history, but it was never given so much credence. Southern Baptists supported secession because the new Republican administration of Lincoln intended to violate God's Old Testament admiration for slaveholding. Their religious freedom was being violated. Back in the 1960s, part of my beat at the *Arkansas Gazette* was white citizens councils, formed to fight laws that promoted integration and equality. Preachers were invariably among the leaders. Rev. Wesley Pruden and Rev. M.L. Moser, citing scripture, were devout in their beliefs that God frowned on race-mixing. Civil rights laws violated white people's religious freedom.

Madison and Jefferson would have been shocked that anyone would claim religious freedom in defense of the practice of slavery, segregation or even discrimination based on race when the government finally set about to end them, although they would have defended the right of segregationists to hold those views and espouse them.

But there was Chief Justice John Roberts and two of the other three dissenters raising the specter of religious tyranny when the majority said the government should respect the right of gay and lesbians to marry and give them the same government-proffered benefits as others.

In the majority opinion, Reagan disciple Anthony Kennedy observed that legalizing gay marriages did not end the First Amendment protection for sincere religious objectors because they "may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."

But Roberts was not mollified. He saw grave forms of religious tyranny looming. Colleges with church affiliations might not be able to discriminate against gay and lesbian students, and adoption agencies might find themselves in a dilemma over whether to let a gay or lesbian

couple adopt a child. Only a few years ago, Southern religious colleges found themselves facing the loss of federal funds if they continued to discriminate against black youngsters. Roberts saw a slippery slope for people who claimed a religious pretext for discrimination.

Then there was the angry voice of Justice Antonin Scalia, who ironically spawned the current religious freedom debate by weighing in precisely on the other side. Scalia wrote for a six-judge majority that upheld an Oregon drug-treatment agency's firing of two drug counselors who admitted using peyote in their Native American Church. Peyote is a sacrament in the church; it brings users into God's presence.

Scalia wrote that the government had to be able to prohibit socially harmful conduct in compliance with public policy, so it "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." Madison would have applauded Scalia's rationale if not the government's act. (That decision caused Congress in 1993 — and Arkansas in 2015 — to pass the Religious Freedom Restoration Act, which recognized religious rights in situations like the peyote sacrament and other acts of conscience.)

With Scalia, Madison's great protection against religious establishment is one man's freedom but another's tyranny. It depends upon whether he likes the religion. When Barack Obama's Affordable Care Act gave women the right to have their insurance cover reproductive medicine, the Catholic Scalia found that it violated the religious beliefs of their corporate employer, Hobby Lobby. Madison's shade is reported to have moaned, "What have I done?"

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