

Opening Comments

Panel on “Funding Challenges: Minding the ‘Three Pence’ Boundary”

Fifth Annual Law & Society Symposium: “Religion and the Law— In Search of a ‘Grand Unified Theory: Thirty Years with the Endorsement Test”

I would like to start with a brief word about our venue in Charleston. It is altogether fitting that a symposium on Religion and the Law would be held in Charleston, which was an early laboratory for many of the issues which ultimately lead to the Free Exercise and Establishment Clauses of the First Amendment. The Carolina Colony was first settled by Europeans in 1670 as part of a British colonial enterprise lead by eight noblemen who were granted vast tracts of land between Virginia and Spanish Florida as a reward for helping Charles II be restored to the throne. Rather than set up a religious based colony, such had been done in Massachusetts, Pennsylvania and Maryland, the noblemen, known as the Lord Proprietors, sought to develop a strictly commercial enterprise. The leader of the group, Anthony Ashley Cooper, the Earl of Shaftesbury, perceived religious dissenters from across Europe to be promising targets for recruitment as settlers to his new colony because so many were victims of persecution in the many countries with established state churches.

In order to attract religious dissenters to the wilderness of Carolina, Lord Shaftesbury enlisted his close friend, John Locke, to draft the first colonial constitution, known as the Fundamental Constitutions. Locke’s constitution welcomed “Jews . . . and dissenters” and authorized any group of seven or more to organize their own church. Persecution of person for the exercise of their religious beliefs was prohibited, including disturbing any religious meeting

or using disparaging language against any religion.. The Fundamental Constitutions was the first in human history to make religious freedom a constitutional right.

The strategy of Shaftesbury was effective and religious dissenters constituted a major portion of the early settlers to Carolina. These included Huguenots, who were French Protestants from Catholic France; Unitarians, Quakers, Congregationalists and Jews. Dissenter churches were constructed in the heart of the newly founded Charles Town. In 1697, a group of Jewish settlers were made citizens of the colony, which was more than forty years before Jews in England were given citizenship rights. Jewish settlement continued to grow during the colonial period and by 1800 Charleston had the largest Jewish population of any city in the United States. In 1816, Isaac Harby of Charleston wrote then Secretary of State James Madison: “Jews are by no means to be considered a religious sect, tolerated by the Government. They are a portion of the people Quakers and Catholics, Episcopalians and Presbyterians, Baptists and Jews, all constitute one great political family.”

In this environment of religious tolerance, the colony and early state thrived. It was thus not surprising that the principle author of the Religious Test Clause of the 1787 Constitution, Article VI, Clause 3, was Charles Pinckney, a delegate from South Carolina. Pinckney would later champion as Governor of the State inclusion of free exercise provisions into the South Carolina State Constitution of 1790 as well as prohibitions against any religious tests or oaths of office. South Carolina stood as an example of the benefits of open and tolerant society, save a blind spot regarding Catholics. However, by 1800, a Catholic Church, St. Mary’s, was organized on Hassel Street across from the historic KKBE Synagogue and has been referred to as the “mother church” of Catholicism in the South.

Notwithstanding this openness to religious dissenters, the Carolina Colony recognized the Church of England as the established church in 1704. Colonial taxpayers supported the church, including paying for the construction of the beautiful St. Phillips Church in 1723 (on Church Street down from the market) and St. Michaels Church in 1752-61 (on the corner of Meeting and Broad across from the Federal Courthouse). South Carolina also adopted religious oaths and tests, which appear primarily to have been a device used by Church of England supporters to ward off the growing numbers of dissenter voters, primarily French Huguenots. The state's faithful enforcement of these oaths and tests is questionable since Francis Salvador, one of the state's largest landowners, was allowed to assume office in the Colonial Legislature in 1775 despite the fact that he was a practicing Jew. Salvador's election marked the first instance of a Jew being elected to any public office in Western world. Salvador's death a year later in an early battle in the American Revolution made him the first Jew to give his life for the cause of American Independence.

South Carolina stood at the cross roads of these complex religious freedom questions as the Constitutional Convention opened in May 1787 and was the fourth state to adopt the Bill of Rights in 1790. Having appreciated the great benefits of religious tolerance and the practical consequences of an established church and religious oaths, South Carolina, and this great city of Charleston, had much to offer on these vital issues confronting a new nation. So it is indeed fitting 226 years after the Constitutional Convention we gather in Charleston to discuss again the issue of religious freedom and the law.