

# Unalienable Rights, Equality and the Free Exercise of Religion

## by Kerry L. Morgan

### I. The Laws of Nature and of Nature's God

#### INTRODUCTION

This Article explains the law of unalienable rights, equality and the free exercise of religion.<sup>1</sup> The origin of this law is found in the laws of nature and of nature's God. Various essential elements of this law are reiterated in the Declaration of Independence and are given legal force and effect in the United States Constitution and the constitutions of the several states, *pro tanto*.

It is rare, however, to find a lawyer who understands or will argue unalienable rights, equality or religious liberty in light of the laws of nature, the Declaration or a written constitutional provision. The preferred approach is to skillfully arrange judicial cases in support of the desired conclusion without regard to inconvenient principle. Such an approach, however, demeans and politicizes the nature of law, the meaning of equality and the scope of unalienable rights. Trampled in the fashionable process are at least five of the foundational principles that govern all religious liberty litigation. These principles are examined *infra* in greater detail, but essentially include the ideas that:

- 1) certain rights are unalienable because they are directly given by God,
- 2) the free exercise of religion is an unalienable right,
- 3) every human being may exercise any unalienable right on an equal and absolute basis, free from the interference or regulation of civil government,
- 4) civil rights may not be expanded or contracted on account of religious practice or religious belief, and
- 5) civil acknowledgment of God the Creator in an oath or other official capacity, is not an unconstitutional religious test or establishment of religion.

This Article examines these principles in five sections. Section I of this Article focuses on the supreme law of the American regime--the laws of nature and of nature's God. It explains this law, its origins and its relevance for legal and Constitutional adjudication.

Section II highlights the Declaration of Independence as an expression of the laws of nature and nature's God. It chronicles the Declaration's succinct restatement of America's first principles: that all human beings are "created equal," they are "endowed by their Creator with certain unalienable rights," and civil governments are instituted to secure those rights.

Sections III and IV expand on the preceding analysis and explain how the People created a federal government, constitutionally limited its power, and adopted a Bill of Rights with the purpose of expressly forbidding the federal government from exercising its constitutionally limited power in such a way so as to deny or disparage equality or unalienable rights, including the unalienable right to the free exercise of religion.

Section V surveys contemporary religious liberty decisions handed down by the Supreme Court during the 1980's and early 1990's. This section examines the Court's "case law" and its neglect of the laws of nature and of nature's God, and unalienable rights in general. Section V also considers the Court's adoption of the flawed concept of balancing of rights against governmental interests. It discusses how state balancing of rights is contrary to unalienable God given rights. The section also discusses how state balancing of rights is contrary to the obligation of civil government to secure unalienable rights, and how balancing tends to nullify or marginalize such rights. Finally, the section discusses some positive developments with the Court's fledgling recognition of equality in matters pertaining to religious rights and liberties.

It is hoped that this Article will impress upon the reader the legal rule that every person enjoys in equal measure the same unalienable rights from God as their fellow human being, irrespective of their differing religious belief or lack thereof. But absent civil recognition and respect of *both* the principle of equality and unalienable rights, there can be no genuine liberty for any person or citizen. Enforcement of equality without a regard for unalienable rights has the effect of reducing all people to a condition of oppressive servitude where none enjoy fixed rights except under the illusory pledge of civil indulgence. Likewise, governmental regard for unalienable rights without an accompanying recognition of their equal endowment by God, has the fearful effect of justifying civil inquiry into a person's individual beliefs in order to "protect" those persons alone whose profession of belief shall square with that of the civil government or magistrate. Neither approach, however, is consistent with the laws of nature, the principles of the Declaration, federalism or the object of the first amendment.

## THE LAWS OF NATURE AND OF NATURE'S GOD

Law is a rule of conduct that distinguishes between right and wrong. In the root, law is based on the idea that right and wrong never change, that common rules exist which are perpetual, universal and invariable. Where do these legal rules ultimately come from and what do they require? Every student of government knows that Congress and state legislatures make law. The executive branch enforces the law. The Supreme Court has even declared its opinion are the Supreme law of the land, supposedly on par with the Constitution and the Bill of Rights.

The people of the United States, however, have declared that the source of its fundamental law comes from God. This assertion is plainly stated in the Declaration of Independence.<sup>2</sup> In drafting that document the framers expressed the unanimous legal sentiment of their newly created "united States." They declared that:

*When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with one another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitles them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.*

By referring to the "Laws of Nature and of Nature's God" in the Declaration of Independence, the signers of that document did not establish religion in any sense of the word. They established a nation and set its foundations upon a set of universal and perpetual legal rules laid down by God. They adopted certain rules that are essential to American liberty when they affirmed that America's right to be a nation among nations was based upon the "Laws of Nature and of Nature's God."

The phrase "Laws of Nature and of Nature's God" was not some mystical incantation or transitory deistic mishmash. It was placed in the Declaration to establish the legitimacy of American revolution and nationhood. The phrase referred to and incorporated the laws which God as the Creator of nature and nations,<sup>3</sup> had established to govern mankind, nations and the Universe.<sup>4</sup> The framers could confidently rely on this law not only because it authorized

revolution under certain limited conditions which the framers asserted were met, but because the laws of nature were themselves unchangeable over time. *Jura naturæ sunt immutabilia*.

These unchanging laws were ascertained through an examination of history, which when combined with a willingness to reason about that history in the unchanging light of Revelation,<sup>5</sup> eventually resulted in a legal consensus about the purpose of the "united States" and its various governments with respect to the security of rights and equality under law. The Bible was a natural book to consult because it discussed legal concepts from God's point of view over significant historical periods. The Bible also presented evidence about the universal object of law, civil government and its limited jurisdiction, and the nature and exercise of rights. To the extent that all the evidence, whatever its origin, was refined and tested in the crucible of human history and experience, and examined throughout the long process of public debate and in convention, such evidence was considered worthy of recognition and inclusion in the organic document of the new American order.<sup>6</sup>

The framers, however, did not finish their work with a declaration that the laws of nature and of nature's God authorized the United States to "assume among the powers of the earth, the separate and equal station" of nationhood. The framers went beyond revolution and nationhood. They identified some of the most essential principles of the "Laws of Nature and of Nature's God." The Declaration then translated these principles into positive law. The framers understood that the Declaration's cardinal significance lay in the fact that it articulated universal legal ideas in concrete readable terms. It reduced philosophical and natural law concepts to positive law.<sup>7</sup>

Thus, the Declaration declared the essential legal rules necessary to institute, organize and dedicate a civil government under law. It outlined and explained the object and duty of civil government. It declared that civil government was instituted to secure unalienable rights and to do so on an equal basis. These principles are the same for all persons everywhere. They are common, unchanging and universal. *Jus naturale est quod apud homines eandem habet potentiam*.<sup>8</sup> The Declaration did all these things, but it did not establish religion.

## FOOTNOTES

**1.** Various Articles and books have examined the topic of religious liberty emphasizing America's religious pluralism and accommodation of religious belief. See, P. Schaff, *Church and State in The United States* (1888), and D. Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment* (1987). But see L. Pfeffer, *Church State and Freedom* (1953). Others have examined the framer's intentions, the historical setting and the records of the Constitutional and Congressional debate. See, I. Cornelison, *The Relation of Religion to The Civil Government in The United States of America* (1895); C. James, *A Documentary History of The Struggle for Religious Liberty in Virginia* (Da Capo Press, reprint ed., 1971) (Lynchburg 1900); S. Cobb, *The Rise of Religious Liberty in America* (Cooper Square Publishers, reprint ed., 1968) (New York 1902); M. Malbin, *Religion & Politics: The Intentions of the Authors of the First Amendment* (1978); Report to the Attorney General, *Religious Liberty under the Free Exercise Clause*, United States Department of Justice, Office of Legal Policy (August 13, 1986); R. Cord, *Separation of Church and State* (1982). Professor Cord examines several significant documents including Virginia's A Bill Establishing A Provision For Teachers of the Christian Religion, Id. at 242-243; James Madison's unrefuted Memorial and Remonstrance Against Religious Assessments, Id. at 244-49, and Thomas Jefferson's A Bill for Establishing Religious Freedom, Id. at 249; McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

Others have examined and analyzed Supreme Court opinions. See, Malbin, *The Supreme Court and the Definition of Religion* (Ph.D. diss., Cornell University, 1973); McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990); *The Constitution of The United States, Analysis and Interpretation*, S. Doc. No. 99-16, 99th Cong., 1st Sess. at 963 et seq. (1986).

**2.** The legal title of the Declaration is "The Unanimous Declaration of the thirteen united States of America." For an in-depth historical analysis of the Declaration, see G. Amos, *Defending The Declaration* (1989).

**3.** The French have coined the legal maxim: *Le ley de dieu et ley de terre sont tout un; et l'un et l'autre preferre et favor le common et publique bien del terre*. The law of God and of the law of the land are all one; and both preserve and favor the common and public good of the land. The Declaration affirms the idea that the law of God and the law of the land are all one. The term "Creator," found in the second paragraph of the Declaration, and the terms "Supreme Judge" and "divine Providence" in the last paragraph, refer to God in the first paragraph, i.e., the "Laws of Nature and of Nature's God." These various references to God and the law of God in their most basic sense, serve as a foundation upon which the law of the constitution was subsequently erected.

The Supreme Court has also acknowledged the significance of these provisions of the Declaration by recognition of "the presence of the Divine in human affairs." Church of the Holy

Trinity v. United States, 143 U.S. 457, 467 (1891). See also, H. Long, *The American Ideal of 1776* (1976); S. Robinson, *And . . . We Mutually Pledge* (1964), and W. Skousen, *The Making of America* (1985).

**4.** Sir William Blackstone recognized that when God created the universe, He impressed upon it certain laws. Blackstone included among the fixed laws those of motion, of gravitation, of optics, and of mechanics. Likewise when God created mankind, He endowed him with "certain immutable laws of human nature, whereby [man's] freewill is in some degree regulated and restrained." 1 W. Blackstone, *Commentaries* 39-40 (The Legal Classics Library, 1983) (London 1765). God gave man the ability to reason and thereby discover the essence of the laws of his Creator--laws that would contribute to his "substantial happiness." According to Blackstone, the accuracy of the conclusions that reason produced were suspect unless informed by the revealed will of God in the Bible.

For an excellent discourse and background on the principles of the laws of nature and of nature's God, see J.Q. Adams, *The Jubilee of the Constitution, a Discourse delivered at the request of the New York Historical Society, on Tuesday, the 30th of April, 1839*, reprinted in 6 J. of Christian Juris. 1 (1987) (hereinafter J.Q. Adams).

**5.** *Lex est dictamen rationis*. Law is the dictate of reason. This maxim implies that "the common law will judge according to the law of nature and the public good."

**6.** For reference to the framer's discussion pertaining to reliance on the idea of the laws of nature, see 2 *The Works of John Adams, Delegates in The Continental Congress of 1774*, 371-374. John Adams also wrote in the *Boston Gazette* exhorting Bostonians to become attentive to the general grounds and principles of their civil government. He began, "Let us study the law of nature . . . ." 3 *The Works of John Adams, The Dissertation on the Canon and Feudal Law* 462 (1765).

The Declaration did not reflect a peculiarly American concept of law. In 1751 the French Baron de Montesquieu, whose legal treatise, "The Spirit of Laws," was well known to the framers. Montesquieu had also acknowledged that God was the lawgiver and was the Creator of the universe. He wrote, "God is related to the universe as creator and preserver; the laws by which he has created all things are those by which he preserves them." Baron de Montesquieu, *The Spirit of Laws* 2 (The Legal Classics Library, 1984) (Dublin 1751).

**7.** The reduction of principle to positive law refers to the universal principles that were reduced to writing and given legal force and effect in the 1776 Declaration. In this sense, this Article's reference to Positive law does not embrace positivism--that system of philosophy founded after the Declaration, by Auguste Comte (1798-1857) which rejects all speculation concerning ultimate origins or causes.

So widespread is the Declaration's significance as the positive foundation of American law that it has even been likened to the Magna Carta. "If the Declaration of Independence is not obligatory, our entire political fabric has lost its magna carta, and is without any solid foundation. But if it is

the basis of our form of government, it is the true expositor of the principles and terms we have employed." J. Taylor, *New Views of the Constitution of the United States* 2 (Da Capo Press, reprint ed., 1971) (Washington 1823).

**8.** Natural right is that which has the same force among all mankind.