Thoughts on Monopolies, Intellectual Property, Corporations and Religious Liberties

James Madison
Written between 1817 and 1832

Monoplies tho' in certain cases useful ought to be granted with caution, and guarded with strictness agst abuse. The Constitution of the U. S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner might otherwise withold from public use. There can be no just objection to a temporary monopoly in these cases but it ought to be temporary, because under that limitation a sufficient recompence and encouragement may be given. The limitation is particularly proper in the case of inventions, because they grow so much out of preceding ones that there is the less merit in the authors and because for the same reason, the discovery might be expected in a short time from other hands.

Monopolies have been granted in other Countries, and by some of the States in this, on another principle, that of supporting some useful undertaking untill experience and success should render the monopoly unnecessary, & lead to a salutary competition. This was the policy of the monopoly granted in Virga to Col. Jno Hoomes to establish a passenger-stage from ____ to ____ But grants of this sort can be justified in very peculiar cases only, if at all, the danger being very great that the good resulting from the operation of the monopoly, will be overbalanced by the evil effect of the precedent, and it being not impossible that the monopoly itself, in its original operation, may produce more evil than good.

In all cases of monopoly, not excepting those specified in favor of authors & inventors, it would be well to reserve to the State, a right to terminate the monopoly by paying a specified and reasonable sum. This would guard against the public discontents resulting from the exorbitant gains of individuals, and from the inconvenient restrictions combined with them. This view of the subject suggested, the clause in the bill relating to J. Rumsey in the Virga Legislature in the year 178_ providing that the State might cancel his privilege by paying him ten thousand dollars and to secure him agst the possibility of a payment in depreciated medium, then a prevalent apprehension, it was proposed that the sum should be paid in metal & that of a specified weight & fineness.

One objection to a Bank is that it involves a qualified monopoly, and the objection certainly has weight in proportion to the degree & duration of the monopoly.

Perpetual monopolies of every sort, are forbidden not only by the genius of free Govts, but by the imperfection of human foresight. (Among such monopolies, cannot be included the grants in perpetuity of public lands to individuals, the grants being made according to rules of impartiality, for a valuable consideration, and all lands being held equally by that tenure from the public, the vital principle of monopoly is lost. The benefit is not confined to one or a few, but is enjoyed by the whole or a majority of the Community. The evil of an excessive & dangerous cumulation of landed property in the hands of individuals is best precluded by the prohibition of entails, by the suppression of the right of primogeniture, and by the liability of landed property to the payment of debts. In Countries where there is a rapid increase of population as the U. S. these provisions are evidently sufficient; and in all countries wd probably be found so.) Where charters of incorporation, even the common ones to towns for the sake of local police, contain clauses implying contracts, and irrevocabily, they are liable to objections of equal force. The ordinary limitation on incorporated Societies is a proviso that their laws shall not violate the laws of the land. But how easily may it happen that redress for such violations may not be pursued into effect? How much injury may accrue during the pursuit of redress. And above all how much local injustice and oppression may be committed by laws & regulations, not in strict construction violating any law of the land. Within the local limits, parties generally exist, founded on different sorts of property, sometimes on divisions by streets or little streams; frequently on political and religious differences. Attachments to rival individuals, are not seldom a source of the same divisions. In all these cases the party animosities are the more violent as the compass of the Society may more easily admit of the contagion & collision of the passions; and according to that violence is the danger of oppression by one party on the other; by the majority on the minority. The ways in which this can be effected, even beyond the cognizance of the paramount law of the land have scarce any other limits than the ingenuity and interest of those who possess the power. Is a tax to be collected? What inequality may attend the rule or modes of assessment? Is a public building to be erected, what is to guard agst partiality or favoritism in fixing its site? Is there a single regulation of police which will not differently affect the component parts of the society, and afford an opportunity to the majority to sacrifice to their prejudices or their conveniency the conveniency or the interests of the minor party.

When the town incorporated is not only a Market town for the neighbourhood, but a port for an external commerce the effect of its

police has a wider range, and its corporate powers the greater need of some other controul than the vague & inefficient one, of the law of the land.

The best illustration of these remarks is to be found in the recorded proceedings of the various local Corporations. What is generally known sufficiently justifies them. Without even a recurrence to facts a common knowledge of human nature, would suggest the probability of the abuses on which they are founded.

The most effectual & perhaps the least exceptionable provision agst them, seems to be that of superadding to the general restraint of the law of the land, a previous veto in some impartial & convenient quarter on each particular by law. The Executive authority of the State or that authority in consultation with a judge or judges of the highest grade might perhaps be relied on for the controul on these local legislatures, most likely to preserve a just, a uniform, and an impartial exercise of their subordinate powers.

The danger of silent accumulations & encroachments by Ecclesiastical Bodies have not sufficiently engaged attention in the U.S. They have the noble merit of first unshackling the conscience from persecuting laws, and of establishing among religious Seas a legal equality. If some of the States have not embraced this just and this truly Xn principle in its proper latitude, all of them present examples by which the most enlightened States of the old world may be instructed; and there is one State at least, Virginia, where religious liberty is placed on its true foundation and is defined in its full latitude. The general principle is contained in her declaration of rights, prefixed to her Constitution: but it is unfolded and defined, in its precise extent, in the act of the Legislature, usually named the Religious Bill, which passed into a law in the year 1786. Here the separation between the authority of human laws, and the natural rights of Man excepted from the grant on which all political authority is founded, is traced as distinctly as words can admit, and the limits to this authority established with as much solemnity as the forms of legislation can express.

The law has the further advantage of having been the result of a formal appeal to the sense of the Community and a deliberate sanction of a vast majority, comprizing every sect of Christians in the State. This act is a true standard of Religious liberty: its principle the great barrier agst usurpations on the rights of conscience. As long as it is respected & no longer, these will be safe. Every provision for them short of this principle, will be found to leave crevices at least thro' which bigotry may introduce persecution; a monster, that feeding & thriving on its own

venom, gradually swells to a size and strength overwhelming all laws divine & human.

Ye States of America, which retain in your Constitutions or Codes, any aberration from the sacred principle of religious liberty, by giving to Caesar what belongs to God, or joining together what God has put asunder, hasten to revise & purify your systems, and make the example of your Country as pure & compleat, in what relates to the freedom of the mind and its allegiance to its maker, as in what belongs to the legitimate objects of political & civil institutions.

Strongly guarded as is the separation between Religion & Govt in the Constitution of the United States the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished in their short history.

The most notable attempt was that in Virga to establish a Gen assessment for the support of ail Xn sects. This was proposed in the year (1784) by P. H. [Patrick Henry] and supported by all his eloquence, aided by the remaining prejudices of the Sect which before the Revolution had been established by law. The progress of the measure was arrested by urging that the respect due to the people required in so extraordinary a case an appeal to their deliberate will. The bill was accordingly printed & published with that view. At the instance of Col: George Nicholas, Col: George Mason & others, the memorial & remonstrance agst it was drawn up, and printed Copies of it circulated thro' the State, to be signed by the people at large. It met with the approbation of the Baptists, the Presbyterians, the Quakers, and the few Roman Catholics, universally; of the Methodists in part; and even of not a few of the Sect formerly established by law. When the Legislature assembled, the number of Copies & signatures prescribed displayed such an overwhelming opposition of the people, that the proposed plan of a genl assessmt was crushed under it: and advantage taken of the crisis to carry thro' the Legisl: the Bill above referred to, establishing religious liberty.

In the course of the opposition to the bill in the House of Delegates, which was warm & strenuous from some of the minority, an experiment was made on the reverence entertained for the name & sanctity of the Saviour, by proposing to insert the words "Jesus Christ" after the words "our lord" in the preamble, the object of which would have been, to imply a restriction of the liberty defined in the Bill, to those professing his religion only. The amendment was discussed, and rejected by a vote of agst (See letter of J. M. to Mr. Jefferson dated)1 The opponents of the amendment having turned the feeling as well as judgment of the House agst it, by successfully contending that the better proof of reverence for

that holy name wd be not to profane it by making it a topic of legisl. discussion, & particularly by making his religion the means of abridging the natural and equal rights of all men, in defiance of his own declaration that his Kingdom was not of this world. This view of the subject was much enforced by the circumstance that it was espoused by some members who were particularly distinguished by their reputed piety and Christian zeal.

But besides the danger of a direct mixture of Religion & civil Government, there is an evil which ought to be guarded agst in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations. The power of all corporations, ought to be limited in this respect. The growing wealth acquired by them never fails to be a source of abuses. A warning on this subject is emphatically given in the example of the various Charitable establishments in G. B. [Great Britian] the management of which has been lately scrutinized. The excessive wealth of ecclesiastical Corporations and the misuse of it in many Countries of Europe has Long been a topic of complaint. In some of them the Church has amassed half perhaps the property of the nation. When the reformation took place, an event promoted if not caused, by chat disordered state of things, how enormous were the treasures of religious societies, and how gross the corruptions engendered by them; so enormous & so gross as to produce in the Cabinets & Councils of the Protestant states a disregard, of all the pleas of the interested party drawn from the sanctions of the law, and the sacredness of property held in religious trust. The history of England during the period of the reformation offers a sufficient illustration for the present purpose.

Are the U. S. duly awake to the tendency of the precedents they are establishing, in the multiplied incorporations of Religious Congregations with the faculty of acquiring & holding property real as well as personal! Do not many of these acts give this faculty, without limit either as to time or as to amount! And must not bodies, perpetual in their existence, and which may be always gaining without ever losing, speedily gain more than is useful, and in time more than is safe! Are there not already examples in the U. S. of ecclesiastical wealth equally beyond its object and the foresight of those who laid the foundation of it! In the U. S. there is a double motive for fixing limits in this case, because wealth may increase not only from additional gifts, but from exorbitant advances in the value of the primitive one. In grants of vacant lands, and of lands in the vicinity of growing towns & Cities the increase of value is often such as if foreseen, would essentially controul the liberality confirming them. The people of the U. S. owe their Independence &. their liberty, to the wisdom of descrying in the minute tax of 3 pence on tea, the magnitude of the evil comprized in the precedent. Let them exert the same wisdom,

in watching agst every evil lurking under plausible disguises, and growing up from small beginnings. Obsta principiis.

Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom? In strictness the answer on both points must be in the negative. The Constitution of the U. S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation?

The establishment of the chaplainship to Congs is a palpable violation of equal rights, as well as of Constitutional principles: The tenets of the chaplains elected [by the majority shut the door of worship agst the members whose creeds & consciences forbid a participation in that of the majority. To say nothing of other sects, this is the case with that of Roman Catholics & Quakers who have always had members in one or both of the Legislative branches. Could a Catholic clergyman ever hope to be appointed a Chaplain! To say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers or that the major sects have a tight to govern the minor.

If Religion consist in voluntary acts of individuals, singly, or voluntarily associated, and it be proper that public functionaries, as well as their Constituents shd discharge their religious duties, let them like their Constituents, do so at their own expense. How small a contribution from each member of Cong wd suffice for the purpose! How just wd it be in its principle! How noble in its exemplary sacrifice to the genius of the Constitution; and the divine right of conscience! Why should the expence of a religious worship be allowed for the Legislature, be paid by the public, more than that for the Ex. or Judiciary branch of the Gov

Were the establishment to be tried by its fruits, are not the daily devotions conducted by these legal Ecclesiastics, already degenerating into a scanty attendance, and a tiresome formality!

Rather than let this step beyond the landmarks of power have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism de minimis non curat lex: or to class it cum "maculis quas aut incuria fudit, aut humana parum cavit natura."

Better also to disarm in the same way, the precedent of Chaplainships for the army and navy, than erect them into a political authority in matters of religion. The object of this establishment is seducing; the motive to it is laudable. But is it not safer to adhere to a right principle, and trust to its consequences, than confide in the reasoning however specious in favor of a wrong one. Look thro' the armies & navies of the world, and say whether in the appointment of their ministers of religion, the spiritual interest of the flocks or the temporal interest of the Shepherds, be most in view: whether here, as elsewhere the political care of religion is not a nominal more than a real aid. If the spirit of armies be devout, the spirit out of the armies will never be Less so; and a failure of religious instruction &, exhortation from a voluntary source within or without, will rarely happen: if such be not the spirit of armies, the official services of their Teachers are not likely to produce it. It is more likely to flow from the labours of a spontaneous zeal. The armies of the Puritans had their appointed Chaplains; but without these there would have been no lack of public devotion in that devout age.

The case of navies with insulated crews may be less within the scope of these reflections. But it is not entirely so. The chance of a devout officer, might be of as much worth to religion, as the service of an ordinary chaplain. [were it admitted that religion has a real interest in the latter.] But we are always to keep in mind that it is safer to trust the consequences of a right principle, than reasonings in support of a bad one.

Religious proclamations by the Executive recommending thanksgivings & fasts are shoots from the same root with the legislative acts reviewed.

Altho' recommendations only, they imply a religious agency, making no part of the trust delegated to political rulers.

The objections to them are

I. that Govts ought not to interpose in relation to those subject to their authority but in cases where they can do it with effect. An advisory Govt is a contradiction in terms.

2. The members of a Govt as such can in no sense, be regarded as possessing an advisory trust from their Constituents in their religious capacities. They cannot form an ecclesiastical Assembly, Convocation, Council, or Synod, and as such issue decrees or injunctions addressed to the faith or the Consciences of the people. In their individual capacities, as distinct from their official station, they might unite in recommendations of any sort whatever, in the same manner as any other

individuals might do. But then their recommendations ought to express the true character from which they emanate.

3. They seem to imply and certainly nourish the erronious idea of a national religion. The idea just as it related to the Jewish nation under a theocracy, having been improperly adopted by so many nations which have embraced Xnity, is too apt to lurk in the bosoms even of Americans, who in general are aware of the distinction between religious & political societies. The idea also of a union of all to form one nation under one Govt in acts of devotion to the God of all is an imposing idea. But reason and the principles of the Xn religion require that all the individuals composing a nation even of the same precise creed & wished to unite in a universal act of religion at the same time, the union ought to be effected thro' the intervention of their religious not of their political representatives. In a nation composed of various sects, some alienated widely from others, and where no agreement could take place thro' the former, the interposition of the latter is doubly wrong:

4. The tendency of the practice, to narrow the recommendation to the standard of the predominant sect. The Ist proclamation of Genl Washington dated Jany 1. 1795 recommending a day of thanksgiving, embraced all who believed in a supreme ruler of the Universe." That of Mr. Adams called for a Xn worship. Many private letters reproached the Proclamations issued by J. M. for using general terms, used in that of Presit W--n; and some of them for not inserting particulars according with the faith of certain Xn sects. The practice if nor strictly guarded naturally terminates in a conformity to the creed of the majority and a single sect, if amounting to a majority.

5. The last & not the least objection is the liability of the practice to a subserviency to political views; to the scandal of religion, as well as the increase of party animosities. Candid or incautious politicians will not always disown such views. In truth it is difficult to frame such a religious Proclamation generally suggested by a political State of things, without referring to them in terms having some bearing on party questions. The Proclamation of Pres: W. which was issued just after the suppression of the Insurrection in Penna and at a time when the public mind was divided on several topics, was so construed by many. Of this the Secretary of State himself, E. Randolph seems to have had an anticipation.

The original draught of that Instrument filed in the Dept. of State in the hand writing of Mr Hamilton the Secretary of the Treasury. It appears that several slight alterations only had been made at the suggestion of the Secretary of State; and in a marginal note in his hand, it is remarked that "In short this proclamation ought to savour as much as possible of

religion, & not too much of having a political object." In a subjoined note in the hand of Mr. Hamilton, this remark is answered by the counter-remark that "A proclamation of a Government which is a national act, naturally embraces objects which are political" so naturally, is the idea of policy associated with religion, whatever be the mode or the occasion, when a function of the latter is assumed by those in power.

During the administration of Mr Jefferson no religious proclamation was issued. It being understood that his successor was disinclined to such interpositions of the Executive and by some supposed moreover that they might originate with more propriety with the Legislative Body, a resolution was passed requesting him to issue a proclamation.

It was thought not proper to refuse a compliance altogether; but a form & language were employed, which were meant to deaden as much as possible any claim of political right to enjoin religious observances by resting these expressly on the voluntary compliance of individuals, and even by limiting the recommendation to such as wished simultaneous as well as voluntary performance of a religious act on the occasion.