EDITORIALS.

MARRIAGE AND THE CONSTITUTION.

In the charge of Chief Justice White, in the Third District Court in this city, to the jury in the case of the U. S. *vs.* George Reynolds, recently delivered, his honor expounds the law and the Constitution in reference to a plurality of wives. In our opinion the learned gentleman does not grasp the question with the broad comprehensiveness, nor present it to the jury with the unclouded perspicuity, which the importance of the subject demands. To some people of limited views the question appears definite, and they narrowly and hastily decide that all plural marriages are crimes, and should be punished by law. To others the question is involved in a large amount of obscurity and doubt, and they are unable to see plainly what steps should be taken in the matter, what steps Congress should take, or whether or not that body has any right to take any steps whatever in regard to it. There is again a third class, who comprehend the whole question more thoroughly, see it in its various aspects with an approximation towards perfect clearness, and consequently are fully assured that Congress has no constitutional right to interfere in the matter of "Mormon" plural marriages, has nothing whatever to do with the subject.

To our view, and judging by his charge in the case mentioned, the Chief Justice belongs to the first named class. In our opinion his charge does very scant justice to the subject. It is too superficial in regard to the question of the constitutionality of the law against plurality of wives, and to the right of Congress to make a law forbidding plural marriages in Utah, and providing punishment for men who marry more than one wife. For our part we are perfectly satisfied that the law of 1862, under which this prosecution of Mr. Reynolds was based, is plainly and flatly unconstitutional, that it ought to be so adjudged in every case of the kind. This we will proceed to demonstrate beyond rational controversy, first stating, by the way, that the law of 1862 was for the prevention and punishment of polygamy, but the Revised Statutes speak of the offence simply as bigamy.

The fundamental principle of the Federal Union is civil and religious liberty—as to civil liberty, the right of the people to self-government, to a government of and by and for the people; and as to religious liberty, the right of every man to worship God according to the dictates of his own conscience. This has always been proudly held forth as the distinguishing characteristic of the government of the United States, as its great superiority over the monarchies, empires and despotisms of the old world, and every other form of government than this upon the globe.

The Declaration of Independence states, as self-evident truths, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are *life*, liberty, and the pursuit of happiness; that governments are instituted to secure these rights, and derive their just powers from the consent of the governed; that the people have a right to institute or change governments, so that they may be founded on such principles and organized in such form as to them shall seem most likely to effect their safety and happiness. Under these fundamental doctrines, or "self-evident truths," the United Colonies proclaimed themselves to all the world "free and independent states," and the republic of the United States of America was formed.

These "free and independent States," in their "Articles of Confederation and Perpetual Union," entered into a firm league of friendship with each other for, among other things, "the security of their liberties," binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, etc., thus showing that a "profound love of liberty" inspired them to act, that the security of their liberties was among the first cares of our revolutionary sires, and that religious liberty was not the least of the liberties involved in this great watchcare.

In the "Articles of Compact" between the original States and the people of the Northwestern Territory, as incorporated in the "Ordinance" for the government of that territory, there was an express provision that the people should not be molested in their religious sentiments or mode of worship, and these "Articles of Compact" were ordained and declared "for extending the principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in said territory," etc., and these Articles of Compact were declared to "forever remain unalterable, unless by common consent." This was the beginning of the territorial system of the United States, showing that the inhabitants of the Territories, as a matter of course, had the same inalienable rights, guaranteed to them as well as to the inhabitants of the States, of religious liberty, and the pursuit of life, liberty and happiness.

In pursuance of this grand principle the Constitution of the United States expressly provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is true that this provision is binding upon Congress, but not upon the various States. The provision is that "Congress shall make no law," etc., but the States are not therein forbiden to make a law of this kind. As the Cincinnati *Commercial* expresses it, "there is now nothing in the Constitution of the United States to prevent any single commonwealth, should it happen to be settled or colonized by a preponderant majority of any religious sect, whether Mormons, Catholics or Anabaptists, from so shaping the Constitution and laws of that State as to disfranchise, or otherwise discriminate against all citizens not affiliating with the prevalent religious belief." In times past some of the States have enacted and enforced laws bearing upon religious faith and practice, but such laws have not been in consonance with the fundamental principles of the Constitution, and are regarded now as things of a past age and as the results or lingering remnants of the Old World policy of governments restricting, regulating, or controlling religious matters, so that at the present time many or most, if not all, of the States have engrafted upon their constitutions this constitutional principle of liberty, whether or not expressed in the same identical words. In fact, theoretically at least, this principle of the liberty of the people is the one great central, salient, distinguishing feature of the American system of government, in express and emphatic and fundamental contradistinction to the common Old World practice of governments interfering with, regulating, and in a greater or less degree controlling the religion of their subjects.

Thus, if Congress enacts a law respecting an establishment of religion, or prohibiting the free exercise thereof, Congress does an unconstitutional thing, and if a State enacts any such law, whether or not it violates its own constitution, it does violate the Declaration of Independence, and the great principle of religious liberty, which is one of the fundamental principles of the American system of popular government.

If Congress has no power to make a law concerning an establishment of religion, nor to prohibit the free exercise thereof, then it follows, as clear as can be, that any such law made by Congress is unconstitutional, and consequently is null and void, and ought to be so regarded and authoritatively declared in each and every instance.

Chief Justice White recognizes this provision of the Constitution and its binding force upon Congress, and declares that "it is of the very essence of American liberty that this right should be accorded in effect and in spirit by all and to all," and that "the reverse of it, persecution for opinion's sake, is the essence of tyranny."

This is all very good, so far as it goes, but the Judge continues and says that "there must be some limit to this high constitutional privilege," and that "parallel with and dominating over this is the obligation which every member of society owes to that society; that is, obedience to law." Dominating over what? What can dominate over a plain constitutional provision? The constitution and all constitutional laws are the "supreme law of the land." What "obedience to law" can dominate over the "supreme law of the land?" What obligation to society can dominate over that supreme law which guarantees the rights and privileges of every individual member of society, and the rights and privileges of society in the concrete? His honor appears to have got things a little mixed here. But it is excusable, as the questions before him were new and peculiar. However, we will proceed to unfold the mystery, to unravel the web, and to make the whole subject as plain as a pikestaff, so plain that the wayfaring man, though a fool, need not err therein.

The point which appears to have puzzled and somewhat mystified the Chief Justice, and which he failed to comprehend and consequently to present clearly, in his charge, is the obligation of members of society to society, or to each other, or, in other words, the limits of constitutional rights and privileges, the line of demarcation between the rights and privileges of one citizen and the rights and privileges of another citizen. We see no difficulty in this, but his honor evidently did, and his ideas of those limits or that line of demarcation seem extraordinary. The Constitution itself furnishes, as we think, the unmistakable landmarks which distinctly designate those limits, that line of demarcation, beyond dispute, when once seen and recognized. The Constitution guarantees to every citizen the right to the "free exercise" of his religion, whatever it may be, and therefore, per force, the exercise of no citizen's religion can be allowed if it is of a nature to deprive any other citizen of the same constitutional guarantees. That is the line. What can be plainer than this? If the Judge had seen this in its native simplicity, its inherent clearness, he would not have adopted such a weak mode of reasoning as he did, for he would have seen the inadequacy, the fallacy of that reasoning.

The Chief Justice presents the strange proposition that the limit of the constitutional guarantee of the free exercise of religion is the line between opinion and action, faith and works, theory and practice. This is one of the strangest ideas conceivable. The Constitution says nothing of the kind. A religion that is all opinion, all faith, all theory, is no religion at all. It amounts to nothing whatever. It is nonsense to say that the Constitution guarantees freedom of religious opinion, of religious faith, of religious theory. Every man in every nation has that freedom, for the very good reason that no power on earth can hinder him, no earthly power can prevent him from thinking what he pleases, believing what he pleases, and theorizing as he pleases. The assertion that the framers of the Constitution did incorporate in it a provision guaranteeing a man rights and privileges which they could neither guarantee nor deny, is simply ridiculous. Not all the constitutions and Congresses and governments on earth can hinder a man from having as many opinions, faiths, and theories as he pleases. They cannot effectually prescribe his faith, his opinions, his theories. In this he is entirely beyond their power, outside of their jurisdiction, and it seems weakness even to puerility to argue that any earthly constitution guarantees to a man rights and privileges of this kind.

If the Constitution guarantees to every citizen the right to the free exercise of his religion, which it certainly does, so far as Congress is concerned, then it guarantees no more to one citizen than it does to another, that very guarantee gives all men equal rights to the free exercise of their religion, unhindered by the religion of any other man. Hence, there needs no other law to dominate over this constitutional provision. Again, as to civil rights, if the constitution guarantees to every citizen the right to life, liberty, and the pursuit of happiness, so far as Congress is concerned, that very guarantee prevents one man, in such pursuit, from infringing upon the right of another man in the same pursuit. Then what necessity for any other law or obligation to dominate over the constitution? We see none whatever. There is none, and there can be none.

Congress is prohibited from making any law prohibiting the exercise of religion. This says nothing about opinions. It is no prohibition against making laws prohibiting the forming or holding of any religious opinions, as none was needed. The *expression* of religious opinions, however, may be considered as coming under the meaning of the exercise of religion, and concerning this Congress has no right to make any prohibitory laws. Expression of opinion is more than opinion, it is an act, such as preaching or lecturing or writing upon religion, and this Congress can not constitutionally prohibit. Many governments prohibit it, or place it under very rigid restrictions. Even in England the law requires a preacher to have a licence to preach, though this law, like some others in that country affecting religion, is not very strictly put into operation. But Congress has no constitutional authority to require a man to be licensed to preach, because preaching is included in the exercise of religion, with which Congress has no right to interfere. Besides, the freedom of speech and of the press is otherwise constitutionally guaranteed.

There are a great many other actions pertaining to the free exercise of religion, and Congress has no right to prohibit these actions. Congress has no right to prohibit prayer; or baptism; or the laying on of hands for the gift of the Holy Ghost, or for healing, or for ordination; or singing, or playing on musical instruments, in church or chapel; or the building of religious edifices; or the dedication or consecration of houses or places for public worship or other religious purposes; or the holding of meetings of any kind for religious purposes; or the partaking of the sacrament of the Lord's Supper; or the holding of mass; or wearing various ministerial robes; or the Shaker dancing in worship. These are all religious acts, not religious opinions.

Are there any other religious acts which Congress cannot consiitutionally prohibit? Yes, very many. No purely religious act of any citizen can be constitutionally prohibited, if it does not infringe upon the liberties guaranteed by the Constitution to each and every citizen. This is the true constitutional limit of the free exercise of religious liberty. So far Congress is authorized to make laws, but no further, not a single step further. The limit is not between religious opinions and religious acts, but it is entirely in the domain of religious acts, and lies on the verge where a religious act, if permitted further, would debar some citizens of constitutionally guaranteed liberties.

Here comes in the all important question, is marriage a religious ceremony? We may answer at once, sometimes it is, and sometimes it is not. Roman Catholics to this day consider marriage a religious ceremony, a sacrament. So do devout and many undevout members of most if not all Christian churches. Germany, Switzerland, and Mexico have recently passed laws to the effect that marriage should be a civil ceremony. But what need of such laws if a large and influential portion of the citizens or subjects of those nations had not believed that marriage was a religious ceremony? We know that they did so regard marriage, and do now.

It is not many years since all marriages in England were religious, and performed by religious ministers, excepting such irregular unions as those of Gretna Green. Even now the great majority of marriages contracted in that country are of a religious nature, performed in religious edifices, by religious ministers, and with a long established and greatly venerated religious ritual, or "service," drawn largely from the Bible. A few years back registrars were authorized to perform a simple and greatly abbreviated civil marriage ceremony. But even to this day thousands of men and women in that country would hardly consider themselves properly married unless it were done in the orthodox fashion in church or chapel, by a religious minister, and according to an acknowledged religious ceremonial. The banns are published in church and the marriages take place there. Why is all this, if marriage was not and is not considered a religious ceremony by a vast number of people in the various nations of Christendom? Is not the expression, "Whom God hath joined together, let no man put asunder," very common in marriage rituals, and very commonly used in relation to married people? The very notice, "Marriages may be solemnized in this chapel," so common in England, has a religious sound to it. The idea of solemnity with many people is a part of the very essence of religion.

In these United States of America and in the Dominion of Canada, a greatly similar condition of things exists. Civil marriages there are, and religious marriages there are, yet thousands of people would not be married by the civil authorities, they would be satisfied with nothing short of a religious marriage, "solemnized" in a house of religious worship, in a religious ceremonial, and by an accredited minister of religion. Especially with the Roman Catholics is marriage sacredly regarded and observed, and religiously "solemnized," and oftentimes with grand and imposing religious ceremonies.

Thus it is as plain as plain can be that two kinds of marriages exist—religious, and civil, that the religious kind were the earliest established in Christendom, and that they are now regarded with the most profound reverence by strictly religious people, and as the only satisfactory marriages to them.

It may be said that the law regards all marriages as civil and not religious. If the law does any such thing, then the law is decidedly wrong, and such law is emphatically unconstitutional. The nations of the Old World may have so declared, and they are not inconsistent in so doing, because they do not profess to guarantee the popular liberties, either civil or religious, that America does, they are not bound by a constitutional provision not to interfere in religious matters, as the Congress of the United States is. Therefore those governments can legitimately do in this regard what the Congress and Government of the United States cannot constitutionally do.

Here is the great controlling constitutional fact—Congress has no authority to declare what is or what is not religion, what is or what is not a part of religious worship. Congress can not do this, the Federal Government cannot do this, the Supreme Court of the United States cannot do this. It is outside the constitutional jurisdiction of all these.

Who then can do it? Each individual citizen for himself. It is a matter entirely and exclusively resting with his own conscience, by emphatic provision of the Federal Constitution, so far as federal authority is concerned. Each individual citizen has the constitutional prerogative to declare, definitively and authoritatively, what is or what is not a part and portion of his religion. The constitution expressly authorizes every man to be the one grand arbiter, the sole dictator, upon the question as to what is or what is not his own religion, and consequently as to which of his acts are religious acts, and which are civil or secular acts.

This is consistent. For who but himself can truthfully and knowingly declare, beyond controversy, which of the acts of a man are to him of a religious nature, which of his acts are covered by and incorporated in the exercise of his religion? None can. Some men's religions include and require a great many acts of various kinds, while other men's religions include and require comparatively few actions.

In regard to the matter of marriage, who shall say whether a man's marriage is a civil or a religious ceremony, whether it is part of his religion or not? Has Congress the right? Has the Federal Government the right? Has the Supreme Court of the United States the right? No. Certainly not. The man, and the man alone, has that right. If he considers his marriage a part of his religion, to him it is actually a part of his religion, and neither Congress nor courts can make it otherwise. As such part of his religion Congress can not constitutionally prohibit the free exercise thereof to him.

It is only since 1862 that Congress has had a law upon the subject of marriage in the Territories. Previously, that subject was left by Congress to the legislatures of the Territories, as it was uniformly to the legislatures of the States. But it now seems to be pretty generally accepted that Congress can legislate upon marriage as a civil institution for the Territories, and