The First Liberty: a Short History of the Freedom of Religion in the United States of America

Allen Moran

The history of the United States of America from the drafting of the Constitution in 1787 until today has been one marked by the articulation of certain God-given human freedoms and the struggle to advance and defend these freedoms. Without the assurance that the federal government's powers would be limited by an articulation in law of basic human rights, it is almost certain that the thirteen original states would not have passed the 1787 constitution, which of itself only defines the three branches of government [executive, legislative, and judicial] and lists the rights and responsibilities or the "checks and balances" of each and codifies the relationship between the federal government to the individual states. Article VI, Section 3 of the Constitution, however, did prohibit any type of religious test or creed from being used as a prerequisite to any public office.[1]

The Bill of Rights originally consisted of twelve proposed amendments to the constitution and was introduced to the first United States Congress by James Madison, who would later become the fourth president of the country, in 1789 and was passed by the first Congress later that year. To become law the amendments also needed to be passed by three-quarters of the states. Ten of these amendments were quickly passed and entered into legal force as constitutional amendments on December 15, 1791.[2] The Bill of Rights begins with the First Amendment, which addresses the freedoms of religion, speech, the press, assembly, and petition. Of these freedoms, the freedom of religion is mentioned first, which although it does not grant to it a legal priority over the other freedoms mentioned in the amendment, it perhaps reveals the understanding of the framers of the Bill of Rights as to its primary importance. The First Amendment prohibits the Congress of the United States of America from establishing a religion [the Establishment Clause] for the entire republic or in interfering with the free exercise of a religion [Free Exercise Clause]: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.*

Although the wording of the First Amendment is quite simple and straightforward, its implementation and interpretation in the country's court system show several stages of change. While the country's Declaration of Independence speaks of all men being created equal, "that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness," the legal system's interpretation of law does not rest on a classical understanding of Natural Law. Instead it functions based off of positivistic letter of the law, attempts to understand the intentions of the founding fathers, and most importantly on precedent—the history of legal interpretations. In the two hundred and twenty plus year history of the interpretation of the First Amendment, three basic periods are observable: 1) from ratification in 1792 until the passage of the Fourteenth Amendment in 1868, 2) from 1868 until the 1947 Supreme Court decision *Everson v. Board of Education*, and 3) 1947 until today. During this time span, the relationship between church and state changed markedly. In very general terms, the first period was marked by continued ties in certain states between specific religious bodies or churches and the state, occasions of public funding of certain religious activity, examples of religious intolerance, and

certain expressly Christian pronouncements on the Christian roots of the country. The middle period was marked by a gradual extension of the Establishment Clause and the Free Exercise Clause to the level of state and local governments. In general, a basically non-denominational Protestant Christianity was promoted at the state and local levels, particularly in public schools, but this began to unravel in 1925. In the most recent and on-going period, the legal trend has been to remove any semblance of government sanction of religion in any form. The issue is no longer whether America is a Christian nation (or some other type of religion) but whether government can show any legal preference to religion in general as opposed to irreligion, atheism, or agnosticism. Before turning to these periods, however, it is first important to understand the diverse attitudes towards religious liberty that the country inherited from its colonial experience.

Colonial Experience

In 1634, two ships named the Ark and the Dove carrying both Catholics and Protestants from England landed on St. Clement's Island in the Chesapeake Bay to establish the colony of Maryland. King Charles I, an Anglican, had granted the Catholic Lord Baltimore a charter for a new colony, and it was Baltimore's intention from the beginning that this colony would be a place where both Catholics and Protestants could live in peace with one another. Religious toleration was codified in 1649 in Maryland Toleration Act. A Puritan uprising in the colony in 1650, however, led to an eight-year hiatus for religious tolerance, but when Lord Baltimore regained control of the colony in 1658 he reconfirmed the Toleration Act. Religious toleration would endure in Maryland until 1692 when the forces that had come to power in the "Glorious Revolution of 1688" in Britain and Maryland's related 1689 "Protestant Revolution" rescinded religious freedom and eventually established the Church of England.

In certain other colonies, religious liberty was more enduring. In 1635, Roger Williams was cast out of the Puritan Massachusetts Bay Colony for holding dissenting religious views. He moved just south of Massachusetts and established the colony of Rhode Island and Providence Plantations in 1636. The small colony was declared a land for religious liberty where no one would interfere in the exercise of another's religion, and the colony itself would refrain from establishing a church. Roger William's own thoughts on the superiority of the separation of church and state would later prove very influential at least in one historic letter written by the third President of the United States, Thomas Jefferson.

The colony of Pennsylvania, founded by William Penn, a Quaker, in 1681, also granted religious tolerance to all monotheistic religions, and in the early eighteenth century, the colony of Delaware followed Rhode Island's example in not only granting religious liberty but also declining to establish a state-sponsored church or make a profession of faith a requirement for holding public office.

By the year 1776, there was a wide range of practices in the British colonies regarding church-state relations. Of the thirteen colonies, six had Anglicanism [the Church of England] as their established religion [Virginia, the lower four counties of New York, Maryland, South Carolina, North Carolina, and Georgia].[3] Three had Congregationalism [Massachusetts, Connecticut, and New Hampshire], and four had no established religion [Rhode Island, Pennsylvania, Delaware, and New Jersey]. Of the four who had no established religion at the time of the War of Independence, New Jersey granted full liberty only to Protestants and required all members of the colony both to belong to a religious congregation and to support that congregation financially.[4] In Rhode Island and Delaware, religious liberty extended to all Christians, and in Pennsylvania to all monotheists.

The Founding Fathers

The American Revolution (1776-83) and the drafting and passage of the Constitution of the United States of America (1787-89) involved the same generation of men whose political philosophy and various writings continue to have a strong influence on the culture and political development of the country. This group is known as the founding fathers. Despite the fact that full religious liberty was not the universal practice of the colonies, the idea was very influential in the founders' understanding of the country that they envisioned. It was understood to be a natural right "endowed by the Creator", in the words of the Declaration of Independence, and a prerequisite for a free and just society. While the belief in the free exercise of religion was widespread among the founders, there was, however, a difference of opinion on exactly how the church and state should relate to one another.

On the one hand, founders such as Thomas Jefferson—author of the Declaration of Independence and the third president—and James Madison—the principal author of the Constitution and the fourth president—firmly defended the right to religious liberty but advocated complete religious neutrality on the part of the state stressing the importance of maintaining a separation between church and state. In neither the case of Madison nor Jefferson, however, was this motivated by contempt for religion or for religious institutions. In Madison's own words:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe… We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. [5]

Separating church and state, was, in the opinion of both Madison and Jefferson, in the best interest first and foremost of religion. In the same text in which he argues against state funding for teachers of Christianity, Madison states:

During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy.[6]

Most of Madison's arguments for the separation between church and state are made with the end of the Christian faith's health and well being in mind. The state should not meddle in matters of religion in order to protect religion from the vices that state funding seems to promote and from the uncertainty that comes with changes in religious profession on the part of those holding office. To put it another way, the establishment of a particular religion generally undermines the free exercise of religious liberty on the part of the citizens. The text of his argument reveals a conviction that men and women are greatly served by Christianity, which was revealed by God, and

that one's religion influences society and the direction of the state.

Yet Madison also warned against the tyranny that established religions can and have wreaked on society such as supporting tyrants and using their access to power to silence or eliminate those with other beliefs. Among his arguments for keeping church and state separated, however, one does NOT find the modern prejudices that religion has nothing good to contribute to civic society or that religion in all of its forms is hostile to true freedom.

Certain other founding fathers, however, though still supporting religious liberty, saw the possibility of a limited tie between the church and state. George Washington, the first president of the country, saw no great difficulty in maintaining certain links between church and the state because of the contribution religion makes, in general, to the good of civic society. He too was greatly motivated by the idea of religious liberty. In a letter that he wrote to the Reformed German Congregation in New York City dated November 27, 1783, he stated "The establishment of Civil and Religious Liberty was the Motive which induced me to the Field; the object is attained, and it now remains to be my earnest wish and prayer, that the Citizens of the United States would make a wise and virtuous use of the blessings, placed before them."[7] In his personal life, his life as leader of the Continental Army during the American Revolution, or in his actions as the first President of the United States, George Washington did not finely separate his religion from his actions. "The use of taxes to support religion, the appointment of military chaplains, the propriety of issuing religious presidential proclamations, and the deliberate inclusion of sacred language in public ceremonies reflect the distance between Washington and Madison on the proper disposition of government towards religion."[8]

From Washington's perspective, religion could and often did contribute to the good of the civic arena whether through virtuous character formation in times of peace or maintaining morale through the work of military chaplains during wartime. , Political theorist Vincent Philip Muñoz believes that as long as there was a common "civic" good being provided by religion Washington would have favored funding it with public money, a position contrary to that of Madison. Furthermore, Muñoz argues, "Government should support religion because religion supports republican government. By implication, government ought not support those religions that maintain principles hostile towards republicanism or advocate behavior contrary to good citizenship."[9] Non-establishment and free exercise of religion according to Washington was still compatible with certain direct ties between church and state even at times to the favouring of one creed over that of another depending upon how a particular religion contributed to the civic good of a republican government.

Early Period 1789-1868

As noted above, the colonial period was characterized by varying experiences of and experiments with religious liberty. As the new republic distanced itself from Great Britain and began to enshrine religious liberty, many of the former colonies began to end the established churches in their territory, but the experience was neither uniform nor immediate.

By 1789, the Church of England, which recognized the King of England as the head of the church, had been de-established in Virginia (1776), Maryland (1776), North Carolina (1776), and South Carolina (1778). During the American Revolution, the Church of England was an obvious sign of monarchy. The clerical oath, dating from 1604, made by every Anglican clergyman required obedience and loyalty to the King of England as the *supreme* authority in the church on earth in Britain and

all of her realms [emphasis mine]. This was obviously problematic for territories seeking separation from the same king as their head of state. To continue to support an established Church of England was, at this time, to work against the establishment of the republic. Of the states in question, South Carolina's 1778 constitution continued to protect the "Christian Protestant religion" establishing it within the state, but the Church of England was no longer granted this exclusive privilege. In the state's 1790 Constitution, however, religious liberty was extended to all, "*Provided*, That the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."[10] The 1790 Constitution in South Carolina would remain in place until the Civil War.

Of the three colonies that had Congregationalism as the established religion, the trend towards de-establishment was slower and more gradual. New Hampshire 's 1784 constitution recognized the right to free exercise of religion and prohibited any requirement for non-members of a religion to support financially a religious body of which they were not a part, which effectively disestablished the Congregational church in the state. In Connecticut, however, there was little move to alter the state's historic link with the Congregational church for an entire generation. Only in Connecticut's 1818 Constitution did the state grant equal protection to all Christian denominations. Massachusetts had yet another path. Article II of its 1780 Constitution granted religious liberty to all, and Article III revealed a Washingtonian approach to church-state relations. This article recognized that good order and the preservation of civil government depends upon "piety, religion, and morality" and that these are best inculcated through religious bodies. The article further granted equal protection to all Christian denominations under the law. It allowed congregations to tax their voluntary members for the support of their own ministers, buildings, and teachers, and maintained a provision for the legislature to tax all those not belonging to any denomination for the support of Protestant public teachers of religion. Those who did not voluntarily belong to a specific denomination were required periodically under this article to attend Protestant lessons offered by these same teachers periodically. Since the decision of who was taxable rested in the hands of the town council many of whom were Congregationalist, Massachusetts effectively maintained Congregationalism as the established religion until this article was abolished in 1833.

As the lingering establishment of the Congregational church in New England demonstrates, the freedoms expressed in the Bill of Rights were primarily seen as a restriction on the powers of the federal government during this early period. The federal character of the country allowed individual states to address the same underlying issues in their own terms. As the U.S. Civil War (1861-65) was to demonstrate, however, there was an unresolved tension between recognizing rights as "endowed by the Creator" and then recognizing the rights of individual states to ignore these rights or to refuse to extend them to all people living within their territory. Legalized slavery in the South of the country was the most obvious example of this, but there were also religious examples.

While the First Amendment prohibited the federal government from tampering with the free exercise of religion or from establishing a national church or religion, the Constitution of the United States itself prohibited the use of religious tests to disqualify candidates holding a government position. Here too, however, there were a wide variety of practices during this first historical period with respect to the use of religious tests on the state and local level. Many states removed all mention of religion in terms of qualifying to hold public office, but the original constitutions of Georgia, South Carolina, North Carolina, and New Hampshire

all required legislators to be Protestants. In Georgia, the restricting of the office of representatives to Protestants was removed in 1789. In South Carolina the religious test was dropped in the 1790 constitution[11], but in North Carolina and New Hampshire the restrictions remained in place until 1875 and 1877 respectively.[12]

Other states had variations on the "religious test" for office. The state of Pennsylvania in its 1776 constitution required all legislators to take an oath professing belief in God and the inspiration of both the New and Old Testaments, although the oath concerning the inspiration of the Sacred Scriptures was dropped in 1790. In New Jersey the state's 1776 constitution allowed for a religious test for public office, i.e. that the person in question must be a Protestant, but it did not *require* that this be done; the option for this test was repealed in 1844. The 1780 constitution of Massachusetts required all governors, lieutenant-governors, councillors, senators, and representative to swear an oath stating that, among other things, they were Christians. Maryland similarly required public officials to take an oath declaring themselves to be Christians; this was modified in the state's 1867 constitution to only require a belief in the existence of God (Article 36).

Similarly the states of Tennessee (1796), Mississippi (1817), Arkansas (1836), and Texas (1845), which were all incorporated into the United States after the Constitution and the Bill of Rights were already in place, required in their state constitutions a religious test for those holding state-wide public office. These states all required public officials to believe in the existence of a Supreme Being or God and, in Tennessee, the existence of eternal reward and punishment.

That a general Protestant Christianity would prevail in the nation's public schools at this time was taken as a given. In fact, in 1844 in Philadelphia a college was erected according to the specifications of the last will and testament of the benefactor, Stephen Girard, requiring instruction in the principles of strictly secular morality. This was challenged in court as an anti-Christian proposal and therefore repugnant to the law, and in *Vidal v. Girard's Executors*, the Supreme Court of the United States unanimously rejected the very notion that such a thing could or should be done. The decision noted that the 1776 Constitution of Pennsylvania contained a comprehensive protection of religious liberty and free exercise. The decision went on to say, "we are compelled to admit that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public."[13] The same court decision almost presupposes that some general form of Christianity will be taught in the schools. "Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college -- its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers?"[14] Certainly at this time, the idea of a strict separation between church and state was not a ubiquitous view in the country.

During this period, it was also true, that not every new religious movement received equal recognition and respect by outsiders. One of these new movements, the Church of Jesus Christ of Latter Day Saints (the Mormons), was forcefully expelled from Jackson County, Missouri in 1833. In 1838, tensions between Mormons and non-Mormons boiled over. Mormon forces raided a state militia camp and provoked the short-lived "Mormon War". The governor of Missouri ordered that "The Mormons must be treated as enemies and exterminated or driven from the state."[15]

Charged with treason, Joseph Smith, the founder, fled to neighbouring Illinois, where his growing militia and introduction of polygamy aroused the suspicions of the state authorities. He was arrested in 1844 and charged with treason, and was murdered by a mob, who broke into the intentionally unmanned jail. The Mormons then fled Illinois and began their journey westward to Utah.

The Latter Day Saints' (Mormons') legal troubles, however, did not end with their departure from Illinois. In the 1857, President James Buchanan reacted to conflicting reports that federal judges had been disrupted by groups of Mormons in the territory of Utah by sending the U.S. Army to the territory to replace Brigham Young, the head of the LDS church, as Governor. News of this decision, however, never reached Young. In the confusion, he marshalled a two-week attack on U.S. Army wagon trains and property. The "Utah War" ended after peaceful negotiations initiated by one of President Buchanan's agents. All those involved were granted amnesty.

The Catholic Church also experienced periods of open hostility during this period. The years 1834 in Massachusetts, 1836 in New York, and 1844 in Philadelphia all saw anti-Catholic prejudice foment into riots in which churches and sisters' convents were burned, many people were injured, and several people were killed. In the 1850s this anti-Catholic sentiment combined with a growing alarm over the number of Irish and German Catholic immigrants arriving in the country a population that many native Protestants thought incapable of upholding a republican form of government. By 1854 this movement had organized politically and spread throughout the country demanding a reduction in immigration and the reservation of certain jobs and political offices for "native-born" citizens. The movement became known as the Know Nothing Party or sometimes, more formally, the American Party. In the 1854 legislative and 1856 presidential elections it advocated, among other things, restricting public school teaching positions to Protestants, the mandatory reading of the King James version of the Bible in public schools, and restricting liquor sales.[16]

The Know Nothings won control of the governorship and state legislature in Massachusetts in 1854, and its followers could be found in the mayoral offices of Philadelphia, Chicago, and San Francisco. On several occasions the anti-Catholic sentiment turned deadly. In 1854 two Catholic churches were burned in New England, and Fr. John Bapst, S.J. was tarred and feathered and nearly killed in Maine.[17] On August 6, 1855 in Louisville, Kentucky activist Know Nothings rioted against Catholics, who they accused of tampering with the election of the state's governor. Twenty-two people were killed.[18] Election violence also marred the mayoral race in Baltimore during this period for the same reason resulting in several deaths. After the 1856 presidential election, however, the party quickly unravelled as an organized body. The issues of slavery and states' rights took centre stage in the 1860 election, then the Civil War and the rebuilding effort became more important political causes than the specter of Catholic immigrants.

1868-1947

Following the American Civil War (1861-65), three separate constitutional amendments were passed. The Fourteenth Amendment, the second of these three, defined as citizens all those born within the geographic boundaries of the country and those who have been naturalized. It also included a clause, the "Due Process Clause", which states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." During the roughly eighty-year period, the court system slowly began to apply this clause to state and local governments in such a way that these lower levels of government also became subject to the restrictions found in the

Bill of Rights. This process known as "Incorporation" reached a high point during this period in the 1925 Supreme Court case *Gitlow vs. New York*, which declared, "For present purposes, we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States."[19] In terms of religious liberty, this meant that state and local governments would also be required to abide by the Establishment Clause [i.e. that they cannot establish a specific church or religion] and the free exercise [of religion] clause. During the second half of the twentieth century, the interpretation of these clauses would effectively alter once again the nature of church-state relations.

The United States of America remained a predominately Protestant country during this period. The Third Great Awakening (1850s-early 1900s) marked another period of Protestant religious fervour and political mobilization in the country. Like the Second Great Awakening, revivals and missionary activity played important roles, but this awakening had a much stronger "social gospel" component that applied the Gospel to social issues. The political impact of this movement can be seen in the many social reforms that took place during the "Progressive Era" (1890s-1920s) that sought to make right the social injustices of the time, eliminate political corruption, and address the high concentration of wealth by the robber barons of industry. These reforms included child labour laws, compulsory elementary education, the introduction of federal income tax, anti-trust (anti-monopoly) legislation, and ultimately the eighteenth and nineteenth amendments to the constitution (prohibition of the production, transportation, and sale of alcohol in 1919, and the right to vote for women in 1920).

While both the absolute number and overall percentage of Catholics in the population continued to grow during this period, but the country remained culturally Protestant and this was noticeable in the public institutions of the country, particularly the public school system. Even if the states no longer had established churches, there was a widespread practice of teaching a generic Protestant approach to religion as part of forming children in the cultural heritage of the country and preparing them to participate in the civic life of the country. The most famous and widely used textbooks of the period in public schools, the *McGuffey Readers*, initially incorporated the Calvinist views on salvation, righteousness, and piety of its author into the lessons. Even though the 1879 edition stripped much of the specifically Calvinist doctrine, it still maintained a generally Protestant approach to religion in its moral and spiritual content.[20] In addition to the Reader, it was also the case that in many frontier schools the only book students had at home was the King James version of the Bible, a translation that was exclusively linked with Protestant usage. As a result, Catholics found the public school systems to be hostile environments.

Initially, Catholics tried to work within the public school system to address this bias to no avail. The First Plenary Council of Baltimore in 1852 urged every Catholic parish to open its own parochial school. The Eliot School Rebellion in 1859 in which a Catholic boy in Massachusetts was beaten for refusing to read the King James version of the Ten Commandments out loud in school, and the Second (1866) and Third (1884) Plenary Councils of Baltimore sparked a widespread establishment and expansion of the Catholic school system throughout the United States.[21] The vast system was expensive to build and maintain, and the argument was raised that the tax money that Catholics paid for the compulsory education of children should be available to parochial school systems. This, however, proved to be politically impossible.

In 1874, President Ulysses S. Grant proposed a constitutional amendment mandating both free public schools and the prohibition of the use of public funds for schools run by "sectarian groups, ". The amendment sponsored by Maine senator James Blaine failed to pass the U.S. Senate, but it successfully attracted the attention of state legislatures across the country. Eventually all but eleven states either passed "Blaine Amendments" to their state constitutions or were admitted to the union with constitutions that prohibited the use of public funds in "sectarian" schools.[22]

Blaine Amendments, however, did not put an end to the question of the legal boundaries regarding parochial education. Funds from public taxation were forbidden in most states, but at least in Oregon some thought the very existence of parochial schools was dangerous. In 1922, the voters of the state of Oregon passed a state initiative requiring compulsory education of all children between the ages of eight and sixteen in *public* schools. The Compulsory Education Act effectively attempted to eliminate all private schools including parochial schools. The law was challenged, and in 1925 the Supreme Court ruled unanimously in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) that the state of Oregon had trampled on the liberty of parents or guardians to choose a school of their choice and had violated the Fourteenth Amendment's Due Process clause.

The Latter Day Saints' legal woes during this period also contributed to the history of church-state relations in the United States. The country's anti-bigamy laws dated back to King James I of England and were part of the English law inherited by the United States from Great Britain. From the 1840s until 1890, the Latter Day Saints advocated polygamy, which put their religious exercise in conflict with the anti-bigamy statue, which itself reflected the traditional Christian understanding of marriage between one man and one woman. In 1878, George Reynolds, an LDS member, was arrested in the Utah territory on the charges of bigamy. The case would make its way to the U.S. Supreme Court. Several arguments were made on Reynolds behalf including the argument that Reynolds had a religious duty to marry multiple times and was therefore not guilty of breaking any law on the grounds of the free exercise of religion. The Supreme Court in *Reynolds v. the United States*, 98 U.S. 145 (1878) ruled that the free exercise of Mr. Reynolds was not at stake since U.S. anti-bigamy laws were based on law inherited from colonial times. It then used the example of the state of Virginia which on the same day of December 8, 1788 passed an act establishing the freedom of religion and had on the same day decided to enact James I's anti-bigamy law. More importantly for the future of church-state relations, the court quoted the January 1, 1802 letter from the founding father and third president of the United States, Thomas Jefferson to the Danbury Baptist Association of Connecticut, in which Jefferson re-worded a phrase once penned by Roger Williams, the Baptist preacher and founder of both the colony of Rhode Island and the First Baptist Church in the state, wherein Williams said, "[A] hedge or wall of separation between the garden of the church and the wilderness of the world." In Jefferson's words:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should `make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the

rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.[23]

Reynolds v. the United States set the precedent that federal law cannot dictate religious belief, but it can prohibit certain practices if those said practices interfere with the most important duties of social life, such as marriage. In the words of the decision, "Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." Using a slippery slope argument [i.e. if we concede on this point, then eventually we will have to concede all the way to human sacrifice], the court wrote "to permit this [bigamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds v. the United States* marked the boundaries regarding religious actions. Based on a positivist notion of law, the decision did not argue that any true religion would not be in conflict with the common good. Instead it set the common good as defined by the laws of the land on one side and religious practice on another. In the case of serious conflict, the exercise of religious liberty would have to yield.

Church-state relations in every period were and are often influenced by social movements, and this was noticeably the case in the 1920s. In 1915, William J. Simmons resurrected the Klu Klux Klan (KKK) a white supremacist organization founded in the South following the Civil War in Stone Mountain, Georgia. The KKK, who reached the peak of their popularity and influence in the 1920s in many ways resembled the Know Nothing movement of the mid-nineteenth century. The group known for its use of white robes, masks, pointed hoods and burning crosses used violence, intimidation, and—in this period—public rallies to raise awareness of its goal of securing power and influence for white Protestants. Like the Know Nothings movement, the KKK appealed to white Protestant prejudices against Catholics, Jews, Blacks, and various immigrant groups. In urban areas, the Klan played off the fears of white Protestants who were afraid of losing their jobs to newly arrived immigrants who were often Catholic. Reflecting, in part, the Third Great Awakening's prohibitionist streak, which was also a subtle instrument of anti-Catholicism, the KKK also advocated the strict enforcement of prohibition statutes. At its peak in the mid-1920s, membership in the KKK constituted close to twenty percent of the adult male population of the country.[24] Politically, the Klan had success in southern California, Indiana, and most notably Alabama, where three of its leading figures—J. Thomas Helfin, David Bibb Graves, and Hugo Black—would, as members of the Democratic Party, be elected members of the U.S. Senate (Helfin and Black) and Governor (Graves). Furthermore, Senator Black, in 1937, was nominated by Democratic President Franklin Roosevelt to the U.S. Supreme Court, where his views would prove to be decisive in shaping the direction of church-state relations in the 1947-present period. As a political organization, the KKK was thrown into utter disarray in 1926 when the state leader [the Grand Dragon] in Indiana, D.C. Stephenson, was charged and convicted of rape and second-degree murder of Margret Oberholtzer.

Supreme Court cases in 1925 played an important role in church-state relations as the Due Process clause of the Fourteenth Amendment began to place greater restrictions on the involvement of state and local governments' relations with religion. In addition to the Supreme Court cases, *The State of Tennessee v. John Thomas Scopes* (the Scopes Monkey Trial) in 1925 became the last vivid example of state support for a particular

type of Protestantism in public schools. Earlier that same year John Scopes had been arrested for teaching evolutionary biology in his public high school class in Dayton, Tennessee. The case garnered widespread media attention as it pitted three-time Democratic presidential candidate William Jennings Bryant as prosecuting attorney arguing on behalf of the fundamentalist-creationist position of the state of Tennessee and Clarence Darrow, who defended Scopes arguing that Christianity was reconcilable with evolution. While Scopes was judged guilty, the case was appealed and thrown out on a technicality. In the court of public opinion, however, the fundamentalist position was the clear loser. In the eyes of many this was proof that Christianity was irreconcilable with scientific discovery and progress. Henceforth a widening division between Christian fundamentalists and more liberal Protestants led to a decades-long decline of the Protestant influence in the country.

1947-present

The appointment of vocally anti-Catholic Democratic Senator Hugo Black to the Supreme Court in 1937 had a lasting effect on the history of church-state relations in the United States.[25] Prior to his appointment, the Supreme Court of the United States had rejected a number of President Franklin Roosevelt's New Deal programs as unconstitutional. Black's appointment is best remembered for swinging the balance of the court to take a more favourable view of these programs. The New Deal, however, was not directly related to religious liberty. It was Black's views on "Incorporation", the relationship between the Establishment and the Free Exercise Clauses of the First Amendment, and the Due Process clause of the Fourteenth Amendment would have lasting effects on church-state relations for the country. As a result, the current trend was established in which the government on all levels distanced itself not simply from particular denominations (e.g. the Church of England or the Congregationalists) or a vague Protestant Christianity but from all forms of religion.

In 1946, Arch Everson, taxpayer from the state of New Jersey, sued his public school district to stop the financial re-imbursement of the parents of school children who used public transportation. The school district had been granting the refund regardless of whether the children in question attended public or private schools. In this instance nearly all of the private schools involved were Catholic. His case argued that this re-imbursement violated the constitution's prohibition against state funding of religion and the use of tax receipts to do this was a violation of the Due Process clause of the Fourteenth Amendment. The case, *Everson v. Board of Education*, was narrowly decided in 1947 in favour of the reimbursement program, but it did so on the grounds that these funds went to the parents and not the schools. Justice Black wrote the majority opinion for the case that included reference to Jefferson's reference to a wall of separation between church and state taken from the above quoted letter to the Danbury Baptist Association:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause

against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'[26]

During Black's tenure on the court (1937-71) and for the remainder of the twentieth century, this separation or wall was interpreted in an ever-stricter sense. As noted above, the founding fathers held divergent opinions on exactly how religious liberty should be understood and enforced and even those such as Jefferson and Madison, who advocated the greatest separation between church and state, understood the Establishment Clause (i.e. that the federal government would never establish a church) and the Free Exercise Clause to compliment one another (i.e. not establishing a federal church favours the free exercise of religious liberty for the citizens). During Black's tenure on the Supreme Court and afterwards the two clauses were increasingly interpreted to be in conflict with one another, or more precisely the free exercise of religion was increasingly viewed as infringing upon the Establishment Clause.

A year later, the separation between church and state was expanded even further in *McCollum v. Board of Educaiton* (1948). A widespread practice of "released time" in which time was set aside for voluntary religious instruction in public schools was declared unconstitutional. The justices reasoned that such arrangements involved the use of tax-supported property to advance religious ends and that releasing only those students who attend the voluntary religious instruction was equivalent to showing preference to all religions as opposed to none.

In 1962's *Engel v. Vitale*, the Supreme Court judged that the nearly two hundred year old practice of officially sanctioned prayer in public schools was unconstitutional even if the prayer was non-denominational and the students were permitted to absent themselves from the prayer. The prayer in question had been composed by the New York State Board of Regents, and it read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country. Amen."[27] The mere free exercise of religion in a public school (or other public institution) by a government official was judged to be in competition with the Establishment Clause. Although Justice Black conceded that the Regents' prayer, "does not amount to a total establishment of one particular religious sect to the exclusion of all others -- that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago"[28] he and the concurring majority concluded that it was still too much of an endorsement of religion.

The ban on prayer in public schools was joined a year later by a prohibition of school-sponsored Bible reading in the 1963 Supreme Court case *Schempp v. Abington School District*. On appeal from a lower court decision, the Schempp case had been combined with a similar case, *Murray v. Curlett*, working its way through the appeals courts by much more famous founder of American Atheists, Madalyn Murray O'Hair. At the time of the case, Pennsylvania required "at least ten verses of the Holy Bible [be] read, without comment, at the opening of each public school on each school day."[29] The Supreme Court ruled that reading the Holy Bible was a religious exercise, and this could not be done in a public institution by public officials without violating the Establishment Clause of the First Amendment. In this decision again the Supreme Court used the Establishment Clause to limit government involvement in the free exercise of religion.

In 1968 the Supreme Court struck down an Arkansas law that prohibited the teaching of evolutionary biology (more specifically that mankind descended from other life forms) in any public school or university as unconstitutional. In *Epperson v. Arkansas*, the

Supreme Court judged that the Arkansas line again violated the Establishment Clause of the First Amendment because the prohibition stemmed from particular religious groups' interpretation of a passage from the Book of Genesis. The state, the decision read, "has no legitimate interest in protecting any or all religions from views distasteful to them."[30] An atmosphere of entire religious neutrality was to be preserved.

The last of the five major Supreme Court decisions involving religious liberty during Justice Black's tenure, *Lemon v. Kurtzman* (1971), created a manipulable three-pronged "test" for courts to determine whether a particular government action violated the First Amendment's Establishment Clause. What came to be known as the "Lemon Test" required that all of the following conditions must be met: 1) The government action must have a secular end; 2) The government action must not have as its primary effect the furthering or obstruction of religion; and 3) The government action must not result in "excessive government entanglement" with religion. The last condition is itself nebulous and open to a wide variety of interpretations. As a result of this decision, state laws in Pennsylvania and Rhode Island that allowed private schools (mostly Catholic) to receive state reimbursement for salaries paid to teachers of non-religious material, e.g. mathematics, were declared unconstitutional because the parochial school system was "an integral part of the mission of the Catholic Church" and such reimbursement schemes thus involved "excessive entanglement".[31]

Since the retirement of Justice Hugo Black from the Supreme Court, numerous challenges have arisen to the use of religious symbols on public property (e.g. crèche scenes at Christmas time or the Ten Commandments in public courtrooms) as violations of the First Amendment's Establishment Clause. The decisions of the court system, however, have been inconsistent with some being labelled unconstitutional and others acceptable. In many instances, the "Lemon Test" mentioned above has proved not to be an impartial instrument, and its future use is uncertain.

Certain more recent Supreme Court decisions such as *Zelman v. Simmon-Harris* (2002) and *Elk Grove United School District v. Newdow* (2004), which respectively recognized the constitutionality of an Ohio program of school vouchers usable at parochial schools and the phrase "under God" in the Pledge of Allegiance said daily in many public schools, seem to have tempered the judicial push to secularize American society or forbid the very name of God from being mentioned in public settings. It is too soon to say, however, whether these decisions mark the beginning of a new more tolerant trend.

Culturally, the string religious liberty decisions handed down during Black's tenure on the Supreme Court has combined with on-going cultural changes and changes in demographics (e.g. growing populations of non-Christians religions, agnostics, and atheists) to produce a less religious country relative to its historical past. While the exercise of religion has been pushed to the periphery in public schools and while religious images even in war memorials are regularly challenged in the courts as being unconstitutional, religion still plays an observable role in the political life of the country. This can be seen in countless political campaigns in which the candidates make public their religious affiliation and practice, or promote their budgets or proposed programs as "influenced by Catholic social teaching" or being "Biblically based". Churches and other religious institutions continue to be treated as tax-exempt in many instances and often receive special consideration in city zoning laws. While levels of religious practice are significantly lower than they were fifty years ago, they are still relatively high compared to other wealthy countries in the world.

In the on-going moral debates regarding legalized abortion and redefining the civil definitions of marriage, religiously based arguments are not uncommon although perversely this can often work to the disadvantage of the same religious groups. In controversial matters, civil law that is in agreement with some religious doctrine, even if that doctrine can be easily defended by Natural Law or other philosophical arguments (e.g. laws regarding the institution of marriage between one man and one woman), quickly finds itself on the defensive in the court of public opinion. This is partially explainable by Justice Black's legacy of pitting the First Amendment's Establishment Clause against its Free Exercise Clause.

Contemporary Controversies

Two recent events involving the Obama administration demonstrate that the parameters of religious liberty in the United States are still not universally agreed upon. The first involved a discrimination, wrongful dismissal lawsuit brought on behalf of the United States Department of Justice against the Lutheran Church-Missouri Synod, and the second regards certain parameters of the 2010 Healthcare Affordability Act that would legally require certain religious institutions, the Catholic Church and her various institutions in particular, to violate their own religious beliefs. In both instances the effect is a restriction of the Free Exercise of religion.

In 2005, Cheryl Perich, an elementary school teacher who also taught religion and secular subjects and was a commissioned minister for the church, became ill and was fired from her job at Hosanna-Tabor Evangelical Lutheran Church and School in Redford, Michigan. She claimed that the dismissal was in violation of the American with Disabilities Act and filed a legal suit with the federal Equal Employment Opportunities Commission [EEOC]. At issue in the case was whether the long-standing legal tradition of recognizing a "ministerial exception" in the First Amendment for religious organizations to hire and fire their ministers without interference from civil courts and most labor laws was applicable. The Obama administration argued that the ministerial exception did not apply in this case, and that the ministerial exception "should be limited to those employees who perform exclusively religious functions."[32] In a unanimous decision, all of the justices agreed that the Hosanna-Tabor Evangelical Lutheran Church and School acted within their constitutional rights to determine who was a minister according to their own legislation and policy. The decision also called EEOC's argument that the "ministerial exception" should only be made for those whose work is exclusively religious an "extreme position." The decision states, "The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," …—is the church's alone."[33] Despite the unusual unanimity of the court, public opinion polls at the time of the decision showed that the American populace was nearly evenly divided on the issue of whether religious bodies should have an exception for their ministers or whether they should be fully subject to all of the employment laws of the land.[34]

Finally, religious liberty in the United States has been drug into the national controversy of the 2010 Patient Protection and Affordable Care Act, a.k.a. Obamacare. The legislation left certain details to the Obama administration to define including the specifics of what health insurance must cover. In January 2012, the Health and Human Services (HHS) finalized the list of "preventative care" items that insurance companies were to cover for free that will go into effect August 1, 2013. On that list are all government-approved forms of contraception including abortifacients and the coverage of elective sterilization surgery. Paying for such coverage or participating in such activities, however, goes against the time immemorial moral teaching of the Catholic

Church. The healthcare act mandates that all health insurance, including that purchased by Catholic institutions such as hospitals and universities for their employees, cover all of the government's specified forms of "preventative care". To qualify for a religious exemption the religious institute that employees must be 1) a non-profit organization, 2) whose primary mission is inculcating its own religious teaching, 3) that primarily employs members of its own religion, and 4) primarily serves members of its own religion. This would rule out most Catholic universities, hospitals, and charities as well as many other religious-sponsored institutions. Given the Supreme Court decisions in *Everson v. Board of Education* and *Lemon v. Kurtzman*, mentioned above, a double standard seems to be at stake. Catholic parochial schools, for instance, are both "an integral part of the mission of the Catholic Church" and therefore disqualified for any taxpayer funding, but being not sufficiently religious enough to avoid compliance with the healthcare insurance law. The healthcare act, however, is currently being challenged in the courts on a number of separate grounds including the insurance mandate's violation of the First Amendment's free exercise of religion clause.

Conclusion

While the Thirty Years War was still raging in Europe, two small British colonies on the Eastern shore of North America were founded that enshrined religious liberty. The founder of one of these, Rhode Island, i.e. Roger Williams, described the separation of church and state as a hedge or a wall that would preserve the garden of the church. Ultimately the principles of the free exercise of religion and the prohibition on federal (and later state and local) establishment of religion were enshrined in the Constitution of the United States of America. The historical experience of their exercise in the country's two hundred and twenty-three year history, however, has not been stable and consistent. Originally the separation of the two important institutions was argued for to preserve "the church" from the corrupting influence of power and public funds and to prohibit government officials from meddling in the internal life of religious bodies. Religion was recognized as beneficial to civic society, but showing preference for one religion over another was divisive and beyond the competence of civic officials. Since the country's founding, establish churches, general protection and promotion of Protestant Christianity and religion in general have faded away. As the influence of secularism and irreligion continues to grow in America, however, it is unclear whether the free exercise of religion will continue to be respected or whether it will be hemmed in and judged to be prejudicial to other competing "freedoms".

NOTE:

[1] "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." *Constitution of the United States of America*, Article VI. Section 3. http://www.house.gov/house/Constitution/Constitution.html Accessed April 29, 2012.

[2] The two originally proposed amendments that were not quickly approved regarded 1) the formula for allotting the number of representatives for Congress to control the size of electoral districts [never passed] and 2) a prohibition on laws that would affect the salaries of the current Congress—all legal changes to the salaries of members of Congress would only go into effect in the subsequent Congress, i.e. after the next election. In 1992, over two hundred years after it was initially proposed, the latter of these two amendments was passed by the required number of states and went into effect as the 27th Amendment to the Constitution of the United States of America.

[3] The Church of England was established in these colonies in the following years: Virginia (1609), the lower four counties of New York (1693), Maryland (1702), South Carolina (1706), North Carolina (1730), and Georgia (1758).

[4] The 1776 New Jersey Constitution article XIX read, "That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects." cf. http://undergod.procon.org/view.resource.php?resourceID=69 accessed April 18, 2012.

[5] James Madison, "Memorial and Remonstrance Against Religious Assessment," June 20, 1785, in *The Founding Fathers*, http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html , accessed April 18, 2012.

[6] Ibid.

[7] John C. Fitzpatrick ed., "Recipient to the Ministers, Elders, Deacons, and Members of the Reformed German Congregation of New York", *The Writings of George Washington*, vol. 27 (Washington, D.C.: United States Government Printing Office, 1938). See http://etext.virginia.edu/toc/modeng/public/WasFi27.html accessed April 29, 2012.

[8] Vincent Philip Muñoz, "George Washington on Religious Liberty" *The Review of Politics* 2003:(65:1), 17.

[9] Ibid., 22-23.

[10] *1790 Constitution of South Carolina*, Article VIII, Section 1. http://emoglen.law.columbia.edu/twiki/pub/AmLegalHist/TheEstablishedChurchInSouthCarolina/S.C._Constitution_of_1790.pdf Accessed April 29, 2012.

[11] South Carolina's 1895 Constitution, which is currently in force, re-introduced the requirement that the Governor believe in "the existence of the Supreme Being" (Article IV, Section 2).

[12] North Carolina's 1875 Constitution, however, still continued to require office holders to believe in God.

[13] *Vidal v. Girard's Executors,* 43 U.S. 127 (1844).

[14] Ibid.

[15] Paul A. Djupe and Laura R. Olson, *Encyclopedia of American Religion and Politics* (New York: Checkmark Books, 2003), p. 289.

[16] Cf. Tyler Anbinder, *Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850s* (New York: Oxford University Press, 1992), pp. 135-143

[17] Cf. Angela Clegg, "The Ordeal of Father John Bapst: Priest Nearly Burned at the Stake in Ellsworth" *Discover Maine: Maine's Original History Magazine*, December 9. 2010. http://www.discovermainemagazine.com/index.php?option=com_content&view=article&id=190:father-john-bapst&catid=86:hancock-washington-county-history&Itemid=121 Accessed April 29, 2012.

[18] Cf. Charles E. Deusner, "The Know Nothing Riots in Louisville," *Register of Kentucky Historical Society*, 61 (1963), pp. 122-147.

[19] *Benjamin Gitlow v. People of the State of New York*, 268 U.S. 652 (1925).

[20] http://mcguffeyreaders.com/1836_original.htm last accessed April 24, 2012.

[21] Cf. John McGreevy, *Catholicism and American Freedom* (New York: Norton and Co., 2003), pp. 1-15, 42.

[22] Only in 2002 were the effects of these Blaine Amendments partially off set when the Supreme Court ruled in *Zelman v. Simmons-Harris* 536 U.S. 639 (2002). In that case the court reasoned that state vouchers in which the public funds followed the student to his [or his legal guardian's] school of choice, even if that was a private religious school, was constitutional.

[23] *Reynolds v. the United States*, 98 U.S. 145 (1879). [**emphasis mine**].

[24] Marty Gitlin, *The Klu Klux Klan: a Guide to an American Subculture* (Santa Barbara, CA: ABC-CLIO, 2009), 20.

[25] For an assessment of Black's anti-Catholic views see Roger K. Newman, *Hugo Black: a Biography* (New York: Fordham University Press, 1997), pp. 87, 104.

[26] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[27] The 1951 New York State Board of Regents' prayer is cited in full in the court's decision, which was written by Justice Black. *Engel v. Vitale*, 370 U.S. 421 (1962).

[28] *Engel v. Vitale*, 370 U.S. 421 (1962).

[29] 24 Pa. Stat. 15-1516, as amended, Pub. Law 1928.

[30] *Epperson v. Arkansas*, 393 U.S. 97 (1968).

[31] Both quotations are taken from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[32] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S.___ (2012).

[33] Ibid.

[34] Cf. Fairleigh Dickinson University's Public Mind, press release January 11, 2012 "In Contrast to High Court, US Voters Split on Freedom of Churches to Hire and Fire." http://publicmind.fdu.edu/2012/hosanna/ last accessed April 26, 2012.