The First Amendment and Religion

By Craig R. Smith, Director
California State University, Long Beach

Center for First Amendment Studies
104 UTC, Long Beach, CA 90840-2801
(562) 985-4313

Table of Contents

Chapter 1:
Introduction: Religion in the New World

By Craig R. Smith, Director

Say nothing of my religion. It is known to God and myself alone. Its evidence before the world is to be sought in my life: if it has been honest and dutiful to society, the religion which has regulated it cannot be a bad one. - Thomas Jefferson

When the states of our young nation ratified the First Amendment in December of 1791, they ended one tradition and extended another. They broke with the traditional European model in which church and state worked hand in glove to promote each other. The tradition they extended was the trend among newly independent states of 1776 to separate church and state and guarantee free exercise of belief. As an introduction to this report on The First Amendment and Religious Freedom, these two traditions must be reviewed in order to contextualize our First Amendment right to religious freedom.

The European Model

By the time Rome was sacked in 410 A.D., the Catholic Church was firmly ensconced as the religion of the empire. Catholicism had won an incredible battle with competing faiths – Paganism, Neo-Platonic Gnosticism, Judaism, Docetism – and overcome its own heretical sects. The most important moment in this march to religious rule came in 325 A.D. when Emperor Constantine, whom the church had endorsed during a civil war, presided over the Council Nicaea to create a unified catechism of belief. When Rome finally fell in 476 A.D. to "barbarians," the invaders embraced the church because it provided an official structure of rule, and the church had been remarkably successful in converting the pagan tribes to Christianity in the preceding years.

In 800 A.D. when Charlemagne emerged as the Holy Roman Emperor, he was crowned by the Pope, symbolizing the progression of hierarchical order: people to princes to kings to Emperor to Pope to God. In turn, these Holy Roman Emperors and the various monarchs that followed them as rulers of different emerging nations were said to rule by "divine right." Just as doubting the king was tantamount to doubting God, so too many political actions were taken in the name of God. For example, in 1095, Pope Urban called for a "crusade" to free the Holy Land of Islamic rule. In 1492, Queen Isabella and King Ferdinand of the newly merged Spanish nation revived the Inquisition to purify their nation of those the King and Queen believed to be infidels. The Inquisition soon spread to Italy where it was administered in an even crueler way than it had been in Spain. Even scholars, such as Galileo Galilee, were put under house arrest for publishing scientific theories that the church deemed heretical.

None of this was lost on the many "heretics" who spoke out against the excesses and the politicalization of the Roman Catholic Church. Most of these were reformers who were unsuccessful because they were neither protected by temporal rulers, nor able to voice their concerns to a large enough audience. All of that changed on Halloween of 1517.

Knowing that the following day was a Holy Day of Obligation in the Catholic Church, Martin Luther posted 95 theses on a church door on the night of October 31st. Luther offered to debate any cleric on his 95 criticisms of the Church. Two things allowed Luther to succeed where his predecessors had failed: first, he had a patron who protected him from the church; second, the printing press, which had been invented with movable type in 1459, was used to distribute his theses across Europe. The debate that followed was nothing the church had seen before. After all, Luther claimed that every person could be their own priest and that justification could only be achieved by faith alone. The Catholic Church held that good works could provide salvation.

Various princes and potentates took various sides in the debate. King Henry VIII of England condemned Luther in 1521 and was named "Defender of the Faith" by the Pope. However, Germanic princes seeking independence from the Holy Roman Emperor, Charles V, embraced Luther's reformation and became "Protestants." Both of these threads soon frayed. Henry VIII sought an annulment from the Pope to marry Ann Boleyn. When it was denied, he started his own religion. In Germany, the Protestant sect of Ana-Baptists took Luther's reform to mean that they could run their own states; their revolt was quickly put down by the princes with Luther's blessing.

The chaos that followed led to the Thirty Years War in which thousands of people on each side of the religious split were killed. New Protestant movements developed. For example, Jean Calvin created the Puritan sect which spread to England and then to New England. In reaction, the Catholic Church convened the Council of Trent to reform itself. The church's newest and leading order, the Jesuits, initiated new efforts at conversion around the world and were quickly and most successfully followed by the Franciscans. New colonies around the world would adhere to the faith of the mother country as the union between church and state was strengthened. In the American colonies, for example, many colleges were headed by clergy who then also served on various governmental councils.

England retains a state religion to this day even though other religions are tolerated. The Glorious Revolution of 1688 put in the place the English Bill of Rights of 1689 which loosened some state control. France did not cut through the knot of church and state until its revolution of 1789; however, when Napoleon conquered Italy in 1802, he imitated the crowning of Charlemagne as the new French leader became "King of Italy." Napoleon, however, took the crown from the Pope and placed it on his own head, indicating a change in the previous hierarchical order. By that time, the Enlightenment had glorified rationalism and science, which led to a new approach to religion: deism. Scientist Joseph Priestly, who discovered oxygen and invented sparkling water, was critical of the church's claims about miracles and questioned the church's institutional power. The "enlightened" approach to religion would have more impact in the United States than it did in England.

The American Model

Thomas Jefferson greatly admired Joseph Priestly and other Enlightenment thinkers, namely John Locke. Locke argued in the late 1600s that all souls are like blank cupboards, empty when they come into the world. Thus, all humans were created equal, and had the right to

life, liberty, and property; sentiments Jefferson engrained into the Declaration of Independence by converting the phrase to life, liberty and the pursuit of happiness. Locke also wrote the English Bill of Rights of 1689; almost a century later, many of his thoughts surfaced in the new constitutions of the newly independent states of America.[1]

On January 16, 1786, Jefferson wrote "A Bill for Establishing Religious Freedom" in Virginia. In this paper he argued that God gave humans reasoning power and encouraged individuals to make their own conclusions about religion. He objected to contributing to church's coffers either directly or indirectly through taxes. Earlier on June 20, 1785, James Madison wrote his "Memorial and Remonstrance Against Religious Assessments" which advanced similar arguments. He protested a bill passed by the Virginia legislature which paid teachers of "the Christian religion." "The Religion" he wrote, "of every man must be left to the conviction and conscience of every man. . . . This right is in its nature an unalienable right." Furthermore, he argued that supporting religious institutions through public assessment would "destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects." Overtime both Madison and Jefferson would strongly endorse separation of church and state.

Many things contributed to the Enlightened thinking of the Founders including the philosophies of Locke, Milton, Montesque, Price, Cartright, Voltaire and Rousseau and discoveries of Priestly, Galileo, Descartes and Newton. However, each of the thirteen colonies had a unique history when it came to religion. Massachusetts was founded by Pilgrims and Puritans who sought a New Zion, a "shining city upon a hill" as Jonathan Winthrop had called it aboard his ship. The Arabella crossed the Atlantic from England hoping to land in Virginia, but eventually sailing into port in Plymouth, Massachusetts. Maryland was founded by Catholics led by Lord Baltimore, who sought freedom from Protestant discrimination. Virginia was founded by adventurers who cared more about material wealth than spiritual reward. Georgia was founded as a penal colony. When the Quaker colony of Pennsylvania declared its independence, its founders made sure that its "frame" would guarantee freedom of religion. Roger Williams made a similar pledge earlier when he founded the breakaway colony of Rhode Island; good to his word, he allowed the first synagogue in the Americas to be built in Providence.

Overtime each of these colonies developed resentment for the European tradition of church and state unity. It began with a dislike for the French, which was a Catholic nation that had allied itself with Native Americans against the colonists in the French and Indian War, which ended in 1763. In 1765 Great Britain provided provocation when it began to impose external taxes on its colonies in order to pay for the debt created by the war with France. King George III became the target of American resentment because of these taxes and his German

[1] A reflection of the impact of this kind of thinking on American politicians can be seen in the fact that Jefferson created his own Bible of only 46 pages by retaining only the sayings of Jesus and his historical life. Miracles and speculation about his divine nature were absent from Jefferson's small book.

roots. But the Americans also resented the privileges afforded to Anglican ministers among them. In Virginia, for example, they were paid in tobacco, depriving some farmers of a rich crop. The British governors of the colonies uniformly favored Anglicans, who then became Tory loyalists.

At its outset, colony after colony declared independence and then wrote constitutions which declared that every person would have the right to exercise religion freely and that the state would not prefer one religion over another. It did not hurt that various priests, ministers, and Rabbis had endorsed this freedom and revolution as early as the 1740s. One of the leaders of this movement was Jonathan Mayhew, whose sermon on "Unlimited Submission" became the "morning gun" of the Revolution in 1750. Parts of its political position were subsumed into Jefferson's Declaration. Those ministers who spoke out for freedom during the Revolution helped to guarantee that the First Amendment would include clauses on religious freedom.

After the Revolution and the writing of the new Constitution, ratification debates were held throughout the new states. Several states ratified the Constitution as it stood including Connecticut and Pennsylvania. However, Massachusetts endorsed the new Constitution in 1788 on the condition that Congress amend it immediately after it was ratified to include a right to worship as one pleased. Virginia signaled a similar desire.

After the Constitution was ratified, the states submitted over 200 amendments to the Congress, many of which concerned religious freedom. It fell to James Madison to make sense of them, to rid them of their overlapping nature and to edit them into a workable document. It helped a great deal that during the debates over the Bill of Rights many ministers endorsed what would become the First Amendment. For example, the Reverend John Leland of New London, Connecticut complained of the lack of religious freedom in his sermon on "The Rights of Conscience." Leland endorsed a free and open market place of spiritual discourse and claimed that establishing a state religion would corrupt spiritual growth. Israel Evans' sermon at the Annual Election of Members in Concord in June, 1791, claimed that freedom of religion was a natural right. His sermon was published and widely disseminated during the debates over the ratification of the Bill of Rights.

Secretary of State Jefferson happily published the new amendments to the Constitution on March 1, 1792. In 1796, he was elected Vice President, and then in 1801, after Congress broke an electoral-college tie, he was inaugurated as President.

It helped a great deal that during the debates over the Bill of Rights many ministers endorsed what would become the First Amendment. For example, the Reverend John Leland of New London, Connecticut complained of the lack of religious freedom in his sermon on "The

The Evolution of Religious Freedom in America

In 1802 President Jefferson wrote a letter to the Danbury Baptist Association in Connecticut in which he concluded that the First Amendment's religious clause builds "a wall of

separation between church and State."[2] However, building the metaphorical wall is easier said than done as there is an inherent conflict in the two clauses of the First Amendment that pertain to religious freedom. The first clause is prohibitive in nature: "Congress shall make no law respecting an establishment of religion . . . ." The following clause is affirmative: "or prohibiting the free exercise thereof." The problem comes when the government protects the right of free exercise of religion and it appears that it thereby is advancing a religion. If the government mandates that employees be given their religious holidays off, doesn't that endorse and thereby help to establish their religion? If the government prohibits certain religious practices, such as ingesting peyote at a Native American ceremony, does that restrict the right of free exercise of religion? This dilemma troubles the courts to this day and that is why it is the subject of this report in the chapters that follow.

Before the contemporary state of the law is discussed, however, it is imperative to trace the evolution of the Supreme Court's rulings regarding this dilemma. Jefferson's impact can be seen in *Everson v. Board of Education* (1947) which argued that the Framers sought to establish a "high wall" of separation between church and state.[3] Incorporating Jefferson's understanding of Enlightenment thinking, the Supreme Court generally has ruled that individuals are free to believe what they want *but are not at liberty to practice that belief in ways that violate other, more privileged rights*.[4] Essentially, laws made by elected officials of the nation take precedent over religious practices when those practices are a matter of action rather than thought. You may believe that it is holy to sacrifice a cat to your god, but you are not allowed to carry out such an act if it violates state or federal law.

The difference was established in case law when the Supreme Court in *Reynolds v. United States* (1878) prohibited bigamy among Mormons despite their plea for free exercise of their religious rights. Chief Justice Waite wrote the majority opinion in which he condemned the odious nature of polygamy in the Western Europe, Enlightenment tradition. He made a distinction between performance and thought. Regulations, he claimed, could not interfere with religious beliefs and opinions, but they may prohibit uncivilized practices. He then posed this question: "Suppose one believed that human sacrifices were a necessary part of a religious worship, would it be seriously contended that the civil government under which we lived could not interfere to prevent a sacrifice?"[5] Nearly a hundred years later, the Court made a similar claim in *Cantwell v. Connecticut* when it ruled that "The [First] Amendment embraces two concepts, – freedom to believe and freedom to act."[6] The Court ruled that only the freedom to believe is absolute.

---

2. Saul K. Padover, The Complete Jefferson (New York: Harcourt, Brace, 1943) p. 519.
3. 330 U.S. 1, 16 (1947).
4. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Everson v. Board of Education* (1947) Justice Rutledge persuaded his brethren that the establishment clause meant no government aid to any religions. In the majority opinion, Justice Black writes, "Neither [the Federal Government nor the states] can force nor influence a person to go to or to remain away from church against his will or for him to profess belief or disbelief in any religion. . . . 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." (330 U.S. 1, 15 (1947)). See also *Engel v. Vitale*, 370 U.S. 421 (1962) which outlawed prayer in public schools. See Mark Fischer, "The Sacred and the Secular: An Examination of the 'Wall of Separation' and Its Implications on the Religious World View," University of Pittsburgh Law Review, 54 (1990) which concludes, "Underlying many of the theories used in Establishment Clause jurisprudence is an implicit disdain for the religious world view"(340). For further analysis, see Robert S. Alley, "Public Education and the Public Good," William & Mary Bill of Rights Journal, 4 (1995): 277-350.
5. 98 U.S. 145, (1878).
6. 310 U.S. 296, 303 (1940).

In 1961, however, the Supreme Court moved to a new paradigm, one that attempted to balance the interests of one side against another instead of establishing absolute criteria. In *Engle v. Vitale* (1962), the Supreme Court ruled that required prayer in school was unconstitutional because it damaged the self-esteem of non-religious students.[7] In 1963 in *School District of Abington Township v. Schempp*, the Court ruled that Bible reading in schools was unconstitutional for the same reason.[8] Carrying these themes forward in 1985 in *Wallace v. Jaffree*,[9] the Court went so far as to prohibit sanctioned moments of silence for meditation or voluntary prayer in public schools.

The most important case in this line of thinking was *Sherbert v. Verner*,[10] in which a Jehovah's Witness in South Carolina was denied benefits for refusing to work on Saturday, a Sabbath for religious observance. Justice William Brennan writing for the majority on the Court argued that the state's interest was not compelling enough to justify denying benefits to the worker. It thereby infringed on her right to freely express her religion. Breaking with the *Reynolds-Cantwell* line of reasoning, Brennan established the "*Sherbert* Test" in which the courts must "consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of the appellant's First Amendment right." Brennan argued for a three-step "process for determining when the state could . . . impinge on religious activities, the most important step being a demonstration that. . . [it] had a compelling interest in controlling specific kinds of behavior." In other words, in order to restrict religious *activity*, the government must show that it is advancing some significant interest such as protecting the lives of children or preventing the use of illegal drugs.

Another policy shift occurred in 1971 when the Supreme Court took up a case concerning the Establishment Clause. Perhaps the majority believed that previous rulings had led to a kind of paralysis in the interpretation of the religious clauses of the First Amendment. Brennan's contextual driven test was too confusing for some judges. To resolve what some saw as a problem in the *Sherbert* test, the Supreme Court invented a new test in *Lemon v. Kurtzman* (1971). The ruling concerned laws in Pennsylvania and Rhode Island that provided funding for *secular* education to private schools, which were mainly Roman Catholic. Pennsylvania and Rhode Island argued that its legislatures were not supporting religion, only funding those segments of the curriculum that existed in all schools. The Supreme Court did not buy this rationale; they found the practice of these states to be unconstitutional because state funds got entangled with religious schools budgets. For example, the money provided by the state government for biology classes at a Catholic school freed up funds in the school's budget for classes in religion. Chief Justice Warren Burger wrote that to withstand scrutiny any statute must pass this test:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an

7. 370 U.S. 421 (1962).
9. 472 U.S. 38 (1985).
10. 374 U.S. 398 (1963).

excessive government entanglement with religion.[11] The language of [the religious clauses] is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state . . . religion. . . . Instead they commanded that there should be 'no law respecting an establishment of religion.'[12]

Burger's meticulous ruling warns states not to enter into arrangements that entangle government policies and religious activity. Governments must walk a fine line between neither discouraging nor encouraging religion.[13] That fine line was clarified in *Bowen v. Kendrick* (1987) in which the Court upheld the Adolescent Family Life Act, which enabled governments to provide grants to public or non-profit groups for resources for teenage sexual health and pregnancy. Those opposed to the Act argued that these funds could go to charitable organizations that were religious, such as Catholic Charities, Incorporated. Thus, the government would be supporting religions. The Court believed that funds would not be placed in "pervasively sectarian" institutions or that the funds would encourage religion. The goal of the act was secular in nature and there was no danger, according to the Supreme Court, of entanglement with religious goals.[14]

Conclusion

In the following chapters, graduate fellows of the Center for First Amendment Studies at California State University, Long Beach, provide in-depth examinations of current conundrums in the laws surrounding religious freedom. Each chapter brings the reader up to date with regard to current law and rulings, discusses problems these rulings may raise, and then advances a solution in each case. In this way, we hope to inform the public in general and students, professors, and opinion leaders specifically about religious freedom. We are very grateful to those who have provided support for this project including Southern California Edison, the Norris Foundation, George August, and the Freedom of Expression Foundation.

We are delighted that this report was included in the program at the National Communication Association's Annual Meeting in November of 2008, and at the President's Forum on Human Rights at California State University, Long Beach in March of 2009.

---

11. 403 U.S. 612, 613 (1971).
12. 403 U.S. 612 (1971). Two years later in *Committee for Public Education v. Nyquist*, the Supreme Court reinforced the *Lemon* test. Justice Powell, writing for the majority, struck down a New York law that provided assistance to non-public schools on the grounds that such these grants, tuition reimbursements and tax relief provisions advance a religion. (413 U.S. 756 (1973)).
13. This dilemma is most clearly apparent in *Zorach v. Clauson*, 343 U.S. 306 (1952). It also surfaces in the *Lemon* test, the second prong of which requires that the "principle or primary effect [of government action] must be one that neither advances nor inhibits religion" (403 U.S. 612, 629 (1973)).
14. 483 U.S. 1304 (1987). In addition, the Supreme Court ruled in 2000 in *Mitchell v. Helms,* 530 U.S. 793 (2000) that under the Title VI program, the Establishment Clause does not prohibit certain types of educational equipment and materials such as library books and computers from being loaned to religious schools as long as the materials are distributed on a non-sectarian, equitable basis. The materials could not be put to religious use and had to supplement programs already in place.