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A MONOGRAPH ON RELIGIOUS FREEDOM

BY BENJAMIN G. REEDER*

Mr. Justice Holmes tells us that, "The life of the law has not been logic: it has been experiences. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a great deal more to do than the syllogism in determining the rules by which men should be governed." Each day we realize more and more that the law is changing. It may reasonably be expected that the present generation, because of the great forces that have been awakened or loosened as a result of the World War and its concomitants, will witness more and more of this metamorphosis.

We could say categorically that the law of religious freedom, so far as our federal Constitution is concerned, has not changed since the adoption of the first ten amendments to our Constitution, but we must be careful to limit this to the objective words and terms of that great instrument. No one conversant with the Constitutional law, meaning the federal Constitutional law, of our land, and its marvelous development to meet the changing conditions of the times, would argue that a particular case would be decided by the Supreme Court of today exactly the same way that the same case would have been decided by the Supreme Court of 1791 after the adoption of the first ten amendments. In other words "the prevalent moral and political theories" are not the same today as they were one hundred and thirty-three years ago.

This leads to a definition of our subject and the question, what was the religious freedom meant by "the Fathers"? Though our federal Constitution mentions "religion" in two places, it does not define "religion." Since we must go elsewhere for a definition of "religion," we should go to the history of the times to de-

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* Law Librarian, West Virginia University, Morgantown, W. Va.
1 Oliver Wendell Holmes, Jr., "THE COMMON LAW," page 1.
3 Constitution of the United States Art VI, Clause 8; First Amendment.
termine what was meant by the word when it was written into the Constitution.

A desire for religious toleration was one of the primary causes of the settlement of a great many of the original colonies. However, having arrived and settled in this country the persecuted became the persecutors and were as intolerant as their oppressors had been. Massachusetts Bay Colony allowed only Puritans to vote. The Assembly of Freemen in Maryland, settled by the Catholics, passed, in 1649, the Toleration Act securing to all Christians liberty to worship God according to the dictates of their consciences. Later the Protestants obtained a majority in the Assembly, excluded the Catholics therefrom and declared them outside the protection of the law. At one time two governments, one Protestant, the other Catholic, were sustained. In 1691 Maryland became a royal province and the Church of England was established. In 1715, the fourth Lord Baltimore recovered the government and religious toleration was restored. Thus in a period of sixty years the religious history of one of the colonies shows a complete cycle from religious toleration—to protestant—to the Established Church of England—to toleration. Such was the state of affairs in our colonial history. Some states went so far as to establish not only a particular religion but also to legislate in respect to its doctrines and precepts. The people were taxed, against their will, for support of religion and sometimes for the support of particular sects to whose doctrines they could not agree.

The law of Virginia in 1705 is well shown by an enactment of that date which was as follows: "If a person brought up in the Christian religion denies the being of God or the Trinity, asserts there are more Gods than one, denies the Christian religion to be true, or the Scriptures to be of divine authority, he shall be punished for the first offense by incapacity to hold office; for the second by disability to sue, to take any gift or legacy, or by three years imprisonment without bail."

There was, however, a ray of hope shining through all this cloud of intolerance. Rhode Island claims that, "Roger Williams was the first person in modern Christiandom to maintain the doctrine of religious liberty and unlimited toleration." It is enough for our purposes to know that, as early as 1655, Roger Williams in

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6 American Law Review XXXII, page 531. 3 Hening's Statutes at Large 358.
his writings compared the state to a ship, with peoples of all denominations and religions aboard, going to sea. He argues that none should be compelled to attend ship’s prayers, yet all should obey the ship’s rules of conduct and behavior, pay their freight, help in the common defense, etc. The fight against intolerance and for religious freedom came to a direct issue in Virginia in 1784. The House of Delegates had under consideration “a bill establishing provision for teachers of the Christian religion.” The action on the bill was postponed and the people requested “to signify their opinion respecting the adoption of such a bill at the next session of the assembly.” This was the signal for a great awakening of the people and for them to plant the seed of religious liberty, which in turn, at least in the opinion of many scholars, is the keystone of our prosperity and national well being.

James Madison drew up his “Memorial and Remonstrance.” The inhabitants of various counties and the members of various denominations likewise presented petitions and remonstrances against the proposed legislation.

When the Assembly next met not only was the “bill establishing provision for teachers of the Christian religion” rejected, but another establishing religious freedom, drafted by Thomas Jefferson, was passed. It is here in this memorable Act and with this setting that we get the definition of religious liberty meant by “the Fathers.” The preamble declares: “that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once de-

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8 The full text of Williams’ writing is as follows:

“There goes many a ship to sea with many hundred souls in one ship whose weal and woe is common, and is a true picture of a commonwealth or a human combination or society. It hath fallen out sometimes that both Papists and Protestants, Jews and Turks may be embarked in one ship; upon which supposal I affirm that all the liberty of conscience that ever I pleaded for turns upon these two hinges, that none of the Papists, Protestants, Jews or Turks be forced to come to ship’s prayers or worship nor compelled from their particular prayers or worship if they practice any. I further add that I never denied that notwithstanding this liberty the commander of this ship ought to command the ship’s course yea, and also command that justice, peace and sobriety be kept and practiced both among the seamen and all the passengers. If any of the seamen refuse to perform their services, or passengers to pay their freight, if any refuse to help in person or purse toward the common charges or defense; if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there ought to be no commanders or officers, because all are equal in Christ, therefore no masters, nor officers, nor laws, nor orders, nor corrections, nor punishments; I say I never denied, but in such cases whatever is pretended the commander or commanders may judge, resist, compel, and punish such transgressors according to their deserts and merits. This if seriously and honestly minded may, if it so please the Father of lights, let in some light to such as willingly shut not their eyes.”


10 Idem.


12 Note nine supra.

13 12 HENNING'S STATUTES 34.
strays all religious liberty.* * * * It is time enough for the right-
ful purposes of civil government, for its officers to interfere when
principles break out into overt acts against peace and good
order. 14

By religious liberty, as we shall see later, it is not meant that
each person is allowed to do as he pleases under the cloak of re-
ligion. Religious liberty, like civil liberty, is liable to abuse. No
one, under the claim of religious liberty has the right to injure an-
other or to do society a wrong. The rule must be: "Sic utere
tuum, ut alienum non laedes." Overt acts which disturb the peace
or undermine the moral fabric of the foundations of our govern-
ment are forbidden.

Thus Jefferson in drafting this bill and the Assembly in pass-

14 Idem.—The full text of the Preamble and Act is as follows: "An act for
establishing religious freedom.—1. WHEREAS Almighty God hath created the
mind free; that all attempts to influence it by temporal punishments or barthens,
or by civil incapacitations, tend only to beget habits of hypocrisy and meanness,
and are a departure from the plan of the Holy author of our religion, who being
Lord both of body and mind, yet chose not to propagate it by coercions on either, as
was in his Almighty power to do; that the impious presumption of legislators and
rulers, who being themselves but fallible and uninspired men, have assumed dominion
over the faith of others, setting up their own opinions and modes of thinking as the
only true and infallible, and as such exclusively coercing them on others, hath
established and maintained false religions over the greatest part of the world,
and through all time that to compel a man to furnish contributions of money
for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even
the forcing him to support this or that teacher of his own religious persuasion, is depriving
him of the comfortable liberty of giving his contributions to the particular pastor, whose
moral he would make his pattern, and whose powers he feels most persuasive to righteousness,
and is withdrawing from the ministry those temporary rewards, which proceeding from
an approbation of their personal conduct, are an additional incitement to earnest
and unremitting labours for the instruction of mankind; that our civil rights have
no dependence on our religious opinions, any more than our opinions in physics or
geometry; that therefore the proscribing any citizen as unworthy the public confidence
by laying upon him an incapacity of being called to offices of trust and emolument,
unless he profess or renounce this or that religious opinion, is depriving him
intercourse of these privileges and advantages to which in common with his
fellow-citizens he has a natural right; that it tends only to corrupt the principles
of that religion it is meant to encourage, by bribing with a monopoly of worldly
honours and emoluments, those to will externally profess and commend it; that
though indeed these are criminal who do not withstand such temptation, yet
neither are those innocent who lay the bait in their way; that to suffer the
civil magistrate to intrude his powers into the field of opinion, and to restrain the
free and untrammelled exercise of his own conscience, by compelling him to
subscribe principles on supposition of their probable truth or untruth, is a
dangerous fallacy, which at once destroys all religious liberty, because he being
of course judge of that tendency will make his opinions the role of judgement,
and approve or condemn the sentiments of others only as they shall square with
or differ from his own; that it is time enough for the rightful purpose
of civil government, for its officers to interfere when principles break out into overt acts
against peace and good order; and finally, that truth is great and will prevail
if left to itself, that she is the proper and sufficient antagonist to error, and has
nothing to fear from the conflict, unless by human interposition disarmed of
her natural weapons, free argument and debate, errors ceasing to be dangerous
when it is permitted freely to contradict them;

"II. Be it enacted by the General Assembly, That no man shall be compelled
to frequent or support any religious worship, place, or ministry whatsoever, nor
shall be enforced to charge, restrain, molest, or burthend in his body or goods, nor
shall otherwise suffer on account of his religious opinions or belief; but that
all men shall be free to profess, and by argument to maintain their opinion in
matters of religion, and that the same shall in no wise diminish, enlarge, or
affect their civil capacities.

"III. And though we well know that this assembly elected by the people
for the ordinary purposes of legislation only, have no power to restrain the acts of suc-
ceeding assemblies, constituted with powers equal to our own, and that therefore
to declare this act to be irrevocable would be of no effect in law; yet we being
free to declare, and do declare, that the rights hereby asserted are of the natural
rights of mankind, and that if any act shall be hereafter passed to repeal the
present, or to narrow its operation, such act will be an infringement of natural
right."
ing it, by one bold stroke, established as law for the great State of Virginia what was already the expressed will of the people, religious liberty. However, Jefferson, it seems desired the whole credit for the task, for he had written into his epitaph, "(2) the author of the Virginia Religious Liberty Statute." Yet he was no more the founder of religious freedom than Mr. Volstead was the founder of prohibition. Each merely put into words for legislative enactment what was or was to be the expressed will of the people. True religious liberty which we have become accustomed to regard as the natural, fundamental and inalienable right of every man was thus established in this country only three years before the adoption of the Constitution.

As before mentioned two provisions of our federal Constitution bear directly on the question. Article VI, sec. 3 declares:

"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."

Charles C. Pinckney, of South Carolina, was responsible, more than any other for these words. In his draft of a constitution submitted to the convention on Tuesday May 29, 1787, we find these words: "The legislature of the United States shall pass no law on the subject of religion." As this draft was not accepted the matter was again introduced on Monday August 20, and finally on August 30, on motion of Mr. Pinckney, the clause was put in its final form as we have quoted above. Roger Sherman, of Connecticut, thought such a provision was unnecessary, "the prevailing liberality being a sufficient security against such tests."

The Federalist makes no mention of religion or of the provision concerning religious tests. However, the people who met in the conventions of the various states to pass on the Constitution did not regard the provision of Article VI, sec. 3 as a sufficient guarantee of religious freedom. The states that required test oaths thought it to liberal, among these were Massachusetts and North Carolina. The leaders in Virginia did not think the provision liberal enough. Strange as it may seem, the proposed

16 CURTIS, THE TRUE THOMAS JEFFERSON, Ch. II.
17 The text and punctuation is as in the original copy in the Department of State at Washington. ELLIOTT'S DEBATES, 2nd ed. Vol. I. 15.
19 Ibid. Vol. 5. 468.
amendments of North Carolina and Virginia were practically the same.

As a result of these proposed amendments, Congress sent to the legislatures of the several states twelve amendments for ratification. The last ten of these proposed amendments were adopted by the legislatures of all the states except Massachusetts, Connecticut and Georgia, which made no returns, and by silence gave consent. Accordingly the first ten amendments to our Constitution were declared in force by proclamation of President Washington December 15, 1791. It is significant that the first part of the first amendment is that respecting religious freedom. The amendment is as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Before going into a study of the interpretation of these clauses it is well to examine them to see what, in plain terms, is their meaning. The essential purpose of sec. 3 of Article VI, was the cutting off forever the possibility of any alliance of the Church and State. The framers of the Constitution were well familiar with the history of Europe and had witnessed the oppression of those who were not able to meet the religious tests set up by those in power. Even Blackstone who wrote in favor of religious toleration sought to justify the test oaths.

That piety, religion and morals are intimately connected with the functions of good government is scarcely to be disputed. Each of the original thirteen colonies had the precepts of Christianity as the basis of their government. But admitting here, for purposes of discussion, that the state has a duty of supporting the Christian religion, the first amendment cut off the right of the federal government to regulate, in any way, the consciences of its people or to punish them or hold them accountable for their religious beliefs. In the words of a well known authority on our Constitution the purpose of the first amendment was, "Not to countenance, much less to advance, Mohametanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any National ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the National Government. It thus cuts off the means

\[^{20}\text{Supra. Note 16. Italics ours.}\]
\[^{21}\text{BLACKSTONE COMMENTARIES, Vol. 4—52, 53.}\]
of religious persecution (the vice and pest of former ages), and of
the subversion of the rights of conscience in matters of religion,
which had been trampled upon almost from the days of the Apos-
tles to the present age."

To go into the examination of the provisions of the state Constitu-
tions upon this subject would not only be tedious and laborious
but also of little value. Judge Cooley has admirably set them out
in his work "Constitutional Limitations" as follows:

"Those things which are not lawful under any of the Ameri-
can Constitutions may be stated thus:

"1. Any law respecting an establishment of religion. The
legislatures have not been left at liberty to effect a union of
Church and State, or to establish preferences by law in favor
of any one religious persuasion or mode of worship. There is
not complete religious liberty where any one sect is favored by
the State and given an advantage by law over other sects. What-
ever establishes a distinction against one class or sect is, to the
extent to which the distinction operates unfavorably, a perse-
cution; and if based on religious grounds, a religious persecu-
tion. The extent of this discrimination is not material to the
principle; it is enough that it creates an inequality of right
or privilege.

"2. Compulsory support, by taxation or otherwise, of re-
gligious instruction. Not only is no one denomination to be
favored at the expense of the rest, but all support of religious
instruction must be entirely voluntary. It is not within the
sphere of government to coerce it.

"3. Compulsory attendance upon religious worship. Who-
ever is not lead by choice or a sense of duty to attend upon the
ordinances of religion is not to be compelled to do so by the
state. It is the province of the State to enforce, so far as it
may be found practicable, the obligations and duties which the
citizen my be under or may owe to his fellow-citizens or to
society, but those which spring from the relations between him-
self and his Maker are to be enforced by the admonitions of
conscience, and not by the penalties of human laws. Indeed as
all real worship must essentially and necessarily consist in the
free-will offering of adoration and gratitude by the creature
to the Creator, human laws are obviously inadequate to incite
or compel these internal and voluntary emotions which shall
induce it, and human penalties at most could only enforce the
observance of idle ceremonies, which, when unwillingly perform-
ed, are alike valueless to the participants and devoid of all the
elements of worship.

"4. Restraints upon the free exercise of religion according
to the dictates of the conscience. No external authority is to
place itself between the finite being and the Infinite when the

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former is seeking to render the homage that is due, and in a
mode which commends itself to his conscience and judgment
as being suitable for him to render, and acceptable to its object.

“5. Restraints upon the expression of religious belief. An
earnest believer usually regards it as his duty to propagate his
opinions, and to bring others to his views. To deprive him of
this right is to take from him the power to perform what he
considers a most sacred obligation.”

From the second point of Judge Cooley’s classification must be
excepted the State of New Hampshire, as he notes by a footnote,
for Article 6, part 1, of the Constitution of New Hampshire pro-
vides:

“As morality and piety, rightly grounded on evangelical
principles, will give the best and greatest security to govern-
ment, and will lay in the hearts of men the strongest obliga-
tions to due subjection, and as the knowledge of these is more
likely to be propagated through a society by the institution of
the public worship of the Diety and of public instruction in
morality and religion, therefore, to promote those important
purposes, the people of this state have a right to empower, and
do hereby fully empower, the legislature to authorize, from time
to time, the several towns, parishes, bodies corporate, or reli-
gious societies within this state to make adequate provision, for
the support and maintenance of public Protestant teachers of
piety, religion, and morality.”

The provisions of the West Virginia Constitution bearing on
the subject of religion are as follows:

“No religious or political test oath shall be required as a pre-
requisite or qualification to vote, serve as a juror, sue, plead,
appeal, or pursue any profession or employment.”

“Religion.—No man shall be compelled to frequent or sup-
port any religious worship, place or ministry whatsoever; nor
shall any man be enforced, restrained, molested or burthened,
in his body or goods, or otherwise suffer, on account of his re-
ligious opinions or beliefs, but all men shall be free to profess,
and by argument, to maintain their opinions in matters of re-
ligion; and the same shall, in no wise, affect, diminish or enlarge
their civil capacities; and the Legislature shall not prescribe
any religious test whatsoever, or confer any peculiar privileges
or advantages on any sect or denomination, or pass any law
requiring or authorizing any religious society, or the people of
any district within the State, to levy on themselves, or others,
any tax for the erection or repair of any house for public wor-
ship, or for the support of any church or ministry, but it shall

23 7th ed. 663-665.
24 WEST VA. CONST. ART. III, SEC. 11. BARNES’ WEST VIRGINIA CODE ANNOTATED 1923, LXXXII.
be left free for every person to select his religious instructor, and to make for his support, such private contract as he shall please."

"Official oaths.—Every person elected or appointed to any office, before proceeding to exercise the authority, or discharge the duties thereof, shall make oath or affirmation that he will support the Constitution of the United States."

"The Legislature shall not pass local or special laws in any of the following enumerated cases; that is to say, for

"Providing for the sale of church property, or property held for charitable uses;

"Church Property; Incorporation.—No charter of incorporation shall be granted to any church or religious denomination. Provisions may be made by general laws for securing the title to church property, and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church, or religious denomination."

Such are the provisions respecting religion that the authors of our State Constitution saw fit to write into that instrument as the foundation of the law on this important subject.

Before going into a further examination of our subject, under the provisions of the Constitutions set forth, it is necessary to examine, at least briefly, the question whether or not Christianity is a part of the common law. That there is no common law of the United States is a matter too well settled to warrant exposition. In West Virginia by statute "The common law of England so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, one thousand eight hundred and sixty-three, or has been or shall be altered by the legislature of this State."

The Virginia statute of 1776 and the subsequent revisions of the Virginia Code show that the common law of England, as it was prior to the fourth year of the reign of King James I, was adopted and maintained as law in that State.

As early as the twenty-eighth year of the reign of Charles II

27 Barnes', West Virginia Code Annotated 1923, Ch. 13, sec. 5.
28 See Scott v. Lunt, 7 Peters 596, 8 L. Ed. 797 (1833).
it was declared that Christianity was a part of the laws of England. This remained the law, or at least was what the courts laid down as the law, until the case of Bowman v. Secular Society Limited was decided in 1917. The Supreme Court of Massachusetts in 1815 declared that the propagation of the Christian religion, either at home or abroad was an object of great concern and could not be opposed as a matter of general law or rule of public policy. Four years prior to this decision the Supreme Court of New York, in an appeal from a conviction for blasphemy said, "The people of this State, in common with the people of this country, profess the general doctrines of Christianity as the rule of their faith and practice."

"Though the Constitution has discarded religious establishments, it does not forbid judicial cognizance of those offences against religion and morality which have no reference to any such establishment, or any particular form of government, but are punishable because they strike at the root of moral obligation and weaken the security of the social ties." This case was decided, of course, in accordance with the provisions of the New York Constitution.

A similar case of an indictment for blasphemy was decided in Pennsylvania in 1822. The court declared; "Christianity, general Christianity, is and always has been, a part of the common law of Pennsylvania. This is limited, however, by the statement that only its divine origin and truth are admitted."

The most important case dealing with this phase of the subject is Vidal et al. v. Girard's Executors. The facts of this interesting case were; Stephen Girard by his will left a great amount of property, both real and personal, to the Mayor, Alderman and citizens of Philadelphia, in trust, for the purpose of establishing a college for the poor white male orphans of the community. This gift was made upon the condition, "That no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college." The will was attacked on the ground that the system of education was unchristian.

32 Taylor's Case, 3 Keb. 607, 621; 1 Ventris, 233; 86 English Reports, Reprint 186. (1676). "For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law."


34 Bartlet v. King, 12 Mass. 536, 7 Am. Dec. 99 (1815). This was an action of debt by a legatee for a bequest to promote the propagation of Christianity among the heathen. It was held valid and not against public policy.

35 The People v. Ruggles. 8 Johnson (Supreme Court, New York) 290, (1811).


37 2 Howard 127, 11 L. Ed. 205 (1844).
tian. The will was held valid. Mr. Justice Story said on this point that for the gift to be held invalid it must, in effect, impugn or repudiate the Christian religion and not merely provide that it should not be taught.

Of course it is to be remembered that the common law is not a part of the law of Louisiana and the matters just discussed would have no application there.

The provision of our federal Constitution affecting religion are limitations on the federal government only. The whole power of government over the affairs of religion, or of the church, is left exclusively to the states. So far as the federal Constitution provides, there is nothing preventing the several states from requiring religious test oaths for state offices. The first ten amendments are limitations on the federal government but not on the several states.

The federal Constitution, the laws of the United States, and all treaties made under the authority of the United States are the supreme law of the land binding upon the judges in every state. A treaty constitutionally concluded and ratified abrogates all state laws inconsistent therewith.

It is interesting to note, that the treaty concluded with Tripoli in 1776, though it was executed before the adoption of the Constitution, provided; "As the government of the United States of America is not in any sense founded on the Christian religion, as it has in itself no character of enmity against the laws, religion or tranquillity of Mussulmen; this indicates that Christianity was not then regarded as a part of the federal law. In 1816 it was declared by treaty; "As the government of the United States has in itself no character of enmity against the laws, religion or tranquility of any nation, and as the said States have never entered into any voluntary act of hostility, except in defense of their just rights on the high seas, it is declared by the contracting parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony between the two nations. There is a very significant provision in the

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38 Supra note 3.

39 Permoll v. Municipality No. 1 of the City of New Orleans. 3 How. 589 (1845); Vidal v. Girard's Executors supra note 9; Webster's Works, Vol. 6, 175.


41 Constitution of the United States Article VI, Clause 2.

42 6 Opinions of the Attorney Generals, 293; U. S. v. Peggy, 1 Cranch 103 (1801); Ware v. Hylton, 3 Dallas, 199 (1796).

43 Article XI.

44 Treaty with Algiers, Article XV.

45 For similar provisions see:
   Treaty with Argentine Republic, 1853, Article VIII;
   Treaty with Bolivia, 1888, Article XIV;
   Treaty with China, 1868, Article IV;
   Treaty with Tonga, 1886, Article XII.
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Treaty with Madagascar of 1867; Article II of that treaty provides; "Citizens of the United States of America shall, while in Madagascar, enjoy the privileges of free and unmolested exercise of the Christian religion." Is this not a tacit recognition that the Christian religion is a part of the law or of the foundation upon which the law of the United States is erected?

It is submitted that the full truth was spoken by the illustrious Webster when he said:

"The massive cathedral of the Catholic; the Episcopal church with its lofty spire pointing heavenward; the plain temple of the Quaker; the log church of the hardy pioneer of the wilderness; the momentoes and memorials around and about us; the consecrated graveyards, their tombstones and epitaphs, their silent vaults, their mouldering contents, all attest it. The dead prove it as well as the living. The generations that are gone before speak to it and pronounce it from the tomb. We feel it. All, all proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and fagot are unknown, general, tolerant Christianity, is the law of the land."  

The common law required witnesses to take an oath before they were qualified to give testimony. The original theory was that Divine vengeance was called down upon one who falsified. The modern view is that such an oath is required as a means of reminding the witness of Divine punishment should he swear falsely; and further to make such witness amenable under the criminal law. The leading case in the English law was Omychund v. Barker. The test is a belief in a supreme being who is the rewarder of truth and avenger of falsehood. What are the rights of one who does not believe in a Supreme Being? Atheists at common law were incompetent as witnesses. It was sufficient, however, if a witness' beliefs met the test above set forth regardless of his religious belief and the oath administered according to the form of that religion that binds most solemnly the conscience of the witness.

The Supreme Court of Virginia decided in 1846 (this case is authority in West Virginia) that no person is incapacitated from being a witness on account of his religious belief. West Virginia

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46 Wigmore, Evidence, 2nd Ed. sec. 1816.
47 1 Atk. 22, 26 English Reprint 15 (1744).
49 Perry v. Commonwealth. 3 Grattan 602 (1846).
has regulated this matter by legislative enactment providing that a solemn affirmation shall be equivalent to an oath.51 This choice provides for those who lack the requisite belief as laid down as the common law rule as well as for those who have religious scruples against taking oaths.52

The greatest amount of litigation on the subject of religious freedom has been concerning the so-called religious instruction in the public schools. There is much conflict of authority on this matter. Perhaps part of the conflict is due to the varying provisions of the several state constitutions on the subject. The question generally arises as to whether the reading of the Bible in the schools violates a constitutional provision establishing religious liberty, or prohibiting the use of public funds for sectarian purposes.53 Between Christian sects there is a conflict of belief as to whether the mere reading of the Bible is religious instruction or merely instruction in the fundamentals of morality.54 By the weight of authority the mere reading of the King James version of the Bible in school without any comment does not violate any provisions against sectarianism or interfere with religious freedom.55 It is evident that such holdings meet with strong opposition from those of the Catholic faith who maintain that the Douay version of the Bible is the true version. These cases by implication, at least, limit the word 'sect' to the various denominations, or divisions of the Christian religion. Such a definition, if carried to the farthest point, would likely effect a grave restriction upon what is the popular conception of religious freedom. The majority view, allowing the reading of the King James version of the Bible, and those cases that allow the recital of the Lord's Prayer and the singing of hymns and instruction in the ten commandments,56 are explained, and those in favor of their holdings, seek to justify them

51 W. VA. CODE Ch. 13, sec. 11. WEST VIRGINIA CONSTITUTION Art. III, sec. 15, also applies. Supra note 24.
53 Practically all jurisdictions allow a witness to make an affirmation instead of an oath. Among those that do not are Virginia and Oklahoma. All the states except Arkansas, Maryland, and North Carolina have Constitutional provisions providing that religious belief shall not affect one's civil capacities—in some cases specifically mentioning competency as a witness.
53 As to the provisions requiring children in public schools to listen to the reading of the Bible, join in the singing of hymns and the repeating of the Lord's Prayer see People v. Board of Education 245 Ill. 334 (1910) holding them invalid, and Church v. Bullock. 104 Tex. 1 (1908) holding them valid. See the discussion of the Illinois case in Schofield, Constitutional Law and Equity Vol. II. 459. 6 ILL. LAW REV. 273-27, 91-112, May & June, 1911.
54 The cases in point are collected in an annotation in 5 A. L. R. 866, and 20 A. L. R. 1351.
on the ground that such things do not amount to sectarian instruction, which seems to be assuming the point in controversy, but that they are instruction tending toward morality and piety. The use of the Bible as a text book has been held to be in violation of provisions against sectarianism or religious instruction. These cases do not seem to be in accord with the principle of the majority view allowing the Bible to be read. However, the use of a text book founded on the Bible is allowed. Clearly the governing body of a public school can forbid the reading of the Bible, the singing of hymns, etc., without violating any of the constitutional provisions dealing with the subject.

New York has upheld, as constitutional, a regulation of the superintendent of public instruction prohibiting the wearing of a distinctive religious garb or uniform by teachers, under penalty of dismissal. The Pennsylvania Court refused to enjoin sisters of a Catholic order from teaching, or the board from hiring them to teach in the public schools, while dressed in a religious uniform. However, the same court in a later case sustained a statute forbidding teachers to wear any distinctive religious garb while teaching.

There are no cases upon this subject in West Virginia. As a matter of fact, however, the Bible is read in the public schools of our State, prayers are made and hymns are sung. The opinion is ventured that should a case arise under any of the provisions of our Constitution, as heretofore set out, the Supreme Court, in view of the great tendency toward liberality by a great majority of the people, would be very reluctant in restricting such usages.

Mr. Henry Schofield, one of the greatest modern authorities on our Constitution, pointed out that the statement of Mr. Justice Story in the Girard Will Case that, "all sects whether they believe in Christianity or not, and whether they were Jews or infidels" is obiter. In a discussion of the Illinois case of People v. Board of Education, where the court by a divided opinion, held that the religious liberty guarantees of the Illinois Constitution forbid
the legislature to authorize reading of the Bible in the public schools on the ground that it deprived certain taxpayers of the right of freedom from taxation to help support any clergy or church establishment; Mr. Schofield argued that, interpreted historically, the provisions guaranteeing religious freedom forbade only the discrimination between Christian sects. This argument

68 Mr. Schofield says: "The majority say 'the free enjoyment of religious worship' includes freedom not to worship. They use that doctrine to put atheists, Pagans, Jews, and all non-Christian sects into the same class with Christians, compelling them all up together into one consolidated mass under the guarantee of freedom of religious profession, worship, and opinion, to enable them to use that guarantee to complain as taxpayers that any mention of the Bible in the public schools constitutes an appropriation or payment of money out of public fund in aid of a 'church or sectarian purpose.' This judicial doctrine that freedom to worship means freedom not to worship cannot be accepted without prejudice to every of the court persistently declines to draw any distinction in their practical application to men and things. between freedom of religious profession and worship, and freedom of religious opinion; between freedom of religious profession, worship, and opinion, and freedom from civil and political disabilities on account of religion or religious opinion; between freedom of religious profession, worship, and opinion, and freedom from taxation to aid any 'church or sectarian purpose.'

"Taking the guarantee of freedom of religious profession and worship, standing by itself in connection with the legally-enjoined duty of Christian toleration, as it stood in the Virginia constitution of 1776, and as it stands in the Illinois bill of rights, it is not as a limitation on the power of the legislature, but as a limitation on the power of the legislature? What do the people mean by 'religious profession and worship' as a limitation on the power of the legislature? In their ordinary, natural signification, the words of religious profession and worship denote an affirmative right, not a negative right; a right to do (facere) not a right not to do (non facere); a right exercisable and enjoyable by affirmative act or acts, and not a right exercisable and enjoyable by a negative forbearance of forbearances. There can be no doubt that historically, the object of the right of religious profession is one certain, determinate religion, i. e., the Christian religion; and the object of the right of freedom of worship is equally certain and determinate, i. e., God, Almighty God, worshiped by all Christians. The words of the bill of rights of the constitutions of Illinois of 1818 and 1884 leave no room to think that the historical meaning was changed. They declare:

'That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.'

'And that no preference shall ever be given by law to any religious establishments or modes of worship.'

The bill of rights of the Illinois constitution of 1870 changes the words of the declaration, saying:

'The free exercise of religious profession and worship without discrimination shall forever be guaranteed.'

'Nor shall any preference be given by law to any religious denomination or mode of worship.'

'There is no direct reference to Almighty God, but the constitution of 1870 begins with the words 'religious profession and worship' as a limitation on the power of the legislature.'

"If the guarantee of freedom of religious profession and worship secures to men, as it does, the affirmative right to profess the Christian religion and to worship God in all usual Christian modes, subject to the legally-enjoined duty of Christian toleration, then its operation and effects as a limitation on the legislature is plain, viz.: it forbids the legislature to discriminate between Christian sects; to give one sect a preference over others; it requires the legislature to stand neutral on the points that divide the Christian sects; to treat them all with absolute equality and impartiality; it secures equal rights to all Christian sects and sects not requiring the legislature to give preference to any non-Christian religion, to infidelity, to atheism, or to Paganism; it leaves the legislature free to raise and unfurl the banner of Christianity stripped of the divisive points and bearing all the nondiscriminative points common to all Christians; or
is very scholarly and ingenious. Doubtlessly "the Fathers" never dreamed of such liberality in respect to religion as we now have; but it is believed that the preponderant public opinion is greatly in favor of that liberality. It is not meant that modern Christians are less zealous in the propagation of their beliefs, that is beside the point, but that preponderant public opinion will now acquiesce in great liberality of religious action, so long as that action does not become overt acts against the peace and good morals.

Sunday Laws.—The observance of the one day's rest in seven greatly antedates the Christian ear. It was then purely the observance of a religious duty. The ordinary name of the word Sunday in Christian Greek is the Lord's Day. With respect to laws concerning Sunday there has been much litigation in this country, though the law is now rather well settled. As pointed out by a New York court the observance of the Sabbath is older than the state governments; and its observance was regulated by the colonial laws. The early regulations concerning the observance of the Sabbath were made purely with the intent of enforcing a religious doctrine. Even in 1861, in upholding the act of the legislature of New York to preserve peace and good order on Sunday, the court based the holding on the desire to keep religion and its ordinances from being openly reviled and held in contempt as well as on the police power.

The provisions of the constitutions upon which are based the attacks on the Sunday laws are those respecting due process of laws, equal privileges and immunities of citizens, the right to acquire property, and those respecting the establishment of religion and guaranteeing religious freedom.

Only one case is found in the digests holding a Sunday law prohibiting the sale of goods unconstitutional. From this decision Judge Field, later Justice of the United States Supreme Court, made a strong dissent and the case was later overruled. All the other cases in which Sunday closing law has been attacked as unconstitutional have been decided in favor of constitutionality.
The courts everywhere recognize such regulations as proper under the police power. It is said these regulations are essentially civil, and not religious, and that their validity is neither strengthened nor weakened by the fact that the day of rest they enjoin is Sunday.

West Virginia has regulated the observance of Sunday by the following enactment; "If a person, on a Sabbath day, be found laboring at any trade or calling, or employ his minor children, apprentices, or servants in labor or other business, except in household or other work of necessity or charity, he shall be fined not less than five dollars for each offense. * * * From the operation of this section are excepted those engaged in carrying the mails, operating railroads or steamboats, and those who observe the seventh day of the week as a day of rest. * * * Prior to the passage of this act it was unlawful to operate freight trains on Sunday; and the regulation, as it was then was held not to be in violation of the provision of the federal Constitution giving Congress the power to regulate commerce. Whether or not a particular piece of work is a work of necessity is a question of fact for the jury.

In brief, the states have the right, under the police power, to pass reasonable regulations prohibiting work on Sunday.

Generally speaking an executory contract made on Sunday will not be enforced. However, executed contracts will not be disturbed. West Virginia provides that no contract shall be deemed void because it was made on the Sabbath day. However, as in all other jurisdictions Sunday is a non-judicial day. Since the courts uphold the Sunday laws under the police power, and the present view is that they are in no way connected with any religion, though the members of the Christian faith are reluctant to admit this, there remains little to be said.

Christians differ in the manner in which Sunday ought to be kept. In Continental Europe, sports, games, and practices are freely indulged in on that day, with the approval of the church, which a great number of the Protestant Churches of England and this country do not approve. The methods of observing the day differs greatly in this country. Some of the states regard it as

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75 West Va. Code C. 149, sec. 16.
77 State v. Railroad Co., 24 W. Va., 783 (1884). It must be noted that this case was decided prior to the Interstate Commerce Act.
78 State v. McBee, 52 W. Va., 257, 42 S. E. 121 (1903). It was there held lawful to pump an oil well on Sunday where not to do so would result in material loss.
80 For a discussion of Sunday contracts see Williston, Contracts Vol. II, sec. 1703-1710.
more salutary, particularly in the larger cities, to allow shows and entertainments of various kinds. Clearly the state may allow such practices and will allow them if the preponderant public opinion in any given section will demand them, for there is nothing in our constitutions to prevent.

The subject of blasphemy raises many interesting questions relating to religious freedom. Blasphemy, as cognizable by and punishable at common law, is defined by Blackstone as "denying the being or providence of God, contumelious reproaches of our Savior Christ, profane scoffing of the Holy Scriptures, or exposing it to contempt or ridicule." Shaw, C. J. in Commonwealth v. Kneeland 80 gave what is the classic definition in this country. "In general blasphemy may be described as consisting in speaking evil of the Diety with an impious purpose to derogate from the Divine Majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God calculated and designed to impair and destroy the reverence, respect and confidence due to Him as the intelligent Creator, governor and judge of the world."

In most states statutes have been enacted against this offense. Do such statutes conflict with the Constitutional provisions affecting religion? At old common law blasphemy was punishable because of the close relation between church and state. Civil society was deemed to be founded on Christianity and therefore an attack on Christianity was an attack on the State. 81 It is generally held that these statutes do not supplant the common law but merely authorize a particular mode of procedure against such offenses. It is further held that neither the common law nor these statutes concerning blasphemy are repugnant to the Constitutions. 82

As before mentioned the West Virginia Constitution gives every person the right by argument to maintain his opinion in matters of religion. 83 Section 15, Chapter 149 of the West Virginia Code provides; "If a person arrived at the age of discretion, profanely curse, or swear or get drunk, he shall be fined by a justice one dollar for such offense." Though this law has been on the statute books for over forty years its validity has never been contested. Clearly a person may argue against the Christian religion, or any sect may controvert its truth or origin of the dogma of any denomination, but such a right may not be extended to excuse blasphemy.

80 20 Pick (Mass.) 211, 212 (1838).
81 The King v. Taylor. Supra note 32.
82 State of Maine v. Michael X. Mockus, 120 Me. 84, 113 Atl. 39 (1921).
83 Supra note 25.
One of the greatest functions of government is the preservation of the public health. The welfare and happiness of the people both of this generation and of the generations to come depends greatly upon the general physical well being of the people as a whole. Mr. Justice Miller, speaking for the Court in The Slaughter House Cases⁴⁴ says that this power “extends to the protection of the lives, limbs, health, comfort and quiet of all persons” and that property is subject to all kinds of burdens to secure this protection. At common law by the weight of authority and later in England by force of statutes, parents were required to obtain medical aid for ill children.⁵⁶ All the states have regulations concerning who may practice medicine.

Within the last fifty years there have come into being certain sects or cults whose doctrines embody both a treatment of disease and a religious belief. Chief among these is Christian Science.⁸⁸ The adherents of this faith and particularly their ‘healers’ claim to treat and cure sickness, contagious diseases and surgical cases excepted. Their system of treatment is by prayer to bring the one who is afflicted into harmony with God and thus be made whole; for God is good and with Him no illness can exist. Do regulations regarding the practice of medicine restrict these people in their religion in such a manner as to be contrary to our Constitutions?

Christian Science ‘healers’ may practice their profession, if it is a profession, provided they meet with the requirements of the legislature that are laid down requiring licenses for the treatment of disease. There is no discrimination and such regulations are within the police power and are therefore constitutional. It is the opinion of the author that under our West Virginia definition of practice of medicine and surgery⁷⁷ a Christian Science ‘healer’ may not legally practice without a license.⁸⁸

The study of the offense of bigamy or polygamy in connection with our subject is very interesting, because it is in connection with these matters that we have had the great decision of the

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⁴⁴ 16 Wallace 36, 62.
⁴⁵ Regina v. Hurry, 76 C. C. C. Sessions Paper ——; 31 & 32 Victoria Chapter 122, sec. 37; Queen v. Downes, 1 Q. B. D. 25 (1875); Regina v. Cook, 62 J. P. 712 (1898), Bingham, J. said “Neglect by parents to call in medical aid to their sick child, and in consequence of such neglect the child dies, amounts to manslaughter, and it is no defense to such a charge for the parents to say that they have conscientious objections to call in medical aid.”
⁵⁶ Founded by Rev. Mary Baker Glover Eddy of Concord, N. H., in 1886, and bases its teachings on the scriptures as understood by its adherents.
⁷⁷ W. VA. CODE, Ch. 160, sec. 8 A.
⁸⁸ See People v. Pierson, 176, N. Y. 201, 68 N. E. 243 (1903). Holding: “The term ‘Medical attendance’ as used in Pen. Code making it a misdemeanor to fail to furnish medical attendance by a physician regularly licensed and does not include such attendance by a person who, because of his religious belief, neglects to furnish proper medical attendance to a minor, relying on prayer for Divine aid.”
Supreme Court of the United States interpreting the clauses relating to religious freedom. Though bigamy has long been an offense against the law, it was first made punishable by the civil courts in the first year of the reign of James I. Each of our several States as well as the Federal Government and territories now have statutes against bigamy. Seventy-five years after the adoption of the first amendment one George Reynolds was indicted for bigamy under section 5352 of the Revised Statutes which read as follows: "Every person having a husband or wife living, who marries another, whether married or single, in a territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years."

As heretofore pointed out the First Amendment prohibits Congress from passing any law prohibiting the free exercise of religion. The defendant asked the court to instruct the jury that if they believed he was married in conformity with what he believed to be a religious duty they should find him not guilty. The court refused this instruction. The Supreme Court held that the statute quoted was within the legislative power of Congress, and that those who practiced polygamy, though as a part of their religion, could be held accountable under the law. The court said to do otherwise would permit every citizen to become a law unto himself and make religious belief superior to the law of the land. "Laws are made for the government of actions, and while they cannot interfere with the mere religious belief and opinion, they may with practices." The reason given for the decision was that bigamy was punishable by the common law and it was not intended to be sanctioned by the first amendment. The Court pointed out that in Virginia three years after the passing of the religious liberty statute, heretofore discussed, which was the forerunner of the First Amendment, a statute was passed making bigamy a crime punishable by death.

In 1889 the question was again raised in the case of Davis v. Beason. The court said that the first amendment was never intended to be a protection against legislation for the punishment of acts contrary to the peace, good order and morals of society. The court made clear the distinction between the meaning of the term religion as used in the Constitution, and what it called cultus or form of worship of a particular sect. By the first amendment it

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89 7 C. J. Bigamy, sec. 2.
90 Reynolds v. United States, 98 U. S. 145, 146 (1878).
91 Idem.
92 133 U. S. 333 (1889).
was sought to secure to every person the right to entertain such views concerning the relationship of the Creator and the creature as he chose, but not to allow the individual full sway in doing any act he should choose under the guise of religion. This constitutionality of the West Virginia statute prohibiting bigamy has never been questioned.

The acquiring or holding of property is practically necessary for the furtherance of the interests of every sect or religion. What restrictions may constitutionally be placed upon the manner or amount of property a religious organization may acquire? This question came before the United States Supreme Court in the case of *Mormon Church v. United States*.

Congress passed a law repealing the act of incorporation and providing for the forfeit and escheat of all property held by the Mormon Church, except that used exclusively for worship, as a burial ground or parsonage. Reference was made to an earlier act prohibiting any religious association or corporation from holding property of a greater value than $50,000. in any territory of the United States. These laws were held to be within the powers of Congress. The reason for the holding was that the Mormon Church was encouraging polygamy which was a crime in the eyes of the law, and that Congress had the power to seize the property and devote it to legitimate charitable uses.

The West Virginia constitutional provision dealing with church property has been noted. In conformity with this provision the legislature has provided that every transfer of property for the use of any church or religious society as a place of worship, or as a burial place or as a residence for a minister shall be valid.

There remains for consideration three chief inquiries. What has been the effect of this body of law upon our country? What, if any, changes are taking place? Is change desirable? Alexis de Tocqueville, after his visit to the United States in 1831, said: "there is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in

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92 *West Va. Code*, Ch. 149, Sec. 1.
93 *Bigamy.—Any person being married, who, during the life of the former husband or wife, shall marry another person in this state, or if the marriage with such other person take place out of this state, shall thereafter cohabit with such other person in this state, shall be confined in the penitentiary not less than one nor more than five years."
94 136 U. S. 1 (1890).
96 12 Stat. 501 (1862).
97 Supra p. 200.
98 *West Virginia Code*, Ch. 57, sec. 1.
James Bryce writing more than fifty years later declared of religion: "So far from suffering from the want of State support, religion seems in the United States to stand all the firmer, because, standing alone, she is seen to stand by her own strength." History has shown that the countries that have, under the influence of Christianity, allowed the greatest toleration have prospered most. It is not unreasonable to assume that a great part of our national well being, and surely ours in the greatest country at the present time, is due to the fact that we have had religious liberty. It is the opinion of the author that there has been a change in the law. The authors of our federal Constitution may have intended to secure religious liberty only to Christian sects, but this clearly is not in accord with present preponderent public opinion. In this connection it is worth while to notice the recent English case of *Bowman v. Secular Society, Limited.* A bequest was left to the defendant society whose purpose was declared to be: "to promote * * * * the principle that human conduct should be based on natural knowledge, and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action." Under the assumption that this object involved a denial of Christianity, the court held the bequest valid. This case, of course, does not directly affect our Constitutional guarantees, but it indicates the course of public opinion as reflected by the courts of our great Mother Country. In a very recent New Jersey case a defendant was indicted, under what is called a disorderly act, charged with pretending to tell destinies or fortunes. The courts held that since the defendant was a message bearer or medium in a church, *duly authorized* to teach and practice the religion of spiritualism, the acts complained of were part of a religious service; and under the constitutional guarantee of religious freedom, the defendant was not a disorderly person. Should there be a check put upon this growth of religious freedom? It is believed there should not be. We have a free church in a free state and both have prospered. Any other course would be fraught with imminent dangers.

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101 1917 Appeal Cases 406.