Religion and the Courts 1790-1947

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When the Framers drafted the United States Constitution in 1787, the only mention of religion was the remarkable text of Article VI, which states "no Religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." That groundbreaking language marked a shift from prior practice in Europe and the states. At the time of the Constitution's drafting, most states had religious qualifications for government officials, following the pattern in Britain, where the monarch was required to be a member of the Church of England. In Europe the guiding principle was *cuius regio, eius religio*: the religion of the people is determined by the religion of the ruler.

Many of the Framers, especially James Madison, believed that the new Constitution protected liberty of conscience by creating a government of enumerated and separate powers that gave Congress no authority over religion. During the ratification process, however, constitutional critics demanded greater protection of individuals from the power of the government. In order to secure the Constitution's ratification, the new Congress drafted a Bill of Rights that protected religious freedom in the following language: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Upon ratification by the states in 1791, the language about religion became the First Amendment to the United States Constitution.[1] The two Religion Clauses of the First Amendment are known as the Establishment Clause and the Free Exercise Clause.

Although Madison suggested that the standard protecting liberty of conscience should apply to state as well as federal governments, the language of the First Amendment—"Congress

shall"—applied only to the federal government. It was not until the twentieth century that the Supreme Court interpreted part of the Civil War amendments—the Fourteenth Amendment's Due Process Clause—to apply certain provisions of the Bill of Rights to state governments through a process called incorporation. The Free Exercise Clause was incorporated against the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and the Establishment Clause was incorporated in *Everson v. Board of Education*, 330 U.S. 1 (1947), thus transforming the law of religious liberty into a national standard.

Cantwell and *Everson* marked the beginning of modern First Amendment jurisprudence due to the importance of holding the states and the federal government to the same legal standard. During the era from 1790 to 1947, however, both federal and state courts issued diverse opinions regarding religious freedom and disestablishment. During those years, the United States Supreme Court issued its initial interpretations of the Religion Clauses, while state courts construed their own constitutions and common law without restriction by the federal standards.

Although the Framers drafted a secular constitution without reference to God or Christianity, neither federal nor state courts immediately crafted a religion-free law. Instead, throughout the nineteenth century "state as well as federal courts vacillated in their understanding both of Christianity's relationship to common law and of the religious or Christian character of the country as a whole."[2] State courts frequently interpreted the law to be consistent with Christianity and even allowed prosecutions for blasphemy of the Christian religion. Early Supreme Court cases suggested that the United States was a Christian nation.

The Christianity identified with the nation's law was always Protestant Christianity. The greatest challenges to the courts came from citizens of Non-Protestant Christian religions or no

religion at all, whose numbers were steadily augmented by immigration as well as the growth of new American religions. From 1790-1947, the legal trend moved away from the Christian nation and toward more secular interpretations of constitutions and laws, culminating in *Everson*'s adoption of the "separation of church and state" as the best interpretation of the First Amendment applicable to both state and national government. In the years immediately following the ratification of the Constitution, however, the states had not yet adopted the federal model of disestablishment.

A (Protestant) Christian Nation?

The States.

On questions of religion, the states were bound by their own constitutions whose provisions regarding religion varied greatly. Most state constitutions contained a free exercise equivalent; by 1947, 42 of 48 states protected liberty of conscience, and the remaining states protected religious freedom in some manner, with language outlawing compulsory religion or protecting conscientious objection.[3] The establishment parallel, however, did not exist, as many states had dominant religions with preferred positions, and the federal Constitution was interpreted to prevent Congress from interfering with state establishments. The right to religious freedom was frequently seen as consistent with the recognition that Christianity was part of the law and necessary to uphold the public order. In the years before 1947, the "dominant pattern was that states sought to balance the general freedom of all private religions with the general patronage of one common public religion."[4] Even the end of state establishments—in Massachusetts in 1833—did not end the belief that Christianity was a necessary foundation for government.

Blasphemy and Sabbath laws reflected the close connection between Christianity and state law. State supreme courts upheld convictions for blasphemy against Christianity: in New York and Delaware, for the statement "Jesus Christ was a bastard, and his mother must be a whore,"[5] in Massachusetts, for printing that Universalist belief "is nothing more than a mere chimera of their own imagination . . . as much a fable and a fiction as that of the god Prometheus,"[6] and in Pennsylvania, that "the Holy Scriptures were a mere fable."[7] To attack Christianity, a part of common law, was "a gross violation of decency and good order"[8] punishable by the state. The Pennsylvania Supreme Court, for example, identified "*the constitutionality of Christianity*" as "*the question*" in rejecting Abner Updegraph's appeal of his blasphemy conviction and concluding that Christianity was the law of Pennsylvania and the nation.[9]

In similar fashion, challenges by Jews and Seventh-Day Sabbatarians to Sunday closing laws were rejected across the country, and the courts upheld those laws as necessary to the country's moral and social well-being. The dominant arguments were that religious freedom was not violated because the challengers remained free to practice their own religion and the legislature was permitted to pick a holiday convenient for the majority. At times the state courts displayed their own interpretations of Scripture. To Abraham Wolf's argument that Jews' religious freedom might be violated by Sabbath laws if they believed that their religion obligated them to work on all six days not their Sabbath, the Pennsylvania Supreme Court replied that "we have never heard of the fourth commandment having received this construction by any persons who profess to believe either in the Old or New Testament," and the Jewish Talmud and Rabbinical constitutions "assert[] no such doctrine."[10] The rare 1858 opinion of the California Supreme Court overturning Newman's conviction for selling goods on Sunday was quickly

rejected three years later when the court upheld a new Sabbath law.[11] After 1854 *economic* challenges that the Sabbath laws violated equal protection by favoring some businesses over others succeeded, but the religious claims continued to fail,[12] and in 1900 the United States Supreme Court upheld the Minnesota conviction of a barber who opened his shop on Sunday.[13]

An 1854 decision of the Supreme Court of Missouri affirming Peter Ambs' double conviction for selling ale *and* keeping an alehouse open on Sunday captures the flavor of the Christian Nation that was not "composed of strangers collected from all quarters of the globe, each with a religion of his own" but was significantly created in the "year of our Lord":

> Those who question the constitutionality of our Sunday laws, seem to imagine that the constitution is to be regarded as an instrument framed for a state composed of strangers collected from all quarters of the globe, each with a religion of his own, bound by no previous social ties, nor sympathizing in any common reminiscences of the past; that, unlike ordinary laws, it is not to be construed in reference to the state and condition of those for whom it was intended, but that the words in which it is comprehended are alone to be regarded, without respect to the history of the people for whom it was made.
>
> It is apprehended, that such is not the mode by which our organic law is to be interpreted. We must regard the people for whom it was ordained. It appears to have been made by Christian men. The constitution, on its face, shows that the Christian religion was the religion of its framers. At the conclusion of that instrument, it is solemnly affirmed by its authors, under their hands, that it was done in the year of our Lord one thousand eight hundred and twenty—a form adopted by all Christian nations, in solemn public acts, to manifest the religion to which they adhere.[14]

Christianity also influenced the courtrooms where witnesses and jurors took oaths or were disqualified for not having sufficient faith to take the oath. In British common law only Christians could be sworn as witnesses, but in the states the rule gradually changed to allow believers in other religions to testify, but kept atheists from the stand. The courts disputed whether the witness must believe in rewards and punishments in a future state or if fear of punishment in this world was sufficient.[15] Although Quakers were allowed to proceed by

affirmation rather than oath according to their religious beliefs,[16] atheists were barred "*because an oath cannot possibly be any tie or obligation upon them. Mahometans* may be sworn on the *Koran; Jews* on the *Pentateuch,* and *Gentoos* and others, according to the ceremonies of their religion, whatever may be the form. It is appealing to *God* to witness what we say, and invoking punishment, if what we say be false."[17] The rule was applied to allow Joe Chinaman's testimony in an 1884 murder prosecution in the Territory of New Mexico because he believed in the Chinese religion.[18]

In contrast, atheist oaths were unreliable because it "would indeed seem absurd, to administer to a witness an oath, containing a solemn appeal for the truth of his testimony, to a being in whose existence he has no belief."[19] Similar reasoning was employed in some jurisdictions to prevent slaves from testifying because of uncertainty whether slaves had any religious sensibilities.[20] In Mississippi, however, in a case about the reliability of a dying declaration, slaves were awarded the same presumption of religious belief as white persons because the "simple, elementary truths of Christianity, the immortality of the soul, and a future accountability, are generally received and believed by this portion of our population."[21]

The slaves' relation to the Christian nation was ambivalent. From the earliest days of the colonies, slaves and Native Americans were encouraged to convert to Christianity rather than pursue their own religions. Christianity frequently provided a justification for slavery as the slaveholders extolled the benefits of leading pagan Africans to the highest good of Christian salvation. Christian missionaries' attempts to convert the slaves to their faith were often opposed by slaveholders who believed that exposing slaves to Christian ideals would make them "saucy" enough to demand the freedom and equality of the Gospel message for themselves.[22] The slave codes reflected the battle between missionaries and slaveholders for the souls and labor of the

slaves. The codes prohibited Sunday labor. In Arkansas, it was an indictable offense for masters to force slaves to work on Sunday, and slaves were allowed to attend Sunday services.[23] In Virginia, masters were fined two dollars for forcing slave labor on Sundays, but in North Carolina Sunday labor could be imposed as punishment.[24] As the slaves became more active in the Christian churches, some states imposed laws against slave preaching.[25] Unlike non-slave Protestant Christians, Christian slaves' religious freedom in the Christian nation was limited by the demands of the economic system.

Federal Apocrypha.[26]

Two early Supreme Court cases are now remembered for their dicta about Christianity rather than their specific holdings, which did not include consideration of the Religion Clauses. Stephen Girard left money to the City of Philadelphia to found a school for boy orphans on the condition that "no ecclesiastic, missionary or minister of any sect whatsoever" teach at the school. His relatives challenged the will on the theory that the provision insulted the Christian law of the state in a similar manner to state laws about blasphemy. The United States Supreme Court upheld the will in 1844, ruling that because it still allowed for non-clergy to teach the Bible and Christianity, it did not "impugn or repudiate" Christianity.[27] In 1892, the Court heard a church's challenge to the application of a labor law forbidding importation of foreign workers to its attempt to hire a cleric from overseas. The Court interpreted the statute to bar manual workers only, not clergy, and added the reasoning and language for which the case remains famous: "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people . . . this is a Christian nation."[28] The Christian basis of the law was also at issue when the Court confronted the Mormon Question.

The Mormon Question

After their church's founding in upstate New York in the 1820s, members of the Church of Jesus Christ of Latter-day Saints, also known as the Mormons, first arrived in the Salt Lake Valley of Utah in 1847. The Supreme Court's first interpretation of the Free Exercise Clause, in 1879, occurred in George Reynolds' appeal of his criminal conviction in the Territory of Utah, which was governed by congressional legislation outlawing the crime of bigamy, punishable by a fine of $500 and up to five years in prison. As a member of the Church of Jesus Christ of Latter-day Saints, Reynolds had a religious duty to practice polygamy, and he argued that his religious belief justified his disobedience of the criminal law.

Given the Constitution's identification of a limited federal power, the Court could have ruled that Congress lacked authority to legislate about marriage, a subject usually associated with the power of the states. Displaying little concern about the scope of congressional authority, however, the Court concluded that because Congress "was left free to reach actions which were in violation of social duties or subversive of good order," it could ban the "odious" practice of polygamy, which "was almost exclusively a feature of the life of Asiatic and of African people."[29] The Court relied on the long Christian ecclesial prohibition of polygamy as a reason to uphold Congress's authority and then rejected Reynolds' claim that his religious belief in polygamy should exempt him from a valid law.

Sixty-seven years later, in 1946 the Court relied on *Reynolds* to rule against another polygamist's challenge to a federal law, the Mann Act, which criminalized the transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for

any other immoral purpose."[30] Once again, polygamy did not enjoy constitutional protection but instead provided an "immoral purpose" that justified prosecution.

A Fundamentalist Mormon who considered polygamy his religious duty brought that 1946 challenge against the Mann Act. The mainstream church, however, abandoned its commitment to polygamy in 1890 after extensive legal tangles with the federal government. *Reynolds* encouraged antipolygamists to seek new legal means to end the odious practice of polygamy. Of the 2500 criminal cases prosecuted in the Utah Territory from 1871 to 1896, 95% were for sexual crimes.[31] The United States Supreme Court upheld laws keeping bigamists and polygamists from public office, jury service, and voting.[32] One law required voters to swear that they were not bigamists and did not associate with organizations that supported bigamy or polygamy. In *Davis v. Beason*, the Supreme Court upheld Samuel Davis's conviction for falsely swearing that oath because he was a Mormon, even though he was not a polygamist. "The fact that this statute made membership in the Mormon Church without more a basis for punishment, that the alleged crime was adherence to a religious belief, that in fact that statute was applicable only to the Mormons, was ignored by a Court that could find no sympathy for so militant a Christian minority sect."[33] Instead, the Court reasoned, "bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind."[34]

After the Court upheld laws revoking the corporate status of the church and rendering much of its property to the federal government, the church issued a Manifesto ending its commitment to polygamy in 1890,[35] and, in 1896 Utah became the only state to have a disestablishment clause with "no union of Church and State"—its price of admission to the union.[36]

Pacifism

In the early twentieth century, at the time of World War I, case law about conscientious objection described the scope of religious freedom. The Court repeatedly held that conscientious objection from military service was a matter of privilege to be granted by Congress, not a constitutional right to be claimed by citizens. The Court upheld the government's refusal to grant citizenship to individuals who refused to bear arms to support the United States or who were *selectively* opposed to war. It also rejected the appeals of Methodist students who were expelled from the University of California because they refused to participate in mandatory military training.[37]

Lurking in the citizenship and draft laws were provisions that appeared to favor well-known religions over less famous ones and religion over non-religion. The 1917 Selective Service Act exempted from military service divinity students, ministers, and members of "any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form."[38] A constitutional challenge to the statute was rejected without any reasoning from the Court. The justices issued a dismissive comment that the unsoundness of the argument that the statute violated the First Amendment was so apparent that it needed no analysis.[39] It was not until the Vietnam War that the Court interpreted draft laws to include individuals whose sincere belief "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[40] Mainstream Christianity enjoyed more legal support than unfamiliar faiths until the Jehovah's Witnesses litigated fiercely for their faith during the 1930s and 1940s.

Jehovah's Witnesses

According to *Reynolds*, the polygamy case, religious belief does not provide a justification for disobeying the law. When the United States Supreme Court decided its landmark cases about Jehovah's Witnesses in the 1930s and 1940s, therefore, it relied on the Free Speech Clause of the First Amendment, which states "Congress shall make no law . . . abridging the freedom of speech." The Watch Tower Bible & Tract Society began in Pittsburgh, Pennsylvania, in 1881 and took the name of Jehovah's Witnesses in 1931. Their important religious duty was to distribute the tracts that bore witness to their faith. When the Witnesses sought to distribute their pamphlets across the states, however, they repeatedly ran into local licensing and permit laws that limited their proselytizing. In a series of cases, the Court limited the ability of state and local governments to silence the Witnesses by putting unconstitutional conditions on their speech.[41]

The most famous cases involving the Jehovah's Witnesses concerned the Pledge of Allegiance, whose recitation was mandated by many school districts and upheld by the state courts during the 1930s as a way to instill patriotism in the nation's children. The Witnesses objected to the idolatry of the flag salute. The Court rejected a challenge to a Pennsylvania pledge law in the 1940 *Gobitis* case, which arose when schoolchildren Lillian and William Gobitis refused to pledge allegiance to the flag because of their religious belief that the Book of Exodus prohibits saluting a graven image. The Court deferred to the wisdom of the states in discerning the best means of promoting patriotism in schoolchildren, observing that the "ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a

treasured common life which constitutes a civilization."[42] In other words, the government's need to foster patriotism outweighed the children's religious freedom.

Only three years later the Court overruled *Gobitis,* concluding that a mandatory salute violated the individual liberty of religious and non-religious citizens alike. The second opinion, *West Virginia State Board of Education v. Barnette*, is famous for Justice Robert Jackson's declaration, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[43] As the quotation suggests, the opinion did not depend upon religious freedom but on free speech; under free speech law, *no* citizen, religious or non-religious, could be forced to proclaim the government's ideas.

The Witnesses had a mixed record of victories and defeats in the Supreme Court. In *Prince v. Massachusetts,* the Court rejected the religious freedom claim of a Witness who sent her nine-year-old niece out in the evening to distribute the organization's pamphlets, ruling that the child labor laws could be enforced against her.[44] As in *Reynolds*, religious freedom was limited by the demands of law enforcement and did not require an exemption from the law for religious citizens. All citizens must obey the child labor laws.

Religious Parents

Prince suggests the limits of the religious rights of parents over their children. As *Prince* held, claims of religious freedom could be limited by the demands of the law, especially where children were involved. Starting in 1840, American courts recognized the doctrine of *parens*

patriae, in which the state is identified as the protector or substitute parent of children in order to protect their well-being.[45]

The theory of *parens patriae* justified state intervention to protect neglected or abused children. The doctrine was also invoked against parents who relied on faith healing instead of medical care to treat their children's illnesses. Faith healing practices became more popular at the same time that medicine became more scientific in the nineteenth century, setting religious parents and faith healers against doctors and prosecutors. The debates echoed the central theme of *Reynolds*: were parents and healers subject to the criminal laws, or did religious belief provide a defense to prosecutions for manslaughter and child-neglect?

In 1903, the Court of Appeals of New York considered the history of medicine and faith healing when it upheld the conviction of J. Luther Pierson for failing to seek medical attention for his 16-month-old daughter, who suffered from whooping cough and then died of catarrhal pneumonia. The state constitution's free exercise clause offered Pierson no protection. In the court's words, "We place no limitations upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the Legislature."[46] In many jurisdictions, however, the elements of the law appeared unclear or inapplicable to religious cases, and many prosecutions failed.

Christian Scientists

The Church of Christ, Scientist, founded in 1879 in Massachusetts by Mary Baker Eddy, was at the forefront of the battle between medicine and faith. Eddy taught that "an individual's sickness is merely an illusion that can be overcome by eliminating erroneous thinking and embracing [her] interpretation of Christ's teachings."[47] The courts were asked to adjudicate cases

where such healing did not occur. Jennie A. Spead, a 55-year-old adult, for example, sued Christian Science healer Irving C. Tomlinson for malpractice when her appendicitis worsened after she followed his instructions to read Eddy's book, *Science and Health*, and to follow the church's program of spiritual healing. The New Hampshire Supreme Court rejected Spead's claim in 1904 because Tomlinson had met the standard of care of a healer, which, it held, was not the same as the standard for a physician.[48] State courts and legislatures were divided over the wisdom of holding Christian Scientist practitioners guilty of practicing medicine without a license under the medical statutes.[49]

The *Spead* decision also explained that the lawsuit for fraud against Tomlinson failed because the defendant sincerely believed in Christian Science. Although a jury might believe Tomlinson's promises were untrue or absurd, the fact that Tomlinson believed them was significant, as the court explained: "It is a matter of common knowledge that honest men not only have in the past, but do now, entertain religious beliefs which appear to the great majority of their fellow men both unsound and incapable of belief. So, even if a relation of trust existed between the parties when the plaintiff employed the defendant to give her Christian Science treatment, a jury could not find from the single fact that they were convinced that religious views both parties professed to entertain were absurd that the defendant did not entertain them."[50] The New Hampshire court thus anticipated the United States Supreme Court's landmark 1944 ruling that a jury may not constitutionally inquire into the truth or falsity of religious claims in the prosecution against Edna Ballard and her son Donald, the leaders of the I AM religion, who were charged with defrauding their adherents of thousands of dollars.[51] Courts and juries may judge the sincerity of religious beliefs but not their truth; for the state to assess the truth of a religion violates the First Amendment.

In the faith healing context, cases involving children were more difficult. In 1903 a Pennsylvania court upheld the involuntary manslaughter conviction of a father who called a Christian Scientist rather than a doctor when his daughter suffered from scarlet fever. The judge charged the jury to consider what a man of ordinary prudence would do in such circumstances without regard to religious belief.[52] State prosecutors repeatedly sought to convict practitioners and/or parents with mixed results. At times legislatures protected Christian Scientists from lawsuits; at other times it held them to the same standards as medical doctors.[53] In 1917, the United States Supreme Court dismissed the equal protection challenge of a drugless practitioner who was subjected to education and training requirements under California law from which faith healers were exempt. The standard of review under equal protection law was undemanding, and because drugless practitioners and faith healers were different, the court ruled that the law could treat them differently.[54] The courts here and in other situations thus accepted legislative exemptions from the law that the courts were not allowed to create under *Reynolds*.

Public and Catholic Schools

In 1925, the Supreme Court identified a constitutional right of parents to educate their children when it invalidated an Oregon statute requiring children to attend public schools. Although the case involved a Catholic school led by the Sisters of the Holy Names of Jesus and Mary, the opinion was based on the liberty protected by the Fourteenth Amendment and not on religious liberty.[55] From the 1850s on, however, the Catholic schools were constantly involved in litigation about religious liberty, and it is no surprise that *Everson*, the 1947 case marking the beginning of modern Establishment Clause jurisprudence, involved a New Jersey plan that reimbursed Catholic parents for busing their children to parochial schools.

Catholics comprised only 1% of the population at the time of the American Revolution, but in the 1820s they began immigrating to the United States in significant numbers. They became 3% of the population by 1840, 10% by 1866, and almost 13% by 1891.[56] Many of them objected to the Protestant Christian nature of the public or common schools, which frequently offered prayer and Bible reading as part of the school day. The Bible was the Protestant King James Version. The immigrants also founded Catholic schools across the country, and then, as a matter of fairness, demanded government funding of those schools. The situation in the schools led to two types of legal challenges: Catholic (and Jewish) litigation against the public schools to end both prayers and Bible readings, and lawsuits (and then legislative initiatives) to prevent funding of religious schools.

As long as non-Catholic Christianity was viewed as an essential part of the law and the instruction necessary for good citizenship, Catholics were bound to fail. As they increased in number, however, they were able to gain the political clout necessary to challenge what they saw as reprehensible religious instruction in the schools. The city of Cincinnati, Ohio, for example, voted to *remove* prayer and Bible reading from the public schools, and the policy withstood a constitutional challenge in 1872 from citizens who wanted the policy reversed.[57]

As in other matters connected to religion, the states differed on prayer and Bible reading. Where the challenges failed, as in Iowa in 1884, the courts rejected arguments that the schools violated state establishment clauses. The attitude is suggested by an Iowa court's rejection of a challenge to Bible reading with these words: "Possibly, the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible. Whether this be so or not, it is sufficient to say that the courts are charged with no such mission."[58] In contrast, in

1915 the Louisiana Supreme Court ruled in favor of Jewish and Catholic plaintiffs, finding that the King James Bible readings promoted a "distinct preference in favor of the religious beliefs of the majority" that violated the state constitution. The Louisiana court also rejected the argument (later accepted in the federal pledge cases) that excusing Catholic and Jewish students would solve the constitutional problem because that practice "subjects [students] to a religious stigma."[59] Not until the 1960s did the United States Supreme Court rule that the states could not sponsor prayer and Bible reading in the public schools.[60]

The courts at times engaged in their own scriptural analysis while resolving the biblical cases. A Catholic student was expelled from public school in Maine in 1854 for refusing to read the King James Version of the Bible. The Supreme Judicial Court of Maine upheld the expulsion because the school district was free to set the curriculum for all students. Anticipating the *Reynolds* argument that the law applies to all, the court wrote that the curriculum would fall apart if every scholar were permitted to challenge the assigned books. Countering the student's argument that she should be allowed to read the Catholic Douay Bible, the court insisted that students needed a common text, and, after a long disquisition on the meaning of translation, concluded that the translation of the Bible was irrelevant.[61] Now 151 years later, some justices of the United States Supreme Court continue to argue that different Protestant and Catholic translations and interpretations of the Ten Commandments are constitutionally insignificant even though the displays always involve the King James Bible.[62]

Funding Catholic schools provided a different problem. As noted above, at the time of the Constitution many states contained established churches that received government funding and support. The most famous funding dispute in early American history occurred in Virginia when Patrick Henry proposed legislation that imposed a tax to fund teachers of religion on every

citizen, each of whom would then choose which Christian denomination should receive the money. In response to the bill, James Madison wrote the *Memorial and Remonstrance Against Religious Assessments,* arguing "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." With the help of Virginia's Baptists and other dissenters from the state's established Church of England, Henry's bill was defeated, and in 1786 Madison successfully sponsored Thomas Jefferson's *Bill for Establishing Religious Freedom*.

In the twentieth century, the Supreme Court interpreted the United States Constitution's Establishment Clause through the lens of the Virginia experience and frequently invalidated government programs funding religion. In its first two Establishment Clause decisions, however, in 1899 and 1908, the Court upheld federal funding of Catholic institutions.[63] In the first decision, the Court allowed funding to support building a hospital run by Catholic sisters on the grounds that the hospital's medical care was secular, not religious. In the second case, *Quick Bear v. Leupp,* the Court upheld funding to a Catholic school on a Sioux reservation in South Dakota on the grounds that the money was tribe money and not federal money.

Quick Bear must be interpreted within the larger context of the federal and state governments' relationships to the Native American tribes. As with the slave religions, Christian missionaries had long viewed the Native Americans as pagans to be civilized through conversion to the Christian faith. In 1819 federal legislation "making provision for the civilization of the Indian tribes" provided $10,000 to reeducate the Indians to more Christian ways.[64] In such circumstances, both Congress and the courts were more focused on the Christian education of the Indians than on the Catholic nature of the Indian school in South Dakota.

The Catholic school system was a different story. Although early nineteenth-century efforts to acquire funding for Catholic schools failed, the efforts grew more successful as the numbers of Catholics in the population increased.[65] Catholic success provoked resentment, and in 1875 President Ulysses Grant gave a noteworthy speech opposing aid to religious schools. Representative James Blaine turned the idea into a proposed federal constitutional amendment, the Blaine Amendment: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations."[66]

Although the federal constitutional amendment failed, twenty-nine states added their own Blaine amendments to their constitutions by the 1890s, and newer states were later required to add such clauses by the enabling legislation that gained them entry to the United States. Thirty-seven states eventually adopted such laws. The state laws varied in scope and detail. In Nevada, a statute passed in 1881 provided state funding to orphan asylums "regardless of creed or sect." The Catholic Sisters of Charity demanded payment for their services at the Nevada Orphan Asylum, but the Nevada Supreme Court denied their funding on the grounds that the 1880 amendment to the state constitution barred any state funding for "sectarian purposes." Although the sisters insisted that providing for the physical needs of orphans was not sectarian, that the asylum admitted students of all faiths who were not required to participate in Catholic education and services, and that they received an education comparable to the public schools, the court focused on the morning prayers and the religious instruction to declare the orphanage sectarian and barred funding.[67]

In other states, public schools that operated on church property or under apparent control of religious leaders were invalidated under constitutions prohibiting sectarian funding.[68] In Kentucky, a public school was held in a building owned by the Presbyterian Board of Church Extension, which also hired the teachers for the school. The Kentucky Court of Appeals rejected the arrangement with emphatic language:

> The Constitution not only forbids the appropriation for any purpose or in any manner of the common school funds to sectarian or denominational institutions, but it contemplates that the separation between the common school and the sectarian or denominational school or institution shall be so open, notorious, and complete that there can be no room for reasonable doubt that the common school is absolutely free from the influence, control, or denomination of the sectarian institution or school.[69]

The state litigation continued to 1947, when the Supreme Court added its separationist voice to the anti-sectarian language of the states, and both state and federal courts continued to invalidate aid to Catholic schools.

Immigration law fostered the influx of Catholic immigrants from Europe in the nineteenth century. A 1790 statute allowing citizenship to aliens (non-citizens) who were "white persons" was amended in 1870 to include aliens of African nativity and descent. In 1882 Congress passed the Chinese Exclusion Act barring entry and citizenship of Chinese laborers. The courts interpreted the statutes to bar citizenship of Chinese, Japanese, and Hindu (Indian) applicants.[70] It was only in 1965 that changes in immigration law brought large numbers of non-Christian immigrants to American shores, challenging the Christian nation and the American civil religion in new ways and significantly increasing the numbers of Hindus, Buddhists, and Muslims in the population.

Church Property

The previous sections of this essay confirm that new American religions and new immigrants of diverse religions posed major challenges to the courts during the years 1790 to 1947. Disputes about the ownership of church property among the majority Christian denominations, however, provided the largest number of cases. In the states, between 1800 and 1920 "there were 87 recorded Sabbath closing law cases, 112 recorded church property disputes, 18 public school prayer and Bible reading cases, 15 cases involving public aid to sectarian schools, and 22 reported blasphemy cases."[71] The property cases primarily involved disputes within Protestant churches, and often raised questions about church doctrine.

The Supreme Court's earliest decisions about churches focused on whether they continued to hold title to their property or the property reverted to the government because of the Revolution. In several cases the Supreme Court held that property rights were not dissolved by the Revolution unless the property in question had not been properly held when the Revolution occurred or the land had not been used for church purposes.[72] The same principle applied to later changes in government; the Catholic Church in Porto [sic] Rico kept title to its churches after the island's annexation to the United States.[73] In 1848, moreover, the Texas Supreme Court denied the Catholic Church's claim after the Texas Revolution to land in Victoria, Texas, that had not been "occupied or used." At the same time, the court acknowledged that the Catholic bishop retained title to its pre-Revolution churches.[74]

More difficult property questions involved intraecclesial disputes among church members over the ownership of property. Some complaints involved family members who unsuccessfully sought to recover their relatives' contributions to religious societies.[75] The majority of cases involved disputes between church factions about who rightfully represented the church and therefore held title to the property. The legal standard was in dispute then and remains

controversial in 2009. The influential English rule, arising from *Attorney General v. Pearson*,[76] was that property should be awarded to the group most faithful to the original purpose of the church. *Pearson* could favor an orthodox minority rather than a majority committed to a new interpretation of the tradition, and it allowed courts to evaluate whether a "departure from doctrine" had occurred within the church. The party faithful to original doctrine prevailed.

In 1893 the Baptist Mt. Tabor Church in Boone County, Indiana, was split between the "anti-means" and "means" parties. The "anti-means" believed that sinners are regenerated by direct and personal contact with the Holy Spirit, while the "means" thought that God used the means of the Gospel, Christian service, and prayers to do the work of regeneration. The Indiana Supreme Court held that the minority, anti-means position was clearly the original belief of the church and felt comfortable reading the church's articles of faith as if they were a secular document to give victory to the minority.[77] In Texas the Wallis Baptist church was divided by accusations of the minority that the new majority was guilty of "Martinism," a heresy that the court was never able to define. The Baptist Convention sided with the minority. Although the court had difficulty applying the departure from doctrine rule because it did not understand "Martinism," it ruled for the new majority because it was well-known that Baptists are always governed by the local rather than the national group.[78]

The Indiana and Texas cases illustrate the problems with the departure from doctrine rule, with courts haphazardly resolving the intricacies of Baptist views of salvation or settling disputes among Lutherans,[79] Quakers,[80] and Methodists.[81] The United States Supreme Court confronted this issue in an 1871 case arising from the Civil War, when northern branches of the Presbyterian Church favored emancipation, while the southern churches defended slavery. At war's end, the church's governing association, the General Assembly, ruled that the pro-slavery forces must

repent of their sin of supporting slavery before being readmitted to the assembly. When pro-slavery advocates resisted, the result at the Walnut Street Presbyterian Church in Louisville, Kentucky, left an antislavery minority in control.

In these circumstances, a departure from doctrine rule would focus on what the church originally believed, and possibly conclude that pro-slavery was more consistent with Presbyterian doctrine. Recognizing that the "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect," the Supreme Court rejected the *Pearson* rule. Instead, in ruling for the General Assembly, the Court held "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."[82]

Watson provided three options for the courts' resolution of property disputes. First, the courts should defer to the highest authority of a hierarchical church. Second, in an independent church under no external control, the majority rules. Third, the courts may enforce express trusts, namely, church provisions that make very clear what the purpose of the church is. An express trust committing the church to honor the Holy Trinity, for example, would legally preclude Unitarians from taking title to the property. The overriding rule was that courts should not interfere in problems of church doctrine. In 2009, disputes about the morality of homosexuality in the Episcopal Church have led to renewed discussion of the validity of *Watson*'s categories, and state and federal courts have followed *Watson*'s hierarchical rule despite skepticism of the courts' absolute deference to hierarchical church decisions that may conflict with legal principles and legal documents.[83]

Conclusion

Terrett v. Taylor, the 1815 Supreme Court decision upholding the Protestant Episcopal Church's right to property held in Virginia before the Revolution, provided one glimpse into a possible vision of religious liberty long before the Religion Clauses of the Constitution were interpreted. The Episcopal Church was established in Virginia before the Revolution, and state legislation had confirmed the church's right to its property in 1661, 1667, 1776, 1784, 1786, and 1788, until those statutes were repealed in 1798 *in the name of religious freedom*.[84] Justice Story challenged such a strict interpretation of religious freedom. His opinion acknowledged the state's right to remove the favored status of the Episcopal Church at law, but then noted that the state's free exercise clause should not limit its ability "to accomplish the great objects of religion by giving [churches] corporate rights for the managment [sic] of their property."[85] Story added the following dicta about the Virginia Constitution's provisions on religious freedom: "the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead."[86]

That vision of state accommodation of religion is far removed from the separationist one adopted by the modern Court in *Everson* in reliance on the Virginia experience and from the state decisions interpreting their Blaine Amendments in light of Catholic immigration. Instead, by 1947 the federal and state courts had provided an outline of religious freedom whose details remained to be filled in during the post-World War II era. The incorporation of the First Amendment set the stage for a national law of religion that would replace many of the state disagreements examined in this essay. On the Establishment side, the Court straightforwardly

ended the practices of prayer and Bible reading in public schools. Its funding decisions were much less direct, but they invalidated numerous legislative attempts to provide aid to religious schools until the tide turned toward aid for all schools in the 1990s. On the Free Exercise side, the Court continued to balance fidelity to *Reynolds'* ideal that all citizens should follow the law with its desire to accommodate religious citizens. And the courts were forced to reexamine the Christian Nation ideal as the United States became the most religiously diverse nation in the world's history.

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Footnotes

[*] I am grateful to Misty Morales and Brian Winegar for their careful research assistance with this essay.

[1] See Thomas Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York, 1989).

[2] Edwin S. Gaustad, "Religious Tests, Constitutions, and 'Christian Nation,'" in Ronald Hoffman and Peter J. Albert, eds., *Religion in a Revolutionary Age* (Charlottesville, 1994), 218-35.

[3] John Witte, Jr., *Religion and the American Constitutional Experiment* (2nd ed. Boulder, 2005), 108-09.

[4] *Ibid*., 117. See also H. Frank Way, "The Death of the Christian Nation: The Judiciary and Church-State Relations," *Journal of Church and State*, 29 (1987), 511.

[5] People v. Ruggles, 8 Johns. 290 (1811); see also State v. Chandler, 2 Del. 553 (1837).

[6] Commonwealth v. Kneeland, 37 Mass. 206 (1838).

[7] Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (1824).

[8] Ruggles, 8 Johns. at 290.

[9] Updegraph, 11 Serg. & Rawle at 400 (italics in original).

[10] Commonwealth v. Wolf, 3 Serg. & Rawle 48, 50 (1817); argument repeated in Specht v. Commonwealth, 8 Pa. 312 (1848).

[11] Ex parte Newman, 9 Cal. 502 (1858); Ex parte Andrews, 18 Cal. 678 (1861).

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[24] Kenneth M. Stampp, "Chattels Personal," in Lawrence M. Friedman & Harry N. Scheiber, eds., *American Law and the Constitutional Order: Historical Perspectives* (Cambridge, MA, 1988), 203-18, 212.

[25] Raboteau, *Slave Religion*, 136.

[26] Philip Kurland, "Of Church and State and the Supreme Court," *University of Chicago Law Review* 29 (1961): 1-96. The term "federal apocrypha" is Kurland's expression for the Court's cases about religion that did not rely upon the Religion Clauses.

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[29] Reynolds v. United States, 98 U.S. 145, 164 (1879).

[30] Cleveland v. United States, 329 U.S. 14 (1946).

[31] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill, 2002), 155.

[32] Murphy v. Ramsey, 114 U.S. 15 (1885).

[33] Kurland, "Of Church and State," 10.

[34] Davis v. Beason, 133 U.S. 333, 341-342 (1890).

[35] Gordon, *The Mormon Question* 220; Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1 (1890); United States v. Late Corporation of the Church of Jesus Christ of Latter-day Saints, 150 U.S. 145 (1893).

[36] Witte, *Religion and the American Constitutional Experiment*, 112.

[37] Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).

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[47] Peters, *When Prayer Fails*, 90.

[48] Spead v. Tomlinson, 59 A. 376 (N.H. 1904).

[49] See, e.g., People v. Cole, 148 N.Y.S. 708 (N.Y.A.D. 1 Dept. 1914), reversed by People v. Cole, 219 N.Y. 98 (N.Y. 1916).

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[64] 15 Cong. Ch. 85, March 3, 1819, 3 Stat. 516.

[65] DeForrest,"An Overview and Evaluation," 551.

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[85] Id. at 49.

[86] Id.; see also David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* (Chicago, 1985), 138-41.