CHAPTER I

The Early Republic: The Common Law Secularization of Church-State Relationships.

Introduction.

Modern historical accounts of the meaning of separation of church and state begin with an array of arguments made by Thomas Jefferson and James Madison, as authors of the First Amendment, in their struggles against an establishment in the state of Virginia. It would be hard to image any other history could exist to explain or tell the story of the First Amendment's religious clauses. However, prior to the incorporation of the First Amendment in the 1940's there were few judicial references to the "founders." A survey of 954 cases, looking for "key" terms such as references to English history, "founders," "framers," or references to constitutional history, found only 10 opinions in the era of the early Republic and 7 opinions in the era of western expansion which made reference to some type of "history." These early judicial references fall into two distinct patterns: in the early Republic, a recourse to English common law and history; and in the late nineteenth century, a recourse to western state experiences and state constitutional developments. This chapter examines the early era of the American Republic.

A number of observations regarding the types of histories invoked by judges during the era of the early republic can be made. The first and most notable pattern is a complete absence of American colonial history or any kind of "founders' intent." Instead, the state judges turned to English law and principle for guidance. It was the English common law that dominates the "historical" discourse and consciousness in the early

period of American history. This predominance was largely due to legal education -- the continued training in Blackstone's *Commentaries*, the primary text of legal education at that time.

One finds no references to American colonial history, state precedent, or state framer's intent. The reliance on the common law occurred for several reasons: there was no state precedent to cite; the American reliance upon legal positivism meant that any "law" prior to the ratification of the state constitutions was no longer valid; and a general reflection of the type of legal training and legal education at the time, when William Blackstone was standard reading for American lawyers. In addition, American colonial history was probably irrelevant at the time, since the state judges never characterized the colonial period as "American" history as moderns do, but as the period of English rule. Only later generations came to view the colonial period as "American" history. Moreover, the American colonial experience was viewed as a history of oppression and religious discrimination, which the state judges did not want to invoke. The absence of early American history may have been a conscious attempt to avoid what early judges deemed as the *dark side* of history. In other words, they may not have cited it because they did not like it.

The historical references which are found in the early case law is the history of European suppression of intellectual freedoms, seen in the judges' references to the inquisitions and the bloody religious-civil wars of Europe. Thus, a particular type of European history was cited, and acceptable, in early legal thought.

References to European oppressions, while flowery and lucid, were primarily

"window dressing" to the reliance on traditional legal canons and methods. The reasoning of the cases reveals a strict adherence to legal methods. So a paradox is evident. On one hand, in any individual case, legal formalism prevailed over the "history" cited. One finds, for example, that the glebe lands were adjudicated by contract law principles. Courts merely construed and applied the church's corporate charter.[1] However, the courts' *dictum* led to the misunderstanding that the courts were helping particular religions. In the taxation for the minister cases, the cases were litigated as a form of trespass, and were resolved under the principle that contracts without consent were invalid, which led to the the conclusion that a church could not tax a non member for the maintenance of the minister, but could tax the membership without violating religious liberty. Blasphemy laws were characterized by the early state judges, as the English courts had done as public peace measures, that is, unprotected as "fighting words." State Sunday closing laws were also given a secular justification, and held to belong to a class of the state's police power to regulate labor hours.[2] These legal controversies were resolved by traditional understandings of contract law and of the state's police power.

On the other hand, the *dicta* or historical discourse played a significant role in developing doctrines and principles of an American separation of church and state. The judges wrote with the assumption that separation of church and state did in fact exist under American law, which began with the ratification of their respective state constitutions. With the strict language of state constitutional texts and the practice of legal positivism, judges fashioned distinct notions of separation of church and state.

The most noteworthy is the early understanding of the guarantee of "no coercion"

under the state constitutions, as defined as liberty of conscience: belief could not be coerced, but actions were not protected. This belief/action distinction, which would later characterize First Amendment jurisprudence, was derived from English sources, particularly from Lord Mansfield's *Evans* speech which was cited in *Muzzy v. Wilkins* (1803).[3] Lord Mansfield had distinguished between religious belief, which he said the common law had never punished, and action, which was not protected but could be regulated by the state. American judges said that it was a principle of the common law that religious opinion could not be coerced. The American judiciary exhibited a sensitivity to coercion of religious belief and the suppression of intellectual freedoms, when they asserted that the state regulations could not be enforced as religious regulations. The judges looked to the common law and the liberalness of Lord Mansfield, not to the American founders, John Locke, or American history, for a definition of the scope of religious liberty under the state constitutions.[4] English legal theory had thus been read into American law.

However, the consequence of this adoption was that early American judges were unable to distinguish between religious liberty (e.g., freedom of opinion) and separation between church and state (e.g., no tax aid, no preference for one religion) in challenges to the last remaining clauses or statutes authorizing taxation in support of ministers. It was only after the American principle of "equality" was read into the guarantee of "separation" that the English notion of religious liberty was superceded.

The legal tradition of religious liberty in these cases is not an American invention at all, but English in origin. American judges looked to the common law and found

principle. Citing the common law was instrumental, for it allowed judges to put law above will or intent, and gave the principle of religious liberty a quality of ancient origin, not to be defined or manipulated by the sovereign or the legislature. Citing the common law made reliance on founders' intent or American history irrelevant to the application of principle; and eventually allowed for the expansion of principle in later cases.

The use of English legal principle was significant, because American judges used it to uphold state regulations, e.g., blasphemy and Sunday closing laws, as secular regulations. Common law provided a secular justification for what appeared to be religious regulations. Paradoxically, judges' references to European religious oppressions becomes a curiosity, since those who were challenging the state regulations contended that the laws were the oppressive remnants of state aid to religion.

In arguing that state laws did not aid a state religion or religions, the state courts began to fashion the argument that Christianity was not part of the common law of the states. The effect of this separationist argument was to create a "separationist tradition" of church and state in American law, which would later become the legal tradition. It is of interest to note that this separationist argument would come out of a concern for, not individual rights and liberties, but from the self-interested motives of the judiciary to maintain its jurisdictional integrity.

In addition, it was in this early era where the first references to Thomas Jefferson as an authority can be found. Surprisingly, Jefferson was not cited as a defender of liberty of conscience, but rather to support the argument that the individual in that case did not have a right of conscience. [5] Jefferson later replaced Lord Mansfield as the authority for

the belief/action dichotomy in American First Amendment law. Jefferson's early legacy was different from what one might expect, for Jefferson was utilized to support a variety of arguments, not to defend an individual's right of conscience.

It was the American reception of the English common law that played a significant role in the secularization of state regulations and in defining the scope of religious liberty in law. Judges manipulated old doctrines to fit new goals. Only later would the *dicta* become the legal tradition when cited.

Not all of the common law was acceptable. Significantly, American judges were careful to reject the status of church property under English law. The state church in England could not own private property and the minister's office was a property interest of the crown. American separation of church and state included the legal understanding that churches, as private corporations, could own property, but there would be no legally recognized right of property in the minister's office or in church membership.[6] American judges rejected the legal status of church property found in English law, which marked one break with the English legal past. It was in the early church-property disputes where the principle of separation of church and state was developed, one where government should not determine religious truths. **Chapter 4** will discuss the significant church-property dispute cases were this principle of separation first appeared.

I. Glebe Land Disputes and the Secularization of Church Property.

The first church-state controversies after the American Revolution were a result of the state handling of the former Anglican church properties. Under the colonial system, the English (i.e., state) church's property consisted to three plots of land: the land for the

church, otherwise known as the "glebe;" the land for the minister; and a plot of land for the church school. The glebe land was legally the property of the town. James Madison was of the opinion that after the Revolution, the Anglican churches should retain their properties as private property. Most states followed this pattern and allowed the former English churches to keep their properties. The state of Virginia was an exception: there, political pressure from dissenting religious societies, namely, the Baptists, pressured the legislature to lay claim to the glebe lands in Virginia and sell the lands at public auction, with the proceeds going to a fund for the care of the poor in 1801.[7]

The glebe controversies in the state of Virginia represent one of the first church-state disputes in the United States. While much litigation arose involving property claims, only two cases addressed the issue whether designating glebe lands as private property "aided" religion, and therefore violated the guarantee of no establishment. The arguments made in these early judicial opinions by the state and federal courts did not reflect the rhetoric of the American Revolution nor religious liberty, but rather the status of private property. Without state precedent to invoke, since none existed, judges in early America relied on English case law and English principles. English authorities, such as William Blackstone, Lord Coke, or Lord Mansfield, were cited. In invoking English common law, including English ecclesiastical law, state and federal judges incorporated a number of common law traditions already evident in English case law: 1) A distinction between the religious and the temporal; 2) The supremacy of the common law (over canon law); and 3) The common law treatment of religious liberty as mere "opinion," distinguishing between belief and action. Thus the English common law became the first kind of

historical *dictum* invoked in American legal history involving separation of church and state.

The controversy over the Virginia glebe acts which confiscated the Anglican church lands in the state reached the U.S. Supreme Court in the case of *Terret v. Taylor* (1815).[8] Terret, representing the overseers of the poor, who, under the Virginia acts, could receive the monies from the sale of the glebe lands, claimed the ownership of the lands of the Episcopal Church in Fairfax, Virginia. According to the legal deed, legal title of the property belonged to the church and the property could not be sold without the minister's permission. The issue was ultimately decided in favor of the church. The U.S. Supreme Court held Terret had no right to the land. The arguments Justice Story invoked were typical for this early period of American legal history, that is, the reliance on English law and precedent. Justice Story began his decision with the legislative history of the Virginia acts, which vested the church as a private corporation, and the later legislation that seized the property. While the American Revolution had separated the English church from the state government, the American Revolution, said Justice Story, could not divest or forfeit any property in the state once that property had been declared private. Justice Story held that the Virginia acts asserting authority over the glebe lands and providing for their sale were unconstitutional, since the act of separation from England did not vest the new government with any right to seize private property. Virginia had taken property away, which Story deemed was not consistent with the "spirit" of republicanism.

The Virginia acts giving the Episcopal Church the status of a private corporation

were constitutional: Justice Story asserted that these acts did not violate any rights secured in the state bill of rights. In other words, the acts regulating the church as a legal corporation did not violate the state's guarantees of religious liberty or of "no" establishment.[9] Justice Story cited various English common law authorities: William Blackstone on corporations, and the common law principles of trusteeship. For the arguments concerning Virginia's seizure of the glebe lands, Story relied on the famous English *Calvin* case, which had outlined the nature of the Crown's authority in foreign lands.[10] Justice Story also invoked the American "spirit of republican" government, that is, the principle that government works to preserve existing property rights, in his rationale declaring the later Virginia acts unconstitutional.

Another case involving glebe lands arose the same year involving the ownership of the glebes in the states of New Hampshire and Vermont. In *Town of Pawlet v. Clark* (1815),[11] the legal issue was whether the Anglican church was in fact incorporated in the state of New Hampshire. Here, Justice Story found for the parson. In order to lay claim to the church (the case involved a bequest to the church), the church must prove that its society was in fact erected by the Crown as an established church, to be entitled to the glebe lands granted in the charter. If the church had not been incorporated prior to the American Revolution, the land then belonged to the town. An argument based on English ecclesiastical law was invoked in this case. After a brief discourse on the legal history of the foundation of parsonages and churches in English law, citing various English authorities -- Bracton, Lord Coke, and Burn's *Ecclesiastical law*, including Daniel Webster's oral argument before the U.S. Supreme Court -- Justice Story concluded that

under English law, the Church of England was not a body corporate but an estate of the realm, which could not own property. The church, therefore, could not receive a grant of land. The church in *Pawlet*, then, was not properly a legally established church under English law, and could not hold title to the glebe land in question. Contrary to the rule followed in *Terret*, Justice Story argued that after the American Revolution, the state of Vermont succeeded to all the rights of the Crown as to the ownership of the glebe lands. The significant difference of this case with that of *Terret*, was the fact that the state of Vermont had by statute granted the unincorporated lands of the church to the towns in 1794, while in *Terret*, the state of Virginia had designated the corporate status of the church as a private corporation. In both cases, Justice Story relied on the original legal status of the glebe lands to determine the legal outcomes of the two cases. And in both cases, Justice Story concluded that designating glebe land as private property did not offend the guarantee of "no establishment" because such action did not violate religious liberty.

But was Justice Story's use of English ecclesiastical law and principles to determine the status of the glebe lands necessary? Indeed, Justice Johnson's concurrence argued that the same conclusion reached in *Pawlet* -- that the legal interest was vested in the proprietor -- would have been reached by construing the church charter without the digression into English case law and history. Justice Johnson's point is significant because it is the beginning of an on-going debate over the necessity of "doing history" to reach a legal conclusion.[12] This survey found a consistent judicial hostility to the introduction of extrinsic aids in resolving legal disputes.

II. Tax Clause Controversies: Taxation as Public Policy.

Establishment of a state church is often referred to as a problem of taxation on behalf of religion. After the American Revolution, the last remaining constitutional clauses providing for taxation in support of ministers' clauses created controversies where they existed. The legal disputes that resulted continued to invoke English common law arguments, but now the state courts were to argue that a tax on all would not violate religious liberty invoked in the common law arguments.

Originally, local taxation for the support and maintenance of the colonial parish minister, whether the Anglican church minister or the minister of the parish poll, was vested in the town. Contrary to the practice in England, where church tithes were part of the rental fees of estates,[13] in New England, where there was no landed aristocracy to pay the minister's salary, taxation was imposed on the entire community who resided within a parish. In England, such taxes were not imposed on all, since this would have violated the common law principle that a contract without consent was invalid. Thus, church tithes were a particular problem in the American context, since there was no landed aristocracy to patronize the churches. While King George I's provincial statute for the colonies of 1714 empowered the colonial towns to designate ministers and raise money by taxation for their support,[14] a few states, such as Pennsylvania, never allowed for this type of taxation.[15] Indeed, King George I's statute allowed for exemption from such taxes and guaranteed liberty of conscience to all.[16] The history of the enforcement of the tax in the colonies and in the states became, according to historians, America's "establishment problem."

A. Early State Constitutional Language: Origins and Development.

The American Revolution had the effect of legally "disestablishing" the prior state church relationship in the five states that had had Anglican state churches: Virginia, Georgia, North and South Carolina, and New York. The new state constitutions written at the time of the American Revolution or immediately thereafter, contained variously - worded clauses prohibiting any tax to support or maintain ministers, or churches, and prohibited the states from "preferring" one religious sect over others. Thus the **Delaware Constitution of 1792** provided: "Yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry. . . ."[17] **Georgia's 1777 Constitution** provided: "All persons. . . shall not, unless by consent, support any teacher or teachers except those of their own profession."[18] **New Hampshire's 1784 Constitution** mandated churches to make their own provisions for maintaining their ministers: "And no person of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teachers of another persuasion, sect or denomination" and ". . . no subordination of any one sect or denomination of any one sect or denomination to another, shall ever be established by law."[19] **The New Jersey Constitution of 1776** said: "That no person shall ever, . . . be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any ministers or ministry. . ." and ". . . no establishment of any one religious sect in this Province, in preference to another. . . ."[20] **Maryland in 1776,** provided: ". . . nor ought any person to be compelled to frequent or Maintain, or

contribute, unless on contract, to maintain any particular place of worship, or any particular ministry. . . ."[21] **North Carolina's Constitution of 1776** provided in Article XXXIV: ". . . neither shall any person. . . be obliged to pay, for the purchases of any glebe, or the building of any house of worship, or for the maintenance of any ministers or ministry" and ". . . no establishment of any one religious church or denomination in this State, in preference to any other. . ." and no one "be compelled to attend any place of worship."[22] **Pennsylvania's Constitutions of 1776 and 1790** provided: ". . . that no man ought or of right can be compelled to attend any religious worship, erect, or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent."[23] **Pennsylvania's Constitution of 1790** added: ". . . that no preference shall ever be given, by law, to any religious establishments or modes of worship."[24] The **Constitution of South Carolina, 1778,** read: "No person shall, by law, be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in . . . ."[25] **Vermont's 1777 Constitution** provided: ". . . no man ought to, of right can be compelled to attend any religious worship, or maintain any minister contrary to the dictates of his conscience."[26] Finally, **Virginia's 1787 Bill for Religious Freedom,** authored by Thomas Jefferson, provided: ". . . that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever. . . ."[27]

1. Origins of State Constitutional Prohibitions.

The states' "no aid" constitutional clauses were taken from previous colonial charters, or were borrowed from other state colonial documents, especially those of Pennsylvania and Virginia. A "no maintenance" provision had earlier been included in

the Pennsylvania and Delaware Charter of 1701.[28] That same charter had also made a preference for the Protestant religion, suggesting that a "preference" was perceived by the colonials as something different from "no support."

The "no maintenance" of the minister's clauses had their origins, that is, their wordings can be traced to, the first colonial document which contained such a clause, that of William Penn's 1681 *Frame of Government* for the colony of Pennsylvania.[29] Penn's "no maintenance" clause had its roots in Quaker religious and legal thought. Authorship of Penn's clause can be attributed to Thomas Rudyard, William Penn's London lawyer and Quaker friend who had successfully defended Penn in the Mead trial of 1670, when a group of Quakers had refused to take the English oath of supremacy. Rudyard later served as deputy governor of East New Jersey, 1682-84. He should be credited with helping Penn draft the final versions of the *Frame*, which was Pennsylvania's first colonial constitution. While historical accounts suggest that Algernon Sidney, the English radical, had written the first draft of the *Frame* with Penn, it was Rudyard who convinced Penn to include the "no maintenance" clause and to restructure to the plan for the legislative body, opening -- up the electoral process to freeholders and a rate-payer franchise. Rudyard's proposal prohibiting taxation for the maintenance of a minister or church appears in the sixth draft of the *Frame*, where Rudyard reminded Penn not to forget to include such a prohibition.[30]

Rudyard was not a stranger to taxation; previously he had argued, on behalf of the Quakers in England, that paying church tithes violated the common law.[31] He maintained that the common law only recognized five means of acquiring rights to property and its

disposal of it: by free gift, inheritance, purchase, compact, or by possession.[32] Rudyard had argued that there was no legal justification to tax people without their consent in order to support a state church. Invoking an historical justification, that tithes were originally imposed by the injustice of the Norman Conquest, Rudyard argued that tithes could not be justified by the fact that the early Saxon Kings had paid tithes to the Catholic Church.

The language of Rudyard's proposal, which became the model for other states to copy, was rooted in the Seventeeth Century English political discourse of the Quakers.[33] It was the English Quakers and their opposition to paying church tithes in England in the 1640's that furnished the legal language later adopted by the American states. A little known fact is that in England, between the civil wars, Long Parliament had abolished the Anglican church as the state church of England and attempted to establish the Presbyterian church as the state church in England. The Quakers and other dissenters reacted to that attempt through pamphlets, stating their position on the issue. They argued that there was no historical or common law justification for the imposition of taxation for a state church. William Penn was of the opinion that the Saxons did not pay church tithes but that King Ethelbert, King of Kent, had refused to give tithes to the monk Austin. The Quakers used this history to argue that the English tithe originated when King Edgar, remorseful over the murder of this brother Ethelward, began to pay a tithe to the Pope.[34] For the Quakers, then, history showed the Saxon kings to be motivated by guilt and external pressures of war to pay tithes to the church.

The earliest documentary evidence of the "no maintenance" language dates to the

English Civil Wars of the 1640's (when King Charles I was beheaded). In the documents of the Levellers, who were part of Parliament's first "New Model Army" drafted to fight the monarch's forces, one can find the proposal to prohibit tithes in support of ministers.[35] The Leveller proposal, or petition, was aimed at Parliament, and it was the first time the English radicals asked for such relief before they asked for a guarantee of religious liberty. The Levellers later provided in their proposal for a written constitution, called *The Agreement of the People*, for a "no maintenance" clause and the right to choose their own ministers. In their pamphlets, they went so far as to ask Parliament for toleration for Roman Catholics, arguing that in order to be consistent with their own request for religious liberty, religious liberty had to be granted to all, lest a grant of authority to penalize one group granted authority to hurt all others.[36] These English Protestant dissenters, Quakers and Levellers, who argued for the first guarantees of church-tax relief, were motivated by religious (no religion could claim it was the "true" church), legal (contracts must have consent), and practical considerations. It is from the English radicals that we get the language guaranteeing "no maintenance" of ministers and churches.

2. Conflicting Interpretations of the State's "No Maintenance" Clauses.

There are two general interpretations of the early state constitutional clauses: a narrow interpretation, and a broad interpretation. The **narrow interpretation** maintains the state clauses were enacted only to prohibit the state enforcement of the payment of the minister's salary and nothing more.[37] Tithing to pay the ministers was the last remaining English church-state union (the other was religious oaths for public office). In those

states where there was no state church, tithes were enforceable in the civil courts against the membership of the parish, treating the issue of taxation as one of corporation law. The narrow interpretation views this "aid" as evidence that the state clauses were only meant to prohibit taxation for the minister's salary, not to disrupt other relationships. This position thus assumes a continuity of English and colonial practices into the American context, and looks upon the last remaining tax clause (Article III of the Massachusetts constitution) as evidence of an "establishment" of a state church that existed after the ratification of the First Amendment.

The **broad interpretation** maintains that the states wished to do more than prohibit taxation for the minister's salary or maintain the old church-state unions.[38] This view maintains that it is too narrow a reading to say that taxation was the only "establishment" prohibited by the state constitutions, since the wordings of those constitutions vary so much: "no tax," "maintenance," or "support of ministers, ministries, places of worship, or buildings;" "no preference" for one sect; "no subordination of any one sect;" "no establishment of any one sect" (New Jersey and North Carolina provided for the later), "no one to be molested or suffer," and "no compelled attendance." [39] Historians have characterized these clauses as evidence of "disestablishment" in the states (in addition to making churches nonprofit corporations under law). The state judiciaries have given these clauses a broad reading, interpreting them to mean "no aid" to or "support" of religious groups or religious purposes, including prohibiting all monetary aid to religion. For the state courts, these clauses illustrated the break with English and colonial practices, and evidence of the *state framers' intent* to

separate church and state. This position also views the precedent of Massachusetts, not as evidence of the continuation of benevolent state aid to religion, but rather as the case of the town church using the civil arm of the state to enforce its rules on its membership.

Since English and colonial law had already provided for exemption from taxation of non-members, the problem in New England, which was not fixed until the 1811 passage of the Religious Freedom Bill in Massachusetts, was the continuation of the *legal definition* of the parish church as its *territorial* parish, thus making non-members who resided within its bound liable to be taxed. The problem of taxation in support of the minister, then, was not whether the state could aid religion, but rather rested upon the definition of church membership. The final demise of enforcement of this tax came about with the elimination of Article III in 1833, and with the judicial acceptance of the idea that membership in a religious association must be completely voluntary (the "voluntary principle"), whereby churches could not resort to the civil courts to enforce the internal rules (including the collection of tithes) on its membership. The final acceptance of the voluntary principle would render the issue of taxation in support of ministers obsolete.

B. Taxation in the American Context: Two Cases.

The history of the tax-in-support of ministers controversy had a unique history in the American context. All but two states at the time of the ratification of the U.S. Constitution had prohibited taxation in support of ministers or churches in their constitutions. Both Maryland (from 1776 to 1790)[40] and Massachusetts (from 1780 to 1833) authorized their state legislatures to tax for the support of a minister. A third state, New Hampshire, provided for taxation through legislation. Massachusetts was the only

state to enforce its tax authorization after the American Revolution. Although there were many challenges, both political and legal, to this taxation, only two cases can be found where the judiciary addressed the issue whether taxation in support of ministers violated the state's constitutional guarantees of "no maintenance" or no establishment: those of New Hampshire, and Massachusetts.

1. New Hampshire: Liberty and the Parish Tax.

The first judicial discussion of the constitutionality of the parish tax for the support of the minister is found in *Muzzy v. Wilkins* (1803).[41] Although the New Hampshire constitution of 1784 expressly prohibited compelled taxation in support of ministers,[42] the state legislature in 1791 gave the towns and parishes the authority to tax. A controversy arose which tested this taxation.[43] John Muzzy, a Presbyterian, residing in Amherst, was arrested and imprisoned and fined two hundred dollars for not paying a tax of seventy-five cents toward Rev. Barnard's salary. Muzzy claimed an exemption from the tax because he was a Presbyterian, while the town minister was a Congregationalist. The legal issue, said the state's supreme court, was whether Presbyterians were Congregationalists. If they were not, Muzzy was entitled to recover. Chief Justice Smith, found for Muzzy citing both doctrinal and institutional differences between Presbyterians and Congregationalists. The opinion was significant in its discussion of English history, and its discourse on the nature of liberty of conscience.

Chief Justice Smith reasoned that religious liberty was freedom of opinion. He relied on Lord Mansfield's celebrated *Evans* speech as authority for defining the scope of religious liberty.[44] Lord Mansfield had treated religious liberty as a type of freedom of

thought and opinion that was protected by the common law. Thus, Chief Justice Smith discussed the history of religious tyranny as part of the history of freedom of intellectual inquiry. Chief Justice Smith invoked examples of European tyranny over free thought, especially the Catholic Church's censure of Galileo. Footnoting various English and European authorities, including Lord Mansfield, Lord Eskine, Voltaire, Burke, and Cicero, Chief Justice Smith made the point that "opinions are not the proper objects of human authority" and "freedom of thought is the prerogative of human mind."[45]

The state's guarantee of religious liberty went further, said the Chief Justice, by separating the union of church and state. While the court assumed separation of church and state existed, the court noted the long history of the state providing for a tax for the support of the parish minister. The state attorneys had maintained that such support was needed to promote morality and piety. Construing the exemption from taxation found in the state constitution, Chief Justice Smith said that the members of corporated churches could be compelled to pay towards the minister of a different denomination, because the individual conscience would still be free! (Perhaps the court was saying that a court could enforce the rules of membership.) "Belief" would not be coerced or worship enforced, said the court. However, a tax would serve, as the state's attorneys suggested, public policy needs. Taxation was declared a public purpose, not a religious one.[46]

Chief Justice Smith reached two conclusions: first, that a tax for the support of the public minister would not violate the guarantee of "liberty of conscience;"[47] second, that the public policy concerns of the state, as long as the state did not coerce "opinion," did not violate the state constitution's guarantees. These conclusions were justified, in

part. by a recourse to English argument. The resort to English principles had narrowed the scope of "liberty" protected under the state constitution. Nor did the court's discussion of European history broaden the scope of liberty. Indeed, citing European history seemed to contradict the court's assertion that tax in support of ministers did not violate religious liberty.

Although the court had concluded in its *dicta* that taxation in support of ministers of a different religion would not violate religious liberty, the court sided with Muzzy. What protected Muzzy was the wording of the state constitution that provided that no person of one sect could be forced to pay for another. The use of history, which seemed to expand the scope of religious liberty, did not determine the final outcome, but instead had the effect of narrowing the scope of individual rights under the New Hampshire constitution.

2. Massachusetts: The Decline of the Congregational Church.

The only state to actually enforce its tax authorization clause after the American Revolution was Massachusetts. Article III of the state's second constitution, ratified in 1780, authorized such taxation, as well as compulsion of church attendance.[48] The existence of this provision in the state constitution has puzzled many historians. There is controversy over how the provision got into the constitution during an era of fierce opposition to taxation. Historical documents suggest that John Adams was given the task of writing the state's first bill of rights, but he later denied authorship of Article III. Adams maintained that a committee of five, including the clergy, wrote it during the second state constitutional convention. Little documentation exists of the convention

notes of 1780 to indicate authorship, or what debates occurred over the article.[49] It is known that the 1780 proposed constitution was sent to all towns and districts of the state for ratification. The original intent was that each district was to vote for each part of the state constitution. The historian Oscar Handlin has examined the district vote returns and found an overwhelming negative note (actually, negative commentary), on Article III. The state clerk was supposed to eliminate provisions without majority approval, but did not. Instead, the district returns were counted as a ratification of the entire document, since discussing each article proved too cumbersome. Hence Article III was retained.[50]

The constitutionality of Article III was never directly challenged in court. Controversies that arose under the clause always devolved into liability issues or problems of corporate status of churches. The discussion of whether Article III violated any right of religious liberty, or constituted an establishment does not exist, except for one case. Of the 10 cases involving Article III in the state courts, mainly the legal issues mainly involved: who was the parish minister?[51] whether churches were corporations for the purpose of collecting taxes;[52] who owned church property?;[53] disputes between one or more ministers claiming to be the town minister;[54] the corporate status of churches;[55] and disputes between parishes.[56] The legal issues under Article III litigation thus revolved around legal definitions of what constituted church membership.

Only one case addressed the constitutionality of Article III, *Barnes v. Falmouth* (1810).[57] There, a Universalist minister sued to recover the taxes assessed in the parish of Falmouth. He had claimed that he was the parish minister. The case was decided against him, because he was not an ordained minister of a legally recognized incorporated

society. A minister, ruled Chief Justice Parsons, must be of an incorporated society to have standing to sue.

Chief Justice Parsons also addressed, in *dictum*, the constitutionality of Article III. In an argument completely devoid of history, English or colonial law, or state framers' intent, the Chief Justice pointed out that Article II of the state constitution protected liberty of conscience of all religions, including non-Christians. However, the tax in support of ministers, said Parsons, did not concern itself with the rights of conscience, but with the mere authority of the state to tax. The Chief Justice argued that taxation did not violate the state's guarantees of religious liberty, because its purpose was public, not religious.[58]

Both Chief Justices Smith, in New Hampshire, and Parsons, in Massachusetts, came to the same conclusion: that taxation in support of ministers did not violate the guarantee of religious liberty, because such action was for a public purpose, which did not touch "opinion." While Chief Justice Smith's discourse invoked the horrors of European history, that history only served to narrow the scope of individual liberties. Without a recourse to European history, Chief Justice Parson reached the same conclusion – that the enforcement of taxation on the members of a corporated society was a public policy issue. Neither court viewed taxation as an establishment of a state church.

3. State Constitutional Change: Theological Disputes Result in Legal Change.

While neither the Massachusetts nor the New Hampshire courts had argued that taxation in support of the minister violated the guarantee of "no state church," the

Massachusetts' tax clause was eventually repealed by voter referendum in 1833. The historical explanation for this constitutional change attributes a theological change in Massachusetts.

The religious dissenters in Massachusetts had always complained about the tax clause, going so far as to send a delegation to the Continental Congress, but they were not effective in securing its repeal. Exemptions from the tax were granted to Anglicans, Quakers, and the Baptists, under a certificate system that required a signed certificate from an incorporated religious society and payment of a fee. The Religious Freedom Bill passed in 1811 extended exemptions to unincorporated societies through certificate.[59]

Final demise of the tax clause, say historians, came about with the breakup of the Orthodox Congregational churches, which had benefited from the taxes, into the new sect of Unitarianism. Unitarianism grew out of an intellectual movement that rejected the doctrine of Calvinism. Many Congregational ministers became adherents of the new doctrines. In many towns, the church orthodoxy objected, and resorted to the civil courts to settle the issue of who constituted the minister of the parish. In the case of *Baker v. Fales* (1821),[60] the old order objected to the election of a Unitarian minister in the town of Dedlam. Because the majority, who objected to the new minister, had physically removed themselves from the church in protest, the Massachusetts Supreme Court said that the majority had forfeited their rights. The court, construing the original church charter narrowly, argued that the "church" constituted the territorial parish, including non-members, all of whom had a right to elect the minister of the church, who was entitled to the tax fund under Article III.

This ruling, according to one historian, was the motivating force for the orthodoxy, which had lost, to finally side with the dissenters and agreed that Article III should be repealed.[61] The orthodoxy objected to the court's contention that the conflict was solely an intrachurch matter, and disagreed with the court's reading of Article III as giving the court jurisdiction to decide who was the lawful minister of any church. The repeal of Article III was, in effect, a check on the judiciary, due to the perception that the judges had show favoritism toward Unitarianism. Here, a theological dispute had resulted in constitutional change. Article III had eventually worked against those sects which had benefited from it, because it permitted the state judiciary to determine who were the faithful (i.e., determine religious truths).

III. Blasphemy Laws and The Secularization of "Fighting Words."

Blasphemy (making it a criminal offense to say anything against Christianity) and Sunday laws (closing business on Sundays) were other remnants of colonial church-state relationships. A few dozen cases were found as late as the era of the early Republic where these laws were challenged as aids to the Christian religion.

Once again, the judicial reliance on English authority and precedent justified the existence of blasphemy and Sunday laws. Both blasphemy and Sunday laws were upheld by the state courts as public peace measures, not as a category of religious crimes. The *dictum* invoked in these cases would present the judiciary's first separationist argument: that "Christianity was not part of the common law." The ultimate effect of invoking the English justification for such laws, and answering counsel's challenge as to whether such laws aided the Christian religion, was to secularize the practice of blasphemy and Sunday

closing laws.

A. Is Christianity Part of the Common Law?: Four Traditions.

The controversial issue found in the blasphemy and Sunday law cases was whether or not Christianity was part of the common law. American judges took the position that it was not. This conclusion came out of four traditions.

One tradition lies in the 16-17th century jurisdictional conflict between the common law courts and the ecclesiastical courts in England. Ecclesiastical courts, not common law, heard blasphemy and Sunday transgressions in England.[62] After 1641, when the jurisdiction of the church courts was abolished, common law courts assumed jurisdiction over some religious crimes and treated them as violations of the public peace. Thus American state judges, examining English precedent, tapped into English *dicta* that focused on the distinction between the religious and the temporal, which emphasized the public need to preserve the public peace rather than to protect religious actions or individual rights. This jurisdictional division held the position that "Christianity was not part of the common law," because the common law never had jurisdiction over it in the first place.

A second tradition of denying that Christianity was part of the common law stems from the practice of legal positivism (e.g., law is the command of the sovereign). The English lawyers had already argued, as means to defend the Crown's prerogative against the Catholic Church, that if one claimed that Christianity was part of the common law, one must be able to cite existing statue to that effect. Common law authorities, such as William Blackstone and Lord Coke, had argued in their treatises that the common law

only dealt with law for human needs, not spiritual ones.[63] Since religion was not part of the original common law jurisdiction. English authorities often referred to religion as "superstition" or "revelation." In English law, the law on property provided for "superstitious" uses, e.g., giving property to churches. There was no such thing in English law as "Christian law." In fact, Lord Coke's reaction to the assertion that the common law recognized Biblical law, was to reply that the laws of the Jews did not apply in England.[64] Thus the distinction between the temporal and the religious had been well established in English thought.

The common law tradition of legal positivism had another effect. If law is the product of the sovereign's will, it must have a sanction. American judges would take this argument one step further to argue that Christianity was not part of the common law because that would mean that the courts (i.e., the state) could use sanction and penalty to enforce Christianity. This was the American judges' strongest argument in rejecting counsel's assertions that "Christianity was part of the common law." Religion fell outside the rubric of legally enforceable law for the community.

A third tradition can be seen in Chief Justice Doe's defense of legal reasoning.[65] Common-law lawyers had argued that legal reasoning was something quite special, and placed value on the secular nature of free intellectual discourse as part of legal reasoning.[66] The acceptance of religious "truths" threatened the entire conception of law. English judges had treated religion as mere "opinion" and made sure that lawyers were protected even from slandering the state church when defending their clients.[67]

Finally, a fourth tradition comes out of Thomas Jefferson's challenge to Lord

Mansfield's alleged assertion that revealed religion was part of the common law.[68] Chief Justice Clayton of Delaware, appalled by Jefferson's argument, spent six pages challenging Jefferson's opinion involving blasphemy law.[69] Jefferson had argued that an early mistranslation of an ecclesiastical appeals decision led common law judges to wrongfully declare that blasphemy was punishable in the common law, and this mistranslation was the source of Lord Mansfield's remark in his celebrated *Evans'* speech before the House of Lords that the principle of the revealed religion was part of the common law.[70]

In reply to Jefferson, Chief Justice Clayton argued that Jefferson misunderstood the issue, and thereby undermined his own argument. The issue was whether the sentence of an ecclesiastical court would be given faith and credit in a common law court.[71] Jefferson was also wrong to claim that Lord Mansfield had read the Bible into the common law. Recognizing another court's jurisdiction did not mean that Christianity was part of the common law. Indeed, the issue was one of recognizing the ecclesiastical court's jurisdiction.[72] Chief Justice Clayton was widely cited by other state courts on this issue.

Thus the debate over whether Christianity was part of the common law, an argument that many American lawyers invoked before the courts, was, not one of sociology, but rather of a legal issue involving perceptions of jurisdictional competency. Like the English judges, American judges claimed a lack of jurisdiction over religion, unless religious actions took the form of disturbing the public peace or public safety. It was the common law judges' glorification of legal reasoning, their defense of Lord

Mansfield, and their view of jurisdictional competence that lead to their rejection of the argument that Christianity was part of the common law in the era of the early Republic.

B. The Case of New York: Protecting Public Order or Prosecuting Religious Crime?

Blasphemy, verbal offenses against God or the Christian religion, had been very serious crimes in the American colonies that carried brutal penalties. In colonial Virginia, for example, punishment included branding the offender with a "B" and a public lashing (a third time offender could be punished with death). Because there were no ecclesiastical courts in the colonies, the colonies and early states granted jurisdiction to try and to punish offenders to the civil courts. Blasphemy laws, for the most part, were eliminated or their penalties reduced to mere fines after the American Revolution. Only a few states retained them.[73]

A remaining blasphemy law in the state of New York was still enforced in the Nineteenth Century. The law was challenged when an individual was sentenced to three months and fined five hundred dollars for uttering: "Jesus Christ was a bastard, and his mother must be a whore." Justice Kent of the New York Supreme Court upheld the conviction on the grounds that the utterance was malicious speech not uttered in a serious discussion, and dangerous to the public peace.[74]

Relying on English case law, Justice Kent argued that blasphemy was not a religious crime. While blasphemy had been a crime punishable at common law, whether uttered by words or by writing, the Justice claimed that this offense involved no rights.[75] Construing the New York State's constitutional clause protecting liberty of conscience,

Justice Kent argued blasphemy laws did not violate the protection of religious opinion but protected the public peace. Liberty of conscience only protected belief, not actions, which were not protected by the state constitution.[76] The state framers, said Kent, only wished to prevent religious oaths for public office, but not to prevent the state from protecting its citizens from harmful acts. The law was upheld has an exercise of the state police power to maintain the public peace.

The American public assumed that, since the state court had upheld the blasphemy law, that the courts had incorporated Christianity into the common law of the states and had taken the first step toward the union of church and state by validating religious crimes. Thus, in the 1821 New York state constitutional convention, a motion to amend the state constitution -- by checking the judiciary -- in order to prevent a future decision like that of *Ruggles* was made.[77] General Root, at the convention, expressed the need to prevent the courts from reading the Christianity of the Roman Catholic Church into state law. In defense of his motion, General Root gave a speech to the convention in defense of freedom of conscience.

Justice Kent happened to be in attendance, and a member of the state convention. He replied that General Root misunderstood *Ruggles* and argued that the court "had never declared or adjudged that Christianity was a religion established by law. . . ."[78] Because of this, Root's motion lost 74 to 41 in the convention. Later, Justice Kent had his opinion read and explained to those attending.[79] He explained that the issue whether Christianity was part of the common law was a legal question, and a proposition that could not be recognized in a country where there was separation of church and state.

Despite Justice Kent's disavowal of the interpretation that the state judges had read Christianity into the law, the U.S. Supreme Court would later cited both *Ruggles* and a Pennsylvania case to make the argument that American judges thought Christianity was part of the common law of the states.[80] The U.S. Supreme Court would later confuse the state judges' legal argument (e.g., blasphemy laws are upheld because they regulate the public peace) with the social characterization of the American people as Christian (e.g., the court's *dictum* that "We are a Christian nation").

C. The Case of Pennsylvania: Is Christianity Part of the Common Law of Pennsylvania?.

The constitutionality of Pennsylvania's remaining blasphemy law was challenged in 1824 when Updegraph, a member of a debating society, during a discourse on religion said: "That the Holy Scripture were mere fable; that they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies."[81] He was found guilty of violating the state's blasphemy law and fined five shillings. Later, his case was reversed by the state Supreme Court on the grounds that the indictment was faulty, failing to put the offensive words into the indictment.

In discussing the state's blasphemy law, the court cited and invoked various English authorities such as William Blackstone, Lord Bracton, Lord Mansfield, as well as state colonial charters. Citing the *dictum* of Justice Kent's *Ruggles* opinion, plus Kent's remarks made in the 1821 constitutional convention, Chief Justice Duncan of the Pennsylvania court argued that blasphemy was a temporal offense. Commenting on English law, he remarked that no one had ever suffered at common law for any heresy (as

Lord Mansfield had asserted). In direct reply to counsel's contention that the union of church and state in England had resulted in oppression, he countered that "Christianity does not form part of the law of the land!"[82] While religious oppression had occurred on this side of the Atlantic, the state blasphemy laws only addressed regulation of the public peace and punished dangerous speech. The Chief Justice concluded that the state law did not violate religious liberty, nor did it give preference to any religion in the state. The law neither violated the state's guarantee of liberty or "no establishment."

In reply to counsel's argument that the English were to blame for the legal oppressions of the past, Chief Justice Duncan cited the wording of William Penn's colonial charter, guaranteeing full religious liberty, as the definition of "Christianity" secured by law.[83] For Duncan, Christianity was part of the common law of Pennsylvania because the Christian religion was based on a philosophy of religious liberty (e.g., no coercion and no tithes). Thus in what would be later cited as precedent, confirming America's religious past, Chief Justice Duncan said quite the opposite.

The *dicta* of *Ruggles* and *Updegraph* were continually misquoted by both lawyers and the American public as evidence of the courts' reading Christianity into American law. The misunderstanding was natural, since the public assumed that if the state courts upheld state blasphemy laws, which were religious in origin, then courts had incorporated Christianity into the common law of the states.

D. The Case of Delaware: Blasphemy as Public Peace.

The rationale that blasphemy laws were mere public peace measures, not aid to religion, was again seen in the case of *State v. Chandler* (1837).[84] Thomas Chandler was

tried and convicted for uttering that "the virgin Mary was a whore and Jesus Christ was a bastard." He was fined ten dollars and given ten days of solitary confinement. The conviction was upheld by the Delaware Supreme Court, which held that Chandler's actions constituted a malicious attempt to disturb the public peace, constituting an *Updegraph* offense. Chief Justice Clayton reasoned, following both ***Ruggles*** and *Updegraph*, that blasphemy was a temporal offense that was only punishable when it had the tendency to create a riot. Quoting from Lord Mansfield's celebrated speech in the *Evans* case and Lord Coke to support the argument that the common law did not infringe upon freedom of opinion, the Chief Justice said that his state law was only concerned with preserving the public peace. Any violation of the state's common law only dealt with public needs, not with private morals.[85]

The Delaware court treated blasphemy as if it belonged to a class of "fighting words" with a tendency to incite riot, not protected under a principle of freedom of speech or opinion. The Chief Justice's distinction between private thoughts and the public peace had the effect of secularizing the state blasphemy statute. Thus, the court's rationale was that state laws prohibiting blasphemy did not violate religious liberty, because such laws merely prohibited actions, not thought, and thus fell under the rubric of an exercise of the state's police power. Blasphemy laws as an exercise of the state's police power was the accepted rationale in the early nineteenth century.

IV. Sunday Laws: The Secularization of Labor Law.

When it came to state Sunday closing laws, the familiar English common-law principle of William Blackstone, who had maintained that Sunday laws were secular --

the sovereign's ability to regulate labor -- was relied upon by American judges. Indeed, while there is much litigation challenging state Sunday closing laws, few judicial opinions actually explore or even discuss this "history" or their constitutionality. It was not until the modern age, that "historical" discussions appear in the judicial opinions. Only three cases among hundreds in the era of the early Republic ventured to discuss "history." The prevailing attitude was, as Judge Bell of the Pennsylvania Supreme Court noted, that whatever their original motive, the Sunday laws were but civil regulations so long as no one was compelled to attend church or belief coerced.[86] Thus, early state case law is completely devoid of any kind of "historical" discussion.

The treatment of Sunday laws as secular labor regulations was in part, due to the growth of industry and the expansion of commerce in the Nineteenth Century. At first, local Sunday laws strained the expansion of interstate commerce. However, state laws contained many exceptions to the prohibition, namely, "works of necessity" and "works of charity." State judges were able to accommodate the needs of commerce by expanding the definition of what constituted "works of necessity."[87] Also, with state law exceptions, which were continually provided for, state judges were able to uphold the constitutionality of state laws while at the same time striking down their application to any immediate case.

One area that also borrowed from English case law was the controversy as to whether state Sunday laws applied to the making of contracts on Sunday. Only two state cases, and one federal, which were often cited for their separationist *dicta*, were found.

In *Bloom v. Richards* (1853), the Ohio Supreme Court held that a contract made

on a Sunday was valid since it did not constitute "common labor" within the state statute.[88] The making of a contract, said the court, was "business," but not "work" or "labor" prohibited by law. Citing for authority the separationist dictum from *Specht v. Commonwealth* (1848),[89] state precedent, and English case law (in England, contracts on Sunday were valid); the court argued that there were no cases in English law holding a contract to be void at the common law if it had been executed on a Sunday.[90] Making the argument that "Christianity was not part of the common law," the court said that, while English common law, from a country which had a state church, had been followed by American courts, it followed that "neither Christianity, nor any other system of religion, is a part of the law of this state."[91] Nor were Sunday laws a religious enforcement, and "could not stand for a moment as a law of this state, if its sole motive to enforce the observance of that duty."[92]

The secularization of the state's Sunday law in *Bloom* was later cited as precedent, both ruling and *dictum*, in subsequent cases, and it was cited in a federal case involving the status of Sunday contracts. State Sunday laws were thus treated as the English treated them, as secular regulations of business or labor.

A federal court, in *Swann v. Swann* (1884), addressed the issue of payment of a debt, which was valid under Tennessee law, but which under Arkansas' Sunday law was void.[93] Invoking English case law to support the argument that Sunday laws were police regulations -- a civil, not a religious institution (e.g., William Blackstone), -- the court held that contracts made on Sunday were as valid as those made on any other day. A contract that was valid in one place was valid everywhere in the Union.

The court also went on to reject counsel's argument that the enforcement of a contract on Sunday would shock the moral sense of the community, which was a Christian society. Long before lawyers characterized Americans as a "religious people," the court refused to accept the argument that there existed a religious consensus in the American states or that this was a religious nation.[94] The legal rights of all, said the court, would take precedence over any religious characterization of the American community, and all religions or non-religion were to be treated equally.[95] The court cited for authority the separationist dictum of *Bloom* and *Specht*, a Vermont Sunday law case, and the famous Judge Thomas Cooley (of the Michigan Supreme Court, author of *Constitutional Limitations*). Noting the "mischievous" lessons of history, the court concluded that Sunday laws did not violate the guarantee of religious conscience because they were a civil, not a religious, institution.[96]

What is significant about the *Swann* case is the court's rejection of the accommodationist argument that maintained that Americans were a religious people. That same argument would later be made in the Twentieth Century, but called "founders' intent."

By relying upon Blackstonian principles, that blasphemy and Sunday laws were secular regulations, American judges were able to secularize and thus sustain state blasphemy and Sunday laws. They were unable to view blasphemy and Sunday laws as aids to the Christian religion or as violations of their state's "no establishment" or "no support" of religion clauses. Instead, the legal standard in the blasphemy and Sunday law cases seems to be whether or not the state law violated religious liberty, defined narrowly

as freedom of opinion. On the issue of coercion, the state courts were careful to make sure that the state's blasphemy or Sunday law was not enforced as religious observation. Thus what was challenged in court as direct aids to Christianity, was made to appear as secular regulations by recourse to established English common law. It was English legal history that provided the secular justification of those laws, treating them as public peace or labor law measures, not as religious laws.

V. Conclusion: The Common Law Lawyers--Keepers of the Liberal Tradition.

Two kinds of "history" were invoked in the era of the early Republic. The first kind was the appeal to the lessons of history, found in the history of religious oppressions and persecutions that had occurred in Europe and in the colonies. Thus, Lord Mansfield's speech was cited for its European examples of religious persecutions, which attempted to stamp out intellectual inquiry. The *Muzzy* court gave examples of the church, not the state, curbing individual freedoms or the rights of conscience. These dark histories were invoked by state judges to defend a belief in individual freedoms, and to challenge counsel's version of history, who blamed the common law for past oppressions. The state judges took pride in the common law's historical role in not having been part of that dark history. Hence, state judges were disturbed when counsel bemoaned the English legal past, a history the judges refuted by arguing that "Christianity was not part of the common law." The state judges' appeal to the liberalism of the common law, and the humanism of Lord Mansfield, served to confirm the court's view of the common law as the protector of a liberal tradition of free inquiry and free debate. Nineteenth Century judges, reminding their audience and counsel of the need to maintain individual freedoms and to give those

freedoms a broad base for their security, invoked the lessons of history.

However, the "lessons of history" were only "window dressing" to the actual legal outcomes of the cases, which, in the final analysis, sustained state blasphemy and Sunday laws. Instead of applying a broad liberal tradition to strike down such laws, state judges were more willing to protect private property, protect the state's ability to tax, to curb "fighting words" and protect valid contracts. The state judges ended up defining the scope of individual liberty very narrowly, to encompass the protection of intellectual discourse or opinion.

The second kind of the "history" evident in the early era was the invocation of English case law and precedent. Here, not the lessons of the past, but justifications for the public peace rationale were derived. The reliance on English law was significant, for it provided the secular justification of state legislation that favored Christianity and Protestant practices. English legal history was used to justify the state legal status quo, as long as that status quo did not burden religious liberty with compulsions. The use of English law also meant that American judges could not see laws involving blasphemy or Sunday closing as problems in "establishment" of a religion. In fact, state judges, in validating the state acts, made it clear that the state regulations were not aids to religion.

Thus, in the final analysis, what appeared as recourse to the liberal tradition of the common law, which, indeed, secularized the state acts, had the effect of narrowing the American definitions of religious liberty and "no establishment." The era of the early Republic was still mired in English, not American, legal thought.

ENDNOTES TO CHAPTER 1

1

See, e.g., Town of Pawlet v. Clark, 13 U.S. (9 Cranch) 292 (1815).

2

See, e.g., Swann v. Swann, 21 Fed. 299 (1884).

Challenges to the practice of court oaths followed the same pattern of analysis and invocation of English judicial practices, that is, state courts sustained the practice on the grounds that the common law never coerced to swear an oath in court (thus avoiding the free exercise issue). In fact, English law had a long tradition of providing for exemptions to oaths. For an examination of the English and American state practice, *see, e.g.*, State v. Levine, 162 A. 909 (Sup. Ct. N.J. 1932) (civil right was denied to require individual to testify at trial when individual had a religious objection against taking court oath, held to violate the state constitutional provision which guaranteed that no person be denied enjoyment of their civil rights because of religious principles). The case law on court oaths was not included in this study because the key "history" cited by a court can be found in State v. Levine (a modern era case, citing English legal history).

For additional examinations of the judicial practice of court oaths, *see, e.g.*, FRANK SWANCARA, OBSTRUCTION OF JUSTICE BY RELIGION (1936). *See also* Frank Swancara, *The Surviving Religious Test*, 18 ST. LOUIS L. REV. 105 (1933). For modern challenges to court oaths, *see, e.g.*, State v. Albe, 460 P. 2d 651 (1969), and People v. Cohen, 90 Cal. Rptr. 612, 12 Ca. 3d 298 (1970) (upholding California's grand juror's oath). For historical interest, *see also* Omichund v. Barker, 1 Ath. 21, 11 Engl. R.C. 126 (1744) (Hindu oath accepted in an English court, contrary to the argument that England had only one officially recognized religion).

For an examination of state oaths requiring, as a condition of exercising the right to vote in federal elections, that a person swear an oath that he did not advocate nor practice polygamy, *see, e.g.*, Davis v. Beason, 133 U.S. 333 (1889) (upholding oath as a requirement of voting). *See also* Toncray v. Budge, 95 P. 26 (Sup. Ct. Idaho 1908) (upholding a state provision prohibiting polygamists from civil office).

Nor were religious oaths for public office included in this study. For an examination of this issue, *see, e.g.*, Note, *Belief in Existence of God as Test for Office*, 33 MISS. L. J. 130 (1961); *Note, Freedom of Religion--Validity of State Requirement that Public Officers Declare Belief in The Existence of God*, 36 N.Y.U. L. REV. 513 (1961); *Note, Constitutionality of Religious Qualifications for State Public Office*, 1962 DUKE L. J. 272 (1962).

3

1 Smith (N.H.) 11 (1803).

4

See, e.g., Donald S. Lutz. *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought.* 78 AM. POL. SCI. REV. 189 (1984).

5

See, e.g., LEONARD W. LEVY. JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE (1963). *See also* The Early Uses of Jefferson **Chapter 4** Part B § 1 *infra*.

6

See, e.g., Wardens Church of St. Louis of New Orleans v. Blanc, 8 Rob. 51 (Sup. Ct. La. 1844) (a claim to property interest in church office constituted an establishment under federal law) discussed in **Chapter 4** *infra* note 38 and accompanying text. *See also* Baker v. Fales, 16 Mass. 487 (Mass. 1820) (no vested interest in church membership).

7

For an examination of the conflict over the Virginia glebe lands, *see, e.g.*, Thomas E. Buckley, *Evangelicals Triumphant: The Baptist's Assault on the Virgina Glebes*, 1786-1801, 45 WM & MARY Q. 33 (1988). *See also* Turpen v. Locket 6 Call. (Va.) 133 (1804); Seldon v. Overseers of Poor of London 11 Leigh (Va.) 127 (1840). For a modern case, *see, e.g.*, Mikell & Town of Williston 285 A. 2d 713 (Sup. Ct. Vt. 1971).

8

13 U.S. (9 Cranch) 43 (1815).

9

Id. at 48:

> . . . Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers for public charities.

It is of interest to note that Justice Story equates "no establishment" with free exercise.

10

See Case of the Duchy of Lancaster (Calvin's Case). 8 COKE'S REP. 10 (1561). The Calvin principle maintained that legal guarantees of a conquered territory remained in effect until changed by the new authority by statutes. For background on the English legal concept of sovereignty. *see, e.g.*, ERNST KANTOROWICZ. THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY (1957).

11

Supra note 1.

12

See, e.g., Jacobus TenBroek, *Use of the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CAL. L. REV. 287-308, 437-454, 664-682 (1938); 27 CAL. L. REV. 157-181, 399-421 (1939).

13

See, e.g., WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (T. Cooley ed. 1893). Blackstone characterized tithes as incoporeal hereditaments that belonged to the clergy, at 25 n. 2. Judge Thomas Cooley's edition noted that English tithes had become a type of rent under English law, *see also* THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS (1878).

14

Provided *in* 13 Ann. Chap. 43. Cited *in* Muzzy v. Wilkins, 1 Smith (N.H.) 1 (1803).

15

See, e.g., PA. Charter of 1701 art. 1. *See infra* note 28.

16

Muzzy v. Wilkins, *supra* note 14 at 11 n. 1:

> . . . Provided always, that this act does not at all interfere with Her Majesty's grace and favor in allowing her subjects liberty of conscience; nor shall any person, under pretence of being of a different persuasion, be excused from paying towards the support of the town aforesaid; but only such as are conscientiously so, and constantly attend the publick [sic] worship of God on Lord's day, according to their own persuasion, and they only shall be excused from paying towards

the support of the ministry of the town. (italics in original).

17

Delware Art. I, § 1 (1792) *in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 278 (B. Poore ed. 1924, reprinted 1972). [Hereafter,THE FEDERAL AND STATE CONSTITUTIONS] The states of Connecticut, New York and Rhode Island provided for religious liberty only. Maryland and Massachusetts allowed for the legislature to authorize taxation in support of the parish minister in their respective first constitutions.

18

GA. CONST. art. LVI. (1777) *in* 1 THE FEDERAL AND STATE CONSTITUTIONS at 383. *See also* Ga. CONST. art. IV § 5, art IV § 10 (1789).

19

N.H. CONST. art. I, § VI (1784) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1281.

20

N.J. CONST. art. XVIII (1776) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1313.

21

MD. CONST. art. XXXIII (1776) *in* 1 THE FEDERAL AND STATE CONSTITUITONS at 819.

22

N.C. CONST. (THE CONSTITUTION FORM OF GOVERNMENT) art. XXXIV (1776) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1413-14 (it is of interest to note that the clause appears in the Form of Government section not the state's Declaration of Rights).

23

PA. CONST. art. II (1776) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1541. *See also* PA. CONST. art. IX, § 3 (1790) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1554.

24

PA. CONST. art. IX, § 3 (1790) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1554.

25

S.C. CONST. art. XXXVIII (1778) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1627.

26

VT. CONST. Chapter 1, § III (1777) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1859.

27

AN ACT FOR ESTABLISHING RELIGIOUS FREEDOM, PASSED IN THE ASSEMBLY OF VIRGINIA IN THE BEGINNING OF THE YEAR 1786 (1786) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1909.

28

Charter of Privileges for Pennsylvania of 1701, para. 1 *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1537:

> . . . That no Person or Persons. . . shall be in any case molested or prejudiced, . . . because of his of their conscientious Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or thing, contrary to their religious Persuasion.

29

Frame of Government of Pennsylvania art XXXV (1682) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1526:

> . . . That all persons. . . shall, in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship, nor shall they be compelled, at any time, to frequent or maintain any religious worship, place or ministry whatever.

30

Sixth Draft of the Frame of Government in 2 THE PAPERS OF WILLIAM PENN 192 (Dunn and Dunn eds. 1982):

> . . . That all persons who professe [sic] faith in God, And that Live soberly honestly

& peaceably under the Governmt [sic] of
the said Province. shall Enjoy the free
practice of their particular perswasions [sic]
in Matters of Religion, without being compelled
to frequent or (help to) maintaine [sic] any
Religious Worship place or ministry, that is
not according to their respective Con-
scientious perwasion [sic]. . .

See also WILLIAM PENN, *Draft of the Laws Agreed Upon in England, in* 2 THE PAPERS OF WILLIAM PENN at 208-9, same as art. XXXV at 225 *in* 2 THE FEDERAL AND STATE CONSTITUTIONS *supra* note 17 at 1526.

31
See, e.g., THOMAS RUDYARD, TYTHES ENDED BY CHRIST (1673).

32
Id.

33
See, e.g., Barry Reay, *Quaker Opposition to Tithes 1652-1660*, 86 PAST & PRESENT 98 (1980).

34
See, e.g., WILLIAM PENN, *Wisdom Justified of Her Children, May 16, 1673, in* 2 THE SELECTED WORKS OF WILLIAM PENN 238-9 (1971).

35
See, e.g., To the Right Honourable and Supreme Authority, Petition of March 1647, in LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION 135, 140 (D. Wolfe ed. 1967):

Section 9. That tythes and all other
enforced maintenance, may be for ever
abolished, and nothing in place
thereof imposed; but that all Ministers
may be paid only by those who voluntarily
contribute to them or chuse [sic] them,
and contract with them for their labors.

See also The Case of the Armie Truly Stated, October 15, 1647. in THE LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION 196. For background, *see, e.g.*,

FREEDOM IN ARMS: A SELECTION OF LEVELLER'S WRITINGS (A. Morton ed. 1974): THE LEVELLER TRACTS 1647-1653 (W. Haller ed. 1944).

36

See, e.g., No Paptist nor Presbyterian, December 21, 1648. in LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION *supra* note 35 at 307-10.

37

See, e.g., Edward Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949); MARK DE WOLFE HOWE, GARDEN IN THE WILDERNESS; RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

38

See, e.g., LEO PFEFFER, CHURCH, STATE AND FREEDOM (1953) and *The Establishment Clause: An Absolutist's Defense*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 699 (1990); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); Douglas Laycock, *NonPreferential Aid to Religion: A False Claim About Original Intent*, 27 WM & MARY L. REV. 875 (1985/86).

39

N.C. CONST. art. XXXIV (1776): ". . . no establishment of any one religious church or denomination in this State, in preference to any other" *in* 2 THE FEDERAL AND STATE CONSTITUTIONS *supra* note 17 at 1413.

40

The state of Maryland from 1776 to 1790 authorized its state legislature to lay a tax for the support of the minister. The authorization followed the state's guarantee that no person could be compelled to maintain any place or ministry. It read:

> . . . [Y]et the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; . . . to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general any particular county. . .

Md. CONST. art. 23 (1777) *in* 1 THE FEDERAL AND STATE CONSTITUIONS *supra* note 17 at 819-820.

However, there exists no information or trace of litigation of this clause in the state's legal history, other than it was repealed in 1790.

41
See, e.g., Muzzy v. Wilkins, *supra* note 14.

42
N.H. CONST. art. I, § 6 (1784) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS *supra* note 17 at 1281:

> . . . Church make their own provisions for the support and maintenance of public ministers. . . . And no person of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination. . .

43
Quoted in Muzzy v. Wilkins, *supra* note 14 at 11 n. 1 (Act of February 8, 1791):

> . . .[M]ay, agreeably to the Constitution, grant and vote such sum or sums of money as they shall judge necessary for the settlement, maintenance, and support of the ministry, schools, meetinghouses, school-houses,. . . to be assessed on the polls and estates in the same town, as the law directs.

44
See, e.g., Sir Thomas Harrison Allen v. Evans, 3 BROWN'S PARLIAMENTARY REPORTS 465 (1767). For historical background *see, e.g.*, JAMES E. BARDLEY, RELIGION, REVOLUTION, AND ENGLISH RADICALISM: NONCONFORMITY IN EIGHTEENTH-CENTURY POLITICS AND SOCIETY (1990).

45
Muzzy v. Wilkins, *supra* note 14 at 4.

46
Id. at 14:

> . . . Public instruction in religion and morality,

within the meaning of our Constitution and laws is to every purpose a civil. not a spiritual, institution.

47
Id. at 15-6:

> In short, on this subject or conscience, there is no mistake more common that for men to mistake their wills and their purses for their consciences. . . it is clear that it would no infringement of the rights of conscience. The question before the Court, therefore, does not involve in it a matter of conscience. It is a mere question of the extent of a civil obligation and a civil duty; that is, how far a corporated body can compel its members to support the public teacher chosen by the corporation; pursuant to the Constitution.

48
Mass. CONST. art. III (1780):

> . . . [T]he legislature hath a right. . . to provide. . . a suitable support for the public worship of GOD, and of the teacher of religion and morals; and to enjoin upon all the subject an attendance upon their instructions. . .

For an account of Article III and its demise, *see, e.g.*, JACOB C. MEYER, CHURCH AND STATE IN MASSACHUSETTS FROM 1740 TO 1833 (1968).

49
See, e.g., MASSACHUSETTS CONSTITUTIONAL CONVENTION 1779-1780: JOURNAL OF THE CONVENTION (1832).

50
See, e.g., THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780 (O. Handlin and M. Handlin eds. 1966) (compiling all the town ballots on the ratification of the first state constitution).

51

See, e.g., Washburn v. Fourth Parish of West Springfield, 9 Mass. 25 (1804).

52

See, e.g., Bangs v Snox, 1 Mass. 181 (1804) (the power of the parish only extended to the settlement of the minister and the building of houses of worship): Boutell v. Cowdin, 9 Mass. 254 (1820) (the deacons of a Congregational church were not a corporation for receiving and managing a fund for the support of the minister).

53

See Baker v. Fales, *supra* note 6. (Holding that when a majority of a church separate from the parish, the members who remain constitute the "church;" a church was not a corporation for the purpose of holding property).

For an examination of this celebrated opinion and its link to the "disestablishment" of Massachusett's Article III, *see, e.g.*, Leonard W. Levy, *Chief Justice Shaw and the Church Property Controversy in Massachusetts*, 30 B.U.L. REV. 219 (1950).

54

See, e.g., Washburn v. Fourth Parish, *supra* note 51 (only ordained ministers could sue to recover the tax support money); Kendall v Inhabitants of Kingston, 5 Mass. 524 (1804) (the minister must be of an incorporated society to have standing to sue for the fund); or Barnes v. Falmouth, 6 Mass. 401 (1810) (minister who collects money must be from a legally incorporated society).

55

See, e.g., Jefts v. York, 64 Mass. 392 (1852) (a Congregational church was not a corporation to authorize an agent to bind them by a promissory note); Inhabitants of Brunswick v. Dunning, 7 Mass. 445 (1811) (ministers of town was the sole corporation, when his office was vacant, town had custody of the church property); Brown v. Porter, 10 Mass. 93 (1813) (lands granted before 1754 for the use of the ministry were vested in the minister); or Stebbins v. Jennings, 27 Mass. 172 (1830) (the church was not a corporation; however, the body of the members was the church).

56

See, e.g., Montague v. Inhabitants of First Parish in Dedham, 4 Mass. 269 (1809) (persons leaving the parish and joining another church were entitled to have their taxes paid over to the new society even if no conscientious scruples existed on the subject); Dillingham v. Snox, 3 Mass. 276 (1809)(a tax dispute between two parishes); Kingsberry v. Slack 8 Mass. 154 (1811) (land annexed to one parish reverted to original parish when the owner died). *See also* Amesbury Nail Factory Co., 17 Mass. 53 (1820) and Goodil Mfg. Co. v. Trash, 28 Mass. 514 (1813) (real estate was liable to be assessed for taxes to support minister even though the owner belonged to a different religious society); Gage v. Currier, 21 Mass. 399 (1826) (church liable for trespass if they tax a non-member); Dall

v. Kimball, 6 Me. 171 (1826) (parish taxes can be assessed on the property of the members of the parish); or Oakes v. Hill, 27 Mass. 333 (1830) (inhabitant of parish who became member of a voluntary religious society became liable to taxation).

57

See, e.g., Barnes v. Falmouth, *supra* note 54. This opinion was later published as a pamphlet in the 1830's in Massachusetts as a means to defend Article III of the Massachusetts' constitution. Article III was repealed by referendum in 1833 (by a 10 to 1 vote).

58

Id. at 408:

> . . . The first objection seems to mistake a man's conscience for his money, and to deny the state a right of levying and of appropriating the money of the citizens, . . . In either case, it can have no weight to maintain a charge of persecution for conscience sake. The great error lies in not distinguishing between liberty of conscience in religious opinions, and worship, and the right of appropriating money by the state. The former is an unalienable right; the latter is surrendered to the state, as the price of protection.

59

See, e.g., Adams v. Howe, 14 Mass. 340 (1817) (upholding the 1811 Religious Freedom Act). For historical background, *see, e.g., Caleb* Cushing, *Notes on Disestablishment in Massachusetts 1780-1833*, 26 WM & MARY Q. 169 (1968).

60

16 Mass. 487 (1821).

61

See, e.g., Leonard W. Levy, *Chief Justice Shaw. . . . supra* note 53 and Jacob C. Meyer *supra* note 48.

62

See, e.g., RONALD G. USHER, THE RISE AND FALL OF THE HIGH COMMISSION (1915, reprinted 1968).

63

See, e.g., WILLIAM BLACKSTONE, 4 COMMENTARIES 41.

64

See, e.g., LORD COKE. *The Ecclesiastical Law In England, in* COKE'S REP.

65

See, e.g., Justice Doe's dissenting opinion *in* Hale v. Everett, 53 N.H. 9 (N.H. 1868) (Doe, J., dissenting). His opinion is discussed in **Chapter 4** *infra* note 39 and accompanying text.

66

See, e.g., Prohibitions Del Roy, 12 COKE'S REP. 63, 65, 77 ENG. REP. 1342, 1343 (1608), CO. LITT 97b. Also cited *in* Hale v. Everett, *supra* note 65 at 202 (Doe, J., dissenting).

66

Id.

67

See, e.g., Nicholas Fuller's Case, 12 COKE'S REP 41, 42-3 (1601):

> . . . That if Counsel at Law, in his argument,
> Shall scandels the King, or his government,
> Temporal or ecclesiatical, or the church, he
> was not punishable in the church courts.

The case involved a charge of liable against a lawyer who said something negative about a bishop while in a private home. The bishop, in turn sought to sue the man in church courts for his offensive words. The common law courts rejected the church courts jurisdiction of the matter.

68

See, e.g., Thomas Jefferson's letter to Dr. Thomas Cooper, February 19, 1814. The court cites Letter to Major Cartwright June 5, 1824 at 558. *See also Art.V. Christianity a Part of the Common Law*, 9 AM. JURIST 346 (1833); and JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT WITH SELECTED WRITINGS (1971).

69

See, e.g., State v. Chandler, 2 Har. (Del.) 553 (1837). The separationist dictum from this case was later cited in State v. Bott 38 La. Rep. 662 (1879) (upholding a Sunday liquor ban as a secular police regulation).

70

Sir Thomas Harrison Allen v. Evan, *supra* note 44. Jefferson had argued that Henry Finch's of Gray's Inn. translation from the Norman French of an ecclesiastical appeals decision had mistakenly translated "ancien [sic] scripture" as "Holy Scripture" to the effect that ". . . to such laws of the church as have warrent in Holy Scripture, our law giveth credence." Jefferson saw this as a mistranslation as the source of the common law judges declaring that blasphemy was punishable in the common law and the source of Lord Mansfield's remark in the Evans speech that the principles of the revealed religion were part of the common law.

71

State v. Chandler, *supra* note 69 at 562.

72

Id.:

> . . . Mr. Jefferson has made a translation for Finch in words with inverted commas, then attempted to prove his translation false, and failed to do it. . . . Lord Mansfield's alleged judicial forgery stood, as the cases we have cited prove, upon other and many other authorities than Mr. Jefferson appears to have ever read.

73

For a modern case, *see, e.g.*, State v. West, 9 Md App. 270, 263 A 2d 602 (1970) (striking down Maryland's remaining blasphemy law as a violation of the First Amendment).

74

People v. Ruggles, 2 Johns (N.Y.) 225 (1811).

75

Id. at 293:

> . . . [S]uch offenses have always been considered independent of any religious establishment of the rights of the church. They are treated as affecting the essential interest of civil society.

76
N.Y. CONST. art. XXXVIII (1777) *in* 1 THE FEDERAL AND STATE CONSTITUTIONS at 1338:

> . . . [T]he liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this State.

It of interest to note that many other states copied this limitation on the free exercise of religion, *see, e.g.*, CA. CONST. art I. § 4 (1851)(1879).

77
JOURNAL OF THE NEW YORK CONSTITUTIONAL CONVENTION 1821 at 462:

> The Judiciary shall not declare any particular religion, to be the law of the land; nor exclude any witness on account of his religious oath.

78
Id. at 463.

79
Id. at 575:

> . . . He [Kent] never intended to declare Christianity the legal religion of the state, because that would be considering Christianity as the established religion, and make it a civil or political institution.

80
Cited *in* Church of the Holy Trinity v. United States, 143 U.S. 457 (1891).

81
Updegraph v. Commonwealth, 11 Serg. (Pa.) 393 (1824).

82
Id. at 406:

> . . . No man ever suffered at common law for any heresy; the writ *de haeretico comburendo*, and all

the suffering which he [counsel] has stated in such lively colors, and which give such a frightful, though not exaggerated picture, were the enactments of positive laws, equally barbarous and impolitic. There is no reason for the counsel's exclamation, are these things to be revived in this country, where Christianity does not form part of the law of the land!--it does form, as we have seen, a necessary part of our common law; it inflicts no punishment for a non-belief in its truths; it is a stranger to fire and to faggots, and this abused statute merely inflicts a mild sentence on him who bids defiance to all public order, disregards all decency. . . (italics in original)

83
Id. at 399:

. . . Christianity, without the spiritual artillery of *European* countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, *William Penn*; not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes and spiritual courts; but Christianity with liberty of conscience to all men. (italics in original). . . .

It is of interest to note that the court defines Christianity as liberty of conscience, *e.g.*, no tax, no coercion.

84
State v. Chandler, *supra* note 69.

85
Id. at 557:

. . . No lawyer ever framed an indictment in a common law court, charging that the defendant did not honor his father and mother, or merely coveted his neighbor's property. . . And in all cases where the tendency of any man's acts or words was, in the judgment of a common

law court. to disturb the common peace of the land of which it was the preserver and protector. or to lead to a breach of it and the good order of society. considered merely as a civil institution. the common law avenged the wrong done to civil society alone. (italics in original)

86

Specht v. Commonwealth, 8 Pa. 312 (1848). Jacob Specht was fined four dollars for hauling manure on Sunday in violation of the state's Sunday law. *See also* State v. Miller, 68 Conn. 373, 377-78, 36 A. 795, 796 (1896), where it was stated:

> If, however, the language used must be con-construed as including an exercise of the power employed prior to the adoption of the constitution to control private action of individuals in a matter of personal conscience, serious questions would arise.

Contra Ex Parte Newman, 9 Cal. 502 (1858) (striking down California's Sunday closing law as a discrimination in favor of one religion and infringing on the liberty to aquire property). The dissenting opinion of Justice Stephens Field was later cited for authority in the U.S. Supreme Court's opinion in McGowan v. Maryland, 366 U.S. 420 (1961) discussed in **Chapter 3** *infra* (upholding Maryland's Sunday closing laws).

87

See. e.g., Commonwealth v. Knox, 6 Mass. 76 (Mass. 1809) (driver of coach transporting U.S. mail on Sunday did not violate state law); Flagg v. Inhabitants of Milbury, 58 Mass. 243 (Mass. 1849) (town must fix defect in public highway even if it meant working on Sunday because the town would be liable for any injuries); Augusta & S.R.C. v. Renz, 55 Ga 126 (Ga. 1875)(running of street railroad car on Sunday was a work of necessity exempt from state's Sunday law); Philadelphia W. & BB Co. v. Lehman, 56 Md. 209 (Md. 1881) (forwarding cattle by railroad on Sunday was not illegal); Commonwealth v. Louisville & N.R. Co., 80 Ky. 291 (Ky. 1882) (running a railroad train on Sunday was a work of necessity, exempt from the state's Sunday laws); Nelson v. State, 25 Tex. App. 599, 8 S.W. 927 (Tex. 1888) (shoeing horses carrying state mail on Sunday was a work of necessity, exempt from the state's Sunday laws); People v. Klinck Packing Co., 108 N.E. 278, aff'd 149 N.Y.S. 504 (N.Y. 1914) (upheld application of state's Sunday law on factory as an exercise of the state's police powers). These case clearly illustrate how local Sunday laws gave way to the growth of commerce and capitalism (by merely enlarging the definition of what constituted a "work of necessity").

88
2 Ohio 387 (1853).

89
Specht v. Commonwealth, *supra* note 86.

90
See, e.g., Moore v. Murdock, 26 Cal. 514 (1864).

91
Bloom v. Richards, *supra* note 88 at 391. *See, e.g.*, concurring opinion in Minden v. Silverstein, 43 La. Rep. 912 (1884) (upholding the state's Sunday liquor ban). The concurrence argued that "Christianity was not part of the common law nor of the civil law" of the state of Louisiana.

92
Bloom v. Richards, *supra* note 88 at 392.

93
21 Fed. 299 (1884).

94
Id. at 301. The court quotes from Vidal v. Girard's Ex'rs, 2 How. 127 (1844) on the same theme (Vidal is often cited for Justice Story's dictum that a private college could allow for Bible reading in the class room; however, here the court uses Justice Story for a separationist argument).

95
Swann v. Swann, *supra* note 93 at 301, *see also* 302:

> . . . In this country legislative authority is limited strictly to temporal affairs by written constitutions. Under these constitutions, there can be no mingling of the affairs of church and state by legislative authority. All religions are tolerated and none is established. Each has an equal right to the protection of the law, whether Christians, Jews, or infidels. (citation omitted)

96
Id. at 302, the court continues:

. . . History records the mischievous consequences of all efforts to propagate religion. . . by penal statute. In religion no man is his neighbor's keeper, and no more is the state the keeper of the religious conscience of the people. The state protects all religions, but espouses none. . . . The statute, then, is not a religious regulation, but is the result of a legitimate exercise of the police power, and is itself a police regulation. (citations omitted).