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INDIVIDUAL FREEDOM AND THE BILL OF RIGHTS

— CHAPTER 1 —

The Roots of Religious Liberty

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...
— First Amendment to the U.S. Constitution

Religious freedom is one of the most prized liberties of the American people, a fact that strikes some people as incongruous if they think of the United States as a secular society. That very phrase, however, is misleading, in that it implies a society in which religion and religious ideals are absent, and secular values alone govern daily conduct.

Religion is not absent from daily life in the United States; rather, the Constitution has created a system in which each individual and religious group can enjoy the full freedom to worship, free not only from the rein of government but from pressures by other sects as well. This combination of religious diversity and religious freedom is a complex matter, and the path toward this ideal has not always been easy, nor is it free from conflict today. But democracy is a process, not a finished product, and liberty in all its forms is also in development.



The concept of religious freedom is relatively recent in mankind's history. There have been societies that permitted some deviation from state-sanctioned and enforced official religion, but such toleration depended upon the whim of the majority or ruler, and could be withdrawn as easily as it had been given. Religious freedom requires, above all else, the divorce of a nation's religious life from its political institutions, and this separation of church and state, as it is called, is also of relatively recent vintage. One of the great social revolutions that accompanied America's rebellion from England and the adoption of the Constitution and Bill of Rights was the formal separation of church and state, first by the former colonies and then by the federal government. By embedding this idea, and the accompanying notion of a full freedom of religious exercise, in the Constitution, the Founding Generation transformed what had at best been a temporary privilege into a protected right. That did not mean that religious freedom, as we know it today, fully existed in 1791, but the seeds had been planted. The great flowering of those germinal ideas would come in the 20th

century.

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The history of western Europe, from whence came the early settlers of the American colonies, was marked by religious conformity from the fourth century until the Protestant Reformation, with the Catholic Church the "established" or official church. One might have expected that the Protestant Reformation would have led to some toleration, and in fact one can find in the writings of Martin Luther and John Calvin some passages that plead for tolerance and freedom of conscience. But in those areas where Protestants gained control, they quickly established their own churches. This should not be surprising, since Luther never objected to the notions that there is only one true faith, that all others need to be eradicated, or that in any state there can be only one church. The Protestant Reformation did split the religious unity of Europe. In some countries, religious differences led to bitter civil wars, often lasting for decades. James Madison had this history in mind when he wrote that "torrents of blood have been spilt in the world in vain attempts of the secular arm to extinguish religious discord, by proscribing all differences in religious opinion." Only in tiny Holland did the competing religious sects so balance each other that by the 17th century the good burghers had adopted a live-and-let-live policy that permitted not only Catholics and Protestants, but Jews as well, to live in a spirit of mutual toleration. The Americans of the Revolutionary generation knew all about Holland, but their actions were dictated primarily by their own colonial experience as British colonies.

In the early 17th century, the colonization of North America began, and Englishmen took their visions of the godly community to the New World. What is important is that in terms of religion, all of the new settlers believed in an established church, and soon after they set up their colonies, they established their churches. A famous example is from New England's First Fruits, a 1643 pamphlet describing the early years of the Massachusetts Bay colony, in which the author wrote, "After God had carried us safe to New England . . . we had builded our houses, provided necessities for our livelihood, reared convenient places for God's worship, and settled the civil government."

From the settlement of Jamestown in 1607 until the American Revolution in 1776, the British colonies in North America, with few exceptions, had established churches. In New York and the southern colonies, the Church of England enjoyed the same status as it had in the mother country, while in New England various forms of Congregationalism dominated. These colonies consistently discriminated against Catholics, Jews, and even dissenting Protestants.

In 1656, the General Court of Massachusetts Bay forbade the presence of Quakers in the colony; should any be found, they were to be jailed, whipped, and deported. But the Quakers were persistent, so the following year the legislature ordered that banished male Quakers who returned should lose one ear; if they returned a second time, the other ear. Females who came back were to be "severely" whipped, and on a third return, male or female should "have their tongues bored through with a hot iron." But the Quakers kept coming, so in 1658, the General Court prescribed death by hanging, the same penalty imposed upon Jesuits and other Catholic priests who returned after banishment. Between 1659 and 1661 one woman and three men were indeed hanged upon Boston Common. As late as 1774, at a time when the colonists were strongly protesting British invasions of their rights, the Reverend Isaac Backus, leader of the Massachusetts Baptists, informed the governor and council that 18 Baptists had been jailed in Northampton, during the coldest part of the winter, for refusing to pay taxes for the support of the town's Congregational minister. That same

year, James Madison wrote to a friend: "That diabolical, hell-conceived principle of persecution rages among some. . . . There are at this time in the adjacent county not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. . . . So I must beg you to . . . pray for liberty of conscience for all."

Yet from the very beginning of settlement in America, pressures grew, especially in the northern colonies, against establishment and conformity. As early as 1645, a majority of the deputies in the Plymouth (Massachusetts) General Court wanted "to allow and maintain full and free tolerance of religion to all men that would preserve the civil peace and submit until government; and there was no limitation or exception against Turke, Jew, Papist, Arian, Socinian, Nicholaytan, Familist, or any other, etc." In nearby Rhode Island, Roger Williams founded a colony that allowed an environment of almost total religious liberty. Williams has been characterized as a prophet of modernity in this area, and by his actions he certainly deserves that title. Williams not only favored freedom of conscience, but he opposed religious establishment, and he did so in the belief that establishment harmed not only the civil society but religion as well. His was one of the few voices in the 17th century colonies to make this argument.

Although formal establishments lasted until 1776, in effect the colonies had to allow some degree of religious toleration. At first the settlers came from a relatively homogeneous background, but within a short time the lure of the New World brought immigrants from all over the British Isles as well as from northern and western Europe. Many came not because America offered any greater religious freedom than they enjoyed at home, but because of economic opportunity. Not all of them shared the Congregational faith of the Puritans or the Anglican views of the middle and southern colonies. Baptists, Jews, Catholics, Lutherans and others arrived and once here began protesting that they should not be subject to taxation for a church they did not attend or be forced to conform to a faith they did not share.

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At the beginning of the Revolution, Virginia, like many other states, disestablished the Church of England, which many colonists identified with the hated royal government. The Virginia constitution of 1776 guaranteed to every person equality in the free exercise of religion but it stopped short of declaring a full separation of church and state, much to the disappointment of the largest dissenting group in the state, the Baptists. Other groups that still adhered to the Anglican faith (soon to be denominated as Episcopalians) believed that tax monies should support religion. Taxes, they thought, ought not go to just one sect, but should be used to support all (Protestant Christian) churches.

The fight in Virginia to establish full religious freedom is worth looking at for a moment, because it involved two of the great architects of the American nation, Thomas Jefferson, the author of the Declaration of Independence, and James Madison, known as the Father of the Constitution. Both men would later serve as president of the United States.

Thomas Jefferson had written a "Bill for Religious Freedom" that provided, among other things, "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." This bill was passed by the Virginia legislature. Jefferson believed religion to be a personal matter between an individual and God, and therefore beyond the reach of the civil government. He did not limit this freedom to Protestant sects, or even to Christians, but to

all groups, and he considered this freedom not to be the gift of a legislative session, but one of the "natural rights of mankind." Jefferson's ideas were far more advanced in the 1780s than those of his countrymen, and even in his native Virginia there was much opposition to his proposal, especially from churches who wanted support from the state.

Jefferson left for Paris as American minister to France, and the fight for religious liberty devolved upon his friend and disciple, James Madison, who wrote one of the key documents in American religious history, the "Memorial and Remonstrance against Religious Assessments." Like Jefferson, Madison argued that the essentially private and voluntary nature of religion should not be subject to government in any manner. A tax assessment, even if divided among all religions, nonetheless remained an establishment of religion, and should therefore be opposed, no matter how mild or beneficent it appeared. The arguments made over 200 years ago still ring strongly.

Memorial and Remonstrance (1786)

1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. . . .

2. Because if Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. . . .

3. Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. . . . We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever? . . .

The force of Madison's argument led the voters of Virginia to elect a state legislature that in fact opposed not only the establishment of a single church, but the taxation of the people for any and all churches. At its next session, the General Assembly adopted what is one of the foundational documents in American history, the Virginia Statute for Religious Freedom. The argument made by Thomas Jefferson is that religion is so important, and its free exercise so essential to mankind's happiness and well-being, that it must be fully protected from the state. People should not be taxed either for an established church that they do not support, or even for support of their own church. Religion thrives best when left to the devotion of its adherents.

***Virginia Statute for Religious Freedom* (1786)**

Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do. . . .

Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities. . . . We are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

Although today we give much of the credit for religious freedom to the First Amendment to the Constitution, in its own time the adoption of the Virginia Statute for Religious Freedom marked a greater step away from state support and enforcement of one particular religious belief and toward an open, tolerant society. The significance of the statute lay in its assumption that religious matters were of a totally personal nature, beyond the legitimate scope of the state. Thomas Jefferson personified this view when he wrote to a friend: "I never told my own religion, nor scrutinized that of another. I never attempted to make a convert, nor wished to change another's creed. I never judged the religion of others . . . for it is in our own lives and not our words that our religion must be read."

By the time the new government formed under the Constitution, the ideas embodied in these two documents had spread throughout the new American states. Even though some states would continue to have established churches for a few more decades, there was common agreement that the national government should not be involved in religion. As John Adams wrote, "I hope that Congress will never meddle with religion further than to say their own prayers, and to fast and to give thanks once a year. Let every colony have its own religion without molestation."

Several states, in fact, had ratified the Constitution on condition that it be amended to include a bill of rights to make sure that Congress did not meddle, and to this task James Madison applied his considerable

talents in the first Congress to meet under the new Constitution. From his labors came the 10 amendments, ratified in 1791 and known collectively as the Bill of Rights. The first of these amendments read:

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

The bundling of these various rights within the same amendment is far more than an act of literary economy. They all deal with the right of the people to express themselves, to be free of state coercion in voicing their political and religious beliefs, their ideas, and even their complaints. One should remember that at the time Madison drafted these amendments, religion and religious beliefs often comprised important political issues. Madison had had to win a political fight to get the Statute of Religious Freedom enacted, and similar political fights took place in other states as well. Not surprisingly, many of the First Amendment cases that would later come before the U. S. Supreme Court have cut across the artificially imposed categories of simple speech or press or religion; rather, they have dealt with the limits of governmental power to restrict a person's mind and the untrammled right of expression.

The past 200 years have seen the playing out of this idea, of keeping government and religion separate, so as to allow each person the right to believe, or not to believe, according to the dictates of individual conscience. This is not to say that there has not been any religious prejudice in the United States. Catholics, Jews, and other groups have been the victims of discrimination, but it has been social discrimination that has been neither endorsed nor enforced by the state. Legal discrimination based on belief lasted a little beyond the Revolution, and then faded away.

It's true that from the time of the Revolution until well into the 20th century, despite great diversity among its peoples and religions, the majority of Americans subscribed to a Protestant Christian faith. Groups that deviated from that mainstream often found themselves the objects of suspicion, yet at all times these groups, especially Jews and Catholics, found champions among the Protestant majority to defend them and their right to worship freely according to the dictates of their conscience.

To take one well-known example, in New York in the early 19th century, a thief, repenting his sins, had confessed to a Catholic priest, Father Andrew Kohlmann, and asked him to return the stolen goods, which the priest did. Police demanded that Father Kohlmann identify the thief, but he refused to do so, claiming that information received under the seal of confession remained confidential to all save priest and penitent. Arrested for obstructing justice, Father Kohlmann was tried before the Court of General Sessions in New York City. Counsel on both sides, as well as the panel of judges, were Protestant, and the lawyer who defended Father Kohlmann made his argument in the broadest possible terms of free exercise of religion.

Argument of counsel in defense of seal of confession (1813)

I shall proceed to examine the first proposition which I undertook to maintain, that is, that the 38th Article of the [New York State] Constitution, protects the Reverend Pastor in the exemption which he claims, *independent of every other consideration.*

The whole article is in the words following:

"And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind: This convention doth further, in the name and by the authority of the good people of this state, ORDAIN, DETERMINE AND DECLARE, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state to all mankind. *Provided*, that the liberty of conscience hereby granted, shall not be so construed, as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

Now we cannot easily conceive of more broad and comprehensive terms, than the convention have used. Religious liberty was the great object which they had in view. They felt, that it was the right of every human being, to worship God according to the dictates of his own conscience. They intended to secure, forever, to all mankind, without distinction or preference, the free exercise and enjoyment of religious profession and worship. They employed language commensurate with that object. It is what they have said.

Again there is no doubt that the convention intended to secure the liberty of conscience. Now, where is the liberty of conscience to the Catholic, if the priest and the penitent, be thus exposed? Has the priest, the liberty of conscience, if he be thus coerced? Has the penitent the liberty of conscience, if he is to be dragged into a court of justice, to answer for what has passed in confession? Have either the privilege of auricular confession? Do they freely enjoy the sacrament of penance? If this be the religious liberty, which the constitution intended to secure — it is as perplexing as the liberty which, in former times, a man had of being tried by the water ordeal, where, if he floated he was guilty — if he sunk he was innocent. . . .

By the early 19th century, therefore, at least some people who thought about what religious freedom meant had reached the essentially modern position. The judges in the Father Kohlmann case unanimously upheld the principle of confessional sanctity, and, in 1828, the New York legislature gave statutory enforcement to the old common law doctrine of priest-penitent confidentiality. Although Catholics alone have confession as a rite, the idea of confidentiality surrounding communications between a person and his or her spiritual advisor, be it priest, minister, rabbi, or imam, has been accepted in both statutory and common law throughout the United States. What started as a test of one religion's practices spread to enhance the freedom of conscience for all.

Catholics continued to have their defenders throughout the time when many Protestants viewed them suspiciously, remembering the bloody conflicts of Europe. John Tyler, the former president of the United States, opposed the Know-Nothing Party of the 1850s, a small but vocal group of nativists who opposed Catholicism. Writing to his son,

Tyler condemned the Know-Nothings and praised Catholics who "seem to me to have been particularly faithful to the Constitution of the country, while their priests have set an example of non-interference in politics which furnishes an example most worthy of imitation on the part of the clergy of the other sects of the North, who have not hesitated to rush into the arena and soil their garments with the dust of bitter strife. The intolerant spirit manifested against the Catholics . . . will arouse a strong feeling of dissatisfaction on the part of a large majority of the American people; for if there is one principle of higher import with them than any other, it is the principle of religious freedom. . . ."

That is not to say that anti-Catholic prejudices disappeared. The great migrations of the late 19th and early 20th centuries brought millions of new immigrants to the United States, and many of them came from Catholic countries in southern and eastern Europe. Crowded into teeming cities, they seemed to many Protestants not part of the country's fabric, and although the United States never experienced the bloody religious wars of Europe, anti-Catholic sentiment ran high. Prejudice certainly contributed to the defeat of the first Catholic to run for president, Alfred E. Smith, in 1924. Thirty-six years later, when John Fitzgerald Kennedy received the Democratic nomination for the presidency, he recognized that in order to be elected, he would have to meet and defuse this prejudice head on. He asked for and received an invitation to speak to a meeting of Southern Baptist ministers about his beliefs as a Catholic and his duties as an American citizen. It is widely believed that this talk, which received national attention, did much to defuse the religious issue in the election.

John F. Kennedy on church and state (1960)

Because I am a Catholic, and no Catholic has ever been elected President, the real issues in this campaign have been obscured — perhaps deliberately in some quarters less responsible than this. So it is apparently necessary for me to state once again — not what kind of church I believe in, for that should be important only to me, but what kind of America I believe in.

I believe in an America where the separation of church and state is absolute — where no Catholic prelate would tell the President (should he be a Catholic) how to act and no Protestant minister would tell his parishioners for whom to vote — where no church or church school is granted any public funds or political preference — and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him.

I believe in an America that is officially neither Catholic, Protestant nor Jewish — where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source — where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials — and where religious liberty is so indivisible that an act against one church is treated as an act against all. . . .

This is the kind of America I believe in — and this is the kind of America I fought for in the South Pacific and the kind my brother died for in Europe. No one suggested then that we might have a "divided loyalty," that we did "not believe in liberty" or that we belonged to a disloyal group that threatened "the freedoms for which our forefathers died."

And in fact this is the kind of America for which our forefathers did die when they fled here to escape religious test oaths, that denied office to members of less favored churches, when they fought for the Constitution, the Bill of Rights, the Virginia Statute of Religious Freedom—and when they fought at the shrine I visited today — the Alamo. For side by side with Bowie and Crockett died Fuentes and McCafferty and Bailey and Bedillio and Carey — but no one knows whether they were Catholics or not. For there was no religious test there. . . .

I do not speak for my church on public matters — and the church does not speak for me.

Although Protestants did not fear a Jewish conspiracy (in fact, the early Puritans admired Judaism), Jews also suffered from centuries-long religious bigotry. The New World did not have to overthrow the medieval institutions that had sanctioned anti-Semitism; nonetheless, seeds of prejudice did cross the Atlantic, and the small Jewish communities that dotted the seaboard had to overcome their fruits.

Like the Catholics, Jews received aid from Protestants who firmly believed that, in the United States, no room existed for the type of religious persecution so prevalent in Europe. "Happily, the Government of the United States," George Washington told the Jewish community of Newport, "which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens." Jefferson and Madison offered similar assurances that in this country religious freedom — not tyranny — would be the rule.

But many Americans considered this a Protestant Christian country, and if they feared a Catholic conspiracy, they felt less than comfortable with Jews as well. In Maryland, as in other states, the post-revolutionary Bill of Rights provided a long step toward religious freedom, but limited it to Christians. Beginning in 1818 Thomas Kennedy, a member of the Maryland State Assembly, and a devout Christian, led the fight to extend liberty to Jews as well.

Thomas Kennedy seeking equal rights for the Jews of Maryland (1818)

And, if I am asked why I take so much interest in favour of the passage of this Bill — to this I would simply answer, because I consider it my DUTY to do so. There are no Jews in the county from which I come, nor have I the slightest acquaintance with any Jews in the world. It was not at their request; it was not even known to any of them, that the subject would be brought forward at this time. . . .

There is only one opponent that I fear at this time, and that is PREJUDICE — our prejudices, Mr. Speaker, are dear to us, we all know and feel the force of our political prejudices, but our religious prejudices are still more strong, still more dear; they cling to us through life, and scarcely leave us on the bed of death, and it is not the prejudice of a generation, of an age or a century, that we have now to encounter. No, it is the prejudice which has passed from father to son, for almost eighteen hundred years. . . .

There are very few Jews in the United States; in Maryland there are very few, but if there was only one — to that one, we ought to do justice.

Perhaps because Jews were so small a group, or perhaps because other states looked upon Jews as good citizens, or perhaps because the blatant prejudice offended many citizens, the battle for Jewish rights now received strong support from other states. Newspaper editorials called upon Maryland to redeem itself. The influential Niles Register weekly wrote: "Surely, the day of such things has passed away and it is abusive of common sense, to talk about republicanism, while we refuse liberty of conscience in matters so important as those which have relation to what a man owes his Creator." The pressure had its effect, and Maryland gave full political and religious rights to Jews in 1826. By the Civil War, only North Carolina and New Hampshire still restricted Jewish rights, and those disabilities disappeared in 1868 and 1877 respectively.

By the Civil War, then, the idea of religious freedom had expanded significantly from the early issue of disestablishment. Nearly all states had adopted and implemented bills of rights to provide individual liberty of conscience, and despite a pervasive sense that America was primarily a Protestant Christian nation, had removed civil and political disabilities from Catholics and Jews. The federal government, bound by the First Amendment, had never attempted to intrude into religious matters, and in religious matters as in political affairs, the United States appeared to those suffering from oppression in the Old World to be, as Abraham Lincoln put it, "the last best hope of freedom."

[Chapter 2: Religious Liberty in the Modern Era »](#)

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