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274

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THE UNITED STATES CONSTITUTION AND RELIGIOUS LIBERTY

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TABLE OF CONTENTS

Chapter I

Introduction

This work is principally a study in constitutional law. Primary emphasis will be placed upon the interpretation which the United States Supreme Court has given that part of the First Amendment establishing religious freedom. Thus there will have to be two main points of emphasis; first, how the Court has interpreted the meaning of the person's right to worship as he likes, and secondly, how it has construed the meaning of the prohibition against a religious establishment. These are the two facets of religious freedom and they are closely interconnected with the realization of a truly liberal policy in regard to the individual and his religion. A study of this particular kind must necessarily be founded upon a consideration of beginnings. In other words, a complete study of the interpretation of this clause of the Constitution demands a statement, brief though it may be, of its origin.

Freedom of religion is one of the most basic liberties possessed by the American people, and its attainment in this country was the product of many long years of struggle, not merely of the creation at one stroke of an organic statement that it was hereafter to exist. Furthermore, present day interpretation of this part of the First Amendment has in many cases been predicated on concepts which have grown out of this early struggle and its meaning.

As a result, the second chapter will present a very brief survey of the status of religion in colonial America, and

especially of the momentous changes which took place in this field following the Revolution. These events logically led to the inclusion in most of the new state constitutions of statements and guarantees in regard to religious liberty, either in separate Bills of Rights or in the bodies of the constitutions themselves. In addition, the First Amendment to the Constitution was in large measure a product of the revised thinking of the eighteenth century Americans on the issue of religious liberty. The main body of the work thereafter will consist of an examination and evaluation of all cases which have reached the United States Supreme Court directly or significantly involving the question of religious liberty. Cases arising in the state courts on the subject, and they have been legion, will be noted only if they were eventually appealed to the United States Supreme Court. Thus, notice will be taken only of those cases which have been judged to come under the First Amendment, or under it through the Fourteenth Amendment, and which therefore have been decided under principles of federal public law.

A study of this kind seems justified on several grounds. In the first place, with the spread throughout the world during the past twenty to thirty years of ideological concepts which have sacrificed the individual and his rights upon the altar of the Total State, and which have ignored the liberal belief which teaches that man as a human being has an inherent value and worth, it is more than ever necessary for those who decry these negative and totalitarian values to examine their own liberal structure for any flaws which might be

present. Also, with the spread of this ideological malignancy which is eating at the heart of the liberal tradition, those peoples who still maintain a rein on their governments in the field of personal liberties are thrown into ever bolder relief upon the world scene.

Further justification seems to stem from the fact that liberty of conscience is the touchstone of any body of civil liberty. If a man is not free to examine his own conscience and to act under the compulsion of this examination, if he cannot decide for himself the way to his own salvation, and if he is not free to come together with others of like feelings on these questions to give expression to them, and if a man cannot reach for himself and in his own way the explanation and purpose of his existence, then how free is he? No matter what else the state may guarantee him, without this completely private, voluntary, and impenetrable sphere of mental freedom man is not a complete human being. And this freedom of course also means the right to decide that neither he nor anyone else has a soul, or to decide that man has no ultimate salvation beyond his earthly existence, or that religion after all is only what Communist doctrine has long taught--"an opiate for the masses."

Then, too, it is true that in order to define completely and accurately what religious freedom means in the United States, in order to illustrate the content of this basic substantive right possessed by the American people, it is necessary to look far beyond constitutional provisions. You cannot understand the status of civil liberty in this country

by a mere perusal of the Federal and state bills of rights. There is a common assumption among laymen, however, that nothing more is necessary. All that is found in these organic pronouncements is a general statement of a governmental limitation.

According to the First Amendment Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." But what does the word "establishment" refer to? What does "free exercise" of religion include? Does it mean that a person can do anything he desires under the guise of religious worship? These words and phrases need definition and interpretation. Especially is this need for definition and interpretation present in our highly complex, industrial society of today. Human relationships today are many and varied, they are interwoven in a hundred different ways. In addition, there is also present the relationships between our 150 million people and government--national, state, city and county. No flat statement of policy will suffice to solve automatically the thousands of different problems which naturally arise as a result.

It is especially true in the field of civil liberty that the problems arising therein cannot be solved by mere statements of general policy. Violations of civil liberties, or claimed violations, arise only out of the interaction of the citizen and his government. Thus, in the United States, the federal judiciary has been allowed to arbitrate this interrelationship of citizen and government and to define the meaning of the various liberties as cases are presented for

decision. Professor J. Allen Smith has said truly that "No one can understand clearly the status of individual liberty in this country without bearing in mind the place occupied by the judiciary under our constitutional system."[1] Although he was of the opinion that such a system impaired the effectiveness of constitutional liberties since the Supreme Court was not directly responsible to the people, it is generally thought today that it has worked fairly successfully.

Professor Smith is correct in saying that since the government controls the interpretation of our civil liberties it can ignore the restraints placed upon it by the Constitution in their regard, but history has not shown this possibility to be an actual and ever-present danger. By and large the Supreme Court has been very solicitous of the individual's rights and freedoms. There have been exceptions in the past of course. The most recent example perhaps, in which it could be claimed that the Court abdicated its duty of protecting the individual's rights, was the case wherein the Supreme Court upheld the Executive Order excluding the Japanese, citizens as well as aliens, from the West Coast during the early years of World War II.[2] By and large cases such as this one have been the exception, especially during the past twenty-five years. If the Supreme Court did not define the area of civil liberty, who would? Certainly in our system of government it is a judicial and not a political function. And it

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1. J. Allen Smith, The Growth and Decadence of Constitutional Government, New York, 1930, p. 279.
2. Korematsu v. United States, 323 U.S. 214 (1944). See also Eugene V. Rostow, "Our Worst Wartime Mistake," Harper's Magazine, CXCI (September, 1945), p. 193.

is also obvious that the threat of an abuse of power is no argument for a destruction of that power. Any power is liable to abuse.

Mention of this recent case involving the West Coast Japanese brings to mind another situation which would seem to allow further emphasis in the study of personal freedom. It is a truism that "democracy does not guarantee the maintenance of any group of liberties for the individual."[3] Professor Cushman, author of this statement, goes on to say that:

> A government founded upon the doctrine of majority rule must show unremitting care and self-restraint if that majority is to respect at all times the civil liberties of the minority. Within recent years there has been a clear tendency, especially in the United States, to a relaxation in the interest in civil liberty and a loss of many specific rights. The increasing governmental control necessitated by the complexities of modern social and industrial life results in continuous encroachments upon rights fundamental to the older philosophy of individualism. Under the guise of protecting health, morals and safety the majority has found opportunity to write into laws its views of morality, decorum, religion and political orthodoxy in such a way as frequently to impair the civil liberty of the individual. The unintelligent censorship of books, plays and moving pictures; the prohibition of the teaching of evolution and other unpalatable doctrines in the public schools; the breaking up of meetings held to expound unpopular political beliefs; the exclusion from the country under the immigration laws of European political offenders and the denial of citizenship to pacifists under the naturalization laws--all are outstanding examples of violations of once generally recognized individual rights.[4]

These statements were written several years ago, however, and some changes have come about which tend to make this

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3. Robert E. Cushman, "Civil Liberties," Encyclopaedia of the Social Sciences, II, p. 511.

4. Ibid.

indictment of Cushman's less serious. For example, more protection has been given the right of assembly since the Fourteenth Amendment was interpreted as enforcing the substantive rights found in the First Amendment upon the states. Then, too, citizenship is no longer denied to persons under our naturalization laws simply because they refuse to bear arms in defense of the United States.[5] Also the Supreme Court recently reprimanded the Postmaster General for denying the magazine Esquire second-class mailing privileges because he thought its contents obscene.[6] Yet the main point Professor Cushman brought out is true, and very important. The point is that constant vigilance is necessary as personal liberties are never automatically guaranteed merely because they are listed in an organic law. The fate of the rights of the German people found in the Weimar Constitution when Hitler came to power is an excellent case in point. The lack of substance to the rights listed in the new Russian constitution of 1936 provides another example.

The other point brought to light by the Korematsu case is that today especially, because of the prevalence of war preparations and of the threat of war, and the natural trend toward a certain amount of regimentation which always accompanies such a period, it seems worth while to examine

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5. Girouard v. United States, 328 U.S.61 (1946). Yet the year before the Supreme Court upheld the Illinois Supreme Court in denying a man admission to the Illinois Bar because of religious scruples against war, In re Summers, 325 U.S. 561 (1945). Cf. infra, Chapter VIII.

6. Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

periodically the condition of civil liberties and personal rights. There is more danger of their being invaded during times of crisis than during normal periods. During the late war the record of the government was on the whole very good. It certainly was an improvement over that made during World War I and during the years immediately following. Yet this fact does not mean that such a liberal attitude is always assured. In this connection it should be noted that because of the extensive consciousness of the American people today of -isms, of their fear of subversive activity, and of the ease with which suspicion is cast today upon persons thought to be of disloyal tendencies, care should be taken that these same attitudes do not develop into a general antagonism to, and impatience with, all minority groups and views which might deviate from the orthodox and generally accepted. Vigilance of this kind is especially necessary in the field of religious liberty as there is always a temptation to turn to minor sects which might be obnoxious or far from the accepted norms in their beliefs as threats to the democratic way of life.

Finally, a study of this kind seems appropriate for another reason. In the field of civil liberty a great principle of modern liberal thought meets a perennial problem of government. The principle involved is that of natural rights. The problem involved is that of reconciling personal liberty with governmental authority. The doctrine of natural rights, the modern legacy of Locke, Rousseau, and other liberal philosophers, teaches that there are certain rights possessed

by the individual which cannot be interfered with or curtailed by government. When men contracted themselves into civil society out of the state of nature they possessed this body of inherent liberty and withheld from the governments they placed themselves under authority to interfere with it. So runs the argument of the natural rights school.

This natural rights doctrine became in large part the rationale of the colonists in their dispute with Great Britain. As a result they placed the principle in their Declaration of Independence. Then after the split had been realized many of the new constitutions written by the new states contained statements of the principle. For example, the Pennsylvania constitution of 1776 included the following:

> That all men are born equally free and independent, and have certain natural, inherent and inalienable rights. . . .[7]

In like vein the preamble to the Massachusetts constitution of 1780 held that

> The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights. . . .[8]

Then when the Bill of Rights was added to the original Constitution, the process was merely one of adding to the basic law the contemporary view of what natural rights a person did possess. One of these was the freedom of religion

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7. Francis N. Thorpe, editor, American Charters, Constitutions, and Organic Laws, Washington, D. C., 1909, V, p. 3082.

8. Ibid., III, p. 1888.

found in the First Amendment. The story of its development will be told briefly in the following chapter.

Yet it was not understood by these men that adherence to the conception of inalienable natural rights meant that here was a sphere of personal anarchy completely free from any interference. For example, the framers of the New Hampshire constitution of 1784 wrote into their document that each person was to have the right to worship God according to the dictates of his own conscience, provided "he doth not disturb the public peace, or disturb others, in their religious worship."[9] This understanding was universal. In other words these so-called "natural rights" were to be qualified, their exercise was not to be allowed to the extent of interfering with the government which guaranteed them or to the extent of interfering with a like exercise of rights on the part of others. Any government, to be an effective instrument of social control, must have the power of regulating personal conduct with this broad aim of maintaining civil order and stability in mind. If all persons had an unlimited freedom to act as they wished, then none would be truly free. Real freedom involves an aspect of restraint as well as one of action. This concept of restraint leads to the heart of the problem. Where are the lines to be drawn? When actually does the exercise of a given right come into conflict with government or with others? As has been noticed previously, the United States Supreme Court decides these questions, and

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9. Ibid., IV, p. 2454.

the decisions are many times most difficult to make. But in making the decision the Court is merely contributing to the solution of the problem previously posed--how to adjust private liberty with necessary social control. This paper will show how the Court has attempted, and is attempting, to solve the problem in one area of personal freedom.

Chapter II

Historical Background

Chief Justice Waite once made the following pertinent comment concerning the subject of religious freedom:

> The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.[1]

He was correct in his statement that the word and its exact meaning are undefined in the Constitution. Furthermore, the scope of governmental limitation in the area of religious freedom is not to be found by reading the First Amendment. So it is important to have in mind, in a study of this kind, the environment out of which present-day guarantees of religious freedom have grown.

A knowledge of the historical background will not open up automatically, of course, whatever uncertainties there may be as to the exact reach of religious freedom. It will be noticed later in this study that attempts to divine all that the members of the First Congress had in mind when they adopted the First Amendment and submitted it to the states, to decide exactly what they wanted to include in the right to worship freely and what they wanted to exclude, are usually futile. Attempts to solve present-day problems in the field of religious liberty on the sole basis of what the past has

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1. Reynolds v. United States, 98 U.S. 145, 162 (1878).

revealed, or seemed to reveal, are not only short-sighted but impossible. An examination of the historical background, however, is important in pointing toward meanings, in evaluating religious freedom on the basis of its roots in order to decide the extent of the flower, and in illustrating the fact that our gropings toward the creation of a true concept of religious freedom are nothing more than a continuation of such a striving extending over the 176 years of our national existence.

In the present chapter a brief survey will be presented of the influence of religion in the founding of America and the religious situation as it existed all through the colonial period. The gradual growth of religious toleration, the slow abolition of religious establishments, and the resulting liberal provisions in many of the early state constitutions will be discussed briefly. Special emphasis will be placed on the struggle for religious liberty in Virginia. There are two reasons for this emphasis. In the first place the colonial struggles over religious questions seemed to culminate in the Virginia controversy. Secondly, the two men most responsible for disestablishing the Episcopal Church in Virginia and for creating freedom of religious worship, Thomas Jefferson and James Madison, are appealed to today in many instances in the support of one view or another on these questions. Emphasis will be placed on the Virginia struggle, and on the views of these men, also because James Madison was one of the leaders in the First Congress in the proposal of the First Amendment.

Finally, the background and passage of the First Amendment will be brought out to complete the background analysis. The passage and adoption of this amendment illustrates the importance which religious freedom, along with all the others found in the Bill of Rights, had come to have in the lives of the American people. It thus points out the fact that there was growing over the years a conviction in the minds of most people that here was a sphere of activity which had to be left to each individual.

It is well known that the search for religious liberty was one of the important factors bringing about the settlement of this country. The Pilgrims and the Puritans came to obtain, among other things, freedom of worship. But their goal was not true religious freedom as we know it today. They wanted freedom of worship for themselves, and then to force everyone else to conform to their dogma and orthodoxy. This attitude was to affect greatly the religious situation in colonial America. These groups established a program of religious persecution little different from the one they came to this country to escape. This persecution developed especially after many religious sects migrated to the New World. Conflicts were bound to arise. In addition to the Separatists in Plymouth and the Puritans in Massachusetts Bay, Catholics came and settled in Maryland. French Calvinists settled in large numbers in South Carolina. German Protestants went to Pennsylvania and many Presbyterians to several of the colonies. Ever present in the colonies, especially in the South, were the Episcopalians, those who remained

true Anglicans. Since this Church was established as the state Church in England it came to occupy the same position in those colonies settled by large numbers of Anglicans. As a result, there were present in colonial America many religious sects, each with its own views on questions of freedom of worship and the relationship between the church and the state. This growth of a heterogeneous religious population meant that the working out of a compromise and a lasting solution was to occupy a long period of time.

Generally speaking, the situation as it existed throughout most of the colonial era was as follows: In all but four colonies a church establishment of one kind or another was set up. An establishment signified the setting up of a church supported by taxation. Taxes had to be paid to support the church by members of that church and dissenters alike. The four colonies in which no church was ever established were Rhode Island, Pennsylvania, Delaware, and New Jersey.[2] In all the New England colonies except Rhode Island the Congregational Church was established by law, with more or less proscription of other forms of worship. The establishment was under the authority of the colonial legislature.[3] In New Netherland the Dutch Reformed Church enjoyed the support of the government until the establishment fell when

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2. William W. Sweet, Religion in Colonial America, New York, 1942, pp. 52-53, 326; Sanford H. Cobb, The Rise of Religious Liberty in America, New York, 1902, pp. 408, 422-453.

3. Cobb, op. cit., p. 133.

England took control of the colony.[4]

By far the most important establishment was the Church of England, known here as the Episcopalian Church after 1783. It was the established church in Virginia throughout the entire colonial period except for a brief time during the Commonwealth era of Cromwell. It was established in Maryland in 1692 and in the Carolinas a few years later. The establishment in Maryland and South Carolina was effective, but in North Carolina it was only nominal so far as a good portion of the province was concerned. There was a vigorous dissenting element in this colony. The attempts made to make the Episcopal Church the state church in New York and New Jersey were not successful, as dissenters greatly outnumbered Anglicans in these two colonies. In Georgia a law was passed in 1758 establishing the Anglican Church, but there were only two churches of this denomination in the colony as late as 1769.[5] In these colonies where the Anglican Church enjoyed state preference the salary of the minister and all other expenses incurred by the Church were paid out of funds raised by public taxation, from dissenters as well as Episcopalians.

Thus at the end of the colonial period the Anglican Church was established in Georgia, the Carolinas, Maryland and Virginia. Partial establishment had also been set up in four southern counties of New York. In Massachusetts, New Hampshire and Connecticut the Congregational Church was the

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4. Ibid., p. 455.

5. Sweet, op. cit., pp. 33-38; 39-42, 43-45.