Liberty of Conscience in the Public Square:
Challenges to the Affordable Care Act

A Preface

It's not uncommon for researchers working on a major topic to find that when they get near the end they need to restate the beginning, therein improving the focus of the essay. Such was the case with this project. Based on earlier work, I knew that liberty of conscience was a fundamental concept that informed the Founders as they wrote state constitutions and then the religion clauses of the First Amendment. I also knew that they drew their understanding of liberty of conscience from English history, especially from the Civil War Era (1640-1660s). This development is really the basis of religious liberty in modern America. It was necessary to trace those developments if the meaning of religious liberty in America today were to be understood. These developments were set forth in my *Liberty of Conscience: The History of a Puritan Idea* (1971, 1992, with ten additional printings, and a Chinese edition in 2010), which is summarized in the first five sections of this essay and denominate Part I.

Part II of this essay, composed of three sections, traces the development of liberty of conscience in America's national period. Part II's content is wholly new material; that is, material never gathered in one place before as far as I know. Its core is the fact that liberty of conscience as the heart of the free exercise clause is to be found in every state constitution from the 1770s—pointed out in Part I; yes, still in each state constitution at this hour. Moreover, since the adoption of the First Amendment with its religion clauses, the United States Supreme Court has developed a religion clause jurisprudence.

This corpus of cases and commentary has had its twists and turns and that is the focus of Part II. Specifically, we note in a first section its general structure from 1791 to the Civil War with its attendant Fourteenth Amendment, rehearsing that amendment's significance over the next decades. Another section of Part II takes up the veritable revolution in the Court's thinking in the wake of its *Cantwell* (1940) and *Everson* (1947) decisions.

Everson receives special focus because in it Justice Black developed his own theory of the religion clauses that do not square with what the Founders had to say. This opened the door to a time of unsettled and less than clear opinion writing by the Court which affected the understanding of the free exercise clause. These opinions stirred a sharp reaction by Congress and the public which resulted in legislation to suppress certain Court opinions, that is, the Religious Freedom Restoration Act of 1993. The Court responded by declaring part of that legislation unconstitutional in 1997.

A final section of Part II takes up several cases, including *Conestoga* (accepted December 2013, with oral arguments set for March 2014), that will test the Affordable Care Act's HHS Mandate which Petitioners claim suppresses their liberty of conscience rights guaranteed by the First Amendment and by the Fourteenth Amendment's due process clause.

Indeed, one motivation for writing this essay has been to interest citizens in the profound significance of the *Conestoga* case—along with its allied case, *Hobby Lobby Inc., et al* v. *Kathleen Sebelius*. The issue is, at one level, whether the government can force people to buy a service they sincerely believe violates their rights of conscience, in this case being forced to buy contraception-coverage insurance. If the Court would conclude that the government today has that power, it would be saying that the present administration has the same power as the old English kings had—power to tell their subjects what they can believe or not, how they can act or not act. With such power the government today would be trampling on convictions based on liberty of conscience. In Part I we defined that attitude as a policy of Toleration, a policy that was one cause of the American Revolution.

Is it possible that attempts by the present government to trample, like the English kings of old, on the tender consciences of Americans, causing another revolution? This is a profound matter because religious liberty, liberty of conscience, has been the cornerstone of American society since colonial days.

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An Outline
of
Liberty of Conscience in the Public Square: Challenges to the Affordable Care Act

Part II

An account of the place of liberty of conscience in American jurisprudence in the national period. It ends with the present time as the Supreme Court takes up, yet again, the question of the relationship between the government and citizen claims of liberty of conscience.

Liberty of Conscience in the Public Square:
Challenges to the Affordable Care Act

God alone is lord of the conscience and hath
set it free from the doctrines and commandments of men.
Westminster Confession, 1646, Chapter xx

Congress shall make no law respecting an establishment
of religion, or to prevent the free exercise thereof,
or to infringe the rights of conscience.
Congress, August 20, 1789

I will walk about in freedom for I have sought out
your precepts.
Psalm 119:45

Toleration: A government policy of permitting forms of
religious belief and worship not officially established.
Merriam-Webster Dictionary

Introduction.

Religious liberty continues to be a prominent theme in the public square. Witness attacks on Christians in Iran—attacks that land practitioners of Christianity in jail for years. Indeed, religious intolerance is pervasive in most Islamic countries; actually, religious liberty is non-existent in most Islamic countries, a practice that the American government accepts silently among many Islamic allies, Saudi Arabia being an outstanding example. Moreover, the Obama administration has been caught up in this issue as well. For example, Obama Care (Patient Protection and Affordable Care Act) has rules about who must pay for medical services that Catholics Bishops, Baptists, and others insist violates their consciences. To emphasize, these groups say that their religious liberty is being trampled on by the American government. Dozens

of entities have sued the Federal Government on this issue. In fact, interest in this matter has been so substantial that the 113th Congress saw the introduction of HR 1179, re-introduced this year as HR 940 and titled "Respect for Rights of Conscience Act of 2013." Significantly, it was co-signed by more than 220 Members. At this writing, it awaits committee action.

Thousands of recent articles and newscasts also have discussed the issue of religious liberty, whether foreign or domestic, and often these discussions use the phrase *liberty of conscience* as interchangeable or synonymous with the word *toleration.* In fact, there is great confusion about the meaning of these terms in the press and in the public square. To emphasize, they appear to mean the same thing to most people, though the meaning of each is the polar opposite of the other, obvious, it seems, upon further reflection.

One argument of this essay is, therefore, that the concept of *liberty of conscience* is absolutely incompatible with the idea and practice of *toleration*, as surprising as that may sound to contemporary ears. This fact can be conclusively demonstrated by an excursion into the past, seeing there how toleration was the prevailing context in which religion was expressed in England for centuries. Then Puritans in the English Civil War advocated liberty of conscience as an inherent, God-given right and pushed that doctrine to a dominant position. Beginning with the early colonies, liberty of conscience came to full flower in America, emerging as a pillar of society by the time of the American Revolution.

Thus, a parallel argument here is that the Founding Fathers sought to suppress new government's natural tendency to control religious expressions and actions. In other words, they sought to prevent the new American government from mimicking the old English policy of toleration. Consider for a moment the two religion clauses of the First Amendment. The first says, "Congress shall make no law respecting an establishing of religion." This prohibits the

Federal Government from creating a national church. Why was such a measure necessary? There was fear among citizens that the new federal government would act just like the English government and try to create a state church. The second clause, "nor prohibit the free exercise thereof (religion)," was designed to further prevent the government from restricting, structuring, limiting, or requiring any religious expression by individual citizens. The government had a natural tendency to want, citizens thought, to limit personal religious expressions, too.

A good grasp of the theme of this conference, religious liberty, requires an understanding of how these two concepts developed. We will achieve this understanding by examining the topic in several sections.

And a warning here: This essay will emphasize many times along the way that whenever there is a claim of, a plea for, liberty of conscience, nearby will be a statement that can only be understood as a rejection of the natural governmental desire to control all or part of citizens' religious rights. **In the language of this essay, this rejection of such governmental policies is a rejection of the practice of toleration.**

The first section of this paper defines these terms *in extensio* so that the difference between them is unmistakable. (Part I of this essay consists of sections I-V). A second section gives an account of how these ideas developed in England, from the Age of Elizabeth, through the English Civil War (1640-1660) to the era of the Glorious Revolution in England in 1689. A third section shows how the settlement and development of Massachusetts Bay Colony [hereafter "the Bay Colony"] was a microcosm of the inherent conflict between liberty of conscience and toleration, ending with proponents of liberty being banished from the Bay Colony. This section also briefly traces the exponential growth of liberty of conscience in the minds of colonials in the decades leading up to the Revolution. A fourth section recounts John Locke's contributions to an

understanding of liberty of conscience. A fifth section outlines how the Founders built liberty of conscience into the new nation's governing documents. To the Founders, religious liberty was just as important as political and economic liberty. Evidence of this includes the fact that the sovereign states of the Confederation all had liberty of conscience clauses in their constitutions. The Founders' attitude toward religious liberty was also evident as the Constitution was created in the Federal Convention. There, most delegates insisted that provisions for it be made in the new Constitution. Their demand was answered in the First Session of the first Congress when it drafted the First Amendment's religion clauses. A sixth section—which begins Part II of the essay—sketches the way liberty of conscience, which now meant religious liberty, was honored and protected in America from the end of the Revolution down to WWII. It includes special emphasis on the effect of the Civil War Era's 14th Amendment which incorporated the First Amendment as part of due process which was to be practiced by all states. A seventh section suggests that a revolution of sorts occurred from the Court's opinions in the *Cantwell* (1940) and *Everson* (1947) cases.[1] Part of this section also examines the Court's muddled treatment of the religion clauses.

Finally, an eight section calls attention to present attempts by governmental officials to return to the old hope that government officials can define rights of conscience for citizens. That is to say, Obamian government officials seem to prefer a return to the doctrine of toleration practiced by the English government before the American Revolution. This is evident in its policies that affect Catholics Bishops, Baptists, and others under the terms of Affordable Care Act. Since the Supreme Court accepted two cases for oral argument for March 2014, we focus on

[1] James Hitchcock, *The Supreme Court and Religion in American Life*, 2 vols. (Princeton: Princeton University Press, 2004), I: 4. He states, "But having affected during WW II a *revolution* in the understanding of the free exercise clause (*Cantwell*, 1940), the Court turned its attention to the establishment clause immediately after in *Everson* (1947).

them first, and especially on the central issue brought by the Conestoga case—a claim that its rights through liberty of conscience have been suppressed by the Health and Human Services Mandate (HHS Mandate). This section concludes with a consideration of other groups—Catholic Bishops and a number of educational institutions concerned with HHS Mandate's impact on them.

PART I

The first part of this essay briefly traces the origins and development of liberty of conscience in the context of English Royal policies of Toleration: from Queen Elizabeth to the First Amendment of the United States Constitution (1570s-1791).

I. DEFINITIONS OF TOLERATION AND LIBERTY OF CONSCIENCE

A. Toleration. Rulers and governments have always desired to dictate how their subjects or citizens act out their natural, Creator-endowed, religious impulses. Religion is, of course, the belief phenomenon evident in all people. Everyone believes in something. Even a strong claim by a person that he believes in nothing is a religious expression. It's not surprising, therefore, that such a pervasive element in a society should be the object of control by rulers and governments.

Looking a bit further into the origin and meaning of *toleration*, it appears that the term has two basic dimensions or forms. One may be thought of as an *attitude*. Often this use of the term is tied to the word *tolerant*, as in "he is a 'tolerant' person." Understood is that the individual allows or puts up with a different view from his own. The sense here is that such a person is "long-suffering," or in biblical terms, "slow to anger." Moreover, one can see that the term as defined includes an emotional element as well.

A second use of the term, and one crucial in this essay, refers to governmental *policies*. By definition governments have a monopoly of the power of the sword. It is natural, therefore, for governments to control as much of society as they can, including the religious beliefs of those governed. That is to say, individual freedom (of conscience) is an historical exception in human history.

Dictionaries and political science texts are not of much help in reaching a clear definition of governmental policies of toleration in religious matters. Often they, too, confuse *liberty* and *toleration*. Consider, however, the way in which the *Merriam-Webster Dictionary* defines *toleration*. It captures the essence of the term when it states that *toleration* is "a government policy of permitting forms of religious belief and worship not officially established." The sense of it, by using the word *permitting*, is that a government has the power to *allow* or *grant* degrees of religious beliefs and practices. Significantly, if a government has the power to allow or grant or permit certain religious practices, it also has the power to revoke or limit or not countenance religious practices at all. Simply stated, a policy of toleration attempts to control religion in a society. It certainly contrasts strongly with liberty of conscience.

We need to add another element to this definition of toleration. Consider this question: What is the source of a state's power to control religion—and everything else if it so desires? The answer has always been tied to the exercise of sovereignty, which is a monopoly of the power of the sword by a government. For our purposes, we note that this was so with English monarchs, especially the Tudors and Stuarts (16th and 17th centuries).

Modern dictators and despots are no different in their outlook and desires. Did the Soviet Union not control and suppress religion in its society? From another angle they tolerated only such religious expression as they wanted. Has it not been the same in China, Cuba, and dozens of

Islamic nations? Of course, such rulers do not refer to themselves in these terms, but their actions and policies betray their basic attitude. Actually, some advocates of toleration are even elected sometimes. Americans are not exempt from this attitude as is evident in the current administration's attempts to suppress liberty of conscience in its battle with the Bishops and Baptists.

Traditional monarchs and contemporary dictators see the seat of sovereignty—a monopoly of state power—either in the government they personally control or in themselves. Here we make a big distinction.

The point of the American Revolution was that sovereignty rested in the hands of the people, **NOT IN THE GOVERNMENT OR MONARCH.** And, the people delegated this power on a limited basis to those they elected for a brief time to be the government. All powers, named or unnamed, not granted to the government were retained by the people. This was the essence of the American Revolution—the creation of a government of limited, enumerated powers, with sovereignty remaining in the hands of the people. Such a government had no power to create a policy of toleration—of allowing or granting or permitting anything, especially religious liberty. This brings us to a comment on a definition of *liberty of conscience.*

B. Liberty of Conscience. While toleration as a policy may be found in any type of society historically, liberty of conscience is a distinctly Christian idea found in societies in which Christianity prevailed. In the Christian tradition conscience is viewed as a faculty placed in man, along with others, at the time of his creation by a sovereign Creator-God. It is a part of man, along with his rational capacity, that makes up his image-bearing nature. It is part of his being that allows him to communicate with his Creator, and aids him in understanding God's moral

requirements. When these requirements are built into a person's soul and heart, they inform conscience; in this way, conscience can be thought of as man's moral compass.

Sixteenth-century theologian John Calvin spoke for many Christian thinkers when he said, "For our consciences do not have to do with men but with God alone" [*Institutes,* 4.10.5]. Again, Calvin said that "conscience is a certain kind of knowledge that tells man when he has strayed from God's moral requirements; it will not allow him to hide sins from God's judgment. . . This sense is called conscience." In the 17th century the Westminster Assembly composed a confession reflecting this when it stated, "God alone is Lord of the conscience and hath set it free from the doctrines and commandments of men."[2] From another angle, it can be said that to function properly, the power, authority, and reliability of conscience must relate to and depend on God alone. Thus, the idea arises: that a properly functioning conscience must be free from the influence of all other people.

Significantly, there is a difference between properly informed consciences and those that are not, much confusion on this distinction existing today. Properly informed ones are equipped with a knowledge of how man should live based on the Scripture. Consciences not informed by Scripture retain a "spark," as theologians like to say, of how God wants them to live, often obvious in that most people have a sense of the Ten Commandments. Sometimes this phenomenon is referred to as the Natural Moral Law, common to all but the most depraved or severely mentally handicapped.

The Scripturally informed conscience has a deep sense and assurance that the person is a creature of the Creator and ought to worship Him alone. America's Founders referred to this as

[2] *Westminster Confession of Faith*, Chapter xx, in *United Presbyterian Church Book of Confessions,* rev. ed. (1646; repr. Philadelphia, PA: United Presbyterian Church, 1966), 125-141.

"the duty we owe our Creator." Worship, or the duty man owes his Creator, is, therefore, the essence of man's religious expression.

The Medieval Church, of course, knew that conscience was a basic part of man's nature, but it was **not** an advocate of liberty of conscience. It developed a tradition in which personal moral issues were to be discussed with the parish priests, often once a week. In time, the church literally amassed hundreds of "cases of conscience" that were available to priests as a source of direction for the consciences of their parishioners. Consciences, and their moral quandaries, when directed by priests, cannot be thought of as free or at liberty. On the contrary, they seem to be in the same position as consciences regulated by political policies of toleration. Eventually a change came to the Roman Catholic view.

After years of struggling with a troubled conscience, and of meeting all the priestly requirements, Martin Luther (1483-1546) finally gained relief for his troubled conscience by recognizing the biblical doctrine of "the priesthood of all believers." Among other things Luther said about conscience in his trial at the Diet of Worms is the phrase, "My conscience is captive to the Word of God." His conscience was free to come before God without the aid of a third party. This insight opened the door to the Protestant Reformation. The birth of the full-blown doctrine of liberty of conscience soon emerged.

C. Conclusion. What then do we say in conclusion about toleration and liberty of conscience? Toleration is a view that assumes kings, dictators, and other holders of political power are the ultimate sovereigns in their societies. From this position they believe they have the power to control how religion will be practiced in their realm. Historically, some such leaders saw themselves as magnanimous in that they allowed some of their subjects to carry on religious exercises that were at variance with the official religion of the realm. Notwithstanding official

magnanimity, subjects' religious lives were at the mercy of the ruler, and thus, without liberty of conscience.

Centuries later not much had changed. A frequent practice in Europe after about 1500 was a governmental change in the official religion when one prince died or decided to change from Catholicism to Protestantism or the reverse. No liberty of conscience here either for the poor subject caught up in the "religious wars." He was forced to take up the new religion of his ruler.

Liberty of conscience, on the other hand, begins, not with a human political sovereign, but with the sovereign Creator of the Universe. He alone is lord of the conscience and has set it free from human commandments and rules—whether from kings or priests. Conscience must be at liberty from other men, hence free to follow the way his Creator-God wants him to live.

While most people, most of the time, in most places in the world, have lived under political policies of toleration, liberty of conscience developed in America earlier and more fully than in any other society on the globe. How and why this occurred is the focus of the rest of this essay.

II. Toleration and Liberty of Conscience in Old England.

A. The Age of Elizabeth. Protestantism as a serious movement in England began with the arrival of Elizabeth I as Queen in 1558.[3] One challenge Elizabeth faced was how to deal with two religious factions—traditional English Catholics and an emerging reform-minded group that came to be known as Puritans. Elizabeth (1533-1603) consciously continued a policy that

[3] L. John Van Til, *Liberty of Conscience: The History of a Puritan Idea*, 2nd ed. (Phillipsburg, N J: Presbyterian & Reformed, 1991).

tolerated dissenting consciences, particularly Catholic ones, as long as, she said, they existed in private and did not disturb the realm. No liberty of conscience here.

An unexpected side effect of this limited recognition of the significance of conscience in the life of English Catholics was the emergence of the Puritan movement and its eventual creation of what has been called "a theology of conscience." But, who were the Puritans?

Historic Puritanism,[4] as a distinct movement, began in England during the reign of Elizabeth I. It was a movement aimed at improving the quality of spiritual life in the English Church, but it was no mystical quietism concerned with an elusive and subjective inner life. The standard for conduct was the Bible which Puritans viewed as an authoritative and infallible guide. Conventional English churchmen, without a doubt, could assent to the same view of the Holy Word, but they were content to follow tradition and place confidence in conciliar and confessional interpretations of what it was that Scriptures meant. These churchmen, thus, held a view of the Bible that was consistent with the assumption of the government's role in policing religious practice, including the policy of toleration.

The supremacy and infallibility of the Scriptures as rule and guide for the Puritan was linked to another distinctive assumption, namely, the religious significance of the individual. Emphasis upon the supremacy of the Bible was inherited from Continental Reformers, such as Luther and Calvin, and from them the English Puritans learned to appreciate the idea of the priesthood of all believers. In this view the individual was finally responsible for the condition of his soul as it progressed in the sanctified/made holy life. No priest or church or government could act or believe, or refrain from acting or believing, for him.

[4] Van Til, *Liberty*, 11-16

The Puritan as a Reformed Christian, as a believer in the supremacy of the Scripture, as a believer in the significance of the individual, was confronted with the question of how it was that he stood alone before God and His revelation in the Scriptures. His answer was quite simple: God as creator had endowed him with a conscience, and it was through his conscience that he knew how to act or believe, or how not to act, or what not to believe all on his own.

Puritan scholars refer to an early group (1570s) of Puritan preachers and professors at Cambridge University as the "Brotherhood" and characterize them as men who saw the significance of conscience in daily life. A sampling of their views includes the following.

Characteristically Brother John Dod wrote about the Ten Commandments, stating their sole purpose was to "to stir us up . . . in conscience." He viewed the Commandments as a "preparation" and not an end in themselves, nor as a "yoke or bondage." Dod's colleague, Richard Rogers, had the same attitude toward the law of the Old Testament; he wrote, "Law is not preached to hold men under, with the yoke of fear and bondage . . . but to set more stores by God's mercy."

It is fair to say that the Brotherhood viewed conscience as a means of grace, as a bridge between the demands of the old law and the freedom taught in the Gospel. Another of the Brotherhood, Richard Greenham, had more to say: "Conscience is a sensible feeling of God's judgments grounded upon the Word . . . ." He metaphorically described the sense of freedom he felt conscience had in these words:

> We must not make our conscience like a chesverel [kid-leather purse], stretch it too far, or too narrow, that is, be not too righteous, as the Anabaptists, and the Family of love. . . . We must not let our conscience be looser than the Scripture be, for then we shall be profane. Take heed of extremes, for virtue is a mean between extremes, taking something of one, and something of the other: knowledge of generals and conscience of particulars.

For Greenham conscience had an elasticity, not to be stretched too far nor too little. Importantly,

it gave him freedom from Old Testament law and freedom to live under New Testament grace.

It was left to a next generation Puritan, William Perkins, to develop a full-blown theology based on the centrality of conscience in the life of the Christian.[5] His *Discourse* outlined what conscience was and how it functions. This was followed by his *Cases of Conscience*, which was a demonstration of how one resolved moral issues that conscience brought to one's mind. Further discussion of his theological morphology here is not necessary. That has been done elsewhere. We note here, however, what Perkins had to say about liberty of conscience. Said Perkins, "God has now in the New Testament given a liberty to the conscience, whereby it is freed from all laws of his own whatsoever, excepting such laws and doctrines as are necessary to salvation."

William Perkins died in 1602. The age of Elizabeth ended a year later with the Queen's death. Puritanism was about to develop into a movement that would precipitate a civil war and revolution, religious liberty being a central issue in these events. We turn now to a consideration of them.

B. Toleration under James I and Charles I: 1600-1640.[6] Queen Elizabeth was succeeded by James I in 1603. He is remembered in history as the sponsor of the "King James" edition of the Bible. His policy regarding differing religious views was one of toleration, though a bit more long suffering than his predecessor when it came to Puritan preachers. In particular, James said that the Bishops' treatment of one Peter Cartwright—they harassed and imprisoned him—was a great slander, "considering the great duty which we owe to such as are afflicted for conscience." Yet, he said that his preference was that his "subjects content themselves soberly and quietly with their own opinions, not resisting authorities nor breaking the law of the

[5] Van Til, *Liberty*, 16-25.
[6] Van Til, *Liberty*, 29-34.

country.” No liberty here.

In 1625 James I was succeeded by his son Charles I for whom a marriage had been arranged with a Catholic princess from France—Henrietta. The arrival of this outspoken Catholic stirred up opposition, even hatred, of Catholics in England. This fueled the growth of the Puritan party, especially in Parliament. In time Charles I and his Anglo-Catholic friends resisted this growing movement. On the other hand, he needed appropriations from Parliament to fund his military campaigns on the continent. Further, by 1629 a large part of Parliament was convinced that Charles I wished to make England into a Catholic country.

Angry over these charges, and angry that he could not extract enough funds from Parliament, Charles dissolved Parliament in 1629 and ruled without it for a decade. At the same time, dissenters, many more groups of them now emerging in English society, received harsh treatment from Charles’ government and the English Church, dominated at the upper levels by Anglo-Catholics.

Defense of their views in the face of more stringent and vigorous attempts to suppress them—many were executed for their views—caused dissenters to plead their causes in the name of liberty of conscience. For example, John Smyth wrote, “Leave the Christian religion free to every man’s conscience.” Continuing, he said, “The Prince’s power allows him to handle only civil transgressions. . . for Christ only is the King and lawgiver of the church and conscience.” Again, John Robinson, famous as the pastor of the Pilgrim flock that came to Plymouth Rock, held the same view of civil power and conscience. Wrote Robinson, the civil government has “no power against the laws, doctrines, and religion of Christ.” Yet another dissenter, Thomas Helwys, wrote “Neither hath our lord the King by [the] sword of justice, power over his subjects’ consciences.”

Clearly, as James I and Charles I tolerated less dissent in the era 1600-1640, defense of liberty of conscience grew among dissenters and also among the Puritan party in Parliament. Conflicts over royal policies of toleration and claims of liberty of conscience were moving English society toward a revolution and civil war. To that we now turn.

C. Liberty and Reformation in the English Civil War: 1640-1660.[7] Like all civil wars the English one in the 17th century was complex with numerous themes and cross-currents shaping it. Here we focus on two significant ones. The first involved the question of who should ultimately rule the realm—who should have political supremacy. In the midst of this struggle a second, prominent issue took center stage as well—the question of religious liberty in English society [and eventually in America].

1. The Question of Political Supremacy. Royal absolutism was a dominant force in English society even before the days of Henry VIII (died 1647). It continued as a royal attitude through the age of Elizabeth, the rule of James I and his son Charles I, that is, to the 1640s. On the other hand, there was an English tradition of non-royal nobles that sought to check the power of the Crown going back to the days of King John in 1215. In time, this dissent from royal authority was expressed in the body that came to be known as Parliament.

As indicated, by the 1640s there was an all-out struggle for control of English society between Charles I and his minions and Parliament now dominated substantially by the Puritan Party, the struggle including militarily battles in the countryside. Indeed, a civil war erupted. Many battles were fought between the supporters of Charles and supporters of the Puritan Party in Parliament. Eventually, Charles was captured, imprisoned, and in 1649 beheaded. The Puritans were in control. Oliver Cromwell ruled as Lord Protector of the Realm from 1653 to

[7] Van Til, *Liberty*, 85-105.

1658. Upon his death, his son Richard replaced him, but Richard was no Oliver and in months factions in Parliament resolved that England would be better off if Charles I's son, Charles II, be brought to the throne, under conditions dictated by Parliament. His return as King in 1660 is known to historians as the Restoration. This conditional return of Charles II was a big step in the process of Parliament limiting royal power.

Charles II ruled until 1685 and was embroiled in religious intrigue with Catholic overtones. He was then replaced by his son James II, who had secretly become a Catholic. Simply stated, this was too much for Parliament and they decided to invite Protestant King William and his Queen Mary of the Netherlands to come and rule England, on Parliament's terms, of course. This exercise marks the achievement of full political control of England by Parliament. The English call it The Glorious Revolution. The year was 1689.

The arrival of the Dutch monarchs assured that England would forever be Protestant, and thus, rooted substantially in the Reformed tradition. The question of political power was resolved in the Civil War and this further consolidated Puritan power in Parliament, at least for a decade. It was during this time that Puritans controlled Parliament and ordered an assembling of leading pastors and preachers at Westminster. Their task was to write a summary of Christian doctrine that would be used to guide the lives of English Christians.

2. The Westminster Assembly and Liberty of Conscience.[8] In 1643 Parliament called for the creation of an Assembly of Divines (preachers and theologians) to review the *Thirty Nine Articles*, which had been the backbone of the English church's theology for most of a hundred years. It was not long, however, before Parliament's charge to the Divines called for a re-writing of all the Church's basic doctrines. This move was abetted by the fact that Scotland had joined

[8] Van Til, *Liberty*, 86-94.

forces in the Civil War against the Crown. In so doing it had demanded that the reformation of the English Church conform to the Scottish Church's theology, which was basically Reformed.

The Divines became known to history as the Westminster Assembly of Divines because they met in the Chapel of Westminster Abbey. About 150 delegates—most of them preachers and theologians—were appointed. They met over 1,100 times between 1643 and 1649, drafting what became known as the *Westminster Standards.* From then to now, these documents have been the heart of Presbyterianism in England and Scotland first, and then in America.

The important point for our purposes is the fact that the Assembly's *Confession* took up the question of liberty of conscience in *Article xx.* The heart of this doctrine, quoted epigraphically in the heading of this paper, bears repeating here. Said the *Confession*, "God alone is Lord of the conscience and has set it free from the doctrines and commandments of men."

While Parliament did not retain the Westminster Assembly's doctrinal standards after the Restoration, the standards continued to be embraced by the Scottish church. Significantly, the *Confession* was brought to America soon after its creation, including its provision for liberty of conscience. How the doctrine of liberty of conscience fared in America is the focus of the next section of this paper. To that topic we shall now turn.

III. Conscience and the Builders of the Bay Colony.[9]

A. Background. The settlement of Massachusetts Bay Colony 1628-1630 is not to be confused with the Pilgrim settlement at Plymouth in 1620, though most people assume that they are the same entity. This is an important distinction because the Pilgrims did, indeed, come to America so that they could enjoy religious liberty.

[9] Van Til, *Liberty*, 55-81.

Puritan settlements in Massachusetts Bay began in 1628-1630, but soon thousands of additional people arrived. It was a reform-minded group with the hope that they could show the rest of England how a Christian society ought to be organized. The Puritans did not come to America for religious liberty. The truth is, in fact, nearly the opposite.

This was already evident in Governor Winthrop's "City on a Hill" lay-sermon while on board ship before arriving in the Massachusetts Bay. President Reagan liked to quote a "City on the Hill" line from Winthrop, but there is a more important one than the Reagan one. In speaking of the need for uniformity in purpose and practice, Winthrop said, "In such cases as this, the care of the public must over sway all private aspects." No room here for private, personal liberty of conscience.

That the Winthrop party did not come to America for religious liberty became evident just months after they formed their settlement, evident in the way they dealt with dissenters. Two famous dissenter cases, that of Roger Williams and of Anne Hutchinson and her "antinomian" friends, illustrate the point. Noteworthy too, Bay Colony leaders drove Quakers and Baptists out of their colony as well, they would not even tolerate them.

Looking at the Bay Colony's opposition to liberty of conscience and its assumption that the leaders had a right to decide what religious practices were acceptable in the Colony suggest that the Bay Colony's experience was a microcosmic example of practices in the Christian West for centuries. That is to say, their practices illustrate how a governmental policy of *toleration* operated. It will be useful to keep this point in mind as we proceed.

B. Roger Williams.[10] Leading American historians a generation or two ago characterized Roger Williams as an "irrepressible democrat." This view bears no resemblance to the facts of

[10] Van Til, *Liberty*, 58-70.

Roger Williams' life and thought. Williams was, in fact, a religious man, a deeply religious man with a well-developed theology and world view. His perspective contrasted sharply with that of the Bay Colony Founders, though the colony leaders seemed not to know this before he arrived in their midst.

The Massachusetts Bay Colony was a serious religious experiment, and its early leaders appreciated serious and earnest young preachers like Roger Williams. Soon after his arrival in 1631, Williams was invited by the Boston Church to officiate in the absence of John Wilson, who had returned to England. Williams was invited because his arrival was preceded by reports of his ability as a preacher and Bible scholar, no small honor for one twenty-seven years old. To the surprise of the Boston Church, Williams refused to accept the offer. His reason for declining shows that at an early date Williams was determined to pursue the goal of a pure church as he understood it. He declined the offer because the Boston Church had not renounced its communion with the Church of England, something he had done. Over the next few years Williams preached and taught in Salem, Plymouth, and then in Salem again. Reports began to circulate about Williams and some of his views that a few leaders thought were unorthodox—meaning contrary to the views of the Bay Colony leaders. Governor John Winthrop, for example, circulated a letter on behalf of the General Court [ruling body of the Bay Colony] that said: Williams has "declared his opinion that the magistrate might not punish the breach of the Sabbath, nor any other offense, as it was a breach of the first table [of the Ten Commandments]." This was the beginning of a series of charges against Williams that led eventually to his banishment.

By 1634 thousands of new settlers arrived in the Bay Colony, among them several distinguished preachers. Some of them were enlisted in a movement to evaluate the views of

Williams. Though a few of the new preachers did not think Williams' views were particularly divergent from Bay orthodoxy, charges were brought against Williams in four counts. One count involved the question whether the King had a right to dispense land in the New World. Williams claimed that the king did not have this right because the land belonged to the Indians. A second count disputed Williams' claim that non-Christians should not be required to pray or take an oath. A third raised the issue about the question of separation from the Church of England. The final count, noted above, involved Williams claim that civil magistrates had no power to enforce the first table of the law. The Court allowed Williams a week to prepare his defense of these points, but he demurred and demanded a debate immediately. The newly arrived Rev. Thomas Hooker was appointed to debate Williams on these issues, but no debate occurred at that time.

Several attempts were made to bring Williams before the Court, but he had slipped away and headed south. Though it was winter he moved more than 100 miles when he met local Indians who took him in. It was here that he established his own colony, later known as Rhode Island, a place where inhabitants were to forever enjoy liberty of conscience.

It's important to note the basis of Williams' insistence on the necessity of liberty of conscience in his colony. It was the fourth point of criticism Williams made of Bay Colony practices and the basis of liberty of conscience. To emphasize, Williams claimed that "the magistrate had no power to enforce the First Table of the Law," meaning that it had no authority to force people to obey the first part of the Ten Commandments—which covers man's relationship to God, i.e., religion. Bay leaders had no authority to force any form of worship on anyone, in Williams' view. Men monitored their own religious expression.

While Williams early in his theological studies learned about liberty of conscience from reading William Perkins, he was also encouraged to embrace it by a growing number of

dissenters in England as the Civil War arrived. Most of what we know about Williams' view of liberty of conscience became evident in a series of books and tracts [short essays] he wrote in the 1640s and after. In fact, he had a heated tract war with the Bay Colony's leading theologian John Cotton.

Williams followed the view of Perkins—"Christ has given a liberty to conscience in the New Testament": later codified by the Westminster Assembly—"God alone is lord of the conscience and has set it free from the doctrines and commandments of men." If conscience was free from the doctrines and commandments of men, it was existentially responsible only to God. Most significantly, it was not subject to the commandments of political/governmental leaders. Williams is, of course, arguing here for separation of church and state, too.

A few of Williams' observations makes his view clear. He characterized conscience as "a fixed persuasion in the mind and heart of man, which enforceth him to judge. . .and to do so and so, with respect to God and his worship." Williams also pointed out that Europe's many religious wars were due to attempts by one political entity to force its religious convictions upon other people—the result was always bad! Williams also argued that the state had an affirmative duty when it came to conscience. It should remove all barriers that hindered tender consciences by disestablishing state churches and ending required payment of tithes by citizens to religious entities to which they did not belong.

Roger Williams' disestablishment of churches in his colony was a profoundly significant development in the history of liberty. It not only propounded the doctrine of separation of church and state, it stripped the state of power to limit religious opinion and actions. It is particularly significant because by the time the Founding Fathers began to set up the government of the new nation, Williams' disestablishment principle was considered a basic pillar of American society.

Most of what Williams had to say about liberty of conscience and the nature of church and state relations was written and published during the decades after he left the Bay Colony, and he lived a long time (1603-1683). Yet, a fundamental principle for him always was the simple phrase, "I plead the conscience of all men be at liberty."

A larger challenge to Bay Colony orthodoxy emerged soon after Williams left and proved to be a much more practical threat to the colony's leaders. It became known as the "Antinomian" controversy.

C. Anne Hutchinson and the Antinomian Controversy.[11]

1. The Context. The "most wild and desperate enthusiasm in the world" was Governor Winthrop's way of describing the Antinomian party that threatened his colony in the years 1636-1638. Undoubtedly Winthrop's remarks were intended for consumption in Old England, though they do evidence the degree of concern among Bay Colony leaders. How Antinomianism came to be a threat and what it meant for the problem of toleration and liberty as attitudes toward conscience is the subject of this section.

The threat of Antinomianism was a different and more difficult problem for leaders of the Bay Colony than the radical ideas of Roger Williams. The task of charging Williams with heretical ideas and then sentencing him to banishment had been relatively easy. While Williams' subsequent fulminations about life in the colony and his sharp remarks about the absence of liberty of conscience over the next ten years was undoubtedly a source of embarrassment for the leaders, these denunciations had the virtue of coming from outside the colony itself. The Antinomian problem, on the other hand, was a critique from within, and it embroiled a large number of colonists, dividing them into two main camps. One supported the founding leaders

[11] Van Til, *Liberty*, 70-79. *Antinomian* has a range of meanings, but here it tends to mean people so labeled are said to believe that "there is no moral law in the age of Grace [New Testament Age]."

and their view of the colony's purpose, their Orthodoxy, personified by Governor John Winthrop.

After a few years of heavy migration, dissenters from the rigidity of the Winthrop party's orthodoxy appeared in large numbers. Soon the Orthodoxy party began to refer to these dissenters as "Antinomians," in this, reviving an old, pejorative term in Christian theology. It literally meant "against the law," in this case meaning that the dissenters were against the law laid down by the founding orthodoxy party. Sixteenth-century uses of the term often tied it to another pejorative term, *libertine,* a term associated with mobs, violence, and property destruction. No doubt, the Orthodox Party wanted to include these qualities as it painted a picture of the colony's dissenters, especially as they wrote letters and tracts for consumption back home in a now restless Old England.

By 1636, Bay leaders noticed a rising rumble of criticisms of some leading Bay Colony preachers. Here, as in the case of Roger Williams, Bay Colony leaders assumed that as tolerationists they had the power and authority to eradicate religious ideas they did not like. Thus, they began to question those who were critics of the preachers' sermons. Some older preachers said that the more recently-arrived John Cotton was the source of the problem. Colony leaders asked the Rev. John Cotton to answer questions about some of his sermons. He answered orally and then in great detail in writing. Scholar that he was, Cotton gave extensive abstract replies, ones not easy for non-theologians to grasp.

Gradually, the General Court brought dissenters before it and examined their theological views. It first charged and sentenced several obscure citizens. One was Steven Greensmyth. He was found guilty and fined for having said that "all ministers did teach a covenant of works," preachers Cotton and Wheelwright excepted. This was a serious matter in the 17th century

because it involved that central doctrine of the Protestant Reformation, that bedrock doctrine of Martin Luther, “Justification by Faith.” To say that a Puritan preacher taught a doctrine of works was a supreme heresy. The most prominent dissenter, however, was Anne Hutchinson and it was Hutchinson that the Bay leaders sought to ferret out and suppress.

2. Anne Hutchinson: Background to the Trial. Having convicted Greensmyth and other “small-fish” citizens, the Bay Colony leaders were ready to go after Anne Hutchinson. Who was she, this formidable opponent of their views?

Born in 1591, in Lincolnshire, England, she grew up under the influence of her preacher-father, later moved with her parents to London, residing there until she married William Hutchinson, a Lincolnshire merchant and returned with him to that town. The town hired a newly minted Cambridge preacher, John Cotton, that year, also. Soon Cotton gained a reputation as a preacher, and people came from great distances to hear him preach, including Anne Hutchinson. When Cotton left Lincolnshire in 1633 for the Bay Colony in America, Anne Hutchinson was greatly distressed. The Hutchinsons soon moved to the Bay Colony, mainly to allow Anne to hear the Rev. Cotton’s preaching.

The controversy over Antinomianism was directly related to the reaction of Anne Hutchinson to the preaching of Cotton. Anne invited people to her home to discuss what preacher Cotton had said. Discussions during the week on the previous Sunday’s sermon was not an unusual practice in the seventeenth century, but in the Hutchinson home Anne expounded vigorously what she conceived to be the essence of Cotton’s views. Many people came to these meetings, eventually as many as sixty. Then the inevitable occurred; Cotton’s preaching was compared with that of other preachers in the Bay Colony.

Anne claimed that Cotton preached better doctrine than did the others. Whatever it was that Anne said in her home each week captured the imagination of many people, for her views were spread about town. A series of meetings were held between preachers and the General Court and between preachers and other preachers. These meetings were followed by a fast day and then days of prayer. None of this actually brought the dispute about "works and faith" closer to a resolution.

For our purposes, however, the way Bay Colony leaders handled Anne Hutchinson and those associated with her is the central issue. It was a microcosm of the conflict between the ideas of toleration and liberty of conscience.

Matters came to a head in the meeting of the General Court in May 1637. An early item of business involved the Antinomian issue. Before it was discussed, however, the Court passed a piece of legislation whose purpose was clear on its face. It was designed to place the matter of accepting new members into the community in the hands of the Court. Previously that decision was made by town officials. The new legislation stated:

> It is ordered that no town or person shall receive any stranger, resorting hither with intent to reside in this jurisdiction, nor shall allow any lot or habitation to any, or entertain any such above three weeks, except such person shall have allowance under the hands of some one of the council, or of two other magistrates, upon pain that every town that shall give or sell any lot or habitation to any such, not so allowed, shall forfeit 100 pounds for every offense, and every person receiving any such, for longer than is here expressed . . . shall forfeit for every offense 40 pounds.

The Court's power to banish dissenters was herein clearly strengthened. If there had been an illusion or pretense of freedom and liberty of conscience before in the colony, it vanished with this order of the Court. Step by step the orthodox party was able to dissipate the strength of the Antinomians, and now it was ready to proceed against Anne Hutchinson, the one they saw as the

chief source of the trouble. Her case presented a special problem, since she had not been involved in any of the politics of the controversy. If they were to banish her from the colony, some other means had to be devised.

3. The Trial of Anne Hutchinson. The record of Anne Hutchinson's examination before the Court is pathetic from a legal standpoint. The Court had nothing concrete with which to charge her; thus, the proceeding rambled from one hearsay argument to another. It was only after long hours of charge and countercharge that Anne, in what could only have been an unguarded moment, stated that she had heavenly revelations in the same way that the Old Testament's Daniel did. The Court seized upon this point and made short work of judging her guilty of heresy, sentencing her to banishment.

This record of Anne's examination is valuable, however, as evidence of how the orthodox party viewed liberty of conscience. Winthrop began the examination by noting that Anne had troubled the peace of the commonwealth; then he got to the heart of the matter: "You are known to be a woman that hath had a great share in the promoting and divulging of those opinions that are causes of this trouble." Like the others, she was charged with holding opinions that were not acceptable in the Bay. From another angle, their message was "you are part of the Antinomian Party which we are suppressing." Then Winthrop declared,

> You are . . . nearly joined not only in affinity and affection with some of those the court had taken notice of and passed censure upon, but you have spoken diverse things as we have been informed very prejudicial to the honor of the churches and ministers thereof, and you have maintained a meeting and an assembly in your house that hath been condemned by the general assembly as a thing not tolerable nor comely in the sight of God nor fitting for your sex.

In Winthrop's thinking she was guilty by association. He went on to state that she had been called before the Court so that it could find out whether she held the same opinions as those

that had been “handled” already by the Court. Moderns will note, too, that in their view she as a female did not have a right to her own religious opinion, i.e., liberty of conscience.

Following Winthrop’s rambling statement as to why she had been brought before the Court, Anne said, “I am called here to answer before you but I hear no things laid to my charge.” Winthrop insisted that he had stated charges, and she replied, “Name one, Sir.” Winthrop asked whether he had not named one already, and she asked again what she had done. “You did harbour and countenance those that are parties in this faction that you have heard of,” said Winthrop. “That’s a matter of conscience, Sir,” Anne replied. Then Winthrop’s telling reply: “**Your conscience you must keep or it must be kept for you**.” “Must I not then entertain the saints because I must keep my conscience?” Anne retorted. When asked what law had been broken in her having saints into her house, Winthrop cited the command to honor father and mother, and by father he meant fathers of the commonwealth.

The brief dispute about the role of conscience is most revealing. Anne assumed that what went on in her house, and how she related to those charged with heresy was a question of conscience. In her mind it was a matter of personal judgment whether she held the same view they did. It was also a personal matter, a right of conscience, to agree or disagree with them. She echoed the view of William Perkins that God hath in the New Testament given a liberty to conscience. She could agree, too, with Roger Williams when he said, “I plead the conscience of all men to be at liberty.”

Winthrop’s terse reply to her claim of liberty of conscience is but a paraphrase of the standard view of Bay Colony leaders. To emphasize, Winthrop’s “Your conscience you must keep or it must be kept for you,” was another way of saying that her conscience had to be consistent with orthodoxy or the keepers of orthodoxy would judge to what degree her

conscience strayed from truth. From another angle, they insisted that she think and act within the bounds of their policy of *toleration.*

Late in the trial Anne again spoke of conscience. As she defended her view of Scripture and how the Holy Spirit worked, she said, "Now if you condemn me for speaking what in my conscience I know to be true, I must commit myself unto the Lord." Here, as in the early part of the trial, she claimed as authority her conscience over against the views of the state and church. She assumed here as before that conscience had a liberty that transcends other men and institutions. In the same passage Anne made the important distinction between power over the body and power over the soul. "You have power over my body but the Lord Jesus hath power over my body and soul." The distinction between power over the body as separate from power over the soul was typical of those who stood for liberty of conscience, a distinction absent in Winthrop's view. The difference between the concept of conscience evident in Winthrop and Anne Hutchinson was fundamental.

Anne was banished from the Bay Colony upon the sentencing of the Court. She was pregnant and it was winter. Bay Colony leaders "magnanimously" allowed her to stay until spring and the baby was born. Then she left and went south to a region near Roger Williams and his Indian friends.

D. Concluding Thoughts about the Bay Colony, Williams, and Hutchinson.[12] The manner in which Massachusetts Bay Colony leaders handled the threats posed by Roger Williams and the Antinomians shows clearly that they did not intend their colony as a haven for the persecuted and oppressed, as has sometimes been suggested. On the contrary, Winthrop indicated that the leadership of the colony intended it to be an example of what the godly

[12] Van Til, *Liberty*, 80-81.

community should be—a community that embraced **their orthodoxy**. Remember, Winthrop's "the care of the public must oversway [override] all private" matters.

As the decade of the 1630s came to a close, Winthrop and his friends undoubtedly felt satisfied in the way that they had handled dissenters. Their extrication of dissent provided hope that their experiment might yet succeed. The events of the next decade in Old England—the Civil War—would illustrate, however, that attempts to control their citizens' consciences through a policy of toleration was not the wave of the future, as Winthrop thought. It was, rather, a mere ripple in the fading wave of royal attempts to control religion in the realm. Stated another way, attempts to restrict freedom of conscience in the Bay Colony through a policy of toleration were headed for the dust bin of history, just like the policies of the Tudor/Stuart Kings of England. Liberty of conscience flowered and flourished outside the Bay Colony. We turn to a brief consideration of it.

E. Liberty of Conscience in Other Colonies.[13] Most historical writing about colonial development generally have a standard pattern when it comes to religion. Yes, there were those *odd*—meaning very strict to the modern mind—inhabitants of the Bay Colony. And the others: Roger Williams, Anglican worshipers in the South, those "out-of-place" Catholics of Maryland, and William Penn and his "strange" friends called Quakers. There were also a few stray sects like the Baptists, too.

As for liberty of conscience in standard histories, most give a nod to Roger Williams for his independent spirit. Moderns especially like his statement that "forced worship stinks in the nostrils of God." After admiring Williams, they move on to discuss economic and political matters.

[13] Van Til, *Liberty*, 129-137.

Actually, non-Bay Colony settlements were deeply interested in liberty of conscience. Their motivation came from several sources. One was the teaching of the Puritan-mandated Westminster Assembly's theological documents which, as noted above, said: "God alone is Lord of the conscience and has set it free from the doctrines and commandments of men." Significantly, a dozen years later (1660) Charles II wrote from his exile in Breda, Holland that he wished that "the tender conscience of his subjects" not be molested. In the first months after returning to England as King, Charles II issued, or re-issued, charters for Carolina and Rhode Island that expressly guaranteed liberty of conscience as a fundamental right in these colonies. The Puritan Revolution itself spawned other sources of support for liberty of conscience, including Oliver Cromwell, the Lord Protector himself.

In this context, liberty of conscience as a basic religious principle became part of every colonial government by the end of the 17th century. Even the Bay Colony gave up its totalitarian view of the matter by the time of the Glorious Revolution in 1689.

It would be tedious to recite the provisions of each document. It will be helpful, however, to mention a few to make the point. Parenthetically, it is interesting to note John Winthrop curmudgeonly noted in his 1648 *Journal* that "many books are coming out of England. . . for liberty of conscience." He also mentioned to another pastor that he should not go to the Bahama Islands because "their charter provides of liberty of conscience." Surely Winthrop thought the Devil was at work there just as he was in Williams' Rhode Island.

New York and Maryland provide examples of deep interest in liberty of conscience in other colonies. Quaker historian Rufus Jones reports that in Flushing, New York, townspeople were profoundly disturbed by public acts of persecution. A group of them drew up a complaint which said that the patent and charter "grant liberty of conscience without modification." The

thirty-nine who signed this document said that they intended to defend their rights of conscience. In Maryland a measure was enacted titled *The Act Concerning Religion* (1649). It included language that talked about "free exercise of religion" and not being "molested" for religious views. It did not, however, explicitly mention liberty of conscience. Later, this point was raised by inhabitants to the third Lord Baltimore. He said that his father had authority to take anyone with him to America, but when it came time to go, few would go until the rights of conscience were fully assured. Many had this view, said Baltimore. So many, he thought, that "without complying with this condition, in all probability this province had never been planted. . . ."

William Penn's settlement west of the Jerseys is famous for its foundation being based on liberty of conscience. It was evident in Frame of Government of 1682 and then re-stated in his final form of government called Charter of Privileges of 1701. A few lines from his 1701 Charter show how basic this concept was in his thinking. Said Penn,

> Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship: And Almighty God being the only Lord of Conscience . . . .

Penn goes on to say that inhabitants may not, therefore, be molested in their person or property for their religious views.

To sum up the advancement of liberty of conscience outside the Bay Colony, it is obvious that all provided for liberty of conscience. Actually, the colonies all continued to practice religious liberty throughout the first half of the 18th century as well. Again, it would be tedious to document this pattern here. Moreover, this was a time of "salutary neglect" on the part of England toward the governance of the American colonies. Specifically, by the

1750s England again became actively involved in the governance of the American colonies.

Before we turn to that theme, we note that there was a new source of support for religious liberty based on conscience as the 18th century opened. It emerged from the imaginative mind of John Locke, especially in his numerous writings on religion.

IV. John Locke, Conscience, and Religion.[14]

John Locke (1632-1704) had a substantial influence on American thinkers, even more so as the American Revolution approached. In our time, and for a long time, his popularity among American scholars has rested largely on his writings associated with political thought and government (political science), his "social contract" being an example. Professional philosophers have aided in the growth of Locke's notoriety by their observations on Locke's comment on the problem of knowledge—"How do I know that I know?"

While most contemporary writing about Locke has been in the disciplines just noted, Locke actually wrote more about a subject that philosophers and political scientists have tended to ignore in their ruminations about his thought. That subject is, of course, religion. Locke thought deeply about religion. He was a pious man too. Born to Puritan parents, reared in the theology of that tradition, studied at Oxford while the great Puritan scholar John Owen was its Dean, read Milton, that great advocate of religious liberty, served as an aide to Oliver Cromwell during his military campaigns, and after a medical education at Oxford, served as physician to several leading Puritan political figures.

The significance and scope of Locke on religion was again demonstrated a decade ago with the publication of Victor Nuovo's magnificent *John Locke: Writings on Religion*

[14] Van Til, *Liberty*, 137-146.

(Oxford, 2002). Nuovo wisely observed that Locke's focus on religion was not surprising since "Locke lived and worked during an age, the last in western European history, when religion [Christianity] pervaded every aspect of human life." Thus, "much of what he wrote" was in a religious context. To emphasize, even his famous *An Essay Concerning Human Understanding*, much admired and dissected by secular-minded thinkers, is sprinkled with biblical references—a point demonstrated by Nuovo in an appendix. Surprising to the many readers who have referred to this famous work of Locke without actually reading it themselves, may be the fact that Locke begins this essay on the problem of knowledge with a title page motto taken from Ecclesiastes 11 (Book of Wisdom).

As for Locke's piety, he daily read and studied Scriptures, and prayed while on his knees. A telling fact about his piety may be found as his death neared. As his eyes failed, he had his aide read the Bible to him each day. And, when he was too frail to easily get out of his bed to pray on his knees, he had help with that, too.

It is in this context that we want to look at Locke's view of liberty of conscience. Odd as it may seem to many readers of this essay, Locke's basic view of liberty of conscience is found in his famous essay *A Letter Concerning Toleration*, written while he was in Holland (1683-1688). It was published upon his return to England with members of the new ruling family from the House of Orange in Holland.

The *Letter* was labeled with the word *toleration* for the simple reason that someone had written to him and asked what his views were on the subject. Locke himself made it clear in the opening lines of the document how this occurred. Said Locke: "Honored Sir, Since you are pleased to inquire what are my thoughts about mutual toleration among Christians in their different professions of religion, I must needs answer you freely that I esteem that toleration to

be the chief characteristic mark of the true church." Next, he says that when you look at all the varieties of Christian faith, each has its own purpose and too often it is simply a matter of men seeking to have power over other men. That is not a mark of the Church of Jesus Christ, Locke noted. Importantly, he then defines *toleration*: "In its essence a matter of Christian charity." In his words, "If the Gospel and the apostles be credited, no man can be a Christian without charity, and without faith which works, not by force, but by love."

If we sum up what he is saying here and look for a modern term that has a synonymous meaning, it would be the word *tolerant.* That is to say, his notion is that Christians, if they be true ones, must be charitable toward others; they must be tolerant of the views of other people. He illustrates this at length in the first pages of the *Letter.* But, being tolerant or exercising Christian charity was not an end in itself for Locke. That was one facet of Locke's belief that religion was "the highest obligation that lies on mankind." *Religion* was the word Locke used to describe how man as a creature related to God as Creator:

> Every man has an immortal soul, capable of eternal happiness or misery, whose happiness depends upon his believing and doing those things in this life which are necessary to the obtaining of God's favor, and are prescribed by God to that end.

Locke went on to say in this context that "there is nothing in this world that is of any consideration in comparison with eternity." Then he added, "The care of each man's salvation belongs to himself." Next he observed that no life lived "against the *dictates of his conscience* will ever bring him to the mansions of the blessed." Stated another way, Locke is saying that if a person lives continuously in violation of conscience, he is sure to be damned.

It is worth emphasizing here that Locke's practice of tying conscience, religion, and the Creator together is repeated often by Jefferson, Madison, and the writers of the new state

constitutions in the 1770s and after. These Founders embraced more than some of Locke's political theories, as we shall see.

Locke writes later that religious opinions belong "entirely to the *conscience* of every particular man, for the conduct of which he is accountable to God only." This view surely seems like an echo of the Westminster Assembly's confessional statement that "God alone is Lord of the conscience and has set it free from the doctrines and commands of men."

In talking about the limits of government when it comes to religious matters, Locke is clear that churches are voluntary organizations that exist so that people may worship God in the manner they see fit. It is not the business of government, or a state church, to tell individuals how, where, and why they must worship. Then he again states his view of the role of conscience in this matter. Said Locke: "Everyone should do what he in his conscience is persuaded to be acceptable to the Almighty, on whose good pleasure and acceptance their eternal happiness depends."

As for one's relationship to the laws of the state, he observed; "For observance is due, in the first place to God, and afterward to the laws." This view of Locke also became a staple of American political and cultural thought for two centuries, until the end of WWII.

It should be clear here that John Locke embraced the normative role conscience played in a person's religious life and that it was to be free from the rule of other men. That is to say, Locke defended liberty of conscience. Further, in so far as the word *toleration* in the title of his *Letter* had specific meaning, that meaning was rooted in his phrase "Christian charity." The sense of this phrase was like the modern term *tolerant.* Locke was saying that one ought to love his neighbor enough to practice Christian charity, to love him enough to be tolerant of his views however different they might be from one's own.

As a concluding note here on Locke's view of conscience, it is worth pointing out that he was one of the drafters of the new Carolina charter issued by King Charles II in 1662 (1665). As observed above, it included provision for liberty of conscience, the same provision found in numerous other colonial charters. Certainly Locke's role in this matter may be taken as an endorsement of the charter's provision for liberty of conscience.

V. Liberty and Toleration in the Era of the American Revolution.

Liberty of conscience was universally recognized in the colonies as the era of the American Revolution approached in the 1750s.[15] It's true that the American Revolution is usually identified with the Declaration of Independence in 1776. But, John Adams gives us a better perspective on its beginning. He recognized that ideas have consequences. And so he said that "the Revolution took place in the hearts and minds of the people a generation before the Declaration," meaning it was an intellectual revolution first.

The struggle for political control of North America in the Seven Years War (1756-1763) and its cost brought an immediate English renewed and expanded involvement in governance of the colonies. The era of "salutary neglect" came to an end. At first, England enlisted colonials in its fight with France. Then it began imposing a series of taxes to pay for the cost of the war and the cost of administering the new land taken from France. As is well-known, colonials told the British government that they did not pay taxes unless they were represented in the decision to tax—"No taxation without representation."

A. Liberty and Toleration in the New Sovereign States.[16] To make an involved story brief, colonials resisted British efforts to control them. And then there was the rumor that

[15] Van Til, *Liberty*, 146-154.
[16] Van Til, *Liberty*, 158-164.

the British government was going to impose the Church of England on all the colonies. By the early 1770s each of the colonies was drafting a new constitution, or in several cases, declaring their Charter from the Crown as the basis of their government. In May 1776 the Continental Congress circulated a letter advising all states to create such documents.[17] They did. The result was the emergence of thirteen sovereign states, which in due course were governed by the *Articles of Confederation and Perpetual Union*, drafted in 1777 and ratified by the states in 1781. Being sovereign states, the constitution of each was crucial to outlining a form of government and protecting the rights of the people.

For our purposes, we note that each of these documents had a provision for religious liberty by specifically declaring that each citizen had an unalienable right to liberty of conscience. A few examples will illustrate the point. Virginia's Constitution stated:

> 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; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

Virginia's constitution set a pattern for many other states. And, it has several features that are very significant. First, note that it uses the same three terms found in Locke's writings—religion, Creator, and conscience. Observe in the additional examples below that other states followed this pattern in their constitutions. Observe too, that this document also uses Locke's language: that Christians are to practice forbearance, love, and charity—Christian charity toward their neighbors. Significant also is the injunction that "force or violence" are not to be used in matters of religion and liberty of conscience, that is, the government cannot force a

[17] Van Til, *Liberty*, 164-168. Find here an interesting discussion of liberty of conscience and the Declaration of Independence based on insights by Staughton Lynd, a well-known radical of a generation ago.

religion on citizens, nor say what religious doctrines are required. In short, there will be no doctrine of toleration as defined in this essay.

Pennsylvania's Constitution said:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: and that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent.

Notice here as in Virginia that no man "can be compelled to attend any religious worship. . ." or forced to do any thing against his free will and conscience. This is a rejection of attempts to use state power to dictate religious practices. Is this not a rejection of the doctrine of toleration that had been practiced in Old England?

Delaware made the same provisions in its Constitution:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner control the right of conscience in the free exercise of religious worship.

Again note the provision here that there will be no forced worship or state religion, no policy of toleration.

As for the rest of the new states, they had the same provisions. Equally important is the fact that they all opposed any form of "forced worship," to use the language of Roger Williams. That is, they opposed state requirements for worship. On the other hand, virtually all of the new states *encouraged* religion and worship of the "Supreme Being" or "Creator of the

Universe." Or as Locke and the Virginia Constitution put it, "That religion or the duty which we owe our Creator . . . can be directed only by reason and conviction, not by force or violence. . . . All men are equally entitled to the free exercise of religion . . . ." This call to "duty" is surely an encouragement of religion.

Notice, too, these state provisions reject not only a state requirement for worship—though they encourage it—but also reject a state church. This, of course, set the stage for one part of the Bill of Right's religion clause. To that subject we now turn.

B. Religious Liberty and the Federal Constitution.[18] The emergence of the Federal Constitution in 1787 created a crisis in the minds of many concerning the protection of their rights, including religious liberty. The story is well known how the ratification of the Constitution involved heated debates by its admirers and detractors, and how the question of protection of rights was a central issue. In fact, two states refused to ratify the Constitution at all until some such provision was made. Still others ratified it on the condition that protection of rights would be established immediately.

As the first Congress met in 1789, therefore, one of the first items presented for the agenda was consideration of a way to protect these rights. The great majority of the House agreed that something had to be done about the question of rights, but it was James Madison, who took it upon himself to assemble a list of the items that the state conventions and others deemed essential to "secure the blessings of liberty." His original list included some twenty propositions aimed at a variety of grievances. When the smoke cleared and Congress was ready to propose amendments to the states, twelve remained, ten of which passed into the Constitution.

[18] Van Til, *Liberty*, 168-173.

The fact that the amendments were all abbreviated following debates in the House is an important clue to understanding their meaning; here, however, we consider only the *religion clauses*. What turned out to be the First Amendment's religion clauses were stated first in the following manner by Madison:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

Obviously this clause was shortened to the familiar phrase, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Madison thought the meaning of the words to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor to compel men to worship God in any manner contrary to their conscience." Madison was certain "that they had been required by some of the State Conventions" because they believed that the Constitution gave the government power to make all laws necessary to carry on the government. The conventions saw this as power to "make laws of such a nature as might infringe the rights of conscience, and establish a national religion." To quiet this fear on the part of the conventions and others was the purpose of the amendment, said Madison.

We see, too, in this context that it is important to see how Madison assumed a link between religion and conscience, just as Locke had done. Moreover, this point will help to understand the fallacy of the "wall of separation" doctrine to be discussed with the *Everson* case.

The omission of specific reference to conscience in the final form may be readily understood by reference to typical diction practices of that time. The framers of the state constitutions assumed that religion was inseparable from conscience and its rights. In other

words, “free exercise of religion” and “the rights of conscience” referred to the same thing; nothing was lost through striking out one of these two phrases.

The whole development of the religion clauses may be summed up in the following four House versions of the religion question.[19] Notice the progression of dates.

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.
>
> **June 8, 1789**

> No religion shall be established by law, nor shall the equal rights of conscience be infringed. **August 15, 1789**

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.
>
> **August 20, 1789**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.
>
> **September 25, 1789**

It is obvious that the “establishment clause” of the First Amendment prohibited the formation of a state church in the United States. Indeed, it prohibited the government from requiring any religious practices whatsoever of citizens. In the language of this essay, it foreclosed the possibility of the government having any policies about how, when, or where people would, could, or should worship. In short, the government had no authority in matters of religion and worship: <u>No policy based on the notion of toleration could be advanced.</u>

On the other hand, it is important to understand in this concluding comment that the Founders and the documents of government they created <u>encourage the practice of religion</u>. It was, after all, “the duty we owe the Creator.” So stated the Virginia Constitution, Madison,

[19] Van Til, *Liberty,* 173.

Jefferson,[20] and a host of other men and documents in the era of the American Revolution**—all echoing Locke.**

PART II

The second part of this essay narrates the place of liberty of conscience in the jurisprudence of the American national period, something that has not been done before. It ends as the Supreme Court begins to take up, yet again, the application of the religion clauses of the First Amendment to cases claiming liberty of conscience under the free exercise clause.

VI. Liberty and Toleration: 1791-1940.

What happened to religious liberty following the ratification of the First Amendment with its religion clauses? First, it must be emphasized that each of the sovereign states, and all that subsequently joined the Union, had provisions for religious liberty based on liberty of conscience in their constitutions. Significantly, most followed the language of Locke, Jefferson, and the Virginia constitution and said that religion was "the duty we owe our Creator," and therefore, had to be free of restriction by the state. And one more point here: Religious Liberty was enshrined as a "fundamental right," echoing the notion that it was a right inherent in man's created nature.

The validity and necessity of the two religion clauses of the First Amendment—the establishment clause and the free exercise clause—were unquestioned from 1791 until the WWII era. How they should be applied, however, was problematic from time to time. First, we look at several basic conditions that controlled the Supreme Court's understanding of these clauses from their ratification in 1791 to the adoption of the 14th Amendment (1868) with its liberty and due process clause. Second, the triumph of the Union in the Civil War (1860-1865) precipitated substantial changes in the way the religion clauses were applied. A third stage in

[20] Van Til, *Liberty*, 178-180. These pages discuss the basis of the famous "Wall of Separation" phrase used by Jefferson and skewed later by Justice Black. More on this in the text later.

post-Civil War religion clause jurisprudence began by 1940 when a "new court" appeared as a result of FDR's appointment of six justices in less than a decade. Although these developments encompass a huge portion of American legal history, we can indicate the essence of them succinctly.

A. Religious Liberty from the Bill of Rights to the Fourteenth Amendment. One normative condition that affected the religion clauses was the fact of "dual sovereignty." Each state claimed to be "sovereign" while others thought the Federal Constitution of 1787 was sovereign since it replaced the Articles of Confederation. Standard historical interpretation assumes that the new nation did not face the implications of "dual sovereignty" until the Civil War. It had been avoided, this view stipulates, by compromises that headed off an all-out confrontation between the Union and the states in the South with their "peculiar institution," e.g., the Compromise of 1820 and the Missouri Compromise.

The effect of dual sovereignty on state and federal religion clauses was to create parallel systems of jurisprudence—one for the federal government and another for the states. Few cases arose in the federal system before the Civil War era because the diversity of citizenship doctrine was a requirement for filing a case in a federal court. That is to say, a suit had to involve citizens from at least two different states.

Further, federal actions were few because the First Amendment was viewed as an absolute limit on the Federal government. Jefferson articulated this view several times. He is worth quoting for emphasis. Jefferson spoke for his fellow Founders in an 1808 letter to the Rev. Samuel Miller when he said:

> I consider the government of the U.S. as **interdicted** by the Constitution from intermeddling with religious institutions, their doctrines, discipline, and exercise. Certainly no power to prescribe any religious exercise, or to

> assume authority in religious discipline, has been delegated to the general government . . . . Every religious society has a right to determine for itself the times for [its religious] exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it.[21]

Two more observations should be made before moving on to the question of state interpretations of their religion clauses. Though not often mentioned, the strict constitutional limitations on governmental action assumes that religion is on an equal footing with the government's power under the American system. That is, each is a separate sphere with its own authority. Secondly, the limitations in the religion clauses, and Jefferson's spirited defense of their meaning, is another way to say that the Constitution does not allow the government, or any of its agents—from the highest to the lowest—to create toleration policies like those used by the English kings. From another angle, the religion clauses prohibit the Federal government from defining and regulating religion.[22]

What about religious liberty in the states in this period? As noted, all the states provided for it in their constitutions. Most cases brought to court were, however, about property rights when churches were split apart—a common event. An English law came to be a model for American states. It was known as Lord Eldon's Rule, which he issued as Chancellor of England in the wake of *Craigdale v. Aikman* (1813).[23] For a century the question of how the government should resolve church property disputes had been an unsettled matter in Great Britain [including Scotland which was the source of the Lord Eldon rule]. Lord Eldon's Rule said that whatever group in the present property dispute reflected most closely the doctrine that governed the church at the time it was formed was to be

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[21] Peterson, Merrill D., ed., *Thomas Jefferson: Writings* (New York: Library of America, 1944), 1186-1187.
[22] At the time of the American Revolution, everyone knew that "religion" meant Christianity or as Jefferson said, "The duty we owe our Creator."
[23] See *Watson v. Jones* 80 U.S. 679 (1871) as an example of how the Court used this rule.

awarded the property. Colonial, and newly formed states, were in the same quandary and remained so until Lord Eldon's Rule appeared. Thereafter, American states often followed this rule, too.

On the other hand, since there was no established church in America like there was in Great Britain, the peculiarity of American churches was also a consideration in property disputes. In New England, for example, courts tended to award contested church property to the numerical majority in the church because they were congregational, or independent in structure. The form of settlements in New York state property disputes was different because churches there were chartered as religious corporations; corporation law, therefore, was the basis of settlements. In Pennsylvania most churches were Presbyterian (hierarchical) and courts tended to defer to the internal rules of that structure: Whatever rules this system used to settle disputes were also applied in church property cases. These conditions governed religion clause issues until the onset of the Civil War. To that subject we now turn.

B. The Civil War's Effect on Religious Liberty. One result of the Civil War and Reconstruction was a dramatic change in the legal status of religious liberty in America. The basis of this change was the suppression of state claims to sovereignty in the face of the Union's overwhelming military force. This was done by numerous statutes and three Constitutional Amendments. Many of these measures involved government power and control, the nature of citizenship, and the eradication of slavery, which took a long time.

Embedded in these measures, however, were two items that are especially significant for religious liberty. One was the requirement that for states to be re-admitted to the Union, they had to acknowledge the supremacy of the Federal Constitution. This, of course, included accepting the supremacy of the national court system. A second pertinent requirement

affecting the religion clauses was stated in the second half of Sec. 1 of the 14th Amendment (1868), to wit: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The due process clause here has the same wording as the Constitution's Fifth Amendment due process clause. In the long run the due process clause turned out to have monumental significance in the application of the religion clauses, as we shall see.

C. Post-Civil War Supreme Court Cases on Religious Liberty. Before turning to the ground-breaking application of the 14th Amendment's due process clause in *Cantwell* (1940) and *Everson* (1947), we need to review several other Supreme Court cases in the post-Civil War era that contributed to the definition of the religion clauses. The first of these was *Watson v. Jones* 80 U.S. 679 (1871). This case arose when a Presbyterian Church in Louisville, Kentucky, split over the question of slavery. The issue was which group should be awarded the property. Attempts were made to resolve the issue in a state court, including appeals to higher state courts. Eventually the case reached the Federal court system because some of the members had moved across the river to Indiana, and thus, claimed the case should be heard on the basis of diversity of citizenship. Eventually, it wound up in the Supreme Court of the United States.

The Court resolved the case by rejecting Lord Eldon's Rule, which would have given the property to the faction following the traditional church's doctrine which now opposed slavery. In place of Lord Eldon's Rule, the Court adopted a rule that required civil courts to defer to hierarchical church courts that were part of the published rules of the Presbyterian

Church. Stated another way, the Court stated that the civil courts had no jurisdiction over matters that were covered by a church's own rules. The Presbyterian Church had a well-settled set of rules; therefore, the property went to the faction that rejected slavery and was supported by the church hierarchy.

Watson articulated several far reaching rules and dicta.[24] It affirmed the proposition that when churches and the state are operating within their respective spheres, neither is subject to the other. The Court also recognized a number of areas which are **not** subject to civil governmental intervention; including, 1) church splits which involve property; 2) disputes between pastors and congregations; 3) disputes involving discipline of church members; 4) claims involving church publications; 5) claims against clergy for malpractice; and 6) claims against churches or her officials for negligence in hiring or managing employees, including ministers.

Many subsequent courts have noted that the spirit and flavor of the *Watson* decision radiates a sense of freedom for religious institutions, that it supports a sense of independence from secular control, and that it encourages religious organizations to decide all kinds of issues for themselves. Scholars and courts have noted that the *Watson* case has many progeny—as many as a thousand, some say. [See especially Justice Brandeis' extension of the *Watson* principles in *Gonzales v. Roman Catholic Archbishop of Manila* 280 U.S. 1 (1920)]. We turn now to a few non-church property cases following *Watson* that came before the Supreme Court.

Probably the most famous post-Civil War 19th-century religion case to come before the Supreme Court was *Reynolds v. United States 98 U.S. 145 (1878).* Mormons at that time

[24] *Watson*, 683.

practiced polygamy which a statute of the United States outlawed in territories. The Mormon church decided to bring a test case and arranged for a secretary of Brigham Young, George Reynolds, to be arrested for bigamy. He was convicted and he appealed, the case eventually reaching the Supreme Court. The Mormon defense was that the United States was interfering with their free exercise of religion as provided for in the First Amendment. Specifically, the claim was that multiple marriages were a requirement of the Mormon religion.

The Court affirmed Reynold's conviction unanimously. It considered whether Reynolds could use religious belief or duty as a defense. While the Congress could not pass a law that prohibited the free exercise of religion, the Court said, it argued that a law prohibiting bigamy did not meet that standard. Marriage to only one person at a time had been English law since the days of King James (1603-1625) and American law was based on English law. The Court investigated the history of religious freedom in the United States and quoted from a letter of Thomas Jefferson in which he observed that there is a difference between religious opinion and action. Legislative measures can only reach actions, not opinions, the Court concluded. If the courts could not affirm legislative restrictions of some actions, what, the Court asked, would prevent a claim that human sacrifice was a protected religious freedom.

Over several years a few other Mormon cases, e.g., *Davis v. Beason* 133 U.S. 333 (1890), came to the Court, but the Reynolds case articulated a rule that eventually led to a legal end to Mormon polygamy.

WWI initiated great hostility against German Americans and several states passed legislation seeking to restrict German cultural influence in America—limitations on speaking German in civic associations, prohibition of teaching in the German language, or teaching the German language in schools, prohibition of the use of German music in public concerts, and

more. Robert Meyer taught reading in the German language, using the Bible in a Lutheran school in Hampton, Nebraska. A county attorney entered the school and observed Meyer at work, arrested and charged him under a state statute which prohibited such teaching. He was convicted and eventually his appeal reached the Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923).[25] For our purposes it is important because Justice McReynolds wrote that the "liberty" mentioned in the due process clause included, among other things, the right "to worship God according to the dictates of one's own conscience . . . ." Here, as in many other cases over the decades, Court opinions continued to cite with approval the doctrine of religious liberty based on liberty of conscience. At the same time, Courts continued to reject attempts to implement government policies which sought to control and define religion in America, that is, a tolerationist approach to religion in society.

VII. The Cantwell/Everson Revolution (1940-1947): New Views of the Religion Clauses.[26]

Standard historical interpretation and jurisprudence texts note that the United States Supreme Court continued on a conservative course for decades leading into the era of the New Deal Revolution, even though Progressive-minded Justices Holmes (1841-1935) and Brandeis (1856-1941) were on the court for decades. This conservative court struck down numerous New Deal measures and prompted FDR to attempt to change the Court through adding "progressive" justices—the so-called "court packing" scheme. By the late 1930s numerous justices either died or retired, allowing FDR to appoint as many as six new justices—most

[25] This case is often associated with religious liberty, but it actually was brought on grounds that Meyer was teaching in the German language, therein violating a state statute.

[26] Hitchcock, *Supreme Court*, 156. He states, "The foundation of the modern jurisprudence of the Religion Clauses was laid between 1940 and 1948."

with a strong liberal/progressive bias. This was the foundation **of** a dramatic shift in legal philosophy. While this new view affected vast areas of the law, our interest here is in its effect on the First Amendment's religion clauses.

The heart of the change in the Court's view of these clauses came from a new use of the Fourteenth Amendment's Section 1 phrase, "nor shall any State deprive any person of life, liberty, or property, without due process of the law. . . ." As noted earlier in this essay, this phrase is a verbatim statement of one found in the Fifth Amendment, it applying only to the Federal government. Congress restated this clause in its draft of the 14th Amendment in 1868 to insure that it also specifically applied to the States.

The New Deal Court marked out a new view of the scope of the 14th Amendment in *Cantwell* (1940) and *Everson* (1947). Its application in *Cantwell* is a clear statement that the 14th Amendment's due process clause "incorporates" the free exercise clause of the First Amendment, insuring that it applied to all states. On the other hand, the Court's application of the 14th Amendment to the so-called establishment clause did not result in a clear statement because Justice Black muddied the meaning of religion in his opinion. We examine each separately.

A. *Cantwell v. Connecticut* 310 U.S. 296 (1940). The facts, in brief, are as follows. A Connecticut statute required persons who desired to publically solicit for religious or charitable purposes to obtain a license. A government official would determine whether the group asking for the license was a bona fide religious organization or not. The Cantwell family (Jehovah's Witnesses) went door to door in New Haven and sought to interest people in their books and records. On one occasion the Cantwells stopped two men on the street and asked

whether they could play a recording for them. The men agreed. The message was a sharp attack on the Roman Catholic Church which angered the men. The Cantwells were arrested and charged with failure to have the solicitation permit required by the statute. The Cantwell's defense was that they did not believe that the government had the power to determine whether the Witnesses was a religion. They denied having had due process under the 14th Amendment and also said that they were denied their right to freedom of religious expression under the First Amendment's religion clauses.

The Cantwells were convicted and their conviction was upheld by the Connecticut Supreme Court. The case was appealed to the United States Supreme Court.

The Court struck down the Connecticut statute, saying in effect that a statute that allows the government to decide what is religious and what is not intrudes on a right protected by the First Amendment's religion clauses. And, significantly, the Court said that the rights of the First Amendment were "incorporated" in the 14th Amendment. Specifically, it said:

> We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of the law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof.

Then the Court noted that constitutional limitations on states and Congress, involving religion, have a double aspect. On the one hand, it forestalls compulsion by law that requires any creed or form of worship. Then the Court picked up the theme that has been stressed here: "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the

individual may choose cannot be restricted by law." And, the Amendment "safeguards the free exercise of the chosen form of religion."

The Court went on to say that the amendment has two parts: "Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. . . ." Next the Court discussed how the freedom to act has limitations and how the Cantwell's actions did not fall within natural limitations of action.

The significance of this case from the point of view of this essay is that it cleared up the question whether the free exercise clause of the First Amendment was applicable to the states. To emphasize, the Court said that it does apply because it is incorporated through the Fourteenth Amendment. Moreover, the record shows that the Court in this case was familiar with the significance of liberty of conscience as the foundation of religious liberty.

Seven years later the Supreme Court "incorporated" the establishment clause of the First Amendment in *Everson v. Board of Education.*

B. *Everson v. Board of Education* 330 U.S. 1 (1947). Many lawyers and jurists would agree that *Everson* is one of the most important Supreme Court decisions—important in the sense that its effect on subsequent law has been far reaching. The facts of the case include the following: This is a typical school bussing case, meaning that taxpayer funds were used to reimburse parents of Catholic school students for the cost of using public transportation to and from the school. A New Jersey taxpayer sued claiming that such expenditures amounted to state support of religion in violation of constitutional prohibitions against it. The taxpayer also claimed that this practice violated the due process clause of the Fourteenth Amendment.

As for the Court's opinion, the justices were split on the question whether the reimbursement for bussing aspect was support of religion, as they defined it, or whether it was a health and safety duty of any government, especially when it involved children. The majority of the Court concluded that the reimbursement practice was "separate and so indisputably marked off from religious functions" that the reimbursement practice did not violate the constitution's religion clauses. Thus, the challenge by the taxpayer was denied. The bussing reimbursement practice was constitutional.

The Court reached this conclusion by extending *Cantwell's* incorporation doctrine to the so-called establishment clause. As to the extension of *Cantwell's* incorporation doctrine, the Court said that the Fourteenth Amendment's due process clause includes both First Amendment religion clauses. On its face this means that in addition to Congress being prohibited from creating or supporting "an establishment of religion," that is, Congress was prohibited from creating or supporting a state church, the states are also prohibited from creating or supporting churches. But, this is not the way Justice Black interpreted it.

The most quoted part of Justice Black's opinion says that the question of establishment means at least this:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the

> affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'

There is, of course, a mixing of the use of religion and church in this statement, a cause of confusion as we shall see. Yet, oddly both affirming and dissenting justices were in agreement that there should be a sharp separation between government and religion.

We need to interject an important interpretive point here. Any search on the internet about *Everson* will show that there has been a heated and on-going debate about the Court's opinion in this case, especially about its use of the "wall of separation" metaphor. These debates have been carried on by Justices themselves in dozens of subsequent religion clause cases, by political ideologues, and by serious constitutional scholars. I make this interjection here to warn readers that the argument here is unlike others of which I am aware.

The claim here is that debates about the scope and meaning of *Everson* are rooted in Justice Black's use of the words *church* and *religion* in his opinion.[27] Indeed, Black seemed not to understand these terms well at all. I explored this difficulty at length in an article titled "A Motorcycle Ride Through American Religious Jurisprudence: From the Founders to Everson," published by Grove City College's Center for Vision & Values (April 2008). Especially pertinent for this essay is Section 6, "The Everson Doctrine: A New View of the Establishment Clause," and Section 7, "Justice Black's Selective Use of Jefferson and Madison as Sources."

[27] That *Everson* was muddled by Justice Black's opinion and the cause of controversy over the next two decades may be seen in Justice White's decision in *Board of Education v. Allen* 392 U.S. 236 (1968) and Black's fiery dissent from White's opinion. Black, of course, was defending his *Everson* view.

Turning to Justice Black's view of *religion* and *church*, we can see the source of his trouble in the extended quotation above. We note again his opening thought. In his mind the question of establishment meant at least this, he said. He then lists about a dozen hypothetical situations that he said were, or would be, prohibited in his view of "establishment." If space permitted, a look at each of these hypotheticals would document his confusion about the meaning of religion—which he refers to eight times.

We can capture the essence of Justice Black's view, however, by looking at the first and last sentences of the above quotation. The first sentence says, "Neither a state nor the Federal Government can set up a church." That is exactly what the first clause of the First Amendment means. As noted earlier in this essay, "an establishment of religion" could only refer to one thing—a church. But, that is not what Justice Black limits himself to as he writes. Justice Black thinks that clause means many other things, some of which are included in his subsequent list of hypotheticals.

Black's last sentence states, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" Compare this with Jefferson's full statement to the Danbury Baptists, which uses the wall of separation phrase. Then ask whether Justice Black has fairly represented Jefferson's view. Said Jefferson:

> Believing with you that **religion** is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach *actions only,* and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting **an** establishment of religion, or prohibiting the free exercise thereof,' thus building

a wall of separation between *church* and state.

The first thing immediately obvious is that Black's use of the phrase "the clause against establishment of religion by law" differs from Jefferson's precise quotation of the First Amendment's phrase "an establishment of religion." As noted many times in this essay, "**an** establishment of religion" clearly refers to creating a state church. This understanding gives full meaning to Jefferson's concluding statement, "thus building a wall of separation between *church* and state." Paraphrased, Jefferson is saying that Congress shall make no law creating a state church.

In this he reflects the desire of the American people and their leaders in not wanting state churches. They were afraid before the Declaration that the British would extend the Anglican Church to all colonies. After Independence support for disestablishment of churches, following Roger Williams' arguments, was widespread and debated fully in Virginia. It was in this context that Jefferson spoke about the First Amendment's prohibition of state churches, creating a wall, as it were, between the state and churches. Notice that it was not a wall between religion and the state, nor a wall between religion and society.

Justice Black seemed not to understand this. Nor did he understand the use of the word *religion* by Jefferson and the other Founders. A look at the use of this word by Jefferson will make Black's position more clear.

Notice what Jefferson says about *religion*. Remember that he was quoted earlier as saying that religion is "the duty we owe our Creator," echoing John Locke. Then in the quotation above, he says, "Believing with you [Baptists] that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith

or worship. . . .” In this Jefferson states the same view of *religion* held by Madison and delegates to the Virginia House that passed *An Act Establishing Religious Freedom* in 1786. That act is sprinkled with phrases that reflect the same view of religion Jefferson held when he wrote his letter to the Baptists. It says, for example, “Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments . . . are a departure from the plan of the Holy author of our religion.” The statute is not talking about Allah or Budda, it is talking about the author of Christianity. We conclude here that these uses of *religion* reflect an observation made earlier in this essay i.e., that man is an image-bearing creature of the Creator.

This sense of *religion* is not to be found in Black’s opinion. He clearly departs from the First Amendment’s meaning of “an establishment of religion.” Moreover, he is not close to adopting the meaning of *religion* used by Jefferson and other Founders, that is, the meaning developed earlier in this essay. Instead, Black adopts a new meaning of the phrase, one that morphs in *Everson* and many subsequent cases.

While Jefferson’s view precludes a state-sponsored church, Black presumes that any and all forms of religious expressions and activities could violate the establishment clause—as he now defined it. And how did he define, or rather re-define, it? What change did he make in the use of the word?

Seldom in the history of the English language, one might speculate, has the replacement of one simple article of speech—“an”—by another—“the”—had such far-reaching effects on the meaning of the language. Many times in his opinion Black simply left

out “an” in favor of “the” when speaking of the First Amendment’s religion clauses. The point, of course, is that this change alters fundamentally the meaning of the word *religion*.

An example or two will make the point clear. At 330 U.S. 7-8, Black wrote, “But if this law is invalid. . . it is because it violates the First Amendment’s prohibition against **the** establishment of religion by law.” Again, at 330 U.S. 14, Black wrote, “In recent years, so far as the provision against **the** establishment of religion is concerned. . . .” Once more, at 330 U.S. 15, “There is every reason to give the same application and broad interpretation to **the** establishment of religion clause.” Obviously, the clause now goes well beyond referring to it being a church.

It’s difficult to avoid the conclusion that Black in *Everson* planted a seed that sprouted and flowered into a new interpretation of the meaning of religion in American law, and therefore, in American society. Indeed, it is the basis of a new jurisprudence on the place of religion in the law. Significantly, the opened-ended nature of Black’s “**the** establishment of religion” phrase required the Supreme Court in its almighty wisdom to decide each religion issue that came its way on a case by case basis. A principle result of this practice has been a succession of inconsistent interpretations of the place and meaning of *religion* in American society. It could be forcefully argued that many Court decisions based on Black’s “the establishment” doctrine should, in fact, have been decided on the free exercise clause alone. That is obviously a large topic for another time.

The fact remains, however, that Black ignored or did not understand the obvious traditional meaning—outlined in this and the other mentioned paper—of the phrase “**an** establishment of religion.” In its place he created his own phrase—“**the** establishment of

religion." This allowed him and subsequent Justices power to define and limit many traditional religious practices—prayer in public places, at some public function, and more.

C. Post-*Everson* Cases and the Religious Freedom Restoration Act of 1993.[28]

Black's new view of "**an** establishment of religion" opened the door to a new time of tension between the Court and Congress, Congress representing popular American attitudes on the question of religion in American life. Such tension had existed before, at the time of the Civil War and in the "court-packing" event of the New Deal.

After *Everson*, dozens of cases came to the court touching the religion clauses including: *Torcaso* (1861), on the question whether a notary had to take an oath required by law to practice his trade; *Abington* (1963), on Bible reading in public schools*; Engle* (1962), on the use of official non-sectarian prayers in public schools; *Lemon* (1971), on paying non-public school teachers to teach secular subjects; and dozens of additional cases—too many to note or catalog here. A number of opinions in these cases were written by Black or his establishment doctrine was assumed by other Justices in their opinions.[29]

In this context it is important to note that Justice Potter Stewart's dissent in *Abington* (1963) took a very different view. He argued that many of the cases brought up under "the establishment" rubric should have been treated as attempts to suppress "the free exercise clause." Significantly, though ridiculed by outside groups hostile to Christianity, Justice Stewart also thought that the Court's use of "the establishment" doctrine actually suppressed Christianity in favor of a religion of secularism.

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[28] Hitchcock, *Supreme Court,* 159-162. See his discussion on this matter.

[29] It is worth noting that there is a whole line of cases diluting the traditional meaning of *religion*. See, for example, *United States v. Seeger* 380 U.S. 163 (1965) and *United States v. Ballard* 322 U.S. 78 (1944).

Many of the Court's decisions in religion cases between 1947 and 1990 created uncertainty and even consternation in Congress and among public interest groups. Their concern was a fear that rights under the religion clauses were being eroded rapidly by the Supreme Court. The Court's decision in *Employment Division. . .Oregon v. Smith 494 U.S. 872 (1990)* brought concerns for religious liberty to new highs. Oregon denied unemployment benefits to two Native Americans who were fired for using an illegal substance—peyote. They argued that it was used as part of their religious life protected by the free exercise and due process clauses. Justice Scalia famously said in his opinion that the Court had never excused criminal action in the name of free exercise of religion. One could wonder whether human sacrifice should be condoned in the name of religion absent Scalia's observation.

Congressional reaction was swift and vociferous, some of it aimed at technical matters in the case while others again raised questions about the security of religious liberty in light of the Smith decision. One result was the passage of Religious Freedom Restoration Act of 1993 [RFRA] (42 USC Chapter 21B). Support for it was overwhelming. The Senate passed it 97-0. The purpose of the act was:

> To restore the compelling interest test as set forth in *Sherbert v. Verner 374U.S. 398* (1963) and *Yoder v. Wisconsin 406 U.S. 205* (1972), and to guarantee its application in all cases <u>where free exercise of religion is substantially burdened</u>; and to provide a claim or defense to persons <u>whose religious exercise is substantially burdened by the government.</u>
>
> (emphasis mine)

Surprising to many, the Supreme Court in *City of Boerne, Texas v. Flores 521 U.S. 507 (1997)* declared most of RFRA unconstitutional. Part of the Court's reasoning here states that Congress exceeded its authority in its application of the Constitution's free exercise and due

process clauses and tended to re-write the 14th Amendment itself. It had no power to do this, the Court said, thus nullifying the Congress' attempt to restrain the Court.

The RFRA episode is, as noted, an example of the struggle between branches of the government based on the separation of powers doctrine. Not surprisingly, therefore, is the fact that differences between Congress and the Court continued after the *Boerne* decision.

In this context, Justice O'Connor's dissenting opinion in *Boerne* is of special interest; writing at page 544 she states forcefully that *Smith* was decided wrongly, that is, more attention ought to be given to the free exercise clause. *Smith's* issues ought to be revisited in the case at hand (*Boerne*), in her view. O'Conner went on to discuss numerous Court opinions on the free exercise clause which are at odds with, if not contradictory to, *Smith*. Petitioners with cases touching the free exercise clause would do well to pay attention to O'Connor's argument.

The unease in Congress and among the public about the Court's uncertain and inconsistent use of the religion clauses, sketched briefly here, continues to the present hour. Indeed, it can be argued that a new chapter in this saga has begun. The focus of it is on the effects of the Affordable Care Act's HHS Mandate. Significant for this essay is the fact that cases arising in this dispute frequently defend themselves by reference to their rights rooted in conscience.

VIII. Challenges to The Affordable Care Act, *Conestoga Wood Specialties, et al, v. Kathleen Sebelius, et al*, and Congressional Reaction to it.

A. The Conestoga Case. At this writing (December, 2013), a simmering legal issue is heating up rapidly in the courts and public press. The issue is whether or not the HHS Mandate

of the Affordable Care Act (ACA) requiring commercial employers to provide employees with insurance that includes contraception-coverage is a violation of the owner's liberty of conscience. The Conestoga case, set for oral arguments in the Supreme Court in March, is a good example of a defense of religious liberty based on liberty of conscience. It also in many ways mirrors legal issues in other cases now in the courts on religious liberty.

We digress here a moment, however, to reiterate what the Court has said recently about liberty of conscience. It has substituted the phrases "free exercise rights" and "free exercise of religion" for liberty of conscience. Why are these changes important? The use of these phrases is evidence of the Court's growing uncertainty as to what *religion* means. Jefferson, and the authors of the Virginia statute on religious liberty knew what it meant. They said, "Religion, or the duty we owe our Creator. . . ." The Court had come a long way from Jefferson's view by 1965 when it said in *Seeger* 380 U.S. 163 that religion was "a sincere belief." This broad, vague, amorphous phrase is part of the Court's current language about religion and certainly is far from what Christians like the Conestoga owners would use.

Returning to the Mandate question, it's true there are a few exceptions to it, but an attempt in the summer of 2013 by the government to reach "accommodations" with objections raised by Catholic Bishops and Southern Baptists failed.

Meanwhile, early in December, 2013, the Supreme Court announced that it would hear oral arguments from two corporations in a consolidated case (Hobby Lobby, Inc. and Conestoga Wood Specialties, Inc.). *Ameci Curiae* briefs promise to expand the number of parties ultimately affected by these cases. There are supporters for each side of the issue. Those favoring the Mandate claim that the real issue involves medical needs of women.

Supporters on the other side insist that the Mandate violates their First Amendment rights of conscience and seeks an exemption from the contraceptive-coverage part of the mandate.

Any survey of the literature (briefs, blogs, articles, broadcasts, etc.) show that the information on challenges to the Mandate is vast. The topic can be limited and focused, however, by applying the argument of this essay to the issue found in *Conestoga.*

The Conestoga case appears before the Court as 13-356, titled *Conestoga Wood Specialties Corp., et al, Petitioners v. Kathleen Sebelius, et al.* Page 1 of *Conestoga* focuses the issue that arises from the Mandate. As to the issue, the Conestoga brief states:

> Question Presented:
>
> Whether the religious owners of a family, or their closely held, for profit corporation, have free exercise rights that are violated by the Application of the Mandate of the Affordable Care Act.

Paraphrasing this statement we can say the following: The owners of this corporation are Christians. The brief uses the word *religious* because for some years the Supreme Court has used this generic term. These Christian owners of the corporation claim that the HHS Mandate requires them to provide contraceptive, and related, devices to their employees through an insurance carrier. Further, the owners argue that this Mandate requirement violates their rights of conscience as Christians in violation of the First Amendment's "free exercise" clause. We have shown in this essay that "free exercise of religion" is synonymous with "freedom of conscience" or "liberty of conscience," the Court itself using these terms interchangeably from time to time.

Conestoga is another in a long line of religion cases since *Everson.* What rules, tests, and doctrines developed since *Everson* will be applied in this case? Though we do not know, we can make some suggestions about how it ought to be argued. Two basic questions at issue could be asked. One, is the substance of the facts about the government's application of HHS Mandate creating and/or supporting a church? Second, is the substance of the facts about a violation of someone's liberty of conscience?

Applying these questions to *Conestoga,* it is easy to see that case does not involve creating a church. Equally clear is an answer to the second question: The HHS Mandate does require the owners of the corporation to violate their consciences and provide a service through insurance for its employees that violates their long-held opposition to the use of any manner of contraceptive and related devices. On this basis the Court should find the HHS Mandate unconstitutional because it infringes on a person's right of conscience found in the free exercise clause of the First Amendment, even as they operate their own corporation. That corporations are persons at law is well established and should not be a barrier to the practice of liberty of conscience by corporate officials.

This is how the case should be resolved. Other institutions and individuals have filed cases also claiming that their free exercise rights have been violated by the HHS Mandate.

B. Other Suits Challenging the HHS Mandate and Congressional Reaction to it. We sample here some of the dozens of other cases now filed in objection to the Affordable Care Act's HHS Mandate. Objections are based on the fact that the Mandate required most employers to provide through insurance carriers contraceptive devices and compounds, including some that destroyed embryos. These suits seemed to catch the government by

surprise. After a national outcry the government said that it would seek to accommodate the interests of the complainants. Months later, on June 26, 2013, the government issued its "accommodation." It did not satisfy most of the original objections to the Mandate's requirements. Lawsuits were continued or re-filed at a rapid rate, seeking relief from Mandate requirements that petitioners said violated their liberty of conscience.

Hundreds of publications appear every day tracking existing suits against the government's Mandate. These developments can be followed by interested parties with the use of an internet browser. Likely, the Supreme Court will take up cases besides the Conestoga case discussed above because the interest of some other institutions is broader than that case. In view of the wide range and large number of cases in the courts that challenge aspects of the Mandate, here we give a few examples of arguments made in them.

Probably the most well-known of these suits is the one filed by the Catholic Bishops. Its principal spokesman is New York's Cardinal Timothy Dolan, President of the U.S. Conference of Catholic Bishops (USCCB). From time to time Cardinal Dolan updates his brother Bishops on developments in their fight against the HHS Mandate, publishing the results in many formats. The official site for publication of these messages seems to be the Secretariat of Pro-Life Activities in Washington, D.C., accessible on line.[30]

What are Cardinal Dolan's concerns? One of his principle concerns is that the Mandate forces many eleemosynary ministries of the Catholic Church to choose between providing contraceptive services through insurance carriers, in violation of their conscience, or face fines which may well ruin the ministeries financially. These institutions, of course, feed the poor,

[30] Quoted in Kathryn Jean Lopez, "The Corner," in *National Review*, September 18, 2012, Online, http://www.nationalreview.com/corner/358832/cardinal-dolan-obamacare-regulation (accessed December 8, 2013).

house the homeless, clothe the needy, heal the sick, and more. As a matter of liberty of conscience, Cardinal Dolan argues, these ministries should be free from providing contraceptive services as the Mandate requires.

Cardinal Dolan, along with Father John Jenkins,[31] President of Notre Dame University, object to government attempts to distinguish between a church and a church's ministries. The government seems willing to accommodate conscience-based objections of a church, but it tries to give *church* a very narrow definition. In effect, the government defines church as a place of worship. In this definition, virtually all other ministries of the church are not exempt from the requirements of the Mandate. There is real irony in this view. It was captured well, perhaps unintentionally, by Ron Paul in an interview reported in the *Albany Tribute* (December 8, 2013). Said Paul, "For what good is a religious liberty that protects your right to attend a worship service, but allows the government to force you to live in opposition to the values preached in those services?"

Cardinal Dolan's argument and defense of his church's rights of conscience are exceedingly important. And, why? First, because he speaks for a very large denomination which also operates the oldest ministering institutions in America. Its scope in terms of lives touched and economic impact is huge. Moreover, its existence is a witness to great moral good in America, and we all know how much this nation needs more examples of moral good.

Southern Baptists—a very large denomination too—has opposed the HHS Mandate as well. Significantly it has done so at times in concert with Cardinal Dolan and the Catholic Bishops. They have even published joint letters to make their concerns known forcefully.

[31] Quoted in Lopez, "The Corner."

Dozens of educational institutions have also filed suit to preserve their rights of conscience against the intrusion of Mandate rules. Notre Dame University is perhaps the most well-known educational institution to so do. Notre Dame filed a suit a year ago but needed to re-file after the Mandate takes effect, that is, after January 1, 2014, Notre Dame's President Jenkins said.[32]

Wheaton College (Illinois) is a well-known Christian evangelical school that has also filed suit against the government over the Mandate. They, like Notre Dame, made it clear that they consider the Mandate's requirement to provide contraceptive services through insurers violates deeply held religious convictions based on liberty of conscience. Failure to be exempt from the contraceptive requirements will cause grievous injury to their consciences in their view. Moreover, failure to comply with the Mandate's requirement will initiate fines by the government that will strain, if not destroy, their economic stability. Exemption from the Mandate's contraceptive requirements based on conscience is a necessity for Wheaton College and dozens of other Christian educational institutions.[33]

Congressional reaction to the government's handling of objections to HHS Mandate has been swift. In 2012 and again in 2013 bills have been introduced to amend the Affordable Care Act to protect the rights of conscience. House Bill 940 was introduced on March 4, 2013, and sponsored by more than 220 Members. The bill is titled "Health Care Conscience Rights Act." Interestingly the bill begins with "findings": The first one cites Jefferson's view of

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[32] Michael Sean Winters, "Notre Dame Refiles Suit Against HHS Mandate," *National Catholic Reporter*, December 2, 2013, Online, http://ncronline.org/print/blogs/distinctly-catholic/notre-dame-refiles-against-hhs-mandate (accessed December 8, 2013).

[33] "Wheaton College Sues Over HHS Mandate," Wheaton College Web site, http://www.edu/Media-Center/News/2012/07/Wheaton-College (accessed January 15, 2014).

conscience that this essay outlined as a basic principle of the Founders. The bill also outlines other legislative measures that were aimed at protecting the rights of conscience.

This bill is, of course, being considered in the midst of strained politics in the Congress. This is, however, a significant measure aimed at preserving the rights of conscience.

A Concluding Note: What Lies Ahead?

In the coming months, after this essay is published, there will be many developments affecting religious liberty in America. There may be additional nuances to the fact date presented, that is, to what each party claims in amendments to lawsuits filed. The basic issue, however, will not change.

In broad terms the issues in the many challenges to the Affordable Care Act [ACA] are the same. It is the same because it involves what the Supreme Court calls "a fundamental right." And, it can be argued that of all fundamental rights, this one is the most important. To emphasize, religious liberty is first because it is based on the God-given rights of conscience, not to mention that it was presented first in the First Amendment.

This view of religious liberty and liberty of conscience has been practiced and embraced from colonial times until recent times. Limits on this view began when the Supreme Court in Everson began to muddle the meaning of the First Amendment's religion clauses, muddling it further in dozens of cases since.

The present suits—dozens of them—against the government based on the ACA's HHS Mandate are very important because they make a direct appeal to rights of conscience. It will be interesting to see how the Supreme Court faces these direct claims of conscience in light of the fact that liberty of conscience was the basis of the First Amendment's religion clauses.

The most important of America's liberties is at stake here. Is it too much to say that this issue, at this time, with this administration in power, is the most important political/social issue in a generation?