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# Christianity in Nineteenth Century American Law

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# ANTITHESIS

A Review of Contemporary Christian Thought and Culture

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"The immortals know no care, yet the lot they spin for man is full of sorrow; on the floor of Jove's palace there stand two urns, the one filled with evil gifts, and the other with good ones....He for whom Jove, the Lord of thunder, mixes the gifts he sends, will meet now with good and now with evil fortune."

***Homer,* Iliad**

"Yet doubt not but in Valley and Plain
God is as here, and will be found alike
Present, and of His presence many a sign still following thee,
Still compassing thee round with goodness and paternal Love"

***John Milton,* Paradise Lost**



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ANTITHESIS

# Christianity in Nineteenth Century American Law

**While strenuously asserting the value of religious liberty, early American courts unhesitatingly appealed to religious considerations.**

**Steven Samson**

The religious underpinnings of American political and legal institutions have been duly noted by legal scholars, historians, judges, politicians, and clergymen alike. Church polities provided models not only for colonial civil governments but also for the present constitutional system. R. Kemp Morton summarized some of these influences from a Presbyterian standpoint:

> Presbyterians had a more republican system; each congregation was independent of every other congregation in its purely local affairs, but the presbyteries and synods of pre-Revolutionary times exhibited a pattern for a union in a central organization without any loss of fundamental rights. It was from this church structure that the formula coordinating the large and the small states into one union came. The College of Cardinals of the Catholic Church formed the pattern for the Electoral College for electing the President and the Vice-President. The persistent pursuit of religious freedom by these and other dissenting sects had taught their votaries the philosophy of both religious and civil liberty.[1]

Other writers have detected Congregationalist, Baptist, Episcopalian, and Jewish contributions to the constitutional framework.[2]

## Christianity as Common Law

Justice Joseph Story and Chancellor James Kent were among many sitting judges during the nineteenth century who cited the maxim that "Christianity is part of the common law." As early as 1764, Thomas Jefferson attributed the phrase to a misinterpretation made by Sir Henry Finch in 1613 that had subsequently been perpetuated by Matthew Hale and William Blackstone. But Justice Story disputed Jefferson's contention that it was a "judicial forgery" and quoted the opinion of Chief Justice Prisot of the Court of Common Pleas, which established the precedent in 1458:

> As to those laws, which those of holy church have in ancient scripture, it behooves us to give them credence, for this is common law, upon which all manner of laws are founded; and thus, sir, we are obliged to take notice of their law of holy church; and it seems they are obliged to take notice of our law.[3]

James McClellan has noted, moreover, that Justice Story was not satisfied simply to base his contention on a single precedent but attempted to prove that the maxim was a general principle of common law. The Presbyterian theologian, Charles Hodge, argued that the moral law of the Bible represents a higher law: "Whatever Protestant Christianity forbids, the law of the land (within its sphere, i.e., within the sphere in which civil authority may appropriately act) forbids."[4] By implication, then, anything contrary to the principles of "ancient scripture" would violate the common law and the Constitution.[5]

Mark DeWolfe Howe suggests that Thomas Jefferson "had always been uncomfortably aware of the

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[1] Morton, R. Kemp, *God in the Constitution* (Nashville: Cokesbury Press, 1933), pp. 82-83.

[2] See Sweet, William W., *The Story of Religion in America* (New York: Harper & Brothers, 1939), pp. 250-73. A thoughtful statement of the nature of the Christian influence on the American constitutional system may be found in the introduction to Verna M. Hall, comp., *The Christian History of the American Revolution: Consider and Ponder* (San Francisco: Foundation for American Christian Education, 1976), p. xxiv.

[3] McClellan, James , *Joseph Story and the American Constitution: A Study in Political and Legal Thought*, (Norman: University of Oklahoma Press, 1973), p. 122. Thomas Jefferson developed his views at some length in a letter to Dr. Thomas Cooper dated 10 February 1814.; Jefferson, Thomas, *The Writings of Thomas Jefferson*, vol. 14 (Washington: The Thomas Jefferson Memorial Association, 1904), pp. 85-97. For a detailed critique of Jefferson's complaint, see the opinion of Chief Justice J. M. Clayton of the Delaware Supreme Court in *The State v. Chandler*, 2 Harrington 553 (1837), which includes the following passages at 561-62: "We know, not withstanding Mr. Jefferson's defiance, that even Finch himself had quoted *8 H.8*, "Ley de Dieu est ley de terre," the law of God is the law of the land, *Doc.& Stud. lib. 1, c. 6, Plowed. 265*, to sustain his position that the holy scripture is of sovereign authority, and to show the extent and meaning of the maxim." Perry Miller discovered many complexions to the controversy over whether Christianity was part of the common law. In fact, it might be best characterized as a falling out among Christians over the implications of the statement: that is, what it meant in regard to the establishment or free exercise of religion. See Miller, Perry, *The Life of the Mind in America: From the Revolution to the Civil War* (New York: Harcourt, Brace & World, 1965), pp. 186-206.

[4] Hall, *American Revolution*, p. 156.

[5] See Corwin, Edward S., *The "Higher Law" Background of American Constitutional Law* (Ithaca, N.Y.: Cornell University Press, 1955), pp. 88-89 and note.

closeness of the affiliation between Christianity and the common law" and "saw the transmitting of the maxim from English to American shores as the transplanting of the seeds of establishment."[6] The idea that the common law established Christianity remained an important political issue because of the persistence of church establishments in several states. In fact, at the time the Constitution was adopted, five states still maintained formal denominational establishments while others like Massachusetts adopted Protestantism or showed preference to Christianity. Only Virginia and Rhode Island guaranteed full religious liberty.[7] In all, nine of the thirteen colonies effectively established Protestantism; all favored Christianity in some manner.[8] Justice Story, a Unitarian, abhorred ecclesiastical establishments but believed Christianity to be the foundation of social order in America. Concerning the First Amendment, he wrote:

> Probably at the time of the adoption of the constitution, and of the amendment to it..., the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. It yet remains a problem to be solved in human affairs, whether any free government can be permanent where the public worship of God, and the support of religion, constitute no part of the policy or duty of the state in any assignable shape.[9]

He agreed with the sentiment that religion should be encouraged by the state but not through compulsion and not by showing sectarian preferences:

> The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.[10]

Story concluded that, because liberty of conscience is protected and power over religion is left to the state governments, "the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship."[11]

Justice Story did not try to make a distinction between the establishment and free exercise clauses. His interpretation, moreover, was echoed by other commentators, such as James Bayard and William Rawle, both of whom noted the evils growing out of the union of church and state. Both also believed religious liberty enabled religion to flourish in greater purity and vigor.[12] Chancellor James Kent of New York indicated that he found no real difference between the federal and state constitutions with regard to religious liberty, except in seven states that still retained religious tests at the time he wrote. He regarded religious liberty as an absolute right and believed it went hand in hand with civil liberty.[13] Nevertheless, during the 1821 convention to revise the state constitution, he joined with Vice President Daniel Tompkins, Chief Justice Spencer of the New York Supreme Court, and Rufus King in defending the recognition of Christianity as part of the common law and helped turn aside a proposed amendment that "no particular religion shall ever be declared or adjudged to be the law of the land."[14]

Near the end of the nineteenth century, Thomas M. Cooley, who publicly opposed Sunday closing laws, strongly reaffirmed the same judicial precepts held by Justice Story and Chancellor Kent:

> By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the Constitution that the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without

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6 Howe, Mark DeWolfe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: The University of Chicago Press, 1965), pp. 27, 28.

7 Pfeffer, Leo, *Church, State, and Freedom*, revised ed. (Boston: Beacon Press, 1967) p. 118-19; Cobb, Sanford H., *The Rise of Religious Liberty in America: A History* (New York: The Macmillan Company, 1902; Burt Franklin, 1970), p. 507.

8 McClellan, James, "The Making of the Establishment Clause," in *A Blueprint for Judicial Reform*, ed. Patrick B. McGuigan and Randall R. Rader (Washington, D.C.: Free Congress Research and Education Foundation, 1981), p. 307.

9 Story, Joseph, *Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*, vol. 3 (Boston: Hilliard, Gray, and Company, 1833; reprint ed., New York: Da Capo Press, 1970), pp.726-27. Evidence to support Story's thesis may be gleaned, for example, from Hatch, Nathan O., *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England* (New Haven: Yale University Press, 1977), p. 168: "As intellectual heirs of a tradition which had entwined republicanism and Christian theism, New Englanders in the last two decades of the century were unable to perceive religion as free from matters of civil government. From ancient history they were convinced that 'the state cannot stand without religion' and from their own experience that 'Rational Freedom cannot be preserved without the aid of Christianity.'"

10 Story, *Commentaries*, p. 728.

11 *Ibid.*, p. 731.

12 Morris, B. F. *Christian Life and Character of the Civil Institutions of the United States, Developed in the Official and Historical Annals of the Republic* (Philadelphia: George W. Childs, 1864), pp. 259-62.

13 Kent, James, *Commentaries on American Law*, ed. O.W. Holmes, Jr., 12th ed., vol. 2 (Boston: Little Brown, and Company, 1873), pp. 34-35 (45). Lieber, Francis, *Miscellaneous Writings*, vol. 2: *Contributions to Political Science* (Philadelphia: J. B. Lippincott and Company, 1880), pp. 74-80.

14 Morris, *Christian Life*, pp. 656-59.

drawing any invidious distinctions between different religious beliefs, organizations, or sects. The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that must continue to be recognized in the same cases and to the same extent as formerly.[15]

In a letter to Robert Baird, Henry Wheaton, who then served as an ambassador to the court of Berlin, described a few of the ways Christianity continued to be recognized, encouraged, and protected back home. His examples included laws governing sabbaths, church property, blasphemy, oath taking, and marriage, all of which helped illustrate his point that the church was not viewed as a rival or enemy of the state but as a "co-worker in the religious and moral instruction of the people."[16]

## State Courts

The extent to which early American law actually incorporated the common law of England is disputed. But Blackstone's commentaries on the common law, which asserted that Christianity is part of the law of the land, exercised a profound influence on the generation that fought the War for Independence. Edmund Burke testified to their acceptance as the popular standard when he remarked: "I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England."[17] Although Blackstone's analysis of offenses against God and religion assumed the existence of an Anglican establishment, he emphasized that revelation is the source of all valid laws and obligations:

> This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligations to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[18]

This belief that American common law incorporated higher law generally and Christianity specifically persisted well into the present century. For example, the first volume of *American Ruling Cases* (1912) cited a New York decision upholding a Sunday closing law as a governing precedent. In *Lindenmuller v. People*, 33 Barb. (N.Y.) 548 (1861), the New York Supreme Court based its decision, in part, on the incorporation of English common law:

> The common law, as it was in force on the 20th day of April, 1777, subject to such alterations as have been made, from time to time, by the legislature, and except such parts of it as are repugnant to the constitution, is, and ever has been, a part of the law of the state (33 Barb. 548,561; 1 A.R.C. 457).

As in similar cases elsewhere, the Court took care to qualify its acknowledgement of Christianity as part of the common law so as not to imply any ecclesiastical establishment, which would make Christianity a civil or political institution. It declared that even though Christianity is not the legal religion of the state, "this is not inconsistent with the idea that it is, and ever has been, the religion of the people."

As in England, the maxim was most frequently cited in blasphemy cases. In *Updegraph v. The Commonwealth*, 11, S.&R. 384, 401 (1824), the Pennsylvania Supreme Court quoted Lord Mansfield:

> There never was a single instance, from the *Saxon* times down to our own, in which a man was punished for erroneous opinions. For atheism, blasphemy, and reviling the Christian religion, there have been instances of prosecution at the common law; but bare nonconformity is no sin by the common law, and all pains and penalties for nonconformity to the established rites and modes are repealed by the acts of toleration, and dissenters exempted from ecclesiastical censures. What bloodshed and confusion have been occasioned, from the reign of *Henry IV*, when the first penal statutes were enacted, down to the revolution, by laws made to force conscience. There is certainly nothing more unreasonable, nor inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution against natural religion, revealed religion and sound policy.[19]

The court indicated that the only interest of temporal courts is to prevent disturbances of the public peace "likely to proceed from the removal of religious and moral restraints; this is the ground of punishment for blasphemous and criminal publications; and without any view to

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[15] Cooley, Thomas M., *The General Principles of Constitutional Law in the United States of America*, ed. Andrew C. McLaughlin, 3rd ed. (Boston: Little, Brown, and Company, 1898), pp.224-25.

[16] Baird, Robert, *Religion in the United States of America* (Glasgow: Blackie and Son, 1844; reprint ed., New York: Arno Press, 1969) p. 282.

[17] Thornton, John Wingate, *The Pulpit of the American Revolution: or, The Political Sermons of the Period of 1776.* (Boston: Gould and Lincoln, 1860), xxvii.

[18] Blackstone, William, *Commentary on the Laws of England*, vol. 1 (Philadelphia: Robert Bell, 1771), p. 41. See Boorstin, Daniel J., *The Mysterious Science of the Law* (Gloucester, Mass.: Peter Smith, 1973), p. 3.

[19] The text of Lord Mansfield's speech in *Chamberlain of London v. Evans*, 2 Burn's Eccles. Law, 218, which was delivered in the House of Lords in 1767, was published in *The Palladium of Conscience; or, the Foundation of Religious Liberty, Displayed, Asserted, and Established, Agreeable to its True and Genuine Principles, Above the Reach of All Petty Tyrants, Who Attempt to Lord it Over the Human Mind.* (Philadelphia: Robert Bell, 1773; New York: Da Capo Press, 1974), pp. 139-55. Lord Mansfield's speech was also cited on the opposite side of the issue in a *Commonwealth v. Kneeland*, 20 pick. 206. 235-36 (1838), a Massachusetts blasphemy case. Another important blasphemy case of the period was *State v. Chandler*, 2 Harrington 553 (1837), cited in the text below.

spiritual correction of the offender" (11S. & R. 394, 404). At 405, it added:

> Chief Justice *Swift*, in his System of Laws, 2 Vol. 825, has some very just reasoning on the subject. He observes, "To prohibit the open, public, and explicit denial of the popular religion of a country, is a necessary measure to preserve the tranquility of a government. Of this, no person in a Christian country can complain; for, admitting him to be an infidel, he must acknowledge that no benefit can be derived from the subversion of a religion which enforces the purest morality." In the Supreme Court of *New York* it was solemnly determined, that Christianity was part of the law of the land, and that to revile the Holy Scriptures was an indictable offence. The case assumes, says Chief Justice *Kent*, that we are a Christian people, and the morality of the country is deeply engrafted on Christianity. Nor are we bound by any expression in the constitution, as some have strangely supposed, not to punish at all, or to punish indiscriminately the like attack upon *Mahomet* or the *Grand Lama*. (*The People v. Ruggles*, 8 Johnston, 290).

Although the Supreme Court of Delaware also upheld a blasphemy conviction in *States v. Chandler*, 2 Harrington 553 (1837), Chief Justice J.M. Clayton similarly made it clear that it was due to a lack of jurisdiction over spiritual offenses, not to a minimizing of their seriousness, that the common law did not punish the violation of every precept of Christianity:

> When human justice is rightly administered according to our common law and our constitution, it refuses all jurisdiction over crimes against God, unless they are by necessary consequence crimes against civil society, and known and defined as such by the law of man. It assumes that for sin against our Creator, vengeance is his and he will repay (2 Harrington 553, 571).

The identification of Christianity with the common law was rejected by the Ohio Supreme Court but the reasons it gives are instructive. The three cases that follow suggest it was influenced, at least in part, by a solicitude for religion. In *Bloom v. Richards*, 2 Ohio St. 387, 390 (1853), Chief Justice Allen Thurman affirmed the validity of a Sunday contract despite a statute prohibiting Sunday labor and remarked that "neither Christianity, nor any other system of religion, is a part of the law of this State." Even so, his reasoning was not inconsistent with that of the Pennsylvania and New York opinions:

> We have no union of church and State, nor has our government ever been vested with authority to enforce any religious observance, simply because it is religious. Of course, it is no objection, but, on the contrary, is a high recommendation, to a legislative enactment, based upon justice or public policy, that it is found to coincide with the precepts of a true religion; but the fact is nevertheless true, that the power to make the law rests in the legislative control over things temporal and not over things spiritual. Thus the statute upon which the defendant relies, prohibiting common labor on the Sabbath, could not stand for a moment as a law of this State, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty. For no power over things merely spiritual, has ever been delegated to the government....(2 Ohio St. 387, 391).[20]

**The Court took care to qualify its acknowledgement of Christianity as part of the common law so as not to imply any ecclesiastical establishment, which would make Christianity a civil or political institution.**

The Court cited *Specht v. Commonwealth*, 8 Barr 312 (1848), in which the Pennsylvania Supreme Court states at 323 that, despite the fixing of Sunday as the day of rest, the statute in question "is still, essentially, but a civil regulation made for the government of man as a member of civil society...." It also determined that those states which forbade secular business on Sunday did so through additional statutory provisions. Later, In *McGatrick v. Wason*, 4 Ohio St. 566 (1855), a case involving a freight loading accident on a Sunday, the Court held that the shipping of freight fit into the exempt category of "works of necessity or charity" and sustained a judgment for the injured dockworker against his employer.

In *Board of Education of Cincinnati v. Minor*, 23 Ohio St. 211 (1872), the Ohio Supreme Court upheld — although it did not require — a prohibition on religious instruction by the Cincinnati Board of Education. In a lengthy opinion, Judge John Welch commented that "*Legal* Christianity is a solecism, a contradiction of terms" (23 Ohio St. 211, 248). He continued:

> If Christianity is a *law* of the state, like every other law, it must have a *sanction*. Adequate penalties must be provided to enforce obedience to all its require-

[20] Similarly, the Supreme Court of California struck down a Sunday law in *Ex parte Newman*, 9 Cal. 502 (1858), because it was clearly designed as a benefit to religion and not as a civil rule. But Judge Stephen Field's dissent in this case eventually prevailed in *Ex parte Andrews*, 18 Cal. 679 (1861), when the Court upheld a similar law on the grounds that it protected "the moral as well as the physical welfare of the State."

ments and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation — rather, the only excuse — for the proposition, that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people. And is not the very fact that those laws do not attempt to enforce Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they are the laws of a Christian people, and that their religion is the best and purest of religions? It is strong evidence that their religion is indeed a religion "without partiality," and *therefore* a religion without "hypocrisy" (23 Ohio St. 211, 249).[21]

Such cases as these, which involved blasphemy, Sunday laws, Bible reading in schools, and other clearly religious issues, are illustrative of the depth and detail of the judicial acquaintance with Christian precepts. At the same time, however, each of these cases raised difficult constitutional issues that challenged the ingenuity and logic of the judges. Many of these and later cases mark the trail by which constitutional innovations were introduced. Sunday laws, for example, were usually defended as public health measures and upheld by the courts as a legitimate exercise of the police power. Similarly, in *Donahoe v. Richards*, 38 Me. 376 (1854), the Supreme Court of Maine cited the maxim "salus populi suprema lex" — the health of the people is the supreme law — in defense of a compulsory Bible reading law that allowed the exclusion of the Douay version from the classroom.

There is considerable reason to believe such legislation was tendered in good faith. But in many of these and similar cases, the opposite side of the issue was also argued from a clearly Christian commitment. Theological differences were often reflected by differences of constitutional interpretation. Indeed, the designation "constitutional hermeneutics" was used at the time by Francis Lieber and other commentators, giving the debate a theological cast. Theology was still regarded as first among the sciences. Moreover, judicial articulations of an explicitly Christian perspective on constitutional law transcended narrowly religious issues, challenging the current view that equates secular issues with religious neutrality or irreligion. A case in point is the imaginative blending of legal scholarship and Biblical illustration in several opinions by Samuel E. Perkins, who sat on the bench of the Supreme Court of Indiana from 1846 until 1865, when a Republican slate of judges swept out all the incumbents, then returned in 1877 and served until his death in 1879.

One of the finest examples of Judge Perkins' judicial writing is his opinion in *Herman v. The State*, 8 Ind. 490 (1855), a case involving a state law prohibiting the manufacture and sale of liquor except by the state for use as a medicine or for sacramental purposes. The case was brought before the Court on a *habeas corpus* obtained by a prisoner who had been arrested and detained for selling liquor. In ruling the law unconstitutional, Judge Perkins noted that "it is not competent for the government to take the business from the people and monopolize it." Quoting J.B. Say, the political economist, he attacked the law as "an invasion upon the faculties of industry possessed by individuals...." He then traced the history of prohibition and its association with governments that were paternal and absolute in character: "which had no written constitutions limiting their powers...."[22]

Such governments as those described, could adopt the maxim quoted by counsel, that the safety of the people is the supreme law, and act upon it; and being severally the sole judges of what their safety, in the countries governed, respectively required, could prescribe what the people should eat and drink, what political, moral and religious creeds they should believe in, and punish heresy by burning at the stake, all for the public good. Even in Great Britain,

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[21] A few of the presuppositions of what the Court called "Christian republicanism" are clearly expressed in this opinion. Referring to article 8, section 3 of the Ohio Constitution of 1802, which was drawn directly from the Northwest Ordinance of 1787, the Court stated at 248-49: "The declaration is, not that government is essential to good religion, but that religion is essential to good government. Both propositions are true, but they are true in quite different senses. Good government is essential to religion for the purpose declared elsewhere in the same section of the constitution, for the protection of mere *protection*. But religion, morality, and knowledge are essential to government, in the sense that they have the instrumentalities for *producing and perfecting* a good form of government. On the other hand, no government is all-adapted for producing, perfecting, or propagating a good religion. Religion, in its widest and best sense, has most if not all, the instrumentalities for producing the best form of government. Religion is the parent, and not the offspring, of good government. Its kingdom is to be *first* sought, and good government is one of those things which will be added thereto. True religion is the sun which gives to government all its true lights, while the latter merely acts upon religion by reflection." The Court reiterated this principle at 253: "Government is an organization for particular purposes. It is not almighty, and we are not to look to it for everything. The great bulk of human affairs and human interests is left free by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government."

[22] By 1855, the issue of liquor had become hopelessly tangled in the status politics of which Ann Douglas wrote. Indeed, American religious politics has long shown a penchant for symbolic crusades and quick fixes. Substantive programs of social reconstruction so often either fail to materialize or become dispirited for want of Biblical charity. The good intentions of those whose faith would move mountains need not be doubted to recognize that the wellsprings of human kindness often run dry when the weightier matters of the law are lost in a frenzy of minor doctrinal differences. As Edward Gaffney has remarked: "And who cannot recall the religious enthusiasm of the Womens' Christian Temperance Union, who gave that cardinal virtue such a bad name, or their spiritual ancestors, the members of the National Temperance Union, who blessed this nation with the 'Noble Experiment' of Prohibition, without perhaps intending its regrettable concomitants, organized crime and unlawful governmental electronic surveillance." Edward McGlynn Gaffney, Jr. "Biblical Religion and American Politics: Some Historical and Theological Reflections," *The Journal of Law and Religion*, 1 (Summer 1983); pp. 177-78.

esteemed to have the most liberal constitution in the Eastern continent, *Magna Charta* is not of sufficient potency to restrain the action of Parliament, as the judiciary do not, as a settled rule, bring laws to the test of its provisions. Laws are there overthrown only occasionally by judicial construction. But here, we have written constitutions which are the supreme law, which our legislators are sworn to support, within whose restrictions they must limit their action for the public welfare, and whose barriers they cannot overleap under any pretext of supposed safety of the people; for along with our written constitutions, we have a judiciary whose duty it is, as the only means of securing to the people safety from legislative aggression, to annul all legislative action without the pale of those instruments. This duty of the judicial department in this country, was demonstrated by Chief Justice Marshall in *Marbury v. Madison*, I Cranch, 137, and has since been recognized as settled American law. The maxim above quoted, therefore, as applied to legislative power, is here without meaning (8 Ind. 490, 494-495).

**Judge Story concluded that, because liberty of conscience is protected and power over religion is left to the state governments, "the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship."**

Later in the opinion, Perkins celebrated the benefits of wine and strong drink, quoting the Bible in their defense, then concluded:

> It thus appears, if the inspired psalmist is entitled to credit, that man was made to laugh as well as weep, and that these stimulating beverages were created by the Almighty expressed to promote his social hilarity and enjoyment. And for this purpose has the world ever used them, they have ever given, in the language of another passage of scripture, strong drink to him that was weary and wine to those of heavy heart. The first miracle wrought by our Savior, that at Cana of Galilee, the place where he dwelt in his youth, and where he met his followers, after his resurrection, was to supply this article to increase the festivities of a joyous occasion; that the used it himself is evident from the fact that he was called by his enemies a winebibber; and paid it the distinguished honor of being the eternal memorial of his death and man's redemption (8 Ind. 490, 502).

Perkins concluded his rebuttal by dismissing the public health argument for prohibition in some of his saltiest language:

> It is based on the principle that a man shall not use at all for enjoyment what his neighbor may abuse, a doctrine that would, if enforced by law in general practice annihilate society, make eunuchs of all men, or drive them into the cells of the monks, and bring the human race to an end, or continue it under the direction of licensed county agents.

Such, however, is not the principle upon which the almighty governs the world. He made man a free agent, and to give him opportunity to exercise his will, to be virtuous or vicious as he should choose, he placed evil as well as good before him he put the apple into the garden of Eden, and left upon man the responsibility of his choice, made it a moral question, and left it so. He enacted as to that, a moral, not a physical prohibition. He could have easily enacted a physical prohibitory law by declaring the fatal apple a nuisance and removing it. He did not. His purpose was otherwise, and he has since declared that the tares and wheat shall grow together to the end of the world. Man cannot, by prohibitory law, be robbed of his free agency (8 Ind. 490, 503-504).

A remarkable feature of the state judiciary during this period was its frequently spirited independence of judgment. In two other cases, the Indiana Supreme Court struck down congressional legislation it regarded as lying outside the constitutional jurisdiction of the federal government. In *Griffin v. Wilcox*, 21 Ind. 370 (1863), the unanimous Court ruled unconstitutional an act of Congress that indemnified federal officers who arrested civilians for selling liquor to soldiers and held that neither President nor Congress could suspend a writ of *habeas corpus* issued by a state court. For the purposes of this case, Judge Perkins conceded the government's right to exercise martial law, but only temporarily and locally in cases of necessity — "where the civil law is expelled" — and as limited by the constitution. Judge James M. Hanna wrote a forceful concurring opinion that conceded even less ground to the federal law. In Warren v. Paul, 22 Ind. 276 (1864), a case involving a stamp tax on state legal documents, Judge Perkins commented that Congress "has not a right, by direct or indirect means, to annihilate the functions of the State government" by taxing them.

Two legal tender cases are also worthy of note, especially in the way they reflect the character of the Court's reasoning. In *Reynolds v. The Bank*, 18 Ind. 467 (1862), Judge Perkins dwelt at some length on the absence of either a constitutional or commercial basis for declaring bills of credit to be legal tender, but then held that doubts about the constitutionality of the law must be resolved in its favor until the Supreme Court of the United States ruled otherwise. Judge Hanna dissented,

arguing "that by the constitution the right is not vested in Congress to make a paper named a legal tender in payment of private debts" (18 Ind. 467, 475). Two years later, Judge Perkins spoke for a unanimous Court in *Thayer v. Hedges*, 22 Ind. 282 (1864), a case involving a promissory note in which the same legal tender law was at issue. Reverting to the Articles of Confederation, he cataloged the subjects covered by the term "general welfare" and then traced the later development of the constitutional separation of powers between the general government and the states. He cited common commercial practice, political economists, and even Biblical history as evidence of the unconstitutionality of the law: "Coin was the sacred currency as well as profane, of the ancient world. Historically considered, we find that the Almighty, and His Prophets and Apostles, were for a specie basis; that gold and silver were the theme of their constant eulogy" (22 Ind. 282, 304).[23]

As these cases illustrate, it was not uncommon for state courts in the nineteenth century to give special recognition to religious considerations and even appeal to commonly accepted religious considerations as a basis for judgment. This was just as true of secular cases as outwardly religious ones. Indeed, the Bible was regarded as a major sourcebook of constitutional theory and practice. The same courts that strongly asserted the value of religious liberty for all apparently did not perceive any contradiction when they acknowledged the special place of Christianity and the Bible in the life of the republic. Δ

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[23] Bancroft, George, *A Plea for the Constitution of the United States, Wounded in the House of its Guardians* (New York: Harper & Brothers, 1886; Sewanee, Tenn.: Spencer Judd, 1982), argued — like Daniel Webster and Joseph Story had before him — that unbacked paper currency was unconstitutional. See Webster's speech, "A Redeemable Paper Currency," delivered on the floor of the Senate, 22 February 1834. Whipple, Edward P., ed., *Great Speeches and Orations of Daniel Webster* (Boston: Little, Brown, & Co., 1879), pp. 362-66. The immediate catalyst of Bancroft's appeal was the Supreme Court's decision in *Julliard v. Greenman*, 110 U.S. 421 (1884), upholding — as a power belonging to sovereignty — the issuance of government notes as legal tender in the payment of private debts. Only Justice Stephen Field dissented. An earlier case, *Knox v. Lee*, 12 Wall. 603 (1870), justified the wartime Legal Tender Acts of 1862-1863 as emergency measures. Charles Warren later discussed the legal tender controversy at considerable length and commented that the Juilliard decision was "the most sweeping opinion as to the extent of Congressional power which had ever theretofore been rendered...." Warren, Charles, *The Supreme Court in United State History*, vol. 2, revised ed. (Boston: Little, Brown and Company, 1938), p. 652. See also Swisher, Carl Brent, *Stephen J. Field: Craftsman of the Law* (Chicago: University of Chicago Press, 1930; Phoenix Books, 1969), pp. 166-204; Lundberg, Ferdinand, *Cracks in the Constitution* (Secaucus, N.J.: Lyle Stuart, Inc., 1980), p. 231.

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