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Religious Freedom Under Our Constitution

William Bruce Hoff

RELIGIOUS FREEDOM UNDER OUR CONSTITUTIONS*

BY WILLIAM BRUCE HOFF**

Blackstone, speaking of the laws of England, has very well said, "The objects of the laws of England are so very numerous and extensive that in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand and too trifling and minute on the other; both of which are equally productive of confusion."[1] So it is with a discussion or investigation of the existence, nature and extent of religious freedom under our constitutions. And, in emulation of the great English commentator, it is our purpose to preface this discussion by placing limitations on its scope which will tend to confine it with certain defined limits and by outlining as briefly, yet as logically, as possible the propositions to be considered and discussed.

We shall assume for the purposes of this investigation that the expression, "Our Constitutions," which might very well be taken to comprehend either of two things, first, the Federal Constitution and the Constitution of West Virginia, or second, the Federal Constitution and the constitutions of the several states, is used in the former or narrower sense. In view of this assumption, no attempt will be made to examine exhaustively the constitutions of the other states or to lay down authoritatively the law of the other states with respect to the question of religious freedom. Such references as shall be made to the constitutional provisions of other states will be made solely for purposes of comparison or contrast with provisions of our own state constitution in regard to similar questions. In the same manner, when references are made to the

* The James F. Brown Prize Thesis, 1923-24. In 1919 the late James F. Brown, of the class of 1873, gave $5,000.00 to the University to be invested by it and the income used as a prize for the best essay each year on the subject of the individual liberties of the citizen as guaranteed by our constitutions. Any senior or any graduate of any College of the University, within one year after receiving his bachelor's degree, may compete for this prize.

** LL. B, West Virginia University, 1924, Parkersburg, West Virginia.

[1] BLACKSTONE'S COMMENTARIES, 121.

decisions of other states, it will be for the purpose of showing what the possibilities and probabilities are in the event that similar circumstances and cases should arise in West Virginia and come before our own state courts for adjudication.

The first inquiry, upon the determination of which in the affirmative all further inquiry is predicated, is as to the existence of religious freedom. Then, assuming that this be determined affirmatively, the natural and logical inquiry would be as to the extent of this freedom, and as to the specific privileges and immunities which evidence its existence, and further, if it be the result of constitutional guaranties, then, as to the specific constitutional provisions which expressly or by necessary implication give or secure these privileges to the individual. The third and final inquiry is as to the nature of this freedom, whether it is absolute and unqualified, and if it be not absolute and unqualified but be limited and restricted, then, in what manner and to what extent is it so limited and restricted.

Undoubtedly a discussion of the problems raised by the last inquiry will attract a more nearly universal and a more intense interest than either or both of the first two, because it is matter of common knowledge that civilized peoples devote far more time to lamenting and deploring the restrictions and limitations placed upon their conduct than they do thanking Divine Providence for the privileges and immunities that they have. The writer must not be understood as condemning this as a vicious trait. On the contrary, it is his opinion that much, if not all, the progress of civilization and every reform worthy of note is directly attributable to this inherent dissatisfaction of man with his present state or condition, however ideal it may be.

If we have religious freedom in West Virginia, it may be created, secured or guaranteed by either the Federal Constitution, or by the Constitution of the State of West Virginia, or by both. Every citizen of every state is also a citizen of the United States,[2] and is thus at the same time the subject of two separate and distinct sovereignties and may be the recipient of the same or different privileges and immunities from the fundamental laws of each, at the same time.[3]

Due to this anomalous situation, created by these dual sover-

[2] Claflin *v.* Houseman, 93 U. S. 130, 136. The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state.

[3] See Claflin *v.* Houseman, *supra*, at 136. The laws of the United States are laws in the several states and just as much binding on the citizens and courts thereof as the state laws are.

eignties, it is possible for religious freedom to be guaranteed by one in so far as legislative encroachment by its legislative department is concerned, and yet at the same time for the individual to be as completely shackled by the constitution and laws of the other as if neither had guaranteed, or purported to guarantee, religious liberty.[4]

As a matter of fact, the constitution proper of the United States is with one comparatively insignificant exception silent on this question. Its only provision in any way bearing on this question is the one which provides that, "No religious test shall ever be required as a qualification to any office or public trust under the United States.[5] While this is of itself a guaranty of a valuable privilege and is an evidence of a commendable broad-mindedness on the part of the framers of our constitution, it cannot be said to create any appreciable degree of religious freedom, because it is expressly limited and purports only to extend to seekers of political offices and emoluments under the United States.[6] It would not nor does it purport to place any restriction on the action of any or all of the several states should they see fit, in the exercise of an uncontrolled discretion, to require a religious test as a qualification for an office or public trust under them.[7]

The next and only further provision of the Federal Constitution pertaining to religion is contained in the appendage to the Constitution, commonly known and referred to as the "Bill of Rights." It provides as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[8] This read in conjunction with the provisions contained in the Constitution proper is a plain indication and expression of the determination of the American people to preserve and perpetuate religious liberty and to guard against the slightest approach toward the establishment of a political and civil inequality which would have for its basis only the differences in religious belief of the people. The explanation for these provisions, which are conceded to have been a great factor in our national development, lies, not

[4] See Claflin *v.* Houseman, *supra.*
[5] U. S. CONSTITUTION, ART. VI.
[6] The language of this provision makes a clear case for the application of the legal maxim, *"Expressio unius est exclusio alterus"*, and hence limits it to offices and trusts under the United States. The complete clause is as follows: "The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States." Thus, by the failure to expressly include state officials in those who were to be exempt from religious tests in the same manner as they were included in the part requiring an oath to support the Federal Constitution, there was a disclaimer of an inclusion by implication of state officials in such exemption.
[7] See *ante*, Note 6.
[8] See FIRST AMENDMENT TO THE U. S. CONSTITUTION.

so much as some historians would have us believe in the supposed fact that the framers of our fundamental laws were a group of inspired super-men, but rests largely on the peculiar facts and circumstances which surrounded the framing and adoption of these laws. That the authors of the Federal Constitution came to their task after centuries of religious oppression and persecution, sometimes by one party or sect, and sometimes by another, had taught them the utter futility of all attempts to propagate religious opinions and beliefs by the rewards, penalties and terrors of human laws. So whatever may have been their individual sentiments or opinions as to the propriety of the state assuming supervision and control of religious opinions under other circumstances, the general voice has been to make persons of all religious beliefs equal before the law and to leave matters of religion to be settled by each individual man and his Maker.[9]

As has been said, these are the solitary provisions in the Federal Constitution in any way relating to or guaranteeing religious freedom. They are not, however, to be quarrelled with on the grounds that they are few in number or that their language is too brief and concise. Despite this, they are nevertheless adequate for the purposes which they purport to serve. The first of these two provisions has been examined as to its meaning and scope and found to be clear and unambiguous; the second, while it does perform the purpose of restraining Congress from interfering with religious freedom, is and purports to be only a limitation upon the power of Congress.[10] This provision does not operate as a limitation upon the powers of the states for the obvious reason that it is by its express terms a prohibition upon the power of Congress only.[11] Since this is true, and we deem it to be too well established to require further argument or citation of authority, the State of West Virginia could have, when framing and adopting its Constitution, effected as complete a union between the Church and State as if the Federal Constitution had been silent on matters of religion. So, it is further apparent that in the absence of an express provision in the Constitution of the State of West Virginia, which is a restraining rather than an enabling instrument, the

[9] COOLEY'S CONSTITUTIONAL LIMITATIONS, (6th Ed.), 571.

[10] Permoli *v.* City of New Orleans, 3 How. 589, 609 (U. S. 1845). The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties. This is left to the state constituions and laws. Nor is there any inhibition imposed by the Constitution of the United States in this respect on the states. See also Brunswick-Balke Callander Co. *v.* Evans, 228 Fed. 998.

[11] See Permoli *v.* City of New Orleans, *supra.* See also People *v.* Board of Education, 245 Ill., 335, 338, 92 N. E. 252, 258, holding that the First Amendment of the United States Constitution left the states free to enact such statutes as they deem proper in respect to religion.
See *ante,* Note 6.

legislature of the State of West Virginia would have had the power to legislate in such a manner as to effectually divest the individual of every vestige of religious liberty.[12] In such a case, it would have been small consolation to the individual to point out to him that in his capacity as a citizen of the other sovereignty he was guaranteed absolute immunity against all governmental interference in matters of religion.

Whatever may have been the motives or purposes actuating the framers of our constitution, and whether or not they inserted the provisions with a consciousness of the fact that the task was only half performed by the Federal Constitution, is a matter of small consequence from the purely legal viewpoint. But certain it is that the Constitution of West Virginia contains provisions relating to and guaranteeing religious freedom, which for sweeping all-inclusiveness and detailed thoroughness it would be difficult, if not impossible, to find a parallel in any written constitution.

Possibly the best illustration of this is the section of our constitution, which provides:

> "No man shall be compelled to frequent or support any religious worship, place of ministry whatsoever; nor shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess and by argument, to maintain their opinions in matters of religion; and the same shall, in no wise, affect, diminish or enlarge their civil capacities; and the legislature shall not prescribe any religious tests whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any laws requiring or authorizing any religious society, or the people of any district within this state, to levy on themselves, or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministry, but it shall be left free for every person to select his religious instructor, and to make for his support, such private contract as he shall please."[13]

A close rival to the section just quoted as to the comprehensiveness of its scope, and of particular significance because the privi-

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[12] See Permoli *v.* City of New Orleans, *supra.* See also People *v.* Board of Education, *supra.*

See State ex rel Thompson, *et al, v.* McAllister, *et al,* 38 W. Va. 485, 18 S. E. 770, holding that there is an important distinction between the construction of state and federal constitutions. The Constitution of the United States is a source and grant of power to the Congress of the United States. It is an enabling and not a restraining instrument, and Congress can do nothing except what the constitution either directly or by reasonable construction authorizes it to do. On the other hand, the constitutions of the states are restraining instruments and the legislatures of the states possess all legislative power not prohibited to them by their constitutions. See also in this connection, Brown *v.* Etts, 91 Va. 726, 734, 21 S. E. 119, 121.

[13] W. VA. CONSTITUTION, ART. III, §15.

leges guaranteed by it are expressly named and designated, which fact presents an almost insurmountable barrier to judicial construction which might otherwise vitiate them, is the one which provides that, "no religious or political test oath shall be required as a pre-requisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment."[14]

These two provisions, while they are not the only ones in our constitution bearing on the question of religion, are for present purposes sufficient.[15] There is sufficient unambiguous and unequivocal language used to establish a prohibition upon the state legislature similar to that imposed by the Federal Constitution upon Congress. Since we have found that the legislative branches of both sovereignties, which by possibility might legislate for the individual, are restrained from doing so by their fundamental laws, we are forced to conclude that we do have religious freedom in West Virginia and that, "No external authority is to place itself between the finite being and the Infinite when the former is seeking to render the homage that is due and in a mode which commends itself to his conscience and judgment as beng suitable for him to render and acceptable to its object."[16]

This brings us to the consideration of the extent of our religious freedom, and to a consideration of the specific privileges which evidence its existence, and a more minute consideration of the specific constitutional provisions from which such privileges are derived. It would be pertinent here to insert a definition of religious freedom, if such were available. But, as Mr. Justice Holmes, one of our greatest living jurists, has put it, "Definition is the most difficult of all things, both in the law and elsewhere."[17] So religious freedom is one of the conceptions in our law which defies successful or satisfactory definition.[18] In lieu of a definition of the whole phrase we propose to submit a definition of the word "religion," leaving the word "freedom" undefined, it being of

[14] W. VA. CONSTITUTION, ART. III, §11.

[15] See W. VA. CONSTITUTION, ART. VI, § 47, which provides: "No charter of encorporation shall be granted to any church or religious denomination. Provisions may be made by general laws for securing the title to church property and for the sale and transfer thereof so that it shall be held, used or transferred for the purposes of such church or religious denomination."

See also W. VA. CONSTITUTION, ART. X, §1, providing that property used for religious purposes may be exempted from taxation. The first of these two provisions obviously has nothing to do with this discussion. The second will be considered in another connection.

[16] COOLEY'S CONSTITUTIONAL LIMITATIONS, (6th Ed.), 576.

[17] Compare languages of Charles M. Hough speaking of definition in an article entitled *"Due Process of Law—Today"* in 32 HARV. LAW REV. 218.

[18] But see Davis *v.* Beason, 133 U. S. 333, 342, where Mr. Justice Field attempts judicial definition of religion. He says: "Religion has reference to one's views of his relation to his creator and to the obligations which they impose of his reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter."

such convenient vagueness as to produce but slight difference of opinion as to its meaning. Religion has been defined by the lexicographer as "The outward act or form by which men indicate their recognition of a God, or of Gods, having power over their destiny, to whom obedience, service and honor are due; the feeling or expression of human love, fear or awe of some superhuman and over-ruling power." According to this definition of religion, religious freedom would be the liberty to perform these acts and entertain these feelings and beliefs unrestricted and unmolested by governmental interference.

A careful inspection of the above definition will divulge that by possibility all that might be understood to be included is not in fact included in the definition. As defined, we understand the term "religious freedom" to merely include the freedom to act affirmatively in pursuance of some religious belief, or to believe affirmatively in some religious doctrine. It is quite conceivable that a broader construction might be placed on the term. Some might reasonably believe it to include not only what has been stated, but also the freedom to passively disbelieve in all religion or to act affirmatively in pursuance of such disbelief in all religious doctrine and creeds. Perhaps the point may best be illustrated by stating it in the form of a question. *Quaere:* Do our constitutional guaranties of religious freedom presuppose the adherence of all men to some religious faith or belief, or do they presuppose nothing, but mean to give and guarantee religious freedom in the broad sense that would include the freedom to be anti-religious, without religion, and to deny the existence of a super-human and over-ruling power? This question is raised in connection with the definition of religious freedom, but will not be commented on here, it being discussed in some detail in another connection.

Mr. Justice Miller has stated perhaps as well and as concisely as anyone has or will the extent of religious freedom guaranteed by our Federal Constitution. He has said, "In this country the full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine, which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy and is committed to the support of no dogma, the establishment of no sect."[19] Scott, Justice, in a Virginia case, speaking of the Constitution and laws of Virginia, which make substantially if not identically the same provisions as ours regarding reli-

[19] See Watson *v.* Jones, 13 Wall, 679, 728. (U. S. 1871).

gious freedom, said, "Proclaiming to all our citizens that henceforth their religious thoughts and conversations shall be as free as the air they breathe; that the law is of no sect in religion; has no high priest but justice, declaring to the Christian and the Mohametan, the Jew and the Gentile, the Epicurean and the Platonist, that so long as they keep within its pale all are equally objects of its protection."[20] So long as religion is a matter of the conscience the civil power must not invade it, but when religious conscience violates the rights of others and culminates in acts which tend toward the subversion of civil government, it must be restrained within its own domain and excluded from the civil realm which it might otherwise control.[21] Our constitutions do not mean to extend religious freedom to matters of a purely secular nature, no matter how conscientiously such matters are believed to be religious in their character.[22] In general we may say that the religious freedom guaranteed by our constitutions is of the mind and conscience, rather than of human actions. The things just discussed obviously overlap somewhat on another question, as to which they have more particular significance. They are gone into here solely for the purpose of having them throw what light they will on the extent of our religious freedom and will be discussed again in connection with the question already stated and given more detailed consideration.

Cooley, in his valuable work on the American Constitutions,[23] has classified the things which are not lawful under them.[24] The classification is particularly accurate as applied to the Federal Constitution and the West Virginia Constitution. So it will be adopted and followed, subject to necessary revision and elaboration, in so far as possible, because it offers, what is to our view, the most logical method of considering the specific religious privileges and immunities of the citizen of West Virginia. His classification is as follows:

1. Any law respecting an establishment of religion would be unconstitutional. The legislative branches of our governments have not been left free to effect a union between the Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. Due to the great dearth of Federal decisions and the entire absence of adjudications by the

[20] Perry *v.* Comonwealth, 3 Gratt, 632, 642. (Va. 1846). Case holds that an atheist is not incapacitated from being a witness. But see *contra,* Thurston *v.* Whitney, *et al,* 56 Mass. 104.
[21] Reynolds *v.* United States, 98 U. S. 145.
[22] Commonwealth *v.* Herr, 229 Pa. St. 132, 78 Atl. 68.
[23] COOLEY'S CONSTITUTIONAL LIMITATIONS.
[24] COOLEY'S CONSTITUTIONAL LIMITATIONS, (6th Ed.), pp. 575 to 577, inclusive.

Supreme Court of West Virginia pertaining to this question, the author deems it necessary to state paranthetically that in the great variety of instances we shall have to content ourselves with a reference to the constitutional provisions themselves. They are, however, in most cases too clear to admit of judicial construction which would vitiate their plain and patent meaning. So, as to this guaranty, we can only refer, first, to the "Bill of Rights" of the Federal Constitution, which provides that, "Congress shall make no law respecting an establishment of religion,"[25] and, second, to the provision of our State Constitution previously quoted, which says that, "No man shall be compelled to frequent or support any religious worship or place of ministry whatsoever,"[26] and the further language of the same section which provides that the legislature shall not "confer any peculiar privileges or advantages on any sect or denomination."

In elaborating the point under discussion it would be difficult to improve on the language of our own constitution. The constitution, after speaking of matters of religion, says, "And the same shall in no wise affect, diminish or enlarge their civil capacities."[27] And in enumerating some of the civil capacities which are referred to, we can with impunity again follow the language of the constitution, which is that, "No religious or political test oath shall be required as a pre-requisite to vote, serve as a juror, sue, plead, appeal or pursue any profession or employment."[28] It is to be observed that our State Constitution, unlike the Federal Constitution, does not specifically provide that, "No religious test shall ever be required as a qualification to any office or public trust,"[29] but on this point merely says that no religious test oath shall be required as a prerequisite to "pursue any professional or employment."[30] *Quaere*: Does it remain possible for our legislature to prescribe a religious test as a requirement to office holding in West Virginia? While the clause referred to is silent on the point, it would seem that this question must of necessity be decided in the negative. The provision that matters of religion shall "in no wise affect, diminish or enlarge their civil capacities," while it does not particularize, would we think by necessary implication prohibit legislative prescription of a religious test or oath as a prerequisite to office. Another clause in the same section, which provides that

[25] FIRST AMENDMENT, U. S. CONSTITUTION.
[26] W. VA CONSTITUTION, Art. III, §15.
[27] W. VA. CONSTITUTION, Art. III, §15.
[28] W. VA. CONSTITUTION, Art III, §11.
[29] See U. S. CONSTITUTION, Art. VI.
[30] W. VA. CONSTITUTION, Art. III, §11.

the legislature "shall not prescribe any religious test whatever,"[31] is in like manner open to the objection that it does not particularize, but its language would seem to be broad enough to control the situation.

As to the wisdom of the separation of Church and State and the full and free participation by all irrespective of religious belief in governmental, civil and temporal affairs, Madison is credited with saying: "Religion is not within the purview of human government," and that "Religion is essentially distinct from human government and exempt from its cognizance. A connection between them is injurious to both. There are causes within the human breast which insure the perpetuity of religion without the aid of law." Washington, however, advocated a somewhat different view. He said: "Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles."[32] We believe that Welch, Justice, in an Ohio case,[33] strikes the keynote of the situation when he says: "A form of religion that cannot live under equal and impartial laws ought to die, and sooner or later must die."[34] And later, in the same case, he says: "True religion is the sun which gives to government all its true lights, while the latter merely acts upon religion by reflection."[35] We may quote the same man further as saying, that, "Religion is the parent, not the offspring, of good government."[36] In view of the statements just quoted, to which we will add that of Jefferson, in which he said: "That to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on the supposition of their supposed ill tendency, is a dangerous fallacy, which at once destroys all religious liberty,"[37] we are not ashamed to adopt the view that this guaranty of our constitution is particularly commendable. We do not adopt this view solely because of the great men in the past who advocated it, but because reason and experience recommend it, our first Chief executive to the contrary notwithstanding.[38]

It is obvious that no attempt has been made to enumerate all the civil privileges and immunities which are the outgrowth and

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[31] *Idem.*
[32] See Washington's Farewell Address.
[33] Board of Education *v.* Minor, et al, 23 Ohio St. 211.
[34] *Idem*, at 247.
[35] *Idem*, at 249.
[36] *Idem.*
[37] See VA. CODE, 1904, §1394; Preamble to Act for Religious Freedom.
[38] See *ante*, Note 32.

concomitants of the separation of the Church and State. Suffice it to say that unless exceptions are discussed elsewhere, there are no limitations on one's civil capacities which have for their basis only his religious beliefs.

2. Compulsory support by taxation, or otherwise, of religious instruction or worship would be unconstitutional. Our constitutions make the support of religious instruction entirely voluntary and remove the coercion of such support from the sphere of government. While some states leave this matter in some doubt,[39] the language of the West Virginia Constitution is so clear and unequivocal as to preclude all possibility of argument. It provides: "No man shall be compelled to frequent or support any religious worship, place of ministry whatsoever."[40] And in the same section it provides that the legislature shall not "pass any law requiring or authorizing any religious society or the people within any district of this state to levy on themselves or others any tax for the erection of any house for public worship, or for the support of any church, or ministry, but it shall be left free for every person to select his religious instructor and to make for his support such private contract as he shall please."[41] The language to which we attach particular significance in this connection is that which provides that it shall be left free for every man to select his religious instructor and to make for his support such private contract as he shall please.

The connection in which the question of taxation for the support of religious worship has been most frequently raised is that of Bible reading in the public schools. In the great variety of instances where this is done, those who desire may be excused from participating in such reading, or even from remaining present.[42] It has been held that the mere reading of the Bible without comment is not a violation of the constitution.[43] The present tendency is toward exclusion of the Bible from the public schools. The theory of this is not that reading the Bible in the public schools molests anyone in the exercise and enjoyment of his constitutional right of freedom of religious profession, worship and opinion, but that Bible reading in the public schools molests the tax payer without any regard to his religion, or want of religion, in the exercise and enjoyment of his constitutional right of freedom from

[39] See for typical case discussing this question, Hale *v.* Everett, 53 N. H. 1.
[40] W .VA. CONSTITUTION, Art. III §15.
[41] *Idem.*
[42] Spiller *v.* Inhabitants of Woburn, 12 Allen 127 (Mass. 1866).
[43] Billard *v.* Board of Education, 69 Kan. 53, 76 Pac. 422. But see Board of Education *v.* Minor, *supra* holding that Bible reading may be constitutionally prohibited in public schools, with or without comment.

taxation to help support any clergy or church establishment.[44] While this question of taxation for the support of religious worship is one which excites a great deal of interest and, which if discussed with reference to all the American constitutions, would entail a long and detailed dissertation, but confined to West Virginia and considered from the strictly legal viewpoint, it presents no difficulty. It is, of course, one of the most valuable guaranties that our constitutions contain.

3. A requirement by legislation of attendance upon religious worship would conflict with our constitutions. Our state constitution expressly provides, in the section quoted before, that, "No man shall be compelled to frequent, or support, any religious worship or place of ministry whatsoever."[45] While there might be some disagreement as to the wisdom of such a privilege or immunity, we submit that the obligations which spring from man's relation to his Maker are to be enforced by the admonitions of conscience, and not by the penalties of human laws.

4. It would be unconstitutional for the legislatures, subject to such exceptions as shall be hereafter noted, to place any restraint upon the free exercise of religion according to the dictates of the conscience. The Federal Constitution, briefly but adequately guarantees this in the clause which prohibits any Congressional legislation restricting the free exercise of religion.[46] The only provision in the West Virginia Constitution directly conferring this privilege is that which says: "All men shall be free to profess and by argument to maintain their opinions in matters of religion."[47] A further provision which may be considered important for this purpose is that which gives to the individual the right to select his own religious instructor and provide for his support.[48] This guaranty, while valuable, is, like the freedom from taxation, so well established that a lengthy discussion is unnecessary.

5. Any law prohibiting the teaching of any religious principle or restraining the propagation of religious doctrines would be unconstitutional. This appears from the general language of the Federal Constitution, hereinbefore quoted, and our state constitution expressly provides that, "All men shall be free to profess and

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[44] People *v.* Board of Education, *supra.*
[45] W. VA. CONSTITUTION, Art. III, §15.
[46] See FIRST AMENDMENT U. S. CONSTITUTION. But see as to propriety of state police regulations Commonwealth *v.* Plaistead, 148 Mass. 374, 19 N. E. 224.
[47] W. VA. CONSTITUTION, Art. III, §15.
[48] *Idem.*

by argument to maintain their opinions in matters of religion"[49] An earnest believer usually regards it as his duty to propagate his opinions and bring others to his views; and so, if it were not for this guaranty, such believer would be deprived of what he regards as a most sacred privilege.

We have arrived at the third, and final, inquiry, which is as to the nature of religious freedom, whether it is unqualified and absolute, and if it be not unqualified and absolute, then, in what manner and to what extent is it limited and qualified. Since the problems in the above inquiry overlap, more or less, perhaps the best method of treating it will be to state the final conclusion as to whether religious freedom is unqualified, and then proceed to a consideration of the things which prove that conclusion.

Our conclusion is that the religious freedom granted to the people of West Virginia is not absolute and unqualified, but is limited and restricted. It has been contended in some cases that Christianity is a part of the common law of this country; and further, that when the word "religion" was used in our constitutions, the "Christian religion" was meant. While this question has not been raised in West Virginia, it has been raised in the Ohio courts, and it has been held that under the Ohio Constitution, which is for practical purposes the same as ours, neither Christianity nor any other system of religion is a part of the law of that state.[50] The government has, however, and we think with propriety, taken cognizance of the fact that the great majority of the people subject to its laws have some form of religion and that the Christian religion, in its various phases, is the prevalent religious system of this country.

Government has not only taken cognizance of this fact, but its laws respecting morality and topics of a kindred nature are based on the Christian conceptions of what is moral and immoral. Out of this practice has grown up the limitations and restrictions on religious freedom. The laws prohibiting polygamy and bigamy in the states and territories of the United States are based on the Christian conception of what is moral. It has been contended that such laws are a violation of our constitutional guaranties of reli-

[49] *Idem.* But see Davis *v.* Beason *supra,* holding that the United States Congress may constitutionally punish one for teaching and counselling one to follow a religious practice or doctrine which encourages the commission of acts made criminal by the law of the land.

[50] See Bloom *v.* Richards, 2 Ohio St. 387. See also Board of Education *v.* Minor, *supra,* at 246, where the court says: "Legal Christianity is a solecism; a contradiction of terms. When Christianity asks the aid of government beyond mere impartial protection, it denies itself. Its essential interests lie beyond the reach and range of human government.' But see State *v.* Chandler, 2 Harr. (Del. 1837) 553, in which case the court vindicates what it calls the legal maxim that Christianity is a part of the common law.

gious freedom.[51] These laws are a limitation and restriction on religious freedom in the broad sense of its being absolute, but they are not a violation of religious freedom within the meaning of our constitutional guaranties thereof.[52] Bigamy and polygamy are prohibited constitutionally in order that the criminal laws may be uniform, and in order to prohibit those things which are regarded by common consent of the Christian world as properly subjects of punitive legislation.[53] It was never intended by the First Amendment to the Federal Constitution that religious belief should be a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.[54] Mr. Justice Bradley, speaking of the validity of laws prohibiting polygamy, said: "The pretense of religious belief cannot deprive Congress of the power to prohibit polygamy and all other open offenses against the enlightened sentiment of mankind."[55] The United States Supreme Court, when called on to pass upon the same question in the famous case of *Reynolds* v. *United States*,[56] held that religious belief could not be accepted as a justification for an overt act made criminal by the law of the land.[57] Mr. Justice Field, in a later case in the United States Supreme Court, involving the constitutionality of an act of a territorial legislature of Idaho denying civil privileges to people who practiced polygamy or belonged to an order which encouraged it, said: "A crime is not the less odious because it is sanctioned by what any particular sect may designate as religion,"[58] and that, "Few crimes are more pernicious to the best interests of society and receive more general or deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call

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[51] Reynolds *v.* United States, *supra.* See also Davis *v.* Beason, *supra.*

[52] Reynolds *v.* United States, *supra.*

[53] Reynolds *v.* United States, *supra,* at 166, where the court says: in speaking of the validity of a law prohibiting polygamy: "It is constitutional, and valid, as prescribing a rule of action for all those residing in territories and places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious behalf may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice Or if a wife religiously believed it was her duty to burn herself upon the funeral pyre of her husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?'

[54] See Davis *v.* Beason, *supra.* See also Knowles *v.* United States, 170 Fed. 412, which holds that prohibiting the mailing of obscene mater is not a violation of the constitutional provisions relating to religion. See also Clarke *v.* United States, 211 Fed. 918.

[55] Mormon Church *v.* United States, 136 U. S. 150.

[56] 98 U. S. 145.

[57] Reynolds *v.* United States, *supra.*

[58] Davis *v.* Beason, *supra,* at 345.

their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such counselling and teaching are themselves criminal and proper subjects of punishment as aiding and abetting crime in all other cases."[59] He goes further, and says: "However free the exercise of religion may be it must be subordinate to the criminal laws of the country passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."[60]

These lengthy quotations relating specifically to polygamy are not inserted on the theory that laws prohibiting polygamy are in themselves of sufficient importance to demand detailed consideration. The object is to show that the conceptions of morals that underlie our laws of this character are the Christian conceptions. This can best be illustrated by reverting again to the language of Justice Field, where he says: "Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts recognized by the general consent of the Christian world in modern times as proper matter for prohibitory legislation must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance."[61] So, the statement may be made and defended that while we do have religious freedom, acts which though they are the religious practices of some sect offend the moral sense of the "Christian world" or violate the Christian conception of what is right and wrong, may be prohibited and justified as a valid exercise of the police power. It is in pursuance of this policy to enforce the Christian code of morality that practically all our laws for morality and decency are enacted.[62] It will thus be perceived that in so far as the Christian code of morals differs from that of other sects, the adherents of such other sects are compelled to pursue a line of conduct which they believe to be improper and to refrain from doing the things which they conscientiously believe they should do.

Profanity and blasphemy are prohibited by our laws and justified as a necessary police regulation to prevent a course of conduct generally shocking to the sentiments of the people and in order to preserve the public peace.[63] The courts hold that blasphemy is punished, not as a crime against God, but as a crime against man.[64]

[59] *Idem*, at 341.
[60] *Idem*, at 342.
[61] Davis *v.* Beason, *supra*, at 343.
[62] See BARNES' W. VA. CODE, 1923, Ch. 149.
[63] State *v.* Chandler, *supra*.
[64] *Idem*.

Enforced observance of the Christian Sabbath could be justified as a necessary police regulation in order to secure to the great majority of the members of the community the enjoyment of the privileges of religious worship. It is not, however, so justified. It is held to be a necessary police regulation for the purpose of providing one day of rest in seven, which is considered by our courts to be conducive to public health.[65] The selection of the Christian Sabbath as this day of rest is, of course, simply another recognition of the desire of the adherents of the prevalent religious system. This is quite obviously a restriction on the religious freedom of those who, if they practiced their religious belief, would not observe the Christian Sabbath, since reasons of practical necessity require their engaging in temporal pursuits on the day which they would otherwise observe as a day for religious worship.[66]

It would be impossible to enumerate and discuss all the laws which in some way or another encroach upon and restrict the religious practices or some of the multitude of religious sects. An illustration which will serve to indicate the things which the laws of the states may constitutionally do is to punish one who fails to furnish medical aid to one who needs such aid and who is legally entitled to look to such party for medical aid. The party charged with such failure cannot set up his religious belief as a defense to a prosecution for such an offense.[67] To summarize, we may say that laws enforcing the police power of the state do not violate religious freedom. Such laws may limit or restrict religious freedom in the broad sense, but in no fair sense of the word can they be said to violate the constitutional guaranties thereof.[68] They were made subject to the regulation of civil conduct conformably to some code of morals. The enforcement of a code of morals does not underlie all police regulations, but it does underlie those which aim toward the general well being of the individual rather than his physical health and safety. These are matters about which all religious sects cannot be given absolute liberty. An attempt to do so would produce no end of confusion and would ultimately tend toward the subversion of all civil government. Law has been said to be a practical matter, existing for practical ends. If this be true,

[65] Swann *v.* Swann, 21 Fed. 299.

[66] See, for example, the practices of the Jews, who if left to follow their own impulses would observe Saturday as the day for religious worship.

[67] Owens *v.* State, 116 Pac. 345, (Okla. 1911). See to the effect that religious healing may be prohibited, Smith *v.* People, 51 Colo. 270, 117 Pac. 612. See State *v.* Chenoweth, 163 Ind. 99, 71 N. E. 199, holding that belief in divine healing is no defense to prosecution for manslaughter for failure to furnish medical aid. See also 6 VA. LAW REG. (NS) 651.

[68] Swann *v.* Swann, *supra;* Reynolds *v.* U. S. *supra.*

and we assume that it is, it was necessary that our law makers should adopt some moral code upon which to base our criminal laws and police regulations. And since the Christian religion is the prevalent religious system in this country it is quite fitting and proper that the Christian code of morality has been consciously or unconsciously adopted.

The question of what, if anything, our constitutional guaranties of religious freedom presuppose is the only question which remains unsettled. The point has been raised and the question stated earlier in this discussion, but for practical purposes it will be re-stated here. *Quaere*: Do our constitutional guaranties of religious freedom presuppose the adherence of all men to some religious faith or belief, or do they presuppose nothing, but mean to give and guarantee religious freedom in the broad sense that would include the freedom to be anti-religious, without religion, and to deny the existence of a super-human and over-ruling power? It is important to observe that thus far the discussion has related specifically to the privileges and immunities of religionists and the restrictions placed upon their conduct. Nothing has been said which is necessarily conclusive of this question. The purpose of the discussion upon which this question has been incidentally raised and touched on before was to show whether or not discriminations could be made against one on account of his religious belief. The object of this discussion is to see whether or not our constitutions permit a discrimination against one on account of his lack of religious belief. We have seen that in a limited sense we have religious freedom. We now propose to see whether we have anti-religious or non-religious freedom. We have already committed ourselves to the view that these conceptions might reasonably be understood to be included in a constitutional guaranty of religious freedom.

In determining this question it is important to note that the problem is not whether laws have been made or enforced which discriminate against the anti-religionist, but is whether laws could be constitutionally made or enforced which would do so. A casual examination of our constitutions would lead one to the opinion that the anti-religionist and non-religionist are protected in the same manner as the adherents to some religious faith or belief. But it is doubtful whether this opinion would remain so firmly fixed after a careful analysis of our constitutional provisions and an investiga-

[69] Observe that as this section now stands without the qualifying language a party is not by its express terms protected irrespective of his religious belief or lack of religious belief. So, the rule of construction that the "expression of one thing is the exclusion of another" might very well be applied here.

tion of what is known as judicial construction. Suppose that by this well established practice of "judicial reading in" explanatory and qualifying language the word "particular" was read into Article VI of the Federal Constitution. It would then read:

> No *particular* religious test shall be required as a qualification to any office or public trust under the United States.

In such a case, what would prevent legislation by Congress which would keep the anti-religionist or non-religionist from holding office under the United States?

Suppose, in like manner, the phrase "any particular" was read into the First Amendment to the Federal Constitution. It would then read:

> Congress shall make no law respecting an establishment of *any particular* religion or prohibiting the free exercise thereof.[69]

This would authorize Congressional legislation encouraging and facilitating religious worship, subject only to the limitation that no particular sect could be favored or given a preference over another.

Applying this same theory to our State Constitution, the Eleventh Section of the Third Article would by the insertion of the word "particular" provide:

> No *particular* religious or political test oath shall be required as a pre-requisite or qualification to vote, serve as a juror, sue, plead, appeal or pursue any profession or employment.

So read, this section would not prevent the state legislature requiring as a prerequisite to the enjoyment of these privileges that the party affiliate himself with some religious faith or another.

Section Fifteen of Article III, would after the insertion of the word "particular" at proper intervals, read as follows:

> No man shall be compelled to frequent or support any *particular* religious worship or place of ministry whatsoever. Nor shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his *particular* religious opinions or belief, but all men shall be free to profess and by argument to maintain their opinions in matters of religion;[70] and the same shall, in no wise, affect, diminish or

[70] Observe that this clause is probably not as broad in fact as it purports to be. The atheist who attempted to propagate his opinions with the same fervency as the religionist would likely be arrested for blasphemy or restrained as a nuisance. See

enlarge their civil capacities; and the legislature shall not prescribe any *particular* religious test whatever, or confer any peculiar privileges or advantages on any *particular* sect or denomination.

Such judicial construction would authorize taxation for the support of religious worship generally. It would permit the law to enforce, molest and restrain a man who was non-religious or anti-religious. Such construction would not permit preferences of sects or denominations over one another, but it would permit preferences in favor of religionists over anti-religionists.[71] Obviously if these things, taxation specifically, were allowed, the atheist would be denied freedom and immunity from discriminatory legislation.

It might be urged that this is a ridiculous situation which could never arise. The purely obvious answer to such a contention is that we are here discussing what it would be possible to do constitutionally and not what is likely or probable. In support of the probability of such a situation what we consider a tenable argument can be advanced. While government has deemed it impossible or impracticable to designate any one religious doctrine as the correct one and attempt to propagate it and extirpate all others and reward those who adhere to that doctrine and punish those who do not, it might conceivably take cognizance of what we deem to be a fact that religion in general and the incidents thereof are beneficial to man. Government might take the view that the belief in religion, with its attendant belief in eternal punishment and reward, would tend to make a man a better public official or a better subject upon which to confer civil privileges and immunities. In pursuance of this view, it might require as a qualification to the enjoyment of these civil privileges that all its citizens should affiliate themselves with some religious sect.

Withdrawing from the field of conjecture and considering actual

Bodenhamer *v.* State, 60 Ark. 10, 28 S. W. 507, which holds that crime need not be committed publicly. See also the extraordinary case of Commonwealth *v.* Kneeland, 37 Mass. 206, holding that no words of malediction, contumely or reproach need be used in order to constitute the crime of blasphemy, but that mere denial with intent to disparage God and destroy the reverence due Him is a blasphemy. See also State *v.* Chandler, *supra*... See further in this general connection a note on "Legality of Atheism" in 31 HAR. LAW. REVIEW. 289.

[71] See to the effect that courts in construing legislation are not to presume an unfriendly attitude toward religion generally, Church of the Holy Trinity *v.* United States, 143 U. S. 457. This case holds that the Act of Congress of 1885 "To prohibit the importation and migration of foreigners and aliens under a contract or agreement to perform labor in the United States or Territories" does not apply to a contract between an alien residing out of the United States and a religious society incorporated under the laws of a state, whereby he engages to remove to the United States and enter into the service of the Society as its rector or minister. The Court says at 472, "The general language thus employed is broad enough to reach cases and acts which the whole history and life of the country show could not have been intentionally legislated against. It is the duty of the courts under those circumstances to say that however broad the language of a statute may be, the act although within the letter is not within the intention of the legislature, and therefore cannot be within the statute.

conditions we are led to inquire whether the anti-religionist and non-religionist have been discriminated against by our laws as they now stand and are enforced. We have already seen that some anti-religious practices, such as blasphemy, have been prohibited, but they were not prohibited because they were anti-religious as distinguished from religious, but were prohibited along with objectionable religious acts and practices because they interfered with the public health, safety and morals. The West Virginia Constitution provides that, "Property used for educational, literary, scientific, religious or charitable purposes" may be exempted from taxation.[72] Thus property used for religious purposes is placed within the same category as property used for educational, literary, scientific or charitable purposes. The theory on which such property as the above named is exempted from taxation is that by common consent it is regarded as being used to encourage and carry out worthy enterprises beneficial to all. The anti-religionist or non-religionist might fail to recognize that property used for religious purposes comes within this category.

However that may be, our state legislature has seen fit to act in pursuance of this constitutional provision and has exempted property used for religious purposes from taxation.[73] This is a case where the atheist and the religionist are not made equal before our law. This is witnessed by the fact that by the exemption of church property the atheist is indirectly compelled to aid and support an enterprise from which theoretically he derives no benefit, and in which he does not believe. Our constitutional provision as to this matter and the legislation made in pursuance of it is defensible on grounds of practicability. Since as a practical matter the overwhelming majority of the citizens of this State are adherents of or are in sympathy with some religious belief, it is proper that religion generally should be encouraged, even though it does inconvenience a few.

After an investigation of the possibilities under our constitutional provisions and the legislation made in pursuance thereof, we conclude that, while it may have been the intention of the framers of our constitutions to guarantee religious freedom in the broad sense, the language used is not sufficiently comprehensive to preclude the possibility of judicial construction which would uphold the constitutionality of legislation based on the assumption that our

[72] See W. VA. CONSTITUTION, Art X, §1.
[73] BARNES' W. VA. CODE, 1923, §57 of Ch. 29. See also in this connection, State v. Kittle, *et al*, 87 W. Va. 526, 105 S. E. 776.

constitutional guaranties of religious freedom presupposes the adherence of all men to some religious belief.

In conclusion, we submit that the status of religious freedom in West Virginia is as follows: Using the term in the narrow sense so as to comprehend merely freedom for religionists we have absolute freedom in so far as religion is a condition of the mind and is purely matter of opinion, but in so far as it involves the performance of acts it is limited and restricted to the extent that the individual must conform to the rules for civil conduct prescribed by law, even though underlying those rules may be a code of morality which is the product of a religious doctrine to which he does not subscribe. But, using the term in the broad sense, so as to include freedom for non-religionists and anti-religionists, we neither have an absolute constitutional guaranty of religious freedom, since we have seen that the whole guaranty in so far as it relates atheists may be vitiated by judicial construction, nor as a matter of practice do we have religious freedom, since all our citizens are not equally protected by our laws irrespective of their religious belief or lack of religious belief.