LESSON FOUR

WHAT ARE THE ORIGINS OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT?

A. What Major Factors Led to the Sentiment[1] That There Should Be a Constitutional Amendment Which Protected Religious Freedom?

There were three major factors which led to increased sentiment for religious freedom.

1. Established Religion in America

One factor which led to the sentiment for religious freedom in America was the colonists' experience with established religion. An established religion in the American colonies meant that the government of a colony supported one or more particular religions or denominations. Much of the support was financial. Taxes were imposed and used to pay for church buildings and the salaries of clergymen. The particular beliefs of that religion were thus advocated and upheld.

Established religion in America could be traced to Europe. The Roman Catholic church was dominant in most of the European countries for centuries, but during the 16th century a schism in the church, known as the Reformation, led to the formation of several Protestant churches. Many countries came to support one of these new Protestant religions as their official religion. For example, the Anglican church became dominant in England and the Lutheran church in Sweden; the Catholic church, however, remained dominant in Spain and France.

The new state-supported Protestant religions were just as protective of their new-found influence and power in government as the Catholic church had been. They instituted many of the same discriminatory practices; for example, persecuting others for having different beliefs.

It was to escape religious persecution that many people came to America. Those people who came wanted to practice religion as they saw fit. It is ironic, then, that in some of the American colonies one religion became dominant, often with little toleration for disagreement with its views and practices.

The most powerful established churches were in some areas of New England, such as the Puritans in Massachusetts and Connecticut, and in the colony of Virginia which had a strongly established Anglican church.

Over the years the governments in different colonies began to support more than one religion. Thus an established religion came to mean in some instances

1. An attitude, thought, or judgment prompted by feeling.

aid to more than one denomination or sect. For example, while the Puritans were at first dominant in Massachusetts, later the Anglicans came to receive state support as well.

Around the time of the adoption of the Constitution, six states still provided for state support to religion: three New England states (Connecticut, Massachusetts and New Hampshire) and Georgia, Maryland and South Carolina.

2. Sentiment for Toleration

Another factor leading to increased sentiment for an amendment protecting religious freedom was the colonists' realization that toleration was necessary for a peaceful society.

Roger Williams, a Cambridge-educated Nonconformist,[1] immigrated to Massachusetts from England around 1631. At that time, the dominant religion in the Massachusetts Bay Colony was Puritanism. Williams attacked some of the beliefs and practices of the Puritans. He believed that the church and the state (government) should be kept separate and apart and that Puritans should not force others to conform to their views. Williams' views led to his banishment from the Massachusetts Bay Colony in 1635.

Williams then went to Rhode Island and in 1636 founded Providence, a colony which adopted a policy of tolerating all religions. Religious toleration was also practiced by William Penn and the Quakers in Pennsylvania. Yet toleration was not the rule in all the colonies. Often conflicts developed between different denominations wishing to believe and practice religion in their own ways.

After years of social disharmony caused by religious conflicts, the colonies gradually came to realize that toleration of religious differences was an important key to peaceful living.

3. Separation of Church and State

Seeing the bitterness that was created by having established religions and a lack of toleration for religious differences, many people in America came to believe that the state should not be involved in the support of any religion. Many colonists began to work aggressively toward a legislative separation of church and state.

In Virginia the fight for the separation of church and state took a dramatic turn prior to the Constitutional Convention of 1787. In 1784 Virginia had debated a bill on whether to extend an assessment (tax) to support religion. James Madison attacked the proposed assessment in a paper called *Memorial and Remonstrance Against Religious Assessments*. In it, he argued against any state involvement

1. A member of a Protestant denomination dissenting from the Church of England (the Anglican Church). The principal Nonconformist denominations are the Baptists, Congregationalists, Methodists, Presbyterians, Quakers, and Unitarians.

LESSON FIVE

THE FIRST AMENDMENT TODAY – RELIGION

A. Who Is Prevented from Violating the First Amendment?

The Bill of Rights was designed to place limits on government action, not on private action. This means that the government cannot do certain things to its citizens. For example, the government cannot establish a religion or prevent the free exercise of religion. The government cannot abridge freedom of speech or of the press. But which "government" is prevented from violating the Bill of Rights—the federal government or state or local governments?

The First Amendment begins, "Congress shall make no law...." Under the Constitution, Congress is a part of the federal government, so it is not surprising that for almost a century after the adoption of the Constitution, the Supreme Court took the position that the Bill of Rights was a limitation only on the federal government, not on state or local governments. The Supreme Court's view that the Bill of Rights applied only to the federal government was first announced in 1833 in a case called *Barron v. The Mayor and City Council of Baltimore.*[1] In *Barron*, the Supreme Court ruled that the Bill of Rights limited federal government action but not the actions of state governments.

B. Why Does the First Amendment Now Apply to State and Local Governments?

During the twentieth century the Supreme Court has changed the position it held since *Barron*. In 1925, in *Gitlow v. New York*,[2] the court ruled that the First Amendment placed limits on state and local governments just as it did on the federal government. What had changed since the *Barron* case? Why was the First Amendment now interpreted differently?

One thing which had changed was the passage of the Fourteenth Amendment to the Constitution in 1868 following the Civil War. One part of that amendment made blacks, many of them former slaves, citizens of the United States. Another part of the Fourteenth Amendment stated:

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1. 32 U.S. (7 Pet.) 242. Barron owned a very successful deep-water wharf where ships could dock to load and unload cargo. The City Council of Baltimore passed several laws requiring city improvements which changed the course and direction of the water. As a result, Barron's wharf was no longer in deep water and boats could not use it. Barron sued the city, citing his Fifth Amendment rights ("...[P]rivate property [shall not] be taken for public use without just compensation."), and won $4,500. On appeal, this decision was reversed. Barron then took the case to the U.S. Supreme Court which upheld the appeals court's decision stating that the rights contained in the Bill of Rights applied only to the federal government, not to the state governments; therefore, his Fifth Amendment rights had not been violated.

2. 268 U.S. 652. Gitlow had urged, in writing, the overthrow of the government through mass strikes and mass action. He was convicted under a New York State statute which made it illegal to advocate the forceful overthrow of the government. Gitlow argued that the statute violated his First Amendment right to free speech. The Supreme Court ruled that the statute did not violate the First Amendment's guarantee of free speech and that Gitlow could be convicted and sent to prison. Even though Gitlow did not successfully demonstrate that his First Amendment rights had been violated, this was one of the early cases in which one of the rights in the Bill of Rights was made applicable to the states.

The Supreme Court sometimes uses three tests to determine whether or not a statute violates the Establishment Clause. (These tests were discussed by the court in a case called *Lemon v. Kurtzman, Superintendent of Public Instruction of Pennsylvania.*[1]) First, a statute must have a secular (worldly) rather than a religious purpose.[2] Second, the "principal or primary effect [of the statute] must be one that neither advances nor inhibits religion."[3] Third, "the statute must not foster 'an excessive government entanglement with religion.'"[4]

2. JUSTICE WILLIAM REHNQUIST — REJECTION OF THE "WALL OF SEPARATION" DOCTRINE

In a dissent in *Wallace, Governor of Alabama v. Jaffree,*[5] Justice William Rehnquist criticized and rejected the view that the Establishment Clause meant a wall of separation between church and state. First, Justice Rehn-quist criticized, as historically inaccurate, the view that the Founding Fathers wanted to create a wall of separation between church and state. Justice Rehnquist argued that James Madison, the person most responsible for guiding the Bill of Rights through Congress, did not advocate the position that there should be a wall of separation between church and state. Similarly, other persons who debated the issue of a Bill of Rights did not advocate the wall of separation between government and religion.

Second, he stated that the Establishment Clause means only that the government cannot establish a national religion and cannot prefer one religion or denomination over another. He said in *Wallace v. Jaffree*:

> It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well- accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations....The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers [of the Constitution] intended to build the "wall of separation" that was constitutionalized in *Everson.* (472 U.S. at p. 106)

Third, Justice Rehnquist criticized the three-part test in *Lemon* as unworkable and not easily applied in specific cases. As to the first test in *Lemon*, that the law must have a secular purpose, Justice Rehnquist argued that a legislature could always give a secular reason for its action and a court could not ignore that reason in deciding if the statute violated the First Amendment. On the other

1. 403 U.S. 602 (1971)
2. Ibid, p. 612
3. Ibid, p. 612
4. bid, p. 613
5. 472 U.S. 38 (1985)

ACTIVITY 1 FOR LESSON FIVE

COMPREHENSION QUICK CHECK

1. The First Amendment is a check on government action. ___ Yes ___ No
2. The First Amendment is a check only on the federal government. ___ Yes ___ No
3. The government can impose a religion on American citizens. ___ Yes ___ No

ACTIVITY 2 FOR LESSON FIVE

1. What was decided in *Barron v. Mayor and City Council of Baltimore*? How did *Gitlow v. New York* change what was decided in *Barron*?

2. What significance does the Due Process Clause of the Fourteenth Amendment have to the First Amendment?

3. What is meant by the term "wall of separation"?

4. What does an "establishment of religion" mean according to Justice Hugo Black? Examine the quotation from *Everson* concerning the "wall of separation." List ten things which Justice Black says neither the federal nor state governments can do.

Case 3: *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986)

In 1979 a young man who was progressively losing his eyesight applied to the Washington State Commission for the Blind for vocational rehabilitation aid. He wanted to receive financial assistance to attend a private Christian College in Washington in order to become a pastor, missionary, or youth director. A Washington statute authorized aid to the visually handicapped for training in the "professions, business or trades."

Case 4: *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985)

The Grand Rapids School District provided for two programs to be carried on in mostly sectarian schools (schools operated by religious groups, or sects) at public expense. The first program was called a Shared Time Program and was offered during the school day. It was additional to the regular curriculum. Instruction was given in "remedial" and "enrichment" mathematics and reading, in art, music, and physical education.

The second program was called a Community Education Program and was offered in the evenings to both children and adults. Subjects included Spanish, home economics, gymnastics, and nature appreciation. Space in the sectarian schools was leased at public expense. The teachers in the Shared Time Program were full-time public school employees. The teachers in the Community Education Program were part-time public school employees. All the teachers were paid with public funds. Materials, supplies, and equipment were provided with public funds as well.

ACTIVITY 5 FOR LESSON FIVE

Justice Rehnquist's dissent in *Wallace v. Jaffree* states that the Establishment Clause of the First Amendment does not mean there is a wall of separation between church and state. It simply means that the government (1) cannot establish a national religion and (2) cannot show a preference for one religious sect or denomination over any other.

Review the cases in Activity 4 for Lesson Five. If Justice Rehnquist's test is used (no establishment of a national religion and no preference for one religious sect or denomination over another), do the cases in Activity 4 show a violation of the Establishment Clause? Why or why not?