

CHAPTER 1

Introduction: Of Liberty, Laws, Religion, and Regulation

In a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case of the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.

– James Madison, *Federalist 51*

ON APRIL 13, 1598, King Henry IV of France signed a remarkable document. In a nation where the Roman Catholic Church reigned supreme, the Edict of Nantes gave French Protestants – the Huguenots – a guarantee that they would no longer be persecuted for their dissenting religious beliefs. Although it did not provide the Huguenots with a legal status equal to that of Roman Catholics, this document represented an important step toward greater freedom of conscience in Europe. Unfortunately, it would not last. Less than a century later (in 1685), King Louis XIV would rescind the Edict of Nantes, an act that resulted in a rush of violence directed at the Huguenots and the subsequent emigration of nearly four hundred thousand French Protestants to various parts of Europe and the British American colonies. Yet, while France was backtracking on its movement toward religious liberty, a neighboring country was moving forward.

Across the English Channel in Britain, King William of Orange proclaimed the Act of Toleration (1689), which marked a significant step

toward the gradual implementation of religious liberty in Great Britain. The rapid expansion of dissenting Protestant denominations (e.g., Presbyterians, Quakers, and Anabaptists) in England during the 1600s made a policy of continued persecution costly and impractical. Efforts to curtail the liberties of Catholics and Protestant dissenters early in the century resulted in an extended period of internecine warfare that hindered economic progress and made unification of the British Isles a difficult task. Not only was the Act of Toleration a response to the religious strife that tore violently at the fabric of English society during the seventeenth century, but also it was a reaction to the growing religious toleration shown by one of Britain's main economic rivals – the Netherlands. Dutch Protestants, having suffered persecution under Spanish rule, ensured that minority religions were protected after the Netherlands gained independence in 1579. Not only did this facilitate trade with other nations, enriching the Dutch economy, but also the Netherlands served as a safe haven for religious sects fleeing persecution in England. These religious refugees, which included the famed Pilgrims, were often the most creative and industrious citizens in their home nations; England's loss was the Netherlands' gain. The English Toleration Act helped address this situation.

Ironically, although dissenting sects long fought for religious toleration in England, some were rather hesitant to extend it to others in the American colonies. The Pilgrims may have found a haven from persecution by fleeing to America, but Quakers and Baptists did not fare well in the Puritan strongholds of New England. Anglicans, too, were quick to declare their religious dominion. Virginians were required to pay taxes to support the officially established Church of England, a fact that the followers of other denominations found to be quite distasteful. And Catholics were never much liked anywhere in the colonies outside of their enclave in Maryland. But by the dawning of U.S. independence, the environment had shifted noticeably. The rise of religious pluralism and tolerance in Pennsylvania pressured the New England assemblies to back away from the most egregious forms of religious persecution. Beginning in 1776, the Virginia Assembly suspended the payment of tax-supported salaries to Anglican priests and placed the official status of the Church of England in limbo. A decade later, a series of contentious debates in the Virginia Assembly finally resulted in the passage of Thomas Jefferson's Bill for Establishing Religious Freedom, which eventually served as the template for the First Amendment of the U.S. Constitution. Even Catholics witnessed improvement in their legal and social status by the late 1700s. During the Revolutionary War, colonial Catholics once derided as "papists" and "antichrists"

quickly became allies in the war against King George III. Nonetheless, Catholics still remained on the “least tolerated” list of denominations and faced ongoing discrimination throughout the nineteenth century.

Catholics fared better to the south in the Spanish colonies, albeit at the expense of Protestant freedoms. Roman Catholicism was granted an exclusive and privileged position in colonial Latin America. The Spanish Crown guaranteed that only one faith would be permitted in its section of the New World. Tithes were collected by the colonial government, Church officials tended vast landholdings granted to them by the Crown, and clergy were tried for misdeeds in separate ecclesiastical courts (*fueros eclesiásticos*), where they often received more favorable treatment. The *quid pro quo* for all of these benefits was that the Spanish monarch had the ability to appoint Church officials and approve of papal decrees that would apply to the colonies – a loss of religious freedom that the Vatican was willing to pay for its advantaged position. Circumstances changed dramatically for the Catholic Church in the decades following Latin American independence. During the mid-nineteenth century, Church landholdings were seized (often without compensation), and the rights of the clergy to conduct and collect fees for marriage and funeral services were revoked. Ecclesiastical *fueros* were abolished and priests came under the jurisdiction of civil courts. By the turn of the twentieth century, a handful of Latin American governments were allowing Protestant missionaries greater access to their countries, though enforcement of religious liberty was highly selective. Growing liberty and toleration throughout the mid- to late twentieth century led to a Protestant “explosion” in several parts of the region.

The Mexican Revolution ushered in perhaps the most dramatic change in church-state relations in Latin American history. The revolutionary constitution of 1917 prohibited the Church (and other religious denominations) from owning any property and clergy lost the right to run for office or vote, effectively making them second-class citizens, a situation immortalized in Graham Greene’s classic novel *The Power and the Glory*. Passions ran high over this new church-state regime. Enforcement of these constitutional provisions ignited a short-lived civil war in the country during the late 1920s. However, conflict between the Church and state eased by the 1930s and by 1992 the Mexican episcopacy, with help from the Vatican, compelled the government to rescind the most restrictive anticlerical provisions in the constitution. These changes not only benefited the Catholic Church but also helped non-Catholics seeking access to the country.

Anticlericalism wasn’t restricted to Mexico during the twentieth century. The fates of religious groups under the yoke of Communist rule are well

known. Although it did not completely eliminate religious practice in Russia and Eastern Europe, the Soviet regime implemented such highly restrictive conditions on churches that religious participation became a rarity in most of these nations. Then in 1989 the Berlin Wall crumbled. The Kremlin no longer controlled Eastern Europe. The Soviet Union collapsed two years later. Along with the process of constructing new democratic constitutions, politicians throughout the region set about drafting laws governing religious groups. Although the United Nations' (UN's) Universal Declaration of Human Rights served as a general template for codifying religious freedom in each country, the specific regulations emanating from the policy-making processes varied quite substantially throughout the region. In Russia, an initial regime of religious freedom gave way to restrictive legislation that primarily favored the Russian Orthodox Church (ROC) just a half decade later. The most interesting irony of this legislation is that it was supported by former members of the Soviet Communist Party who had previously suppressed the rights of Orthodox clergy. Although the Russian Orthodox hierarchy celebrated the new laws that came into being in 1997, religious minorities heard the door to a promising new mission field slam shut.

The Baltic States of Lithuania, Latvia, and Estonia offer an instructive comparison.¹ Admittedly, these three nations differ in terms of their religious and ethnic makeup and their historical experiences predating the Communist era. Nonetheless, all three suffered under a similar repressive Soviet rule devoted to reducing religious influence in society from the end of World War II to 1990. The leadership arising from the ashes of Communist rule in each nation faced a "blank slate" for writing laws regulating religious groups. Yet the regulatory regimes taking shape by the mid-1990s differed dramatically. Lithuania had one of the most aggressive activist groups promoting religious liberty for Catholics *and* religious minorities (such as Pentecostals) in the 1970s and 1980s, advocating their positions through the largest underground publication in the Soviet Union – the *Chronicle of the Lithuanian Catholic Church*. Yet when the newly independent Lithuanian government finally instituted its laws governing religious bodies in 1995, Pentecostals (and several other prominent religious minorities) did not make the list of nine officially recognized "traditional" religions receiving special legal status. A concordat with the Vatican firmed up the preferential status of the Roman Catholic Church five years later. Neighboring

¹ I am deeply indebted to Cheryl Žilinskas for her knowledge, insight, and work on Eastern European religiosity.

Latvia imposed similar restrictions on religious minorities, only providing legal recognition for six traditional religions and not allowing more than one organization within the same confession – that is, an officially established church – to register, making it all but impossible for highly splintered evangelical and Pentecostal faiths to gain equal status. Like their southern neighbor, the Latvian government claimed that the influx of dangerous sects was a primary motivation for its lack of flexibility with particular religious groups. By contrast, as of 2006, Estonia – with a mix of Orthodox and Lutherans and a smattering of other denominations – possessed no officially recognized religion and maintains comparatively minimal requirements for the registration of new religious communities, making it the most religiously free country in the former Soviet bloc according to a recent Freedom House ranking (Marshall 2000, 26). Despite this, the Estonian parliament has considered tightening regulations on religious groups in recent years.

The aforementioned cases represent significant historical changes in religious liberty. In most instances, the path has been toward expanded freedom for religious organizations. But the march of religious liberty certainly has had its setbacks over time, as witnessed by the revocation of the Edict of Nantes and the 1917 Mexican Constitution.² And a casual glance at nations today reveals significant variation in the nature and extent to which churches are regulated, as can be seen in the Baltic States. All of this raises a series of important questions central to this book. What accounts for the origins and development of religious liberty over time? How can we explain the differences in the nature of laws regulating religions throughout countries? Related to these questions, we must ask why governments would ever want to place restrictions on the free worship of its citizens in the first place. Why would politicians favor one confession over other denominations, effectively guaranteeing a religious monopoly over a population? And once a religious monopoly is established, what factors would motivate politicians to deregulate the religious economy (i.e., introduce religious liberty)?

The issue of religious liberty garnered growing attention in the latter decades of the twentieth century. The UN saw fit to reaffirm its commitment to religious liberty in 1981 with Resolution 36/55, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief. Seventeen years later, one hundred fifty representatives from various countries and religious groups gathered in Oslo to declare the

² Even in the United States, perhaps the cradle of religious liberty, the cause of religious liberty has arguably had its setbacks, a subject that will be examined in Chapter 6.

importance of religious freedom yet again. A plethora of nongovernmental organizations (NGOs) has arisen during this time to monitor religious freedom throughout the world, including the International Coalition for Religious Freedom, the International Religious Liberty Association, International Religious Freedom Watch, the Religious Liberty Commission and the Rutherford Institute (cf. Moreno 1996). Even the prestigious Freedom House, which has monitored economic freedom and civil liberties since 1941, created a separate division specifically for monitoring religious freedom in 1986 – the Center for Religious Freedom (cf. Marshall 2000).

Policy makers have turned their attention to the issue of religious liberty, largely responding to pressure from constituents interested in the issue. In 1998, the 105th Congress of the United States passed the International Religious Freedom Act (P.L. 105–292) requiring the U.S. Department of State to provide an annual overview of religious liberty and persecution around the world for consideration in foreign-policy making. It has factored into debates surrounding the economic trade status of several countries, most notably the People's Republic of China (PRC) where groups such as the Roman Catholic Church, various Protestant missionaries, and Falun Gong have suffered serious persecution. Domestically, a series of U.S. Supreme Court decisions throughout the 1990s prompted federal policy makers to pass legislation aimed at specifically defining and protecting the rights of religious individuals and institutions.³ Other countries such as Sweden have substantially modified the way in which religious groups are regulated and a number of other countries in Europe are trying to find ways to legally incorporate the Islamic faith of immigrants into their highly secular societies. Finally, the salience and increased visibility of religious-based conflict at the beginning of the twenty-first century has served only to reinforce our desire to understand all facets of religion, including the interactions between church and state – the institutional nexus of religious freedom.

To date, however, few scholars have sought to explain the rise of – or, more precisely, the change and fluctuations in – religious liberty in any theoretically systematic way. Most studies have either emphasized the consequences of varying forms and levels of religious liberty or regulation (cf. Monsma and Soper 1997; Stark and Iannaccone 1994; Chaves and Cann 1992), discussed the normative implications of varying interpretations

³ The two major pieces of legislation passed by the U.S. Congress were the Religious Freedom Restoration Act (1993), which was declared partially unconstitutional by the Supreme Court four years after its implementation, and the Religious Land Use and Institutional Persons Act (RLUIPA) (2000).

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Anthony Gill

Excerpt

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of religious freedom (cf. Segers and Jelen 1998; Instituto de Investigaciones Jurídicas 1996),⁴ or provided detailed historiographies (cf. Curry 1986; McLoughlin 1971) with little attempt to develop a generalizable theory for the emergence of religious liberty throughout time and space.⁵ Only a few scholars – such as Roger Finke (1990),⁶ Charles Hanson (1998),⁷ and John Anderson (2003) – have attempted to provide theoretically developed explanations for the rise of religious freedom, though each focused on specific case studies and did not seek greater generalizability for their ideas. Part of this general scholarly neglect can be attributed to the fact that the answer to this puzzle (if it is considered a puzzle at all) is thought to be obvious. The secularization paradigm, which has dominated social scientific studies of religion until recently, appeared to provide the solution. From this perspective, religious liberty was concomitant with religious pluralism and a general decline in spirituality and was considered a natural outcome of the process of social, political, and economic modernization. The question about the origins of religious liberty was not seen as much of a question at all. This book attempts to remedy the neglect of this important topic by providing a general theoretical framework for studying the origins and development of religious liberty.

Although the path toward religious liberty has often been considered a natural outgrowth of more “modern” thinking (i.e., the triumph of Enlightenment philosophy) over traditional thought, the overarching thesis presented here argues that *interests* play an equally important if not more critical role in securing legislation aimed at unburdening religious groups from onerous state regulations. Specifically, I will focus on the political and

⁴ The normative literature on religious freedom, centering mostly on interpretations of the U.S. Constitution’s First Amendment, is too voluminous to cite here. For the broad parameters of the debate, see Clarke Cochran’s detailed preface to Segers and Jelen (1998). Or, should the reader be more adventurous, I suggest a stroll down the BR and BX aisles of any major research library.

⁵ There are several edited volumes such as Sigmund (1999), Helmstadter (1997), and van der Vyver and Witte (1996) that deal with religious freedom in different eras and countries, but the nature of these volumes – with different authors emphasizing different aspects of religious liberty – make the promulgation of a reasonably unified theory difficult. This should not be seen as a critique of these volumes as they provide a wealth of detailed information in their own right. Moreover, had any of these works attempted to provide an overarching theory of the origins of religious liberty, I would not be writing this book.

⁶ Finke’s article on the *origins* and *consequences* of religious liberty tended to focus more on the latter than the former, though his initial thoughts on the topic of origins was a major inspiration for this work.

⁷ Hanson’s explanation for why American colonists yielded greater tolerance to Catholics during the Revolutionary War might be considered more of an emphasis on a particular factor – the need to win French support – than a deductive theory.

economic interests of politicians (rulers)⁸ and the institutional interests of religious leaders in the policy-making arena. As such, this book discusses the *political*, as opposed to the *intellectual*, origins of religious liberty. This is not to say that ideas are irrelevant when formulating policy; ideas do matter as will be discussed in Chapter 2. However, when competing ideas exist in society, it is often *political interests* that tip the balance of the debate in one direction or another.

The interests at play in determining the nature of religious liberty come from both the side of religious actors (church leaders, clergy, and parishioners) and secular rulers (legislators, presidents, monarchs, and dictators). Leaders of a dominant religion in society, I contend, are inclined to prefer a regulatory regime that discriminates against religious minorities, making it difficult for them to worship and/or gain converts.⁹ In contrast, religious minorities will favor regulations that make it easier for their clergy and members to openly practice their faith and proselytize.¹⁰ The degree of denominational pluralism in a society thus affects the likelihood that greater religious liberty will prevail. A religious market with a plurality of denominations (i.e., where no majority denomination exists) will be most favorable to the expansion of religious freedom, something that James Madison recognized in *Federalist 51*. An environment wherein religious minorities are gaining significant ground will also be amenable to the growth of religious freedom but not without conflict or attempts to restrict that freedom by leaders of the dominant religion. Societies where one denomination is hegemonic and religious minorities are of no consequence will tend toward a highly regulated environment favoring the dominant church. The one important exception to this latter situation is where political leaders see the dominant church as a potential threat to their political survival and seek to limit its societal influence. Such situations will also tend toward a highly regulated (less free) religious environment that does not favor the dominant church nor most other denominations.

⁸ The term *politician* will be used throughout the text in a generic manner to refer to any type of political actor – be it a democrat or a dictator.

⁹ As will be noted in the following text, this discrimination can be subtle yet very powerful. Although proclaiming favoritism toward religious freedom as a general principle, it is still possible to favor microregulations that inhibit an upstart church from gaining foothold in a certain area. Battles over land-use law and zoning regulations are common in religious freedom cases.

¹⁰ The scope of this book is largely limited to religious liberty in Christian societies wherein most of the religions examined are proselytizing. I realize that some faiths (e.g., Judaism) and denominations do not aggressively seek members. Nonetheless, the arguments made in this book still apply.

But religious leaders and activists are not the only ones who determine the degree of religious freedom in society. The role of government officials is essential too. After all, these secular rulers – be they democrats or dictators – are the ones who put pen to paper and define the legal parameters under which churches and their members operate. Understanding the motives and incentives of these rulers thus becomes crucial in understanding the origins of religious liberty. Moreover, policy makers do not make laws and regulations on a specific topic in a vacuum; in other words, policy makers often consider factors seemingly unrelated to the specific topic under debate when passing legislation. This is important to realize considering that many of the discussions related to religious liberty tend to center on the moral arguments surrounding different legal configurations of religious freedom (e.g., Harmin 2005; Pufendorf [1687] 2002; Segers and Jelen 1998; Tierney 1996; Locke [1689] 1955).¹¹ This leaves the impression that the nature of religious liberty is the result of an intellectual (and often esoteric) debate. To the contrary, I contend that political actors consider a set of other *interests* when deciding how to regulate religion. Specifically, I argue that politicians take into account their own political survival (i.e., ability to get reelected or stave off a coup), the need to raise government revenue, and the ability to grow the economy when writing laws pertaining to religious freedom. Whenever a rather restrictive set of laws governing religious activity affects any of these three interests, secular rulers will be more apt to liberalize regulations on religion – that is, promote religious liberty.

Defining the Scope of Religious Liberty

What constitutes religious liberty? As an outside observer, how can one tell whether or not a country has religious freedom? This latter question is perhaps misleading in that it assumes religious liberty is a simple dichotomy – that is, it is something that a nation either possesses or does not possess. Constitutional declarations pronouncing a “right to conscience” enhance this perception that religious freedom is an “either/or” concept. In reality, religious liberty is a large umbrella concept that covers a wide array of policies that affect worshipers, clergy, and spiritual institutions. Methodist Bishop G. Bromley Oxnam, in a 1947 article for the magazine *Churchman*,

¹¹ Again, this is most common in scholarly discussions about the First Amendment of the U.S. Constitution and the various cases that have come before the U.S. Supreme Court related to the subject of religion.

laid out what might be the best definition of *religious liberty* and helped to elucidate the scope of policies that affect such freedom:

When we speak of religious liberty, specifically, we mean freedom of worship according to conscience and to bring up children in the faith of their parents; freedom for the individual to change his religion; freedom to preach, educate, publish, and carry on missionary activities; and freedom to organize with others, and to acquire and hold property for these purposes. (Cited in Stokes 1950, 20–1)¹²

What Oxnam reveals here is that religious liberty involves more than the right of personal conscience; it includes a host of policies concerning property rights, education, media ownership, and public speech. The ability of congregants to come together, build a church, and reach out to nonbelieving members of the community is an essential part of religious freedom. Although religious freedom can certainly be framed in moral imperatives, it is important to understand that religious liberty is a matter of government regulatory policy and can touch on issues as diverse as citizenship requirements and land-use restrictions.

From this point forward, I will view religious liberty as a matter of government regulation. Thinking of religious liberty in regulatory terms has several analytical advantages. First, following up on the work of scholars studying regulatory policy, the analysis can be cast in terms of cost-benefit analysis. Government policies impose various costs and benefits on different individuals and groups. In a world where people have unlimited goals and face scarce resources, any increase in cost can be thought of as a restriction on one's liberty; making some activity more expensive reduces the ability of a person with fixed resources to pursue that activity.¹³ For instance, a

¹² The original citation is attributed to G. Bromley Oxnam, "Liberty: Roman or Protestant," *Churchman* (November 15, 1947). No page numbers provided.

¹³ I am aware of the argument that without a minimal restriction of liberty imposed by some form of government, humans would be living in a Hobbesian state of nature wherein life is solitary, nasty, brutish, and short. Such a world – free from all government restrictions – would not be conducive to liberty at all given that we would live in a perpetual state of fear of others. As such, some basic restrictions upon behavior – e.g., laws preventing murder, theft, and jaywalking – are necessary for humans to realize a more comfortable and expansive freedom. Institutions such as an independent judiciary are also necessary to guarantee that freely made economic contracts are respected. In order to recoup the costs for a government to provide the public good of security, it is necessary to coerce citizens into paying taxes. Paying taxes is a restriction on liberty in an absolute sense, but the sense of security that tax revenue buys does enhance our ability to enjoy freedom. The optimal level of taxation needed to provide for basic public goods that allow us to enjoy a comfortable freedom is up for eternal debate. Suffice it to say that I do not intend to resolve that debate here.