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The Wall of Separation Between Church and State:

The Role of Christian Natural Law in American Jurisprudence Past and Present

Brent Taylor

In 2002 the California based Ninth Circuit Court of Appeals ruled that recitation of the Pledge of Allegiance in public schools was unconstitutional. The Court declared, "The Pledge, as currently codified, is an impermissible government endorsement of religion" (Newdow 2002, 20). The dramatic ruling, the ensuing debate, and the eventual reversal by the US Supreme Court brought one of America's most divisive issues again to the political forefront: the separation of church and state. The courtroom is the primary battleground for this divisive debate, as opponents and proponents file suits and countersuits. The current judicial paradigm for this controversial topic is the 1947 Everson v. Board of Education case, where the Supreme Court declared, "The First Amendment has erected a wall between church and state" (Everson 1947, 18). The 'wall of separation' paradigm has—since its popularization in 1947—become the dominant jurisprudential approach to church and state questions in the United States. This paper uses judicial evidence to argue that although the 'wall of separation' metaphor is the current judicial interpretation, this interpretation is a fairly recent creation—one which the Founding Fathers did not author and would not recognize.

The author acknowledges the burden of proof required to substantiate such a dramatic claim, because as Carl Sagan famously remarked, "extraordinary claims require extraordinary evidence." As such, this paper uses direct citations from multiple pre-Everson US and state Supreme Court cases to demonstrate that the American Founders created no clear 'wall of separation,' but rather that the Founders built a government and courts based on a legal system that this paper terms "Christian natural law." Sir William Blackstone—arguably the thinker who most influenced the American Founders—was also the major proponent of the Christian natural law system. The influence of Blackstone and Christian natural law is clearly evident in pre-Everson American jurisprudence, but the Court's ruling in Everson has dramatically changed the course of American church and state law by erecting a 'wall of separation' unintended by the Founders.

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Thinkers from Plato and Aristotle to Aquinas and Locke have elucidated different principles of what is loosely called the natural law position. While their views of natural law vary greatly, they all agree on what is generally considered a fundamental principle of natural law: “the claim that there is a necessary connection between law and morality” (White & Patterson 1999, 4). Proponents of natural law also generally hold that these moral principles “are universal” (White & Patterson 1999, 4).

Early philosophers who proposed natural law arguments generally credited “reason” with the disclosure or discovery of natural law principles, rather than a Supreme Being or metaphysical force. For example, Cicero asserted, “True law is right reason in agreement with nature” (Bix 1985, 224). Classical Christian thinkers like Augustine, Aquinas, and Gratian, however, developed natural law theories that were deeply rooted in Christian theology. In Decretum, Gratian’s influential medieval work of jurisprudence, he asserts, “Natural law (ius) is what is contained in the Law and the Gospel by which each is commanded to do to another what he want done to himself and forbidden to do to another what he does not want done to himself” (Tierney 1997, 59). The scriptures from the Old and New Testaments (the Law and the Gospel, respectively) form the basis for Gratian’s natural law theory; in short, he bases his jurisprudence on the Biblical “Golden Rule” of doing good to one another.

Like Gratian, Aquinas also based his philosophy of natural law on Christian principles. Aquinas created a hierarchy of laws which are, listed in descending order of perfection and importance: eternal law, natural law, divine law, and human law. Eternal law is fully known only to God, but every other form of law, “is a kind of reflection and participation of the eternal law” (Steinberger 2000, 520). Aquinas blends Christianity and classical, rational thought by asserting that divine law is revealed by God to man, yet natural law is discovered by reason. Aquinas explains that the, “participation of the eternal law in the rational creature is called the natural law” (Steinberger 2000, 512). In summary, natural laws are based upon God’s eternal laws, but they are discovered by human reason, and humans are expected in turn to use reason to create human laws based upon the natural laws.

The influence of this fusion of Classical and Christian thought upon Western culture can hardly be overestimated. This blending of reason and revealed Christianity introduced by the medieval canonists and later perfected by Locke and Blackstone would form the basis of English (and by extension, American) common law and jurisprudence.

Sir William Blackstone, an Eighteenth Century English jurist, built upon the foundation of previous natural law thinkers and advanced a system that this paper terms “Christian natural law.” Belief in a “Supreme Being,” who, “formed the universe,” and “established certain laws” (White & Patterson 1999, 27) is the foundation of Blackstone’s Christian natural law. Based upon this strong belief in a Supreme Being, Blackstone held that nothing in the universe or nature is “left to chance,” but that instead everything is “preformed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator” (White & Patterson 1999, 28).

Blackstone built his legal theory upon this belief in a Supreme Creator by stating, “[the] will of [the] maker is called the law of nature,” and by identifying these natural laws as “the eternal immutable laws of good and evil (White & Patterson 1999, 28).”
meaning and purpose of these natural laws are not readily apparent, however, and hence God “gave [man] also the faculty of reason to discover the purport of these laws” (White & Patterson 1999). Thus, man is able to discover the natural laws by reason, which is a gift from the Creator.

In addition to natural law, Blackstone gives great importance to divine law, which is not discovered by reason, but rather by “immediate and direct revelation” (White & Patterson 1999, 30). This divine law is “to be found only in the holy scriptures” (White & Patterson 1999, 30) and is given by God to guide men spiritually on earth.

Blackstone explains, “Upon these two foundations, the law of nature and the law of revelation, depend all human laws” (White & Patterson 1999, 30). Thus, both direct revelation and human reason have a place in his Christian natural law theory. Humans are to use revealed divine law along with the reasoned understanding of natural law to create just human laws. These laws should be based upon the following general principles: “That [man] should live honestly, should hurt nobody, and should render to everyone his due” (White & Patterson 1999, 28-29). Importantly, Blackstone states that human laws should never “be suffered to contradict” either divine or natural law, because human laws “are only declaratory of, and act in subordination to, the former” (White & Patterson 1999, 30).

In Blackstone’s system, law is supreme. Law is not merely “counsel” or “persuasion,” but it is a, “matter of injunction . . . a command directed to us” (White & Patterson 1999, 32). The rule of law is to be respected and obeyed, particularly since human law derives from divine law. A far-sighted Blackstone also suggested the manner by which laws should be interpreted, “The fairest and rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable” (White & Patterson 1999, 34-35). Although Blackstone’s theory allows for legal interpretation, he warns against giving judges too much judicial discretion, “which would make every judge a legislator, and introduce the most infinite confusion” (White & Patterson 1999, 36). Not only would giving judges too much interpretive power create confusion, it might also “destroy all law, and leave the decision of every question entirely in the breast of the judge” (White & Patterson 1999, 36).

Blackstone summarizes his “golden-rule” Christian natural law system by explaining that it is the “excellent rule of gospel-morality, of ‘doing to others, as we would they should do unto ourselves’” (White & Patterson 1999, 36). His theory provides a foundation for law in the Christian religion and also a practical method for interpreting and making laws, by referring to the intentions of the legislators. His theory of Christian natural law differs from Greco-Roman natural law, in that Blackstone’s uses as a foundation the Christian religion and the Judeo-Christian Scriptures. This theory of Christian natural law was deeply influential on the American Founders.

The influence of Blackstone and of Christian natural law upon the American Founding Fathers was statistically quantified in an important study conducted by Dr. Donald Lutz from the University of Houston. In the most comprehensive study of its kind, Lutz reviewed 15,000 published political writings (speeches, articles, pamphlets, etc.) from the Founding Era of the American Republic (defined as 1760-1805) and then analyzed the cited sources for each statement in the writings. The purpose of the study was to document and quantify the relative influence of different European writers on
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American political thought by tracing how many statements printed during the founding era were based upon their writings. After ten years of research Lutz concluded his study with two unexpected results.

First, the study showed that the Bible was actually the most cited source by far in Founding Era political writings. Second, Blackstone was the second most cited individual thinker during the entire Founding Era, and he was by far the most cited thinker during the time the Constitution was actually being written, ratified, and implemented. Both of these findings give support to the assertion that the Christian natural law championed by Blackstone and others had significant influence upon the Founding Fathers and upon the foundations of American Jurisprudence.

Lutz’s careful review of thousands of documents showed that the Bible alone accounted for an astounding 34 percent of citations from Founding Era writings (Lutz 1984, 192). Lutz characterized this finding as “somewhat surprising.” (Lutz 1984, 192) and explained that it was important, “to note the prominence of biblical sources for American political thought, since [the Bible] was highly influential in our political tradition” (Lutz 1984, 192). Table 1 is a reproduction from Lutz’s study showing the relative number of citations attributed to thinkers of various political categories. The table shows the absolute dominance of Biblical citations vis-à-vis citations from any other source or category.

<table>
<thead>
<tr>
<th></th>
<th>1760s</th>
<th>1770s</th>
<th>1780s</th>
<th>1790s</th>
<th>1800-05</th>
<th>Total</th>
<th>% of</th>
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<td>24</td>
<td>44</td>
<td>34</td>
<td>29</td>
<td>28</td>
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<td>Whig</td>
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<td>54</td>
<td>9</td>
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<td>Peers</td>
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<td>2</td>
<td>5</td>
<td>6</td>
<td>5</td>
<td>30</td>
<td>4</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
<td>1</td>
<td>1</td>
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<td>2</td>
<td>18</td>
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Besides finding that the Bible was actually the most often cited source in Founding Era writings, Lutz also found Blackstone was the second most cited individual author overall, and the most cited author during the Constitutional Era. While thinkers such as Locke and Montesquieu were more often cited during the Revolutionary period, Blackstone is by far the most prominently cited thinker during the Constitutional period (1790-1805) when the actual details of the new Constitution, government, and courts were being worked out. Table 2 is a reproduction from Lutz’s study and illustrates
Blackstone's dominance in this later period of the Founding Era, as indicated by the fact that he is cited more than twice as often as any other individual thinker during that period.

Table 2 - Most Cited Individual Thinker by Decade

<table>
<thead>
<tr>
<th>Thinker</th>
<th>1760s</th>
<th>1770s</th>
<th>1780s</th>
<th>1790s</th>
<th>1800-05</th>
<th>Total Number</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montesquieu</td>
<td>8</td>
<td>7</td>
<td>14</td>
<td>4</td>
<td>1</td>
<td>8.3</td>
<td></td>
</tr>
<tr>
<td>Blackstone</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>11</td>
<td>15</td>
<td>7.9</td>
<td></td>
</tr>
<tr>
<td>Locke</td>
<td>11</td>
<td>7</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2.9</td>
<td></td>
</tr>
<tr>
<td>Hume</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>6</td>
<td>5</td>
<td>2.7</td>
<td></td>
</tr>
<tr>
<td>Plutarch</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>1.5</td>
<td></td>
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<tr>
<td>Bocarina</td>
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<td>1</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>1.5</td>
<td></td>
</tr>
<tr>
<td>Trenchard &amp; Gordon</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>1.4</td>
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<td>Delomme</td>
<td>0</td>
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<td>1</td>
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<tr>
<td>Pufendorf</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>5</td>
<td>1.3</td>
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<td>Coke</td>
<td>5</td>
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<td>1</td>
<td>2</td>
<td>4</td>
<td>1.3</td>
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<tr>
<td>Clark</td>
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<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1.2</td>
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<td>Hobbes</td>
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<td>1</td>
<td>0</td>
<td>0</td>
<td>1.0</td>
<td></td>
</tr>
<tr>
<td>Others</td>
<td>33</td>
<td>25</td>
<td>37</td>
<td>29</td>
<td>32</td>
<td>32.4</td>
<td></td>
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</tbody>
</table>

William Blackstone and his theory of Christian natural law were a dominant influence upon the Founders. Boorstin stated, “In the history of American institutions, no other book—except the Bible—has played so great a role as Blackstone’s Commentaries of the Laws of England.” (Boorstin 1958, iii). The popularity of Blackstone in early American Jurisprudence and political writings support this paper’s claim that his Christian natural law system deeply influenced the Founders.

This influence of Christian natural law upon federal and state governments is witnessed by the dominance of Biblical and Blackstone citations in Founding Era political writings. It is also clearly evident in numerous court cases involving the actual implementation and administration of the law. The following are a few of many cases which could be cited as examples.¹

**PEOPLE V. RUGGLES, SUPREME COURT OF NEW YORK, 1811**

In this case the defendant was charged with blasphemy “of and concerning the Christian religion, and of and concerning Jesus Christ” (Ruggles 1811, 1), for having spoken of Jesus Christ profanely. He was found guilty by the trial court and sentenced to three months in prison and ordered to pay a fine of $500. The Supreme Court of New York heard the case on appeal. The defendant’s lawyer argued that given the lack of an established church in the United States and in New York, “it was to be inferred that Christianity did not make a part of the common law of this State” (Ruggles 1811, 2). Hence, a man should be allowed “to declare his opinions” (Ruggles 1811, 2) about

¹ For list of other cases which could be cited as examples see footnote #6 on p. 23.
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Christianity, even if some would consider the opinions to be blasphemous. Furthermore, the defendant argued, America freely allowed the worship of Judaism and Islam, and hence Christianity should not be entitled to any special privilege under the law. Chief Justice James Kent\(^2\) delivered the unanimous opinion of the Court. Citing Blackstone he rejected the defendant’s arguments, and ruled that such blasphemous words uttered “with a wicked and malicious disposition” did indeed constitute, “an offense at common law” (Ruggles 1811, 6). The Court noted that previous courts had held that “Christianity was parcel of the law” and to allow the brazen ridicule of Christianity would be unwise, for “whatever strikes at the root of Christianity tends manifestly to the dissolution of civil government” (Ruggles 1811, 6).

Because of the blending of Christian natural law and US law it was commonly held that Christianity was part of the law, and that to allow an attack upon Christianity was tantamount to allowing an attack upon the law. This, of course, would lead to the “dissolution” of civil government, as respect for the law was broken down. The jurisprudential influence of Christian natural law was clearly evident here, as the Court noted, “The very idea of jurisprudence . . . embraced the religion of the country” (Ruggles 1811, 8).

In addition to ruling that Christianity was part of the common law, the Court also declared that non-Christian religions were not entitled to the same protections:

Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet [Mohamed] or of the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted [sic] upon Christianity, and not upon the doctrines or worship of those imposters. (Ruggles 1811, 8-9).

According to the Court, the US and New York Constitutions protected Christianity because the country was built upon Christianity and not upon other religious “imposters.” While such a statement would shock most modern Americans, it clearly demonstrates the influence of Christian natural law in early American jurisprudence and substantiates the claim that the Founders created no wall of separation between church and state. Early courts held that Christianity was actually part of the law and was entitled to protection as such, because it was the very basis for the law.

**UPDEGRAPH I: COMMONWEALTH, SUPREME COURT OF PENNSYLVANIA, 1834**

*Updegraph* was also a case of blasphemy; the defendant was charged with blasphemy against “the Christian Religion and the Scriptures of Truth” for having, “unlawfully, wickedly, and premeditatedly, despitefully and blasphemously” said “that the Holy Scriptures were a mere fable” (Updegraph 1824, 1). The trial court found the defendant guilty and the Supreme Court of Pennsylvania heard the case on appeal.

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\(^2\) Kent is sometimes referred to as one of the “Fathers of American Jurisprudence. He published the well known and well respected four volume *Commentaries on American Law.*
The defendant argued that the Constitution of the United States forbade the establishment of religion, and did not protect Christianity from persons merely speaking their opinions "in a discussion" (Updegraph 1824, 3). In rejecting the defendant’s assertions, the unanimous Court noted that the defendant, like defendants in similar cases, made the misguided assertion "that Christianity never was received as part of the common law of this Christian land; [or] that if it was, it was virtually repealed by the constitution of the United States" (Updegraph 1824, 13). The Court explained that this bold line of thinking (i.e., that Christianity was not part of the law) "has often been explored," but "it is a barren soil, upon which no flower ever blossomed" (Updegraph 1824). The Court declared, "The plaintiff in error has totally failed to support his grand objection to this indictment, for Christianity is part of the common law" (Updegraph 1824, 36). In fact, the court countered, "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania" (Updegraph 1824, 14-15).

The Court was careful to note that everyone was entitled to believe in whatever religion they desired; in fact, the Court noted that the state of Pennsylvania was remarkably tolerant in religious matters "with the exception of disqualification for office of all who did not profess faith in Jesus Christ" (Updegraph 1824, 24). The Court also provided a detailed history and description of the role and importance of Christianity in the law. In this decision almost fifty years after the ratification of the US Constitution and the Bill of Rights, a unanimous Pennsylvania Supreme Court ruled that Christianity was part of the law, even the very basis for the law, and that as such it was afforded special protection from blasphemy.

This historical analysis of Christianity’s role is particularly important for the purposes of this paper, which seeks to demonstrate that Christian natural law was once the standard of adjudication, not the ‘wall of separation.’ Speaking again of religious toleration, the Court explained, "No preference is given by law to any particular religious persuasion. Protection is given to all by our laws" (Updegraph 1824, 36). Notwithstanding this toleration, the Court declares, "It is only the malicious reviler of Christianity who is punished" (Updegraph 1824, 36). Again the court underscores the relation between Christianity and the law, thus requiring the special protection under the law of Christianity.

To the modern American, this ruling that only blasphemy of the Christian religion was prohibited may seem patently unfair. However, the Court explained why:

No society can tolerate a willful and despicable attempt to subvert its religion... a general, malicious, and deliberate intent to overthrow Christianity, general Christianity. This is the line of indication, where crime commences, and the offence becomes the subject of penal visitation. (Updegraph 1824, 31).

The Court declared that an attack upon America’s religion was in essence an attack upon its laws, and said that no society could be expected tolerate such an act. A citizen

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3 Laws requiring a belief in Christianity or a Supreme Being and an after-life to hold office were commonplace in many other states also even long after the passage of the US Constitution and of the Bill of Rights, including the First Amendment which supposedly created the ‘wall of separation.’
was allowed to believe whatever religion he/she saw fit to believe in; the belief crossed the "line of indication" and became criminal, however, if the citizen blasphemed Christianity, which the Court declared was "certainly the religion of the country" and "part of the common law of this state" (Updegraph 1824, 32-33). It is interesting to note that the court spoke of "general" Christianity, as the Court was not choosing any specific denomination within Christianity to be favored. This allowance of "general" Christianity into the application of law was the original interpretation of the Church/state relationship in American Jurisprudence. The Founders intended that Americans would be free to practice the religion of their choice, but that general, non-denominational Christian principles were expected and understood to be the foundation for the law.

The Court continued by explaining that Christianity was fundamentally necessary for the rule of law in America: "It is impossible to administer the laws without taking the religion which the defendant in error has scoffed at, that Scripture which he had reviled, as their basis" (Updegraph 1824, 33). The Court clearly declared that Christianity and the Holy Scriptures were the basis for the laws; in fact, the Court ruled, "the great body of the laws [is] an incorporation of the common law doctrine of Christianity" (Updegraph 1824, 24). Here the Court clearly delineates the blending of Christianity and the law—which is the basis for the Christian natural law this paper seeks to prove was a foundation in early American Jurisprudence.

The Court also declared that "religion and morality" were the "foundations of all governments" (Updegraph 1824, 33) and explained that "Without these restraints no free government could long exist" (Updegraph 1824, 33). The Court revealed strong Christian natural law leanings, because it held that the nation's laws were indeed founded upon and even dependant upon Christianity. The Founders and the early jurists who interpreted their laws believed that the rule of law depended upon each citizen's ability to lead a moral life and obey the laws. As Christianity was the almost universal religion of the country and believed to be part of the law of the land, it was natural to assume that this type of moral life could best be brought about by adherence to Christian principles.

This assumption was the fulfillment of Blackstone's vision of the Divine Law and Natural Law operating together for a happy society. Americans overwhelmingly believed Christianity and the Bible to be the source of the Divine Law; thus, the Court held that to allow open blasphemy against Christianity would "weaken the bonds by which society is held together" (Updegraph 1824, 38). This case, adjudicated nearly fifty years after the passage of the US Constitution and the Bill of Rights clearly shows the dominance of Christian natural law thinking in pre-Everson American Jurisprudence.

**COMMONWEALTH v. KNEELAND, SUPREME COURT OF MASSACHUSETTS, 1838**

*Kneeland* is another blasphemy case and will only be treated briefly to show that the enforcement of the blasphemy laws occurred in many states and also to show that the press was not exempted from these laws. In this case the defendant, Kneeland, was charged with blasphemy, for, "reproaching Jesus Christ and the Holy Ghost." because he published that the "whole story" concerning Jesus Christ was "a fable and a fiction" (Kneeland 1838, 1-2). On appeal to the Massachusetts Supreme Court, he asserted the familiar argument that the law against blasphemy was invalid, because of a supposed
separation of church and state. He also claimed "that the liberty of the press" allowed a person to publish "whatever he pleases, from bad or good motives" (Kneeland 1838, 48).

Like other courts who heard similar arguments, the Court summarily rejected Kneeland's assertions and upheld his sentence of "sixty days' imprisonment" (Kneeland 1838, 77). The Court quoted from Blackstone to demonstrate the importance of blasphemy laws and used reasoning similar to the previous cases. However, the Court also noted that such laws had been "repeatedly enforced" and that "many prosecutions and convictions" resulted (Kneeland 1838, 21). According to the Supreme Court of Massachusetts blasphemy of God or of Christianity was taken very seriously and the laws were regularly enforced; this case shows that nearly fifty years after the passage of the Bill of Rights a person could still be sentenced to sixty days in jail for blasphemy against Jesus Christ because Christianity was tied so closely to the law.

**Shover v. State, Supreme Court of Arkansas, 1850**

George Shover was charged with "Sabbath-breaking" for having "unlawfully kep[t] open his grocery" on a Sunday (Shover 1850, 1). Sunday laws or "blue laws" were once very common throughout the United States. Shover was convicted by the trial court and sentenced. He appealed his conviction to the Arkansas Supreme Court asserting that "the act upon which the indictment was based was unconstitutional" (2) because it violated the separation of church and state found in Arkansas' Declaration of Rights.

The Court summarily rejected Shover's assertion and Chief Justice Johnson declared in a unanimous opinion that Sunday and Christianity were protected by law:

Sunday or the Sabbath is properly and emphatically called the Lord's day, and is one amongst the first and most sacred institutions of the Christian religion. This system of religion is recognized as constituting a part and parcel of the common law, and as such all of the institutions growing out of it, or, in any way connected to with it . . . are entitled to the most profound respect, and can rightfully claim the protection of the law making power of the State. (Shover 1850, 6; emphasis added).

Christianity was again ruled by another unanimous State Supreme Court to be part of the law, and hence entitled to state protection. The Court also explained why the action of Sabbath-breaking was criminalized:

The act of keeping open a grocery on Sunday is not, in itself, innocent or even indifferent, but it is, on the contrary, highly vicious and demoralizing in its tendency, as it amounts to a general invitation to the community to enter and indulge in the intoxicating cup, thereby shocking their sense of propriety and common decency, and bringing into utter contempt the sacred and venerable institution of the Sabbath. It is not simply the act of keeping open a grocery, but the keeping of it open on Sunday, that forms . . . the offence. (Shover 1850, 264).
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Although the state allowed the freedom of worship, the enforcement of Sunday laws was considered completely constitutional. The Court ruled that allowing a grocery to remain open would have a "deleterious effects upon the body politic," (Shover 1850, 263) because the morals of the community would be assaulted. The Christian natural law position of allowing the government to enforce Christian morals—even upon the unwilling or non-believing—is clearly evident here. Also apparent is the Christian natural law blending of natural and divine law (i.e., the Sacred Sabbath), into human law (i.e., Sabbath laws/blue laws). The Court ruled nearly sixty years after the passage of the Bill of Rights that the binding together of Christianity and the law allowed for the protection of the Sabbath.

_Thurston v. Whitney, Supreme Court of Massachusetts, 1848._

In a previous trial Thurston had been convicted based on the testimony of an acknowledged atheist. He appealed to the Supreme Court alleging that the testimony of an atheist was not admissible in court and a unanimous Court ruled in Thurston's favor. After citing numerous precedents, the Court declared, "all authorities agree, that an atheist, who disbelieves in the existence of a God, who is 'the rewarder of truth and avenger of falsehood,' cannot be permitted to testify" (Thurston 1848, 11-12). It was held that an atheist did not believe that, "perjury will surely be punished by some supreme power;" (Thurston 1848, 7) and hence, an oath would be, "ineffectual to bind his conscience to speak the truth" (Thurston 1848, 6). The testimony of an atheist was inadmissible, because the Court stated that he did not believe that he would be held accountable before God for his testimony. The Court closed with these powerful words, "We are therefore very clearly of the opinion, that the [atheist] witness was incompetent, and ought not to have been allowed to testify" (Thurston 1848, 13; emphasis added). Here again a unanimous state Supreme Court rules based on the blending of Christianity and the law.

_Unit States v. Miller, U.S. District Court (Washington, D.C.), 1916_

This case also involved a witness who did not believe in a "God who rewards truth and avenges falsehood" (Miller 1916, 1). The witness' testimony was challenged, and the US Court sustained the challenge. The Court ruled, "Under the common-law rule a person who does not believe in a God who is the rewarder of truth and the avenger of falsehood cannot be permitted to testify" (Miller 1916, 1-2). Importantly, the Court also officially recognized the sources of the common-law: "The common law consists of those principles, maxims, usages, and rules founded on reason, natural justice, and an enlightened public policy" (Miller 1916, 4). Here the court recognized both reason and "natural justice" as contributors to common-law—both are foundational principles in Christian natural law. Additionally, the Court ruled more than one hundred years after the passage of the Bill of Rights that the testimony of an atheist could be challenged because the atheist did not believe in God.
This case involved a lawsuit challenging the City of Rome's law requiring the daily reading of the King James Bible in every public school. The law required:

Some portion of the King James Version of the Bible, of either the Old or New Testaments, to be read and prayer offered to God in the hearing of the Pupils of the Public Schools of the City of Rome daily. (Wilkerson 1922, 1).

The reading and prayer were to be done, "without comment," (Wilkerson 1922, 2) and an, "exemption from attendance" (2) would be granted to any student upon parental request.

A suit was filed, alleging that the law violated the separation of church and state and that, "readings and offering of prayers . . . is prohibited by the law in public schools" (Ibid., 4). It was also argued that the law would "aid the Protestant sect of the Christian Church" while undermining the, "Roman Catholic" or "Jewish faith" (Wilkerson 1922, 5).

The Georgia Supreme Court heard the case on appeal and summarily rejected the plaintiff's arguments and ruled that the reading and prayer, "offered in the hearing of the pupils daily during the regular session of school, is not in conflict with [the religious freedom] paragraphs of the constitution of Georgia" (Wilkerson 1922, 7). The Court first cited other states and cities with similar Bible reading laws. Then Justice Hines, writing for the 5-2 majority, made an important distinction between providing religious freedom to all while still maintaining Christianity as part of the law.

The Court explained that the passages of the Georgia Constitution guaranteeing religious freedom for all people were created so that "all might enjoy an unrestricted liberty in their religion" (Wilkerson 1922, 16). However, the passages were not to be construed so as to allow a "war upon the Bible and its use in common [public] schools" (Wilkerson 1922, 15). In fact, the Court noted, "Those who drafted and adopted our constitution could never have intended it [the Georgia Religious Freedom Act] to meet such narrow and sectarian views" (Wilkerson 1922, 15). The Court summarized the movement for the separation of church and state in these terms:

[T]his was not a movement for the separation of the State from Christianity, but specifically a separation of Church and State. Christianity entered into the whole warp and woof of our governmental fabric. (Wilkerson 1922, 16).

The Court also quotes from Daniel Webster's famous church and state speech to support their claim that the separation of church and states does not mean that Christianity and the state are separated:

All, all proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and fagot are unknown, general, tolerant Christianity, is the law of the land. (Wilkerson 1922, 15-16).
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Like other courts faced with a religious freedom claim, this Court again declared that notwithstanding religious freedom acts, Christianity was indeed part of the law of the land—the Christian natural law blending of human and divine law is again evident. No one specific Christian denomination was to be favored, but no wall between Christianity and the state was ever erected.

Following Blackstone's principles of judicial interpretation, the Court repeatedly sought to discover and explain the motives of the founders, writing, "From an examination of all of them [religious freedom laws] and of their origin, we think it clearly appears that the framers of our constitutions have never intended to declare the policy of this State to be unreligious or unchristian" (Wilkerson 1922, 24). The court ruled that Christianity was to be a part of the policy of the state, and as such, state activities could be Christian in nature.

To support their claim that the founders never intended to separate Christianity from the State, the Court cited numerous legal precedents (including some that this paper has treated) in order to clearly establish that the founders and early justices clearly understood that the principle of religious freedom and the conception of general Christianity as part of the law of the land could operate in harmony. This idea was a major tenant of the Christian natural law endorsed by the founders. No particular religious belief or sect was to be forced on anyone; however, it was clearly understood that Christianity was the foundation for human law. The use of this Christian natural law approach as a guide in adjudication was commonplace and constitutional in America for many years after the passage of the Bill of Rights. The 1947 US Supreme Court ruling in Everson, however, radically altered the judicial paradigm.

Everson v. Board of Education, US Supreme Court, 1947

The shift from Christian natural law as a basis for American Jurisprudence to the contemporary jurisprudential paradigm of 'wall of separation' occurred most dramatically in Everson. In this case a divided US Supreme Court ruled in a 5-4 decision that, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach" (Everson 1947, 18). The separation language of Everson contrasts sharply with the Christian natural law language of earlier court decisions as cited above. This ruling introduced a new paradigm, because the 'wall of separation' metaphor quickly became popular with separation proponents. While Everson signaled the major paradigm shift, in some senses the shift had been occurring gradually for decades.

As the nation became more pluralistic, religiously-based laws were inevitably relaxed. For example, state laws requiring a belief in Christianity to hold office (commonplace at the Founding) had all been eliminated or replaced with laws requiring the belief in a Supreme Being4. However, the basic belief that America was a Christian

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4 Even these non-denominational laws were invalidated, however, in 1961 by the US Supreme Court; see Torcaso v. Watkins. The Court used Everson's "separation" language to support the invalidation.

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nation and that America’s laws are based upon Christianity was upheld by the US Supreme Court as recently as 1892 and 1931.

The Court in *Everson*, however, rapidly accelerated the change that had been gradually occurring, and public religion and public Christianity are now favorite targets for atheists, the ACLU, and other interest groups. For example, long-time nativity or crèche scenes, once constitutional and popular in almost every community, have been outlawed, or made to become non-religious in nature. Crosses have been driven from war memorials, displays of the Ten Commandments have been moved, and actions once considered crimes against natural law or Christianity (blasphemy, sodomy, birth control etc.) have been decriminalized. Clearly, the shift has been away from the Christian natural law blending of the human and the divine, and towards a separation of church and state, or a separation of the human from the divine.

Significant disagreement exists over the ‘wall of separation’ between church and state, which according to *Everson* was created by the First Amendment. For example, the late Chief Justice William Rehnquist has ridiculed the ‘wall of separation’ phrase, calling it a “misleading metaphor” (Wallace 1985, 93). This phrase is attributed to a letter by Thomas Jefferson and, ironically, was first used judicially to support the enforcement of Christian community standards against polygamy, not to support a separation of church and state. Also ironically, *Reynolds* was the only judicial precedent cited by the Court in *Everson* to support its ‘wall of separation’ claim—even though the Court in *Reynolds* denied the separation of church and state claimed by the Mormon plaintiff as the Court enforced Christian standards against polygamy.

The late Chief Justice Rehnquist also explained that using Jefferson’s ‘wall of separation’ metaphor is irrelevant because he was in France when the Constitution and Bill of Rights were written:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association [that included the ‘wall of separation phrase’] was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of

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5 See *Church of the Holy Trinity v. United States* (1892), and *Macintosh v. United States* (1931)

6 Blasphemy laws were invalidated in 1970, see *Maryland v. West*; sodomy laws were invalidated in 2003, see *Lawrence v. Texas*; Birth-control laws were invalidated in 1963, see *Grizwald v. Connecticut*.

7 See *Reynolds v. United States* (1897). In this case a Mormon plaintiff argued that he should be allowed to practice polygamy because the US separated church and state. The Court rejected his arguments and declared that the state had the right to enforce Christian standards even against non-believing persons.
contemporary history as to the meaning of the Religion Clauses of the First Amendment. (Wallace 1985, 92).

Blackstone’s system of Christian natural law—the basis for the American jurisprudential system—calls for judges to examine the motives and objectives of the framers of a law in order to understand the true intent of a law. Using this standard, Thomas Jefferson is clearly not the person to consult concerning the intentions of the First Amendment as he was not even present in the US when the Amendment was written. Notwithstanding this obvious conclusion, the courts have completely ignored the objections stated above by the late Chief Justice and have used Jefferson’s phrase as if it were part of the Bill of Rights or of the Constitution itself. In fact, Justice Gallagher from the New York State Supreme Court stated—almost prophetically—in 1958:

Much has been written in recent years . . . to ‘a wall of separation between church and State’ . . . [It] has received so much attention that one would almost think at times that it is to be found somewhere in our Constitution. (Baer 1958, 237).

Ironically, Justice Gallagher’s statement nearly fifty years ago is fulfilled; many Americans do believe that the phrase “separation of church and state” is actually found in the US Constitution or in the Bill of Rights. This, however, is completely incorrect, as the only mention of religion is found in the First Amendment which simply states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (U.S. Constitution, Amendment I).

In addition to not being found in the Constitution or Bill of Rights, the over reliance on the ‘wall of separation’ metaphor ignores the intentions of the Founders who drafted the Amendment. The late Chief Justice Rehnquist offered this scathing analysis of the “wall” metaphor and its impact on jurisprudence:

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "crucible of litigation," is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned. (Wallace 1985, 107).

Rehnquist asserts that the metaphor is undermining the concept of judicial review—the idea that the intentions of a law’s founders must be examined. The courts constantly cite as precedent a single phrase, from a single letter written by Thomas Jefferson, instead of examining what the actual authors of the Amendment said. As quoted above, Rehnquist explains that Jefferson was not even a participant in creating the Bill of Rights,

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8 There are also valid arguments—outside the scope of this paper—that conclude Jefferson’s statement is taken out of context.
and his comments fourteen years after the fact are certainly not the best source to
discover the First Amendment authors’ intentions. Instead of examining previous court
cases for illumination, the Supreme Court uses Jefferson’s metaphor—which Rehnquist
calls a “misleading metaphor”—as precedent to separate Christianity from the state.
Rehnquist also notes that the Court is relying on historical and factual errors and that
hence the entire ‘wall of separation’ paradigm is invalid and should be abandoned.

The late Chief Justice’s analysis of the ‘wall of separation’ is both legally convincing
and exhaustively documented. As demonstrated in this paper, the notion that the
Founders intended to create a ‘wall’ between church and state is patently ridiculous. If
they did, early American judges certainly did not understand this, because the judges
constantly ruled in favor of the blending of divine and human law. Christian natural law
was deeply influential in America’s Founding and in pre-Everson adjudication. Multiple
rulings—almost all unanimous—by state supreme courts cited in this paper have
demonstrated these facts, and numerous other cases could also be cited.9

Certainly, Christian natural law has shortcomings. For example, with an
increasingly pluralistic society it is difficult to agree on moral truths. Also, certain
religions might find their beliefs trampled by the majority’s morals; for example, the
Church of Jesus Christ of Latter-day Saints and polygamy in the late 1800’s.

However, these difficulties do not signify that the US needs to continue to abandon
all laws based on Christian natural law, as some seem to think necessary. The application
of general Christian principles and morals can be successfully accomplished without loss
of individual rights. All religions can be respected, while still allowing general Christian
principles to have a prominent role in American public life. The Founders and early
justices clearly agreed. America’s Founders and pre-Everson jurists regularly drew on
Christian natural law principles to blend human law with general Christian principles.

Prior to Everson the highest courts in the land regularly declared this to be a
Christian nation, and regularly declared the laws to be based upon and even dependent
upon Christianity. Surely the Everson ‘wall of separation’ interpretation of the First
Amendment is a far cry from the Christian natural law foundation the Founding Fathers
laid and pre-Everson jurists protected. The author joins with the late Chief Justice
Rehnquist in asserting that the Everson interpretation defies 150 years of previous
American jurisprudence, and should be reexamined and abandoned for a return to
Christian natural law in jurisprudence and for a return of general Christian principles to
American public life.

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