Secularity and secularism in the United Kingdom

On the way to the First Amendment

By Iain McLean

The political science of church and state

I am neither a lawyer, nor a theologian, nor a sociologist of religion. I am a political scientist with an interest in historical institutionalism. I approach this question bearing the tools of political science. This paper examines the evolution of religion-state relations in the United Kingdom. I hope it has comparative interest for those from, or interested in, other jurisdictions. I start with a political scientist's slogans: *Politics is about who gets what, when, and how* (Lasswell 1936): and *The state …successfully upholds the claim to the monopoly on the legitimate use of physical force in the enforcement of its orders* (Weber 1918)[1]. As religion may challenge any state monopoly on the legitimate use of physical force, all societies where there is religion have to handle this potential conflict.

Religions make incompatible truth claims which may involve claims over civil power. When a state contains groups of people of different religions, they may make incompatible truth claims, not merely against the state, but against one another. This is a near-universal feature of the modern state. It threw up very difficult problems in early-modern Europe, which were reconciled in different ways: many of them bloody, many of them involving mass forced migration. In emerging liberal democracies, however, the State learned gradually to accommodate religions, beginning with the unthreatening ones. It often took time, sometimes centuries, for states to recognise which religions posed no threats to them, and for religions to cease threatening states. The next sections of the paper trace the evolution of this accommodation in one liberal democracy, the United Kingdom. The accommodation began when the UK was neither liberal, nor a democracy: in fact when it comprised two separate states.

I will argue that the UK is secular, but not (as three prominent religious leaders have alleged) secular*ist*. Their complaints confuse secularity (where the UK is coming into alignment with the USA) with secularism (as in, e.g., France and Turkey). A secular*ist* state actively tries to keep religion out of the public arena. A secular state is neutral between religions, and between religion and non-religion.

The Reformation in the UK

Protestant Christianity was established in (what is now) the United Kingdom by two routes. They were very different. In England, Wales, and Ireland, the dominant form was Erastian. In Scotland it was Calvinist/Reformed.

[1] H. D. Lasswell, *Politics: who gets what, when, and how* New York :Whittlesey House; London : McGraw-Hill book company, inc, 1936; Max Weber, 'Politics as a Vocation', lecture delivered in 1918, in H. Gerth and C. W. Mills ed, *From Max Weber* (London: Routledge 1948): 77-128.

As is well known, the origins of King Henry VIII's quarrel with the Catholic Church were geopolitical. His first, Spanish wife had failed to produce a male heir. There was a risk that England might therefore fall into the territories of her nephew Charles V, head of the Hapsburg dynasty, especially given that Henry's own claim to the throne was shaky, dependent on his father's victory in battle in 1485. Pope Clement VII refused to annul Henry's marriage, so in the Act of Supremacy (1534) Henry declared himself Supreme Head of the Church of England. The title was later modified to Supreme Governor under his daughter Queen Elizabeth. From the start, the Church of England, established also in Wales and Ireland, was therefore an Erastian state church. Parliament and the secular courts could regulate its doctrine as well as its property. Bishops of the church continued to sit in the upper house of Parliament, the House of Lords, as Lords Spiritual. They still do, to a total of 26.

The Reformation in Scotland was quite different. The leading reformers – John Knox and his successor Andrew Melvill – were followers of Jean Calvin. They took a Calvinist view of church and state. Melvill expressed this forcefully in 1596, having grabbed the sleeve of King James VI (whom he had called "God's Sillie Vassal"), while haranguing him in his own palace at Falkland:

> [T]hair is twa [two] Kings and twa Kingdomes in Scotland. Thair is Chryst Jesus the King, and his kingdome the Kirk [Church], whase [whose] subject King James the Saxt [Sixth] is, and of whase kingdome nocht [not] a king, nor a lord, nor a heid [head], bot a member!

Shortly afterwards, James VI became king of England, on the death of Elizabeth in 1603. He had shaken Melvill off (and only visited Scotland once again)[2]. One of his moves to accommodate the incompatible truth claims of the two main Protestant religions in his territory was to sponsor an English bible translation that both might accept, and indeed that the already divergent Reformed and sacramentalist wings of the Church of England might both accept: hence the King James Bible (the "Authorized Version", authorized, or at least accepted, in both countries; some of the translators were Scots).

Religious crises and accommodation in UK in the 18th century

In the 17th century, civil war broke out in all James' three kingdoms (Wales was not treated as a separate kingdom). The war ended with two separate settlements in 1688-9. The parliaments of both England and Scotland contracted with the Dutch Stadtholder William of Orange and his wife Mary to be their monarchs. William and Mary agreed to two different sets of conditions. The English conditions (the 'Bill of Rights') included parliamentary sovereignty and a degree of religious toleration, while reinstating the establishment of the Anglican church. The Scottish conditions (the 'Claim of Right') insisted on the legal monopoly of the Reformed Church of Scotland. The Act of Union 1707, which created the United Kingdom of Great Britain, resulted from shrewd and hard bargaining by Scottish as well as English delegates. As a consequence, it contains two sets of clauses to protect the "true Protestant religion" in England and Scotland. However, these are two different religions. A philosopher might argue that there can be at most one true Protestant religion. But the Act of Union is an act of constitutional diplomacy, not of theology. It created the situation still in

[2] Jenny Wormald, ''James VI and I (1566–1625)', Oxford Dictionary of National Biography, Oxford University Press, 2004; online edn, Jan 2008 [http://www.oxforddnb.com/view/article/14592, accessed 13 Oct 2010]

force today. In England the established church is Erastian, with the monarch as its Supreme Governor. The monarch retains the right to make senior appointments (now delegated to the monarch's advisers, i.e., the UK government of the day); and Parliament retains the right to govern its doctrine, although that right is normally delegated to internal church bodies. In Scotland the established Church of Scotland is Reformed in governance as well as theology. Its Reformed theology was finally embedded in the Church of Scotland Act 1921. Importantly for Reformed theology, the following statement, in a schedule to the Act, was drafted by the church, not by the state:

> This Church receives from [Jesus Christ], its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers.[3]

The UK monarch is indeed not a king, nor a lord, but a member of the Church of Scotland when in Scotland. Andrew Melvill lost in 1596, but won in 1921.

The Clandestine Marriages Act 1753

The settlement of 1707 was a compromise. In the religious wars of the C17, each religion had tried to impose itself on the other's country: the English in Scotland in 1637, and the Scots in England in 1643. 1707 was, among other things, a recognition that these efforts had failed and would not be renewed. The path to toleration of other religions was slow: in particular, to this day the British monarch must swear his or her Protestantism; and may neither be, nor marry, a Roman Catholic. But a symbolic step in the separation of church and state came in 1753 with the Clandestine Marriages Act, also known as Lord Hardwicke's Act.[4] From 1534 to 1753, the Church of England had claimed a legal monopoly of marriage in England. The power to say who is married and who is not obviously grants enormous social control, and is part of core politics as defined by Weber or Lasswell.

Two groups which had refused to accept this were the Quakers and the Jews. Quakers had refused to report their marriages to the state, or to be married in parish churches. As a result they lost property rights. After persecution of Quakers in the 17th century, the state had gradually come to accept that the costs of persecution outweighed the benefits. The 1753 Act regulated marriage in England, but specifically exempted 'the people called Quakers' and Jews. Quakers and Jews in England retain the legal right to conduct marriages with neither state nor established church intervention, and simply report them to the state from time to time. The state declined to use force to coerce them. Other religions did not receive comparable exemptions, until a process of civil marriage was introduced in the 1830s.

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[3] Church of Scotland Act, 1921 c. 29 Sch.1, Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual.

[4] An Act for the better preventing of clandestine Marriages, (1753 c. 33), s. XVIII: Provided likewise, That nothing in this Act contained shall extend to that Part of Great Britain called Scotland, nor to any Marriages amongst the People called Quakers , or amongst the Persons professing the Jewish Religion, where both the Parties to any such Marriage shall be of the People called Quakers , or Persons professing the Jewish Religion respectively, nor to any Marriages solemnized beyond the Seas.

David Hume and Adam Smith

There was probably more religious freedom in Scotland than in England in the 18th century. The State had packed its bags and gone to London. The church had no armies nor police. This made it easier for the philosophers of the Scottish Enlightenment, beginning with Adam Smith's teacher Francis Hutcheson, to divorce ethics from religion. According to a student pamphlet written in his defence, Hutcheson taught his class (including Adam Smith) that

> [W]e have a notion of moral goodness prior in the order of knowledge to any notion of the will or law of God.... We count God morally Good, on this account, that we justly conclude, he has essential Dispositions to communicate Happiness and Perfection to his creatures… we must have another notion of moral Goodness, prior to any Relation to Law, or Will…. Otherways, when we say God's Laws are Good, we make no valuable Encomium on them; and only say, God's Laws are conformable to his Laws or, his Will is conformable to his Will…. So, when we say God is morally good or excellent, we would only mean, he is conformable to himself; which would be no Praise unless he were previously known to be good.[5]

This climate enabled the two greatest thinkers of the Scottish Enlightenment, the close friends David Hume and Adam Smith, to discuss matters of church and state without restriction. Hume was an atheist; the more cautious Smith may or may not have been an atheist, but he was almost certainly not a Christian.

Hume produced an ironic argument in favour of church establishment, in a digression in his six-volume *History of England* embedded in a discussion of Henry VIII's Act of Supremacy:

> [T]his interested diligence of the clergy is what every wise legislator will study to prevent; because in every religion, except the true, it is highly pernicious, and it has even a natural tendency to pervert the true by infusing into it a strong mixture of superstition, folly, and delusion. Each ghostly practitioner, in order to render himself more precious and sacred in the eyes of his retainers, will inspire them with the most violent abhorrence of all other sects.... And in this manner ecclesiastical establishments, though commonly they arose at first from religious views, prove in the end advantageous to the political interests of society.

In his *Wealth of Nations*, published in 1776, Smith quotes this passage from his friend, whom he calls 'by far the most illustrious philosopher and historian of the present age'. He none the less disagrees vigorously:

> The interested and active zeal of religious teachers can be dangerous and troublesome only where there is, either but one sect tolerated in the society, or where the whole of a large society is divided into two or three great sects.... but that zeal must be altogether innocent where the society is divided into two or three hundred, or perhaps into as many thousand

[5] *A Vindication of Mr Hutcheson from the calumnious Aspersions in a late pamphlet. By Several of his Scholars*. Glasgow 1738. In Special Collections, Glasgow University Library.

> small sects, of which no one could be considerable enough to disturb the publick tranquillity.[6]

The *Wealth of Nations* is all about the advantages of free trade. Smith argues that free trade in religion is as valuable as free trade in anything else.

Smith was described as 'very zealous in American affairs', advising British ministers in a tone of wry detachment that the rebellious colonies should be made to pay for their own defence; and (almost uniquely in Britain) that American independence would be no loss for Great Britain. The tone of his remarks on America in the *Wealth of Nations* made him no friends there, and he was never quoted at the Convention that drafted the US Constitution in Philadelphia in 1787. Nevertheless his books were closely read there.

One of his closest readers was James Madison from Virginia, often called the "Father of the US Constitution". (Actually, there were many). With his friend Thomas Jefferson, Madison sponsored the overthrow of state support of religion in the Virginia Assembly. His 'Memorial and Remonstrance against Religious Assessments' (1785) is clearly derived from Adam Smith. Madison repeated these arguments twice in 1787: first in "Vices of the Political System of the United States", which was a briefing note for the Virginia delegation to the Constitutional Convention; and then in the celebrated *Federalist no 10.* The *Federalist Papers* were published in the New York newspapers by Madison and Alexander Hamilton to try to persuade New Yorkers to ratify the Constitution. Madison had to write No. 10 in a hurry because the press date was on him. So he quickly adapted his arguments about faction to apply to political as well as religious factions. Worried by the tyranny of the majority, Madison argued that, in an 'extended republic' such as the USA, it could not arise because there was no group, neither political nor religious, that could form a majority in the whole republic. Smith's two or three hundred sects were already to be found in the new republic, as they still are.

The ratification of the Constitution, which required nine states to approve, was a close-run thing. Several states said they were unwilling to ratify it unless a Bill of Rights were added to protect individual freedoms against the state. In the first session of the US House of Representatives in 1789-90, Madison became floor manager for the Bill of Rights. As finally passed, reconciling the versions sought by the House and the Senate and ratified by the states, the Bill of Rights comprises the first ten amendments to the US Constitution. Perhaps the most important is the First Amendment, which opens

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

For over 200 years, the First Amendment has protected religious freedom and prevented religious tyranny. It creates what Jefferson called a "wall of separation" between church and state. How high that wall should be, is contested. This paper does not attempt to intervene in that debate.

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[6] David Hume, *History of England* (Indianapolis, Liberty Fund 19xx), 3:xxx; Adam Smith, *Wealth of Nations* (Indianapolis, Liberty Fund 19xx), V.x.x.x; I. McLean and S. M. Peterson, 'Adam Smith at the Constitutional Convention', *Loyola Law Review* 56 (2010): 95-133..

The supermajority coalition to enact the 1st Amendment

Of course, Madison did not enact the First Amendment single-handed; and Jefferson was not even in Congress at the time, being US Minister in Paris before returning to be Secretary of State. Mark David Hall has recently complained that the Virginians get all the glory, overlooking the role of Reformed Christians such as Roger Sherman in enacting the Establishment and Free Exercise clauses.[7] That is a good point, which nevertheless merely heightens the achievement of the Virginians. Madison and the other authors of the First Amendment had to construct a supermajority coalition, agreeing on a text that was acceptable to the constitutionally required supermajorities in both houses of Congress and the required number of states. To be sure therefore, the Establishment and Free Exercise Clauses meant different things to different members of that coalition. To Virginian Deists, Pennsylvania Quakers, and New England Baptists they probably meant what Madison and Jefferson intended them to mean, which I believe was the strict separation and non-establishment that the US Supreme Court majority has supported since *Lee* v. *Weisman*.[8] New England Congregationalists likely heard the words with a different stress: *Congress* shall make no law (implying that the states remained free to).

The supermajority for the First Amendment was only made possible, I believe, because as Madison had seen in *Federalist* 10, there was no majority religion in the 13 states, nor was there foreseeably ever likely to be. If each sect knew that it could not be considerable enough to disturb the public tranquillity, it had a vested interest in protecting itself from the risk that any other sect might seize the levers of state power. Hence, sects had a common interest in both non-establishment and free exercise.

Religious crises and accommodation in the UK from the 19th century till now.

In the UK in Madison's day, the Church of England was still dominant in England. The treaty of 1707 protected the establishment of the Reformed church in Scotland. The first problem area was Ireland, which was predominantly Catholic, with a large Reformed (Presbyterian) minority in the north-east and a probably smaller Anglican minority evenly spread around Ireland. But it was this third denomination which was established in the Act of Union of 1800. This establishment became intolerable as soon as enough Irish people had the vote to protest effectively against it (beginning with 'Catholic Emancipation' in 1829, which allowed Catholics to vote and to sit in Parliament, shortly followed by the Reform Act of 1832). The Church of Ireland was disestablished in 1869. When W.E. Gladstone first proposed devolution ('Home Rule') to Ireland in 1886, he had to fend off Irish Protestant anxieties that the Catholic Church would seize the organs of the state and discriminate against non-Catholics. Therefore he incorporated the wording of the Establishment and Free

[7] Mark David Hall, 'Vindiciae Contra Tyrannos: The Influence of the Reformed Tradition on the American Founding', paper presented to the 2010 Annual Meeting of the American Political Science Association

[8] Lee v. Weisman, 505 US 577 (1992). See discussion, especially of Souter J's magisterial analysis, in I. McLean and S. M. Peterson, 'Adam Smith at the Constitutional Convention', *Loyola Law Review* 56 (2010): 95-133.

Exercise clauses into his bill.[9] That bill failed, as did all subsequent attempts to keep all of Ireland within the UK. But in 1921, when the territory of Northern Ireland remained in the UK, the clauses were applied there. They still apply in Northern Ireland, albeit no longer in the wording of the First Congress or W. E. Gladstone.[10]

A series of evangelical revivals in Wales seriously weakened the Church of England there. As in Ireland, as soon as a sizeable number of Welsh people had the vote (in 1868), they elected MPs who campaigned for the disestablishment of the Church of England in Wales. However, Welsh disestablishment was blocked in the unelected house, the House of Lords, not least by the Lords Spiritual, who (although bishops only of English dioceses) voted either unanimously or with only one dissenter against both Welsh disestablishment and Irish Home Rule. Disestablishment was not enacted until 1914, and then suspended because of the outbreak of World War I, coming into force only in 1920.

Comment [m1]: Scot – can you check please – we have published the voting numbes somewhere

Therefore since 1920 the Church of England has been established only in England itself. A series of internal reports considered the advantages for the church of moving to a looser Scottish establishment[11] but there has been no change until recently. A sufficient reason is that the Lords Spiritual have no interest in surrendering their seats in the legislature, and the state has had no interest in throwing them out. Recent developments have, however, disturbed this equilibrium.

Challenge to the Lords Spiritual 2000-10

If the UK had an elected legislature, the position of the Lords Spiritual would clearly become anomalous. Out of office, politicians routinely call for the replacement of the House of Lords by an elected house. In office, they become coy: the very fact that the Lords are unelected makes them a weaker obstacle to a determined government. The current cycle of change began in 2000, with a report on the reform of the Lords commissioned by Labour Prime Minister Tony Blair. That report (the Wakeham Commission) said that faith leaders should remain in the House of Lords, which should remain mostly unelected. They proposed a reduction of Anglican bishops to 16, to be joined by ten other Christian leaders (five of them from outside England) and five representatives of non-Christian faiths.

These numbers were wildly wrong. To scale up from 16 Anglican bishops would have required 77 faith representatives, most of them female (because Wakeham also endorsed gender equality). They ignored the evidence in front of Wakeham. Almost no religious body, and absolutely no secular body, wished for religious representation in the house to remain. The Church of Scotland explained how it was incompatible with Reformed theology; the Catholic Church explained how it was incompatible with canon law; the Baptists explained how it was incompatible with separation of church and state. All these representations were ignored.

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[9] Government of Ireland Bill 1886 cl 4(1): 'The irish Legislature shall not make any law respecting the establishment or endowment of religion, or prohibiting the free exercise thereof'. Great Britain, *Parliamentary Papers* 1886 II:461-81.

[10] Government of Ireland Act 1920 c.67 s.5; subsequently repeated in Northern Ireland Constitution Act 1973 c.36 Part III, and currently in Northern Ireland Act 1998 c.47 S.6.

[11] I. McLean and S. M. Peterson, 'A Uniform British Establishment' in M. Chapman and W, Whyte ed., *title* (place: publisher 2011).

By 2010, the Wakeham report was utterly discredited. The only UK public body which still supports an unelected House of Lords is (surprisingly) the House of Lords. The Commons has voted for either an all-elected or an 80% elected House. All three main party manifestoes in 2010, and the post-election Coalition program for government, call for an elected house. Furthermore, Prime Minister Gordon Brown (the 4th Scottish Presbyterian to hold that post) unilaterally withdrew from making Church of England appointments in 2007. The days of establishment in the UK are numbered.

Contemporary issues in secularity and secularism came into sharp relief with the Lords debates on the Equality act 2010. The UK has been a signatory to the European Convention on Human Rights since shortly after it was drafted (mostly by British lawyers, and in response to Nazi atrocities in World War II) in 1950[12]. The Convention protects classical negative human rights such as those protected in the US Bill of Rights. These include freedom of speech, assembly, and religion, privacy, and freedom from discrimination. Several of these ECHR rights, including the freedom to manifest one's religion or beliefs, are qualified: "subject only to such limitations as are prescribed by law and are necessary in a democratic society". By the Human Rights Act 1998[13], Convention rights are incorporated in British law and must be considered, when relevant, by UK courts. The 1998 Act, like the US Bill of Rights, often protects unpopular and stigmatized minorities. Until the 2010 General Election it was Conservative policy to repeal it. However, the current coalition government has dropped that proposal.[14] It has also wrought a change in judicial culture: judges are more willing than previously to challenge executive and legislative acts on human rights grounds.

One piece of human-rights compliance undertaken in the last year of the Labour government (2009-10) was to amalgamate various pieces of anti-discrimination law into an Equality Bill which would create a single body to oversee the law prohibiting discrimination on grounds of gender; ethnicity; sexual orientation; disability; religion; age; and caste (a late addition). The bill was undertaken in part to ensure that the UK complied with Article 14 of the European Convention. It was enacted on the last day before the dissolution of the Parliament, so it now forms the Equality Act 2010.

Convention rights obviously have to be balanced, in any jurisdiction. For instance, freedom of religion, if it is to mean anything, must permit religious bodies to restrict their ministry to those who share the principles of their religion. Some religions impose restrictions that would not otherwise be permitted under the 2010 Act: such as appointment of members to single-sex religious communities. Arguments about the proper boundary of such restrictions have given rise to contemporary claims that the UK is 'aggressively secularist' and similar phrases[15]. Although these claims come from a

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12 I. McLean, *What's wrong with the British Constitution?* (Oxford: OUP 2010): 201-2.

13 1998 c. 42.

14 HM Government, *The Coalition: our programme for government* (London: HM Government 2010), p. 11. At http://programmeforgovernment.hmg.gov.uk/files/2010/05/coalition-programme.pdf, accessed Sep. 17 2010.

15 Lord Carey, former Archbishop of Canterbury, in witness statement in *McFarlane:* http://www.bailii.org/ew/cases/EWCA/Civ/2010/B1.html; Cardinal Walter Kasper, interview with *Focus* published Sep. 15 2010 („England ist heute ein säkularisiertes, pluralistisches Land. Wenn Sie [Benedict XVI] am Flughafen Heathrow landen, denken Sie manchmal, Sie wären in einem Land der Dritten Welt gelandet.... Vor allem in England ist ein aggressiver Neu-Atheismus verbreitet. Wenn Sie etwa bei British Airways ein Kreuz tragen, werden Sie benachteiligt." Accessed via http://www.thinkinganglicans.org.uk/archives/004616.html#comments and

former Archbishop of Canterbury, the former head of the Pontifical Council for Christian Unity, and Pope Benedict XVI, I believe that they are incorrect.

There have been two flashpoints. One concerns alleged discrimination against Christians in employment; the other, the proper boundary of the religious exemptions from anti-discrimination law. A series of employment tribunal cases have been decided against Christians in the workplace, and the decisions have been affirmed in the higher courts. In *Ladele v. London Borough of Islington* [2009] EWCA Civ 1357; [2009] ICR 387, the claimant was a registrar of births, deaths, and marriages, who refused to officiate at civil partnerships. In *Eweida v. British Airways* [2010] EWCA Civ 80 (the case referred to by Cardinal Kasper), the claimant was a British Airways check-in employee who refused to remove a jewelry cross, contrary to her employers' dress code; in *McFarlane v. Relate Avon Industries* [2010] EWCA Civ B1, the claimant was a relationship counsellor dismissed for refusing to offer sexual counselling to same-sex couples. In each case, the court balanced the ECHR Article 9 freedom to manifest one's religion against the 'limitations' permitted in the same article and (in *Ladele* and *McFarlane*) against the right of same-sex couples to be protected from discrimination. In *McFarlane*, Lord Carey, former Archbishop of Canterbury, filed a witness statement in support of the claimant. The statement requested a panel of judges with a "proven sensitivity and understanding of religious issues" to hear the case. This call was fiercely dismissed by the appeal judge Lord Laws (who happens to be a senior lay Anglican) as "divisive, capricious and arbitrary".

During discussion of the Equality Bill in the House of Lords, in January 2010, eight Lords Spiritual attended – an unusually large number – to oppose a clause in which the government defined the ministerial exemption from anti-discrimination law. They were successful. One of the three votes to delete the clause was carried by a majority of only 5, so they were pivotal. In view of the pending dissolution of Parliament for the 2010 General Election, the government did not seek to reinstate the clause. The degree of religious exemption from anti-discrimination law therefore remains

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http://www.focus.de/politik/ausland/papst/walter-kasper-irritationen-ueber-kardinal-ueberschatten-papst-reise_aid_552106.html, 17 Sep. 2010); Benedict XVI, "Religion, in other words, is not a problem for legislators to solve, but a vital contributor to the national conversation. In this light, I cannot but voice my concern at the increasing marginalization of religion, particularly of Christianity, that is taking place in some quarters, even in nations which place a great emphasis on tolerance. There are those who would advocate that the voice of religion be silenced, or at least relegated to the purely private sphere. There are those who argue that the public celebration of festivals such as Christmas should be discouraged, in the questionable belief that it might somehow offend those of other religions or none. And there are those who argue – paradoxically with the intention of eliminating discrimination – that Christians in public roles should be required at times to act against their conscience. These are worrying signs of a failure to appreciate not only the rights of believers to freedom of conscience and freedom of religion, but also the legitimate role of religion in the public square. I would invite all of you, therefore, within your respective spheres of influence, to seek ways of promoting and encouraging dialogue between faith and reason at every level of national life." Speech at Westminster Hall, 17.09.10, at http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/documents/hf_ben-xvi_spe_20100917_societa-civile_en.html, accessed 23 Sep. 2010

undefined until it is tested in future courts (which will, however, be guided by the outcomes of the cases discussed in the previous paragraph and recent ECtHR jurisprudence[16]).

In the same debate, two of the Lords Spiritual addressed another amendment, which had been advanced by the Labour backbench peer Lord Alli on behalf of three sects: the Religious Society of Friends (Quakers), Liberal Judaism, and the Unitarian Church. Those three sects, after internal discussion, had all decided to request an amendment of the Civil Partnership Act 2004[17]. That Act prohibits religious language from being used in civil partnership ceremonies, and forbids them from being conducted on religious premises. The Quakers had discussed the matter over several days at Britain Yearly Meeting 2009. They had decided that it was integral to the Quaker faith that

> "For the right joining in marriage is the work of the Lord only, and not the priests' or magistrates'; for it is God's ordinance and not man's; and therefore Friends cannot consent that they should join them together: for we marry none; it is the Lord's work, and we are but witnesses". (George Fox 1669)[18]

In a Quaker marriage, therefore, no official declares the couple to be married. They simply rise, in either order, and declare that each takes the other as spouse. All Friends at the meeting sign the declaration of marriage as witnesses, it is entered by a Quaker registrar into a register book of weddings, and from time to time the registers are reported to the state. Accordingly, Britain Yearly Meeting decided to allow Quaker marriages conducted under the exemption granted in 1753 to include same-sex marriages; and in the interim to press for the Alli amendment in order to allow civil partnership ceremonies to be conducted in Quaker meeting houses. However, the bishop of Winchester, who spoke in favour of allowing the Church of England an undefined exemption from anti-discrimination law, opposed the Alli amendment on the grounds that

> [The amendment would] blur the characteristics of the civil partnership as distinct from marriage ... [and presented] the likelihood of a steady and continuing pressure on, if not a forcing of, the churches, the Church of England among them, to compromise on our convictions that marriage has a character that is distinct from that of a civil partnership. Churches of all sorts really should not reduce or fudge, let alone deny, that distinction[19]

In a single debate, the Lord Spiritual therefore asserted the spiritual independence of the Church of England and denied that of the Quakers, Liberal Jews, and Unitarians. That is the sort of thing that helps a Quaker (for instance) to remember why religious dissenters emigrated to the USA in C17 and why the Establishment and Free Exercise Clauses entered the US Constitution in 1791. The Alli Amendment was later carried, on a free vote, by 95 to 21, against the opposition of the duty bishop and both front benches. It now forms s.202 of the Equality Act 2010.

The protests by eminent religious leaders against the "secularism" of the UK seem therefore to be misplaced. Correctly understood, they are protests against its growing secularity. From the

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16 *Schut*; *Obst*; [citations to come]; Carolyn Evans, paper to 17th Law and Religion Symposium, Provo, UT, October 2010.

17 2004 c.33.

18 Britain Yearly Meeting of the Religious Society of Friends (Quakers), *We are but witnesses* (London: BYM 2009).

19 House of Lords *Hansard* 25 January 2010.

perspective of a minority religion, secularity is to be welcomed. It protects adherents of that religion from the sort of overbearing behaviour just described. Clearly, if an analogue to the First Amendment were in place in the UK, the ban on conducting civil partnerships in meeting houses would be unconstitutional under both its Establishment and Free Exercise clauses.

The special establishment of the Church of England is likely to disappear in the near future. The free exercise of religion in the UK is protected under the ECHR. Only 220 years late, the UK is about to catch up with the First Congress of the USA.

What about the alleged legal discrimination against Christians? Though there is room to pick holes in the detailed legal reasoning in some of the cases, the freedom to *manifest* religion is not absolute in states signatory to the ECHR. (Nor has it been so judged in the USA).[20] It must be balanced against other ECHR rights. Even when no other ECHR right is alleged (as in *Eweida*) a court must decide whether a discriminatory regulation is proportionate to achieving a legitimate objective. Only courts are fitted to such balancing exercises. Legislatures and executives are not. The bishops' defeat of the proposed proportionality clause in the Equality Act will push more, not fewer, alleged discrimination cases into the courts, because there will be no common 'proportionality' standard, which would easily have accommodated the requirements of religious believers; instead, religious organizations will remain an anomaly, subject to an absolute, either/or, or black letter standard of decision, onto which some form of proportionality requirement will have to be grafted by the courts.

[20] *Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal*, 546 U.S. 418 (2006); *Employment Div. v. Smith*, 494 U.S. 872 (1990). See also Religious Freedom Restoration Act, 42 U.S.C. 2000bb; *City of Boerne v. Flores*, 521 U.S. 507 (1997); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-1.