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ARTICLES

IN THE END IS THE BEGINNING: AN INQUIRY INTO THE MEANING OF THE RELIGION CLAUSES

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I. INTRODUCTION

We have in America a tradition of religious liberty. This tradition antedates the Constitution and is exemplified in such documents as the Statute of Virginia for Religious Freedom, enacted in 1785:

[N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.¹

Religious liberty, whether expressed as freedom of the individual conscience or freedom of a group to worship or to practice its religious beliefs, has generally been a "preferred" liberty. This liberty has not been without its problems. That is, religious liberty itself has been a source of tension in American society. To use a New Testament image, the demands of Caesar conflict, at times, with the demands of God.² Governmental regulation of the health, safety, welfare, and morals of its citizens will provoke, from time to time, the claim by some citizens for an exemption from such regulation on account of religious beliefs. For example, zoning ordinances,³ taxation for the com-

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1. VA. CODE § 57-1 (1981). See also T. JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 311-13 (A. Koch & W. Peden ed. 1944).

2. *Matthew* 22:15-22; *Mark* 12:13-17; *Luke* 20:20-26.

3. See *Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor*, 342 N.E.2d 534 (N.Y. 1975) (declaring zoning ordinance unconstitutional as

mon defense,⁴ laws requiring vaccinations for school children,⁵ laws forbidding racial discrimination,⁶ and laws requiring the recitation of the pledge of allegiance by school children⁷ have engendered claims of exemption on religious grounds. The power of the state to regulate body and soul is tempered by the requirements of religious liberty. Thus, the tension involves the problem of reconciling the state's interest in commanding obedience to its duly enacted laws with the claims of religious liberty.

The recent docket of the United States Supreme Court reflects the strength of this tension. In the last few terms, litigants representing religious and governmental interests have asked the Court to adjudicate several cases where claims of church and state conflicted.⁸ The number of cases and the range of issues presented indicate a lack of clear guidelines with which to resolve these disputes. The Court, however, has shown some reluctance to address the fundamental issue of the state's power to regulate where a religious exemption is claimed. For example, in *National Labor Relations Board v. Catholic*

applied to synagogue); *City of Chula Vista v. Pagard*, 159 Cal. Rptr. 29 (Cal. 1979) (upholding zoning ordinance as applied to religious communal family groups).

4. See *Autenrieth v. United States*, 279 F. Supp. 156 (N.D. Cal. 1968) (upholding the power to tax persons whose religion forbade support of war efforts).

5. See *Wright v. DeWitt School Dist.*, 385 S.W.2d 644 (Ark. 1965) (state power to require smallpox vaccinations upheld). See also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

6. See *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (upholding trial court finding that policy of racial discrimination was not one adopted in the exercise of religion).

7. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (declaring unconstitutional state requirement of flag salute as applied to children whose religious beliefs forbid it). Cf. *Palmer v. Board of Educ. of Chicago*, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 444 U.S. 1026 (1980) (upholding dismissal of teacher for refusing to teach the pledge of allegiance and patriotic songs).

8. See, e.g., *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), cert. denied, ____ U.S. ____, 102 S. Ct. 970 (1981) (court below upheld the school board denial petition of student group to conduct voluntary prayer meeting before start of school day); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 952 (1980) (court below denied injunctive relief to Cherokee Indians who claimed that completion of a federal dam would flood land sacred to the Cherokee religion); *Sherwood v. Brown*, 619 F.2d 47 (9th Cir.), cert. denied, 449 U.S. 919 (1980) (court below upheld Navy regulations requiring specific attire and prohibiting members of the Sikh religion from wearing a turban); *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980) (Justices Brennan and Marshall would grant certiorari) (court below upheld the practice of public school observance of Christmas holidays); *Palmer v. Board of Educ. of Chicago*, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 444 U.S. 1026 (1980) (court below upheld the dismissal of a public school teacher who was fired for refusing to teach the pledge of allegiance and patriotic songs to her kindergarten class on the ground that it violated her religious beliefs); *Barr v. United Methodist Church*, 153 Cal. Rptr. 322 (Cal.), cert. denied, 444 U.S. 973 (1979) (court below denied immuni-

Bishop of Chicago,⁹ the Court held parochial schools were not subject to the jurisdiction of the National Labor Relations Board. The Court, following customary practice, chose to base the decision upon statutory interpretation rather than upon constitutional requirements, noting that its interpretation avoided what otherwise would have been a serious question of church-state entanglement.

The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.¹⁰

This decision indicates a sensitivity to the problem of governmental authority over church operated schools, but it also demonstrates a reluctance to articulate constitutional standards on a question of ad-

ty from civil liability in a fraud lawsuit to a mainstream Protestant denomination, the United Methodist Church); *Rankins v. Commission on Professional Competence*, 593 P.2d 852 (Cal.), *appeal dismissed*, 444 U.S. 986 (1979) (court below denied relief to school superintendent who challenged a state policy of accommodating individual teachers' observance of religious holidays); *Rader v. Superior Court of Cal.*, (unreported, Cal. Ct. App.), *cert. denied*, 444 U.S. 916 (1979) (Supreme Court stated the Superior Court was the real party in interest) (court below denied immunity from discovery to an official of the Worldwide Church of God); *Johnson v. Motor Vehicle Div., Dept. of Revenue*, 593 P.2d 1363 (Colo.), *cert. denied*, 444 U.S. 885 (1979) (court below denied injunctive relief to members of a religious organization who sought to invalidate a Colorado requirement that all licensed drivers be photographed on the basis that it conflicted with their literal interpretation of the Bible); *Town v. State ex rel. Reno*, 377 So.2d 648 (Fla. 1979), *cert. denied*, 449 U.S. 1004 (1980) (court below upheld conviction for violation of marijuana laws notwithstanding the defense that the practice was part of defendant's religious worship); *Brown v. Stone*, 378 So.2d 218 (Miss. 1979), *cert. denied*, 449 U.S. 886 (1980) (court below upheld school board requirement of immunizations for school children despite religious objections of parent); *Keenan v. Gigante*, 390 N.E.2d 1151 (N.Y.), *cert. denied*, 444 U.S. 887 (1979) (court below adjudged a priest guilty of criminal contempt for refusing to answer questions concerning improprieties in the New York prison system even though his refusal was based on his right to practice ministry); *Damascus Community Church v. Clackamas County*, 610 P.2d 273 (Or. Ct. App. 1980), *appeal dismissed*, 450 U.S. 902 (1981) (Supreme Court dismissed for want of a substantial federal question) (court below held that zoning ordinance did not interfere with church's right to the free exercise of religion).

9. 440 U.S. 490 (1979).

10. *Id.* at 504. The first amendment questions arise out of the establishment and free exercise clauses of the Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. Both clauses are potentially involved because if the Court had chosen not to grant an exemption from NLRB jurisdiction in order not to favor religion (establishment), it would then have to deal with the church's claim that government supervision of its operations impeded its ability to provide a religious education (free exercise). Compare *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970) with *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

mittedly far ranging importance.¹¹ This caution is understandable in an area where the basic parameters of state authority and religious liberty are not clearly understood. The lack of clear guidelines, however, produces uncertainty and frustration for state authorities, religious groups, and individuals.

The Supreme Court has not always avoided this problem. Two of the leading cases concerning the boundary between governmental regulation and religious autonomy are *Walz v. Tax Commission*¹² and *Wisconsin v. Yoder*.¹³ In *Walz*, a taxpayer challenged a New York statute which provided an exemption from taxation for "real or personal property used exclusively for religious, educational or charitable purposes"¹⁴ The Court upheld the tax exemption for church properties notwithstanding the argument that it was akin to a subsidy to the church and thus encroached upon the separation of church and state. The exemption clearly treated property owned by religious organizations differently from other property, but the Court upheld the exemption because taxation would have presented serious free exercise problems. In *Walz*, free exercise claims predominated over establishment concerns. Likewise, in *Wisconsin v. Yoder* the Court restricted the state's power to require compulsory education of Amish children through age sixteen, citing the conflict with the religious interest of the Amish in educating their own school-aged children.¹⁵ Balancing between legitimate state and private religious interests, the Court ruled in favor of a religious exemption from the Wisconsin education laws.¹⁶ As in *Walz*, the Court had to balance, as if it were

11. According to Justice Brennan, this was not simply a case where the Court followed its traditional rule of deciding a case on narrower, nonstatutory grounds. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 508-09 (1979) (Brennan, J., dissenting). Brennan argued that the majority was neither faithful to the statute's language and history, nor the Court's own precedent. He stated that the majority opinion, in requiring a "clear expression of an affirmative intention of Congress" before the teachers would be considered within the Act's language, amounted to amending the statute rather than construing it. *Id.* at 509-11. He quoted Justice Cardozo's statement that the majority's action pressed "avoidance of a difficulty . . . to the point of disingenuous evasion." *Id.* at 517-18. See, *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 254, 256-63 (1979); Note, *Labor Law—Jurisdiction of the National Labor Relations Board Over Parochial Schools*, 54 TUL. L. REV. 786, 794-97 (1980).

12. 397 U.S. 664 (1970).

13. 406 U.S. 205 (1972).

14. 397 U.S. at 666-67.

15. 406 U.S. at 234.

16. Chief Justice Burger emphasized that such exemption was granted solely on account of religious beliefs and would not extend to those whose opposition to the laws was philosophically based. 406 U.S. at 216. *But see* Justice Harlan's concurring opinion in *Welsh v. United States*, 398 U.S. 333, 356-59 (1970) (Harlan, J., concurring). Thus, according to *Yoder*, the free exercise clause is not a general freedom of conscience clause but rather protects only such actions which are a part of the religious tenets of the actor.

traversing a "tight rope,"¹⁷ so that its reading of the establishment and free exercise clauses would not lean too far in either direction and thus neither unduly favor religion nor inhibit the free exercise of religion. *Walz* and *Yoder* illustrate the tension which is inherent in the first amendment. Neither clause can be read as an absolute because an absolute interpretation of the clause would ultimately swallow the other.¹⁸

The tension created between the demands of God and Caesar requires seeking a balance so that the practice of religion and its ensuing benefits may continue without creating the conditions for religious domination of democratic institutions. On the level of public policy, the solution has been sought in the concept of separation of church and state. Religion may not intrude into matters of state; the state may not intrude into matters of religion. In practice, the operation of this concept has not always been self-evident and the problem has generated much public debate concerning the proper resolution of the church-state relation.¹⁹ The Supreme Court itself has not articulated a clear and consistent treatment of these issues—relying at times on the establishment clause, and at other times on the free exercise clause. A coherent approach to the problem of religion and democracy requires that both clauses be read together *and* as part of a greater whole.

An understanding of the original intent of the founding fathers with respect to the role of religion in a democracy is a necessary first step in reading the religion clauses of the Constitution as part of a greater whole. The founders were closer to the problem of religious despotism, having seen its effects in Europe and in the colonies. Their understanding is very instructive in the articulation of a theory of democratic government which accommodates both ends—religious freedom without religious domination. The Supreme Court has attempted to ascertain the original intent of the founders, but its attempt has not been very successful; hence, a coherent theory has not emerged from the decisions. It has not been a success because the reading of the founder's intention has been too partisan. The founders have been quoted on both sides of an issue as if the matter could be resolved by finding the closest quote on point. What should be attempted instead is an understanding of the problem of religion

17. 397 U.S. at 672.

18. *Id.* at 668-69. See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-7 (1978).

19. See, e.g., W. BERNs, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 1-79 (1976); CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT (P. Kurland ed. 1975); P. KAUPER, RELIGION AND THE CONSTITUTION (1964); P. KURLAND, RELIGION AND THE LAW (1978); L. PFEFFER, CHURCH, STATE AND FREEDOM (rev. ed. 1967); L. TRIBE, *supra* note 18, at §§ 14-1 to 13.

and democracy as the founders understood it. This understanding should be used as a guide to resolving contemporary problems. The founders will educate us in how to think about religion and democracy, but not necessarily what to think. The history will instruct us to the process; it should not be read as a recipe book.

II. DISCOVERING THE PAST: THE SUPREME COURT AND THE USES OF HISTORY

The Supreme Court has said that the religion clauses of the first amendment are heavily grounded in the history surrounding their adoption.²⁰ Accordingly, its decisions have often rested upon a reading of the historical record.²¹ Reliance upon the history of any particular constitutional provision adds fidelity to the original purpose and continuity of practice. It also enhances the prospects of a break from accepted practice when the history is reinterpreted.²² When the Court believes it understands the full meaning of the text, or its own interpretation is at odds with the history, however, the history of a provision is sometimes ignored or even rejected. In either event, the use or nonuse of the historical materials say something important about the Court. In the area of religion, the use of history denotes an additional factor: when used, history indicates a degree of detachment or objectivity, whereas when history is not used the Court may be viewed as a committed participant either for or against religion. A resort to history forces one to consult and reflect upon authorities independent of oneself. Omission of the historical materials pushes the analysis in a more personal or subjective direction.

The Supreme Court cases on religion illustrate a pattern of development from a committed participant to a detached observer. Early cases seemingly tolerated a very close relationship between church and state. "Toleration" is not a totally satisfactory description because the Court simply did not perceive a conflict in the close relationship. History became a crucial tool as the Court began to adopt a more detached view, although the use of the tool was not always clearly understood.

20. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962); *McGowan v. Maryland*, 366 U.S. 420, 437-40 (1961); *McCullum v. Board of Educ.*, 333 U.S. 203, 213-15 (1948) (Frankfurter, J., concurring); *Everson v. Board of Educ.*, 330 U.S. 1, 8-13 (1947); *id.* at 33-43 (Rutledge, J., dissenting).

21. See, e.g., *Walz v. Tax Comm'n of N.Y.*, 397 U.S. at 681-87 (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. at 425-36; *McCullum v. Board of Educ.*, 333 U.S. at 213-31 (Frankfurter, J., concurring); 333 U.S. at 244-48 (Reed, J., dissenting); *Everson v. Board of Educ.*, 330 U.S. at 8-16; *id.* at 31-43 (Rutledge, J., dissenting).

22. See C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 26-28, 47-48 (1969).

A. *The Early Cases*

The early Supreme Court cases concerning religion were shaped by the understanding that the first amendment restrictions upon the power of Congress were not applicable to the states.²³ Unlike the majority of the Bill of Rights guarantees, the first amendment is clearly directed at limiting the power of the national government.²⁴ Thus, official state establishment of religion continued into the 19th century.²⁵ This helps to explain judicial reference to the Christian religion as part of the common law of the state. The practice is reflected

23. See, e.g., *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589, 609 (1845): "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states." See also *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 197-98 (1844).

24. See *infra* notes 287-89 and accompanying text. See also W. CROSSKEY, II *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1068 (1953). The inapplicability of the entire Bill of Rights to the functions of state government was not decided until *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). For a persuasive discussion on the textual and historical deficiencies of this case, see W. CROSSKEY, *supra*, at 1056-82. One of the principal arguments in Professor Crosskey's discussion is that the framers knew how to limit the scope of the provision to the federal government by appropriate language. The first and seventh amendments are testimony to this. The failure to limit the other amendments should not be taken as inadvertent, but rather, intentional.

25. The last official establishment of religion was abolished by Massachusetts in 1833. See L. PFEFFER, *supra* note 19, at 141; *Abington School Dist. v. Schempp*, 374 U.S. 203, 255 n.20 (1963) (Brennan, J., concurring). See generally I. CORNELISON, *THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA* (da Capo ed. 1970).

At the time of the American Revolution, the states recognized in some instances certain religions and in all cases the importance of religious worship. Fundamental Orders of Connecticut (1639), reprinted in B. SCHWARTZ, I *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 62-63 (1971) [hereinafter cited as *THE BILL OF RIGHTS*]; Connecticut Declaration of Rights (1776), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 289; Delaware Declaration of Rights §§ 2 & 3 (1776), reprinted in *THE BILL OF RIGHTS*, *supra*, at 276; GA. CONST. art. LPI & LXII (1777), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 299-300; Maryland—Declaration of Rights, XXX-III (1766), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 283; Massachusetts Declaration of Rights, art. II & III (1780), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 340; New Hampshire Bill of Rights, art. IV-VI (1783), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 375; N.J. CONST. art. XVII & XIX, (1776), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 260; N.Y. CONST. art. XXXVII-XL (1777), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 312; North Carolina Declaration of Rights, art. XIX (1776), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 287; Pennsylvania Declaration of Rights, art. II (1776), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 264; Charter of Rhode Island and Providence Plantations (1663), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 96-98; S.C. CONST. art. XXXVIII (1778), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 333-35; Vermont Declaration of Rights, art. III (1777), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 322; Virginia Declaration of Rights, art. XVI (1776), reprinted in I *THE BILL OF RIGHTS*, *supra*, at 236.

in an early state court opinion by Chief Justice Kent affirming a conviction for blasphemy:

The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the constitution, as some have strongly supported, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mohamet 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 upon Christianity, and not upon the doctrines of worship of those imposters.²⁶

The United States Supreme Court noted the close relation of church and state in *Vidal v. Girard's Executors*,²⁷ where Justice Story wrote: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."²⁸ Nevertheless, all states eventually adopted nonestablishment provisions in their constitutions or statutes.²⁹ Such provisions were generally drafted and interpreted narrowly to preclude only direct aid to religion.³⁰ The enactment of the fourteenth amendment to the Constitution had no immediate impact upon state practices. There was no mention of religion in the congressional debates³¹ and after the adoption of the fourteenth amendment, religious matter continued to be handled under the state constitutions and laws.³²

The emergence of the Mormons in the territories, however, raised the question of governmental regulation of religious activities. Congress had plenary power to regulate in the territories and pursuant to this power had prohibited polygamy.³³ In *Reynolds v. United*

26. *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. Sup. Ct. 1811).

27. 43 U.S. (2 How.) 127 (1844).

28. *Id.* at 198. Justice Story went on to point out that Christianity was not the only religion in Pennsylvania. All varieties of religious opinion were protected under the state constitution. *Id.* The statements of Justice Story and Chief Justice Kent may be compared with a rather curious statement contained in a treaty between the United States and Tripoli: "Art. 11: As the Government of the United States of America is not in any sense founded on the Christian Religion—as it has in itself no character of enmity against the laws, religion or tranquility of Musselman" Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary, Nov. 4, 1796-Jan. 3, 1797, United States-Tripoli, art. 11, 8 Stat. 154, T.S. No. 358.

29. L. PFEFFER, *supra* note 19, at 141-42.

30. *Id.*

31. See M. HOWE, *THE GARDEN AND THE WILDERNESS* 72-73 (1965); L. LUSKY, *BY WHAT RIGHT?* 168-69 (1975); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371.

32. See M. HOWE, *supra* note 31, at 73-90.

33. 12 STAT. 501 (1862).

States,³⁴ the first major case to test the validity of a conviction under the federal law, the Supreme Court affirmed the conviction and rejected the religious defense.³⁵ The Court determined the scope of protection for religious freedom by relying upon "the history of the times in the midst of which the provision was adopted."³⁶ It relied primarily upon the Statute of Virginia for Religious Freedom and Jefferson's famous letter to the Danbury Baptists containing the "wall of separation between Church and State" metaphor. Both texts were cited for the proposition that there was an unqualified freedom for beliefs but only a limited freedom for acts based upon the belief.³⁷ When the beliefs "break out into overt acts against peace and good order,"³⁸ then the government may regulate such acts. Polygamy was deemed to be an overt act against the order of society and as such, subject to regulation. Citing the long standing restrictions against polygamy, the Court concluded that the government had the power to prohibit the practice.³⁹

The Mormons persisted and the next case, *Davis v. Beason*,⁴⁰ raised the religious freedom issue once again. The Court responded

34. 98 U.S. 145 (1878).

35. *Id.* at 168.

36. *Id.* at 162.

37. *Id.* at 163-64. For a discussion of the Virginia Statute for Religious Freedom, see *infra* notes 207-23 and accompanying text.

38. *Id.* at 163 (quoting from the Virginia Statute for Religious Freedom, VA. CODE § 57-1 (1974)), reprinted in T. JEFFERSON, *supra* note 1, at 311-13.

39. The Court stated:

In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com. 81, note (e). An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

98 U.S. 145, 165-66 (1878).

40. 133 U.S. 333 (1890).

with the act/belief distinction, reserving for Congress the power to regulate marital relations. The first amendment, it declared, allows people to believe as they shall choose. "It was never intended or supposed that the [first] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society."⁴¹

When the federal government suspended the corporate charter of the Mormon church, the Supreme Court upheld the action in a tone generously described as strident:

[I]t is also stated in the findings of fact, and is matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress—notwithstanding all of the efforts made to suppress this barbarous practice—the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society.⁴²

41. *Id.* at 342. The Court further noted that:

With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.

Id. at 342-43.

42. *The Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 48-49 (1890). The Court addressed the act/belief distinctions as follows:

One pretence for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and,

The latter two decisions, *Davis* and *Mormon Church*, did not discuss the history of the religion clauses. *Reynolds* did not discuss the history other than to cite a state statute, drafted by Thomas Jefferson, and an excerpt from a letter written by then President Jefferson in 1802. Without further analysis, the relation of these documents to an understanding of the religion clauses adopted in 1791 is ambiguous. This is evidence of Professor Gilmore's claim that this period of law generally was an age of faith, where the judges knew the right answers.⁴³ The language of the Court opinions indicates a faith in their ability to discern the difference between protected and unprotected religious activities. This is the view of a committed participant or, one might say, the view from the inside.

B. *The Personal Rights Cases*

The fourteenth amendment made a relatively slow emergence as a constitutional force. The due process clause was invoked first to strike down state regulation that the Court viewed as interfering with "liberty of contract."⁴⁴ It gradually emerged as a substantive source of personal rights. In the 1920s, the Supreme Court began to articulate the concept that the fourteenth amendment protected certain liberties and rights from state infringement. This development occurred in two cases that had religious overtones: *Meyer v. Nebraska*⁴⁵ and *Pierce v. Society of Sisters*.⁴⁶ *Meyer* concerned the constitutionality of a state statute which prohibited the teaching of the German language in schools. The defendant was convicted for teaching Bible stories in German in a Lutheran parochial school.⁴⁷ Although not incorporating the first amendment into the due process clause of the fourteenth amendment, the Supreme Court held the statute to be an unwarranted interference with the "liberty" of the defendant. The Court did not precisely define the scope of protected liberties but did mention that it included the right "to worship God according to the

therefore, under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

Id. at 49-50.

43. G. GILMORE, *THE AGES OF AMERICAN LAW* 41-42 (1977).

44. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

45. 262 U.S. 390 (1923).

46. 268 U.S. 510 (1925).

47. 262 U.S. 390, 397 (1923).

dictates of [one's] own conscience."⁴⁸ *Pierce* concerned the validity of a statute that would have resulted in the closure of all private schools in the state. The Society of Sisters, a corporation which operated a private religious school, challenged the statute. The Court ruled in favor of the Society of Sisters, essentially on grounds of protection of business and economic interests. Although not expressly a first amendment case, *Pierce* raised the specter of the religious freedom issue and, together with *Meyer*, it has become an important case in the area of privacy.⁴⁹ Both cases support the notion of a sphere of private activity that is immune from governmental regulation and both describe its application in the area of religious activity as part of our fundamental liberties. These cases are the beginnings of what may be described today as "human rights," or in other words, universal principles of policies which are valid without regard to time and place.⁵⁰

C. *Incorporation of the Bill of Rights Through the Due Process Clause of the Fourteenth Amendment*

In *Gitlow v. New York*,⁵¹ a case announced the same day as *Pierce*, the Supreme Court gave formal approval to the idea that the due process clause might incorporate certain provisions of the Bill of Rights. In that case the Court noted:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.⁵²

After *Gitlow*, the incorporation process itself proceeded on a case-by-case basis.⁵³ Although there is some dispute whether the Court incorporated freedom of religion as part of due process in the 1934 case of *Hamilton v. Regents of the University of California*,⁵⁴ it is

48. *Id.* at 399.

49. Professor Kurland describes *Pierce* as "[p]robably the most abused citation in the construction of the first amendment. . . . The case raised no church-state issues; the Court decided no church-state issues. Indeed, no reference to the first amendment is made anywhere in the Court's opinion." P. KURLAND, *supra* note 19, at 27-28. Nevertheless, the Supreme Court cited *Pierce* in, *Wolman v. Walter*, 433 U.S. 229, 240 (1977); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 233-34 (1972); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *id.* at 27 (Jackson, J., dissenting); *id.* at 33 (Rutledge, J., dissenting).

50. See L. STRAUSS, *NATURAL RIGHT AND HISTORY* 190-93 (1953).

51. 268 U.S. 652 (1925).

52. *Id.* at 666.

53. For a discussion of the incorporation process, see H. ABRAHAM, *FREEDOM AND THE COURT* 56-96 (3d ed. 1977).

54. 293 U.S. 245 (1934). The *Hamilton* Court did not expressly incorporate

clear that by 1940 the free exercise clause was applicable to the states. In *Cantwell v. Connecticut*,⁵⁵ the Court reversed the convictions of some members of Jehovah's Witness for soliciting funds without a license and for breach of the peace. The Connecticut statute that gave broad censorship powers to state officials was held to be invalid on its face as a violation of the defendant's free exercise of religion.⁵⁶ Neither *Hamilton* nor *Cantwell* contained any historical analysis of the first amendment religion clauses and their relation to the fourteenth amendment. History did not play an important role at that stage of the incorporation process.⁵⁷

D. *Everson v. Board of Education*

The first case to apply the establishment clause to the states was *Everson v. Board of Education*.⁵⁸ In that case the Supreme Court considered the constitutionality of government payments made to parents of parochial school children for reimbursement of school transportation costs. A taxpayer challenged the payments as a violation of the establishment clause, claiming such payments constituted an impermissible aid to religion. The Supreme Court, speaking through Justice Black, held that the payments did not violate the establishment clause. Justice Jackson and Justice Rutledge wrote dissenting opinions, with Rutledge giving an extended account of the history of the religion clauses.⁵⁹

Justice Black's majority opinion was grounded upon an examination of the historical events leading to and culminating in the adoption of the first amendment.⁶⁰ Citing the religious persecutions that had plagued Europe for centuries, he noted that the early colonists had come to America to escape the miseries engendered by religious domination of politics and society. However, the new settlements for

the first amendment through the due process clause. Rather, it viewed religious liberty, as it did in *Meyer* and *Pierce*, as being included within the "liberty" protected by the due process clause. *Id.* at 262. Justice Cardozo, in his concurring opinion, indicated that he considered the due process clause to have incorporated the first amendment. *Id.* at 265. *But see* H. ABRAHAM, *supra* note 53, at 64.

55. 310 U.S. 296 (1940).

56. *Id.* at 305-06.

57. By contrast, history played a key role in later discussions. *See* Adamson v. California, 332 U.S. 46, 92-123 (1947) (Black, J., dissenting); R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1965); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

58. 330 U.S. 1 (1947).

59. 330 U.S. at 33-43 (Rutledge, J., dissenting).

60. 330 U.S. at 8-16.

the most part were not formed on the principle of religious freedom. Many of the old practices continued with the persecuted minorities now sitting in the position of the majority. Religious freedom as a principle was not yet widely accepted; on the contrary, religious domination by the practitioners of "true religion" remained the order of the day. With the control of religion built into charters granted by the crown, Catholics were persecuted, Quakers were jailed, and Baptists were excluded from the political and social life of the community.⁶¹

The cumulative effect of these persecutions was to produce a counter movement for religious freedom. Black described this reaction in an important passage: "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment."⁶²

Although no one group or locality alone could be credited with arousing sentiment for religious liberty, the struggle in Virginia exerted a special influence. Led by James Madison and Thomas Jefferson, the opposition to the officially established Church of England won a ten year political struggle in 1786 with passage of the Statute of Virginia for Religious Freedom. This statute not only disestablished the Church of England, but also prohibited state support of any religion and made religious belief a matter of private concern.⁶³ Together with Madison's *Memorial and Remonstrance*, written in 1785 in opposition to a renewal of a tax to support the established church, the statute furnished the Court with an authoritative statement of the principles underlying the religion clauses: "This court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute."⁶⁴

After reading the views of Madison and Jefferson into the first amendment, there remained an additional problem in the historical analysis. The first amendment prohibitions were limitations on the power of Congress, not the states. Notwithstanding the success of the disestablishment movement in Virginia, some states continued official support of religion decades after the passage of the first amendment.⁶⁵ The missing link was supplied by the fourteenth amendment which

61. *Id.* at 10.

62. *Id.* at 11.

63. *See infra* notes 198-214 and accompanying text.

64. 330 U.S. at 13.

65. *Id.* at 14. *See supra* note 25.

Black said was intended to incorporate the restrictions of the first amendment and make them applicable to the states.⁶⁶ The problems of church-state entanglement are the same, whether it be on a national or a local scale: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."⁶⁷

Black proceeded to summarize the essential restrictions on "establishment of religion" and included among them the requirement that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions"⁶⁸ He concluded, however, the payments from tax revenues for transportation of parochial school children did not violate the constitutional restrictions. Justice Jackson was puzzled by such an incongruity that followed a strong statement of the principles of religious liberty with the Court's subsequent application. He was reminded of Byron's Julia who "whispering 'I will ne'er consent'—consented."⁶⁹

Justice Rutledge wrote a long dissenting opinion emphasizing the importance of the history:

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.⁷⁰

Rutledge's historical analysis covered much the same ground as Black's but it was more detailed and ultimately reached the opposite conclusion. His account relied more on Madison than Jefferson. He traced the political maneuverings of Madison from the Virginia struggle through the enactment of the Bill of Rights. The Virginia struggle was a preliminary step to the realization of religious freedom generally, and yet it was so successful that the resolution of the problem on a national level was almost anticlimatic.⁷¹

Rutledge placed primary importance on Madison's *Memorial and*

66. 330 U.S. at 15.

67. *Id.* quoting *Harmon v. Dreher*, 17 S.C. Eq (Speers Eq) 87, 120 (S.C. 1843).

68. *Id.* at 16.

69. *Id.* at 19 (Jackson, J., dissenting).

70. *Id.* at 33-34 (Rutledge, J., dissenting).

71. *Id.* at 42 (Rutledge, J., dissenting).

Remonstrance.⁷² Calling it Madison's complete (though not his only) interpretation of religious liberty, Rutledge cited the *Remonstrance* extensively to show Madison's intense opposition to any form of aid to religion.⁷³ The *Remonstrance* indeed was a powerful statement of the problems engendered by church-state entanglement. Madison believed religion to be a private matter and any intrusion of it into the public realm could only be to the detriment of both public and private concerns. Despite the harmful effects, there remained the tendency to mix the two realms. Any establishment of religion, no matter how slight, was an infringement on freedom. Disestablishment was seen as a complementary idea to free exercise, for "to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that [religious] freedom."⁷⁴

Rutledge also cited Madison's activities after the Virginia issue had been successfully concluded. Madison was a member of the Constitutional Convention of 1787 and probably the chief architect of the Constitution produced in Philadelphia. He worked hard for its ratification in Virginia and elsewhere.⁷⁵ Although he believed the Constitution to be a sufficient guarantee of civil liberties because power to infringe civil liberties had not been granted to the national government, Madison also worked hard in the First Congress for passage of a Bill of Rights. He introduced a provision concerning religion: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed."⁷⁶

Rutledge said there was relatively little discussion of the religion issue because there was general agreement as to its essential resolution.⁷⁷ Only the formal phrasing had to be resolved. At one point the following provision was proposed: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."⁷⁸ There was some concern that such language might be construed to prohibit judicial enforcement of private pledges.⁷⁹ Madison suggested

72. See APPENDIX.

73. "[T]he Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.'" 330 U.S. at 37 (Rutledge, J., dissenting).

74. *Id.* at 40 (Rutledge, J., dissenting).

75. Madison participated in a project with Alexander Hamilton and John Jay to aid ratification in New York. He authored many essays under the name "Publius" that later were published with the Hamilton and Jay essays as *The Federalist Papers*. See *infra* notes 270-73 and accompanying text.

76. 1 ANNALS OF CONG. 434 (J. Gales ed. 1789), reprinted in II THE BILL OF RIGHTS, *supra* note 25, at 1026.

77. 330 U.S. at 42 (Rutledge, J., dissenting).

78. 1 ANNALS OF CONG. 729 (J. Gales ed. 1789), reprinted in II THE BILL OF RIGHTS, *supra* note 25, at 1088.

79. *Id.*, reprinted in II THE BILL OF RIGHTS, *supra* note 25, at 1088-89.

the addition of "national" before "religion" thereby showing, as Rutledge argued, that Madison might not want to inhibit private pledges, but also that establishment meant public financial support as well as legally sanctioned establishment.⁸⁰ The main concern of Congress, according to Rutledge, was not preserving power to use public funds in support of religion, but rather in making sure that the language adopted was not too broad so as to inhibit the free exercise of religion.⁸¹

Rutledge attributed the final version of the amendment to Madison and argued that his ideas were incorporated into the amendment:

All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.⁸²

This takes the incorporation argument one step further because the first amendment is said to have incorporated Madison's writings and career, and the first amendment in turn is incorporated by the fourteenth amendment so as to apply to the states.

Despite the historical accounts by Black and Rutledge there remain several questions concerning the history, which must be considered:

1. Justice Black painted a picture of religious domination and persecution in America that gave way to a concern for religious liberty as a principle of politics.⁸³ Why did this shift in attitude occur? How widespread was the concern for religious liberty? How was the concern expressed? The search for the answer to these questions points to other documents that are relevant to an understanding of the religious problem.

2. How representative are the Virginia Statute for Religious Freedom and Madison's *Memorial and Remonstrance* in reflecting public sentiment on the religious issue?

3. Since Madison and Jefferson occupy an important place in modern understanding of the purpose of the first amendment, to what extent should their writings be incorporated into first amendment doctrine? Surely it is problematic to incorporate writings produced after the adoption of the first amendment. Nevertheless, the Supreme Court has often referred to Jefferson's metaphor of "a wall of separation between Church and State," written in 1802.⁸⁴

80. 330 U.S. at 42 (Rutledge, J., dissenting).

81. *Id.*

82. *Id.* at 39 (Rutledge, J., dissenting).

83. See *supra* note 62 and accompanying text.

84. See, e.g., *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444

4. Rutledge referred to "establishment" and "free exercise" as correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom.⁸⁵ What was the original understanding of the relation between the two ideas? The two ideas were certainly not the same for Justice Black. He felt that to deprive the parents of reimbursement for transportation costs tended to verge on an infringement of free exercise.⁸⁶

5. Rutledge's argument clearly goes too far. He said that Madison opposed all public support of religion in whatever form and that the first amendment incorporated Madison's ideas in this regard. The language of the first amendment, however, simply does not go this far. Whereas the other amendments in the Bill of Rights, except the seventh amendment, are general prohibitions on the powers of government, the first amendment is a restriction only on the power of Congress. A provision like the one initially introduced by Madison,⁸⁷ or "no religion shall be established by law," would have been more in keeping with a total separation of church and state. Why then did the framers leave the matter of religion to the states?

6. Did the framers of the fourteenth amendment intend to incorporate the provisions of the first amendment so as to make them applicable to the states? If not, on what theory can such application be supported?

These are all serious questions that must be addressed before the historical analysis can be deemed complete. If they are not answered, some reassessment of the basic account by the Supreme Court may be necessary. Failure to account for critical data is an indication that the model of analysis may be faulty.⁸⁸ As in geology, the recognition of an anomaly may point the way to a rich discovery.

E. *The Released Time Cases*

The next major religion case after *Everson* was *McCullum v. Board of Education*.⁸⁹ In *McCullum* the Court considered the constitutionality of a released-time program whereby children in public schools could elect to take one-half hour of religious instruction in the school classrooms. The Court struck down the state program by an eight to one vote, stating that the program came within the pro-

U.S. 646, 671 (1980) (Stevens, J., dissenting); *Wolman v. Walter*, 433 U.S. 229, 266 (1977) (Stevens, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 425 (1962); *Zorach v. Clauson*, 343 U.S. 306, 317 (1952) (Black, J., dissenting); *McCullum v. Board of Educ.*, 333 U.S. 203, 231 (1948); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

85. 330 U.S. at 40 (Rutledge, J., dissenting).

86. *Id.* at 16.

87. See *infra* text accompanying note 110. See also *infra* note 279.

88. See T. KHUN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

89. 333 U.S. 203 (1948).

hibitions set forth in *Everson*.⁹⁰ Justice Frankfurter wrote a long concurring opinion discussing, in part, the historical basis of the first amendment. His concurrence was necessary to respond to Justice Reed's dissent, which contended the Court had misread the history and had ignored past practice.⁹¹ Frankfurter's response emphasized the principles of religious liberty articulated by the founders. Frankfurter's utilization of the historical argument served the function of easing over the otherwise high obstacle of established practice. The historical argument serves as a way for a court to appear traditional while instituting change.

The Frankfurter opinion relied for the most part upon the Rutledge dissent in *Everson*. What is of interest here is the fourteenth amendment argument:

[L]ong before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people.

.....

Separation in the field of education, then, was not imposed upon unwilling states by force of superior law. *In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life.* To the extent that the Constitution thus made it binding upon the states, the basis of the restriction is the whole experience of our people.⁹²

This is different from the incorporation argument where it is said that Congress utilized broad language which was only fully understood seventy-five to one hundred years later.⁹³ Rather, the fourteenth amendment is characterized here as stating or recognizing an existing truth. In this sense, the fourteenth amendment is seen as a codification of the Declaration of Independence, affirming a tradition of liberty, rather than initiating a revolution in constitutional government.

Justice Reed's dissenting opinion does not give an extensive treatment of the founders' intent. He quickly distinguished Madison's *Remonstrance* and Jefferson's metaphor of separation by saying they were inapplicable to the released-time program.⁹⁴ Of greater importance, he believed, was a report made by Jefferson in 1822 on the issue of religious instruction at the University of Virginia. Jefferson said religious instruction was important and "would complete the circle

90. *Id.* at 210.

91. *Id.* at 239, 256 (Reed, J., dissenting).

92. *Id.* at 215 (Frankfurter, J., concurring) (emphasis added).

93. See, e.g., L. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 71 (1972); L. PFEFFER, *supra* note 19, at 142-44; Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64-65 (1955).

94. 333 U.S. at 247 (Reed, J., dissenting).

of the useful sciences."⁹⁵ Reed cited Madison's approval of the report as an indication of his views as well.⁹⁶ Without further analysis, however, there is some difficulty attributing actions that occurred over thirty years after the adoption of the first amendment to its interpretation. It is particularly difficult in this instance because consistency was not one of Jefferson's main virtues,⁹⁷ and the problem of Madison's consistency on constitutional matters is a controversial issue in early American history.⁹⁸

The Supreme Court later approved a program whereby children might leave the school grounds during the day to attend centers for religious instruction or devotional exercises. In *Zorach v. Clauson*, the Court distinguished *McCullum* by noting there was no expenditure of public funds nor use of public facilities.⁹⁹ Moreover, the majority, speaking through Justice Douglas, said the state should not be prohibited from accommodating the religious needs of its citizens:

We are religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.¹⁰⁰

Although there is no explicit analysis of the history of the religion

95. *Id.* at 245-46 n.11 (Reed, J., dissenting).

96. *Id.* at 248 (Reed, J., dissenting).

97. There is, of course, the famous problem of Jefferson's writings condemning slavery while he continued to own slaves. See generally STORING, SLAVERY AND THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC (2d ed. 1979). Jefferson's writings on politics as well are often ambiguous and sometimes contradictory. See Mansfield, *Thomas Jefferson in AMERICAN POLITICAL THOUGHT: THE PHILOSOPHIC DIMENSION OF AMERICAN STATEMANSHIP* 42-50 (M. Frisch & R. Stevens ed. 1976).

98. The most commonly held view is that Madison changed his position between the time of his collaboration with Alexander Hamilton in *The Federalist Papers* and his emergence in the 1790s as a party leader in opposition to the Federalist Party and Hamilton. See J. ZVESPER, *POLITICAL PHILOSOPHY AND RHETORIC, A STUDY OF THE ORIGINS OF AMERICAN PARTY POLITICS* 110-19 (1977); YARBOROUGH, *Federalism in the Foundation and Preservation of the American Republic*, 7 *PUBLIUS* 43 (1976).

100. *Id.* at 313-14 (emphasis added).

clauses, the Court states that accommodation of private religious needs "follows the best of our traditions."¹⁰¹ The history is not examined or explained; it is self-evident. Accommodation is treated almost as if it were a requirement of the free exercise clause. The state should not be required to be indifferent about the religious needs of its citizens. The Court concluded, "[W]e cannot read into the Bill of Rights such a philosophy of hostility to religion."¹⁰²

F. *The Sunday Closing Cases*

In 1961 the Supreme Court decided a series of cases concerning the constitutionality of state mandated Sunday closing laws. The Court upheld the laws both as to free exercise claims¹⁰³ and as to establishment claims.¹⁰⁴ According to the Court, Sunday closing laws did not violate the free exercise clause even though they placed an indirect commercial burden on those who closed on Saturday for religious reasons. Sunday closing laws were also held not to violate the establishment clause even though the laws originally had a religious purpose. Their present justification was secular—the state's interest in providing a common day of rest for its citizens.¹⁰⁵

The first of this series of cases, *McGowan v. Maryland*, contained a short discussion of the historical background of Sunday closing laws and the first amendment.¹⁰⁶ Using the history as an essential point of reference, Chief Justice Warren concluded that the Sunday laws were compatible with the principles of religious liberty. First, he focused on the Virginia experience, noting that Sunday labor prohibitions were not believed to be inconsistent with the Virginia Declaration of Rights enacted in 1776.¹⁰⁷ Furthermore, James Madison, who fervently urged the disestablishment of the Anglican church in Virginia, introduced a bill to the legislature for the punishment of "Sabbath Breakers."¹⁰⁸ This occurred in the same year as his sponsorship of the Statute for Religious Freedom. Madison's career often showed great sensitivity to the slightest infringement of religious liberty,¹⁰⁹ and thus his actions here indicate he felt there was no

101. *Id.* at 313.

102. *Id.* at 315.

103. *Gallagher v. Crown Koshier Super Market of Mass.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

104. *Two Guys From Harrison—Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).

105. *McGowan v. Maryland*, 366 U.S. at 445.

106. 366 U.S. at 437-42. In addition, Justice Frankfurter wrote a lengthy concurring opinion (with two appendices) in this case which detailed the long history of Sunday legislation. *Id.* at 459.

107. *Id.* at 438.

108. *Id.*

109. For example, Madison as President vetoed a bill to incorporate the Episcopal

problem. Whether Madison was right in this regard is not really germane to the historical inquiry. What the framers intended by the first amendment is the touchstone of the historical discussion. Second, Warren argued that the agreement of civil law and religious law on a particular issue should not in itself be taken as an establishment of religion. Citing the *Reynolds* case, which prohibited polygamy, Warren argued that the first amendment was not intended to displace existing civil sanctions against certain social behavior.¹¹⁰ Here, history serves the function of justifying a well-established practice and also reminds us that there are other traditions besides religious traditions.

G. *The School Prayer Case*

The next major historical analysis of the religion clauses was undertaken by the Court in *Engel v. Vitale*.¹¹¹ *Engel* was an extremely controversial case that involved the constitutionality of a state sanctioned prayer at the beginning of each school day.¹¹² In an opinion by Justice Black, the Court relied primarily on its reading of history. An argument from authority—the authority of the founding fathers—is helpful when striking down something popularly perceived to be an important part of our religious and cultural heritage. The Court asserted that “[i]t is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our colonists to leave England and seek religious freedom in America.”¹¹³ Justice Black began with an account of the escape from religious orthodoxy

Church in the District of Columbia on the ground that it would obscure the “essential distinction between civil and religious functions.” II MESSAGES AND PAPERS OF THE PRESIDENTS 474-75 (J. Richardson ed. 1897). See L. PFEFFER, *supra* note 19, at 157. Madison also registered objections to the appointment of chaplains in the armed services, *id.* at 170, 250-51; and the appointment of congressional chaplains, *id.* at 170, 248-49. Late in his life, Madison wrote in his essay *On Monopoly* about the Virginia Statute on Religious Liberty:

This act is a true standard of Religious Liberty: its principle the great barrier against usurpations on the rights of conscience. As long as it is respected & no longer, these will be safe. Every provision for them short of this principle, will be found to leave crevices at least thro’ which bigotry may introduce persecution; a monster, that feeding & thriving on its own venom, gradually swells to a size and strength overwhelming all laws divine and human.

MADISON’S “DETACHMENT MEMORANDA,” III WM. & MARY Q. 534, 554-55 (E. Fleet ed. 1946).

110. 336 U.S. at 439-40.

111. 370 U.S. 421 (1962).

112. The nondenominational prayer read as follows: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” *Id.* at 422.

113. *Id.* at 425.

in Europe. The *Book of Common Prayer*, intended as a unifying document, became the focal point of an intense religious struggle in England.¹¹⁴ Unfortunately, some of the groups that had opposed the orthodoxy of the Church of England imposed their own orthodoxy in this country. "Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five."¹¹⁵ The successful revolution against English domination was, however, soon followed by an intense opposition to religious domination. By the time of the adoption of the Constitution there was a widespread awareness of the dangers of a union of church and state.¹¹⁶ The framers of the Constitution intended to avoid this danger by setting up a democratic republic where power was diffused. In addition, they adopted the first amendment:

[T]o stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.¹¹⁷

Under this formulation, the founding fathers are cited as authority against government sanctioned public prayer. The historical argument operates by analogy as there was no direct evidence on prayer in the public schools. The argument is weak, however, because the closest historical examples would appear to sanction public prayer. This essentially was the argument raised by Justice Stewart in the lone dissent. He pointed out that American presidents have utilized prayers in their inaugural addresses. Washington, Adams, Jefferson, and Madison, all founding fathers, included prayers in their first official acts as president.¹¹⁸ These examples, from public speeches of undoubted importance, are evidence that some forms of public prayer were not believed to constitute an establishment of religion. They implicitly recognize a spiritual tradition which is a part of American culture.¹¹⁹ As a matter of historical analogy then, the Court's reliance

114. *Id.* at 426-27.

115. *Id.* at 427-28. *See also id.* at 428 n.10; A. STOKES, *I CHURCH AND STATE IN THE UNITED STATES* 444 (1950).

116. 370 U.S. at 429.

117. *Id.* at 429-30.

118. *Id.* at 445 n.3 (Stewart, J., dissenting). Stewart cited Lincoln, Cleveland, Wilson, Roosevelt, Eisenhower, and Kennedy as using similar invocations. *Id.* More recently, President Reagan, in his Inaugural Address, called for a national day of prayer on each succeeding Inaugural Day. *L.A. Times*, Jan. 21, 1981, at 17, col. 1.

119. *See, e.g.*, 36 U.S.C. § 169(h) (1976): "The President shall set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer, on which the people of the United States may turn to God in prayer and

on the founding fathers for the result in *Engel* is probably inapt, or at the very least overstated.

If there is no specific historical precedent against school prayer, can it be said that the principles articulated by Jefferson and Madison support the Court's conclusion? Possibly, but the Court did not analyze the connection between the views of Jefferson and Madison and the result in the case. Although Madison is cited at several points as authority, there is no analytical argument to show how Madison's statements concerning the Assessment Bill favor prohibition of school prayers.¹²⁰ This is not to say that such an argument cannot be made, the Court simply did not make it. As a result, Madison's views are flattened out like a position paper of a twentieth century politician. Madison is not "soft" on the mixing of church and state, therefore he must be against school prayers. To accurately understand Madison's and Jefferson's views, it is necessary to examine the content of their writings, and not just their positions.

It is interesting to note that although Justice Black cites Madison's *Memorial and Remonstrance* a total of five times in the opinion,¹²¹ he does not observe that the *Memorial and Remonstrance* ends with a prayer.¹²² It is clear from the tenor of the *Remonstrance* and particularly from its citation of the Virginia Declaration of Rights that the duty to pray is a private duty and cannot be coerced by force or violence.¹²³ Whether the state must also forbid voluntary school prayers is another matter requiring further analysis. It may be that the real issue is the religious freedom to pray. Madison's *Remonstrance* ought not to be read as foreclosing this freedom.

In any event, the Court did not have to address the free exercise concern here because voluntary prayers were not forbidden by the state board rule. Rather, the question before the Court was whether the prayers were voluntary or coerced. Viewed in its most favorable light, the decision held that the circumstances of state involvement, through the board of education and the individual teacher, was inherently coercive.¹²⁴ The first amendment forbids governmental sanc-

meditation at churches, in groups, and as individuals." See also 36 U.S.C. § 169(g) (1976); IN GOD WE TRUST: THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS (N. Cousins ed. 1958).

120. Madison's *Memorial and Remonstrance* is cited five times in the opinion. 370 U.S. at 431 nn.13-14, 432 nn.15-16, 436. The quotations amply illustrate Madison's concern with church-state entanglement. However, there is no attempt made to connect Madison's views with the specific problem of government sanctioned school prayer.

121. *Id.*

122. See APPENDIX at ¶ 15.

123. See I THE BILL OF RIGHTS, *supra* note 25, at 236.

124. 370 U.S. at 430-31. In this regard, *Engel* may be seen as the simple application of the principle enunciated in *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

tion of religious doctrine. It is here that the citations to Jefferson and Madison are most appropriate. Government may not coerce citizens into engaging in religious activity. The holding of *Engel* thus is narrower than that held out by critics of the decision. *Engel* did not outlaw prayer in the public schools;¹²⁵ it forbade the state requirement of involuntary religious activity. The problem with *Engel* lies not in its result, but rather in its partisan and doctrinaire treatment of the historical materials.

H. *The Bible Reading Cases*

In the next term, in *Abington School District v. Schempp*,¹²⁶ the Court affirmed its holdings in *Engel*, striking down the requirements of Pennsylvania and Maryland for Bible reading and the recitation of the Lord's Prayer in the public schools. The Court's opinion, by Justice Clark, stated that although religion had played an important role in American society, the history of the first amendment dictated the principle of neutrality on the part of government.¹²⁷ This neutrality was not simply that government refrain from preferring one religion over another, but rather that government must be "neutral in its relations with groups of religious believers and non-believers."¹²⁸ Neutrality between the state and all citizens on the matter of religion is attributed to Madison and Jefferson, whose views were discussed in *Everson* and *Engel*.¹²⁹ The Court held that the implicit endorsement of religion in the readings and the prayer violated this neutrality.¹³⁰

A concurring opinion by Justice Brennan signaled a shift away from the previous emphasis on the history of the first amendment. Brennan warned against a "too literal quest for the advice of the Founding Fathers upon the issues of these cases."¹³¹ Such a quest would be futile because the historical record was at best ambiguous¹³² and would be misdirected in that both the structure of American education and the religious composition of the American people had changed greatly since the founders' time.¹³³ Thus, the use of the history should be limited to the understanding of "broad purposes, not specific practices."¹³⁴ The suggestion here that one can accurately

125. A sampling of the reactions to *Engel* may be found in Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUP. CT. REV. 1, 2-4.

126. 374 U.S. 203 (1963).

127. *Id.* at 212-17.

128. *Id.* at 218 (quoting *Everson v. Board of Educ.* 330 U.S. 1, 18 (1947)).

129. 374 U.S. at 214.

130. *Id.* at 223-24.

131. *Id.* at 237 (Brennan, J., concurring).

132. *Id.* (Brennan, J., concurring).

133. *Id.* at 238-41 (Brennan, J., concurring).

134. *Id.* at 241 (Brennan, J., concurring).

distill broad purposes apart from the limitations of specific practices must be evaluated. The founders should not be made spokesmen for positions to which they did not subscribe; their views ought to be accepted or rejected on their own merits and not distorted to bear witness to views they opposed.¹³⁵ The mechanism of articulating principles in the face of countervailing practices is fraught with danger unless the principles are carefully drawn from the whole set of circumstances. The suggestion, in any event, seems to have provided the basis for much of the Court's subsequent historical analysis because the figures of Madison and Jefferson appear to have faded while their "principles" have become prominent. The key principle for establishment clause cases becomes neutrality.¹³⁶

Sherbert v. Verner,¹³⁷ which was decided on the same day as *Abington School District v. Shempp*¹³⁸ involved the parameters of the free exercise clause. The Court, speaking through Justice Brennan, held that a state may not burden the exercise of religious beliefs by denying unemployment compensation to an employee who refused to work on Saturday, the Sabbath day of her faith. A noteworthy aspect of the decision is the absence of historical analysis. Whereas the major establishment clause cases had relied heavily upon the history accompanying the adoption of the first amendment, *Sherbert* did not mention this history. Instead, the Court utilized the more general analysis of whether the state had a compelling interest to justify its infringement of the employee's first amendment rights.¹³⁹ With this case, the Court began to put some distance between itself and the founders.

I. *The Tax Exemption Case*

After *Engel* and *Abington School District*, with their broad readings of the establishment clause, and *Sherbert*, with its broad reading of the free exercise clause, the Court appeared to be on a collision course. The requirements that government may not favor religion and that government must respect religious beliefs produced an apparent tension within the first amendment. The Supreme Court began to address this tension in *Walz v. Tax Commission*¹⁴⁰ where it upheld the validity of property tax exemptions for religious organiza-

135. Cf. B. BETTELHEIM, *SURVIVING AND OTHER ESSAYS* 313 (1979).

136. See, e.g., *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 747-48 (1976); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 772-73 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

137. 374 U.S. 398 (1963).

138. 374 U.S. 203 (1963).

139. *Id.* at 406-09.

140. 397 U.S. 664 (1970).

tions. Walz, a property owner in the State of New York, had sought an injunction to prevent the Tax Commission from granting tax exemptions to religious organizations for properties used solely for religious worship. He argued that the exemption was akin to a direct subsidy and thus violative of the establishment clause. The Court held this was not an establishment of religion and indicated that the exemption of religious organizations may have a free exercise basis.¹⁴¹

The opinion by Chief Justice Burger expressly adopted the prior historical analysis of *Everson* and *Engel*.¹⁴² There was no re-examination of the original historical materials. The opinion focused more on later judicial interpretations of the religion clauses and concluded that, "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."¹⁴³ The outcome of this neutral course is a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."¹⁴⁴ The "benevolent neutrality" language is more encouraging than the "strict neutrality" language of other opinions.¹⁴⁵ It implies that government need not be indifferent about religion. Society can benefit from the existence of voluntary associations that act as mediating institutions between the state and the individual.¹⁴⁶

A concurring opinion by Justice Brennan focused on the historical evidence in support of the Court's judgment. Of prime importance was the long standing practice of tax exemptions for religious organizations. While not sufficient to support the constitutionality of the tax exemption, historical evidence at least implied that the original intent was not to prohibit such practices. Brennan reviewed the early history and found that although the practice of exemptions was widespread, the chief spokesmen for religious liberty, Madison and Jefferson, did not criticize it. "It is unlikely that two men so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion."¹⁴⁷

After concluding that the tradition supported the constitutionality

141. *Id.* at 674-75, 678. For a thoughtful discussion of the tax exemption issue, see D. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES (1977).

142. 397 U.S. at 667.

143. *Id.* at 668-69.

144. *Id.* at 669.

145. See *Abington School Dist. v. Schempp*, 374 U.S. at 225; *Despain v. Dekalb County Community School Dist.*, 384 F.2d 836, 839 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968).

146. See P. BERGER & R. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 26-33 (1977).

147. 397 U.S. at 685 (Brennan, J., concurring).

of the exemptions, Brennan pointed out the positive contributions made by religious organizations to the pluralism of American society:

[G]overnment grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.¹⁴⁸

By acting as private sources of authority and association, religious groups provide an important, nongovernmental alternative to state authority. In this sense, the concept of separation of powers is important not only to intragovernmental relations, but also to the relation of government and citizens. The diversity of private associations, including religious associations, provides a balance in the "extended republic" against the domination of any particular group.¹⁴⁹ The exemptions do not constitute an establishment of religion, which tends toward unification of authority in state and church, but rather they foster diversity of nongovernmental organizations. A healthy democracy is dependent upon a diversity of views. The development and preservation of private associations, including religious organizations, tends to promote a setting that is consistent with nonestablishment of religion.

Notwithstanding this perspective on tax exemptions for religious organizations, Justice Douglas dissented, saying there was no difference between an exemption and direct subsidy from general tax revenues.¹⁵⁰ In his dissent, Douglas advanced essentially a two-pronged historical argument. First, Douglas argued much of the early history was irrelevant because of the "revolution" brought about by the fourteenth amendment:

In affirming this judgment the Court largely overlooks the revolution initiated by the adoption of the Fourteenth Amendment. That revolution involved the imposition of new and far-reaching constitutional restraints on the States. Nationalization of many civil liberties has been the consequence of the Fourteenth Amendment, reversing the historic position that the foundations of those liberties rested largely in state law.

. . . .

Hence the question in the present case makes irrelevant the "two centuries of uninterrupted freedom from taxation," referred to by the Court. . . . If history be our guide, then tax exemption of church property in this country is indeed highly suspect,

148. *Id.* at 689 (Brennan, J., concurring).

149. *See infra* text accompanying notes 276-79.

150. 397 U.S. at 713 (Douglas, J., dissenting).

as it rose in the early days when the church was an agency of the state. See W. Torpey, *Judicial Doctrines of Religious Rights in America* 171 (1948). The question here, though, concerns the meaning of the Establishment Clause and the Free Exercise Clause made applicable to the States for only a few decades at best.¹⁵¹

This focus on the fourteenth amendment certainly creates a different perspective on the problem of original intent. According to this argument, the intent of the framers of the first amendment is not conclusive because the fourteenth amendment has intervened and basically changed the ground rules of religious liberty. What was permissible under a more federal regime, where each state functioned as a "laboratory," is no longer permissible in a more national regime where the rights and liberties stand on a more unified basis. Thus, the "state" in the separation of church and state means government at all levels. The problem of original intent is not rendered irrelevant by the enactment of the fourteenth amendment. Initially, it would appear to shift the focus from 1791 to 1868. However, the framers of the fourteenth amendment expressed no concrete or specific desires concerning the application to the states of the principles of religious liberty.¹⁵² At best, it may be said that the framers of the fourteenth amendment, if they thought about the problem at all, intended to incorporate the principles of religious liberty expressed by the founding fathers. The Supreme Court has traditionally looked to the original understanding of the first amendment as if it had been incorporated into the fourteenth amendment along with the actual text.¹⁵³ Thus, Douglas himself makes extensive references to Madison in the second part of his historical argument¹⁵⁴ and included Madison's most famous statement on religious liberty in an appendix to his opinion.¹⁵⁵ Therefore, it would appear that Douglas is not totally serious about his fourteenth amendment revolution argument because he does not give any evidence that the framers of the fourteenth amendment intended a revolution. Further, he appears to rely more on Madison than any member of the Reconstruction Congress.

The second part of Douglas' dissent was devoted to showing the similarity between an exemption and direct subsidy, which the court agreed would be unconstitutional. He relied in particular upon Madison's opposition in 1784-85 to the Assessment Bill in Virginia. As Douglas conceded, the *Memorial and Remonstrance* is not exactly on point because it dealt with subsidies rather than with tax exemp-

151. *Id.* at 701, 703 (Douglas, J., dissenting).

152. *See supra* note 31.

153. *See, e.g.,* *Engel v. Vitale*, 370 U.S. at 429-30; *Everson v. Board of Educ.*, 330 U.S. at 11-15.

154. 397 U.S. at 704-07, 712-13 (Douglas, J., dissenting).

155. *Id.* at 716 (Douglas, J., dissenting).

tions. Nevertheless, he felt that the arguments were equally applicable to the exemption question.¹⁵⁶

The majority did not respond directly to Douglas' historical argument, but explicitly rejected the modern functional analogy. The Court said a direct subsidy was an excessive entanglement with religion whereas abstaining from the collection of revenue involved only "a minimal and remote involvement between church and state"¹⁵⁷ and less entanglement than if taxation would be required.¹⁵⁸ In this regard, the Court's response relies on the free exercise clause to temper its construction of the establishment clause. The issue is not followed through because the Court does not say that a decision to tax property owned by religious organizations would violate the free exercise clause. For the moment, the Court left the exemption standing on middle ground: it is not prohibited by the establishment clause nor required by the free exercise clause.

J. *The Amish and Compulsory Education*

The free exercise issue not explored in *Walz* received consideration by the Supreme Court in *Wisconsin v. Yoder*.¹⁵⁹ There, the state had not exempted members of religious organizations from a general obligation of citizenship, but instead insisted that all citizens be educated in public or private schools. Wisconsin prosecuted certain Amish parents for refusing to send their children to any school after completing the eighth grade. The parents claimed the law interfered with their right to raise their children and with their religious rights that were protected by the first and fourteenth amendments. Relying upon *Meyer v. Nebraska*¹⁶⁰ and *Pierce v. Society of Sisters*,¹⁶¹ the Court held that the state could not require the respondents to comply with the compulsory education law.

The principal question in *Yoder* was: Does the free exercise clause shield persons from compliance with an otherwise valid criminal statute? The answer given by the Court was clearly in the affirmative, but the basis for the answer is less clear. It should be noted that *Yoder* was the first instance in which the Court had given an affirmative answer to this question. Previously, the Court had either rejected the religious claim,¹⁶² or resolved the issue on other grounds.¹⁶³

156. *Id.* at 712-13 (Douglas, J., dissenting).

157. *Id.* at 676.

158. *Id.* at 675-76.

159. 406 U.S. 205 (1972).

160. 262 U.S. 380 (1923).

161. 268 U.S. 510 (1925).

162. See, e.g., *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934) (conscientious objection to university's ROTC program); *Davis v. Beason*, 133 U.S. 333 (1890) (Mormon's claim of exemption from polygamy laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (claim of exemption from polygamy laws).

The difficulty the Court encountered in giving an adequate explanation of its holding becomes more understandable once the difficulty of the original question is understood. There is a two-fold problem. First, what is the status of individual conscience in a regime governed by majority rule?¹⁶⁴ Individual conscience often compels a person to act in accordance with deeply held beliefs. The first amendment generally protects the right of people to think and speak freely but it does not always shield their actions from the sanctions of the criminal law.¹⁶⁵ Thus, for example, members of the Ku Klux Klan may speak about social and ethnic groups, but their beliefs, no matter how sincere, will not exempt them from the application of state or federal civil rights laws. The problem in *Yoder* is somewhat easier because there is no ostensible harm to innocent third parties. The Wisconsin law is designed to protect its citizens from their own imprudence. Surely the state's interest in regulating private conduct is diminished when the private conduct causes no ostensible harm and is based upon deeply held beliefs.

The second part of the problem presents a wholly different aspect concerning rights of conscience. Is there a basis for exempting compliance with a valid criminal statute on religious grounds without establishing religion? That is, if the state requires some citizens to comply with a criminal statute but exempts others because of their religious belief, has the state lost the neutrality required by the

163. See, e.g., *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (refusal to salute flag protected on free speech grounds); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (teaching foreign language in parochial school protected as part of "liberty" guaranteed by the fourteenth amendment).

164. See generally J. BANNON & R. BANNON, *LAW, MORALITY & VIETNAM: THE PEACE MILITANTS AND THE COURTS* (1974); R. NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 257-77 (1932).

165. For example, if one is suspected of committing a homicide, statements made by the defendant may be admissible to prove motive or intent. The problem becomes more difficult if the action is intended as a form of speech. Compare *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (students' wearing of black armbands to protest the Vietnam War) with *United States v. O'Brien*, 391 U.S. 367 (1968) (destruction of draft card). The problem may also be difficult if the speech itself is made unlawful. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Nevertheless, one usually may not claim a first amendment defense to a murder charge if the case is based upon a oral contract to commit murder. See *People v. Rubin*, 158 Cal. Rptr. 488 (Cal. Ct. App. 1979), *cert. denied*, 449 U.S. 821 (1980). It is not a valid defense to a pricefixing charge to claim the exchange of pricing information was an exercise of free speech. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978). The law generally holds people accountable for their speech. The law of fraud and misrepresentation is designed to deter untruthful statements and to compensate for damages resulting therefrom. The first amendment, however, is not totally absent from this area. See *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (constitutionality of antifraud restrictions on charitable contributions); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (constitutionality of bar association ban on lawyer advertising).

establishment clause? From a strict reading of the establishment clause, the state appears to lose neutrality because duties of citizenship, including taxes and education are obligations, and exemption from such obligations would appear to be a benefit. When the benefit is extended only to those who profess religion or certain religions, the state would appear to be no longer neutral. However, the Court in *Yoder*, as in *Walz*, did not read the establishment clause that strictly. How the Court read the clause remains unclear. The Court simply said that a state's exemption of the Amish would not "support, favor, advance, or assist" their religion but allows them to continue as they had for centuries.¹⁶⁶ This focuses on the history of the litigants as constituting a basis for protection, rather than focusing on the public interest in encouraging free exercise of religion. The Court's conclusory resolution and the subsequent difficulties the Court has had in deciding when the state must suspend compliance with statutes because of religious objections indicates that further analysis is needed.

Interestingly, the Court did not use the historical materials in order to reach a balanced reading of the free exercise and establishment clauses. This is surprising because the Court had said that the interpretation of these clauses was heavily grounded on the original understanding.¹⁶⁷ The Court, having hammered out its own understanding of the original intent, seems to have almost abandoned the historical perspective. This is reflected in *Walz*, where Chief Justice Burger declared that the history was so well known that it would serve no useful purpose to recount it again.¹⁶⁸ Ironically, it is the reverse in the free speech area where even the clearest truth must be debated or else it loses vitality and becomes vulnerable to attack.¹⁶⁹ History is even more important when significant questions and ambiguities remain; resort to the acknowledged fundamentals is even more imperative.

K. *Some Preliminary Observations*

From the Court's opinions, two traditions with respect to religious liberty emerge. There is a tradition of freedom *of* religious exercise and a tradition of freedom *from* religious exercise. The latter is exemplified in cases like *McCullum*, *Engel*, and *Abington School*

166. 406 U.S. at 234 n.22.

167. See, e.g., *Engel v. Vitale*, 370 U.S. at 429-30; *McCullum v. Board of Educ.*, 333 U.S. at 213 (Frankfurter, J., concurring); *Everson v. Board of Educ.*, 330 U.S. at 8; "No provision of the Constitution is more clearly tied to or given content by its generating history other than the religious clause of the First Amendment." *Id.* at 33 (Rutledge, J., dissenting).

168. 397 U.S. at 667-68.

169. See, e.g., T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 51 (1970).

District and may be characterized by the term "neutrality." Neutrality means not only that the state may not favor one religion over other religions, but also that it may not favor religion in general over nonreligion. From this perspective, it makes no difference to the state whether its citizens have or do not have religious beliefs. As Jefferson wrote, "[T]he legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."¹⁷⁰ One consequence of this perspective has been the attempt to exclude all religious influences from public life.¹⁷¹ The concept of neutrality has been used as a sword in an effort to sterilize public discourse of any religious overtones.¹⁷²

On the other hand, the tradition of freedom of religious exercise, exemplified by *Everson*, *Zorach*, *Walz*, and *Yoder*, is best characterized by the term "accommodation." Without passing judgment upon the validity of various religious beliefs and practices, the state must accommodate such beliefs and practices in the interests of religious liberty. The term "accommodation" itself implies neutrality and reflects some indifference on the part of the state as to the party accommodated. Professor Robert Bellah has characterized current attitudes in the following manner: "What is put forward in the name of religious freedom usually contains at least the covert view that after all religion is some weird outmoded way of thinking that has no relation to contemporary life, even though we must defend people's right to be weird."¹⁷³ This kind of detachment places religion wholly within the area of individual decision; free from government influence. It may well be that this resolution of the problem of religion and democracy is the one which ought to be pursued. Before the founders are enlisted as partners in this venture, however, careful attention must be paid to accurately represent their ideas. The account of the original understanding of the religion clauses has thus far raised a number of questions. These questions include the use of contemporary documents to illuminate the meaning of the clauses; the original prohibition on Congress but not the states and the subsequent incorporation by way of the fourteenth amendment; the appropriate relationship between the reading of the free exercise clause and the

170. T. JEFFERSON, *supra* note 1, at 275.

171. See F. SORAU, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 30-157 (1976); Louisell, *Does the Constitution Require a Purely Secular Society?*, 26 CATH. U.L. REV. 20 (1976). Cf. Cohen, *The Dark Side of Religion*, in RELIGION FROM TOLSTOY TO CAMUS 279 (W. Kauffman ed. 1964).

172. P. BERGER & R. NEUHAUS, *supra* note 146, at 32-33.

173. Bellah, *Cultural Pluralism and Religious Particularism* in FREEDOM OF RELIGION IN AMERICA: HISTORICAL ROOTS, PHILOSOPHICAL CONCEPTS, AND CONTEMPORARY PROBLEMS 45-46 (H. Clark ed. 1982).

reading of the establishment clause; and the substantive content of Madison's and Jefferson's thoughts on religious liberty. These questions will be explored in the course of Section III.

The best way to consider these questions is through a re-examination of the basic documents which comprise the record of religious liberty in America. The documents themselves reveal much of the nature of religious liberty because the debate over religion was a public debate conducted by some of America's great thinkers. This should become self-evident as the documentary review unfolds. It is also important to let the documents "speak" because the passage of time has diminished their impact upon succeeding generations whose knowledge of their contents comes largely through the hearsay of history books. The succeeding generations eventually relegate the founders to their "time and place" and look to their own resources for resolving contemporary problems.¹⁷⁴ Thus, for example, a leading article on religious liberty noted that "any thoroughgoing effort to interpret the religion clauses of the first amendment by resorting to the original understanding of the authors and ratifiers of the Constitution is apt to be regarded as a misguided, if not dangerous enterprise."¹⁷⁵ This makes thinkers like Madison and Jefferson little more than ornaments on a mantelpiece, to be taken down from time to time, admired in light of the limited resources of their time, and even used for a quotable quote. If we take their views seriously, however, the founders will break out of this mold and challenge us once again with their mature reflections on a subject crucial to the preservation of democracy.

The primary focus in this brief documentary history of religious liberty will be on James Madison and Thomas Jefferson. Madison, credited as the chief architect of the Constitution and the Bill of Rights, also led the struggle for religious liberty in his own state of Virginia. This Article will examine in detail his *Memorial and Remonstrance*, as well as his work on the Constitution, his authorship of *Federalist Papers No. 10* and *No. 51*, and his role in the Bill of Rights debates. Jefferson, sometimes noted for not recording his ideas in a systematic and scholarly manner,¹⁷⁶ has left us two public documents, The Declaration of Independence and the Statute of Virginia for Religious Freedom, as well as private correspondence and the example of his own career in pursuit of religious liberty. Religious liberty was at the center of his public career. Jefferson wrote

174. See, e.g., R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 15-17 (1948).

175. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1383 (1967).

176. See A. BEITZINGER, *A HISTORY OF AMERICAN POLITICAL THOUGHT* 267 (1972); R. HOFSTADTER, *supra* note 174, at 23.

the epitaph for his tombstone giving testimony to the three achievements by which he wished most to be remembered:

Here was Buried
Thomas Jefferson
Author of the Declaration of American Independence
of the Statute of Virginia for Religious Freedom
and Father of the University of Virginia.¹⁷⁷

Standing in the middle, providing a tie between his two more famous achievements, the central position of religious liberty is symbolic of its importance in Jefferson's career.

III. THE ESTABLISHMENT OF RELIGIOUS LIBERTY: A BRIEF DOCUMENTARY HISTORY

A fundamental premise which shapes the following documentary account is that religious liberty and political liberty are integrally related aspects of freedom. There can be no religious liberty without political liberty; there can be no political liberty without religious liberty. Analysis of religious liberty therefore will include some consideration of the essential documents of political liberty in America. This broadening of the scope of review is necessary to understand the original intent regarding religion and the social order. The founders saw both religious and political liberty as part of the same problem. To overlook this connection would be to turn the documentary analysis in a direction not intended by the founders. Thus, the documentary review must not only let the documents speak for themselves but also let the documents shape the selection of documents to be reviewed. Although this raises problems of circularity, it is preferable to the use of an *a priori* selection principle which may distort rather than clarify.¹⁷⁸ Indeed, one of the difficulties with modern analysis of religious liberty is that the metaphor which placed a wall between church and state appears to have placed a wall between religious and political liberty.¹⁷⁹ A recovery of the original understanding requires a removal of the barrier between the analysis of politics and religion.

The documentary history will proceed in chronological order beginning with the Declaration of Independence. The review will not be limited to those documents utilized by the Supreme Court; it will also

177. T. JEFFERSON, *supra* note 1, at ii.

178. No documentary history can be entirely neutral. The process of inclusion and exclusion necessarily involves choices as to the relevancy of each document to the subject of inquiry. The validity of the selection process can only be measured by how the materials illuminate the problem. Cf. ARISTOTLE, *NICOMACHEAN ETHICS*, Book I, ch. 3 (McKean ed. 1941).

179. See W. BERNES, *supra* note 19, at 76-79. See also A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 44 (J. Mayer & G. Lerner ed. 1966): "Thus, then, when any religion has taken deep root in a democracy, be very careful not to shake it, but rather guard it as the most precious heritage from aristocratic times." *Id.* at 516.

include others which relate to the problem, such as the Declaration of Independence and the *Federalist Papers*. Although not seriously discussed in the Supreme Court's history of religious liberty, the Declaration of Independence is vital to an understanding of the problem and provides a good starting point.

A. *The Declaration of Independence*

Adopted in 1776 by the Continental Congress of the United States, the Declaration of Independence is a statement of principles fundamental to an understanding of the American regime. The purpose of the Declaration was not simply to secure independence from Great Britain, but also to formulate a statement of principles which would shape the new regime.¹⁸⁰ Although not fully implemented by the Constitutional Convention of 1787, the statements of the Declaration have served as overarching principles¹⁸¹ and the Constitution should always be read in light of the Declaration.¹⁸²

180. Abraham Lincoln stated:

The assertion that "all men are created equal" was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should re-appear in this fair land and commence their vocation they should find left for them at least one hard nut to crack.

A. LINCOLN, II THE COLLECTED WORKS OF ABRAHAM LINCOLN 1848-1858, at 406 (Basler ed. 1953) (from a speech at Springfield, Illinois, June 26, 1857). For a more complete discussion of the Declaration of Independence as a basic statement of the principles of constitutional government, see H. JAFFA, CRISIS OF THE HOUSE DIVIDED 308-29 (1959); H. JAFFA, THE CONDITIONS OF FREEDOM 149-160 (1975); Anastaplo, *The Declaration of Independence*, 9 ST. LOUIS U.L.J. 390 (1965).

181. *Id.*

182. This statement, of course, posits a greater continuity between the Declaration and the Constitution than is generally thought to be the case. See *supra* note 180. The more widely held view, shared by Charles Beard and his followers, among others, is that the Constitution represented a retrenchment of economic interests against the eloquent statement of individual rights contained in the Declaration. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1956). Beard sees the Constitution as strictly an expression of positive law (and a rather base expression at that). What has not been included is the maxim which underlies this positivist view. An alternative account, however, views the Constitution as a continuation of the regime founded in 1776, and based upon the principles stated in the Declaration of Independence. The framers of the Constitution were not operating with a blank slate but sought to form a "more perfect Union." See W. CROSSKEY, *supra* note 24, at 363-79 (discussing the significance of the preamble to the Constitution). They acted as representatives of the sovereign *people* to better secure "the blessings of liberty" articulated in the Declaration. The "higher law" background of the Constitution, discussed by Corwin in his famous essay, is most clearly articulated in the Declaration of Independence. See Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 394-409 (1928).

The understanding of the founders that the Declaration served as a cornerstone for the regime may be seen at several points. From a strictly legal standpoint, the Declaration, duly adopted by the Continental Congress, is part of federal law. It is the first law to be included in the United States Code Statutes, and is set forth in Title I of the United States Code as part of the "organic law" of the United States.¹⁸³ Conscious reference to the year 1776 as the starting point of the American regime is found in the closing statement of the Constitution as recorded by George Washington: "Done in convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and eighty seven *and of the Independence of the United States of America the Twelfth.*"¹⁸⁴ The Constitution was not seen as the starting point, but rather as the continuation and implementation of the principles upon which the nation was founded in 1776.¹⁸⁵ Both Jefferson and Madison regarded the Declaration as the best guide for understanding the principles of the Constitution. During the course of establishing a law school and the required curriculum for the University of Virginia, Jefferson and Madison agreed that the first of the "best guides [to] the distinctive principles of Government of our own State, and of that of the United States" was the Declaration of Independence.¹⁸⁶

One might argue such citation of the Declaration was merely formal, serving as a polite ritual but offering little or no substantive guidelines for the operation of the regime.¹⁸⁷ However, the principles of the Declaration and the problems in realizing those principles have been central to American politics. One of the central issues of American politics is equality. The Declaration is famous for what it said—and did not say—about equality. Much has been made of Congress' deletion of Jefferson's condemnation of the slave trade from the Declaration.¹⁸⁸ More important, however, was the statement of

183. See I STAT. 1 (1845) & 1 U.S.C. xxxi (1976). The other documents comprising the "organic law" of the United States are the United States Constitution, the Northwest Ordinance, and the Articles of Confederation.

184. 1 U.S.C. xlv, 1 (1976) (emphasis added). Lincoln's *Gettysburg Address* also consciously points to 1776 as the beginning of the American regime. VII LINCOLN, *supra* note 180, at 23.

185. The preamble to the Constitution states that it is designed to form a "more perfect Union." U.S. CONST. preamble.

186. THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 446 (M. Meyers ed. 1973) (letter of February 8, 1825); THE COMPLETE JEFFERSON, 1112 (S. Padover ed. 1943).

187. See, e.g., Diamond, *The Revolution of Sober Expectations* in THE AMERICAN REVOLUTION: THREE VIEWS 60-61 (1975).

188. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 388 (1978) (Marshall, J., concurring in part, dissenting in part); J. FRANKLIN, FROM SLAVERY TO FREEDOM 88-89 (4th ed. 1974); J. FRANKLIN, RACIAL EQUALITY IN AMERICA 13-15 (1976); R. KLUGER, SIMPLE JUSTICE 29-31 (1975).

equality that remained, although not fully realized in all its practical applications. The tension between the equality principle and its realization shaped the direction of American politics, ultimately leading to the Civil War.¹⁸⁹ Abraham Lincoln believed the central issue in American politics was whether a nation conceived in liberty and dedicated to the proposition that all men are created equal

189. See generally H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* (1959); D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978). Many of the antebellum politicians denied the truth of the Declaration, but none denied its importance. Abraham Lincoln made this point during the course of his debates with Stephen A. Douglas:

At Galesburg the other day, I said in answer to Judge Douglas, that three years ago there never had been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term "all men." I re-assert it to-day. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a matter of great astonishment to me if they shall be able to find that one human being three years ago had ever uttered the astounding sentiment that the term "all men" in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery, *denied the truth of it*. I know that Mr. Calhoun and all the politicians of his school denied the truth of the Declaration. I know that it ran along in the mouths of some Southern men for a period of years, ending at last in that shameful though rather forcible declaration of Pettit of Indiana, upon the floor of the United States Senate, that the Declaration of Independence was in that respect "a self-evident lie," rather than a self-evident truth. But I say, with a perfect knowledge of all this hawking at the Declaration without directly attacking it, that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it and then asserting that it did not include the negro. [Cheers]. I believe the first man who ever said it was Chief Justice Taney in the Dred Scott case, and the next to him was our friend Stephen A. Douglas [Cheers and laughter]. And now it has become the catch-word of the entire party.

III LINCOLN, *supra* note 180, at 301-02 (Seventh Debate with Douglas, at Alton, Illinois, October 15, 1858). What did Jefferson and Congress mean by their broad language? Lincoln gave probably the best summary of the original understanding of the principle of equality:

I think the authors of that notable instrument intended to include *all* men, but they did not mean to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral development or social capacity. They defined with tolerable distinctness in what they did consider all men created equal—equal in certain inalienable rights, among which are life, liberty and the pursuit of happiness. This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right* so that the *enforcement* of it might follow as fast as circumstances should permit.

They meant to set up a standard maxim for free society which should be familiar to all: constantly looked to, constantly labored for, and even

could long endure.¹⁹⁰ In his Second Inaugural Address, Lincoln wondered aloud if all the profits earned in defiance of this principle would be taken away as a measure of divine justice.¹⁹¹ Because the commitment to equality was not realized by the passage of the Civil War amendments, some wonder today if there are still payments, heavy payments, due the bondsman because of the bad faith and noncompliance with the principles of the Declaration.¹⁹²

The importance of the Declaration has been questioned by those who fail to distinguish between principle and actualization. Many believe if a principle is not practiced or realized, it is empty and meaningless. This view, however, misunderstands the nature of politics. Politics is the art of implementing the principles, or the self-conception of society. It must be an art, since the principles are not always entirely consistent with each other and because of the nature of human beings living in society. A tension exists within the principles of the Declaration because government, by consent of the governed, will pose the possibility that the majority will not fully agree with the logical consequences of the principle of equality. The tension between the principle of government by consent of the governed and the principle of equality cannot be resolved by fiat.¹⁹³ A prudent politician understands that these principles must be weighed according to the circumstances. The favoring of one principle at a given time does not lessen the validity of the others. Moreover, even when one principle is favored, the subordinate principle retains its vitality and keeps the other in check so that the predominate principle is not fully realized. Thus, although the Declaration's principle of equality has not been fully realized, its importance is not vitiated in American politics and constitutional theory. For example, its importance can be seen in the founding of the American regime with the establishment of political and religious liberty,¹⁹⁴ at the mid-nineteenth century

though never perfectly attained, constantly approximated and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people, of all colors, everywhere.

Id. at 301.

190. VII LINCOLN, *supra* note 180, at 23.

191. VIII LINCOLN, *supra* note 180, at 333.

192. See, e.g., C. WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 84-86 (1960); R. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* (1975).

193. This is at the center of the problem of desegregation in the public schools. The Supreme Court here has assumed the role of statesmen and, as such, must find their way to a solution that accommodates both the deepset desires of the people, including the desire to be left alone, and the demands of the Constitution for equal protection of the laws. Cf. L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976); L. TRIBE, *supra* note 18, at §§ 16-20; J. WILKINSON, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, at 131-249 (1979).

194. See H. JAFFA, *HOW TO THINK ABOUT THE AMERICAN REVOLUTION* (1978).

crisis of the Union with the abolition of slavery,¹⁹⁵ and at the mid-way point of this century with the seminal decision of *Brown v. Board of Education*.¹⁹⁶ A nation dedicated to the proposition that all men are not created equal would have been a radically different regime in practice as well as theory.¹⁹⁷

Symbols are important, for they are the primary means by which persons living in society come to understand themselves as a people.¹⁹⁸ Of particular importance are the symbols concerning origins. The *Gilgamesh Epic*, the tales of Homer, and the story of Moses leading the children of Israel out of Egypt as the "chosen people," all served to shape the self-conception of each culture. The symbols are not simply ornamental but vital to the self-conception and comprise the core of what it means to be Jewish, or Christian, or what it means to be Norwegian or American. The telling of stories about origins is one of the most fundamental tasks of cultural education. Particularly for the Jews, dislocated from the land of their origin for many centuries, the ceasing of cultural education would have literally meant extinction by assimilation. For cultures tied to land, the problem is less acute but nonetheless important because a culture can collapse from within if people no longer remember their past and their reason for being a people.¹⁹⁹

195. See R. BELLAH, *supra* note 192, at 52-62. One might imagine a different outcome of the Civil War, with the problems of raising an army with sufficient manpower and material and sending the soldiers away from their families to fight for several years on enemy soil, if the regime did not teach that all men were created equal.

196. 347 U.S. 483 (1954). See R. KLUGER, *supra* note 188, at 448-49, 709-10.

197. See Bellah, *The Revolution and the Civil Religion* in RELIGION AND THE AMERICAN REVOLUTION 64-65 (J. Brauer ed. 1976). Such a regime was contemplated by the Confederacy. The Constitution, as adopted by the Confederate States of America contained an explicit reference to slaves as property. See E. THOMAS, THE CONFEDERATE NATION: 1861-1865, at 313 (1979): "No . . . law denying or impairing the right of property in negro slaves shall be passed." The principle of inequality found expression not only in the formal constitution of the Confederacy but was also to serve as a fundamental principle of the regime. Consider a portion of the Confederate Vice-President Alexander Stephens' "Cornerstone Speech":

Our new government is founded upon exactly the opposite idea; its foundations are laid, its cornerstone rests upon the great truth that the negro is not the equal to the white man. That slavery—the subordination to the superior race, is his natural and normal condition. This our new Government [the Confederate States of America] is the first in the history of the world, based upon this great physical and moral truth.

Quoted in H. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION 159 (1978).

198. See R. BELLAH, *supra* note 192, at 3-4; E. VOEGELIN, THE NEW SCIENCE OF POLITICS 27-28 (1952); E. VOEGELIN, I ORDER AND HISTORY: ISRAEL AND REVELATION 1-13 (1956).

199. See R. WEAVER, IDEAS HAVE CONSEQUENCES 18-34 (1948); R. WEAVER, VISIONS OF ORDER: THE CULTURAL CRISIS OF OUR TIME 40-54 (1964).

The conscious cultivation of a societal self-conception is what some observers have called "civil theology."²⁰⁰ Professor Robert Bellah has identified the Declaration of Independence as one of the principal texts of American civil religion.²⁰¹ The Declaration serves as both a statement concerning the origins of the regime and a canon for measuring continuing adherence to the founding principles. It is a regime founded upon certain truths. Nonadherence to these truths may engender in the people a right of revolution to re-establish the regime.²⁰²

What are the teachings of the Declaration? The laws of nature and of nature's God entitle one people to declare their separation from one sovereignty and to establish a new government upon the authority of the following principles: God created all people²⁰³ equal and endowed them with certain unalienable rights, that among these rights are life, liberty, and the pursuit of happiness. To secure these rights of persons, governments are instituted, deriving their just powers from the consent of the governed. When government becomes destructive of these ends, the people have the right to alter

200. See E. VOEGELIN, *THE NEW SCIENCE OF POLITICS* 152-161 (1952); Bellah, *Civil Religion in America* and Herberg, *America's Civil Religion: What It Is and Whence It Comes* in *AMERICAN CIVIL RELIGION* (R. Richey & D. Jones ed. 1974).

201. Bellah, *supra* note 197, at 55-57. See also Mead, *The "Nation With the Soul of a Church"* in *AMERICAN CIVIL RELIGION* (R. Richey & D. Jones ed. 1974) where Professor Mead quotes G.K. Chesterton as follows:

America is the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in The Declaration of Independence. . . . It enunciates that all men are equal in their claim to justice, and that governments exist to give them that justice, and that their authority is for that reason just. It certainly does condemn anarchism, and it does also by inference condemn atheism, since it clearly names the Creator as the ultimate authority from whom these equal rights are derived.

Id. at 45.

202. Cf. *In re Anastaplo*, 366 U.S. 82, 112-14 (1961) (Black, J., dissenting).

203. Given the context of the word "men," it appears certain that Jefferson used the term in its generic sense, that is: all persons, including women and children. Interpretation of "men" in its specific sense, adult males, would render the subsequent statement of principles virtually meaningless. For example, when government becomes destructive of life, liberty, and the pursuit of happiness, it is the right of the *people* to alter or abolish it. Certainly, the people's right of revolution arises from violation of their rights, not just the rights of adult males. Thus, the word "men" should be understood in its generic sense. Of course, there has long been the charge that Jefferson's term "men" was over inclusive because he and the members of the Continental Congress did not intend to include blacks. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 388-89 (1978) (Marshall, J., dissenting in part, concurring in part); R. KLUGER, *supra* note 188, at 29-31. However, for the reasons stated by Abraham Lincoln in his debates with Stephen Douglas, this charge is essentially false. See II LINCOLN, *supra* note 180, at 405-06; III LINCOLN, *supra* note 180, at 301-04. See also H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 308-22 (1959).

or abolish it and to institute a new government on these principles of equality, liberty, and government by consent of the governed.

This formulation contains the basis for both the nonestablishment principle and the free exercise principle. Government by consent of the governed, designed to secure life, liberty, and the pursuit of happiness, is not compatible with a theocracy. It is not solely government by consent of the governed that is incompatible with establishment of religion. A majority may choose to be governed by a church council or an ayatollah. Democracy per se is not an adequate safeguard against establishment of religion. The requirement that majority rule must secure the rights of all persons to life, liberty, and the pursuit of happiness, however, promises to be a more adequate safeguard. This is also an operational definition of constitutional government. That is, constitutional government is democratic rule toward certain agreed ends. These ends constitute the substance of what may be called the social contract. When a majority becomes tyrannical and destructive of these ends, it breaches the social contract and engenders in the minority a right to revolt.

Included within the scope of life, liberty, and the pursuit of happiness is freedom of religious worship. Government may not interfere with religious belief and worship, even when a majority of the governed consent. Jefferson's formulation is meaningful here. God gave mankind life, liberty, and the capacity for happiness; government may not be destructive of these ends.²⁰⁴ When, in the name of God, government becomes destructive of these ends, it is a form of blasphemy. As elaborated more fully in Jefferson's statute on religious freedom, God gave mankind freedom, that is, free will, and the free will of each person ought not to be coerced or oppressed without consent. In this light, nonestablishment and free exercise are corollaries of the same principles of religious liberty.

The Declaration of Independence is not the statement of just one man. It was adopted with the unanimous consent of the thirteen United States of America. Moreover, it represents, as Jefferson said near the end of his life, a statement of principles shared by the people as a whole.²⁰⁵ The principles of the Declaration are also reflected

204. That government may not be destructive of these ends is not to say it cannot regulate at all for the common good. The fifth amendment says that people may not be deprived of life, liberty, or property, *without due process* of law. This clearly implies that there will be times when such deprivation is necessary and may be accomplished by due and appropriate procedures. U. S. CONST. amend. V (emphasis added).

205. T. JEFFERSON, *supra* note 1, at 719 (letter of May 8, 1825 to Henry Lee). See also B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 12 (1967); E. MORGAN, *THE BIRTH OF THE REPUBLIC—1763-1789*, at 79-80 (1956). *The Ideological Origins of the American Revolution*, *supra*, is an extremely important book for understanding

in other revolutionary documents of the time.²⁰⁶ The application of these principles to the problem of religious liberty, however, was not always fully understood. Thus some states espoused the principles but allowed only limited freedom of worship, or established an official church. In Virginia, where rights of religious liberty were recognized in its Declaration of Rights (1776), the problem of religious establishment became a matter of bitter controversy until 1786, when Jefferson's statute was enacted.

B. *The Virginia Statute for Religious Freedom*

Establishment of religion in the colonies followed no typical pattern. Circumstances differed between colonies and sometimes different factors arose within a particular colony. One prevalent factor was an emphasis in the royal charters on Christian missionary

the political fabric of revolutionary America. Professor Bailyn reviews the revolutionary literature and shows how ideas of liberty and equality influenced and shaped people's beliefs. Bailyn concludes that "the American Revolution was above all else an ideological, constitutional, political struggle and not primarily a controversy between social groups undertaken to force changes in the organization of the society or the economy." *Id.* at vi. Bailyn begins his study with a quote from John Adams:

What do we mean by the Revolution? The war? That was no part of the Revolution; it was only an effect and consequence of it. The Revolution was in the minds of the people, and this was effected, from 1760 to 1775, in the course of fifteen years before a drop of blood was had at Lexington. The records of thirteen legislatures, the pamphlets, newspapers in all the colonies, ought to be consulted during that period to ascertain the steps by which the public opinion was enlightened and informed concerning the authority of Parliament over the colonies.

Id. at 1.

206. See, e.g., The Virginia Declaration of Rights (1776) art. I, *reprinted in* I THE BILL OF RIGHTS, *supra* note 25:

I. That all men are by nature equally free and independent, and have certain inalienable rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Id. at 234. Pennsylvania Declaration of Rights, (1776) art. I, *reprinted in* I THE BILL OF RIGHTS, *supra* note 25. "I. That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." *Id.* at 264; Delaware Declaration of Rights (1776) section 1, *reprinted in* I THE BILL OF RIGHTS, *supra* note 25, "Section 1. That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole." *Id.* at 277; Massachusetts Declaration of Rights (1780) art. I, *reprinted in* I THE BILL OF RIGHTS, *supra* note 25, "I. All men are born free and equal, and have certain natural, essential, and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." *Id.* at 340.

work.²⁰⁷ In Virginia, this developed into an institutional relationship of church and state with the Anglican Church as the officially recognized religion. The relationship continued through the revolutionary period but the strength of the ties began to wane as people began to see the implications of the revolutionary ideals. The contagion of liberty manifested itself at several levels. On the political level, people came to understand that throwing off the rule of the King of England might be insufficient if they did not also throw off the King's church. People also understood that political liberty would mean greater liberty of conscience, including greater liberty in matters of religious opinion. The Virginia Declaration of Rights, adopted in June of 1776, is illustrative:

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

* * * * *

16. That Religion, or the duty which we owe to our Creator, and the manner of discharging it, can only be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.²⁰⁸

The Virginia Declaration of Rights did not terminate the establishment of Anglicanism in Virginia, but it focused attention on the connection between liberty and religious liberty and helped to set the course for the disestablishment of religion achieved ten years later. At the core of the connection between political and religious liberty is the notion of individual freedom or free will. Without the existence of individual free will, it is meaningless to defend or even discuss liberty—political, religious, social, or economic. Thus, the proposition that all people are by nature free and independent is the necessary starting point for a bill of rights. Conversely, determinist views can never give an adequate account why people should have rights because the notion of rights and individual capacity to exercise the rights is antithetical to economic or psychological determinism.²⁰⁹

207. See L. PFEFFER, *supra* note 19, at 77-79.

208. I THE BILL OF RIGHTS, *supra* note 25, at 234-36. James Madison was chiefly responsible for the language of paragraph 16 declaring freedom of conscience to be a natural and absolute right. *Id.* at 250. See also I. BRANT, I JAMES MADISON: THE VIRGINIA REVOLUTIONIST: 1751-1780, at 241-50 (1941); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 20-22 (1978).

209. At best, the determinist can only view individual liberties as one of those

The mutual dependence between political and religious liberty is not always clearly perceived. The Virginia Declaration of Rights did not terminate the establishment of religion. It did, however, spur discussion of the problem, and from 1776 there were many attempts to disassociate religion from the secular domain. One of these attempts was in the form of a statute written by Thomas Jefferson for the purpose of ending the privileges accorded by law to the Anglican church.²¹⁰ Written in 1779, the statute was finally adopted in 1786 after a long and bitter struggle in the Virginia legislature. The most important part of the act is the preamble, where the argument for religious liberty is made. Here, Jefferson sketches the principal arguments in concise, yet eloquent form.

"pleasing illusions" by which people delude themselves into believing they are better off than they actually are. See, e.g., B. SKINNER, *BEYOND FREEDOM AND DIGNITY* 27-30 (1971).

210. The account of the struggle for religious liberty in Virginia is found in many places. See, e.g., I. BRANT, *II JAMES MADISON: THE NATIONALIST: 1780-1787*, at 343-355 (1948); A. KOCH, *MADISON'S "ADVICE TO MY COUNTRY"* 19-27 (1966); M. KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE* 21-29 (1957); L. LEVY, *JEFFERSON AND CIVIL LIBERTIES* 307 (1963); J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 78-86 (1979). For a discussion of the influence of John Locke on Jefferson's draft of the bill, see Sandler, *Lockean Ideas in Jefferson's Bill for Establishing Religious Freedom*, 21 J. OF THE HIST. OF IDEAS 110 (1960). The text of the statute reads as follows:

Whereas Almighty God hath created the mind free, that all attempts to influence it by temporal punishment, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical, and even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards which, proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors, for the instruction of mankind; that our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends only to corrupt

"Well aware that Almighty God hath created the mind free" is the famous opening line of the statute. This is a statement about human beings and a statement about God. People have free will, and this capacity is part of a divine plan. Attempts to coerce the mind are thus doomed to failure because they "tend only to beget habits of hypocrisy and meanness" and are contrary to the divine plan.²¹¹ One might say that attempts to coerce the mind in matters of religion by use of punishment is in fact a form of blasphemy. The word Jefferson uses is "impious." Nevertheless, such attempts are common throughout the history of mankind. Often these attempts are

the principles of that religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it; that though, indeed, those are criminal who do not withstand such temptation, yet, neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being of course judge of that tendency, will make his opinions the rules of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them:

Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies constituted with the powers equal or our own, and that, therefore, to declare this act to be irrevocable, would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind; and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

VA. CODE § 57-1 (1981).

211. Insofar as Jefferson perceives a divine plan, he reveals his personal preference for a rationalist theology. See D. Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U.L. REV. 57 (1976). According to Jefferson, mankind perceives God through the use of reason. In this sense, Jefferson's definition of religion is too narrow. Many religions claim to have perceived God through other faculties besides reason. See, e.g., R. BELLAH, *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* (1970).

welcomed by people as a relief from the burden of free will. People have free will but they sometimes desire not to use it. Probably the most dramatic image portraying the tendency to deny or disavow freedom is Dostoevsky's story of the Grand Inquisitor. In this fictional account, Christ returns to earth at the height of the Spanish Inquisition and is told by the local cardinal, the Grand Inquisitor: "We have corrected your work and have founded it upon *miracle, mystery, and authority*: And men rejoiced that they were again led like a flock, and that the terrible gift [of freedom] that had brought them such suffering, was, at last lifted from their hearts."²¹² People will trade their freedom, people will gladly escape from freedom to embrace authority and fall down and worship the miraculous, or what they are told is the miraculous. Thus, the history of religion is not an unbroken line of progress toward greater religious liberty, but reflects a constant tension between freedom and slavery, liberty, and authority. Jefferson expressed the tendency of people to reject freedom in the agrarian image of people who believed they were born with saddles on their backs.²¹³ The opening line of the statute therefore constitutes a challenge as well as a declaration.

It is not only wrong to compel religious beliefs, it is also wrong to compel contributions for the support of religious institutions. It is a form of tyranny, taxation without representation, to compel support of a church where one is not a member. Even where there is voluntary support for a particular religion, it is wrong to interject the state mechanism for support of that religion because it is a deprivation of the ability to encourage or withhold support. The church itself suffers from a guaranteed income. It loses vitality and direction if its "daily bread" comes from the state. The European experience is all too clear on this point.²¹⁴

Civil rights or capacities should not be made dependent upon religious beliefs. Jefferson gives four principal reasons: (1) just as opinions about physics and geometry are not part of the political realm neither are religious opinions; (2) civil incapacities are a deprivation of a natural right and are thus violative of the social contract; (3) a society which compels beliefs produces hypocrites and tends to corrupt religion; and (4) political definitions of religious orthodoxy destroy religious liberty because enforcement can never be neutral.

Jefferson separates religious opinions from the realm of politics.

212. F. DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 301 (Magarshack trans. 1958). See also A. TOCQUEVILLE, *supra* note 179, at 692.

213. T. JEFFERSON, *supra* note 1, at 729-30 (letter of June 24, 1826, to Roger C. Weightman).

214. In Sweden, for example, most people are members of the state established Lutheran Church, and less than 37% attend religious services regularly. See L. PFEFFER, *supra* note 19, at 56.

Rights of conscience are never a legitimate concern of government. In his *Notes on Virginia*, Jefferson wrote, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."²¹⁵

Only when principles break out into overt acts against peace and good order may government intercede. This raises one of the central problems in the discussion of religion and politics. To what extent is religion separate from politics? Democracy requires persons with a capacity for self-government, which includes respecting the integrity of persons, property, and civil rights. Religion can be helpful in this respect. Religion can also make the problem of self-government more difficult if religious intolerance affects the political realm. There are numerous examples of religious groups or movements that form around a charismatic leader whose vision of a "new world" ultimately produced misery and destruction. Norman Cohn, in his book, *The Pursuit of the Millennium*, chronicles the exploits of radical religious movements in medieval and reformation Europe. Typically, the religious leader possessed the true knowledge of good and evil and his followers were the instruments of this truth and were to purify the world from all evil. Much of the slaughter of Jews was done by such groups because Jews were viewed as agents of the devil.²¹⁶ These kinds of groups are antithetical to government by consent of the governed.

It is clear that problems of religion are a concern of politics as well. Religion can aid self-government; religion can hurt self-government. Religion as a cause of social disorder was an ever present European specter in the minds of the founders. The proper role of religion must be established in society. Although the analysis of politics and religion is interrelated, society must from the standpoint of political institutions put religion outside the political realm. As an institutional arrangement, religion becomes a private matter. By placing religious opinion in the private realm, the community is strengthened because a source of division and bitterness is muted. The community is also strengthened as the private practice of religion tends to produce good citizens.

Religious opinion as a prerequisite for civil capacities deprives society of able leaders and places some citizens outside of the political community. This is injurious to all. The development of able leaders is a concern of all societies. Placing a premium on a particular religious belief may discourage otherwise able persons. Worse, a premium may attract those who "externally profess" but who are basically opportunistic. Such people are more dangerous because they

215. T. JEFFERSON, *supra* note 1, at 275 (*Notes on Virginia*, Query 17).

216. N. COHN, *THE PURSUIT OF THE MILLENNIUM* 60-65 (2d ed. 1961).

are clothed with what appears to be righteous grab and are given more trust than is otherwise due. At the very minimum, it will produce hypocrites and the end result will be to corrupt religion, not aid it.

The diminishing of civil capacities because of religious belief is injurious to individuals who are deprived of the privileges of civil society. Participation in the political community on an equal basis is a natural right. Governments derive their just powers from the consent of the governed, not from the consent of the "righteous." Not only does exclusion of groups from the political community form the theoretical basis for a right of revolution, it also creates the practical conditions for revolution. Revolution is most likely to come from those who are displaced and do not have a place in the existing social order.²¹⁷

Civil incapacities jeopardize all religious liberty because enforcement can never be neutral. To allow the civil magistrate to restrain certain religious opinions gives the magistrate too much power. The only standard of judgment will be that of the magistrate or the prevailing orthodoxy.²¹⁸ This ties religious liberty either to the whim of those in authority or to the sufferance of the current majority. It is difficult to fathom any argument justifying deprivation of religious liberty that cannot ultimately be used against present orthodoxy. An attack on one lays the groundwork for an attack on all.

Jefferson felt that the only permissible attack on religious error was in free and open debate. Truth is a sufficient antagonist to error and will prevail unless deprived by human intervention of its natural weapons: free argument and debate. Jefferson wrote in his *Notes on Virginia* that "Reason and free inquiry are the only effectual agents against error. Give a loose to them, they will support the true religion, by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only."²¹⁹ This is not the same as Justice Holmes' image of the marketplace of ideas.²²⁰ The marketplace is indifferent to whether these are truths—political, religious, or otherwise. Jefferson, on the other hand, believed in certain self-evident truths concerning the rights of mankind.²²¹

217. See, e.g., J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 134-42 (3d ed. 1976); H. ARENAT, *THE ORIGINS OF TOTALITARIANISM* 314-20 (1973).

218. This argument applies, with some irony, to Jefferson's own view of religion with his clear preference for rationalist theology. See *supra* note 211.

219. T. JEFFERSON, *supra* note 1, at 275 (*Notes on Virginia*, Query 17).

220. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

221. The Declaration of Independence is the chief testament of this. There is also Jefferson's explicit statement: "Nothing then is unchangeable but the inherent and unalienable rights of man," *quoted in* A. BEITZINGER, *supra* note 176, at 267.

In order for the debate to be free and open, it is necessary that government be neutral. The neutrality is accomplished by the statute:

[N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall no wise diminish, enlarge or affect their civil capacities.²²²

Government may not aid religion—not one, a few, or all. Nor may governmental positions be determined on the basis of religious belief.²²³ Religious beliefs are protected against governmental interference. Thus, the statute expresses both nonestablishment and free exercise as complementary principles. The statute cannot be considered the final statement of these principles since many of the questions raised in Section II remain unaddressed by the Supreme Court. Nevertheless, the statute will serve as an important link in our understanding of religion and democracy.

C. *Madison's Memorial and Remonstrance*

Jefferson's statute was not passed by the Virginia legislature until after a bill supporting teachers of the Christian religion was defeated in a bitter contest. In 1784 Patrick Henry introduced an assessment bill to collect a general tax to subsidize Christian teachers because "the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society."²²⁴ The goal of educating citizens to retrain themselves and respect the rights and interests of others is a beneficial one. It is surely compatible with, if not essential to, the principles of self-government. However, the particular means to this end, a general assessment tax for the public support of Christian teachers,

222. VA. CODE § 57-1 (1981); T. JEFFERSON, *supra* note 1, at 313.

223. See *McDaniel v. Paty*, 435 U.S. 618, 628-29 (1978). The Court declared invalid a Tennessee constitutional provision that barred clergy from holding legislative posts:

The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. . . . [But] American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.

Id.

224. Assessment Bill (December 24, 1784), reproduced in the supplemental appendix to the dissenting opinion of Mr. Justice Rutledge in *Everson v. Board of Educ.*, 330 U.S. at 72.

created a problem. James Madison led the attack against this bill, not on the grounds that the encouragement of morality was wrong, but rather, the means were wrong. To favor separation of church and state is not necessarily to be hostile to religious belief. Madison certainly was not hostile to religious belief, although he was sometimes hostile to the clergy.²²⁵

Madison's opposition to the bill took the form of a remonstrance, a protest, in which he advanced fifteen distinct, cumulative arguments against the propriety of the tax. The *Memorial and Remonstrance* was circulated among the citizens of Virginia for their approval and signature and eventually, was presented to the Virginia legislature. Madison's authorship of the *Remonstrance* was not publicly disclosed so that he could still work effectively with all members of the legislature.²²⁶ With the other protests submitted to the legislature, the *Remonstrance* was greatly instrumental in causing the defeat of the assessment bill. Moreover, the case made for religious liberty was so persuasive that the next year Jefferson's statute was passed, ending the official establishment of the Anglican Church in Virginia.

The summary of Madison's arguments along with commentary will follow the numbered paragraphs of the *Remonstrance*:

1. Religion is outside of the jurisdiction of civil society.²²⁷

Madison begins with a quote from the Virginia Declaration of Rights: "That Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence."²²⁸ This duty is precedent and superior to the claims of civil society. The *Remonstrance* states that no man's rights may be abridged by society and religion is exempt from its cognizance. The rights of religious freedom are retained by all persons even though they are no longer in the state of nature. This indicates the importance of religious freedom to Madison. Whereas rights to life, liberty, and the pursuit of happiness may be generally moderated by the demands of civil society, religious freedom may not. Society simply does not have jurisdiction in the religious area.²²⁹

225. See THE MIND OF THE FOUNDER, *supra* note 186, at 2-4 (letter to William Bradford, January 24, 1774).

226. See Brann, Madison's "Memorial and Remonstrance," *A Model of American Eloquence*, 32 ST. JOHN'S L. REV. 55, 56 (1981). Many of the observations in this section are derived from this essay, and it is an elegant model for an interpretive essay.

227. See APPENDIX at ¶ 1.

228. I THE BILL OF RIGHTS, *supra* note 25, at 236. See *supra* text accompanying note 208.

229. Compare this formulation with the absolute language of the first amend-

In this regard, Madison's view differs from the libertarian view, which would ground religious freedom on the sovereignty of the individual. Madison does not regard the individual as the ultimate ground. The individual, sovereign in religious matters among men, is not autonomous in an ultimate sense. Hence, Madison's position requires society to recognize religious freedom not as a matter of comity or deference to the individual, but as a recognition of the individual's pre-existing obligation to God.²³⁰ We begin to see the emergence of a relative ranking or priority between free exercise and establishment. Free exercise discharges the individual's ultimate obligation; establishment aids this discharge by forbidding the interference of civil society.

2. There is no legislative power with respect to the retained rights of the people.²³¹

Civil society has no power over the exercise of religious freedom. The legislature, deriving its powers from civil society, likewise has no jurisdiction. Separation of powers not only applies to the relations between branches of government, but also between government and the people. One senses here the later formulation by Madison in the ninth amendment in which there is a reservation of rights, not enumerated, which are protected against governmental interference. Madison says that the encroachment upon these rights is tyranny because exercise of legislative power in this area is a violation of the social contract. It is in excess of the authority given to civil society by the people. Thus, religion is one area where the consent of the governed does not create power. This is one right that cannot be encroached on by civil society. People who submit to such tyrannical laws are therefore slaves.

3. Even the smallest infringement of religious liberty poses a danger.²³²

The beneficial end sought by the assessment should not obscure the danger posed by the method of its accomplishment. Again, it should be recalled that Madison does not dispute the need of citizens in a democracy to be educated so as not to act in an immoral manner. He believes that government cannot achieve this end by officially

ment ("Congress shall pass no law . . .") and the moderate language of the fifth amendment ("nor be deprived of life, liberty, or property, without due process of law . . ."). U.S. CONST. amend. I, V.

230. See Landi, *Madison's Political Theory*, VI THE POLITICAL SCIENCE REVIEWER 73, 77-79 (1976).

231. See APPENDIX at ¶ 2.

232. See APPENDIX at ¶ 3.

aiding religion. The danger posed by the assessment echoes Jefferson's statute: There is no argument in favor of aiding Christianity that cannot be used to aid other religions to the exclusion of Christianity. That is, once the authority of civil society to legislate in this realm is conceded, then it is as lawful to subjugate or outlaw Christianity as to aid Christianity.

Apprehension of the danger posed by the assessment should not be diminished because of the relatively small amount of tax imposed. As Madison says: "[I]t is proper to take alarm at the first experiment on our liberties."²³³ The authority to levy a small tax is also the authority to levy a larger tax, and to regulate completely. This raises the following question: If we are to take alarm at the first experiment, is there no room for moderation, for accommodation of competing interests? At this point, it is helpful to draw a distinction between means and ends. Madison would argue that the ends of civil society and the ends beyond civil society are immutable. The ends of civil society are essentially expressed in the Declaration of Independence. To secure the rights of persons to life, liberty, and the pursuit of happiness through self-government is the stated end of civil society. Freedom of religion, or freedom of conscience, as Madison would say, is part of liberty and the pursuit of happiness, and is independent of civil society. Society should value these ends and its desire to accomplish them is not subject to moderation. Contrasted with immutable ends, moderation in realizing these ends is permissible in two ways:

First, moderation in achieving the ends of civil society is not only permissible, but also necessary. This is the art of politics. For example, during the Civil War President Lincoln suspended the writ of habeas corpus, the cornerstone of all civil liberties, in order to preserve the Union dedicated to the principles of the Declaration of Independence. One of the principles was equality, which Lincoln advanced as fast as public opinion would permit; he attempted to steer a course through the tension of a government by consent that had withheld the benefits of equality from black people. He fought to preserve a Union dedicated to the proposition that all persons are created equal, even though equality was not yet fully realized. Moderation to accommodate competing interests in civil society is neces-

233. In this sense Madison's position is close to the famous statement made by Barry Goldwater and shared, possibly, by the American Civil Liberties Union: "Extremism in the defense of liberty is no vice" T. WHITE, *THE MAKING OF THE PRESIDENT*—1964, at 217 (1965). Madison's description in this paragraph of the Revolution as affirming this principle that Americans were quick to object to violations of liberty is contradicted somewhat by the words of the Declaration of Independence stating that "mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." 1 U.S.C. xxxi (1976).

sary. The refusal to accommodate in such circumstances may be a form of tyranny, because certain means favored to the exclusion of others may result in the denial of life, liberty, or property without due process of law.

Second, moderation of competing interests generally is more a problem of necessity, not principle. In the area of religion, however, there is less ground for an argument from necessity. In the establishment of religion, no moderation would appear to be justified. Madison makes this clear. The slightest infringement is cause for alarm. He notes later, however, in paragraph eleven, that the exuberance of religious exercise has posed a danger to moderation and harmony in society. Madison would agree with Jefferson that freedom of religion is a freedom of belief and conscience. That freedom, however, does not include the right to cause injury to others. The exercise of religion may not deny others the benefits of civil society. Thus there will be a certain amount of moderation in defining what activities are protected under the free exercise of religion.

4. The bill violates the principle of equality.²³⁴

Madison again alludes to the Virginia Declaration of Rights and its statement that "all men are by nature equally free and independent."²³⁵ Utilizing a Lockean image, he argues that all persons enter civil society on equal conditions and are entitled to the equal enjoyment of their civil rights. Madison also points to the connection between liberty and equality, noting that equal rights to the free exercise of religion are violated by the preferences of one religion over another. Any preference given in a situation where each person would otherwise have an equal claim to liberty, diminishes both liberty and equality. It is in this sense that the Supreme Court has recognized violations of equal protection as also constituting unlawful deprivations of liberty.²³⁶

5. The civil magistrate is not competent to judge religious truth.²³⁷

This argument is akin to the one made in Jefferson's statute. History has shown that rulers in all ages have differed on what is religious truth. There is no reason to believe current officials will do better. Madison's statement differs from Jefferson's in that it is more neutral. In making his argument for religious liberty, Jefferson could

234. See APPENDIX at ¶ 4.

235. See *supra* text accompanying note 208.

236. See *Frontiero v. Richardson*, 411 U.S. 677, 679 (1973); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

237. See APPENDIX at ¶ 5.

not refrain from endorsing a rationalistic theology, in which the Divine is discovered through the use of reason.²³⁸ Madison's observation, in contrast, is more detached, and states that people cannot allow civil society to define religious truth, whether it be based upon reason, mystery, or authority. This paragraph, together with the second paragraph concerning the limits of legislative power, constitutes probably the strongest argument against prayer in the public schools. The government ought not to be in the business of promulgating or sanctioning "approved" prayers. While individual prayer may aid the worship life of the individual and the community, state sanctioned group prayer is counterproductive because it becomes divisive. The state must remain neutral in order to foster the religious life of the community.

In addition to the neutrality argument, Madison also asserts that religion may not be employed as an "engine of Civil policy." Such an action is a perversion of the means of salvation. Religion does not exist to serve the state; it is a duty which antedates the obligations of civil society. To subordinate religion to the position of serving civil society is wrong. This does not mean that the practice of religion does not benefit society; it does in an extremely vital way, but these benefits may not be compelled by the civil authorities.

6. Establishment of religion is contrary to the principles of Christianity.²³⁹

Madison addresses in this paragraph those who favor the assessment bill and attempts to dissuade them on the basis of their own principles. He points out that Christianity has always recognized the distinction between the sacred realm and the secular realm. Christianity disavows a dependence on the powers of this world. Dependence upon secular authority turns the admonition to render to Caesar what is Caesar's and to God what is God's on its head. Dependence also weakens Christian faith because it makes one trust in the law and not in the Lord.

Separation of church and state in the Western world has been made possible because Christianity itself contained the idea of separation. Jesus' teaching about the distinction between the two kingdoms—secular and spiritual—was reinforced by the writings of St. Augustine.²⁴⁰ This concept of separation is foreign, for example, to the Moslem religion, and as a result it will not occur in countries where this religion is prevalent.²⁴¹

238. See *supra* note 211 and accompanying text.

239. See APPENDIX at ¶ 6.

240. See *supra* note 2; ST. AUGUSTINE, CITY OF GOD, Part 5 (V. Burke ed. 1958).

241. See E. ROSENTHAL, ISLAM IN THE MODERN NATIONAL STATE (1965); D.

7. The experience of establishment has been disastrous.²⁴²

Madison uses his rhetorical skills to make an argument showing a cause and effect relationship. The experience of Europe with regard to establishment of religion serves as a strong example of what happens if the foregoing principles are ignored. Madison states that:

During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy.²⁴³

Of course, any institution will suffer grievous problems over a long period of time. Periodic reform is necessary in order to retain the vitality and clarity of the original purpose. The problems of institutions, which tend to be cyclical in character, are exacerbated when the institution is made part of the state. Madison's view of fifteen centuries of secular and ecclesiastical history may be over-simplified, but the essence of his point is probably correct. Christianity recognizes a distinction between the sacred and the secular and its happiest periods have been where the distinction was practiced.

8. Establishment is not necessary for the support of Civil Society.²⁴⁴

In the middle of the fifteen paragraphs, Madison deals with the central problem of the *Memorial*. If establishment is not necessary for the support of religion, can it be necessary for the support of civil society? Madison says no. Religion is not within the realm of civil government and, therefore, establishment cannot be necessary for the support of government. As Madison states, a "just government, instituted to secure & perpetuate it, needs [an established clergy] not."²⁴⁵ While religious establishment is not necessary to the support of government, religious exercise is its best support. This shows the dichotomy between establishment and free exercise: establishment is detrimental to self-government; free exercise is essential for self-government. Free exercise of religion will help shape citizens with a capacity for self-government. It will also foster private diverse groups or associations and thereby broaden the base of social and

SMITH, RELIGION AND POLITICAL DEVELOPMENT (1970); Najjar, *Islam and Modern Democracy*, 20 REV. OF POL. 164 (1958).

242. See APPENDIX at ¶ 7.

243. *Id.*

244. See APPENDIX at ¶ 8.

245. *Id.*

political consensus. The formation of such diverse groups will stand as a barrier to tyranny. Democracy, therefore, relies upon a peculiar irony: religion must remain politically impotent while furnishing the moral basis for self-government.

Experience has shown that legal establishment of religion has not been a means to liberty but rather a means to tyranny. Either the church controls the society through a religious tyranny or provides support for a political tyranny by others. Rulers who wished to subvert the public liberty may find an established clergy convenient auxiliaries. A church tied to the fortunes of the state will be a natural ally of the existing powers. It eventually loses the independence and ultimately the will to question leaders of policies. In the 1930s, it was only by breaking official relations with the state that some of the German churches, known collectively as the "Confessing Church," were able to recover a remnant of their integrity. The remaining established church played a key role in legitimizing the Nazi regime.²⁴⁶

9. Establishment departs from America's image as an asylum from religious oppression.²⁴⁷

Madison appeals to the social self-conception of America as a bulwark of liberty. The appeal testifies to the existence of this self-image, and to the vitality of the image which can bring people back from a lapse of faith in liberty. It is important not to lose this self-image because the actualization of liberty will be harder to achieve if people no longer believe in, or are indifferent to liberty. People will not believe in liberty if they see oppression tolerated or justified in the name of liberty. Hence, it is proper to take alarm at the first experiment with liberty. The assessment bill differs from the Inquisition only in degree. "The one is the first step, the other the last in the career of intolerance."²⁴⁸ Passage of the bill would represent a significant decline for a nation conceived in liberty.

10. The bill would encourage emigration.²⁴⁹

By subjecting religious liberties to the political process, people in the minority would tend to leave Virginia. They will not long endure the deprivation of a natural right. This is a very practical argument from circumstances directed at those worried about westward expansion with its consequent effect in Virginia of labor shortages and declining land values.

246. See E. BETHGE, DIETRICH BONHOEFFER 203-53 (1970); G. CRAIG, GERMANY: 1866-1945, at 666-67 (1978).

247. See APPENDIX at ¶ 9.

248. *Id.*

249. See APPENDIX at ¶ 10.

11. Establishment destroys political moderation.²⁵⁰

While religion is helpful to democracy, religion also poses a danger to it. Even within the Christian religion where there is a tradition of charity toward others, there is a tendency to practice intolerance toward those who do not conform.²⁵¹ The exuberance of religious belief sometimes leads to the remaking of the existing social order in the image of the "New Kingdom."²⁵² Government becomes the rule of the righteous. In this instance, religion can be too strong for democracy. Madison's cure for this problem lay in continued separation of the religious issue from politics. Liberty and equality are the best antidotes for this malignant aspect of religion. Madison does not say that this resolves the problem. Separation keeps the problem under control; however, the tension remains. Madison would say that religion per se is not a threat to moderation; religion produces the inner moderation which is necessary to the order of civil society.

Separation of church and state aids political moderation because it keeps an immoderate element out of the political realm. Compromise on matters of religious doctrine is very difficult to achieve. The existence of hundreds of separate denominations in America is a testament to this fact. The politics of producing an annual budget, revising corporate and commercial laws, or implementing new policies in labor/management relations is a moderating process. Negotiation produces concessions and gains by the interested parties. Often, a genuine consensus is achieved. As long as religion is excluded from the political realm, the basic model for Madison's "extended republic," which is discussed in *Federalist Papers No. 10* and *51*, is revealed. The interjection of a religious element into politics would probably produce discord and engender a breakdown of social consensus.

12. Establishment is counterproductive to the spread of Christian religion.²⁵³

Madison argues that establishment will discourage people from becoming Christians by making Christianity appear weak and un-

250. See APPENDIX at ¶ 11.

251. See R. BELLAH, *supra* note 192, at 100-04.

252. See N. COHN, *supra* note 216.

253. See APPENDIX at ¶ 12. Cf. A. TOCQUEVILLE, *supra* note 179, at 297-301. [B]y allying itself with any political power, religion increases its strength over some but forfeits the hope of reigning over all.

...
So long as a religion derives its strength from sentiments, instincts and passions, which are reborn in like fashion in all periods of history, it can brace the assaults of time, or at least it can only be destroyed by another religion. Unbelievers in Europe attack Christians more as political than as religious enemies, then hate the faith as the opinion of a party much more than as a mistaken belief, and they reject the clergy less because they are representatives of God than because they are friends of authority.

attractive on its own merits. The policy of the bill is adverse to the diffusion of the light of Christianity. The light of Christianity, the "light of revelation," will naturally spread throughout the world. The bill represents an obstacle rather than an aid to this expansion. Madison's rhetoric represents a more balanced synthesis of the claims of Christian revelation and the progress of truth than Jefferson's more rationalistic approach.

13. Establishment of religion will weaken respect for the law.²⁵⁴

"Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society."²⁵⁵ Government by the consent of the governed will recognize the interests of a minority if the government has prudent leadership. One mark of prudence is understanding the deleterious effects of enforcing a law obnoxious to a significant proportion of people. A sustained disregard of minority interests can generally lessen respect for the law. Of course, the minority cannot always be accommodated. Otherwise, the principle of majority rule would be thwarted. A prudent exercise of majority rule, however, will attempt to accommodate minority interests when fundamental rights are involved. Denial of fundamental rights to a minority will weaken the bands of society; continued denial gives rise to a right of revolution.²⁵⁶

14. It is not clear that the assessment bill is favored by a majority.²⁵⁷

A measure of such importance, dealing with the exercise of a natural right, should not be adopted in any case without a very clear indication of support by a majority of citizens. Madison has faith in the principle of majority rule. There were, however, problems of equal representation in the Assembly that obscured the actualization of the majority rule. Prudence would dictate caution in such a delicate matter.

15. The assessment bill is violative of the Virginia Declaration of Rights.²⁵⁸

Madison returns again to paragraph sixteen of the Virginia

254. See APPENDIX at ¶ 13.

255. *Id.*

256. The Declaration of Independence (U.S. 1776). See also G. ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* 331-37, 367-79 (1971); G. ANASTAPLO, *HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM AND THE COMMON GOOD* 205-06 (1975).

257. See APPENDIX at ¶ 14.

258. See APPENDIX at ¶ 15.

Declaration of Rights, which accords to each citizen the equal right to free exercise of religion. The assessment bill, he says, is contrary to this fundamental provision. If the bill may contradict it, then a simple legislative act may alter or abolish all fundamental rights. The argument here is strikingly similar to an argument made by Chief Justice John Marshall in *Marbury v. Madison*,²⁵⁹ where Madison was the defendant. The principle of a written constitution requires that the basic charter is not amended by a legislative majority, but by a more rigorous process where the clearest expression of majority sentiment is established. Resort to a more rigorous amendatory process tends to accommodate both the interest of majority rule and minority rights. Minority rights rest ultimately on the good judgment of the majority to respect these rights because the majority can change them through formal or informal means. The respect comes from the recognition that minority rights are majority rights as well. The rights to speak, to own property, to receive a fair trial, to be protected against unequal application of the laws, benefit all citizens. The attack on religious liberty is implicitly an attack on all these rights because the principle for the abolition of all rights is thereby established.

The strength and eloquence of Madison's *Remonstrance* resulted in the defeat of the assessment bill and the adoption, in the next legislative session, of Jefferson's statute of religious liberty. The Virginia experience served to clarify both Madison's and Jefferson's thinking on this issue and prepared them for the subsequent debate on the national level. It also served to educate all citizens on the meaning of religious liberty and its connection to political liberty. This process of education, through free argument and debate, was vital to the ultimate establishment of religious liberty in the Constitution. The task of arguing for inherent rights that cannot be affected by the political process is a difficult one because of its inherent tendency to conflict with the principle of majority rule. This is precisely what must be done, however, in a constitutional government. A prudent leader will attempt to influence public opinion toward this end.

D. *The Northwest Ordinance of 1787*

On the national level, the United States operated under the Ar-

259. 5 U.S. (1 Cranch) 149 (1803). The Marshall opinion is filled with considerable irony with its "lecture" to Secretary of State Madison on the vested legal right of Mr. Marbury to his judicial commission. In light of Madison's known opinions on the duty to obey the law, this portion of the opinion must have caused Madison some discomfort. Moreover, the primary theory of judicial review advanced by Marshall, that it strengthens the integrity of a written constitution not subject to amendment by a simple legislative majority, is essentially the same argument made by Madison in paragraph 15 of the *Remonstrance*.

ticles of Confederation from 1781 until the adoption of the Constitution in 1789. The Articles of Confederation contained no national policy on religious liberty. This is not surprising because the national government was endowed with relatively few powers. Matters concerning personal freedoms, including religious liberty, were left to the states: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."²⁶⁰ This provided a workable arrangement for personal freedoms as all states had enacted constitutions or bills of rights dealing with individual liberties.²⁶¹ The national government did not have the power to interfere with the state jurisdiction.

The national government was not inactive during this period because, although its power did not extend into the sovereign states, the national government had primary jurisdiction in the territories. The Northwest Ordinance of 1787 became the most important piece of legislation from this period because it established the basic pattern for how the republic was extended.²⁶² The Ordinance ties together several elements in its "blueprint" for the territories. The inhabitants of the territories would be part of the established political community, citizens of the United States.²⁶³ As the states formed their own

260. 1 U.S.C. xxxv (1976).

261. See I THE BILL OF RIGHTS, *supra* note 25, at 231-379.

262. See H. JAFFA, HOW TO THINK ABOUT THE AMERICAN REVOLUTION 79-80 (1978). Professor Jaffa has summarized the contribution of the Northwest Ordinance to the maintenance of the American regime as a democratic regime:

What the Northwest Ordinance did, was to assure that the United States, in the course of the continental expansion which had already begun, would become a democratic, and not an autocratic republic. It did this in the following way:

1. By assuring that the territories of the United States would remain part of the United States; and that the citizens of the territories would be citizens of the United States.
2. By assuring that the territories, even before becoming states, would be governed by the same principles of civil and religious liberty as "form[ed] the basis whereon [the original thirteen] republics, their laws and constitutions, are erected."
3. By assuring that when any territory possessed enough inhabitants to become a state, it would be admitted upon a basis of full political equity with the original thirteen.
4. By declaring that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."
5. By declaring that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes"

Id. The Northwest Ordinance was readopted by the First Congress on August 7, 1789. 1 STAT. 50 (1845).

263. The use of the term "territory," instead of "colony," reflects the desire to integrate additional political units into the nation on an equal basis. See J. ROBERTSON, AMERICAN MYTH, AMERICAN REALITY 60, 75 (1980).

political units in the federal system, they would be admitted to the confederacy on an equal basis with the other states. This equal status would be based on the equivalency of like kind: the new states would have a republican form of government with the same principles of civil and religious liberty as in the established states. Encouragement of education, as a means of support for republican government, was an important function. The prohibition of slavery in the Western territories was another important achievement of the Ordinance. It helped to limit the spread of slavery and thereby, according to the desires of the founders, helped to put the institution of slavery on its ultimate course of extinction.

For present purposes, two provisions of the Ordinance are of particular significance. In extending the fundamental principles of civil and religious liberty, Congress passed several "articles of compact between the Original States and the people and the State in the said territory" ²⁶⁴ The first of these articles of compact was a guarantee of the free exercise of religion and stated that, "[n]o person, demeaning himself in a peaceable and orderly manner shall, ever be molested on account of his mode of worship, or religious sentiments, in the said territory." ²⁶⁵ This represents a clear sentiment on the national level in favor of religious liberty in an area where Congress did have plenary authority to legislate. As such, it provides another example of the prevailing sentiment in favor of religious freedom.

The second provision of particular interest in the Ordinance is the statement that, "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." ²⁶⁶ This reflects the belief of those in the early years of the regime that religion was an indispensable element of democratic society. Religion and morality together with knowledge were the essential shaping elements in the regime. These elements prepare citizens for self-government. In addition, the language of this provision shows a movement away from the kind of religious establishment existing in several states. The prior draft of the Ordinance, considered two days before its final passage, read as follows: "Institutions for the promotion of religion and morality, schools and the means of education shall forever be encouraged" ²⁶⁷ In the final version, the encouragement of religious institutions is dropped in favor of the encouragement of schools and the means of education. Religion remains as a necessary element but its sustenance will come from the people and the schools, not from

264. 1 U.S.C. xlii (1976).

265. *Id.*

266. *Id.* at xliii.

267. 1 THE BILL OF RIGHTS, *supra* note 25, at 395.

government. In this regard, the Ordinance possibly reflects the influence of Jefferson, whose initial draft of a territorial ordinance in 1784 served as the starting point for the version finally adopted by Congress in 1787.²⁶⁸

E. *The United States Constitution*

A little over two months after the adoption of the Northwest Ordinance, a national convention in Philadelphia completed its work on a new constitution. The convention had originally been charged with the task of amending the Articles of Confederation.²⁶⁹ The primary concern was to strengthen the national government in order to deal more effectively with interstate matters. There was little discussion concerning the need for a bill of rights. In his notes, Madison recorded near the end of the convention a brief discussion whether a committee should prepare a bill of rights. The motion was defeated by a unanimous vote of the states, largely on the ground that the individual states' declarations of rights would still be in force and sufficient.²⁷⁰ It was the view of the convention that the new constitution did not give the national government power to legislate against individual liberties. This power was reserved to the states.²⁷¹

The only mention of religion in the new Constitution was in article VI, which prohibited religious tests as a qualification to "any Office or public Trust under the United States."²⁷² Every public officer must take an oath to support the Constitution but cannot be required to take a religious oath.²⁷³ Support of constitutional government is the only loyalty which can be rightfully demanded of public officials.

During the ratification process, the supporters of the Constitution realized the necessity, from a political standpoint, of including a bill of rights. One of the most successful criticisms made by opponents of ratification was the lack of a bill of rights.²⁷⁴ In defense of the proposed Constitution, Hamilton argued that a bill of rights was not necessary and could even pose a danger:

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They

268. See T. JEFFERSON, *supra* note 1, at 313-15.

269. See M. JENSEN, *THE MAKING OF THE AMERICAN CONSTITUTION* 35 (1964).

270. J. MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 630 (A. Koch ed. 1966).

271. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1717-1787*, at 536 (1969).

272. U.S. CONST. art. VI.

273. See *Torcaso v. Watkins*, 367 U.S. 488 (1961) (invalidating the requirement of an oath of belief in God as a prerequisite for the office of notary public).

274. See *THE ANTIFEDERALISTS* 191-233 (C. Kenyon ed. 1966).

would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare what things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed.²⁷⁵

James Madison agreed that the national government had no power to infringe upon individual rights and in addition offered another argument why the new Constitution would not be destructive of individual rights. In essays later collected in the *Federalist Papers*, Madison argued that on the national level the plurality of interests would inhibit the formation of a tyrannical majority:

Extend the sphere and you take in a greater variety of parties and interest; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discuss their own strength and to act in unison with each other.²⁷⁶

This general analysis applies to religion as well. The problem of religious factions, whether legally established or not, poses a serious threat to democracy and constitutional government. The extended republic will ameliorate the problem of religious faction:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.²⁷⁷

Thus, even apart from whether the national government has the power to legislate, Madison argues that the majority will not invade the rights of the minority. This is a *political* protection against majority tyranny. For the most part, Madison's analysis has been proven correct. The one major exception was the institution of slavery. There, a majority of whites acceded to the suppression of the black minority. In the area of religion, Madison's analysis has largely borne out. The only serious establishment problems that have occurred on the national level have been the relatively recent aid to education

275. THE FEDERALIST NO. 84, at 513-14 (Rossiter ed. 1961).

276. THE FEDERALIST NO. 10, at 83 (Rossiter ed. 1961). Note that this argument is based on Madison's observations on human nature and is to be distinguished from the Holmesian image of the marketplace of ideas. See *supra* notes 220 & 221 and accompanying text. Madison was not indifferent to the pursuit of truth, nor did he believe that truth is whatever people agree on. From a governmental standpoint, however, it is best that the pursuit of truth is initiated by the people, not by the government.

277. *Id.* at 84.

cases.²⁷⁸ In these cases, the primary motive of Congress was not to establish religion but to aid education, some of which was religiously oriented. Obviously, the first amendment has been a safeguard against establishment, but the fact remains that national establishment has never been a serious possibility, for the reasons Madison stated:

Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in 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; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.²⁷⁹

The motives of the framers in not including a bill of rights ought not to be impugned. They believed the new government did not have the power to invade personal rights and that there were already sufficient political safeguards against the formation of a tyrannical majority. The decision to leave these matters to the states was not unreasonable. Hamilton's argument that a bill of rights was unnecessary, and even dangerous, however, was wrong for two reasons. First, the government did have the power to regulate interstate commerce, and this eventually expanded into a great national power. The power to enact aid to education legislation comes from the commerce clause and, secondarily, from the general welfare clause.²⁸⁰ Hamilton and Madison should not be faulted for not foreseeing the great expansion of congressional power after 1937.²⁸¹ Second, and more fundamental, Hamilton was wrong not to see the importance of the Bill of Rights in winning the goodwill and support of the people. Whether it was legally necessary, a bill of rights would gain the emotional support of many opponents of the new Constitution and thereby broaden the social and political base under the new regime. Jefferson was able to convince Madison on this point and Madison thereafter led the movement for the adoption of a bill of rights.²⁸² The Constitution was eventually ratified, with a political consensus

278. See, e.g., *Tilton v. Richardson*, 403 U.S. 672 (1971); *Flast v. Cohen*, 392 U.S. 83 (1968).

279. THE FEDERALIST NO. 51, at 324 (Rossiter ed. 1961).

280. U.S. CONST. art. I, sec. 8.

281. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

282. See I THE BILL OF RIGHTS, *supra* note 25, at 592-623.

that one of the first orders of business in the Congress would be the consideration of a bill of rights.²⁸³

F. *The Bill of Rights*

During the first term of the first Congress, James Madison introduced a number of amendments to the new Constitution in accordance with promises made during his campaign for election to the House of Representatives from the State of Virginia.²⁸⁴ Madison's introduction of amendments set the agenda for consideration by Congress, and many of the final provisions can be traced to this initial step. The amendments were not without significant controversy. The provision concerning religion was no exception, going through several different versions before taking its final form.²⁸⁵ Its

283. See II THE BILL OF RIGHTS, *supra* note 25, at 983-84; B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 160-86 (1977); J. GOEBEL, I HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 425-56 (1971).

284. II THE BILL OF RIGHTS, *supra* note 25, at 984.

285. On June 8, 1789, Madison formally introduced his series of amendments to the Constitution. The religion provision states that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." I ANNALS OF CONG. 434 (J. Gales ed. 1789), *reprinted in* II THE BILL OF RIGHTS, *supra* note 25, at 1026.

On August 15, during a meeting of the House of Representatives as committee of the whole, the House considered the following language, "No religion shall be established by law, nor shall the equal rights of conscience be infringed." I ANNALS OF CONG. 729 (J. Gales ed. 1789), *reprinted in* II THE BILL OF RIGHTS, *supra* note 25, at 1088. Representative Huntington raised the objection that the language might be interpreted too broadly so as to prohibit for example, the enforcement of pledges to a church in the federal courts. Madison replied that perhaps the issue could be clarified if the word "national" was inserted before "religion." Madison, however, withdrew his motion and the House passed the following language suggested by Mr. Livermore: "Congress shall make no laws touching religion, or infringing the rights of conscience." I ANNALS OF CONG. 731 (J. Gales ed. 1789), *reprinted in* II THE BILL OF RIGHTS, *supra* note 25, at 1089.

Two days later, the House again resolved into committee of the whole and considered an amendment which Madison characterized as the most valuable of all: "No state shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases." I ANNALS OF CONG. 755 (J. Gales ed. 1789), *reprinted in* II THE BILL OF RIGHTS, *supra* note 25, at 1112. The two amendments took the following form in the House a few days later: "3. Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed . . . 11. No state shall infringe the right of trial by jury in criminal cases; nor the rights of conscience; nor the freedom of speech, or the press." II THE BILL OF RIGHTS, *supra* note 25, at 1122, 1123.

The proposed amendments then went to the Senate. The members agreed to strike the words of the third article "nor shall the rights of conscience be infringed." II THE BILL OF RIGHTS, *supra* note 25, at 1148. Two days later, the language was

importance was never a matter of disagreement as the religion amendment always occupied the first position among the Bill of Rights provisions. In fact, it was not until a late revision by the Senate that the provisions regarding free speech were elevated to this lofty position among the amendments.²⁸⁶ With regard to the religion provision, the concerns appear to have been threefold: (1) that Congress would not restrict the free exercise of religion without (2) legislating so as to establish a national religion, and (3) that Congress should not interfere with the jurisdiction of the states in religious matters. The text of the religion clauses will serve as the primary basis of discussion.

1. "Congress . . ."

For the most part, the Bill of Rights would appear to have general applicability to all levels of government. "The right of the people to be secure in their persons, houses, papers, and effects . . .,"²⁸⁷ or "[N]o person shall be . . . deprived of life, liberty, or property, without due process of law"²⁸⁸ are statements not directed or limited to particular branches or levels of government. The first amendment, by contrast, is limited in two ways. First, it is directed toward the federal government, not the states. Second, it is limited to one branch of the federal government—Congress. We see here the concern that Congress, the legislative branch, posed the greatest danger to religious and civil liberty. If the legislative branch were without power to enact, the executive could not implement and the judiciary could not interpret. More important, however, is the federal/state distinction. Under the first amendment, protection of religious liberty, freedom of speech, press, and association were clearly left to the states. The Senate insisted on this reservation of state power probably because the Senate was more beholden to state legislatures than

amended and combined with the article on free speech to read as follows: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances." II THE BILL OF RIGHTS, *supra* note 25, at 1153. The other article concerning restrictions on the states were deleted. II THE BILL OF RIGHTS, *supra* note 25, at 1154. Although the House agreed to most of the Senate changes, they did not agree to the Senate provision on religion. Instead, the final version read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." I ANNALS OF CONG. 913 (J. Gales ed. 1789), reprinted in II THE BILL OF RIGHTS, *supra* note 25, at 1162.

Two very helpful discussions of the debates in the First Congress are contained in W. BERNs, *supra* note 19, at 1-32 and M. MALBIN, *supra* note 208.

286. See *supra* note 285.

287. U.S. CONST. amend. IV.

288. U.S. CONST. amend. V.

to the people themselves. Concerning state power over religion, Congress apparently felt that religious liberty was so delicate that religion required handling at the state level. Madison's feelings on establishment at any level were clear; hence, his agreement to this language indicates his recognition that the states had to resolve this issue. This compromise is similar to the great compromise regarding slavery, but this one worked, as establishment was set on a course of ultimate extinction. By 1833 the last legal establishment of religion had been abolished.²⁸⁹ Through the method utilized by Congress of leaving the matter to the states, religious liberty was ultimately achieved by majority vote in each jurisdiction when circumstances permitted. This shows a prudent course of implementing principles in the face of entrenched opposition.

2. "[S]hall make no law . . ."

The language of the first amendment differs from many other Bill of Rights provisions in another dramatic fashion. The prohibition in the first amendment is absolute; the other restrictions are for the most part qualified:

Amend. III. No Soldier shall, in time of peace be quartered in any house, *without the consent of the owner*, nor in time of war, *but in a manner to be prescribed by law*.²⁹⁰

. . . .

Amend. V. No person shall be held to answer for a capital, or otherwise infamous crime, *unless on a presentment or indictment of a Grand Jury, or in the Militia, when in actual service or War or public danger*; . . . nor be deprived of life, liberty, or property, *without due process of law*; nor shall private property be taken for public use, *without just compensation*.²⁹¹

Qualifications or exceptions to the absolute language of the first amendment would give a gloss not intended by the framers. For example, the "clear and present danger" test²⁹² is clearly such a gloss. The framers expressly provided for no exceptions. When the framers wanted qualifications and limitations, they used appropriate language.

3. "[R]especting an establishment . . ."

The establishment clause has a broad scope. The text does not say, as did an early draft of the clause, "[n]o religion shall be established by law."²⁹³ The key word in the text is "respecting."

289. S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* (1968); *Abington School Dist. v. Schempp*, 374 U.S. at 255 n.20 (Brennan, J., concurring).

290. U.S. CONST. amend. III. (emphasis added).

291. U.S. CONST. amend. V. (emphasis added).

292. See, e.g., *Schenk v. United States*, 249 U.S. 47, 52 (1919).

293. See *supra* note 285.

Synonyms for respecting are "regarding," "concerning," "relating to," "in connection with," "tending toward." Establishment of religion is much narrower in scope than laws *respecting* an establishment of religion. Laws which may lead to the establishment of religion are prohibited.

On the other hand, the establishment clause is not as broad as some would claim because it does not say "Congress shall make no law respecting religion." Strict neutrality, or "religion-blindness," is not required. To be prohibited, the law must in some way relate to an *establishment* of religion. What is establishment? The Supreme Court has often answered this question through examples.²⁹⁴ Jefferson's statute is actually more helpful because it expresses the principle for nonestablishment: opinions concerning matters of religion "shall in nowise diminish, enlarge, or affect their civil capacities."²⁹⁵ In other words, religion shall not be the ground of political right.

4. "[O]f religion . . ."

Congress may not make a law respecting an establishment of religion. Clearly, this is broader than no establishment of a church. The definition of religion for establishment purposes has caused little difficulty. The definition of religion, however, has become critical in determining the scope of protection offered by the free exercise clause. The definition is critical because after *Wisconsin v. Yoder*,²⁹⁶ exemption from otherwise valid criminal and civil laws is offered.

An agent of the state, the judiciary, ultimately decides what constitutes religion. Fearing possible overreaching on its own part, the courts give tremendous deference to persons claiming exemption from laws on the basis of religious liberty. As a result, this deference, which may be indecision, has given sanction to mail order divinity degrees, questionable tax exemptions, and the operation of a restaurant in violation of zoning ordinances because the patrons were "parishoners," the chefs "priests," and the meal "the sacred communion."²⁹⁷ Obviously, before one erects a high wall between church and state, one should take some care to ascertain the location of the property line.

There is a certain irony here because it is generally recognized that American society is becoming more secular, yet the courts are willing to recognize more forms of religious belief and activity. Consider some cases on religious exemption from the military draft. Con-

294. *Everson v. Board of Educ.*, 330 U.S. at 15-16.

295. T. JEFFERSON, *supra* note 1, at 313.

296. 406 U.S. 205 (1977).

297. See Note, *Mail Order Ministries, The Religious Purpose Exemption, and the Constitution*, 33 TAX LAWYER 959, 959 n.3 (1980). Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1081 n.122 (1978).

gress has traditionally provided an exemption for those who "by reason of religion training and belief [are] opposed to participation in war in any form."²⁹⁸ In *United States v. Seeger*,²⁹⁹ the defendant applied for a draft exemption even though he expressly denied belief in a Supreme Being. He based his claim on his "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."³⁰⁰ The Supreme Court held this was equivalent to religious belief and Seeger was thereby entitled to the exemption. The Court went one step further in *Welsh v. United States*.³⁰¹ In this case Welsh said he did not believe in a Supreme Being. He denied any religious aspect to his pacifist views, saying they were based upon his reading in the areas of history and sociology.³⁰² Despite Welsh's own disavowal, the Court held his views to be akin to religious belief. Even the atheist can be religious.³⁰³

The framers offered little guidance on the meaning of the term "religion." Their consideration of the problem extended only slightly beyond the Christian tradition of Western Civilization. They were in this sense committed participants on the issue of religion. There were leanings in different directions. Jefferson, for example, favored a deistic religion with a rationalist theology.³⁰⁴ Madison was more neutral in this regard. According to Madison, the duty owed to the Creator not only transcended civil society, but also the demands of any particular sect or religion. The framers may have regarded religion as an "open-textured" word whose meaning would evolve as circumstances changed. To freeze the concept of religion in 1789 would probably constitute an unlawful establishment of religion or, in the alternative, constitute a violation of equal protection.³⁰⁵ Certainly society should be very hesitant, like the Supreme Court, to allow the government to define religion. The power to define is very much the power to destroy, particularly because government tends to define things in terms of its utility. A utilitarian definition of religion—what is useful to the state—would invert Madison's notion of religion as antecedent to the demands of civil society. On the other hand, a purely individual definition of religion—"religion is what I say it is"

298. 50 U.S.C. § 456(j) (1976).

299. 380 U.S. 163 (1965).

300. *Id.* at 166.

301. 398 U.S. 333 (1970).

302. *Id.* at 341.

303. See *Malnak v. Yogi*, 440 F. Supp. 1284, 1326 n.29 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979): "Atheism may be a religion under the establishment clause in that the government cannot aid the propagation of a belief in the nonexistence of a supreme being." (citations omitted).

304. See *supra* notes 211-13 and accompanying text. See also, H. Mansfield, *supra* note 97, at 29.

305. *United States v. Seeger*, 380 U.S. at 174-75, 180-83.

—goes too far. People are a part of civil society and individual obligations may not be abrogated by the simple technique of delaring a “religious” immunity. The problem is prevalent among those who essentially proclaim a single issue religion where the issue in question is a basic obligation of citizenship. The most current example is the organization that preaches tax avoidance as its fundamental tenet.³⁰⁶ In addition to the single issue religions, the problem of the philosophically based beliefs which are expressly nonreligious exists. Chief Justice Burger in *Yoder* said that the protection of the first amendment does not extend to such persons.³⁰⁷ This area is more problematic, as pointed out by Justice Harlan,³⁰⁸ because the philosophical belief bears a strong likeness to the religious belief. Indeed, Madison would have protected it as well under a guarantee for the rights of conscience.³⁰⁹ The task, therefore, is to give protection to religious belief and its functional equivalents without providing the basis for the subversion of fundamental duties of citizenship. Although there can be no hard and fast rule in this task, the founders, particularly Madison, would have us err on the side of religious liberty rather than on the side of civil obligation.³¹⁰ In this regard, Professor Tribe has suggested that the definition of religion evolve into a dual standard: a broad definition of religion for free exercise purposes and a more narrow definition of religion for establishment purposes.³¹¹ In any event, the definition of religion remains a crucial problem for the Supreme Court, although the problem is probably not amenable to more than a tentative solution. Only when the religion clauses are read in relation to each other and in the context of the entire framework of constitutional government, can a proper adjudication of a particular problem be realized. The understanding of the founders will, in such cases, be very helpful.

5. “[O]r prohibiting . . .”

Congress can make no law *respecting* an establishment of religion, nor may it legislate to *prohibit* the free exercise of religion. Respecting is a much broader term than prohibit. The lack of parallelism between the two clauses suggests the possibility of a middle ground between establishment and the prohibition of free exercise. The language indicates that Congress may be able to enhance the free exercise of religion without the establishment of religion. This appears to be the basis of the *Walz* case and the federal tax exemption for contributions

306. See *supra* note 297.

307. 406 U.S. at 216.

308. *Welsh v. United States*, 398 U.S. at 356-59 (Harlan, J., concurring).

309. See *supra* note 285.

310. See, e.g., *supra* text accompanying notes 227-30 and 243-46.

311. L. TRIBE, *supra* note 18, at § 14-6.

to religious organizations.³¹² Providing a tax exemption aids religious exercise without establishing religion. Similarly, legislating a draft exemption protects the integrity of religious practice without causing religion to be established.³¹³

6. "[T]he free exercise thereof . . ."

Clearly included within the free exercise of religion is the freedom to entertain and hold any belief concerning religion. Under the Constitution, one may believe there is one God, or twenty gods, or no gods. The text gives a broader scope to this freedom, however, because it protects the free exercise of religion. Religious conduct as well as belief is protected. By comparison, the free speech clause by its own terms only protects speech, not conduct based upon the speech. What is the scope of protection afforded religious exercise? A good starting point is Jefferson's observation that the state has an interest in controlling the effects of religious opinion when it "break[s] out into overt acts against peace and good order."³¹⁴ Free exercise will not protect acts which cause clear and direct protection for violation of civil rights laws, even though an exemption is claimed for religious belief.³¹⁵

If the harm caused is within the family unit, a more difficult problem arises. Both the right of privacy and free exercise protect most governmental intrusion into the family domain. The problem, however, does not disappear because the state has a valid interest in protecting minors from physical harm or neglect.³¹⁶ The safety interest remains even in cases where the harm is to the individual. The poisonous snake handling cases are examples.³¹⁷ Less justifiable is a Florida case involving a prosecution for smoking marijuana.³¹⁸ The defendants claimed the smoking of marijuana was an integral part of their religious practice. This argument has been accepted by the California Supreme Court in prosecution against the Native American

312. 397 U.S. 664 (1970).

313. See L. PFEFFER, *supra* note 19, at 618-25.

314. T. JEFFERSON, *supra* note 1, at 313.

315. See *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). See also *Hollon v. Pierce*, 64 Cal. Rptr. 808, 810-11 (Cal. Ct. App. 1968).

316. See *Jehovah's Witness v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968); *In re Green*, 292 A.2d 387 (Pa. 1972); *Raleigh-Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 201 A.2d 537 (N.J.), *cert. denied*, 377 U.S. 985 (1964).

317. See *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976); *Harden v. State*, 216 S.W.2d 708 (Tenn. 1948) (handling of poisonous snakes part of worship service).

318. *Town v. State ex rel. Reno*, 377 So.2d 648 (Fla. 1979), *cert. denied*, 449 U.S. 1004 (1980).

Church.³¹⁹ When the harm is not clearly manifested, it would appear the state's interest in controlling private conduct, which is ostensibly religious, is not strong enough to punish individuals criminally. Nevertheless, the Florida Supreme Court affirmed the conviction and the United States Supreme Court denied certiorari.³²⁰

The problem of ascertaining which acts are protected under free exercise and which acts are not, seems to be the most unresolved and difficult problem for the Court. The Court understands the great potential of the free exercise clause to exempt persons from certain obligations of citizenship. The Court sympathizes with the claims of certain groups, such as the Amish,³²¹ the Roman Catholics,³²² and the Jehovah's Witnesses.³²³ It has not, however, articulated a principle to distinguish these cases from others where the state interest prevails. Until such clarification is made, the area will be plagued by uncertainty and the Court itself may be violating due process by failing to give adequate notice of what conduct is to be permitted or prohibited.³²⁴

The Court should note Madison's concern that zealous religious exercise may pose a danger to the moderation and harmony of civil society.³²⁵ The newly emerging coalition of fundamentalist Protestantism and conservative politicians may pose the kind of problem envisioned by Madison.³²⁶ Any interpretation of the free exercise clause must acknowledge the tendency of that clause to "swallow up" the establishment clause. The Court should strive for a balanced interpretation which accommodates both interests. The overarching guideline should be to err, if necessary, on the side of religious liberty.

F. *The Fourteenth Amendment*

The fourteenth amendment provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

319. *People v. Woody*, 394 P.2d 813 (Cal. 1964). Where the use of hallucinogenic drugs is not part of a formal or organized religion, the California courts have been less sympathetic to the free claims. See *People v. Werber*, 97 Cal. Rptr. 150 (Cal. Ct. App. 1971); *People v. Wright*, 80 Cal. Rptr. 335 (Cal. Ct. App. 1969); *People v. Mitchell*, 52 Cal. Rptr. 884 (Cal. Ct. App. 1966).

320. *Town v. State ex rel. Reno*, 377 So.2d 648 (Fla. 1979), *cert. denied*, 449 U.S. 1004 (1980).

321. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

322. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979).

323. See *Wooley v. Maynard*, 430 U.S. 705 (1977).

324. Cf. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 83-84 (1973) (Brennan, J., dissenting).

325. See *supra* notes 250-51 and accompanying text.

326. See *infra* note 370.

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³²⁷

There has been a long, intense debate regarding the impact of these words on state and national government.³²⁸ It is not possible in this article to review this debate other than to make a few observations. First, it is reasonably clear that the framers of the fourteenth amendment were thinking primarily of the civil rights of blacks and did not give any serious consideration to the problems of religion and government.³²⁹ This is not to say they were unconcerned with civil liberties generally; they were concerned with undoing the effects of *Barron v. Baltimore*,³³⁰ and restoring certain limitations upon powers of state governments.³³¹ This time, however, the original restrictions in the first amendment on congressional power were also dropped. All privileges and immunities of citizens were to be protected from encroachment by the state government. This reflects a trend during and after the Civil War toward national government and away from state sovereignty.³³²

The text of the fourteenth amendment provides possibilities for applying the Bill of Rights to the states. The privileges and immunities clause, standing at the head of the list, protects the privileges and immunities of United States citizens from abridgement by state government. What are these privileges and immunities? Common usage shows a "privilege" to mean a benefit or advantage and an "immunity" to mean a freedom or exemption from law or government.³³³ Where does one look in the Constitution to find these privileges and immunities? They are primarily found in the first eight amendments to the Constitution where freedoms or immunities from government action are specified. By taking away from the states the power to abridge privileges or immunities of citizens, the clause would appear to have nationalized the Bill of Rights and made it applicable to all levels of government.³³⁴

The due process clause is actually the least likely candidate for application of the first amendment to the states because the clause on its face deals with process or procedure, not substance. One may not be deprived of liberty except by appropriate or due process. The rights to speak, to assemble, and to worship are substantive rights which may

327. U.S. CONST. amend. XIV.

328. See *supra* note 57.

329. See *supra* note 31.

330. 32 U.S. (7 Pet.) 243 (1833).

331. See W. CROSSKEY, *supra* note 24, at 1089-95.

332. See G. ANASTAPLO, *supra* note 255, at 192-97; M. HOWE, *supra* note 31, at 61-90.

333. See W. CROSSKEY, *supra* note 24, at 1118.

334. *Id.* at 1083-1118.

not be abridged by Congress under any circumstances. By reading these rights through the due process clause of the fourteenth amendment, do they not thereby become qualified? May one be deprived by a state of the liberty to speak or worship as long as there is appropriate legal process? Moreover, if the first amendment freedoms become qualified by the due process clause, may not Congress also abridge these freedoms by appropriate process under its section five powers to implement the fourteenth amendment? The modern proponents of incorporation would certainly reject this formulation, but in so doing they change the language of the due process clause.³³⁵

The primary reason for applying the first amendment through the due process clause is the Supreme Court's decision in the *Slaughter-House Cases*,³³⁶ which practically obliterated the privileges and immunities clause. Thus, the process of applying the Bill of Rights to the states as intended by the framers, sidetracked by *Barron v. Baltimore*,³³⁷ revitalized by the fourteenth amendment, sidetracked again by the *Slaughter-House Cases*, took a circuitous route to its ultimate destination: nationalization of the fundamental rights of citizenship.

An alternate route for application of the first amendment to the states which might have been easier was the equal protection clause. As discussed earlier, liberty and equality are concepts which are, at times, interchangeable. Although they are not the same, many arguments for liberty can also be stated in terms of equality and vice versa. Establishment of religion involves making distinctions among various religions or the conferring of benefits to some religions or to all religions. Religion may not serve as a ground for political right. In this light, the establishment clause fits more neatly into equal protection than due process. The equal protection clause would also apply for some of the free exercise arguments. Government may not single out individuals or groups for special burdens or disabilities because of their religious beliefs.³³⁸ The equal protection clause does not cover the *Yoder*³³⁹ type case where government has a law equally applicable to all citizens. In such instances, it may be better to treat these cases under the due process clause where some moderation is

335. Under the modern cases, the due process clause actually reads something like this: nor shall any State make a law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances; nor in any other instance deprive any person of life, liberty, or property, without due process of law.

336. 83 U.S. (16 Wall.) 36 (1873).

337. 32 U.S. (7 Pet.) 243 (1833).

338. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); Cf. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

339. 406 U.S. 205 (1972).

required. The *Yoder* defendants, and all others similarly situated, should not have an absolute right to be exempted from the just demands of civil society. Nevertheless, the claim to religious liberty ought to be accorded great deference and restricted only when clearly necessary for the common good.

The effect of the fourteenth amendment has been the nationalization of the Bill of Rights. Whether this was the intent of the framers of the fourteenth amendment is still subject to debate but the result is now well-established. The framers used expansive language which allowed the concepts of liberty and equality to develop over time. The language of the fourteenth amendment affirmed the original commitment in the Declaration of Independence to liberty and equality and helped to bring their realization closer to actuality.³⁴⁰

V. ARRIVING AT THE BEGINNING: THE TEACHINGS OF THE PAST

The foregoing review has attempted to articulate the founders' understanding of the problem of religion in a democracy. In giving careful consideration to the principal texts, a clearer perception of the nature of religious liberty emerges. A summary of the results of the documentary review begins with a brief recount of the struggle for religious liberty in America.

The early colonists came to the New World with a dual view of religion. On the one hand, many fled the imminent effects of religious tyranny in Europe. Yet many, including those fleeing religious tyranny, sought to establish the New Kingdom in the New World. The errand into the wilderness meant leaving the failures and frustrations of the old European society, and attempting to make the New World into a better image of God's Kingdom.³⁴¹ At that point in history, the lesson of religious intolerance in Europe was not that church and state should be separated, but that given a fresh start the kingdom of God could be realized on this earth. It took over a century for this missionary zeal to wane. In fact, it took a greater and more fateful struggle in the political realm to bring about a change in the perception of religious freedom. As Bernard Bailyn has described in *The Ideological Origins of the American Revolution*, the contagion of liberty illuminated not only the nature of political freedom, but also the consequences of such liberty for the religious realm.³⁴² It would do no good to throw off the King's rule if the King's church

340. Richard Kluger has quoted Thurgood Marshall as saying, "[t]he Fourteenth Amendment was no more or less than a codification of the Judeo-Christian ethic." R. KLUGER, *supra* note 188, at 222.

341. See R. BELLAH, *supra* note 192, at 13-16; P. MILLER, *ERRAND INTO THE WILDERNESS* 1-15 (1956).

342. B. BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 246-72 (1967).

were allowed to dominate civil society. Belief in the natural equality of persons meant that government would not derive its just powers from the consent of the righteous. This realization did not reach every citizen at the same time or with equal impact. Achievement of religious liberty did not occur overnight.

The opening rounds in the struggle for religious liberty were fought at the state level, with Virginia providing the most intense and most illuminating battleground. James Madison and Thomas Jefferson fought for the disestablishment of the Anglican Church, and for the establishment of religious liberty in Virginia. The victory did not come by way of litigation in the judicial system; the participants relied on the political process to reach the right result after free debate and argument. Jefferson's statute, with its extended preamble, and Madison's *Memorial and Remonstrance*, with its catalogue of arguments against the assessment bill, are testaments to Jefferson's and Madison's belief in the power of reason. Their belief was ultimately justified in Virginia, and this set the tone for Madison's later endeavors in national politics.

On the national level, there was little danger posed to religious liberty because the national government was not given the power to establish religion or to prohibit it. Jefferson, and later Madison, believed that notwithstanding any technical inability of the national government to act in the area of individual liberties, it was imperative to adopt a bill of rights. This would give individual liberties a more firm grounding and would help gain broader support of the people for the new regime. After the Constitution was ratified, Madison was the chief architect of the Bill of Rights passed by Congress and later ratified by the states.

The bulk of the Bill of Rights provisions, by the tenor of their language, were intended to apply both to the state and federal government. Only the first amendment and the latter part of the seventh amendment were expressly limited to the federal government. In light of Madison's clear and deep rooted opposition to the establishment of religion in Virginia, it would appear that his sponsorship of the limitations solely on Congress arose out of prudential considerations. Due to the intensity of the Virginia struggle, Madison understood that the proponents of religious establishment, or more aptly the opponents of religious liberty, needed to be convinced about the correctness of Madison's views.³⁴³ It would do no good to

343. Commenting on the Virginia statutes later in his life, Madison said: "The law has the further advantage of having been the recruit of a formal appeal to the sense of the Community and a deliberate sanction of a vast majority, comprising every sect of Christians in the State." MADISON'S "DETACHED MEMORANDA," *supra* note 109, at 554.

force even a just view upon the unconvinced. In order for constitutional government to work, the consent of the governed should not be coerced.

Under the first amendment, therefore, the protection of religious liberty was left to the states. This arrangement was successful, for the most part, as religious establishment was put on the course of ultimate extinction. Over the next seventy-five years, however, it became clear that the states were not the best protectors of individual liberties, particularly in the instance of oppression of blacks. The compromise over slavery did not lead to the gradual extinction of slavery, as was hoped by Jefferson and many of the other founders.³⁴⁴ A civil war resulted, and the nation conceived in liberty and dedicated to equality only barely survived. The fourteenth amendment was enacted to reverse the *Dred Scott* case, restore citizenship to blacks, and to reverse *Barron v. Baltimore*, and thereby nationalize the rights of citizens in a civil society. In short, the fourteenth amendment brought the promise of the Declaration of Independence within the express constitutional framework.

The struggle for religious liberty illustrates the value of the prudential pursuit of liberty within the framework of democracy. The two religious clauses are monuments of that struggle and serve to remind us of the tension between liberty and authority, democracy and tyranny. Part of the tension between liberty and authority concerns the relationship of religious liberty and religion. There is much praise for religious liberty, less so for religion, and yet there is something lacking in an account of religious liberty which does not take the religion seriously. The founders believed that religion was an essential element in the preservation of free government. President Washington noted the connection between religion and the values essential to American democracy in his Farewell Address:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens. The mere Politician, equally with the pious man ought to respect and cherish them. A volume could not trace their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in the Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion: Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and ex-

344. See STORING, *supra* note 97, at 214-33.

perience both forbid us to expect that National morality can prevail in exclusion of religious principle.³⁴⁵

Jefferson, in his *Notes on Virginia*, expressed the sentiment that belief in divine justice was essential to the liberties of the nation:

And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with His wrath? Indeed I tremble for my country when I reflect that God is just³⁴⁶

There is also the statement of the first Congress in the Northwest Ordinance, which it re-adopted in 1789, "[r]eligion, morality, and knowledge being necessary to good government and to the happiness of mankind, schools and the means of education shall forever be encouraged."³⁴⁷ These statements illustrate a concern of the founders for preserving the conditions of freedom, as well as freedom itself. They believed that the regime remained dependent upon religious institutions for the development of private morality and public spiritedness, although the regime must at the same time remain free of sectarian influence.³⁴⁸

Religion, therefore, has generally occupied a paradoxical position in modern democracies: it can be helpful, it can be hurtful. A modern democracy cannot survive without religion; but it also cannot survive with religion if religion is allowed to dominate it.³⁴⁹ A recognition that democracy cannot live without religion is to recognize that religion has made crucial contributions to the development of citizens with a capacity for self-government. Unlike a totalitarian regime which does not need a virtuous citizenry, but rather an obedient citizenry, democracy requires citizens who can

345. BASIC WRITINGS OF GEORGE WASHINGTON 637 (S. Commins ed. 1948).

346. T. JEFFERSON, *supra* note 1, at 278-79.

347. 1 U.S.C. xiii (1976).

348. The kind of religion the founders usually had in mind was nonsectarian religion. Sectarian religion is an important institutional aid to the development of morality, both public and private, but it has a countervailing tendency to divide citizens and hence the political community along doctrinal lines. The experience of Ireland is a classic example. The founders' preference for nonsectarian religion was the desire to realize the beneficial aspects of religion in its corresponding doctrinal tensions. Religion, not subsumed in any particular sect, would shape the citizens for self-government by teaching the values essential to democracy. See generally R. BELLAH, *supra* note 192. This desire by the founders has not been fully realized because it is difficult to sustain religious inclinations outside of the institutional churches.

349. This is a rough paraphrase of Matthew Arnold in his Preface to *God and the Bible* (1875). "But at the present moment two things about the Christian religion must surely be clear to anybody with eyes in his head. One is, that men cannot do without it; the other, that they cannot do with it as it is." VIII THE WORKS OF MATTHEW ARNOLD, xii (MacMillan ed. 1904).

govern themselves and can exercise "self-interest properly understood."³⁵⁰ The capacity for self-government is not a given or inherent in the nature of human beings. It must be developed, over generations, and nurtured with great care.³⁵¹ Capacity for self-government requires that citizens respect the rights and interests of others. Promises should be kept, personal and bodily integrity should be honored, and property rights should be respected. Without these basic restraints, self-government becomes very difficult, if not impossible.

Traditionally religion has shaped the character of democratic institutions and its citizens. Religion's beneficial contribution has been the inculcation of values essential to self-government. These values stem not only from specific texts such as the Ten Commandments or the Sermon on the Mount³⁵² but also from a positive veneration of all human beings, created in the image of God.³⁵³ The

350. See A. TOCQUEVILLE, *supra* note 179, at 525-28. Tocqueville argued that Americans practiced an enlightened self-interest which tempered the potential excesses of individualism. Self-restraint and self-sacrifice were practiced in the interest of the common good.

351. This is why education is also essential to the survival of democracy. Education is the formal method of training in self-government. Education trains persons to govern themselves, through reason and moderation, so that they may later govern others who consent to be governed. Cf. PLATO, LAWS 639a-644b (Pangle trans. 1980). See E. BRANN, PARADOXES OF EDUCATION IN A REPUBLIC (1979); L. STRAUSS, LIBERALISM ANCIENT AND MODERN 3-25 (1968); R. WEAVER, VISIONS OF ORDER 113-33 (1964).

352. *Exodus* 20:3-17; *Matthew* 5:1-7:29. The Ten Commandments and the Sermon on the Mount are at the core of the Judeo-Christian tradition which emphasizes respect and concern for persons, their property, and the general well-being of the community.

353. The image of persons created in the likeness of God is an important image. See H. DELUBAC, THE DRAMA OF ATHEIST HUMANISM 3-5 (Riley trans. 1950); E. VIVAS, THE MORAL LIFE AND THE ETHICAL LIFE 174-79 (1963); M. ELIADE, THE SACRED AND THE PROFANE 167-79 (W. Trask trans. 1959). By contrast, the denial of substance of human beings is at the core of totalitarian ideologies where human dignity counts for nothing. See E. VOEGELIN, THE NEW SCIENCE OF POLITICS 130-31 (1952); A. SOLZHENITSYN, I THE GULAG ARCHIPELEGO 308-09 (T. Whitney, trans. 1973). Totalitarian regimes disseminate propaganda which denies the humanity of those who are not of the proper race or class and thus may be treated as beasts. See H. ARENDT, *supra* note 217, at 341-64. The example of slavery in our own country also fits this pattern. See H. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE LINCOLN-DOUGLAS DEBATES 310-13 (1959). Ironically, this occurred primarily in a region of the country which prided itself on its religious character. See R. WEAVER, THE SOUTHERN TRADITION AT BAY 138-48, 208-13 (1968). Thus, religion cannot be the sole defense against totalitarianism. Indeed, in places where religion is the chief institution, for example, Spain, Portugal, and Italy, fascism has had some success. The religious recognition of the substance of all human beings must be coupled with democratic institutions where this can be articulated and realized. The American regime has articulated the principle of human substance in the Declaration of Independence. See H. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN IN-

dignity of the person and of the human soul is at the root of these values. In fact, the answer to the question of man's status is the cornerstone for any code of human conduct. The denial of substance of persons has terrible consequences.³⁵⁴ Thus, promises are kept in order to maintain integrity and to affirm expectations. Respect for others comes from respect for self; respect for others generates a concern for their well-being. Recognition of the dignity of persons restrains actions which may damage their reputation or their personal well-being. Accordingly, the decline in concern for persons gives rise to reckless, negligent, and generally selfish behavior which endangers the personal and bodily integrity of everyone. Respect for property rights is implied in the respect for persons because property rights give the individual a measure of privacy where the person can exercise judgment and develop an honorable vocation. Without the sanctuary provided by private property, the dignity of the person is dependent upon the benevolent intentions of the state. As Trotsky wrote: "In a country where the sole employer is the State, opposition means death by slow starvation."³⁵⁵

In addition to the recognition of personal rights and interests of persons, religion also supplies the theoretical foundation for the two values which are essential for democracy: liberty and equality. The dignity of the person requires liberty from arbitrary and capricious actions by other persons or by government. Liberty of conscience and liberty of expression are premised upon the doctrine of free will. If persons have no free will, they have no conscience; they have no reason. They are simply a part of a giant anthill, and allowing "freedom of expression" would be inefficient and potentially dangerous to the interests of the state.³⁵⁶ Likewise, equality arises from the notion that persons, as distinct from beasts, are created in the image of God. Social Darwinism tends to minimize the distinction between man and beast and as such, establishes the basis for inequality of human beings,³⁵⁷ just as the whole animal world demonstrates the

INTERPRETATION OF THE LINCOLN-DOUGLAS DEBATES 305-29 (1959); H. JAFFA, *THE CONDITIONS OF FREEDOM* 149-60 (1975).

354. See E. VOEGELIN, *supra* note 353, at 130-31; A. SOLZHENITSYN, *supra* note 353, at 308-09; C.S. LEWIS, *THE ABOLITION OF MAN* (1947); Krimmel & Foley, *Abortion: An Inspection Into the Nature of Human Life and Potential Consequences of Legalizing Its Destruction*, 46 U. CIN. L. REV. 725, 810-14 (1977).

355. Quoted in R. WEAVER, *IDEAS HAVE CONSEQUENCES* 129 (1948).

356. For an illustration of the Marxist attitude toward freedom of expression, see MARX AND ENGELS, *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 22-23, 27, 276 (L. Feuer ed. 1959); B. WOLFE, *THREE WHO MADE A REVOLUTION* 259 (1948); H. MARCUSE, *ONE-DIMENSIONAL MAN* 1-18 (1964). For an illustration on the behaviorist attitude toward freedom of expression, see B. SKINNER, *supra* note 209, at 26-43 (1971).

357. See, e.g., R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT*

principle of hierarchy (based particularly upon force and violence). Democracy, on the other hand, rests upon an essential equality of persons: each has an equal claim to human dignity. As Lincoln said: "As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy."³⁵⁸ A totalitarian regime, by contrast, can never achieve true equality because of its implicit denial of the substance of human beings. The remaking of persons in order to achieve the classless society requires the regime to eliminate those who cannot be remade. The new order ultimately denies the humanity of large numbers of persons because they are not of the proper race, class, or ideology.³⁵⁹ *This is the greatest inequality of all.* It is essential for a democratic regime to actualize as nearly as possible the values of liberty and equality among its citizens. Recognition of claims to equal human dignity from arbitrary, capricious, and unjust actions has a firm religious basis. The connection drawn in the Declaration of Independence between the inalienable rights of all human beings, such as life, liberty, and the pursuit of happiness, and a Creator as the source of these rights, is not accidental.³⁶⁰

These values are not easily imparted, but must be taught and practiced over generations in order to spread their influence throughout the citizenry. Society is not an amalgamation of autonomous persons. Knowledge and virtue are imparted generally from older to younger, from wiser to the less wise, from experienced to the less experienced, from artists to their audience. The primary setting for this communication is the family unit. While the family unit is undergoing certain cultural changes, the family's existence in some essential form is still necessary or the ill effects of its absence will be felt.³⁶¹ Traditionally religion has emphasized the importance of the family unit and this has had a significant stabilizing influence as well as providing a basis for creativity and productivity in American culture.³⁶²

In addition to the role of religion in shaping citizens for self-government, religious groups contribute to the vitality of a democratic regime by acting as private associations that serve important

170-200 (rev. ed. 1959); F. MATSON, *THE BROKEN IMAGE: MAN, SCIENCE AND SOCIETY* 24-26 (1964).

358. II LINCOLN, *supra* note 180, at 532.

359. *See supra* note 354.

360. *See infra* text accompanying notes 203-05.

361. *See* Berger, *The Family as a Mediating Structure* in *DEMOCRACY AND MEDIATING STRUCTURES* 144-79 (M. Novak ed. 1980); P. BERGER & R. NEUHAUS, *supra* note 146, at 19-26; C. LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESEIGED* (1977); K. KENISTON AND THE CARNEGIE COUNCIL ON CHILDREN, *ALL OUR CHILDREN: THE AMERICAN FAMILY UNDER PRESSURE* (1977).

362. *See, e.g., Exodus* 20:12 (New Jerusalem 1966): "Honor your father and your mother so that you may have a long life in the land that Yahweh your God has given to you." *See generally* S. KIERKEGAARD, *WORKS OF LOVE* (H. & E. Hong trans. 1962).

public functions,³⁶³ such as health,³⁶⁴ welfare,³⁶⁵ and education.³⁶⁶ They also help to consolidate and articulate views and thereby enrich the social process. As Justice Brennan noted in his concurring opinion in *Walz v. Tax Commission*, religion has made a positive and unique contribution to American democracy:

[G]overnment grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.³⁶⁷

363. See generally P. BERGER & R. NEUHAUS, *supra* note 146; DEMOCRACY AND MEDIATING STRUCTURES (M. Novak ed. 1980); CHURCH, STATE AND PUBLIC POLICY (J. Mechling ed. 1978).

364. The church's involvement in health care and services is its response to the mandate of the Gospel. The church in all its structures should continue and increase its role as advocate in health matters with a concern for equity, justice, and the preservation of human values. *Presentation of Major Health Insurance Proposals: Hearings Before the Committee on Finance, U.S. Senate*, 96th Cong., 1st Sess. 423 (1979) (statement of the United Presbyterian Church in U.S.A.). In 1977 more than one-half (3,551 out of 7,099) of all hospitals in the United States were operated by nongovernmental, nonprofit institutions. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 111 (1979). Many of these institutions are church related.

365. The percentage of church contributions toward benevolences is approximately 20% of all church contributions. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 56 (1979). Churches have traditionally taken an active role in the providing of social services such as counseling, rehabilitation programs, welfare, and general community outreach. See P. BERGER & R. NEUHAUS, *supra* note 146, at 28-31.

366. In 1970 enrollment in elementary and secondary schools totalled 50,715,251 students. Of these, 4,499,857, or 8.9%, were enrolled in church related schools. W. GRANT & L. EIDEN, DIGEST OF EDUCATION STATISTICS 45 (1980). See also *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, dissenting in part):

The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

367. 397 U.S. at 689 (Brennan, J., concurring). Elsewhere in his opinion, Justice Brennan emphasized the special character of the religious institution, stating: "there is no nonreligious substitute for religion as an element in our societal mosaic, just as there is no nonliterary substitute for literary groups." *Id.* at 693.

By acting as private sources of authority and association, religious groups provide an important, nongovernmental alternative to state authority. In this sense, the concept of separation of powers is important not only to intragovernmental relations, but also to the relation of government and citizens. The diversity of private associations, including religious associations, provides a balance in the extended republic against the domination of any particular group.³⁶⁸

Any candid assessment of the role of religion in American democracy must also note the shortcomings. Religion has had a tradition of persecution, bigotry, and despotism,³⁶⁹ in addition to the beneficial tradition discussed above. These shortcomings are due in part to the nature of religion, which has always had its more extreme and fanatical elements. Religious fanaticism, in fact, is often at odds with democracy because obedience to religious commands overrides the rights and interests of other persons or the just claims of the state.³⁷⁰ It is at this point that the status of persons created in the im-

368. See THE FEDERALIST NO. 10 & 51, *supra* note 275. See also, Adams, *Mediating Structures and the Separation of Powers* in DEMOCRACY AND MEDIATING STRUCTURES 1 (M. Novak ed. 1980):

Nothing makes one long for water more than to be without it in a desert. The loss of the mediating structures that exist between the individual and the states creates such a desert, one that was experienced by millions of people in Nazi Germany. One of the first things Adolf Hitler did after seizing power was to abolish, or attempt to abolish, all organizations that would not submit to control. The middle organizations—for example, the universities, the churches, and voluntary associations—were so lacking in political concern that they created a space into which a power charismatic leader could march with his Brown Shirts. Paradoxically, in taking the way left open to him, Hitler developed a mediating organization himself. By the use of mass persuasion, psychic violence, blackmail, and terror his organization practically wiped out the others as if they were tottering ninepins. He persuaded his followers to abandon freedom for absolute unity under a *Fuhrer*. This toboggan slide into totalitarianism was accelerated by the compliance of governmental structures, provincial and local, including the secondary school system. Considering this broad range of compliance, we may define the totalitarian society as one lacking effective mediating structures that protect the self-determination of individuals and groups.

See generally P. BERGER & R. NEUHAUS, *supra* note 146.

369. See, e.g., R. BELLAH, *supra* note 192, at 87-100. See also, Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment* 51 S. CAL. L. REV. 1, 10-25 (1977); N. COHN, *supra* note 216, at 60-65; M. MARTY, A NATION OF BELIEVERS 103-04 (1976); M. MARTY, RIGHTEOUS EMPIRE 24-33, 71-72, 133-43 (1970); L. PFEFFER, *supra* note 19, at 71-82; J. POLE, *supra* note 210, at 70-73, 88.

370. The relatively recent emergence of conservative evangelicals in the political arena has caused much concern among liberal commentators. The main criticism of the evangelicals has been their unwillingness to exercise restraint in areas where, the critics believe, recognition of other rights and interests are called for. It is indeed difficult to have a discussion with a person who sees himself as the true exponent of divine will. See, e.g., Foley, *Evangelical Politics* in CVII COMMONWEALTH

age of God is displaced by the more ominous image of persons and public authority as agents of the devil.³⁷¹ To the extent that individuals or groups are caught up in this kind of rhetoric, the practice of religion will not aid the democratic regime. In fact, it may at times be harmful to democracy.³⁷² Thus, the scope of religious belief and practice that is helpful to a democratic regime is narrower than the scope of what commonly passes as religion. This does not lead directly, however, to a narrowing of constitutionally protected religious activity. As in the areas of speech, society may wish to have a broader protection for religion than is immediately necessary in order to provide the beneficial exercise of religion with adequate "breathing space" from governmental regulation. Nevertheless, not all religion benefits democracy, just as not all speech benefits democracy.³⁷³

The shortcomings of religion are also due in part to a general inability of persons to live up to the commands and ideals of their religion. The churches are full of sinners. Problems of persecution, bigotry, and despotism appear in even the most orthodox of religious institutions.³⁷⁴ A more general aspect of the problem is indicated, however, since these problems are not limited to religious persons or groups. In this regard, religion may ultimately be a critical means to generally ameliorate these problems.

From the documentary review, three competing considerations emerge: nonestablishment, free exercise, and civil society. There can be no precise formula to resolve religious problems among these forces. It is not like the child's game where stone beats scissors, scissors beats paper, and paper beats stone. Each of the three factors will dominate or recede, according to the circumstances of the particular case. For Madison and Jefferson, identification of the relevant principles was the most important step, with the practical resolution of the problem to follow as the circumstances would warrant. Present circumstances are different, hence, the understanding of their writings will not necessarily produce the same results. Attempts to

104 (Feb. 27, 1980); Lichtman, *The New Prohibitionism* in XCVII THE CHRISTIAN CENTURY 1028 (Oct. 29, 1980); FitGerald, *Reporter at Large* (The Reverend Jerry Falwell) THE NEW YORKER 53, 111-15 (May 18, 1981); Clymer, *For Moral Majority: A Step Toward '82*, N.Y. Times, June 14, 1981, at 36, col. 1.

371. See generally N. COHN, *supra* note 216, at 60-65, 71-73; E. VOEGELIN, *THE NEW SCIENCE OF POLITICS* 144-61 (1952). See also Delgado, *supra* note 369, at 26-35.

372. See *supra* note 250 and accompanying text. The fervor of religious practice can conflict with the principle of majority rule and change the regime from government by consent of the governed to government by consent of the righteous. See Delgado, *supra* note 369, at 25-36.

373. See H. JAFFA, *EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS* 169-89 (1965).

374. See *supra* note 369.

resolve problems should be guided by their understanding transposed to the present. In addition, it is sometimes not possible for the resolution to be immediately achieved, like the case where the protection of religious liberty was left to the states. Prudence will dictate when principles can be fully implemented.

The principles of the religion clauses may be stated in brief: Non-establishment means that religion shall not be a ground of political right; free exercise means that people have a right of conscience to believe as they choose, and that government ought to regard acts in accordance with such beliefs with as much deference as possible.

The concepts of nonestablishment and free exercise are extremely powerful and the principles of either concept could be extended so as to swallow up the other. If nonestablishment is made absolute, the government may not in any way accommodate religious beliefs or conscience. If free exercise is extended to its logical conclusion, democracy will cease to function because an individual may claim exemption from any law on the ground of religious belief. Even without a strict extension of either principle, the clauses remain in tension with each other. Resolution of religious issues may attempt to satisfy both clauses and resolution under one clause must not violate the other. Moreover, the resolution must be in time with the principles of constitutional government; the particular must always be viewed in light of the whole.

The analysis will also be influenced by the technique of characterization. As in the area of conflicts of law,³⁷⁵ characterization of the nature of the problem will significantly influence the outcome. In the religious area, characterization of the issue as either establishment or free exercise will be a definite factor in the analysis. When there is no prior tradition of applying labels to a particular case, that is, in a case of first impression, characterization can be very important. The best way to deal with this problem is to avoid characterization and look at the issue from both the nonestablishment and free exercise perspective. The goal is to reach the maximum amount of freedom compatible with the general obligations to civil society without tending toward the establishment of religion.

An area of concern today is the demarcation of the protected exercise of religion because the definition of religion has expanded, and hence the area of immunity from governmental regulations has correspondingly expanded. To say that it is a problem area is not to say that the expansion of the concept of religion has necessarily been a detrimental or unwise development. Too narrow a definition is not

375. See, e.g., R. LEFLAR, *AMERICAN CONFLICTS LAW* 174-80 (3d ed. 1977); Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L.J. 8 (1970).

beneficial because religion, with all functional equivalents, aids the operation of civil society. Civil society has a vested interest in protecting individual conscience from governmental intrusion. Civil society also has an interest, however, in maintaining basic order and in keeping people from violating the rights and interests of others. There is a definite tension between free exercise and civil society. Jefferson would urge the resolution to be drawn in favor of free exercise, whenever possible. Only when acts break out into harm to others should the interest of civil society dominate.³⁷⁶ In such event, government instituted to secure the enjoyment of life, liberty, and happiness must intervene. Otherwise, free exercise can lead to a tyranny.

In conflicts between free exercise and nonestablishment, the free exercise principle should be preferred if possible. The goal is to accommodate religious belief without making religion too strong for democracy. The preference for free exercise stems in part from the broader principle of privacy. Individuals have rights to life, liberty, and the pursuit of happiness. Governments are instituted to preserve these rights, not to infringe upon them. We see in the ninth amendment, authored by Madison, the idea that rights are antecedent to civil society.³⁷⁷ Rights do not owe their existence to the grace of the sovereign. *Meyer v. Nebraska*,³⁷⁸ *Pierce v. Society of Sisters*,³⁷⁹ and *Wisconsin v. Yoder*³⁸⁰ show the tie between the right of privacy and religious freedom. Free exercise, however, will not always dominate because nonestablishment and civil society have just claims as well. The resolution will depend upon the particular circumstances as illuminated by the principles of liberty, equality, and majority rule.

The establishment of religious liberty cannot depend upon a search for the right formula, the magic elixir to resolve the problems of freedom, individual integrity, and majority rule. The purpose of this article has not been to engage in such an endeavor but rather to study the understanding of the founding fathers in order to see the dimensions of contemporary problems. The study of the founders is an essential means to the understanding of constitutional government. As stated in the Virginia Declaration of Rights (1776) this understanding itself is a necessary element in the preservation of free government: "That no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice,

376. T. JEFFERSON, *supra* note 1, at 313.

377. U.S. CONST. amend. IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

378. 262 U.S. 390 (1923).

379. 268 U.S. 510 (1925).

380. 406 U.S. 205 (1972).

moderation, temperance, frugality and virtue, and by the frequent recurrence to fundamental principles."³⁸¹

The founders believed that religion should remain politically impotent, and simultaneously furnish the moral basis for self-government. In achieving this goal, there can be no precise prescriptions. The founders' understanding will shape our understanding to our benefit if we take them seriously. Otherwise, the teachings of the past will be stories, not lessons.

APPENDIX*

MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS.

TO THE HONORABLE THE GENERAL ASSEMBLY
OF
THE COMMONWEALTH OF VIRGINIA.
A MEMORIAL AND REMONSTRANCE.

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such

381. I THE BILL OF RIGHTS, *supra* note 25, at 243. See also, The Massachusetts Declaration of Rights (1780), *id.* at 343.

* Reproduced from VIII THE PAPERS OF JAMES MADISON 299 (R. Rutland & W. Rachal ed. 1973), *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 63 (1947) (Rutledge, J., dissenting) (footnotes omitted).

homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order to time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the coordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached.

If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offense against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some of peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarrantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet preeminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have preexisted and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishment, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has

the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appears in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in a career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles.

10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking

the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the time fruits of the threatened innovation. The very appearance of the Bill has transformed that "Christian forbearance, love and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?

12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority.

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be

determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because, finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the "basis and foundation of Government," it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority, and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly; or we must say, that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth.

