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# Standing in the Need of Prayer? The Supreme Court on James Madison and Religious Liberty

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# Standing in the Need of Prayer?: The Supreme Court on James Madison and Religious Liberty

## I

In his Second Inaugural Address, Abraham Lincoln noted that both North and South prayed to the same God, invoking His aid against the other. Naturally, the prayers of both could not be answered and, as Lincoln observed, those of neither were answered in full. Sessions of the Supreme Court of the United States begin with a prayer for the Court's preservation, but it is not known whether individual Justices have also invoked divine intervention on behalf of their own particular causes. Although James Madison is not officially recognized by the Court as a deity, his writings have been regarded as sufficiently canonical as to warrant invocation of his authority on issues of religious liberty, even by both sides in the same case. For example, Madison has been cited in support of majority rulings and dissenting opinions in *Everson v. Board of Education*<sup>1</sup> (reimbursement for transportation of parochial school students), *Engel v. Vitale*<sup>2</sup> (prayer in the public schools), *Walz v. Tax Commission*<sup>3</sup> (property tax exemption for religious organizations), *Marsh v. Chambers*<sup>4</sup> (practice of opening each state legislative session with a prayer), and *Wallace v. Jaffree*<sup>5</sup> (silent meditation in the public schools). It is evident that while there is agreement on the importance of Madison's

views, there is little agreement as to what his views actually mean for contemporary issues of religious liberty.

Probably the strongest statement acknowledging Madison's importance was made by Justice Wiley Rutledge, who dissented in the seminal case of *Everson v. Board of Education*:

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.<sup>6</sup>

Justice Hugo Black, writing for the majority in *Everson*, did not dispute this statement. He too regarded Madison's leading role in the drafting and adoption of the First Amendment as sufficient to consider Madison's views expressed in the earlier Virginia debate as authoritative.<sup>7</sup>

Although the views of James Madison are regarded as authoritative, they are not conclusive for resolution of contemporary issues of religious liberty. After all, it is said that Madison, as well as the other Founders, were men of their time and could not be expected to resolve complex issues arising under very different circumstances. Justice William Brennan, concurring in the Bible reading case of *Abington School Dist. v. Schempp*, warned against a "too literal quest for the advice of the Founding Fathers upon the issues of [religious establishment]."<sup>8</sup> Such a quest would be futile because the historical record, according to Brennan, was ambiguous at best and would be misdirected because the religious composition of the American people had changed greatly since the Founders' time. He suggested that the use of history should be limited to under-

<sup>1</sup>330 U.S. 1, 13, 33-43 (1947).

<sup>2</sup>370 U.S. 421, 428, 436, 447 n.3 (1962).

<sup>3</sup>397 U.S. 664, 684-85, 704-06 (1970).

<sup>4</sup>103 S.Ct. 3330, 3333 n.8, 3343-44 (1983).

<sup>5</sup>105 S.Ct. 2479, 2488 n.38, 2510-12 (1985).

<sup>6</sup>330 U.S. 1, 39 (1947).

<sup>7</sup>*Id.* at 12-13.

<sup>8</sup>374 U.S. 203, 237 (1963).

standing of “broad purposes, not specific practices.”<sup>9</sup>

Brennan’s view posits the possibility of finding broad principles in the writings of the Founders, despite the prevalence of countervailing practices. This kind of abstraction may enlist the Founders in support of judicial decisions which they themselves would not condone and may thereby obscure the extension of power by the Court. Extension of judicial power can be made to appear less radical if it is based, even in part, upon the authority of the Founders. Yet that is precisely what the Supreme Court has done in the area of religious establishment and exercise, concealing their continual amendment of the Constitution by decision while citing the Founders, particularly James Madison, along every step of the way.

## II

The first major case in the Supreme Court discussing the requirements of the Establishment Clause was *Everson v. Board of Education*.<sup>10</sup> Decided in 1947, the Court upheld the constitutionality of a State statute authorizing reimbursement to parents for the costs of transportation of their children to parochial schools. Justice Black, writing for the majority, gave an account of the development of religious liberty in America in order to ascertain the meaning of the Establishment Clause. He observed that many colonists had left England in order to escape religious persecution, but in the process had transplanted established religion to the colonies. As a result, there was a repetition of the “old world practices and persecutions.” By the time of the American Revolution, “[t]hese practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence.”<sup>11</sup> This impelled the conviction, according to Black, that religious liberty could be achieved only when government was stripped of all authority to interfere in religious matters or to support or aid religious institutions.

Black identified James Madison as one of the principal leaders in the struggle for religious liberty and described his views arising out of the debate in Virginia as follows:

[T]hat a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.<sup>12</sup>

Madison’s views on religious liberty were influential in securing the passage of the Virginia Statute for Religious Freedom, which had been drafted by Thomas Jefferson.

Justice Black then asserted that Madison’s and Jefferson’s views on religious liberty, as articulated in the Virginia debate, were to be regarded as authoritative for understanding the meaning of the First Amendment. He believed that this had been established by prior Court decisions:

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. *Reynolds v. United States*, *supra* at 164; *Watson v. Jones*, 13 Wall. 679; *Davis v. Beason*, 133 U.S. 333, 342.<sup>13</sup>

An examination of the cases cited, however, offers little support for Black’s claim. *Reynolds v. United States*<sup>14</sup> involved a prosecution of a member of the Mormon faith for the crime of bigamy. The *Reynolds* Court cited Madison’s and Jefferson’s work in Virginia, but did not offer any analysis of the

<sup>9</sup>*Id.* at 241.

<sup>10</sup>330 U.S. 1 (1947).

<sup>11</sup>*Id.* at 11.

<sup>12</sup>*Id.* at 12.

<sup>13</sup>*Id.* at 13.

<sup>14</sup>98 U.S. 145 (1879).

connection between the Virginia experience and the adoption of the First Amendment other than the assertion that the Amendment had been “proposed” by Madison and “met the views of the advocates of religious freedom.”<sup>15</sup> This is hardly conclusive on the question of whether Madison’s or Jefferson’s views are to be read into the First Amendment. The *Reynolds* Court was not so much interested in their views on religious liberty as it was in using that part of the preamble to the Virginia statute which stated that the civil government may interfere when religious beliefs “break out into overt acts against peace and good order.” The Court affirmed Reynold’s conviction on this basis. *Watson v. Jones*,<sup>16</sup> to which Black gives no specific page citation, concerned a property dispute between two factions of a congregation. There is simply no mention of either Madison or Jefferson in the case. *Davis v. Beason*<sup>17</sup> was another Mormon case where the Court was intent on affirming a conviction for unlawful activities. The case contains no discussion of Madison or Jefferson, although its treatment of the First Amendment appears to be influenced by the Virginia Statute for Religious Freedom. It is fair to conclude that none of these cases addressed in more than a casual manner the question of the extent to which Madison’s and Jefferson’s views were synonymous with the First Amendment. This extremely important issue was therefore resolved by Black with a flimsy citation and without any discussion on the merits, either in *Everson* or elsewhere.

Justice Black then stated a number of propositions which he believed to be the *minimum* requirements of the Establishment Clause. The most significant requirements were: “Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice

religion. . . .”<sup>18</sup> Surprisingly, Black held that reimbursement of the parents of parochial school children for the costs of transportation did not violate the Establishment Clause.

Reimbursement, however, was consistent with the notion that citizens ought not to suffer special disabilities on account of their religious beliefs. The State normally absorbed the cost of transportation of public school children and this measure ensured that parents who chose to educate their children in a parochial school would not suffer an extra financial burden on account of this choice. Black noted that the State provided police and fire protection to all persons and institutions on a nondiscriminatory basis; the reimbursement for transportation expenses was analogous to these other social services. The dissenting justices in *Everson* were dismayed that any money had gone to support religious activities, albeit indirectly. They would have, in effect, made religious beliefs a special civil disability which disqualified certain taxpaying citizens from receiving otherwise available social services.

Justice Rutledge, in dissent, was more forthright than Justice Black on the connection between the Virginia debate and the First Amendment. He traced Madison’s activities in the Virginia legislature in some detail and gave particular emphasis to Madison’s Memorial and Remonstrance because it contained his “complete” interpretation of religious liberty.<sup>19</sup> When Madison was later sent to the First Congress, “he went at once about performing his pledge to establish freedom for the nation as he had done in Virginia.”<sup>20</sup> According to Rutledge, this proved to be a relatively easy task:

By contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, *reflecting the fact that the essential issues had been settled. Indeed the matter had become so well understood as to have been taken*

<sup>15</sup>*Id.* at 164.

<sup>16</sup>80 U.S. (13 Wall.) 679 (1872).

<sup>17</sup>133 U.S. 333 (1890).

<sup>18</sup>330 U.S. at 15-16.

<sup>19</sup>*Id.* at 37.

<sup>20</sup>*Id.* at 39.

for granted in all but formal phrasing.<sup>21</sup>

Thus, by this account, Madison had not only convinced Virginia, but also the nation. His views triumphed in the First Congress and the intellectual victory was so complete that there was little in the way of debate. Having asserted that Madison's views constituted the "warp and woof" of the First Amendment, Rutledge then invoked Madison's authority to resolve the issue in *Everson*:

With Jefferson, Madison believed that to tolerate *any* fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever.

In no phase was he more *unrelentingly absolute* than in opposing state support or aid by taxation. Not even "three pence" contribution was thus to be exacted from any citizen for such a purpose.<sup>22</sup>

Rutledge's characterization of James Madison as "unrelentingly absolute" would appear to make Madison the founding father of the American Civil Liberties Union. This characterization came to be accepted by the Court as the correct account of Madison's position on church and state issues. Justice William O. Douglas, for example, later praised Rutledge's dissent in *Everson* as "durable First Amendment philosophy."<sup>23</sup> Thus, the Court became increasingly willing to view church and state issues from an absolute separationist viewpoint and, in part, covering their tracks with citations to James Madison.

The Founders, including Madison, were cited by members of the Court in striking down released time programs<sup>24</sup> and prayer

in the public schools.<sup>25</sup> The Court's account of the Founding is virtually unrestrained in the breadth of its assertions. For example, Justice Black wrote for the court in *Engel v. Vitale*: "It was in large part to get *completely* away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against *any* governmental establishment of religion."<sup>26</sup> The sweep of this statement obscures the fact that the First Amendment by its own terms did not apply to the States and indeed did not prohibit State established religions. Nevertheless, the Founders are portrayed as "freedom-loving colonials" who insisted that all State support of religion be torn out "root and branch."

It is no wonder that the Court later felt the need to put some distance between it and the asserted absolutist position of James Madison. In arguing for the use of *judgment* with respect to church and state issues, Justice Lewis Powell stated: "Yet, despite Madison's admonition [that religious freedom should never become entangled in precedents] and the "sweep of the absolute prohibitions" of the Clauses, this Nation's history has not been one of entirely sanitized separation between Church and State."<sup>27</sup> That Madison is characterized essentially as an ideologue and the Court as having been more moderate is one of the better ironies of constitutional history.

The career of James Madison was a very propitious one for the cause of religious liberty, but it was not as the Supreme Court has made it out to be. The Court's use of Madison has been on a selective basis and in the service of ideology rather than historical scholarship. The strict separation of Church and State, as the Court understands it, is a concept largely of its own making. The Court has also mistakenly applied Madison's views in its attempts to interpret the First Amendment. It is highly unlikely that

<sup>21</sup>*Id.* at 42 (Emphasis added).

<sup>22</sup>*Id.* at 40 (Emphasis added).

<sup>23</sup>*Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).

<sup>24</sup>*McCollum v. Board of Education*, 333 U.S. 203, 214 (1948) (Frankfurter, J., concurring).

<sup>25</sup>*Engel v. Vitale*, 370 U.S. 421, 429 (1962).

<sup>26</sup>*Id.* at 433 (Emphasis added).

<sup>27</sup>*Committee for Public Education v. Nyquist*, 413 U.S. 756, 760 (1973).

Madison's views, even properly understood, could have been the basis for the political consensus that resulted in the adoption of the First Amendment.

### III

To understand James Madison's views on religious liberty and his influence on the First Amendment, we need to consider three periods in his career: (1) Madison's role in the Virginia struggle to establish religious liberty; (2) Madison's role in the First Congress with respect to the drafting and adoption of the First Amendment; and (3) Madison's actions in public office as they relate to the issue of church and state.

Madison's initial contribution to the establishment of religious liberty arose out of his participation at the Virginia Convention of 1776 when the Virginia Declaration of Rights was drafted. The Declaration was largely the work of George Mason,<sup>28</sup> with Madison, by his own account, playing the role of recommending amendments.<sup>29</sup> One important change Madison brought about from the draft by Mason was in the provision on religious liberty. Mason's original formulation, though broad in scope, stated that "all men should enjoy the fullest toleration in the exercise of religion."<sup>30</sup> Madison objected to the word "toleration" because it implied that the freedom existed as a matter of sufferance by the government. The final version adopted by the Convention declared that "all men are equally entitled to the free exercise of religion."<sup>31</sup> Together with the opening provision of the Virginia Declaration that "all men are by nature equally free and independent, and have certain inherent rights," this affirms that religious freedom has a stronger basis, in Madison's opinion, when it is grounded on natural right than on prescriptive right.

Madison's next experience with the church and state question marked an important point

in his career and subsequently for the Supreme Court's understanding of the First Amendment. Madison was then a leading member of the Virginia legislature and he undertook, in 1784, to oppose Patrick Henry's bill to exact a public assessment for the subsidy of Christian teachers. Using an anonymous authorship, he circulated a petition in the form of a remonstrance or protest in which he argued against the bill. The petition was instrumental in blocking enactment of the assessment bill. Moreover, it helped to shift sentiment on this issue so that the legislature subsequently enacted the Virginia Statute for Religious Freedom, drafted in 1777 by Thomas Jefferson.

What was Madison's thinking on religious liberty as revealed by the Memorial and Remonstrance? The Remonstrance set forth a series of arguments, fifteen in number, against the assessment bill. The arguments addressed at many levels the problem of providing financial aid to Christian teachers.<sup>32</sup>

The Remonstrance began with the assertion 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."<sup>33</sup> The discharge of this duty must be left to the "conviction and conscience" of each person, as a matter of right. Madison said "[t]his right is in its nature an unalienable right." It is a right with respect to others, but it is also "a duty towards the Creator."<sup>34</sup> By expressing the right as grounded in *nature* and in terms of a *duty* owing to the Creator, Madison differed from the modern view of individualism which bases rights on the sov-

<sup>28</sup>B. Schwartz, 1 *The Bill of Rights: A Documentary History* 231 (1971).

<sup>29</sup>*Id.* at 250.

<sup>30</sup>*Id.* at 243.

<sup>31</sup>*Id.* at 236.

<sup>32</sup>For a very careful and excellent analysis of Madison's arguments, see Brann, *Madison's "Memorial and Remonstrance," Model of American Eloquence* in G. Thurow & J. Wallin, ed., *Rhetoric and American Statesmanship* (1984). See also Van Patten, *In the End is the Beginning: An Inquiry Into the Meaning of the Religion Clauses*, 27 St. Louis U. L.J. 1, 50-60 (1983).

<sup>33</sup>*The Mind of the Founder: Sources of the Political Thought of James Madison* 9 (Paragraph 1) (M. Meyers, ed., 1973).

<sup>34</sup>*Id.*

ereignty of the individual. The individual is not sovereign or autonomous, but society has no jurisdiction over the individual's discharge of this duty. "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."<sup>35</sup> The question of homage or worship is thus placed outside the jurisdiction of society.

Madison followed this argument with an *a fortiori* argument. If society has no jurisdiction over a person's right of religious freedom, then government, a creature of society and necessarily more limited in its powers, has no jurisdiction with respect to this right.<sup>36</sup> The government not only must observe the proper boundaries between its separate departments, but, more importantly, it must observe the greater boundary between the exercise of its limited powers and the rights of the people. Because the right of religious freedom is unalienable, it may not be compromised by the consent of the majority.

Madison then tied the no jurisdiction arguments to a strict prohibition against any attempts to assert power over the rights of religious liberty. "Because, it is proper to take alarm at the first experiment on our liberties."<sup>37</sup> The amount of the tax is not determinative. The slightest assertion of power by the government in this area is cause for alarm. The Supreme Court, of course, has quoted this line many times in support of its reading of the First Amendment.<sup>38</sup>

The first three paragraphs of the Remonstrance present Madison's strongest statement in favor of a strict separation between Church and State: society and government have no jurisdiction over religion or the rights of conscience and it is proper to object to the slightest assertion of jurisdiction by the state. This statement, however, should be understood in context with the other more concrete arguments advanced

in the Remonstrance. One reason Madison cannot be held to an absolutist position on the religious question is that he regarded religious liberty as consistent with other principles of justice. He did not intend that the bounds of religious liberty be determined without consideration of other relevant principles. To do otherwise is to impute an ideological abstraction to Madison which is not entirely accurate. It would also make the rest of the Remonstrance superfluous.

Indeed, in the next paragraph, Madison began to place the principle of religious liberty in context with other political principles. He argued that the assessment bill violated the principle of equality, which he said ought to be the basis of every law.<sup>39</sup> The bill favored teachers of Christianity. Professor Robert Cord has concluded from this passage that Madison was simply arguing against the preference of one religion over all others.<sup>40</sup> This reading is not supported by the language in Madison's fourth paragraph. "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." Abuse of the freedom is "an offense against God, not against man."<sup>41</sup> The equality therefore is not merely among those who profess religious beliefs, but among all citizens.

Madison's invocation of the principle of equality may be extended to protect religion from discriminatory treatment as well. Equality is an essential attribute of justice. If the bill had provided for subsidies to all schools, except religious schools, it would have violated the principle of equality. There should be no extra benefits accorded or burdens placed on citizens on account of their

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 10 (Paragraph 2).

<sup>37</sup>*Id.* (Paragraph 3).

<sup>38</sup>See e.g., *Wallace v. Jaffree*, 105 S.Ct. 2479, 2489 n.38 (1985); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963); *Engel v. Vitale*, 370 U.S. 421, 436 (1962).

<sup>39</sup>*The Mind of the Founder*, *supra* note 33, at 10 (Paragraph 4).

<sup>40</sup>R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 20-21 (1982).

<sup>41</sup>*The Mind of the Founder*, *supra* note 33, at 11 (Paragraph 4).

religious beliefs.<sup>42</sup> “As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.”<sup>43</sup> The principle that religion ought not to be the basis for benefits or burdens has not been fully accepted by the Supreme Court. It has struck down certain attempts to provide public funds to parochial schools or their students even on a nondiscriminatory basis.<sup>44</sup>

The next argument by Madison reinforced the prior analysis of equality as a guiding principle. He said that the bill implied that government officials are competent judges of religious truth or that government may employ religion as an “engine of social policy.”<sup>45</sup> There is no basis for government to choose between sects; government may not favor one religion over other religions. Government may not favor religious institutions in order to achieve its own ends.

Madison expanded on this latter argument in the central paragraph of the Remonstrance, where he said that “the establishment in question is not necessary for the support of Civil Government.”<sup>46</sup> This was Madison’s most direct response to the argument underlying the assessment bill. In eighteenth century America, it was generally believed that virtue was necessary for the preservation of good government. It was also generally accepted that religion aided virtue. Madison shared these sentiments, but he denied that it was necessary to establish religion in order to support government.

This does not mean that government should

be indifferent to religion. Although government does not need the support of established religion, Madison said its *best* support was the protection of “every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property.”<sup>47</sup> Religious establishment is detrimental to the principles of self-government whereas religious exercise is necessary for its preservation. It would be fair to say that the attitude of the Supreme Court toward religion, on the other hand, is more like Stephen A. Douglas’s attitude toward slavery. He didn’t care whether the people voted it up or down; it was essentially a matter of personal opinion. The Court increasingly views religion as a purely private matter and does not entertain the possibility that religious exercise may be a necessary condition for a free people.

Madison recognized the essential contributions which a religious people could make to the establishment of self-government. But the contributions had to come from religious people and institutions acting independently from the State. Madison saw the paradox posed in the relationship between religion and democracy: Religion helps democracy by shaping citizens with a capacity for self-government, but religion can destroy democracy if it should become an established part of the government. Religion can be detrimental to democracy because it can destroy the moderation which is essential to political life.<sup>48</sup> Madison was keenly aware of the dangers that sectarian strife could pose for civil peace. Political discourse, which is often intemperate, and political moderation, which is produced often only by the necessity of compromise, are made much more difficult, if not impossible, if one faction views itself as an instrument of divine will and other groups as representing forces of evil. Madison would not have agreed, however, with many contemporary liberals who believe that religion per se is a threat to

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<sup>42</sup>This position is clearly supported in Jefferson’s Statute for Religious Freedom. *The Life and Selected Writings of Thomas Jefferson* 311-13 (A. Koch & W. Peden, eds., 1944). Although one may not be compelled to support religious worship, one is also not required to bear extra burdens on account of religious reliefs with respect to the receipt of public benefits.

<sup>43</sup>*The Mind of the Founder, supra* note 33, at 11 (Paragraph 4).

<sup>44</sup>*See, e.g., Aguilar v. Felton*, U.S., 105 S.Ct. 3232 (1985); *Grand Rapids School Dist. v. Ball*, 105 S.Ct. 3216 (1985); *Meek v. Pittinger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>45</sup>*The Mind of the Founder, supra* note 33, at 11 (Paragraph 5).

<sup>46</sup>*Id.* at 12 (Paragraph 8).

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<sup>47</sup>*Id.* at 13 (Paragraph 8). The characterization of the right of religious liberty as akin to property rights was also made by Madison in his *Essays for the Party Press. Id.* at 243-44.

<sup>48</sup>*Id.* at 14 (Paragraph 11).

political moderation and therefore ought to be discouraged. He believed, along with the other Founders, that religious exercise outside of the political realm produces the inner moderation in the citizenry which is essential to the maintenance of the civil peace.

Madison's final arguments in the Remonstrance concerned the problem of individual rights and majority rule. First, he said that passage of the bill would violate the rights of a substantial number of the citizens and would thereby weaken significantly respect for the rule of law.<sup>49</sup> Continued denial of individual rights strengthens the notion that there are no rights, only interests, dependent solely upon political power for their realization. If this notion takes hold in the citizenry, then respect for the rule of law will necessarily diminish.

There is an inherent tension between individual rights and majority rule. Madison recognized that a majority may decide to alter or abolish individual rights. However, if the majority decided to legislate on matters touching individual rights, it should do so only by the formal amendatory process, rather than by simple legislative act.<sup>50</sup> (We could add today that it is unwise to amend the Constitution by a simple majority of the Supreme Court). Recognition of individual rights ultimately will depend upon the prudent judgment of the majority. It is important that the majority recognizes that the rights of those in the minority are not minority rights. Minority rights, as such, are in fact only minority interests, whereas the rights of minorities are the rights of every citizen. The way that the majority comes to understand this is not through Platonic Guardians rebuking the majority for infringing the rights of minorities. Instead, it takes root through persuasion: Denial or infringement of the rights of one citizen lays the foundation for an attack on the fundamental rights of all citizens. The Remonstrance itself provides a good example of Madison's inclination throughout his career to seek to persuade men rather than coerce them with respect to constitutional rights.

Madison's views arising out of the Virginia debate present a perspective on religious liberty significantly different from the account given by the Supreme Court. Religious liberty is a natural right and cannot be divested of the individual in society. Religion cannot be made the ground of political right or the basis upon which discriminatory burdens are imposed. Government does not need the support of religious establishment; the best support of democratic institutions comes from the protection of the rights of religious liberty. This allows moderation to prevail in the political realm while protecting the contribution made by religion toward the preservation of constitutional government. Recognition of fundamental rights is more secure when rights are not confused with interests, when the rights of minorities are understood as the rights of the majority as well. Finally, the Remonstrance, by example, provides counsel to political leaders, including members of the Supreme Court, that the realization of individual rights has a firmer basis if it rests upon persuasion, not force or will.

Madison's views on religious liberty are persuasive and worthy of serious study today. It is far from clear, however, that his views persuaded the other members of the First Congress who considered adoption of a Bill of Rights. Madison did not bring to this task the same zeal for establishing religious liberty that he had displayed in Virginia. There was no comparable threat to religious liberty posed by the new national government, as had been the case with Virginia. In fact, Madison had initially been lukewarm about the idea of a Bill of Rights. He had agreed with Hamilton that a Bill of Rights was both unnecessary, because the national government lacked the power to infringe individual rights, and potentially dangerous, because express prohibitions would imply a power to infringe upon what had not been expressly protected. He believed that the greater protection of rights lay in the political standoff produced by the multiplicity of sects and factions.<sup>51</sup> He became convinced by Thomas Jefferson, how-

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<sup>49</sup>*Id.* at 15 (Paragraph 13).

<sup>50</sup>*Id.* at 16 (Paragraph 15).

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<sup>51</sup>The *Federalist* No. 51 at 324 (C. Rossiter, ed., 1961).

ever, that a Bill of Rights would be *useful* in consolidating popular support of the new Constitution. Madison thus had different objectives and was more restrained in his advocacy of religious liberty than he was in Virginia.

In June of 1789, Madison introduced into the House of Representatives a series of amendments to the Constitution, as he had promised during the ratification process. The provisions on religion, which should probably be regarded as the clearest expression of Madison's aims at this time, were as follows:

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.<sup>52</sup>

No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.<sup>53</sup>

The proposed amendments show Madison's modest aims. The prohibition on establishment is limited to establishment of a national religion, something even more limited than the eventual language adopted: "respecting an establishment of religion." In addition, the concept of establishment is used only in connection with a limitation on the power of the national government. However, one could read the State prohibition respecting rights of conscience in light of Madison's Remonstrance as a prohibition on State establishments. In any event, the restriction on the States did not pass in the Senate. The debates make it clear that Congress wanted no law respecting or "touching" religion in order to preserve the jurisdiction of the States over this matter.

Contrary to the assertions made by Justices Black and Rutledge, Madison's views on the church and state question did not prevail in the First Congress. Madison was op-

posed to the establishment of religion in Virginia. The "sparse debate" in Congress, however, did not show agreement with the position taken by Madison in the Virginia debate. The desire to preserve the state establishments from interference by the national government was expressed in the debates and manifested in the final language adopted. It is not even clear how strongly Madison felt about the proposed prohibition on the state establishments. Madison could not prevail on this issue at this time and he knew it. Rather than brand himself as a fanatic, and thereby lose influence in the First Congress, he acquiesced in the rejection of the proposed limitation on state establishments.

Moreover, there is a significant question as to whether Madison's views on separation of church and state prevailed with respect to the limitation imposed on the power of Congress. This limitation should be understood in light of two other actions taken in the First Congress. The first action was ceremonial, the second was substantive. Both the House and the Senate appointed Chaplains within a month after commencing business.<sup>54</sup> Madison not only voted for the measure in the House, but he was also a member of the committee which had made the recommendation.<sup>55</sup> Near the end of his life, Madison wrote private notes which indicated his misgivings about the congressional appointment of Chaplains.<sup>56</sup> But these misgivings were not voiced by Madison in 1789. Even if we postulate that Madison did believe at the time that the appointment compromised the principle of separation of church and state as he understood it, this would further support the argument that Madison's more extreme views on establishment were not shared by his colleagues in the House. Madison knew how to pick his fights wisely and he did not fight on this one, if indeed he had misgivings.

The second action in Congress relating to

<sup>54</sup>The Senate acted on April 25, 1789. *Id.* at 24. The House acted on May 1, 1789. *Id.* at 233.

<sup>55</sup>*Separation of Church and State, supra* note 40, at 23.

<sup>56</sup>E. Fleet, ed., *Madison's "Detached Memoranda"*, III William and Mary Quarterly 534, 558-59 (1946).

<sup>52</sup>1 *Annals of Congress* 434 (J. Gales ed. 1834).

<sup>53</sup>*Id.* at 435.

the establishment question was the Northwest Ordinance. The argument made by Hamilton in *The Federalist Papers* that the new national government would have no power to infringe liberties was not entirely accurate. The national government had *plenary* power to legislate in the territories. Congress, under the Articles of Confederation, had enacted the Northwest Ordinance in 1787. In August of 1789, the First Congress readopted the Ordinance without change.<sup>57</sup> The Ordinance guaranteed rights of religious liberty in the territories and also contained the following line: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."<sup>58</sup> Religion was seen as necessary to good government, but its contribution had to remain independent of government institutions.<sup>59</sup> This action by the First Congress took place during the same month in which the language of the First Amendment was being debated. There is no indication that Madison had any misgivings about this action.

The language of the First Amendment finally adopted by Congress must be read in light of these other actions. These actions are incompatible with a strict separationist approach to the church and state issue. Surely the James Madison portrayed by the Supreme Court would have said something. Only four years earlier, he had written: "it is proper to take alarm at the first experiment on our liberties." Either Madison did not consider these congressional actions to violate the principles of religious liberty or he harbored private reservations, but declined to voice them for fear of being labeled as a crackpot. In addition, the First Amendment left undisturbed the state establishments and

we do know that Madison opposed them. The Supreme Court could not have been correct when it concluded that Madison's views, as the Court portrayed them, were to be read into the meaning of the First Amendment.

Madison's later service in public office also sheds light on what must have been the political consensus supporting the adoption of the First Amendment. Madison, as President, sought to honor the principles embodied in the First Amendment as consistently as he could. For example, in February of 1811, he vetoed a bill which would have conveyed land to the Baptist Church in the Mississippi territory. He believed it would establish "a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'"<sup>60</sup> He likewise vetoed a bill for the incorporation of the Episcopal Church in the District of Columbia, believing that it would give the articles in the church constitution and administration the force of law.<sup>61</sup> These actions reflect *his*, not Congress's understanding of the First Amendment. Although the first action is unobjectionable, the second appears to be an idiosyncratic view of the Establishment Clause. The legal incorporation of a religious organization today is not regarded, even by the Supreme Court, as an implied endorsement by the State.

As President, Madison also promulgated Thanksgiving Day proclamations in 1812, 1813, 1814, and 1815. These proclamations were issued in response to requests by Congress and they called for a national day of thanksgiving and prayer. It is perhaps the case that Madison put aside his principles during the war years, but it is also indicative of the political circumstances by which he felt bound. Madison later expressed reservations about the issuance of the proclamations, but he did not indicate he would have acted any differently if given the chance

<sup>57</sup>1 Stat. 50.

<sup>58</sup>1 U.S.C. xliii (1976).

<sup>59</sup>An earlier draft of the Ordinance in the Articles of Confederation Congress had read: "Institutions for the promotion of religion and morality, schools and the means of education shall forever be encouraged. . . ." 1 *The Bill of Rights*, *supra* note 28, at 395. The direct support for religious institutions was dropped from the final language approved by the Confederation Congress.

<sup>60</sup>1 *Messages and Papers of the Presidents* 490 (Richardson ed., 1897).

<sup>61</sup>*Id.*

to do it over.<sup>62</sup> He may have regretted issuing the proclamations, but his compliance with Congress' request further substantiates the nature of the consensus reached at that time on the church and state issue. During his presidency, Madison took opportunities to advance his views on church and state. He did not impose them when prudence dictated otherwise.

#### IV

The Supreme Court's reading of the history and meaning of the First Amendment causes one to despair over the prospects for the rule of law. It would appear that we have a government of men, not of laws. The inadequacy of the arguments, particularly in the *Everson* case, is appalling. What could Justice Black have had in mind when he foreclosed discussion on the crucial question of Madison's relation to the First Amendment by citation to inapplicable authority? Why did Justice Rutledge conclude that Madison's views were synonymous with the First Amendment when most of the evidence pointed to the contrary? It may be that when they looked back to the Founding period they saw James Madison as they would have liked him to have been. In commenting on the *Everson* case, Professor Corwin observed: "undoubtedly the Court has the right to make

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<sup>62</sup>Madison's "Detached Memoranda," *supra* note 56, at 560-62.

history, as it has often done in the past; but it has no right to *remake* it."<sup>63</sup> When the Court looked back to the founding, it re-wrote the founding in its own image.

It is also possible that the resort to history was never intended to be an accurate account, but rather to serve as a cloak of legitimacy for the Court's own political actions. A candid admission in this regard has been provided by Leo Pfeffer, leading advocate of the absolute separationist position: "In short, while the Constitution provides formal methods for its amendment, the Supreme Court can be considered a *de facto* continuing convention expanding or rewriting the Constitution as the need arises."<sup>64</sup> James Madison believed that individual rights were in jeopardy when they could be modified or amended by a simple legislative majority. Their status is even more precarious when they are subject to the Supreme Court's continuing constitutional convention. The remaking of the Constitution according to the Court's own designs will mean the end of democratic government under a written Constitution. [E]

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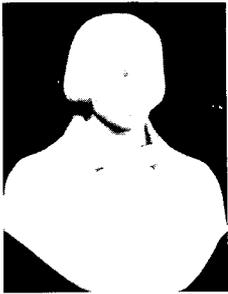
<sup>63</sup>Corwin, *The Supreme Court as National School Board*, 14 *Law & Contemp. Probs.* 3, 20 (1949).

<sup>64</sup>L. Pfeffer, *God, Caesar, and the Constitution* 31 (1975).

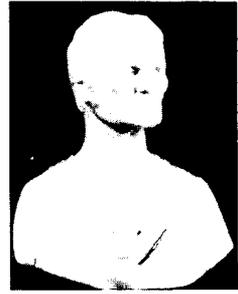
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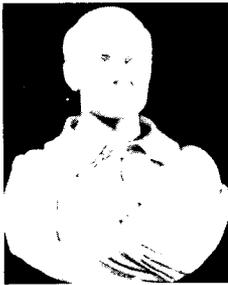
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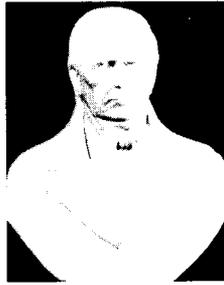
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