The Constitutional Intent Concerning Matters of Church and State

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Introduction

Religion and its place in America has been a subject of consideration since the earliest beginnings of the nation. Recent court decisions delineating the role of religion in the schools, discussing the constitutionality of state and local "Blue Laws," and the election of the first President of the Roman Catholic faith, have all made a consideration of this subject not merely academic but timely as well. As we seek the proper relationship between church and state it is only proper that we seek to establish the historical context of the Constitutional intent in this area.

I. The Place of God in our Early History

When Thomas Jefferson wrote the Declaration of Independence he appealed to God as the source of our liberty, not to man, the state, or any group of men. This is clear at the beginning of the document: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." ¹

On November 1, 1777 there was the first real Proclamation of Thanksgiving by the Congress. George Washington, whose army then was at Valley Forge, referred to the Proclamation of the Continental Congress in his orderly book:

"Tomorrow being the day set apart by the honorable Congress for Public Thanksgiving and praise, and duty calling us devoutly to express our grateful acknowledgements to God for our manifold blessings, the general directs that the army remain in its present quarters, and that the chaplains perform divine services with their several corps and brigades, and earnestly exhorts all

¹ DECLARATION OF INDEPENDENCE (1776)
officers and soldiers whose absence is not indispensably necessary to attend with reverence the solemnities of the day.”

The Continental Congress issued four fast day proclamations prior to its first Thanksgiving. Of these perhaps the most significant was that issued July 12, 1775, for a fast day to represent all the colonies that were being molded into a nation. The Proclamation, signed “by order of Congress, John Hancock, President,” reads:

“As the great Governor of the world, by his supreme and universal providence, not only conducts the course of nature with unerring wisdom and rectitude, but frequently influences the minds of men to serve the wise and gracious purposes of his providential government; and it being, at all times our indispensable duty devoutly to acknowledge his superintending providence, especially in times of impending danger and public calamity, to reverence and adore his immutable justice as well as to implore his merciful interposition for our deliverance; this Congress, therefore, considering the present critical, alarming, and calamitous state of these colonies, do earnestly recommend that, Thursday, the 20th of July next, be observed by the inhabitants of all the English colonies on this continent, as a day of public humiliation, fasting, and prayer; that we may, with united hearts and voices, unfeignedly confess and deplore our many sins, and offer up our joint supplications to the allwise, omnipotent, and merciful Disposer of all events... It is recommended to Christians of all denominations to assemble for public worship and to abstain from service labor and recreation on said day.”

On September 11, 1777 a resolution was passed by Congress instructing the Committee on Commerce “to import 20,000 copies” to meet the lack of Bibles in the colonies. This proposal for importation was adopted in place of an earlier suggestion to have Bibles printed in the country, so as to save money.

On this motion New Hampshire, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, and Georgia

2 LOVE, FAST AND THANKSGIVING DAYS OF MASSACHUSETTS, 402.
3 Id. at 334 and 340.
voted in the affirmative; New York, Delaware, Maryland, Virginia, North and South Carolina in the negative. As the margin in favor of the resolution was a single vote, it seemed wise to have the matter reconsidered, with the result that no final action was taken. In 1780, as the demand had not been met, the following resolution was adopted: "That it be recommended to such of the states who may think it convenient for them that they take proper measures to procure one or more new and correct editions of the Old and New Testaments to be printed; that such states regulate their printers by law so as to secure effectually the said books from being mis-printed." 4

In the Articles of Confederation of November 15, 1778 reference is made to the Deity: ". . . And whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union." 5

The Northwest Ordinance, prepared from a draft originally written by Jefferson and adopted in 1787, is a landmark in many respects. Often forgotten is its reference to religion as "necessary to good government" echoing, in some respects, Jefferson's grounding of our freedom in "the Creator."

The relevant portion of the Ordinance is this:

. . . And for extending the fundamental principles of civil and religious liberty, which form the basis wherever these republics, their laws and constitutions are erected: to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be found in the said territory . . . It is hereby ordained and declared . . .

Article I. No 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.

4 XIX JOURNAL OF CONGRESS, 221.
5 STOKES AND GABRIEL, CHURCH AND STATE IN THE UNITED STATES (1950), 470.
Article III. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.6

Benjamin Franklin, considered one of the most skeptical of the Founders concerning religion, is reported by James Madison in his "Notes" to have made the following proposal on June 28, 1787 before the Continental Congress:

I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men . . . I therefore beg leave to move that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the clergy of this city be requested to officiate in that service.7

Those mainly responsible for the plan to have the session opened with prayer were Samuel Adams and Thomas Cushing, both delegates from Massachusetts. The former, writing three days later, said:

After settling the mode of voting, which is by giving each colony an equal voice, it was agreed to open business with a prayer. As many of our warmest friends are members of the Church of England, I thought it prudent, as well on that as on some other account, to move that the service should be performed by a clergyman of that denomination.8

During the Administration of Thomas Jefferson, who was President from 1801 to 1809, the capitol was used for religious services. These were generally held in the main hall of the old Senate wing, where both houses met prior to the completion of the House wing. It is said that the President himself frequently attended; that the Marine band played; and that there were

6 IV BEVERIDGE, LIFE OF JOHN MARSHALL, 69-70.
7 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 450-452.
preachers from not only the Orthodox Protestant churches but also from Quakers, Roman Catholics, and Unitarians.\(^9\)

In 1796 George Washington pointed out the importance of religion as regards the state in his Federal Address. He said: "Of all the dispositions and habits which lead to political prosperity Religion and Morality are indispensable supports." And on January 27, 1793, he wrote (this) to the New Church in Baltimore:

> We have abundant reason to rejoice that in this Land the light of truth and reason has triumphed over the power of bigotry and superstition, and that every person may here worship God according to the dictates of his own heart. In this enlightened Age and in this Land of equal liberty it is our boast that a man's religious tenets will not forfeit the protection of the Laws, or deprive him of the right of attaining and holding the highest offices that are known in the United States.\(^10\)

It should be pointed out that a Divine Service was part of Washington's Inaugural Ceremony in New York in 1789.

> The National Seal shows the eye of Providence on its reverse—a pyramid representing the thirteen original colonies in the all seeing eye of Jehovah is surrounded by a cloud of glory symbolizing the protecting Divine Providence.\(^11\)

There was, however, no unanimity even at that time as to what the role of government in regard to religion was to be.

In 1785 Madison was among those who opposed the decision of a committee of Congress to recommend setting aside one section in each township in the Western territories for the support of religion. He rejoiced when he heard a report that the plan would be abandoned, writing:

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\(9\) WASHINGTON, CITY AND CAPITOL (1937), 195, 211, 216.

\(10\) III (SPARKS EDITION) WRITINGS OF GEORGE WASHINGTON, 201-202.

\(11\) CHURCH AND STATE, supra, note 5, at 462.
How a regulation so unjust in itself, so foreign to the authority of Congress, so hurtful to the sale of public land and smelling so strongly of an antiquated bigotry, could have received the countenance of a committee is truly a matter of astonishment.\textsuperscript{12}

Madison opposed paying chaplains, whether in Congress, or in the Army or Navy, not because of having services for these groups, but to their being conducted as a function of government and paid for by public funds. He wrote:

The establishment of the Chaplainship to Congress is a palpable violation of equal rights as well as Constitutional principles . . . Why should the expense of religious worship for the Legislature be paid for by the public, more than that for the Executive or Judicial branches of government?\textsuperscript{13}

Similarly Madison opposed the incorporation by the Federal government of religious institutions, believing that such action would tend to break down the “wall of separation between church and state.” He logically extended his views concerning freedom of religion to exclude the teaching of religion in public institutions. Writing to Edward Everett of Massachusetts about the position of religion in public institutions and universities, he evidently had the experience of the University of Virginia in mind: “There seems to be no alternative but between a public university without a theological professorship and sectarian seminaries without a university.”\textsuperscript{14}

In laying his plans for the University of Virginia, Thomas Jefferson adopted a different approach from that of his fellow advocate of religious freedom, James Madison. Jefferson wrote:

The proof of the being of God, the Creator, Preserver, and Supreme Ruler of the Universe, the author of all the relations of morality, and the laws and obligations which

\textsuperscript{12} BRANT, JAMES MADISON, (1941), 353.
\textsuperscript{13} LIVINGOOD, in HARPER'S MAGAZINE, MAY, 1914.
\textsuperscript{14} BLAKELY, AMERICAN STATE PAPERS ON FREEDOM OF RELIGION, 592-3.
these infer will be in the province of the Professor of Ethics.\textsuperscript{15}

He secured works on Christianity for the library and provided in his plan for a room of worship in the Rotunda. He also hoped that four major Virginia denominations would establish independent theological schools in the neighborhood. More on this plan is found in a letter dated November 2, 1822:

In our annual report to the legislature, after stating that the constitutional reasons against a public establishment of any religious institutions or instruction, we suggest the expediency of encouraging the different religious sects to establish, each for itself, a professorship of its own tenets on the confines of the University, so near as that its students may attend lectures there and have the free use of the library and every other accommodation we can give them: preserving, however, their independence of us and each other. This fills a chasm objected to in ours as a defect in an institution professing to give instruction in all useful sciences: By bringing the sects together we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality.\textsuperscript{16}

Furthermore, the board of visitors of the University in 1824, referring to this proposal, adopted a resolution indicating that if it were carried out, "the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour."\textsuperscript{17}

Jefferson believed that civil liberties in the last analysis were dependent upon the Creator. "Can the liberties of a nation," he said, "be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gifts of God? . . . .\textsuperscript{18}

\textsuperscript{15} CHURCH AND STATE, supra, note 5, at 463.
\textsuperscript{16} MOEHLMANN, SCHOOL AND CHURCH, 90.
\textsuperscript{17} VI THORPE, THE FEDERAL AND STATE CONSTITUTIONS, (1904), 362.
\textsuperscript{18} CHURCH AND STATE, supra, note 5, at 339.
Although hardly addressed to one another, since Jefferson and Madison were more often on the same side than on different sides, the statements of these two leaders contrasted with one another make an excellent outline for a dialogue on this question.

Madison was the author of the widely circulated and highly influential “Memorial and Remonstrance” of 1784, against the proposal of the House of Delegates of Virginia to provide through assessments, for teachers of the Christian religion. In this he showed that religion is a matter of individual conscience and not within the official cognizance of civil government. We opposed this, he wrote:

...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 of every man, then, must be left to the conviction and conscience of every man to exercise it as these may dictate. This right is in its nature an unalienable right. . . .

Because it is proper to take alarm at the first experiment on our liberties . . . 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 set 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 . . . .

Because experience witnesseth that ecclesiastical establishments 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 . . . .

In a speech before the Virginia House of Delegates in October, 1784, Madison opposed the plan of a tax "for the support of the Christian religion." The speech was reported this way:

He then showed, that, as the benefits of the proposed provisions were to be limited to the Christian societies and churches it would devolve upon the courts of law to determine what constitutes Christianity, and thus, amid the great diversity of creeds and sects to set up by their fiat a standard of orthodoxy on the one hand and of heresy on the other, which would be destructive of the rights of private conscience. He argued, finally, that the proposition dishonored Christianity by resting it upon a basis of mercenary support, and concluded with vindicating its holy character from such a reproach, contending that its true and best support was in the principle of universal and perfect liberty established by the Bill of Rights, and which was alone in consonance with its own pure and elevated concepts.20

While agreeing with the Virginia advocates of religious liberty that government should be tolerant and not prejudiced in favor of any one sect or view, Daniel Webster pointed out in his view that America was indeed a Christian country. He said: "All proclaim that Christianity, tolerant Christianity, Christianity independent of sect and party, that Christianity to which the sword and faggot are unknown, tolerant Christianity is the law of the land.21

It should be pointed out that the sessions of the first Constitutional Convention held in America were in the little Church at Jamestown in 1619. These sessions were opened with a prayer to God. The mottoes of many of the states indicate a belief in and reliance upon God.

Among these mottoes is that of Arizona, which is "Ditat Deus," meaning, God enriches. The motto of Colorado is "Nil Sine Numine," which means, Nothing without God. The motto of South Dakota is, "Under God the People Rule," and that of Florida is, "In God We Trust," the same as our National motto.

20 V THORPE, supra, note 17, at 3096.
21 VII WORKS OF DANIEL WEBSTER, 176.
Discussing the Declaration of Independence the following has been written: "The ideal of the Declaration is of course a definitely Christian one, and when considered along with the references to the Deity, it shows that the two most fundamental Christian teachings, those of our duties toward God and toward our neighbor, permeate the document." 22

In this discussion two facts become clear. One is that the Founders were, on the whole, strong believers in religious freedom. And the other is that the Founders were almost without exception supporters of religion.23

Given this context and background we may now proceed to a consideration of the battles for religious freedom in the several emerging states.

II. State Efforts to Achieve Religious Freedom

MASSACHUSETTS. The struggle for religious liberty was not finally settled in Massachusetts until 1833. In 1631 it was enacted by the General Court that "to the end that the body of the commons may be preserved of honest and good men . . . for the time to come no man shall be admitted to the freedom of this body politic but such as are members of some of the churches within the limits of the same." 24

This meant that if a person was not a member of one of the regular congregational churches he could not be a voting citizen. Professor Newman, in his book, referring to this action, says: "We can scarcely conceive of a more perfect equipment for the exercise of tyranny and the violation of conscience than existed in this small community thus theocratically organized." 25 This enactment was one of the major factors in bringing about the banishment of Roger Williams and the establishment of the Separatists in Rhode Island.

22 CHURCH AND STATE, supra, note 5, at 462.
23 Id. at 514.
24 NEWMAN, A HISTORY OF THE BAPTIST CHURCHES IN THE UNITED STATES, 63.
25 Ibid.
There were various liberalizing actions between this time and that of the Revolution, such as the Charter of William and Mary in 1691 extending toleration to all Protestant Christians, but at the outbreak of the Revolution the Congregational Church was still the strongest institution in the state.\textsuperscript{26}

In 1780 Massachusetts adopted a State Constitution containing an important Declaration of Rights. It includes the following pertinent passages:

II. It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great preserver and creator of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

III. As the happiness of a people, and the good order and preservation of civil government essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of God, and of public instruction in piety, religion, and morality; therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require and the legislature shall from time to time, authorize and require the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily.

And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin

\textsuperscript{26} CHURCH AND STATE, supra, note 5, at 423.
upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

And all moneys paid by the subject to the support of public worship and of the public teachers aforesaid, shall, if he requires it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish in which the said moneys are raised.

And every denomination of Christians, demeaning themselves peaceably and as good subjects of the commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.\(^{27}\)

The Declaration of Rights was largely the work of John Adams. The latest Constitution of the state, drafted by a constitutional convention (1917-1920) and ratified by the people, contains unchanged the important Article II of 1780 as to the duty of religious worship, although Article III was modified in 1833 by omitting the reference to Protestant teachers.\(^{28}\)

The Declaration of Rights was a rather conservative document from a modern point of view, but it must be remembered that it represented a definite step forward for a Puritan Commonwealth long accustomed to an Established Church. The Constitutional Convention of 1820 was notable for an address by Daniel Webster, upon the importance of retaining the definitely Christian character of the American state. Webster stated:

I am clearly of opinion that we should not strike out of the Constitution all recognition of the Christian religion.

\(^{27}\) MEYER, CHURCH AND STATE IN MASSACHUSETTS 1740-1833, 234-5.

\(^{28}\) MATT, RODNEY, HINDMAN, CONSTITUTIONS OF THE STATES OF THE UNITED STATES (1938), 767-8.
I am desirous, in so solemn a transaction as the establishment of a Constitution, that we should keep in it an expression of our respect and attachment to Christianity—not, indeed, to any of its peculiar forms, but to its general principles.\textsuperscript{29}

In 1820 the following proposal was submitted to the Massachusetts voters: (A) The religious provisions of the Third Article were no longer to be confined to Protestant teachers; (B) Unincorporated religious societies were to be recognized as well as incorporated ones; (C) All money paid by a subject for the support of religious worship was to be applied toward the support of the public worship upon which he attended; (D) Money paid by non-resident proprietors who lived outside of the Commonwealth was to be applied toward the support of worship in the town, precinct or parish, by which such taxes were assessed; (E) Attendance at public worship was no longer to be compulsory.\textsuperscript{30} The proposed amendment was defeated by a vote of 19,547 to 11,065. In 1831 the Massachusetts Legislature voted in favor of dis-establishment, the Senate 25-13 and the House, 348-93. In 1833 the amendment was ratified by 32,234 to 3,273.\textsuperscript{31}

SOUTH CAROLINA. In 1778 the Constitution of South Carolina established the Protestant religion. Only Protestants could sit in the State Senate and House of Representatives. Article 20 contained detailed provisions: "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be the established religion of this state." This was a step forward, since previously the Anglican Church had been the established church, and with this provision it was now disestablished. By its 1790 Constitution South Carolina provided for complete religious freedom "without distinction of preference."\textsuperscript{32}

DELAWARE. The Delaware Constitution of 1776 provided that the state could be governed only by Orthodox Christians, but it did provide:

\textsuperscript{29} CHURCH AND STATE, \textit{supra}, note 5, at 427.

\textsuperscript{30} MEYER, \textit{supra}, note 27, at 197.

\textsuperscript{31} Ibid.

\textsuperscript{32} CHURCH AND STATE, \textit{supra}, note 5, at 434.
There shall be no establishment of any one religious sect in this state in preference to another; and no clergyman or preacher of the gospel of any denomination shall be capable of holding any civil office, or of being a member of either branch of the legislature, while they continue in the exercise of the pastoral function.\(^33\)

PENNSYLVANIA. The Pennsylvania Constitution of 1776 contains the following provision:

II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship or erect or support any place of worship, or maintain any ministry, contrary to or against his own free will and consent: Nor can any man, who acknowledges the being of God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship . . .\(^34\)

The Constitution also included a religious test for public office. It said:

Each member of the House of Representatives, before he takes his seat, shall make and subscribe to the following declaration, viz.: 'I do believe in one God, the creator and governor of the universe, the rewarder of good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testaments to be given by divine inspiration'.\(^35\)

In 1783 the Jews of Philadelphia petitioned that the last portion be dropped. This was done in the revision of 1790, and after that only a belief in God was required. This was repeated in the Constitutions of 1838 and 1873. An early Pennsylvania statute imposed a penalty upon any who should "wilfully, premeditatedly, and spitefully blaspheme, or speak lightly or pro-

\(^33\) THORPE, supra, note 17, at 567-568.
\(^34\) Id., Volume V, at 3082.
\(^35\) Ibid.
fanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth.” 36

VIRGINIA. The clause regarding religious liberty in the Declaration of Rights of Virginia written by George Mason, as originally drafted, read:

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; and, therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate unless, under color of religion, any man disturb the peace, the happiness, or the safety of society. And that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. 37

James Madison objected to the word “toleration,” as implying a system in which “the free exercise of religion was permissive, instead of being an unquestioned natural right.” 38 Madison’s intention, as he tells us, was “to substitute for the idea expressed by the term ‘toleration’ an absolute and equal right in all to the exercise of religion according to the dictates of conscience.” 39 He also objected to the clause giving the courts power to punish those who disturbed the peace in the practice of his religion. He proposed as a substitute:

That religion, or the duty we owe to our Creator, and the manner of discharging it, being under the direction of reason or conviction only, not of violence or compulsion, all men are equally entitled to the full and free exercise of it, according to the dictates of conscience and, therefore, that no man or class of men ought on account of religion, to be invested with peculiar emoluments or privileges nor subjected to any penalties or disabilities unless under color of

36 Id. Volume XIII, at 3.
37 I ROWLAND, LIFE OF GEORGE MASON (1892), 435.
38 NEVINS, AMERICAN STATES DURING AND AFTER THE REVOLUTION, 432.
39 I LETTERS AND OTHER WRITINGS OF JAMES MADISON, 24.
This clause was further modified by the committee of the whole, and as finally adopted by the convention, June 12, 1776, included the first and last portions of Madison’s original draft verbatim and the middle section somewhat altered:

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, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the natural duty of all to practice Christian forbearance, love, and charity towards each other.

When the Virginia Assembly first met under the state constitution, which was adopted June 29, 1776, it took steps to put into definite law the provisions of the Virginia Declaration of Rights regarding religious liberty. George Mason was chosen as chairman of the committee to prepare a suitable act. The result was:

All and every act of parliament, by whatever title known or distinguished, which renders criminal and maintaining any opinions in matters of religion, forbearing to repair to church, or the exercising any mode of worship whatsoever, or which prescribes punishments for the same, shall henceforth be of no validity or force within this commonwealth . . . All dissenters, of whatever denomination, from the said church, shall, from and after passing this act, be totally free and exempt from all levies, taxes, and impositions whatever, towards supporting and maintaining the said church, as it now is or hereafter may be established, and its ministers.

Discussing the clause concerning “toleration” which Madison had so vigorously and effectively criticized, Brant says that “for

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40 RIVES, LIFE AND TIMES OF MADISON, 441.
41 ROWLAND, supra, note 37, at 441.
42 IX HENING, STATUTES AT LARGE, 164-166.
the first time in any body of fundamental law, a natural right which had not previously been recognized as such by political bodies in the Christian world” had been enacted.43

What was the early situation in Virginia concerning religion and state? From 1622 on, for about a century, the Virginia General Assembly required ministers to present evidence of ordination by an English Bishop, and the Governor and Council were empowered to silence the teaching of all other persons. The Episcopal Church had been long and exclusively established in Virginia and was largely endowed with land, the leading statesmen were identified with it, it was both class conscious and spiritually inactive and its ministers often lacked seriousness of purpose. They were unsympathetic with the zeal of the Methodists, whom they denounced for their “fanaticism” and “enthusiasm,” and opposed giving up their exclusive public prerogatives. The Presbyterians and Baptists, who had been coming in large numbers into the Shenandoah Valley and adjoining regions, and had a vital religious message to give to the people, were greatly hampered in their work by restrictive laws.44

Clerical salaries were fixed by law in pounds of tobacco. In the period from 1755-1758 owing to deficient crops, the price of tobacco had risen. The Virginia Assembly made debts payable at the rate of twopence to the pound of tobacco. The clergy resisted and induced the Board of Trade to persuade the British Government to invalidate the act. They also tried to force their parishioners to pay them the difference between this legal rate and the market price.

It was in this controversy—known as Parson’s Cause—because a parson in Hanover County, the Rev. James Moury, sued for the payment of back salary—that Patrick Henry came to the front in 1763 by resisting, on behalf of the vestry, the enforcement of the British government’s decision. He believed that the King, by vetoing the law was guilty of tyranny. His eloquence resulted in the jury’s giving the parson only a penny as damages. The effort of the clergy to thwart the will of their own assembly made them unpopular.

43 BRANT, MADISON THE VIRGINIA REVOLUTIONIST, 249.
44 CHURCH AND STATE, supra, note 5, at 367.
On the whole the Parson's Cause injured the prestige of the establishment and its ministers and encouraged the dissenters.\textsuperscript{45} We are told that the action of the King and Council in declaring invalid the act of the Virginia Assembly was one of the causes leading to Virginia's strong stand on independence. Patrick Henry was an Anglican with a Presbyterian mother, and the Presbyterians and Baptists from this time on cooperated heartily in the attempt to overthrow the establishment and secure independence of church and state.

The battle was one in which the liberal forces—political, economic, social, and religious—were, generally speaking, aligned against the conservative and strongly entrenched Episcopal Church. Many factors contributed to the result, but among these the interest of the Baptists, the Presbyterians, and the political philosophers was dominant. The three most important of these were Thomas Jefferson, James Madison, and George Mason, the contribution of each being significant.\textsuperscript{46}

At the first Republican legislature of the independent state the earliest dissenter petition came from the largely Presbyterian county of Prince Edward, pleading allegiance to the new government and urging complete dis-establishment. It stated:

The last article of the Bill of Rights we also esteem as the rising sun of religious liberty, to relieve us from a long night of ecclesiastic bondage; and we do most earnestly request and expect that you would go on to complete that which is nobly begun: raise religious as well as civil liberty to the zenith of Glory, and make Virginia an asylum for free enquiry, knowledge, and the virtiron of every denomination. Justice to ourselves and posterity, as well as a regard to the honor of the commonwealth, makes it our indispensable duty, in particular to entreat, That without delay, you would pull down all church establishments; abolish every tax upon conscience in private judgment—and define accurately between civil and ecclesiastical authority; then leave our Lord Jesus Christ the Honor of being the sole law giver and Governor in his church.\textsuperscript{47}

\textsuperscript{45} ECKENRODE, THE REVOLUTION IN VIRGINIA (1916), 22.
\textsuperscript{46} NEWMAN, supra, note 24, at 366-67.
\textsuperscript{47} ECKENRODE, supra, note 45, at 46.
In his *Notes on Virginia*, written in 1781-82, Jefferson said in reference to religion in the state:

... It is error alone which needs the support of Government. Truth can stand by itself. Subject opinion to coercion: whom will you make your inquisitors? Fallible men; governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desirable? No more than of face and stature. Introduce the bed of Procrustes then, and as there is danger that the large men may beat the small, make us all of a size, by lopping the former and stretching the latter. Difference of opinion is advantageous in religion. The several sects perform the office of censor morum.

Our sister states of Pennsylvania and New York, however, have long subsisted without any establishment at all. The experiment was new and doubtful when they made it. It has answered beyond conception. They flourish infinitely. Religion is well supported; of various kinds, indeed, but all good enough; all sufficient to preserve peace and order; or if a sect arises whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the state to be troubled with it. They do not hang more malefactors than we do. They are not more disturbed with religious dissensions. On the contrary, their harmony is unparalleled, and can be ascribed to nothing but their unbounded tolerance, because there is no other circumstance in which they differ from every nation on earth. They have made the happy discovery, that the way to silence religious disputes is to take no notice of them. Let us too give this experiment fair play, and get rid while we may of those tyrannical laws.48

In 1784 the Assessment Bill was passed in Virginia. This Bill called for an assessment for the support of all Christian churches. Most Protestants in Virginia at that time favored the encouragement of religion by the state through financial aid to the Christian churches. Even John Marshall and George Washington were among the influential statesmen who were not opposed to some proposal of this character.

48 II WRITINGS OF JEFFERSON, 222-224.
Mason sent Washington a copy of Madison's "Remonstrance," hoping to get his support in opposing the proposal as opposed to religious freedom. In his reply, Washington said:

Although no man's sentiments are more opposed to any kind of restraint upon religious principles than mine are, yet I must confess, that I am not amongst the number of those who are so much alarmed at the thoughts of making people pay towards the support of that which they profess, if of the denominations of Christians, or declare themselves Jews, Mahometans, or otherwise, and thereby obtain proper relief. As the matter now stands, I wish an assessment had never been agitated, and as it has gone so far, that the bill could die an easy death; because I think it will be productive of more quiet to the state, than be enacting it into a law, which in my opinion would be impolitic admitting there is a decided majority for it, to the disquiet of a respectable minority. In the former case, the matter will soon subside; in the latter, it will rankle and perhaps convulse the state. 49

As a result of Madison's "Remonstrance" the assessment plan was killed by the legislature in October. Madison is considered the great hero of religious freedom. He wrote: "Who does not see 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." 50

The Bill for Establishing Religious Freedom was adopted by the Assembly in 1785 and became a law January 16, 1786.

Writing in 1823 to Edward Everett of Massachusetts, Madison said the following:

The difficulty of reconciling the Christian mind to the absence of a religious tuition from a University established by law, and at the common expense, is probably less with us than with you. The settled opinion here is that religion is essentially distinct from civil government, and exempt

49 II ROWLAND, supra, note 37, at 89.
50 II BRANT, supra, note 43, at 351.
from its cognizance; that a connection between them is injurious to both; that there are causes in the human breast which ensure the perpetuity of religion without the aid of law; that rival sects, with equal rights exercise mutual censorship in favor of good morals; that if new sects arise with absurd opinions or over heated imaginations, the proper remedies lie in time, forbearance, and example; that a legal establishment of religion without a toleration could not be thought of, and with a toleration, is no security for public quiet and harmony, but rather a source itself of discord and animosity; and, finally, that these opinions are supported by experience, which has shewn that every relaxation of the alliance between law and religion, from the partial example of Holland to its consummation in Pennsylvania, Delaware, New Jersey, etc., has been found as safe in practice as it is in theory. Prior to the Revolution, the Episcopal Church was established by law in this State. On the Declaration of Independence it was left, with all other sects, to a self-support. And no doubt exists that there is much more religion among us now than there ever was before the change, and particularly in the sect which enjoyed the legal patronage. This proves rather more that the law is not necessary to the support of religion.51

NORTH CAROLINA. The North Carolina Constitution was adopted during the period from November 12, 1776 to December 18, 1776.

The three articles which deal specifically with religion are as follows:

XXXI. That no clergyman, or preacher of the gospel, of any denomination, shall be capable of being a member of either the Senate, House of Commons, or Council of State, while he continues in the exercise of the pastoral function.

XXXII. That no person who shall deny the being of God or the truth of the Protestant religion, or the divine authority of either the Old or New Testaments, or who

shall hold religious principles incompatible with the freedom and safety of the state, shall be capable of holding any office or place of trust or profit in the civil department within this state.

XXXIV. That there shall be no establishment of any one religious church or denomination in this State, in preference to any other; neither shall any person, on any pretense whatsoever, be compelled to attend any place of worship contrary to his own faith or judgment, nor be obliged to pay, for the purpose of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship: —Provided, that nothing herein shall be constrained to exempt preachers of treasonable or seditious discourses, from legal trial and punishment.62

The only major change in this between the time of adoption and after the Civil War was the alteration of the provision of Article XXXII by substituting the word "Christian" for "Protestant." It was carried by a vote of 74-33 in Raleigh in 1835.63

NEW YORK. In the discussion in New York, John Jay proposed an amendment to the general (1777) Provision for freedom of religion by addition of these limiting words:

Except the professors of the religion of the Church of Rome, who ought not to hold lands in, or be admitted to a participation in the civil rights enjoyed by the members of this state until such time as the said professors shall appear in the Supreme Court of the State, and there must solemnly swear that they verily believe in their consciences that no Pope, priest, or foreign authority on earth has power to absolve the subjects of this State from their allegiance to the same; and further, that they renounce and believe to be false and wicked the dangerous and damnable doctrine that the Pope, or any earthly authority, has power to absolve men from sins described in and prohibited by the holy Gospel of Jesus Christ; and particularly that no Pope, priest, or

62 VI THORPE, supra, note 17, at 2793.
63 CHURCH AND STATE, supra, note 5, at 403.
foreign authority on earth has power to absolve them from the obligations of this oath.\textsuperscript{54}

Although this convention, thanks to the opposition of Gouvernor Morris and others, by a vote of 19-10 declined to go so far as Jay wanted, the Constitution as adopted included a significant statement in Article 38:

And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against the spiritual aggression and intolerance wherewith the bigotry and ambition of the weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this state.\textsuperscript{55}

CONNECTICUT. There was no victory for religious freedom in Connecticut until 1818. Connecticut did not create a state Constitution for over 40 years after the Declaration of Independence, merely continuing under the old Royal Charter. This fact made it very much easier for the Established Church of the colony to continue as the Established Church of the state. To this entrenched Congregational group Jefferson was "a man of sin."\textsuperscript{56}

Purcell has looked up some of the toasts given at Republican gatherings in Connecticut from 1801 to 1809. They are most suggestive: "Our brethren in Tripoli and Connecticut, may the former be freed from pirates and the latter from priestcraft,"—"Church and State united—the cornerstone on which Satan builds his fabric of infidelity."\textsuperscript{57}

\textsuperscript{54} SPIRES, LIFE OF GOUVERNOR MORRIS, (1832), 124.
\textsuperscript{55} V THORPE, \textit{supra}, note 17, at 2636-2637.
\textsuperscript{56} CHURCH AND STATE, \textit{supra}, note 5, at 408-9.
\textsuperscript{57} PURCELL, CONNECTICUT IN TRANSITION, 191.
Religious freedom gained a victory in 1818. The first Governor of the New Order was Oliver Wolcott. In his inaugural he said:

It is the right and duty of every man to worship and adore the Supreme Creator and preserver of the universe, in the manner most agreeable to the dictates of his own conscience; and no man or body of men have, or can acquire, by acts of licentiousness, impiety, or usurpation, any right to disturb the public peace, or control others in the exercise of their religious opinions or worship.  

The Connecticut Constitution provided that “no preference shall be given by law to any Christian sect or mode of worship.” This meant that, although all religious forms were given protection, Christianity was virtually recognized as the state’s official belief.

MARYLAND. This state granted toleration to all Trinitarian Christians in 1649. This was due to the efforts of the Proprietor, Cecil Calvert, Second Lord Baltimore, a Roman Catholic, and its character and significance may be found in descriptions of Lord Baltimore as a “great leader in the cause of religious freedom and liberty.” Unfortunately, and not the fault of the original proprietary, this was not of long duration.

RHODE ISLAND, whose charter was secured from King Charles II in 1663, provided for complete religious freedom. This was due mainly to the efforts of the Rev. John Clarke, a leader of the liberal colony of Aquidneck. He was a co-worker of Roger Williams, perhaps the most advanced and effective advocate of religious freedom in colonial times.

PENNSYLVANIA, whose “Frame of Government” was granted by William Penn in 1683, provided that all who believed in “One Almighty God” should be protected and all who

58 Id. at 32.
59 Id. at 395.
60 ECKENRODE, supra, note 45, at 95-6.
61 Id. at 34.
believed in "Jesus Christ, the Savior of the World" were capable of holding civil office.62

In NEW JERSEY Roman Catholics did not have the right to hold elective office until 1844, although there was no restriction upon Roman Catholics as voters.63

Echoing Madison's contempt for the idea of mere religious toleration, the Rev. John Leland, a Baptist minister, wrote in 1820 his "Short Essays on Government." He proposed an amendment to the Constitution of Massachusetts to separate Church and State. He wrote the following:

Government should protect every man thinking and speaking freely, and see that one does not abuse the other. The liberty I contend for is more than toleration. The very idea of toleration is despicable; it supposes that some have a pre-eminence above the rest to grant indulgence; whereas all should be equally free, Jews, Turks, Pagans, and Christians. Test oaths and established creeds should be avoided as the worst of evils.64

The various states approached the matter of religious freedom differently; some achieved it early in our history, and others took a good deal longer. It was generally thought at this time that although each man should be free to worship as he pleased, worship itself was an affirmative good. It was not thought at this time in our history that government should be neither for nor against religion—that it should be, so to speak, "neutral." Religion was the basis upon which many established the source of our liberty. Jefferson, Adams, and Webster found the dignity of our lives in the all powerful creator, and not in the state.

The states supported and encouraged religion, in some areas Protestantism, in others Christianity in general, and in several merely a "belief in Providence."

Religious freedom was hard to win in some areas, but eventually was won in all. Few, however, believed that religion and

62 CHURCH AND STATE, supra, note 5, at 364.
63 Id. at 435.
64 GEWEHN, THE GREAT AWAKENING IN VIRGINIA, 190-1.
the state were, or ever could be, separate and distinct. In this sense that generation differed from many in this one.

III. Religion and its Consideration at the Constitutional Convention

Some light is shed on the question of whether the provisions of the First Amendment are meant to be applicable to the states as well as to the national government by a discussion in *Legacy of Suppression*, by Leonard W. Levy of Brandeis University.

He points out that the original intention of the House of Representatives was to guarantee the freedoms protected by the First Amendment against state violation. An Amendment proposed to the House by Madison, along with his other recommendations for what became the Bill of Rights, provided that “No state shall violate the equal rights of conscience or the freedom of the press, or the right to trial in criminal cases.”

Madison declared, in defense of his proposed restrictions on the states, that they were “of equal, of not greater importance” than the prohibitions against the state enactment of ex post facto laws, bills of attainder, or laws impairing the obligations of contracts. He argued that the powers of the states were more likely to be abused than those of the national government, if not controlled by the general principle that laws are unconstitutional “which infringe the rights of the community.”

He thought it proper that “every Government should be disarmed of powers which entrench upon the particular rights of press, conscience, and jury trial.” The amendment was all the more needed, he asserted, because some of the states did not protect these rights in their own Constitutions. As for those that did, a “double security” could not reasonably be opposed.

Madison’s proposal for a restriction on the states was assigned with his other recommended bills and amendments to a com-

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65 DEBATES AND PROCEEDINGS OF THE CONSTITUTION OF THE UNITED STATES (1834), 452.
66 LEVY, LEGACY OF SUPPRESSION, 221.
67 Ibid.
mittee of the House selected to frame a Bill of Rights. The Committee adopted the proposal but expanded it to include "the freedom of speech." The recommendation of the Committee to the House was: "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." 68

When this proposal was debated in the House, only one member declared his opposition. Tucker of South Carolina stated simply that it would be "better . . . to leave the state governments to themselves, and not to interfere with them more than we already do . . ." And he moved to strike out the amendment. 69

Madison, in reply, declared that he "conceived this to be the most valuable amendment in the whole list." If there was any reason to restrain the government of the United States from infringing upon these essential rights "it is equally necessary that they ought to be secured against the state governments." He thought that the people would support the amendment for that reason. 70

Livermore of New Hampshire, the only other speaker, agreed with Madison and suggested a slight stylistic change. The House then rejected Tucker's motion and by a two-thirds majority passed the amendment. But it died in the Senate. That body included many, like Tucker in the House, who were jealous of state prerogatives and believed that the Constitution already imposed too many limitations on the states. All we know about the deliberations of the Senate is that a motion to adopt did not receive the necessary two-thirds vote, though by what margin is not recorded. "As a result of the failure of the Senate to pass the amendment, assuming that it would have been ratified, the Constitution of the United States offered against state violation no protection whatever to speech, press, or religion." 71

68 Supra note 65, 1:783.
69 Id. at 1:783-4.
70 Ibid.
71 LEVY, supra, note 66, at 222.
This historical fact has been the subject of much discussion. Recent criticism of the Supreme Court's decisions concerning school prayer has used this fact. For example:

... Of course there is no 'Constitutional prohibition against any daily religious exercises in the public school.' The Constitution specifically prohibits Congress from passing any law 'prohibiting the free exercise of religion.' Apparently... the Supreme Court thinks it can do what Congress cannot Constitutionally do. The ruling of the Supreme Court did not change the Constitution.72

The first amendment, as introduced by Madison in the House of Representatives, differs materially from its present reading. It read: "The civil rights of none shall be abridged on account of religious beliefs 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." 73 The amendment occasioned considerable debate in the House and was then referred to the Committee of Eleven. The Committee reported the article, which read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." Mr. Sherman regarded the amendment as wholly unnecessary, as Congress had no authority delegated to it by the Constitution to make religious establishments, and he therefore moved to strike the clause out. Mr. Carroll replied:

As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hands; and as many sects have concurred in opinion that they are not well secured under the present Constitution, he was much in favor of adopting the words.74

Mr. Madison thought if the word "national" was inserted before religion, it would relieve the objections made to the report. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion

73 WATSON, THE CONSTITUTION OF THE UNITED STATES (1910), P. 1371.
74 Ibid.
to which they would compel others to conform, and believed if
the word "national" was introduced, it would point the amend-
ment directly to the object it was intended to prevent.\textsuperscript{75}

The matter was finally referred to a Committee of Three
which on August 24, 1789 reported: "Congress shall make no
law establishing religion, or prohibiting the free exercise thereof;
nor shall the rights of conscience be infringed." \textsuperscript{76} It was re-
ported out this way: "Congress shall make no law respecting an
establishment of religion, or prohibiting the free exercise thereof."

History would seem to justify the conclusion that in pre-
senting this amendment Madison was reflecting the successful
sentiment in the struggle which had been carried on in his state
over the question of religious freedom. The spirit as well as the
language of the amendment was that the general government
should forever refrain from manifesting any preference concern-
ing any particular religion; that it must take no part in form-
mulating or establishing a religion of any kind, nor must it pro-
hibit to any person the free and unfettered enjoyment of the
religion of his choice. As a covenant between the government
and the people on this subject, Congress submitted this amend-
ment, which was promptly ratified by the requisite number of
states. It was not aimed at the progress of Christianity or intended
to impede its influence.\textsuperscript{77} Mr. Justice Story has said:

The real object of the amendment was not to counte-
nance much less to advance Mahometanism, or Judaism, or
infidelity, by prostrating Christianity; but to exclude all
rivalry among Christian sects, and to prevent any national
ecclesiastical establishment which should give to a hierarchy
the exclusive patronage of the national government. It thus
cuts off the means of religious persecution (the vice and
pest of former ages) and of the subversion of the rights of
conscience in matters of religion, which had been trampled
upon almost from the days of the Apostles to the present
age.\textsuperscript{78}

\textsuperscript{75} Id. at 1373.
\textsuperscript{76} Id. at 1374.
\textsuperscript{77} II HOWISON, HISTORY OF VIRGINIA, 297.
\textsuperscript{78} 2 STORY ON THE CONSTITUTION, 631-2.
This amendment secured forever in the United States the separation of church and state. It prevents national recognition of any particular religious creed, while it does not impair nor diminish the appeal of Christianity, or religion generally.

In his second Inaugural Address, Jefferson stated the position of government:

In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them under the direction of the church or state authorities, acknowledged by the several religious societies.⁷⁹

Concerning whether the states retained any power over religion, Mr. Jefferson in 1808 wrote:

I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline or exercise. This results not only from the provision that no law shall be made respecting the establishing, or free exercise of religion, but from that also which reserves to the states the powers not delegated to the United States. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the state as far as it can be in any human authority.⁸⁰

It has been recently suggested that since America is now a three-religion country—Protestant, Catholic, and Jewish—rather than a predominantly one religion Protestant society, the legislative judgments of the colonial period were made on the basis of an entirely different situation in which different standards were applied. It has been further argued that science and industrialism have combined to usher in a new era of secularism in which ancient religious truths are widely disputed, and in which

⁷⁹ I MESSAGES OF THE PRESIDENTS, 379.
⁸⁰ IV FORD, LIFE OF JEFFERSON, 174.
the only role for a government to play and be truly fair is one of absolute and almost aggressive neutrality.

In 1789 we were emerging from a situation in which each colony had an established church, or barring this had given several religious groups a preferred place and status. The era was one in which the very concept of religious freedom was a revolutionary one. For Madison to propose the First Amendment was an important step forward. To say that he meant to place government in a "neutral" position—as against religion on the one hand and secularism or agnosticism on the other—is hardly borne out by the facts. The intention of Madison, Mason, and Jefferson seems to have been that government be neutral about endorsing any particular religion—but not about religion and a belief in God itself.

IV. Conclusion

James Madison stated that "... The good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decisions of his predecessors, should vary the rule of law according to his individual interpretation of it." 81

Perhaps we have traveled a long way in America from those days to these. Even if this is true, even if we are no longer guided by the intent of those who wrote the Constitution, still it is of at least historical value to know and understand what the thinking was about church-state relations in Philadelphia in 1789, and in America during the era of its independence and infancy.

The evidence points to the fact that we are a religious nation. Madison, Jefferson, Mason, Webster, Adams, and other founders of the Republic and authors of the Constitution were devout men. Jefferson said that our rights come from "the Creator." All believed that religion and society went hand in hand, and could not be separated. Each believed in religious freedom, but none believed in an absence of the atmosphere of belief in God from our public life. The preceding review of the relevant events of that era leads to these conclusions. Whether our own era has achieved a contrary consensus of opinion is yet to be determined.

81 Commonwealth v. Posey, 4 Call. (Va.) 109 (1788).