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ARTICLES

THE ORIGINS OF THE RELIGION CLAUSES OF THE CONSTITUTION

PHILIP B. KURLAND*

I. INTRODUCTION

More years ago than I can believe, when I lived the exalted life of a Supreme Court law clerk—that category of law school graduate who knows everything there is to know about the Constitution and most other things—I learned some basic facts of the life of the law, the hard way. The first of these was that the right answer depends on the right question; the second was that a right answer was not always to be found; and the third was that if I could not find the right answer through my research, I was not supposed to make it up. These precepts afford the sad prologue to the tale that this Article unfolds.

I also have tried to master another bit of wisdom, but not always with success. It, too, relates to the subject of this Article, and it was framed by Learned Hand in language on which I certainly cannot improve:

You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar's gown, or lead flaming causes from a cloister. Luther cannot be domesticated in a university. You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voices of doubt. I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage; that, when the final count is

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made, it will be found that the impairment of his powers far outweighs any possible contributions to the causes he has espoused. If he is fit to serve in his calling at all, it is only because he has learned not to serve in any other, for his singleness of mind quickly evaporates in the fires of passions, however holy.¹

I dare say that most of the so-called literature in the field of first amendment law—my own included—reflects the advocate with a cause rather than disinterested scholarship. If I adhere to these stated teachings, however, I fear that I shall have little new to offer. If I abjure them, I may tickle the fancies of one set of partisans or the other; I may display some talent for verbal pyrotechnics; or I may show only that in some parts of the law school world, in which the tenets of neither Richard Posner nor Duncan Kennedy hold sway, charity is still a virtue and mindlessness a vice. Perhaps, then, readers should concentrate on whether this Article sticks to the straight and narrow path because, “strait *is* the gate, and narrow *is* the way . . . and few there be that find it.”² Readers may console themselves, temporarily at least, with the thought that the learned commentators that follow will provide enlightenment on this subject. Whether they are Luthers or Erasmuses I leave to the readers’ discernment.

II. THE HISTORICAL BACKGROUND OF THE RELIGION CLAUSES

A. Prologue

The tale begins at the end. During the 1984 Term the United States Supreme Court handed down several opinions in which it purported to apply the provisions of the religion clauses of the first amendment. These decisions immediately evoked a great deal of adverse commentary. Of course, that is not at all an unusual reaction to Supreme Court decisions. What might be considered unusual, however, was the reason for the challenges. Essentially, the complaint was that the Court had adhered to *stare decisis* and had followed its own precedents. The argument was that the Court should have abandoned the heresies that it had perpetrated in its

1. L. HAND, *THE SPIRIT OF LIBERTY* 138 (I. Dilliard 3d ed. 1974).

2. *St. Matthew* 7:14 (King James).

earlier readings of the first amendment and should have substituted what the critics labeled "the original meaning" of the amendment. The tone of the criticism was somewhat reminiscent of Martin Luther's exposition of the real truth in contradiction of that which had been expounded by the Pope and his predecessors and the Roman Catholic hierarchy.

I do not mean to dwell on whether the true meaning of the Constitution can be determined by seeking the intention of the Framers as to the contents of each of the sections, paragraphs, and clauses of the written text. I do think it necessary to reveal my general attitude, however, so that, in evaluating what I have to say, readers may discount my bias.

My colleague Ralph Lerner and I have just edited five volumes of documents relating to the origins of the 1787 Constitution and the 1789 amendments thereto.³ These five volumes of double-columned pages do not by any means constitute all of the relevant materials. They do show, however, that even in the age of the computer, when we can recapture with inordinate speed almost every recorded word, we cannot definitively read the minds of the Founders except, usually, to create a choice of several possible meanings for the necessarily recondite language that appears in much of our charter of government. Indeed, evidence of different meanings likely can be garnered for almost every disputable proposition, especially if one looks for authority not only to the members of the 1787 Convention, but also to the members of the eleven ratifying conventions; to the members of the First Congress, who promulgated the Bill of Rights; and to the members of the legislatures of the original states, who ratified those amendments. To this legislative history also must be added the arguments and teachings of those persons who influenced the Founders' ideas, and the actions and deeds that gave rise to the need for constitutional protections against what the forefathers denounced as tyranny.

Do not misunderstand me. I do not deny that history is relevant to constitutional decision, and I do not contend that the Constitution should be molded by the sitting justices either to suit their own predilections or those of the news media or the opinion polls. History should provide the perimeters within which the choice of

3. *THE FOUNDERS' CONSTITUTION* (P. Kurland & R. Lerner eds. 1987).

meaning may be made. History ordinarily should not be expected, however, to provide specific answers to the specific problems that bedevil the Court. Care must be taken that the so-called history is not what historians properly denounce as "law office history," written the way brief writers write briefs, by picking and choosing statements and events favorable to the client's cause.

I do not deny, either, that history may afford clear and cogent answers to some questions of original intent. This, however, points to still another question: whether the Constitution must be given the meaning today that it was given in 1787, or 1789, or 1868, by those who wrote it. For example, should we adhere to our revisionist notion that the three vital clauses of the first section of the fourteenth amendment were intended for the protection of individuals other than the newly freed slaves? Should we stick to the proposition that corporations are "persons," and that they are sometimes but not always "citizens," as those words are used in the Constitution? History tells us that these post-creation constructions clearly are perversions of the original intent.

I leave such questions unanswered. I do state my prejudices, however, which coincide with those expressed by Paul Freund when he said that the Constitution can be regarded both as Newtonian and Darwinian, both as a structure and an organism,⁴ and with Judge Learned Hand when he said:

Nor need it surprise us that these stately admonitions refuse to subject themselves to analysis. They are the precipitates of "old, unhappy, far-off things, and battles long ago," originally cast as universals to enlarge the scope of the victory, to give it authority, to reassure the very victors themselves that they have been champions in something more momentous than a passing struggle. Thrown large upon the screen of the future as eternal verities, they are emptied of the vital occasions which gave them birth, and become moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in light of its own experience.⁵

4. P. Freund, *The Constitution: Newtonian or Darwinian*, U.S. Dep't of Justice Bicentennial Lecture, University of Chicago School of Law (1976).

5. L. HAND, *supra* note 1, at 163.

B. The Intent of the Founders

Having postponed the inevitable as long as possible, I now must address what the Founders said and did when they constitutionally defined the relationship between government and religion. I say "government and religion" because "church and state" is an erroneous label that actually describes the conflict between crown and mitre concerning the governance of the people. In this sense, the United States never has suffered through problems of church and state, except perhaps in the very early history of New England. The questions in this country have centered not on the rights of a church but on the rights of individuals to worship, preach, and proselytize as they choose, and to be free of any obligation to fund the worship of others. Occasionally, Americans have become confused and bemused by questions such as whether the United States should exchange representatives with the Vatican. That may be a question of church and state—although I view it as a purely political question—but it is not a question of freedom of religion, or of establishment, as those problems were addressed by the first amendment.

I start with the most simple of the historical questions, or at least the one most easily answered: the challenge, most strongly made by Attorney General Meese, that the Framers did not intend the first amendment to be a limitation on the states when they promulgated that amendment in 1789.⁶ I think that the evidence overwhelmingly supports Attorney General Meese's position. Notwithstanding the arguments to the contrary by my former colleague, Professor Crosskey,⁷ none of the amendments in the so-called Bill of Rights was to be applied to the states. This conclusion is supported not only by the language of the first amendment, which speaks of a limitation on Congress, but also by the fact that when Madison first proposed an amendment to protect the freedoms of religion, speech, press, petition, and assembly, his proposal was addressed to the states as well as the national government, but Madison's colleagues in the First Congress overwhelmingly rejected his proposal. They believed that the Bill of Rights was to be

6. See Meese, in *Bar Group Speech, Criticizes High Court*, N.Y. Times, July 10, 1985, at A13, col. 1.

7. See W. CROSSKEY, *POLITICS AND THE CONSTITUTION* (1953).

a response to the demands made at the state ratification conventions for specific limitations on national authority, and that Congress should not go beyond its charge.

The Framers' true intent is indicated in a letter that Thomas Jefferson wrote to Rev. Samuel Miller in 1808:

I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U.S.⁸

In that letter, Jefferson declined the invitation to declare a day of fasting and prayer, a position inconsistent with that taken by the first President of the United States.⁹

While the evidence of the nonapplicability of the first amendment to the states is clear and convincing as far as the intent of the authors and ratifiers of the first amendment is concerned, that intent alone does not answer the question whether the religion clauses, any more than the speech and press clauses, should be treated today solely as restraints on the national government. Modern learning and precedents demonstrate that these provisions of the first amendment have been held applicable to the states through the fourteenth amendment. Justices Black and Frankfurter, for example, engaged in a debate in *Adamson v. California*¹⁰ concerning whether the fourteenth amendment incorporated the first eight amendments *in haec verba*, as Justice Black contended, or merely required the states to conform to the principles of "ordered liberty," as Justice Frankfurter contended, borrowing from Justice Cardozo's opinion in *Palko v. Connecticut*.¹¹

The Black-Frankfurter controversy never has been clearly resolved, but neither side finds much support in the legislative history of the fourteenth amendment, unless one engages in a kind of Jesuitical or Talmudic reasoning so arcane as to be unconvincing

8. Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON 174 (P. Ford ed. 1898).

9. *Id.*, *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON at 175-76.

10. 332 U.S. 46 (1947).

11. 302 U.S. 319 (1937).

to those of us who have disdained the art of deconstruction. The failure of the first amendment to emerge as a control of state action until well into the twentieth century, therefore, is not surprising. In its present form, and not merely as applied to the states, it is essentially a judicial construct. By this I do not mean to demean the developed and developing law of the first amendment, but only to doubt that the decision can be justified by the form of constitutional construction that has been denominated "original intention."

So much for the easy question. The harder question involves the original meaning ascribed to the religion clauses as applied to the actions of the national government. With the possible exception of the third amendment, the meaning of the first eight amendments is not susceptible to definition by dictionary, as a reading of these amendments quickly makes apparent. As a result, a reference to history is not only proper, but also necessary to discover meaning. This reference is even more appropriate because the Constitution, although it invoked the wisdom of savants of political theory and law such as Locke, Coke, Montesquieu, Harrington, Rousseau, and Hobbes, essentially was drafted to meet particular problems experienced both in the United States and in England. To a great degree, the Constitution also was derived from the state constitutions that had preceded it. One can best understand the provisions of the Constitution dealing with religion not merely by examining what its authors and contemporaries said about them, but also by examining the problems that the Founding Fathers encountered, remembered, and sought to solve.

The first amendment was not the first constitutional provision directed to an issue of freedom of religion or establishment. Article VI of the Constitution includes a clause, inserted after the provision requiring all government officials, both national and state, to take an oath to support the Constitution, that provided: "no religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States."¹² Religious oaths had a long history in England, remaining evident until the late nine-

12. U.S. CONST. art. VI, cl. 3. This provision, too, became applicable to the states through the fourteenth amendment, because of the Supreme Court's decision in *Torcaso v. Watkins*, 367 U.S. 488 (1961).

teenth century,¹³ and at the time the Constitution was adopted they still existed in most of the states. In England, the oath required allegiance to the tenets of the Church of England, and such an oath was required even of students and dons at Oxford and Cambridge. In the United States, the requirement sometimes was adherence to the established church of a particular state, sometimes simply a belief in the Holy Trinity, and sometimes an acceptance of the divine inspiration of the Old and New Testaments.

In England, the oath was part of the establishment. In the United States, however, Oliver Ellsworth defended the abolition of the oath in article VI in terms of freedom of religion rather than the establishment, although the Founding Fathers usually subscribed nonestablishment under freedom of religion. Ellsworth wrote:

Some very worthy persons, who have not had great advantages for information, have objected against that clause in the constitution, which provides, that *no religious Test shall ever be required as a qualification to any office or public trust under the United States*. They have been afraid that this clause is unfavourable to religion. But, my countrymen, the sole purpose and effect of it is to exclude persecution, and to secure to you the important right of religious liberty. We are almost the only people in the world, who have a full enjoyment of this important right of human nature. In our country every man has a right to worship God in that way which is most agreeable to his own conscience. If he be a good and peaceable citizen, he is liable to no penalties or incapacities on account of his religious sentiments; or in other words, he is not subject to persecution.

. . . .

. . . Test-laws are useless and ineffectual, unjust and tyrannical; therefore the Convention have done wisely in excluding this engine of persecution, and providing that no religious test shall ever be required.¹⁴

13. See 1 L. STEPHEN, *HISTORY OF ENGLISH THOUGHT IN THE EIGHTEENTH CENTURY* 74 (rev. 3d ed. 1962).

14. Ellsworth, *A Landholder VII* (published in the *Connecticut Courant*, Dec. 17, 1787), reprinted in 14 *THE DOCUMENTARY HISTORY OF THE CONSTITUTION* 449-52 (J. Kaminski & G. Saladino eds. 1983).

Another future Supreme Court justice delivered an encomium to this clause in the North Carolina ratifying convention:

I consider the clause under consideration as one of the strongest proofs that could be adduced, that it was the intention of those who formed this system to establish a general religious liberty in America. . . . [Congress] certainly [has] no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentlemen should conceive they have. Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm. . . . If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. . . .

. . . .
 . . . This article is calculated to secure universal religious liberty, by putting all sects on a level—the only way to prevent persecution. . . . This country has already had the honor of setting an example of civil freedom, and I trust it will likewise have the honor of teaching the rest of the world the way to religious freedom also.¹⁵

The ban on test oaths was written into the Constitution at the 1787 Convention without significant demur. After Mr. Pinckney moved to add the provision on August 30, 1787,¹⁶ Mr. Sherman stated that he “thought it unnecessary, the prevailing liberality being a sufficient security against such test.”¹⁷ Mr. Sherman, however, was a bit optimistic about the “prevailing liberality.” Even so modern a constitution as the one adopted by Massachusetts in 1780 had not reached the “liberality” of article VI. As Benjamin Franklin wrote to his friend Richard Price on October 9, 1780:

I am fully of your opinion respecting religious tests; but, though the people of Massachusetts have not in their new constitution kept quite clear of them, yet, if we consider what the people

15. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 193-96 (J. Elliot 2d ed. 1836) (quoting speech of James Iredell) [hereinafter cited as ELLIOT'S DEBATES].

16. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 468 (M. Farrand ed. 1911) [hereinafter cited as RECORDS].

17. *Id.*

were one hundred years ago, we must allow they have gone great lengths in liberality of sentiment on religious subjects; and we may hope for greater degrees of perfection, when their constitution, some years hence, shall be revised. . . . When a religion is good, I conceive that it will support itself; and, when it cannot support itself, and God does not take care to support it, so that its professors are obliged to call for the help of the civil power, it is a sign, I apprehend, of its being a bad one.¹⁸

Mr. Pinckney's "motion was agreed to nem: con."¹⁹ Few provisions entered the Constitution with such ease. It was not so readily accepted, however, at all of the ratifying conventions. The records of the Massachusetts ratifying convention, for example, reflect that, despite a defense of the provision by Rev. Shute,²⁰ Col. Jones of Bristol

thought, that the rulers ought to believe in God or Christ, and that, however a test may be prostituted in England, yet he thought, if our public men were to be of those who had a good standing in the church, it would be happy for the United States, and that a good person could not be a good man without being a good Christian.²¹

At the North Carolina convention, William Lancaster gave vent to words also spoken elsewhere:

As to a religious test, had the article which excludes it provided none but what had been in the states heretofore, I would not have objected to it. It would secure religion. Religious liberty ought to be provided for. I acquiesce with the gentlemen, who spoke, on this point, my sentiments better than I could have done myself. For my part, in reviewing the qualifications necessary for a President, I did not suppose that the pope could occupy the President's chair. But let us remember that we form a government for millions not yet in existence. I have not the art of divination. In the course of four or five hundred years, I do not know how it will work. This is most certain, that Papists may occupy that chair, and Mahometans may take it. I see noth-

18. Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), *reprinted in* 8 THE WORKS OF BENJAMIN FRANKLIN 505-06 (J. Sparks ed. 1839).

19. 2 RECORDS, *supra* note 16, at 468.

20. 2 ELLIOT'S DEBATES, *supra* note 15, at 118-19.

21. *Id.* at 119.

ing against it. There is a disqualification, I believe, in every state in the Union—it ought to be so in this system.²²

At the Connecticut ratifying convention, Oliver Wolcott sought to finesse the issue by suggesting that the objections to the ban on religious oaths were answered by the implicit inclusion of a religious test in the general oath requirement.

I do not see the necessity of such a *test* as some gentlemen wish for. The Constitution enjoins an oath upon all the officers of the United States. This is a direct appeal to that God who is the avenger of perjury. Such an appeal to him is a full acknowledgment of his being and providence. An acknowledgment of these great truths is all that the gentleman contends for. For myself, I should be content either with or without the clause in the Constitution which excludes test laws. Knowledge and liberty are so prevalent in this country, that I do not believe that the United States would ever be disposed to establish one religious sect, and lay all others under legal disabilities. But as we know not what may take place hereafter, and any such test would be exceedingly injurious to the rights of free citizens, I cannot think it altogether superfluous to have added a clause, which secures us from the possibility of such oppression.²³

Apparently agreeing with Wolcott that an oath to support the Constitution was an invocation of a commitment to God, the South Carolina ratifying convention proposed an amendment stating: "Resolved that the third section of the Sixth Article ought to be amended by inserting the word '*other*' between the word '*no*' and '*religious*.'" ²⁴ This amendment was not considered by Congress, but it is nonetheless instructive because the state conventions were the sources of other amendments that were. This amendment, as well as the preceding passages, demonstrates that the delegates to the state conventions frequently mooted the issues of religious freedom and establishment in their discussions of article VI.

Indeed, Justice Story believed that article VI epitomized the conception of separation:

22. 4 *id.* at 215.

23. 2 *id.* at 202.

24. 4 THE FOUNDERS' CONSTITUTION, *supra* note 3, at 645.

This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It had a higher object; to cut off forever every pretense of any alliance between church and state in the national government. The framers of the constitution were fully sensible of the dangers from this course, marked out in the history of other ages and countries; and not wholly unknown to our own. They knew that bigotry was increasingly vigilant in its stratagems, to secure to itself an exclusive ascendancy over the human mind; and that intolerance was ever ready to arm itself with all the terrors of the civil power to exterminate those, who doubted its dogmas, or resisted its infallibility. The Catholic and the Protestant had alternately waged the most ferocious and unrelenting warfare on each other; and Protestantism itself, at the very moment, that it was proclaiming the right of private judgment, prescribed boundaries to that right, beyond which if any one dared to pass, he must seal his rashness with the blood of martyrdom.²⁵

The push for amendments to the Constitution, not all of which properly could be labeled part of a "bill of rights" but all of which were intended to impose additional restraints on national power, came largely from the Antifederalist camp.²⁶ The Federalists dominated the Philadelphia convention, where they saw what they had wrought and pronounced it good, but the Antifederalists were more prominent, although hardly dominant, in the state conventions. The Antifederalists frequently secured concessions in the state conventions from the defenders of the 1787 document ensuring, as a condition of ratification, that amendments suggested by the state conventions would be proposed by Congress and proffered to the people of the states for ratification.

25. J. STORY, COMMENTARIES ON THE CONSTITUTION § 1841 (1833).

26. During this time, the denominations "Federalist" and "Antifederalist" did not yet designate political parties but only attitudes. The Federalists were defenders of central government power, usually fearing the hegemony of a democratic legislature. This camp included characters as disparate in attitude as Alexander Hamilton, John Adams, James Madison, and James Wilson. The Antifederalists, on the other hand, were deeply concerned with maintaining state government authority, largely because these governments were closer to the people. This camp included individuals with such different voices as Luther Martin, Melancton Smith, Thomas Jefferson, and George Mason.

Alexander Hamilton essentially reflected the view of the Federalists when he opined in the *Federalists Papers* that a bill of rights was both unnecessary and dangerous. According to Hamilton, a bill of rights was unnecessary because the national government under the Constitution already could exercise only those powers delegated to it, and it was dangerous because a denial of powers never granted carried an implication that the powers inhibited by a bill of rights somehow lurked in the interstices of the fundamental document.²⁷ Even as he introduced the proposed amendments in the First Congress, James Madison conceded the weight of the Hamiltonian argument, but he thought it necessary to keep faith with the state conventions.²⁸

An amendment to protect religious liberty, however, was by no means at the forefront of the Antifederalists' desires. As Jackson Turner Main wrote:

Antifederalists were not greatly concerned about religious freedom under the Constitution, apparently because there was nothing that threatened it and no special safeguards were deemed necessary. A prominent Virginia Baptist thought religious freedom was "not sufficiently assured," and a few individuals in the North felt that it should be expressly guaranteed; but most opinion voiced in New England was animated by desire to exclude non-Protestants from public office—not by toleration but by intolerance. Generally, when the ratifying conventions drafted bills of rights, they included provision for religious freedom as a matter of course, but other amendments were felt to be far more important.²⁹

The inclusion of the religion provisions among the suggested amendments seems to have derived more from habit than from reason. The written constitutions of the states at the time the national Constitution was adopted generally included some sort of religious freedom provision in their own bills of rights. These provisions, however, were far from uniform in language or construction.

27. THE FEDERALIST No. 84, at 535 (A. Hamilton) (B. Wright 2d ed. 1966).

28. 5 THE FOUNDERS' CONSTITUTION, *supra* note 3, at 24-28.

29. J. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 159 (1961) (footnotes omitted).

If no pattern can be discerned among the provisions of the fundamental documents governing religion within the colonies and the states, a clear direction can be seen in the changes made in these provisions from founding to statehood, which reflect a movement toward toleration. In the beginning, some if not all of the colonies were no more tolerant of minority religious practices than the Mother Country whose persecution they had escaped. By the time of the Revolution and the framing of the national Constitution, however, almost all of the states had declared in their bills of rights that a man's relationship with his god was a matter of individual conscience with which the state should not interfere.

Having announced what they frequently denominated "freedom of religion" in those terms, the states then proceeded to restrict the benefits of this protection to less than the universe of their citizenry. Sometimes the states protected only Protestants. At other times, they protected only individuals who acknowledged the divine origin of the Old and New Testaments, which, strangely enough, if taken literally, meant that the provision applied to Protestants, Catholics, and Mahometans, but not to Deists or Jews. At still other times, the states singled out certain sects for protection or for exclusion from protection—often Quakers and Baptists, or certain kinds of Baptists. Test oaths of varying kinds remained a condition for public office in most jurisdictions, and state financial support of chosen sects continued, even when state constitutions forbade it.

Indeed, by 1787 the provisions of the state bills of rights had become what Madison called mere "paper parchments"—expressions of the most laudible sentiments, observed as much in the breach as in practice.³⁰ On the other hand, although anticlericalism was not widespread, despite the antagonism for Anglican bishops, who never showed up on this side of the Atlantic, many state constitutions provided that no active member of the clergy was eligible for service in the state legislature.³¹

30. 5 THE FOUNDERS' CONSTITUTION, *supra* note 3, at 27.

31. In *McDaniel v. Paty*, 435 U.S. 618 (1978), the Supreme Court held that such a provision, which had found its way into a Tennessee statute, violated the first amendment. Of course, the Court was not of one mind; the case produced four opinions, none of which was subscribed to by a majority.

Most states also provided for support of the clergy by taxation, usually to pay them for teaching in schools that were expected to indoctrinate children in religion as well as in the other "three R's"—"readin', 'ritin', and 'rithmetic." At this time, education at the elementary level, like charity and welfare, principally was the concern of the parish, through its churches, and not the concern of the government. By the late eighteenth century, however, after many bloody legislative battles, members of nonestablished sects frequently were relieved of the obligation to pay taxes for religious instruction except to support the minister-teachers of their own particular persuasion. For example, the New Hampshire Constitution of 1784 provided: "[N]o person of any one particular religious sect or denomination shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect, or denomination."³²

In 1789, then, when Madison was called on to draft the religious freedom provisions of the first amendment in response to a generalized request by the state conventions for such a restraint on the national government, no particular precedent was available to guide him except Virginia's. Disestablishment certainly was not yet the rule among the states. In any event, the most troublesome problem of establishment, the test oath, already had been taken care of by article VI of the Constitution. The other principal establishment problem, tax support for clerics engaged in education, was not a likely national issue. Taxation of some to support the religious activities of others, however, certainly had roiled the states, without generating any uniform answer in practice, however the laws were framed.

My estimate, perhaps because it satisfies my desires, is that Madison turned to his own experience in Virginia to guide his efforts, rather than looking to the sister states for enlightenment. When the Declaration of Independence granted to the people of Virginia the sovereignty that had belonged to the King of England, Virginians assumed that the Anglican church, devoid of its English hierarchy, came along with it. As a result, Virginia had an estab-

32. N.H. CONST. part I, art. 7 (1784). In contrast, the current New Hampshire Constitution provides: "[N]o person shall ever be compelled to pay towards the support of the schools of any sect or denomination." N.H. CONST. part I, art. 6.

lished church even after it divorced itself from England, just as Henry VIII had an established church even after his separation from Rome. This change required no modification of religious doctrine, but only a change of hierarchical authority. Parliament no longer could dictate doctrine, but the House of Burgesses, like any government with an established church, could. The House of Burgesses often was intolerant of the behavior of the so-called "dissenting sects." The Quakers and Baptists generally received the harshest treatment, although in some enactments, such as Patrick Henry's bill establishing "a moderate assessment for the support of the Christian religion" in 1784,³³ they were the most favored dissenters. In the forefront of the battle to establish religious freedom in Virginia were Thomas Jefferson and James Madison, whose efforts climaxed in Jefferson's "Act for Establishing Religious Freedom."³⁴

Shortly after Madison helped to defeat Patrick Henry's bill, largely through his famous *Memorial and Remonstrance Against Religious Assessments*,³⁵ Madison steered Jefferson's bill into law. Madison had to carry the whole load, because Jefferson was in Paris in 1785. His task was made easier, however, because Patrick Henry effectively had been silenced through his election as governor, who in Virginia had no veto power.

The substantive section, section II, was short enough to have made an appropriate constitutional provision in its own terms:

[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but . . . all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and . . . the same shall in no wise diminish, enlarge, or affect their civil capacities.³⁶

33. See R. MEADE, *PATRICK HENRY: PRACTICAL REVOLUTIONARY* 278 (1969).

34. Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 8 *THE PAPERS OF JAMES MADISON* 399 (R. Rutland & W. Rachal eds. 1973).

35. Madison, *A Memorial and Remonstrance* (circa June 20, 1785), reprinted in 8 *THE PAPERS OF JAMES MADISON*, *supra* note 34, at 298 [hereinafter cited as *Remonstrance*].

36. Act for Establishing Religious Freedom § II (Oct. 31, 1785), reprinted in 8 *THE PAPERS OF JAMES MADISON*, *supra* note 34, at 400. Those who need further explication should turn

Madison surely had these documents and experiences in mind when he first proposed the religion clauses for adoption. Although the significance of these documents is clear, their meaning is not. Keeping in mind that one should not read history to accommodate the laws when one is seeking to accommodate the laws to history, I must confess that I have been unable to discover any recorded connection between the Virginia statute and the first amendment religion clauses other than the similarity in language.

For the religion clauses, the legislative history in the House shows only variations in wording. Madison's original submission provided: "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 in any manner, or on any pretext, be abridged."³⁷ In committee, this version was shortened to: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."³⁸ Two amendments were proposed in the House. Congressman Livermore offered: "Congress shall make no laws touching religion, or infringing the rights of conscience."³⁹ Congressman Ames came up with: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."⁴⁰ The Senate, on the other hand, came forth with a more modest conception of nonestablishment. The Senate version required Congress to "make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."⁴¹ Because few governments in the United States, since the early days of New England, had engaged in "establishing articles of faith or a mode of worship," the Senate version apparently cut back on the ban on national fiscal support for religious enterprises in the House version. Madison and the House would have none of this. The conference between the two houses, therefore, produced the amendment

first to section I of the statute, *id.* § I, reprinted in 8 THE PAPERS OF JAMES MADISON at 399-400, and then back to the *Remonstrance*, *supra* note 35.

37. 5 THE FOUNDERS' CONSTITUTION, *supra* note 3, at 25.

38. 1 ANNALS OF CONG. 729 (J. Gales ed. 1834) (Aug. 15, 1789).

39. *Id.* at 731.

40. *Id.* at 766 (Aug. 20, 1789).

41. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 166 (L. de Pauw ed. 1972) (Senate Journal).

as we know it: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."⁴²

Unfortunately, the word "establishment" and the words "free exercise" are not unambiguous. To make them more precise, if original intention rather than current construction is sought, one has to look at the evils that the Framers sought to abate.

Considered against the background of American history in 1789, the Founders' general purpose is not in serious doubt. The government was not to determine how any individual could worship God; nor could it compel an individual, through taxation or otherwise, to support a religious observance by an individual, whether it was the taxpayer's own religion or someone else's. If the Founders' generation truly sought freedom for religious beliefs, however, I find no evidence that they were equally concerned with freedom for irreligion. Quite to the contrary, they sought to protect man's relation to his god. Indeed, from Roger Williams through Locke through Madison and his *Remonstrance*, contemporary thinkers relied on God's will to justify nondiscrimination among any who worshiped a single god. Deists, Jews, and Mahometans came within the announced protection of religious freedom, but I am hard put to find any evidence in the development of legal protection for religious freedom that indicates any intention to protect atheists.

Whether the Framers intended to protect atheists under the free speech and free press clauses, rather than the religion clauses, is another question. Certainly the three provisions of the first amendment were overlapping rather than mutually exclusive. The speech and press clauses were concerned with religious speech as well as political speech. In fact, the origins of the petition and assembly clauses are found, among other historical evils sought to be abated by those provisions, in the *Case of the Seven Bishops*.⁴³

The goal that the delegates to the 1787 Constitutional Convention sought to attain with the 1789 religion amendments, in my opinion, cannot find its precedent in Anglo-American history. Between article VI and the religion clauses, the national government put the capstone on the movement that had become more and more evident on this side of the Atlantic. This movement began

42. U.S. CONST. amend. I, cl. 1.

43. 87 Eng. Rep. 136 (1688).

with the religious intolerance that clearly marked the beginnings of government in New England, continued with the consistently expanding religious tolerance for nonmajority sects that marked later colonial and state governments, and culminated in the right to religious freedom embodied in the first amendment.

The national government seemed to provide for a freedom of religion distinguishable from the freedom provided by the states. The first amendment guaranteed the right to worship and to proselytize, but it also rejected, along with the explicit establishment of a single sect, the implicit establishment of Christianity as the religion entitled to government sustenance.⁴⁴ As Thomas Paine observed: "Toleration is not the *opposite* of Intolerance, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it."⁴⁵ Both also purportedly were erased by the first amendment. Tench Coxe, another prominent essayist, noted: "Mere toleration is a doctrine exploded by our general constitution; instead of which have been substituted an unqualified admission and assertion, that their own modes of worship and of faith equally belong to all the worshippers of God, of whatever church, sect, or denomination."⁴⁶

At least some of the Founders, however, did not expect the religion clauses in practice to guarantee the religious freedoms stated therein. Madison, for example, too often had seen the pious words of state constitutions and statutes perverted by their application, with the majority overriding the parchment guarantees given to minorities. For the national Constitution, however, Madison thought that his goal would be accomplished by the multiplication of sects, which would divide and subdivide religion so that no sect could dominate and each sect would have to allow freedom to the others to be assured of its own freedom. The same type of theory underlay the Constitution's complex system of separation of powers and checks and balances.⁴⁷ Madison, however, could have found the same theory of multiplicity of sects and competition among

44. Mark DeWolfe Howe has called this the "de facto" establishment of religion. M. HOWE, *THE GARDEN AND THE WILDERNESS* 11-12 (1965).

45. T. PAINE, *THE RIGHTS OF MAN* 65 (1791).

46. T. COXE, *A VIEW OF THE UNITED STATES OF AMERICA* 103-04 (Philadelphia 1794).

47. See *THE FEDERALIST* No. 51, at 358 (J. Madison) (B. Wright 2d ed. 1966).

them as a safeguard for religious liberty in Adam Smith's *Wealth of Nations*,⁴⁸ first published in the year of the American Revolution. Smith wrote:

[I]f politics had never called in the aid of religion, had the conquering party never adopted the tenets of one sect more than those of another, when it had gained the victory, it would probably have dealt equally and impartially with all the different sects, and have allowed every man to choose his own priest and his own religion as he thought proper. There would in this case, no doubt, have been a great multitude of religious sects. Almost every different congregation might probably have made a little sect by itself, or have entertained some peculiar tenets of its own. Each teacher would no doubt have felt himself under the necessity of making the utmost exertion, and of using every art both to preserve and to increase the number of his disciples. But as every other teacher would have felt himself under the same necessity, the success of no one teacher, or sect of teachers, could have been very great. The interested and active zeal of religious teachers can be dangerous and troublesome only where there is either but one sect tolerated in the society, or where the whole of a large society is divided into two or three great sects, the teachers of each acting by concert, and under a regular discipline and subordination. But that zeal must be altogether innocent where the society is divided into two or three hundred, or perhaps into as many thousand small sects, of which no one could be considerable enough to disturb the public tranquillity. . . . [This] might in time probably reduce the doctrine of the greater part of them to that pure and rational religion, free from every mixture of absurdity, imposture, or fanaticism, such as wise men have in all ages of the world wished to see established, but such as positive law has perhaps never yet established, and probably never will establish in any country. . . .⁴⁹

Hamilton, also in the true spirit of Adam Smith, added the practical assertion that true freedom of religion would be good for trade among different communities of the nation and the world, and that it would be an attraction for entrepreneurs and artisans, who could

48. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (J. Rodgers 2d ed. 1880).

49. 2 *Id.* at 377-78.

feel secure in their religious freedom when at best they were tolerated and at worst were persecuted at home.

About twenty years ago, the distinguished Harvard legal historian, Mark DeWolfe Howe, published *The Garden and the Wilderness*.⁵⁰ In that work, he pleaded that the Supreme Court had misread history in adopting the Madisonian or Jeffersonian notion of separation, which was concerned that the state would be mulcted by the church to support religious activities that at least some of the citizenry opposed. Howe conceded that this was an attitude of many, including Virginians such as Madison and Jefferson, who had experienced the impositions of the Church of England. He called this attitude "a principle of politics."⁵¹ He argued, however, that Roger Williams had called for separation for a different reason: to prevent the government from interfering in ecclesiastical affairs. He labeled this attitude, which was prevalent in New England, "a principle of theology."⁵² If the New England attitude rather than the Virginia attitude were accepted, Howe concluded, the first amendment would forbid government actions in support of religion only when they interfered with someone's liberties. Government support for religion that did not interfere with anyone's liberty would not be banned under this interpretation.⁵³

This substitution of evangelical separation for political separation has several difficulties. First, in terms of legislative history, the evangelical separation position is connected to the drafting of the first amendment by even less evidence than the political separation position. Second, Howe's argument necessarily assumes that the mere use of a taxpayer's money to provide aid to religious activity is not an interference with that taxpayer's liberty. Third, the proposed Senate version of the religion clauses, which came closer to the evangelical notion of separation, was rejected.⁵⁴ Fourth, many would argue that government aid to religion would endanger religion's independence from government in a manner best expressed by the seventeenth century maxim, "He who pays the piper calls the tune." Howe argued that, as long as aid to religious

50. M. Howe, *supra* note 44.

51. *Id.* at 8.

52. *Id.*

53. *Id.* at 26.

54. See *supra* notes 41-42 and accompanying text.

activity is precluded, the de facto establishment of religion is preserved, whether that establishment is Christianity, Protestantism, Catholicism, Methodism, or some other sectarian control in a particular geographic area.⁵⁵ I can only reply that the Constitution was concerned with limiting government and not with limiting or enhancing ecclesiastical institutions. De facto establishment was not an evil at which the first amendment was directed.

III. CONCLUSION

Constitutional history almost always suffers from what T.S. Eliot described as the cruelty of mixing memory with desire.⁵⁶ At best, the past is never fully recapturable, and the parts that are recapturable may not be an accurate reflection of what actually occurred. When the quarry is neither recorded words nor events, but rather the state of mind that gave rise to the words or events, and when the state of mind is not of one person but of many persons, the pursuit of the past is almost hopeless.

Despite these problems, I think I can confidently say that the intended direction of the first amendment was the enhancement of individual freedom. I also am confident that the objectives were to establish an equality among persons, so that each individual could choose without interference how to commune with his god, and to avoid the havoc that religious conflicts had imposed on mankind throughout history. I doubt, however, that we can learn more from the history of the origins of the religion clauses than the lesson Mr. Justice Jackson derived from the first amendment as a whole when he stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁵⁷

This lesson, however, does not afford particular solutions to particular issues that come before the Supreme Court. As Justice Jackson also observed:

55. See M. HOWE, *supra* note 44, at 95-96.

56. T.S. ELIOT, *The Waste Land*, in COLLECTED POEMS 1909-1962, at 53 (1963).

57. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 642, 642 (1943).

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . .

. . . .
. . . True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions.⁵⁸

The removal of the government from matters of religion by article VI and the first amendment have given this nation 200 years of religious liberty. Americans have not been without religious strife or religious bigotry during this time. On the whole, however, the government has not participated in these conflicts and has not, overtly at least, been guilty of religious discrimination. On this score, the hopes if not the specific intent of the Framers seem to have been realized. Whether Americans can continue to keep government out of religion and religion out of government is dubious, especially in these times when Elmer Gantrys and George Babbitts once more abound in the land. Thanks to the first amendment, however, we can hope—and we can pray.

58. *Id.* at 638-40.