

# Religion and the Constitution: “Eternal Hostility Against Every Form of Tyranny Over the Mind of Man”\*

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We are here to pay homage to Ed Barrett. A lecture in constitutional law may seem to you, as it does to me, a strange way to do so. I do not mean that a lectureship in his name is not appropriate. I mean that subjecting him to a sermon on the subject of constitutional law, a sermon which will probably make him squirm if it does not put him to sleep, is not the best way to express the affection and admiration that we all feel for him. Ed's casebook in constitutional law has long been one of the standards in the field. His writings on the subject have untied many of the knots that the Supreme Court has contrived and that most of us seek to cut rather than to unravel. In a world full of constitutional deconstructionists, his has been a voice of reason. He belongs to no cult, he is committed to no ideology, and he dares to speak plainly when few are plainspoken lest their want of ideas be made apparent. He understands that law is meant to be in the service of society and not its master.

But we are not here to eulogize Ed Barrett: he is one of the few persons who would not enjoy it. Indeed, I think he is extraordinary as a person of great accomplishment who is also modest. In the contemporary world of the law, achievement is seldom coupled with humility.

In this year of the Constitution's bicentennial, we are busily engaged in celebrating the Founding Fathers. It is most appropriate that we pay tribute to the Founding Father of this law school. Like the men of Philadelphia of 1787, Ed undertook to meet an impossible challenge. He built from scratch a law school of the first order, a law school of which its university, alumni, students, faculty, and, indeed, the whole legal profession can be proud. In a few short years, he made U.C. Da-

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vis School of Law a national law school of premier rank. No, he did not create this institution without help. He was, however, a necessary if not a sufficient cause.

I am deeply honored to have been chosen to inaugurate the Edward Barrett Lectures. I shall try to prove myself worthy by at least avoiding, to the extent I can, the trite and the trivial. I shall try to earn my welcome by being brief — comparatively brief. Since I shall be concentrating on the meaning to be given to the establishment clause of the first amendment to the Constitution, however, I cannot as readily avoid being controversial. The subject is one that evokes more heat than light in both lector and auditor. I shall endeavor to treat the subject objectively, abiding by Learned Hand's admonition that a scholar's gown is not an advocate's robe. Hand once wrote:

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 . . . . I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage . . . .<sup>1</sup>

My quest this evening is for some light on the origins of the establishment clause. It begins, however, with a contemporary controversy. During the 1984 Term, the Supreme Court handed down several opinions in which it purported to apply the provisions of the establishment clause.<sup>2</sup> These decisions evoked a great deal of extraordinarily adverse commentary.<sup>3</sup> The commentary was extraordinary not because it was adverse. Rather, it was unusual because it complained essentially that the Court had followed its own precedents. The argument was made that the Court should have abandoned earlier readings of the first amendment in favor of what the critics labeled the "original" meaning of the amendment.<sup>4</sup> The critics purported to know what the original intent of the Framers was. In sum, however, what they sought was to have the Court indulge the state and national governments affording aid to religious activities, so long as that aid was not in favor of a particular church or sect.

I do not mean here to argue the issue whether the only proper way

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<sup>1</sup> L. HAND, *THE SPIRIT OF LIBERTY* 138 (3d ed. 1960).

<sup>2</sup> See *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Thornton v. Calder*, 472 U.S. 403 (1985); *Aguilar v. Felton*, 472 U.S. 91 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>3</sup> See, e.g., Address by Attorney General Edwin Meese before American Bar Association (July 9, 1985).

<sup>4</sup> See, e.g., Address by Attorney General Edwin Meese before Federalist Society Lawyers Division, Washington, D.C. (Nov. 15, 1985).

to ascertain the true meaning of the Constitution is to discover the connotations and denotations of the Framers' words. Indeed, I propose here to do that myself. But while I concede that historical origins are a vital part of constitutional construction, they cannot be the exclusive guides. If we cannot use a dictionary where we need a history, neither can we separate text from context or substitute desire for memory. With Professor Paul Freund, I think that the Constitution can be regarded both as Newtonian and Darwinian, both as a structure and an organism.<sup>5</sup>

When we look back at the origins of our Constitution, it becomes immediately apparent that in at least one respect Attorney General Meese and his cohorts are correct in their assertions that the original intent of the first amendment has been abandoned. The first amendment was not originally intended to be a restraint on state governments. None of the Bill of Rights was. But it is particularly clear that the first amendment was not. When Madison proposed the amendments to the Constitution, his proposal for freedom of religion and freedom of press and speech was written to apply to the states as well as to the central government. But the First Congress would have none of it. They were concerned with freedom from oppression by the national government, and thought they had succeeded in limiting state power through state constitutions. If we had nothing more than this history to rely on, it would be clear that the Supreme Court, in applying the first amendment to the states, has exceeded its mandate. But that would ignore the role of the fourteenth amendment in curtailing the power of the states and protecting the rights of their citizens. There are several theories for reading at least some of the provisions of the Bill of Rights — certainly the first amendment — into the fourteenth. This, however, is too complex a story even to try to synopsise here.<sup>6</sup>

Suffice it to say that it has long been established that the first amendment liberties protected by the fourteenth amendment include those specified in the first. Let me turn to the meaning that was in the first amendment's establishment clause insofar as it was to be a restraint on national authority, and leave the question of extending that meaning to

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<sup>5</sup> P. FREUND, *THE CONSTITUTION, NEWTONIAN OR DARWINIAN*, Department of Justice Bicentennial Lecture (1976).

<sup>6</sup> See *Adamson v. California*, 332 U.S. 46, 51-54 (1947) (Bill of Rights was initially adopted to protect individuals from federal, not state, government; only Bill of Rights provisions that were "implicit in the concept of ordered liberty" became protected from state interference through the fourteenth amendment (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

state action to another time.

First, I should quickly dispose of the canard that it is the Supreme Court which has removed God from the Constitution. That omission was by action of the Framers and it was not unintentional. The difference between the Constitution and the Declaration of Independence in this regard is marked. God is mentioned only once in the Constitution and that is in the attestation clause in which the date is given as "the Year of our Lord one thousand seven hundred and eighty seven."<sup>7</sup>

This is not to say that the American people at the time of the founding were not a religious people. They were, indeed, a Christian people. They were primarily a Protestant people, predominantly congregational adherents of John Calvin in the North and episcopalians detached from the Church of England in the South. All religions, even Christian ones, were not equal de facto or de jure. But when the Founders wrote their charter of government, they did not invoke the authority or blessings of God to justify or condone what they had done. It was "We, the People" who "ordain[ed] and establish[ed] this Constitution for the United States of America."<sup>8</sup> Whether it was more or less presumptuous for them to speak in their own name rather than in God's is a matter on which judgments may differ. But surely the Founders had had enough of the government at Westminster which purported to rule by divine mandate and whose chief magistrate since Henry VIII — even Elizabeth — was its highest ecclesiastical authority. Indeed, Professor Harvey Mansfield has recently asserted that "Modern constitutionalism began with a defense of the independence of the human soul against the claim of divine right. . . . The demon of divine right still needs to be exorcised."<sup>9</sup>

If Professor Mansfield is right, modern constitutionalism was born here in America. And it was here, too, that religious freedom was discovered. I do not mean to repeat the ancient myth that the Pilgrims brought religious freedom with them from England. It is true that they were escaping from religious persecution. Once here, however, they were as intolerant of dissenters as their tormentors had been intolerant of them. Witness their treatment of Anne Hutchinson and Roger Williams.<sup>10</sup>

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<sup>7</sup> U.S. CONST. attest. clause.

<sup>8</sup> *Id.* preamble.

<sup>9</sup> Mansfield, *Constitutional Government: The Soul of Democracy*, THE PUBLIC INTEREST, No. 86, at 84 (Winter 1987).

<sup>10</sup> See CHARLES FRANCIS ADAMS, *ANTINOMINIANISM IN THE COLONY OF MASSACHUSETTS BAY 1636-38* (1894).

The constitutional history of church and state has been different in the United States from what was known in the countries of almost all of our forebears. Our European ancestry knew the controversy between civil and ecclesiastical authority as a contest between sceptre and mitre for hegemony over the lives and minds of the people within their domains. The blood that was spilled and continues to be spilled throughout the world in these contests for authority were never frequent or important in the nation that became the United States. That church and state have seldom, if ever, been locked in battle in this country, does not mean that persecution of religious minorities has been unknown. Indeed, persecution was prevalent before the framing of the Constitution and in evidence even after that. Religious bigotry — like other forms of bigotry — has not been absent from our land even in modern times. For bigotry is a product of ignorance and superstition that affects the educated as well as the illiterate. I mean only to suggest that until now, religious bigotry, unlike racial bigotry, has been the prerogative of individuals and not a force of government.

It may be that the old world church-state issues did not darken the new nation for the simple reason that the people of the United States have not been governed either by crown or church since the revolution. The Constitution was created by the people and the people are their own sovereigns. Government is the agent of the people, subject to self-imposed constitutional restraints. The churches are voluntary associations to whom authority is voluntarily surrendered by individuals and as readily reclaimed by them. The Preamble to the Constitution of what has been called “The First New Nation”<sup>11</sup> proclaims the people as their own masters, beholden as a nation to no rulers, lay or clerical.

As Clinton Rossiter wrote in his book on “The Grand Convention,” the United States was born in a condition of religious toleration which was the inheritance of John Locke and which had developed within the colonies before they became states.

Although the secular culture of the new nation was still in a thinly productive state — with Noah Webster, David Rittenhouse, Francis Hopkinson, Philip Freneau, Charles Wilson Peale, Jedediah Morse, David Ramsay, Joel Barlow, Thomas Jefferson, and John Trumbull the “hopeful proofs of genius” — its religion was moving into new ways of believing and behaving. The Old World pattern of state-church relations had been hurried toward its doom by the Revolution, the most splendid milestone being Virginia’s (that is to say Jefferson’s) Statute of Religious Liberty of 1786; the New World pattern of multiplicity, democracy, private judgment, mutual respect, and widespread indifference was well on its way to

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<sup>11</sup> S. LIPSET, *THE FIRST NEW NATION* (1963).

maturity. Although America was still largely a nation of believers in 1787, many of the believers — and almost all of them in high political station — were thoroughly tolerant of the beliefs of others. Neither upper-class ritualism nor lower-class enthusiasm had much appeal for the solid citizens of the United States, and men who still claimed to enjoy a monopoly of religious truth were no longer in a position to impose their dogmas on dissenting neighbors.<sup>12</sup>

What must be remarked about the famous Act for Establishing Religious Freedom<sup>13</sup> is that it revealed that for Jefferson and Madison, church disestablishment was an intrinsic part of and not distinct from their notion of religious liberty. Concededly, the ideas of religious tolerance which had informed almost all of the laws of the original states were not always as generous as the principles they purported to espouse. Some of the state constitutions were prepared to tolerate only Protestants, some only Trinitarians, some only monotheists; some excluded Catholics or Quakers or Baptist in terms. But the closer they came to the founding of the new nation, the closer they came to a more universal tolerance. Jefferson's statute and then the first amendment took the great leap never taken elsewhere — not yet in England, not yet in Europe — from full religious tolerance to complete religious liberty. As Tom Paine wrote in his *Rights of Man*: "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."<sup>14</sup> Tench Coxe stated the abandonment of toleration with more particularity:

The situation of religious rights in the American states, though also well known, is too important, too precious a circumstance to be omitted. Almost every sect and form of Christianity is known here — as also the Hebrew church. None are tolerated. All are admitted, aided by mutual charity and concord, and supported and cherished by the laws. In this land of promise for the good men of all denominations, are actually to be found, the independent or congregational church from England, the protestant episcopal church (separated by our revolution from the church of England)[,] the quaker church, the English, Scotch, Irish and Dutch presbyterian or calvinist churches, the Roman catholic church, the German Lutheran church, the German reformed church, the baptist and anabaptist churches, the hugonot or French protestant church, the Moravian church, the Swedish episcopal church, . . . the menonist church, with other christian sects, and the Hebrew church. Mere toleration is a doctrine exploded by our general

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<sup>12</sup> C. ROSSITER, 1787: THE GRAND CONVENTION 35-36 (1966) (footnote omitted).

<sup>13</sup> 8 PAPERS OF JAMES MADISON 399 (W.T. Hutchinson, et al., eds. 1973) [hereafter MADISON PAPERS], reprinted in 5 P. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 84 (1987).

<sup>14</sup> T. PAINE, RIGHTS OF MAN 65 (1971).

condition; instead of which have been substituted 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."<sup>15</sup>

With the provisions for disestablishment in the Virginia Statute of Religious Freedom, the concept of religious freedom came to full fruition. Not only was the state barred from imposing sanctions on dissenters, it was precluded as well from rewarding the faithful. Billy clubs and bribes were equally banished. The statute sought to remove government from the business of religion and religion from the business of government.

It is often argued these days that the concept of establishment means only the designation of a particular church or churches as the official ones which can receive governmental aid. It is thought to follow from this premise that the establishment clause forbids only this kind of preferential government action. The argument is faulty both in premise and conclusion. Establishment was not monolithic in nature. The establishment clause did not inhibit only the creation or recognition of an official church. We must remember that the establishment clause bans any "law respecting an establishment of religion,"<sup>16</sup> not only those actually endorsing a religion.

The principal facets of establishment are at least three. First, with establishment, government participated in the control of the church and the church in control of the government. In England, for example, the government determines by law the proper content of the religion: the Book of Common Prayer is government ordained as are the Thirty Nine Articles. The government decides who shall hold high ecclesiastical office, with the Queen the sworn protector of the faith. The government even allots the livings of the ministry. The Bishops sat and sit in the House of Lords by reason of their ecclesiastical offices. In New England, there was no church hierarchy to be appointed, and the order of service was pretty well left to the local ministry, who were chosen by local government. In the South, where the Church of England prevailed, the Anglican Bishops exercised the better part of valor by remaining in England and ordaining the American clergy from there. The first prong of an established church, government control of the administration of the church and its services, or participation by the church in the affairs of government was not a formal reality in the

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<sup>15</sup> T. COXE, NOTES CONCERNING THE UNITED STATES OF AMERICA (1970), reprinted in 5 P. KURLAND & R. LERNER, *supra* note 13, at 94.

<sup>16</sup> U.S. CONST. amend. I.

American states at the time of the framing of the American Constitution except perhaps in the choice of the standard version of the Bible.

A second prong of establishment was the requirement that lasted well into the nineteenth century in England and in many American states. This requirement was that all members of the Government, as well as beneficiaries of other forms of government largesse such as membership in universities, subscribe to the religious doctrines of the established church. In most American states, even those where the constitutions made provisions for toleration, test oaths were the rule rather than the exception. Virginia and Rhode Island were exceptions.

The third major element of establishment was support of a designated church or designated churches through the taxing power and by other forms of governmental imprimatur of church behavior and privileges. This, too, was standard operating procedure in most of the states. Indeed, compelled payment of taxes for the purpose of supporting the ministry — one's own or another's — was the particular evil at which Jefferson's statute was aimed.

Jefferson's Statute for Religious Freedom<sup>17</sup> was revolutionary in its abolition of all three attributes of establishment. The statute regarded the requirement of disestablishment as necessary to complete the right of religious freedom. It is appropriate in light of the many calumnies that have been visited upon those who defend the notion of separation of church and state to iterate that Jefferson's statute was not a denial of God. The statute indeed invoked God as its source for the positions it would legislate. Jefferson was a deist, not an atheist or agnostic. Madison was a fully committed member of the Christian sect to which he belonged. I could, perhaps, make the point of this talk best by simply reading to you the full text of the Statute. But you can do that better yourselves. The statute is short and its rhetoric is more cogent than any reading by me could make it. I should insist here only that it clearly condemns all three attributes of establishment as well as commanding complete toleration of all forms of religion.

I think that it is safe to say that, with occasional backsliding, our constitutional history has reflected a growing acceptance and adherence to the principles of toleration and separation as set forth in Jefferson's Statute. Before I leave the Statute, however, I would remind you that, although Jefferson was the author of the statute, which he wrote in 1779, he was in Europe as an emissary of the Continental Congress in 1786 when James Madison secured its enactment in the Virginia legis-

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<sup>17</sup> 8 MADISON PAPERS, *supra* note 13, at 9.



lature.<sup>18</sup> Madison had paved the way for its enactment by his opposition to Patrick Henry's bill for religious assessment, and through the enormous public support that he evoked by his "Memorial and Remonstrance Against Religious Assessment,"<sup>19</sup> which must be read as part of the legislative history of the 1786 statute. The tie of the 1786 statute to Madison is not unimportant in light of Madison's great responsibility for the contents of the text of the 1787 Constitution and the First Amendment itself.

I have suggested that the first aspect of separation, control of the liturgy and the clergy by the government, has never been an important element in American church-state relations. The 1787 Constitution itself effectively removed the second aspect of separation, disqualification from office for failure to subscribe to the tenets of a state-sanctioned religion. It is too often ignored that Article Six of the Constitution provides: "no religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States."<sup>20</sup>

Oliver Ellsworth, John Marshall's immediate predecessor as Chief Justice of the United States, writing in 1787 as *The Landholder* in defense of this provision of the Constitution, also saw this aspect of separation as but a part of religious liberty, not as a separate concept of disestablishment. He wrote about this provision of Article VI:

Some very worthy persons, who have not had great advantages for information, have objected against that clause . . . . They have been afraid that the clause is unfavorable 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 conscience. If he is a good and peaceable person he is liable to no penalties or incapacities on account of his religious sentiments; or in other words, he is no[t] 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.<sup>21</sup>

When we come to the 1789 provisions of the first amendment relating to religion we again find nothing strange or incompatible with the Virginia Statute for Religious Freedom. Indeed, if the amendment is read

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 298.

<sup>20</sup> U.S. CONST. art. VI.

<sup>21</sup> Ellsworth, *A Landholder VII*, Connecticut Courant, Dec. 17, 1787, reprinted in 4 P. KURLAND & R. LERNER, *supra* note 13, at 639, 641.

with the Virginia statute in mind — and it should be remembered that it is Madison's handiwork — there would be little need for construction. It provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>22</sup> Certainly the phrase "shall make no law respecting the establishment of religion" suggests some broader restraint than "shall make no law establishing a national church."

In any event, the constitutional mandates relating to religion remained all but moribund during most of our history, acting more as counsels of moderation than as rules of decision. Establishment issues tested state courts under their own constitutions, particularly as the Catholic Church more or less successfully fought against compulsory prayer and Bible reading in the public schools. But, the early treatment of Mormons aside, the national government was seldom seen to be guilty of interfering with religious activities. Special beneficent treatment for clerics and religious activities which took — and takes — many and varied forms, including railroad passes, tax exemptions, and exemption from immigration quotas, were held immune from judicial attack. This was largely because national citizens were held to have no right to challenge governmental expenditures in court, even when the expenditures furthered religious interests. And the first amendment, like all of the Bill of Rights, was originally regarded as confining only the national and not the state governments.

The middle of the twentieth century, however, brought about revolutionary changes in constitutional doctrine. Not only was it discovered that national taxpayers had a constitutional right to challenge governmental expenditures that funded religious activities, it was also revealed — and the process was certainly akin to revelation — that the provisions of the sixth article and the first amendment were equally applicable to the states as well as the nation by reason of their inclusion in the fourteenth amendment. Once the question of state behavior became justiciable, the Court announced the applicable standards in Jeffersonian terms. The language of Mr. Justice Black in the *Everson* case in 1947 was, in very large measure, a modern paraphrase of the terms of the Virginia statute of 1786. Black wrote in *Everson*:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to

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<sup>22</sup> U.S. CONST. amend. I.

profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.<sup>23</sup>

It is obvious that for Mr. Justice Black, too, the distinction between freedom of religion and nonestablishment was, at best, a diaphanous line.

For the most part, the Court has adhered to the principles announced in *Everson*. Unfortunately, however, in the four decades since *Everson*, the Court has sought to improve on Black's language by offering new and different rationalizations, frequently tailored to the facts of the case before it and cut on a bias to achieve a result. Sophistry has frequently supplanted reason and principle, as the Court has sought to maintain a neutrality between church and state, first on the one side and then on the other. (I am reminded here of an introduction by Thomas Reed Powell of Harlan Fiske Stone at a Columbia Law Review dinner, where Powell said that Stone was "neither partial, on the one hand, nor impartial, on the other.") The result has been an accumulation of precedents in the field that are often at odds with one another. The Court, in an effort to justify itself to the highly emotional contesting elements in the society, has been able to satisfy no one. Those who write the opinions, like those who attack or defend them, seem frequently engaged in furthering their personal predilections rather than advancing constitutional standards.

Calls for reversal of one judgment or another by constitutional amendment are frequently heard in the land, like the voice of the turtle. But those who do so learn that there is no consensus, certainly not the required extraordinary legislative pluralities needed to effect change by this means. A counsel of patience suggests that the protagonists of governmental support for religion would do best simply to await a change of personnel on the Court. For it is apparent that the political forces of the anti-Jeffersonians, the contemporary George Babbitts and Elmer Gantrys, are gaining political strength as the fundamentalist churches join some of the old-line churches as the most potent Political Action Committees in the nation.

It is to be realized that as the religious differences among American

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<sup>23</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

religions and sects continue to diminish, the prime protection for individual religious freedom on which Madison relied, multiplicity of religious organizations, is disappearing. This will necessarily mean that absent the protections of the Constitution, majority rule will destroy minority rights. And we shall be returned to that state of persecution which the Virginia Statute of 1786, the Constitution of 1787, and the first amendment of 1791 attempted to end. Madison's language in the *Federalist Number Fifty-One* reveals his concern and his notion of the means for protecting against majority tyranny:

Whilst all authority . . . will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . . .<sup>24</sup>

It is probably futile to suggest to those who look to government to finance and to sponsor their religious activities and beliefs to consider some wisdom of Benjamin Franklin:

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 oblig'd to call for the help of the Civil Power, it is a sign, I apprehend, of its being a bad one.<sup>25</sup>

And then there are the counsels of Roger Williams who, even before Jefferson and Madison, called for a total separation of church and state.<sup>26</sup> He reminded us in effect that "he who pays the piper calls the tune." Religion underwritten by the funds or force of the state is likely to become a captive of the state. The history of Freedom where religion is a tool of the state or where the state is a tool of religion is usually a very short history indeed.

It is probably as impertinent for a law professor to try to teach the Supreme Court its business as it once was for a youngster to try to teach his grandmother how to suck eggs. Not only impertinent but futile. And so I tell you what I cannot tell the Justices. I think that most of their problems in the so-called "establishment clause" cases derive from the fact that they are not addressing the right questions. And the right answer is dependent upon the right question. The problem is not,

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<sup>24</sup> THE FEDERALIST NO. 51, at 324 (J. Madison) (C. Rossiter ed. 1961).

<sup>25</sup> Letter from B. Franklin to Richard Price (Oct. 9, 1780).

<sup>26</sup> See J. ERNST, THE POLITICAL THOUGHT OF ROGER WILLIAMS (1929); J. ERNST, ROGER WILLIAMS, NEW ENGLAND FIREBRAND (1932).

as they tend to see it in so many cases, whether government may aid or support religion, whether by way of subvention or imprimatur. That question is answered in the negative by the precepts of the Constitution. The issue usually raised by the establishment cases is whether the government action or inaction is in fact aid to religion. The Court in *Everson* was not riven so much over Black's reading of the establishment clause as by his decision that payment for the busing of a single parochial school student was succor to the church. The factual questions are hard ones, for in our complex modern societies, ecclesiastical institutions, like most institutions, play a multiplicity of roles. A church school is not only engaged in sectarian education but in meeting the requirements of secular education imposed by the state and local authorities as well. Even the church itself is frequently as much engaged in social welfare activities as in saving souls. Only when a public agency is being used for religious worship or religious training is the question an easy one.

I do not mean to ring the tocsin. With all due respect to the adversaries, the church-state issues that have roiled the courts and the nation have not been earth-shaking matters. They are worrisome only for the same reason that it is desirable to keep the camel's nose outside the tent. But behind the petty quarrels there is a fundamentally important principle at stake, which cannot be too often compromised without being lost. What is at venture in the cases denominated church and state are not the picayune governmental expenditures or religious blasphemies involved in state sponsored religious symbols or school prayers. What is at issue is nothing less than preserving the freedom of the individual mind. The preservation of that freedom is the reason behind the first amendment, not only its religion clauses but its speech and press and petition and assembly provisions as well. And in this area, the greatest danger lies in the attempts by adults, who have closed their own minds, to close the minds of others, especially children, through the instruments of government sanctions. Of course, the young are the most vulnerable to indoctrination. But the histories of every European nation, some well into the twentieth century, and not excluding England, have taught us that it is not only the young who are vulnerable to the coercion of religious bigotry.

It is the constitutional objective of freedom of the mind that should inform the construction of the application of the constitutional provisions that come before the Court. Principled decisions, not what Mr. Justice Schaefer used to call "pots and pans jurisprudence," must be its guide. Let me remind you of the opening words of Jefferson's statute:

Well aware that the opinions and belief of men depend not on their

own will, but follow involuntarily the evidence proposed to their minds, that Almighty God hath created the mind free, and manifested his Supreme will that free it shall remain, by making it altogether insusceptible of restraint: That all attempts to influence it by temporal punishment or burthens, or by civil incapacities, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was his Almighty power to do, but to extend it by its influence on reason alone . . . .<sup>27</sup>

In the Second Flag Salute Case, Mr. Justice Jackson spoke in less majestic language when he said: "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."<sup>28</sup>

In the cenotaph for Jefferson, located close to the Lincoln Memorial and at the other end of the Ellipse from the Washington monument, there is emblazoned on the walls a proposition that distills the essence of the Jeffersonian philosophy and encapsulates the first amendment. The words are these: "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man."

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<sup>27</sup> 8 MADISON PAPERS, *supra* note 13, at 9.

<sup>28</sup> Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).