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RELIGIOUS DISESTABLISHMENT AND THE FOURTEENTH AMENDMENT

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Mr. Justice Cardozo, concurring in *Hamilton v. Regents*,¹ assumed that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states² and, on this assumption, found that it would invalidate any state law "respecting an establishment of religion, or prohibiting the free exercise thereof."³ The regulation of the University of California there in question was found, however, not to infringe this assumed guarantee. It was not until 1940, almost seventy-two years after the ratification of the Fourteenth Amendment, that the Supreme Court, in *Cantwell v. Connecticut*,⁴ held that "[t]he fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment,"⁵ and invalidated a state statute on the ground that it contravened the concept of religious liberty thus protected.

Mr. Justice Roberts in the *Cantwell* case construed the "liberty" of the Fourteenth Amendment to include both the establishment and the free exercise clauses of the First Amendment.⁶ This unfortunate bit of dictum, though sound enough if viewed in the light of his interpretation of the establishment clause,⁷ has since led the Court down a path strewn with further dicta on the establishment of religion supposedly interdicted to the states by the Fourteenth Amendment.⁸ If

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1. 293 U.S. 245 (1934).

2. *Id.* at 265.

3. *Id.* at 266. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. AMEND. I.

4. 310 U.S. 296 (1940).

5. *Id.* at 303.

6. *Ibid.*

7. He interprets the establishment clause in terms of religious freedom. See p. 398 *infra*.

8. See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *Everson v. Board of Education*, 330 U.S. 1 (1947).

holding eventually follows upon dictum, the result will be a constitutional *faux pas* as historic and as embarrassing as that in *Swift v. Tyson*,⁹ and one which may be as long lived. This paper frankly questions the validity of such indiscriminating incorporation of the two-fold restriction of the First Amendment into the liberty clause of the Fourteenth.

It is not intended here to discuss the broad question whether the framers of the Fourteenth Amendment intended thereby to incorporate bodily the first eight amendments—a question which has been ably considered elsewhere.¹⁰ Nor, assuming the concept of substantive due process to be included in the restrictions of the Fourteenth Amendment,¹¹ would I deny that the word “liberty” in that Amendment does and should include the fullest measure of personal religious liberty.¹² Further, I take no issue with those who consider certain types of establishment to be naturally and immediately an infringement of that religious liberty and hence forbidden to both federal and state governments by the free exercise clause of the First Amendment as read into the Fourteenth.¹³

The precise question here is whether the religious freedom now guaranteed against state interference under the liberty of the Fourteenth Amendment places exactly the same restrictions upon state action as are placed by the First Amendment upon federal activity—not only under the free exercise clause but under the establishment clause as well. First, it is essential to determine whether the two clauses are synonymous or whether they can be distinguished. Secondly, if they can and should be distinguished, can the establishment clause legitimately be read into the liberty protected by the Fourteenth Amendment?

It is my contention that these two clauses of the First Amendment can and must be distinguished, and that the establishment clause *per se*¹⁴ should not, and historically and logically cannot, be incorporated

9. 16 Pet. 1 (U.S. 1842). The Supreme Court *sua sponte* expressly overruled this case as unconstitutional in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

10. Fairman and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5, 140 (1949).

11. See Note, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365 (1891); Note, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

12. For earlier intimations to this effect in the Supreme Court, see *Hamilton v. Regents*, 293 U.S. 245, 265, 266 (1934); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Berea College v. Kentucky*, 211 U.S. 45, 67 (1908) (dissenting opinion).

13. For instance, the type of establishment considered in *Davis v. Beason*, 133 U.S. 333, 342 (1890), or in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

14. I say “*per se*” because certain types of establishment would be forbidden under the Fourteenth Amendment, not because they are establishments, but because they are such as to infringe the religious liberty protected by that Amendment.

into the liberty protected by the Fourteenth Amendment. The validity of this contention must be sought in the history which led to the adoption of the First Amendment in its present form as well as in the judicial interpretation of the Amendment. A careful investigation of these sources leads me to the conclusion that the establishment clause of the First Amendment, as distinguished from the free exercise clause, both in the mind of the framers of the Amendment and their contemporaries, as well as in the judgment of the Supreme Court during the last century, was meant to accomplish one or both of two purposes. It is clearly regarded: (1) as a reservation of power to the respective states; and (2) possibly as a politically wise means of forestalling any abridgment of the religious freedom of the free exercise clause on the part of the then suspect federal power. These two purposes are found expressed side by side in the debates in the ratifying conventions¹⁵ and in the legislative history of the First Amendment. Either purpose implies an intent to impose upon the federal government a political duty, rather than to confer upon the citizen a constitutional right,¹⁶ and what is not a constitutional right under the First Amendment can hardly be a fundamental concept of liberty protected by the Fourteenth!

Debates in the Ratifying Conventions

The debates in the ratifying conventions of the several states, and the amendments which they proposed to the Constitution, show the contemporary understanding of the relation of the federal government to the subject of religion. The absence of a federal Bill of Rights safeguarding, among other things, religious freedom was excused on the ground that the federal government was one of delegated powers only; that religion was one of the matters over which power had not been so delegated and hence remained within the exclusive cognizance of the respective states.

This general argument was made in Pennsylvania on 23 October 1787 by Mr. Wilson,¹⁷ and in Massachusetts on 23 January 1788 by Mr.

15. These debates are found in THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Elliot 2d ed. 1836). It is unfortunate that there is no similar record of the debates on the First Amendment, when this was submitted to the states for ratification.

16. Of course, a violation of this political duty by the federal government, adversely affecting a citizen, would be *indirectly* a violation of his constitutional rights under the due process clause of the Fifth Amendment. An analogous situation would be an attempt by the federal government to regulate wholly intra-state commerce or internal property rights, or to take over completely the field now covered by criminal laws of the states. Where there is no right to command, there is no duty to obey. But in all these cases the federal government has no right to command, not because of a constitutional guarantee running to the individual, but because only the state has the requisite right under the Constitution.

17. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 435, 436 (Elliot 2d ed. 1836).

Bowdoin¹⁸ and Mr. Parsons.¹⁹ Other advocates of the Constitution entered more fully into the precise question of religious freedom.

In Virginia, Patrick Henry objected strenuously to the absence of a Bill of Rights in general, and of a guarantee of religious freedom in particular²⁰—probably because he found this not so much a stumbling block as a convenient peg on which to hang his opposition to the whole proposed Constitution. His objections were ably met by both Governor Randolph and James Madison in terms which left no doubt of their own views on the relation of the federal government to religion. Thus, on 10 June 1788, Governor Randolph, in reply to Patrick Henry, found a guarantee of religious freedom in the prohibition against any religious test²¹ and vitiated further difficulties in these words:

It has been said that, if the exclusion of the religious test were an exception from the general power of Congress, the power over religions would remain. I inform those who are of this opinion, that no power is given expressly to Congress over religion. The senators and representatives, members of the state legislatures, and executive and judicial officers, are bound, by oath or affirmation, to support this Constitution. This only binds them to support it in the exercise of the powers constitutionally given it.²²

And on 15 June Governor Randolph again urged this lack of any federal power over religion in reply to further objections by Mr. Henry:

He [Patrick Henry] has added religion to the objects endangered, in his conception. Is there any power given over it? Let it be pointed out. Will he not be contented with the answer that has been frequently given to that objection? . . . No part of the Constitution, even if strictly construed, will justify a conclusion that the general government can take away or impair the freedom of religion.²³

James Madison, whose views will be discussed later at greater length, made the same point on 12 June 1788, again in reply to the worrisome Patrick Henry:

There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.²⁴

In the North Carolina debate on 30 July 1788, the same concept was expressed by Mr. Iredell. North Carolina then had religious tolera-

18. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 87 (Elliot 2d ed. 1836).

19. 2 *id.* at 90, 93.

20. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 44, 314, 462, 587, 588 (Elliot 2d ed. 1836).

21. U.S. CONST. Art. VI.

22. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 204 (Elliot 2d ed. 1836).

23. 3 *id.* at 469.

24. 3 *id.* at 330.

tion²⁵ but restricted the holding of state office to Protestants.²⁶ Iredell not only denies that any power over religion has been delegated by the Constitution to the federal government, but does so in terms which clearly suggest that he is considering both the right of the citizen to religious freedom, and the right reserved to the state to require religious tests for office:

They [Congress] certainly have no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentleman 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 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. Every one would ask, "Who authorized the government to pass such an act? It is not warranted by the Constitution, and is barefaced usurpation." The power to make treaties can never be supposed to include a right to establish a foreign religion among ourselves, though it might authorize a toleration of others.²⁷

Iredell's choice of language is, I believe, significant. In his discussion of the general authority of Congress, he does not speak of Congress *establishing* a religion, but denies to it the authority "*to interfere in the establishment of any religion.*"²⁸ Congress has no "power . . . *in matters of religion*" and may not "pass an act *concerning the religion of the country.*"²⁹ It is only when he comes to the authority of Congress under the treaty-making power that he refers for the first time to the possibility that Congress might *establish* a religion. This was in reply to an objection raised by Mr. Henry Abbot. Iredell admits that, under the supremacy clause of the Constitution,³⁰ the treaty-making power might be used to enforce toleration of minority sects by the states. Read in context, he clearly implies thereby that this is an exceptional encroachment upon a domain otherwise reserved to the states; that religion is so reserved, and in no way delegated to the federal government. The exception proves the rule. To ensure similar protection to American citizens abroad, the treaty-making power could be used to enforce toleration by the states of a sect regarded by them as foreign,³¹ just as it may be used to force them to grant prop-

25. N.C. DECL. OF RIGHTS Art. XIX (1776); N.C. CONST. Art. XXXIV (1776).

26. N.C. CONST. Art. XXXII (1776). In Article IV, Section 2 (1835), this provision was amended to make all Christians eligible. Article VI, Section 5 (1868), made ineligible only those who "deny the being of Almighty God," a provision which was retained (N.C. CONST. Art. VI, § 8 (1876)), and is still the fundamental law of North Carolina.

27. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194 (Elliot 2d ed. 1836).

28. Italics added.

29. Italics added. *Quaere*: Does the word "country" here embrace the thirteen states or only North Carolina?

30. U.S. CONST. Art. VI.

31. Such provisions have often been included in treaties of the United States.

erty rights to aliens.³² But it could no more use the treaty power to *establish* a religion against the will of an individual state to have a different religious establishment or none at all, than it could use that power to regulate the whole field of property rights in the states. Both are areas reserved for the exercise of state sovereignty.

The same concept of reservation is implicit in Iredell's reply to the query why the Constitution did not guarantee religious freedom although it required the federal government to guarantee to each state a republican form of government.³³ A federal republic could not long endure if the individual states reserved to themselves the power to establish within their borders an aristocracy or a monarchy, but it is not inconsistent with such federation to reserve to the individual states the power to determine their own polity in religious matters:

It has been asked by that respectable gentleman (Mr. Abbot) what is the meaning of that part, where it is said that the United States shall *guaranty* to every state in the Union a republican form of government, and why *guaranty* of religious freedom was not included. The meaning of the guaranty provided was this: There being thirteen governments confederated upon a republican principle, it was essential to the existence and harmony of the confederacy that each should be a republican government, and that no state should have a right to establish an aristocracy or monarchy. That clause was therefore inserted to prevent any state from establishing any government but a republican one. Every one must be convinced of the mischief that would ensue, if any state had a right to change its government to a monarchy. If a monarchy was established in any one state, it would endeavor to subvert the freedom of the others, and would, probably, by degrees succeed in it. . . . It is, then, necessary that the members of a confederacy should have similar governments. But consistently with this restriction, the states may make what changes in their own governments they think proper. Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.³⁴

In Iredell's concept, therefore, while Congress could not establish a religion, neither could it disestablish a religion in the several states; it could not even guarantee religious freedom in the states. On the same day in North Carolina, Mr. Spaight, on the ground that Congress had no power over the subject of religion, endeavored³⁵ to allay the

32. *Clark v. Allen*, 331 U.S. 503 (1947); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Sullivan v. Kidd*, 254 U.S. 433 (1921); *Geofroy v. Riggs*, 133 U.S. 258 (1890); *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

33. U.S. CONST. Art. IV, § 4.

34. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194, 195 (Elliot 2d ed. 1836).

35. 4 *id.* at 208.

fears of Mr. Lenoir³⁶ that Congress might set up a system of ecclesiastical courts under Article III of the Constitution.

It is clear from the debates in the ratifying conventions that many of the most ardent supporters of the Constitution argued, and evidently succeeded in convincing their colleagues, that religion was a subject reserved to the states, over which the Constitution delegated to the federal government no power whatsoever.

Their success is evinced by the failure in several states to propose any amendments on religious freedom, and by the form which the proposed amendments on this subject assumed in other states. This is all the more striking in view of the vigorous debates on religious freedom in the various state ratifying conventions. The nine amendments proposed by Massachusetts³⁷ contained no mention of religion at all. South Carolina, where the Protestant religion was declared in so many words to be the established religion of the state,³⁸ was content to suggest that the third section of Article VI of the Constitution be amended to read: "but no other religious Test shall ever be required."³⁹ The Committee on Amendments in the Maryland Convention rejected the proposed amendment: "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty."⁴⁰

In Virginia, the Committee Report on the Declaration of Rights and on Amendments was accepted by the Convention and voted into the ratification of the Constitution. The Committee, of which Madison was a member, included in the declaration of rights a paragraph on religious freedom taken from the Virginia Bill of Rights.⁴¹ But significantly, religious freedom was not the subject of any of the amend-

36. 4 *id.* at 203.

37. 1 *id.* at 322, 323.

38. S.C. CONST. Art. XXXVIII (1778). This provision betrays some of the contemporary confusion between the establishment of a religious sect and the incorporation of religious societies: when it was eliminated in Article VIII, Section 1, of the North Carolina Constitution (1790), it was felt necessary to provide that this change did not affect property rights of the various religious societies (S.C. CONST. Art. VIII, § 2 (1790)). The same confusion may be seen in Madison's message vetoing a bill to incorporate an Episcopal church in Alexandria, D.C. See 22 ANNALS OF CONG. 982, 983 (1811). The same confusion is present in the cases of *Turpin v. Lockett*, 10 Va. (6 Call) 113 (1804); *Selden v. Overseers of Poor*, 38 Va. (11 Leigh) 127 (1840); and in state constitutional provisions forbidding such incorporation. For the latter, see VA. CONST. Art. IV, § 32 (1850); VA. CONST. Art. IV, § 30 (1864); VA. CONST. Art. V, § 17 (1870); VA. CONST. Art. IV, § 59 (1902); W. VA. CONST. Art. XI, § 2 (1861-63); W. VA. CONST. Art. VI, § 47 (1872). This prohibition is still contained in the constitutions of Virginia and West Virginia.

39. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 325 (Elliot 2d ed. 1836).

40. 2 *id.* at 552, 553. The Maryland convention did not propose any amendments to Congress.

41. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 657-659 (Elliot 2d ed. 1836). The Virginia guarantee of religious freedom is found in VA. BILL OF RIGHTS § 16 (1776).

ments recommended by the Committee and proposed to Congress by the Convention, probably because this was thought to be provided for by the first of the amendments recommended and proposed, which read:

That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government.⁴²

The procedure adopted in Virginia was followed to the letter by North Carolina⁴³ and Rhode Island,⁴⁴ *i.e.*, the inclusion of religious freedom in the declaration of rights and its omission from the list of proposed amendments, among which was, however, the "reservation of powers" amendment as proposed by Virginia.

Only New York⁴⁵ and New Hampshire⁴⁶ made any definite recommendations to Congress on the relation of the federal government to the subject of religion. The declaration proposed by New York was:

That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others.⁴⁷

The wording of the New Hampshire proposal reflects the same policy which underlies the phrasing of the First Amendment, to which it is very similar: "Congress shall make no laws touching religion, or to infringe the rights of conscience."⁴⁸ The reported debates shed no light on why New Hampshire chose this phrasing, which is essentially that of the Livermore formula to be presently examined.⁴⁹ New Hampshire's constitution required, however, profession of the Protestant religion as a qualification for the offices of state senator, representative and governor,⁵⁰ and empowered the state legislature to authorize the municipalities to provide for the "support and maintenance of public protestant teachers of piety, religion and morality."⁵¹

42. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (Elliot 2d ed. 1836). See also the *Preamble*, 3 *id.* at 656.

43. 4 *id.* at 242-247.

44. 1 *id.* at 334-337.

45. 1 *id.* at 328.

46. 1 *id.* at 326.

47. 1 *id.* at 328.

48. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (Elliot 2d ed. 1836).

49. See p. 385 *infra*.

50. N.H. CONST. PART II SENATE (1784); *Id.* at PART II HOUSE OF REPRESENTATIVES; *Id.* at PART II COUNCIL. These provisions were retained in N.H. CONST. PART II, §§ XIV, XXIX, XLII (1792). The qualification was eliminated by an amendment framed by a state convention in 1876 and ratified by the people on 13 March 1877. 4 AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS 2492 (Thorpe ed. 1909).

51. N.H. CONST. PART I, Art. VI (1784); *Id.* at PART I, Art. VI (1792). This provision is still to be found in the constitution of New Hampshire.

It seems not unreasonable to infer that the precise wording of the New Hampshire amendment was designed to prevent the federal government not only from infringing the liberty of New Hampshire citizens by some other religious establishment but also from passing any laws "touching" the then existing New Hampshire establishment.

The Drafting of the First Amendment

Considerable light is shed on the precise question now before us by a careful investigation of the legislative history⁵² of the First Amendment from Madison's first introduction of proposed amendments⁵³ on 8 June 1789 until they were sent in final form to President Washington on 24 September 1789 for submission to the states.⁵⁴ A discriminating study of its history and context will, I believe, justify a conclusion that the establishment clause was meant to reserve powers to the several states, while the free exercise clause was meant to guarantee religious liberty of the individual citizen against federal encroachment.

Madison submitted his amendments, including the "Bill of Rights," to the House of Representatives on 8 June 1789. Two of his amendments, the fourth and fifth, dealt expressly with the subject of religion. His fourth amendment was to be inserted in Article I, Section 9, of the Constitution⁵⁵ in the following terms:

. . . The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.⁵⁶

His fifth amendment, to guarantee religious freedom against encroachment by the states, was to be inserted in Article I, Section 10, of the Constitution⁵⁷ in this form:

No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.⁵⁸

52. The Supreme Court apparently attaches great importance to the legislative history of the First Amendment, as is evidenced by *Zorach v. Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); and *Everson v. Board of Education*, 330 U.S. 1 (1947).

53. 1 ANNALS OF CONG. 431-442 (1789). Madison proposed two amendments to secure religious freedom. His fourth amendment restricted federal activity, and his fifth amendment guarded against state action. For brevity I refer to these in the text above as his "federal amendment" and "state amendment," respectively. His state amendment was eliminated by the Senate. His federal amendment, as altered by the House, was the third of those actually submitted to the states for ratification. The first two failing of ratification, this became our present First Amendment. These facts lend a certain touch of ironic humor to Mr. Justice Jackson's statement: "This freedom was first in the Bill of Rights because it was first in the forefathers' minds. . ." See *Everson v. Board of Education*, 330 U.S. 1, 18, 26 (1947) (dissenting opinion).

54. 1 ANNALS OF CONG. 913, 914 (1789).

55. Under the rubric "Limitations upon Powers of Congress."

56. 1 ANNALS OF CONG. 434 (1789).

57. Under the rubric "Restrictions upon Powers of States."

58. 1 ANNALS OF CONG. 435 (1789).

And finally he proposed a new article⁵⁹ to the Constitution which, after expressly providing for a separation of powers among the three branches of the Federal Government, declared:

The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively.⁶⁰

A comparison of these three amendments proposed by Mr. Madison, especially in view of the theories which he had propounded in the Virginia ratifying convention,⁶¹ leads to some interesting conclusions.

Both the federal and state amendments proposed by Mr. Madison (his fourth and fifth amendments, respectively) protect the "equal rights of conscience," the one against infringement by the federal government, the other against violation by the states. But the federal amendment placed further restrictions upon the exercise of federal power, which the state amendment did not impose upon state competence in the matter of religion. For the federal amendment expressly further commanded the federal government that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established. . . ."

When this difference is read in the context of his "reservation of powers" amendment, it is clear that he concedes to the states power over religious matters which he would deny to the federal Government. This conclusion may be established on either of two grounds. *First*, the federal amendment expressly declares that the federal government shall have no power to abridge civil rights on account of religious belief or worship, or to establish a national religion. Such powers are, therefore, not delegated to the federal government by the Constitution and hence, by the provisions of the "reservation" amendment, are to be deemed reserved to the states respectively. *Secondly*, while the state amendment prohibits the states from violating the equal rights of conscience, it does not place upon them the further restriction put by the federal amendment upon the federal government. It does not forbid the states to abridge the civil rights of its citizens on religious grounds (as clearly distinguished from "equal rights of conscience"), nor does it forbid them to establish a religion, provided only that the equal rights of conscience be not violated. Since these powers are not prohibited to the states by the Constitution, they are, by the provisions of the "reservation" amendment, to be deemed reserved to the states.

From the original draft of the amendments, as proposed by Madison, two points are clear. *First*, in Madison's view, a law infringing or

59. To be called Art. VII, and the present Art. VII to be renumbered as Art. VIII. 1 ANNALS OF CONG. 435, 436 (1789).

60. 1 ANNALS OF CONG. 436 (1789).

61. See p. 374 *supra*. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (Elliot 2d ed. 1836).

violating the equal rights of conscience is one thing; and a law which abridges civil rights on religious grounds or establishes a religion is quite another. Otherwise, it would be logically unsound to make the distinction which he does make, in two juxtaposed amendments, between restrictions upon federal power and those upon state power. It would betray not only unsound logic but faulty craftsmanship.⁶² *Secondly*, when the difference between these two amendments is read in the light of the "reservation" amendment, the conclusion is inescapable that both amendments protect the religious liberty of the citizen against encroachment by either federal or state governments, while the state amendment has the added function of reserving to the states certain other powers over the subject of religion, provided only that there be no violation of the equal rights of conscience by any state in the exercise of the powers thus reserved.

On 8 June 1789, Madison's amendments were referred to a Committee of the Whole,⁶³ but on 21 July 1789, after much argument,⁶⁴ it was decided that the amendments should be referred instead to a select committee, of which Madison was appointed a member.⁶⁵ On 15 August 1789, the House resolved itself into a Committee of the Whole to consider the report of its select committee. The "reservation" amendment was reported unchanged from Madison's original version, but the two on the subject of religion had been altered by the committee. His fourth amendment, restricting the power of the federal government, now read:

"... no religion shall be established by law, nor shall the equal rights of conscience be infringed."⁶⁶

And Madison's fifth amendment, which placed restraints upon the exercise of state power over religion, had undergone slight alteration and was reported in the following form:

"... 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."⁶⁷

Again, both amendments guarantee the equal rights of conscience against infringements by either state or federal government, but only the federal government is forbidden to establish a religion by law. Taken in conjunction with the provisions of the "reservation" amendment, the prohibition of an establishment of religion by the federal government must be held to reserve this power to the states. Indeed,

62. See the remark of Mr. Justice Rutledge in *Everson v. Board of Education*, 330 U.S. 1, 31 (1947) (dissenting opinion), approving James Madison's conclusion that the First Amendment is a "Model of technical precision, and perspicuous brevity."

63. 1 ANNALS OF CONG. 450 (1789).

64. 1 *id.* at 660-664.

65. 1 *id.* at 664, 665.

66. 1 *id.* at 729.

67. 1 *id.* at 755.

one member of the select committee, Mr. Sherman (who had also been a member of the Constitutional Convention), stated on the floor of the House that he considered the fourth (federal) amendment unnecessary, "inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments."⁶⁸

In reply to the objection of Mr. Sylvester of New York, who feared that the amendment "might be thought to have a tendency to abolish religion altogether,"⁶⁹ Mr. Madison gave his understanding of the proposed amendment as it then stood, and for the first time intimates that the prohibition against establishment may be regarded as a means to secure religious freedom:

MR. MADISON said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that . . . the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.⁷⁰

Two comments may be made on this explanation of the amendment by Madison. When his construction is read in conjunction with the accompanying restriction upon state power and the "reservation" amendment, the question of establishment as such is still to be regarded as among the powers reserved to the states. In his view the amendment *expressly* restricting federal activity in this field will serve two purposes. It will prevent the federal government from using the "necessary and proper" clause of the constitution⁷¹ in order to pass laws which might infringe the rights of conscience. It will prevent the use of the same clause to establish a national religion. These effects are in his mind distinguished. Both are by this amendment reserved to the states. A later amendment is intended to prevent the states from infringing the rights of conscience, but will leave them free as to establishment.

Madison does, however, regard the question of establishment as important; and it may be suggested that he believed it unwise policy to allow the federal government to operate in the establishment field, not only because this was a power reserved to the states, but also be-

68. 1 ANNALS OF CONG. 730 (1789).

69. 1 *id.* at 729.

70. 1 *id.* at 730.

71. U.S. CONST. Art. I, § 8.

cause of possible repercussions in the field of individual rights of conscience. It is well known that he was opposed to the establishment of a religion for this reason.⁷² Hence, it is all the more significant that he never once suggested that the Constitution place such a restriction upon the states to forbid them, as well as the federal government, to "establish a religion," but was content with forbidding them to infringe the equal rights of conscience. But in regard to the federal government, which, after all, has no competence whatever in the field of religion, he would go further. He would protect the *rights* of conscience against infringement by both sovereignties, but in addition would lay upon the federal government a *political duty* which in his mind would be a further protection of those rights. But duty and right are clearly distinguished, and the mere fact that the duty is meant to protect a right does not convert the duty itself into such a right.

Madison's concept of the function of the establishment clause of the federal amendment is strikingly clarified by his defense of the amendment commanding that "no State shall infringe the equal rights of conscience." Mr. Tucker of South Carolina, where the state constitution expressly established the "Christian Protestant religion,"⁷³ objected to this restriction upon state power:

This is offered, I presume, as an amendment to the Constitution of the United States, but it goes only to the alteration of the constitutions of particular states. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much. I therefore move, sir, to strike out these words.⁷⁴

Madison's reply in defense of his proposed restrictions upon state power, and the reasons he advances for their adoption, are highly significant in arriving at his understanding of the two proposed amendments on the subject of religion, and especially of the function of the establishment clause. His reply is thus reported:

MR. MADISON conceived this to be the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.⁷⁵

72. See MADISON, *Memorial and Remonstrance Against Religious Assessments* in 2 WRITINGS OF JAMES MADISON 183 (Hunt ed. 1901), reprinted as appendix to *Everson v. Board of Education*, 330 U.S. 1, 63 (1947).

73. S.C. CONST. Art. XXXVIII (1778).

74. 1 ANNALS OF CONG. 755 (1789).

75. *Ibid.*

Madison, whose interpretation of the First Amendment seems to carry great weight with the present Supreme Court,⁷⁶ thought it "equally necessary" to restrain both federal and state governments "from infringing upon these essential rights." In attempting to accomplish this equally necessary purpose, he did not regard it as essential that state governments as well as the federal should be commanded by the Constitution that "no religion shall be established by law." It is indeed stressing the obvious to conclude that, in his mind at least, the two were quite distinct and that the establishment of a religion by law is not per se an infringement of the equal rights of conscience. Further, the prohibition against establishment is not a prerequisite of religious freedom. Hence, however great his desire to protect religious freedom—and he regarded the restriction upon state power as "the most valuable amendment in the whole list"—he would encroach upon the reserved power of the states only to the extent *necessary* to protect the equal rights of conscience; he would leave it to the individual states to adopt such measures in the field of religion as they saw fit, provided only that they did not thereby infringe those rights. It is highly unfortunate that, in view of the recent judicial interpretation of the First Amendment as read into the Fourteenth, it should now be necessary to stress the obvious!

A further objection was raised, despite Madison's explanation of the federal amendment,⁷⁷ by Mr. Huntington of Connecticut, who feared that it might prevent the enforcement in a federal court of contracts for the support of ministers or the building of meeting houses.⁷⁸ He prefaced his objection with a statement that has proved prophetic:

MR. HUNTINGTON said that he feared . . . that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia [Madison]; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who neglected to perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment.

By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He

76. See cases cited note 8 *supra passim*.

77. 1 ANNALS OF CONG. 730 (1789).

78. 1 *id.* at 730, 731.

hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.⁷⁹

Underlying the objection expressed by Huntington⁸⁰ and Sylvester⁸¹ was doubtless the fear that, while the amendment proposed would prevent Congress from establishing a national religion, it did not expressly preclude Congress from forbidding state "religious establishments" of the kind then existing in several states, nor from interfering with other state provisions on the subject of religion.⁸² I believe this was why the House adopted the motion of Mr. Livermore of New Hampshire that the federal amendment be changed to read: "Congress shall make no laws touching religion, or infringing the rights of conscience."⁸³ This was essentially the same phraseology as in the amendment proposed by the New Hampshire ratifying convention and should be read in that context.⁸⁴ The amendment was adopted in this form on 15 August 1789.⁸⁵

On 20 August 1789, on a motion of Mr. Ames of Massachusetts, the fourth amendment was again altered to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."⁸⁶ The recorded debates do not indicate why this alteration was proposed and adopted. The second clause may have been inserted to protect religious *worship* or other *activity*, with the fear that the clause "infringing the rights of conscience" might be construed to protect only religious *belief* as such, and not worship or other external expressions of that belief as well.

Nor is there any indication why the Livermore formula for the first clause was abandoned and the amendment again phrased in terms of a "law establishing religion," which, though it would prevent establishment of a national religion, again did not expressly preclude Congress from prohibiting or interfering with state establishments. But,

79. *Ibid.*

80. *Ibid.* Huntington's reference to Rhode Island is ambiguous; it may be intended as sarcasm in view of the unsettled conditions prevailing then in that state.

81. 1 ANNALS OF CONG. 729 (1789).

82. Suggested by Crosskey, 2 POLITICS AND THE CONSTITUTION 1068 (1953). For the type of provisions then in state constitutions, see DEL. CONST. Arts. 22 and 29 (1776); MD. DECL. OF RIGHTS Arts. XXXIII and XXXIV (1776); MD. CONST. FORM OF GOVERNMENT Art. IV (1776); MASS. CONST. PART I, Arts. II, III, and PART II, c. VI, Art. I (1780); N.J. CONST. Arts. XVIII and XIX (1776); N.C. CONST. Arts. XXXII and XXXIV (1776); PA. CONST. FRAME OF GOVERNMENT § 10 (1776); PA. DECL. OF RIGHTS Art. II (1776); S.C. CONST. Arts. III, XII, XIII and XXXVIII (1778); Vt. CONST. c. I, § III, and c. II, § IX (1777); and provisions in N.H. CONST. in text supported by notes 50 and 51 *supra*.

83. 1 ANNALS OF CONG. 731 (1789).

84. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (Elliot 2d ed. 1836). See p. 378 *supra*.

85. 1 ANNALS OF CONG. 731 (1789).

86. 1 *id.* at 76.

whatever its motive, the Ames formula must also be read in conjunction with the "reservation" amendment and that forbidding states to infringe the equal rights of conscience. The inclusion of the establishment clause in the fourth amendment and its omission from the fifth must still be explained and, in the light of the "reservation" amendment, can be interpreted only as an express reservation of power to the respective states.

The amendments to the Constitution were referred by the House to a committee to be arranged.⁸⁷ On 24 August 1789, the committee reported its arrangement to the House, and it was ordered that an engrossed copy be sent to the Senate for their concurrence.⁸⁸ The Annals of Congress do not report the form given the amendments by the committee on arrangement, but the three relevant amendments in the copy received by the Senate read as follows:

"[Article III.] Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

"[Article XIV.] No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."

"[Article XVII.] The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively. . . ."⁸⁹

The fate of these amendments in the Senate has been but meagerly reported, and there seems to be no record of the debates on the subject. Though they were received by the Senate on 25 August 1789, it was not until 3 September that Article III came before the Senate for consideration. A motion was first made to amend this article to read as follows:

"[Article III.] Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed."⁹⁰

This motion was defeated, but on motion for reconsideration it passed in the affirmative. It was then moved that the whole article be stricken out, but this motion was also defeated.⁹¹ The Senate then rejected two motions to amend the article as follows:

"[Article III.] . . . Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society. . . ." [First motion.]

"[Article III.] . . . Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed. . . ." [Second motion.]

87. 1 ANNALS OF CONG. 778 (1789).

88. 1 *id.* at 779.

89. JOURNAL OF THE FIRST SESSION OF THE SENATE 104, 106 (1802).

90. *Id.* at 116.

91. *Ibid.*

92. *Id.* at 116, 117.

On the question of approving the third article as it came from the House of Representatives, the Senate again voted in the negative.⁹³ A motion was then made and carried to strike out the words "nor shall the rights of conscience be infringed," and with this modification the Senate approved the third article as proposed by the House.⁹⁴ On 7 September the Senate considered Article XIV, restricting state power over religion, and rejected the proposed amendment to that effect.⁹⁵ On the same day the "reservation" amendment, Article XVII, was altered by the Senate and approved in these terms:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁹⁶

What reasons were advanced in debate for these alterations, and why the Senate rejected several of them, we may never know. It is clear, however, that all of them labored under the difficulty which the Livermore formula was meant to prevent: they did not expressly preclude Congress from interfering with state sovereignty by prohibiting or regulating state establishments or state legislation on the subject of religion. This objection could also be raised against the formula finally adopted by the Senate on 9 September 1789, which read:

". . . Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the Government for the redress of grievances. . . ."⁹⁷

The House disagreed with alterations made by the Senate in this and other amendments, and so both the Senate and the House appointed managers for a conference upon the amendments disagreed to. Mr. Madison, Mr. Sherman and Mr. Vining were appointed by the House,⁹⁸ while Mr. Ellsworth, Mr. Carroll and Mr. Paterson acted for the Senate.⁹⁹ The records of this conference have unfortunately not been preserved, but it resulted in the following formula for what is now the First Amendment:

". . . Congress shall make no Law RESPECTING AN ESTABLISHMENT OF RELIGION, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances. . . ."¹⁰⁰

The Senate had already rejected the amendment forbidding state interference with these liberties—another point on which there was

93. *Id.* at 117.

94. *Ibid.*

95. *Id.* at 121.

96. *Id.* at 123.

97. *Id.* at 129.

98. *Id.* at 141, 142; 1 ANNALS OF CONG. 905 (1789).

99. JOURNAL OF THE FIRST SESSION OF THE SENATE 142 (1802).

100. *Id.* at 145.

disagreement between House and Senate. In a message to the Senate, however, the House informed the Senate that they would recede from all their disagreements—they had refused to accept sixteen of the twenty-six alterations proposed by the Senate¹⁰¹—and would approve the amendments as altered and changed by the Senate, *provided the Senate would also agree to phrase the restriction on Congressional power in the third article as agreed on by the conference.*¹⁰² It is clear that the only part of this article in dispute was that which referred to matters of religion.

After agreement by the Senate,¹⁰³ this was the form in which the amendment was submitted to the states and ratified by them. The vital question is why the House was so insistent on this particular form of words. We have already seen the dissatisfaction in the House with the earlier formula which, in spite of the contrast with the restrictions upon state power and in spite of the conjunction of these two amendments with the "reservation" amendment, some feared might be construed to allow Congress to interfere with existing state establishments or state legislation on religious matters. Once the Senate had rejected the restrictions on state power, with their startling contrast to the restriction placed on the federal government, the danger became more real that, despite the "reservation" amendment, Congress might assume to itself under the "necessary and proper" clause of the Constitution the power to interfere with the exclusive competence of the states over religion.

In any case, however, whatever may have been the effect of the Senate's rejection of the amendment limiting state power over religion, the formula insisted upon by the House as an essential condition for agreement as to other changes demanded by the Senate is clearly a return to the concept of the Livermore formula. This was meant to reserve to the states any and all power over religion, provided only that the equal rights of conscience were not thereby infringed. Now that the latter restriction (Madison's fifth amendment) had been removed, the states were left absolutely free to legislate on the subject of religion. Congress could not prohibit the free exercise of religion, but it was left powerless to interfere with the states if they chose to do so. Only the *establishment* clause, as an explication of the general reservation of power in the Tenth Amendment, explains this Congressional impotence. It would be more than naive to suggest that Congress was unable to protect the religious liberty of American citizens against state action on the ground that it was forbidden "to prohibit the free exercise" of religion!

101. JOURNAL OF THE FIRST SESSION OF THE SENATE 141 (1802).

102. *Id.* at 148; 1 ANNALS OF CONG. 913 (1789).

103. JOURNAL OF THE FIRST SESSION OF THE SENATE 150 (1802).

The First Amendment, therefore, is not only an express guarantee of personal religious freedom against the threat of federal action, but also an application of the principle of federalism. The two purposes must be clearly and unequivocally distinguished, as must the two clauses in which these purposes are separately expressed. The two clauses together were intended¹⁰⁴ to remove the subject of religion completely from the federal competence. Much ink has been spilt over Jefferson's metaphorical description of the First Amendment as building a wall of separation.¹⁰⁵ As Cardozo once remarked, a metaphor is indeed a dangerous and shifting foundation for a rule of law, but at the risk of making confusion worse confounded, I make bold to suggest that the First Amendment built not one, but two walls of separation. It built a wall between the federal government and the American citizen, because it forbade Congress to make any law "prohibiting the free exercise" of his chosen religion.¹⁰⁶ When Congress was further forbidden to make any "law respecting an establishment of religion," a second wall was built. But, in the mind of the framers of the First Amendment, the establishment clause drew a line of demarcation, not between federal power and personal freedom, but between federal and state sovereignty. It is difficult to understand by what logical or historical *tour de force* the wall erected by the establishment clause between those two sovereignties, which left the states free to interfere at will with the religious freedom of their own citizens, can be construed to be a positive guarantee of religious freedom. The establishment clause expressly made it impossible for the federal government to give to the American citizen positive protection in the exercise of the very freedom which by the free exercise clause it was forbidden to infringe; this was something reserved to the states. By what magical metamorphosis does a clause which, under the First Amendment, is expressly a reservation of power to the states, become a denial of that very power by virtue of the Fourteenth Amendment?

104. An expanding concept of federal jurisdiction has, of course, led the federal government into areas which at that time were regarded as completely reserved to the states. This expanding concept will be reflected, of course, in the reservation effected by the establishment clause, as discussed later in this paper.

105. THE COMPLETE JEFFERSON 518, 519 (Padover ed. 1943).

106. That Jefferson, in his letter to the Danbury Baptists, was dealing with this first wall of separation is clear from even a casual reading of the document:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions

Ibid. None of these truths give rise to "establishment" problems, unless the establishment clause be given the peculiar interpretation which it received from Mr. Justice Roberts in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Justice Roberts' construction of the clause will be considered later in this paper.

The Virginia and Kentucky Resolutions

In view of the extreme, and perhaps exaggerated, importance which has been attached by the Supreme Court to the opinions of both Jefferson and Madison on the meaning of the First Amendment,¹⁰⁷ some comment may well be made here on Madison's *Report on the Virginia Resolutions*¹⁰⁸ and on Jefferson's draft of the *Kentucky Resolutions*¹⁰⁹ for the light they shed on the meaning of the First Amendment.

Both the *Virginia* and the *Kentucky Resolutions* were drafted to be presented by those respective state legislatures to Congress in protest against the Alien and Sedition Laws, which were claimed to be an encroachment by Congress into areas forbidden to it by the Constitution. Both Madison and Jefferson rely heavily upon the analogy of the protection given to free speech and press with the restrictions put on Congress in the matter of religion. Their argument is that federal encroachment in the field of speech and press will set a dangerous precedent likely to lead to similar encroachment in the sphere of religion. By looking at the obverse of that coin, we may gather from their comparison of the two areas just what they considered to be forbidden to Congress by the restriction in religious matters. Madison, in his *Report on the Virginia Resolutions* to the 1799-1800 session of the House of Delegates, rests his analogy upon four grounds, which are worth quoting here at length:

First, Both of these rights, the liberty of conscience, and of the press, rest equally on the original ground of not being delegated by the Constitution, and consequently withheld from the government. Any construction, therefore, that would attack this original security for the one, must have the like effect on the other.

Secondly, They are both equally secured by the supplement to the Constitution; being both included in the same amendment, made at the same time and by the same authority. Any construction or argument, then, which would turn the amendment into a grant or acknowledgement of power, with respect to the press, might be equally applied to the freedom of religion.

Thirdly, If it be admitted that the extent of the freedom of the press, secured by the amendment, is to be measured by the common law on this subject, the same authority may be resorted to for the standard which is to fix the extent of the "free exercise of religion." It cannot be necessary to say what this standard would be—whether the common law taken solely as the unwritten, or as varied by the written law of England.

107. *E.g.*, *Zorach v. Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Reynolds v. United States*, 98 U.S. 145 (1878).

108. 4 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546-580 (Elliot 2d ed. 1836).

109. 4 *id.* at 540-545.

Fourthly, If the words and phrases in the amendment are to be considered as chosen with a studied discrimination, which yields an argument for a power over the press, under the limitation that its freedom be not abridged, the same argument results from the same consideration, for a power over the exercise of religion, under the limitation that its freedom be not prohibited.

For, if Congress may regulate the freedom of the press, provided they do not abridge it, because it is said only, "they shall not abridge it," and is not said "they shall make no law respecting it," the analogy of reasoning is conclusive, that Congress may *regulate*, and even *abridge*, the free exercise of religion, provided they do not *prohibit* it; because it is said only, "they shall not prohibit it;" and is not said, "they shall make no law respecting, or no law abridging it."¹¹⁰

His first two arguments need no further explanation, but the third and fourth merit fuller comment. In his third ground he argues that, if the common law restrictions on freedom of the press can be applied, then the common law restrictions upon freedom of religion are also applicable. But it is important to note the scope of the argument. Madison does not deny that the common law restrictions can be applied to religion any more than he denies they can be applied to the press. What he does deny is that they can be applied *by the federal government*. The states are still competent to act in both areas. The reason why Congress cannot validly act in either sphere is not because these two freedoms are *per se* inviolable, but because their positive protection and their regulation is reserved to the states. Freedom of religion is used as the analogue and freedom of press as the analogate, because religion is not only protected from federal interference by the free exercise clause—where it stands on an equal footing with the freedom of press clause—but is also completely and expressly removed *in toto* from federal competence by the establishment clause reserving it entirely to state jurisdiction.

In his fourth argument Madison takes a further step. Here he considers the First Amendment as a whole and concludes that each and every clause is a removal of these subjects from federal jurisdiction and a reservation to the states of all power over them. Congress is not merely forbidden to *regulate* the freedom of the press, provided it does not *abridge* that freedom; but freedom of the press is simply not subject to Congressional legislative jurisdiction, because its regulation, or even its abridgment, is a power reserved to the states: the clause is an application of the principle of federalism and only thereby a guarantee of freedom of the press against federal encroachment. The press need not fear restriction by Congress simply because Congress has no jurisdiction over the press. The same may

110. 4 *id.* at 577.

be said of the command that Congress shall not prohibit the free exercise of religion, and in this latter case Madison bolsters his argument by the complete reservation of such jurisdiction to the states under the establishment clause.

Madison's extreme view is, of course, today untenable. He did not foresee the relations which would necessarily arise between these freedoms and the United States government, with an expanding concept of the extent of federal jurisdiction. He never conceived of the possibility of federal legislation regarding the press under the power, for instance, of prohibiting and penalizing the use of the mails for the transmission of obscene or fraudulent matter, any more than he envisaged the issues arising in cases like *United States v. Ballard*,¹¹¹ or *Reuben Quick Bear v. Leupp*,¹¹² or *Municipality of Ponce v. Roman Catholic Apostolic Church*.¹¹³ The problems of federalism in those good old days were a relatively simple matter. But here we are not concerned with the correctness of his views of federal-state relations or of his comparison between freedom of the press and religious freedom, but only with the light those views shed on his understanding of the effect of the first two clauses of the First Amendment, and of the distinction between the establishment and free exercise clauses.

Jefferson expresses almost identical views in his *Kentucky Resolutions*, which he drafted for the Kentucky legislature in protest against the federal Alien and Sedition Laws of 14 July 1798, and which were adopted on 10 November 1798, by the Kentucky House of Representatives.¹¹⁴

The Establishment Clause as a Political Duty

The legislative history of the First Amendment and the expression of contemporary views would indicate that the establishment clause was meant by its framers to remove the whole subject of religion from the jurisdiction of the federal government and to make it exclusively a matter for state cognizance. By reserving this power to the states, the establishment clause imposed a political duty upon the federal government without directly conferring a constitutional right upon the citizen,¹¹⁵ while the free exercise clause directly guaranteed to the citizen a right of religious freedom against encroachment by the federal government.

That there may also have been a secondary purpose for the establishment clause is not denied. It is quite likely that Madison had in

111. 322 U.S. 78 (1944).

112. 210 U.S. 50 (1908).

113. 210 U.S. 296 (1908).

114. 4 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540, 541 (Elliot 2d ed. 1836).

115. See note 16 *supra*.

mind the reasons given in his *Remonstrance*,¹¹⁶ where he argued against the Virginia establishment as a *danger* to religious freedom. The same concept is implied in Jefferson's letter to the Danbury Baptists.¹¹⁷ By removing questions of religion from federal jurisdiction, not only was a power reserved to the states, but there was an added safeguard against federal encroachment upon the free exercise of religion. The establishment clause, in this interpretation, is a *political duty* designed to safeguard a *constitutional right*, but it does not thereby become itself such a right.

Madison thought it "equally necessary" to secure religious freedom against state encroachment¹¹⁸ and offered an amendment for this purpose.¹¹⁹ But, as seen earlier, he evidently did not consider this equal necessity to require, as an *essential condition* for religious freedom, that the state governments be subjected to the same restraint as the federal government in respect to religious establishments. If he considered the establishment clause to be more than a mere reservation of power to the states, it was because he deemed it to be a wise policy designed as an additional safeguard for that freedom, but not as part and parcel thereof. Thus is explained the apparent inconsistency between his efforts toward complete disestablishment in Virginia¹²⁰ and his failure to include the establishment clause in his fourth amendment to secure religious freedom from state encroachment. As a member of the House of Representatives he attempted to do with regard to the federal government exactly what he tried to do as a Virginian with regard to religious freedom in that state—he adopted what, in his mind, was the best way to guard against any possible encroachment upon religious freedom, and remove any power over religion as an added protection for "the free exercise thereof." But this was not an essential constituent of that freedom, and hence he would prohibit the states only from infringing upon that freedom and not impose on them the political measures which seemed to him *best* suited to safeguard that freedom from any *possible* encroachment. That question he would leave to the various state legislatures. The views expressed in his *Remonstrance* and elsewhere are thus largely irrelevant to an understanding of his concept of the establishment clause of the First Amendment. There is some room for doubting the facile statement of Mr. Justice Black, in *Everson v. Board of Education*,¹²¹ that "the provisions of

116. See note 72 *supra*.

117. See note 105, 106 *supra*.

118. 1 ANNALS OF CONG. 755 (1789).

119. 1 *Id.* at 434, 755.

120. See MADISON, *Letter to Henry Lee* in 2 WRITINGS OF JAMES MADISON 288 (Hunt ed. 1901).

121. 330 U.S. 1 (1947).

the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."¹²²

Religion and the States before the Fourteenth Amendment

Though the Supreme Court, in *Barron v. Mayor of Baltimore*,¹²³ had held that the Fifth Amendment was not a restriction upon the states, it was not until 1845, in *Permoli v. First Municipality*,¹²⁴ that it considered whether the religious guarantees of the First Amendment protected against state action. The Court decided there was no such protection and stated its decision in language which left no doubt that the protection and regulation of religious liberty was a power reserved under the Constitution to the states:

The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the States.¹²⁵

Though the case does not expressly rely on the distinction between the establishment and free exercise clauses, this distinction is implicit in the holding of the case. By being precluded from "prohibiting the free exercise" of religion, the federal government is not precluded from protecting the citizen against the states in that exercise. It is expressly so precluded precisely because it may "make no law respecting an establishment of religion." The principle of federalism formed the basis for the Court's rejection¹²⁶ of the contention that state action violated the guarantees of religious freedom in the 1787 Northwest Ordinance¹²⁷ and in the 1811 Enabling Act for Louisiana.¹²⁸ Of these statutes the Court said:

So far as they conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental

122. *Everson v. Board of Education*, 330 U.S. 1, 13 (1947).

123. 7 Pet. 243 (U.S. 1833).

124. 3 How. 589 (U.S. 1845).

125. *Id.* at 609.

126. *Id.* at 610.

127. 2 FEDERAL AND STATE CONSTITUTIONS 957 (Thorpe ed. 1909). Rights guaranteed by this Ordinance of 1787 were extended to the Mississippi Territory by the Act of April 7, 1798, 1 STAT. 549, 550 (1798); and by the Act of March 2, 1805, 2 STAT. 329 (1805), the inhabitants of the Territory of Orleans (now the State of Louisiana) acquired all the rights of the people of the Territory of Mississippi.

128. Act of Feb. 20, 1811, 2 STAT. 641 (1811).

principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence.¹²⁹

Provisions made, therefore, to protect the religious freedom of the inhabitants of a territory, and even an enabling act requiring minimal guarantees of religious freedom in the state to be admitted,¹³⁰ could not operate to deprive the state of its exclusive competence, for good or for evil, in the sphere of religion—a power reserved by the Constitution to the several states.

The treaty of 1803 with France, ceding the Louisiana Territory to the United States, also contained guarantees of religious freedom for the inhabitants.¹³¹ Counsel in the *Permoli* case did not argue the applicability of these provisions. It would be interesting, but unrewarding, to speculate whether the Court would have held them to be applicable.¹³² There is, therefore, no case directly in point to the effect that the federal government under its treaty-making power might have interfered to a limited extent with state establishments—as had been suggested in the debates of the North Carolina ratifying convention.¹³³ The result, however, which might be expected is indicated by *Municipality of Ponce v. Roman Catholic Apostolic Church*.¹³⁴ The question there raised was whether the Church in Puerto Rico had juridical personality, with capacity to sue and be sued or to acquire and possess property, independently of any incorporation by the government of the island. The Court considered this question to be settled in the affirmative by the provisions of Article 8 of the Treaty of Paris,¹³⁵ which expressly secured the existing capacity of ecclesiastical bodies in Puerto Rico and other former Spanish territories to acquire and possess property. The Court also took judicial notice of the position of the Holy See in international law.

The case clearly involved federal action respecting an establishment of religion. It secured to the Catholic Church in the former Spanish territories the same juridical personality (at least as to capacity to sue and be sued, and to acquire or hold property), as it had possessed under Spanish law as the sole state-recognized church.

129. *Permoli v. First Municipality*, 3 How. 589, 610 (U.S. 1845).

130. It is interesting to note that it was not until 1868 that Louisiana enacted a constitutional guarantee of religious freedom. LA.CONST. tit. I, Art.12 (1868). The earlier constitutions of 1812, 1845, 1852, and 1864 did not provide an express guarantee.

131. Art. III. See 3 FEDERAL AND STATE CONSTITUTIONS 1360 (Thorpe ed. 1909).

132. See construction given a similar treaty provision in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

133. 4 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 191-192, 193-194 (Elliot 2d ed. 1836).

134. 210 U.S. 296 (1908).

135. 30 STAT. 1758 (1898).

To some extent it gave a favored position to the Catholic Church, since it was in fact the only religious body then legally existing in Puerto Rico. But there could be no claim that this provision was one which prohibited the free exercise of religion, provided at least that the other religious bodies which later found their way into these territories should be given the opportunity of acquiring legal personality by means of incorporation.

At the same time, there can be no doubt that the federal government would be absolutely precluded from using even the treaty power as a pretext for prohibiting the free exercise of religion in the acquired territories, or in territories within the jurisdiction of individual states. The difference can be explained only on the ground that the establishment clause removed the question of religion from the jurisdiction of the United States as an application of the principle of federalism, and this reservation of power is subject to the exception of a legitimate use of the treaty power, just as is every other power reserved to the respective states. A treaty might provide that citizens or former citizens of a foreign power be guaranteed complete religious liberty, and to that extent interfere with state sovereignty and state establishments. Such would be a valid use of the treaty power, and such agreements have frequently been made with foreign nations.¹³⁶ But, at least prior to the Fourteenth Amendment, the federal government could not by agreement with a foreign nation provide that all inhabitants of the individual states, whether foreign nationals or American citizens, be granted the most complete religious freedom and that all state establishments be eliminated,¹³⁷ any more than it could thereby provide that inheritance throughout the states should henceforth be *per capita* and not *per stirpes*. Nor could a treaty ever operate to restrict the inhabitants of the several states in the exercise of such religious freedom as was conferred by the constitutions and laws of those states. The command that Congress, or the federal government,¹³⁸ shall not prohibit the free exercise of religion is, within its proper scope, absolute and restricts that government in the exercise of each and every power which it possesses under the Constitution. No treaty could operate to prohibit this free exercise of religion, because this is a constitutional guarantee running from the federal government to every person within the

136. See Treaty of Guadalupe Hidalgo with Mexico Art. IX (1848) (1 FEDERAL AND STATE CONSTITUTIONS 351 (Thorpe ed. 1909)); Treaty Ceding Louisiana Art. III (1803) (3 FEDERAL AND STATE CONSTITUTIONS 1360 (Thorpe ed. 1909)).

137. I prescind here from the question whether this might be done under the treaty known as the United Nations Charter.

138. Although the words of the First Amendment refer only to Congress, there can be no doubt that it was intended as a restriction upon all branches of the federal government. Cf. *United States v. Ballard*, 322 U.S. 78 (1944), where it was applied to judicial proceedings.

United States.¹³⁹ That is not the case with the establishment clause. This, like so many other clauses of the Constitution, draws a line between federal and state sovereignty—a line which the federal government may legitimately, *per modum exceptionis*, overstep in the exercise of the treaty-making power.¹⁴⁰

The Establishment Clause and the Fourteenth Amendment

The Fourteenth Amendment became effective in 1868. It was not until 1940, almost seventy-two years later, that the Supreme Court in *Cantwell v. Connecticut*¹⁴¹ expressly held that this Amendment incorporated the religious freedom guaranteed by the First Amendment. The *Cantwell* decision, however, had already been foreshadowed by a dissenting opinion of Mr. Justice Harlan in *Berea College v. Kentucky*¹⁴² and by dicta in *Meyer v. Nebraska*.¹⁴³ Eleven years after the *Meyer* dicta,¹⁴⁴ the Supreme Court in *Hamilton v. Regents*¹⁴⁵ denied that students had a right, because of conscientious scruples, to be exempted from military training at the University of California. The Court there made this comment on the "liberty" of the Fourteenth Amendment:

There need be no attempt to enumerate or comprehensively to define what is included in the "liberty" protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training.¹⁴⁶

These cases, while intimating that religious freedom is protected by the Fourteenth Amendment,¹⁴⁷ do not do so by incorporating into that Amendment the prohibitions of the First. The earliest suggestion that this is, or should be, the case was made by Cardozo concurring in *Hamilton v. Regents*:¹⁴⁸

I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states.

139. Language used in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115 (1952), raises the interesting question whether the constitutional protection extends to those who are outside the jurisdiction of the United States.

140. See the classic case of *Missouri v. Holland*, 252 U.S. 416 (1920).

141. 310 U.S. 296 (1940).

142. See 211 U.S. 45, 58 (1908) (dissenting opinion).

143. 262 U.S. 390, 399 (1923).

144. I omit mention of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), since—despite its religious overtones—it was not concerned with religious freedom.

145. 293 U.S. 245 (1934).

146. *Id.*, at 262.

147. *Contra*: *Brunswick-Balke-Collander Co. v. Evans*, 228 Fed. 991 (D.C. Ore. 1916), *appeal dismissed*, 248 U.S. 587 (1918); *In re King*, 46 Fed. 905, 912 (C.C.W.D. Tenn. 1891).

148. See 293 U.S. 245, 265 (1934) (concurring opinion).

Accepting that premise, I cannot find in the respondents' ordinance an obstruction by the state to "the free exercise" of religion as the phrase was understood by the founders of the nation, and by the generations that have followed. . . . The First Amendment, if it be read into the Fourteenth, makes invalid any state law "respecting an establishment of religion or prohibiting the free exercise thereof." Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war.¹⁴⁹

The "incorporation" theory, whereby Cardozo for the first time read into the Fourteenth Amendment the guarantee of religious freedom as formulated in the First, was followed by Mr. Justice Roberts' express holding to this effect in *Cantwell v. Connecticut*.¹⁵⁰

The fundamental concept of liberty embodied in that [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.¹⁵¹

Roberts here explains the liberty protected by the Fourteenth Amendment, as does Cardozo, in terms of the First Amendment formula. Roberts and Cardozo include in the prohibition of the Fourteenth Amendment both the establishment and free exercise clauses of the First. But both of them explain the establishment clause in terms of an establishment which is also of its very nature an interference with the free exercise of religion. For Cardozo it meant "government establishing a state religion," to which all citizens would be compelled to subscribe; and he found against petitioners on the ground that there was no "obstruction by the state to 'the free exercise' of religion." Roberts, relying like Cardozo on the similar interpretation given to establishment in *Davis v. Beason*,¹⁵² also explains the forbidden establishment in terms which clearly indicate a problem in religious liberty as such:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom

149. *Hamilton v. Regents*, 293 U.S. 245, 265 (1934) (concurring opinion).

150. 310 U.S. 296 (1940).

151. *Id.* at 303.

152. 133 U.S. 333, 342 (1890).

to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion . . . freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.¹⁵³

These two opinions represent the first judicial attempt to read the establishment clause into the concept of the "liberty" protected by the Fourteenth Amendment. Both cases dealt with problems of religious freedom and the free exercise of religion. The establishment clause is explained in terms of that *freedom*. It means freedom to believe and worship, while the free exercise clause refers only to freedom to act in accordance with one's chosen belief. This was, *in part*, the meaning attached by Madison¹⁵⁴ to his original proposal¹⁵⁵ as amended by the select committee¹⁵⁶ that "no religion shall be established by law, nor shall the equal rights of conscience be infringed"—the phraseology which Congress rejected in favor of the Livermore formula. Madison cannot be cited as authority for Roberts' interpretation of the establishment clause in terms of freedom to believe and to worship. *First*, his interpretation of the rejected formula is not addressed solely to the establishment clause but to the whole amendment. *Secondly*, the amendment at that stage did not contain the free exercise clause, thus destroying the nice parallelism of the Roberts interpretation. I cannot believe that Mr. Justice Roberts would not consider freedom to choose one's own belief as among "the equal rights of conscience." *Thirdly*, to adopt the dichotomy suggested by Roberts would make meaningless Madison's view¹⁵⁷ as to the "equal necessity" of his proposed restrictions upon state power, which contained no establishment clause. It can hardly be supposed that Madison proposed to leave citizens of the states completely free to act in accordance with their beliefs, while conceding to the states the power to prescribe what that belief should be! There is no suggestion that Madison so interpreted the Livermore formula on the establishment clause as finally adopted; and such an interpretation of the clause in terms of religious freedom cannot be reconciled with his understanding of the restriction which he proposed to place upon the individual states.

Roberts' interpretation of the establishment clause, though incorrect historically, would nonetheless logically justify its inclusion within the "liberty" protected by the Fourteenth Amendment: it is fundamental to religious freedom that one be free to choose his own belief and form of worship.

153. 310 U.S. 296, 303 (1940).

154. 1 ANNALS OF CONG. 730 (1789). See p. 379 *et seq. supra*.

155. 1 *id.* at 434.

156. 1 *id.* at 729.

157. 1 *id.* at 730.

Seven years later, in *Everson v. Board of Education*,¹⁵⁸ the Supreme Court was confronted with a case in which Roberts' interpretation of the establishment clause proved inadequate. There a New Jersey taxpayer questioned the constitutionality of state action authorizing reimbursement to parents of sums expended by them in providing bus transportation of their children to and from school, including parochial schools. His challenge was not based on the ground that this constituted an interference with the free exercise of his religion, but on the theory that it was a "law respecting an establishment of religion." It was obvious that there was no interference with his freedom of belief or worship. The Supreme Court, therefore, attempted to present a more comprehensive definition of the establishment clause and, for the first time, to justify its incorporation into the due process clause of the Fourteenth Amendment. Mr. Justice Black's justification for including the establishment clause in the Fourteenth Amendment, while both facile and fascinating, is hardly illuminating:

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. . . . The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. . . . There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina . . . quoted with approval by this Court in *Watson v. Jones* . . . "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority."¹⁵⁹

This represents the only attempt by the Supreme Court to state the reasons why the establishment clause, especially with the broad interpretation later given it,¹⁶⁰ should be read into the "liberty" of the Fourteenth Amendment. The reasoning of Mr. Justice Black will, therefore, bear close analysis. Such analysis and a study of the cases cited show that his conclusion, to put it kindly, is far from conclusive.

158. 330 U.S. 1 (1947).

159. *Id.* at 14, 15.

160. *Id.* at 15, 16.

(1) *Terrett v. Taylor*,¹⁶¹ decided by Mr. Justice Story in 1815, is first cited to show the meaning and scope of the First Amendment as elaborated by the Supreme Court. In that case Virginia statutes of 1776, 1784 and 1785 confirmed to the Episcopal Church in Virginia the title to lands acquired when it was the established church, and also incorporated the individual vestries. On the ground that these statutes were inconsistent with the Virginia Bill of Rights of 1776,¹⁶² the legislature attempted in 1798 and 1801 to divest the Episcopal Church of its glebe lands and destroy the corporations earlier created. The Supreme Court, reviewing a decision of the lower federal court for the District of Columbia,¹⁶³ held this attempt to be void as an unlawful seizure of private property. The decision was not based on the First Amendment—of which the Court made no mention whatever. Of the Virginia Bill of Rights guaranteeing religious freedom, the Court made this surprising statement:

Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations.¹⁶⁴

It is asserted by the legislature of Virginia, in 1798 and 1801, that this statute was inconsistent with the bill of rights and constitution of that State, and therefore void. Whatever weight such a declaration might properly have as the opinion of wise and learned men, as a declaration of what the law has been or is, it can have no decisive authority. It is, however, encountered by the opinion successively given by former legislatures from the earliest existence of the constitution itself, which were composed of men of the very first rank for talents and learning. And this opinion, too, is not only a contemporaneous exposition of

161. 9 Cranch 43 (U.S. 1815).

162. VA. BILL OF RIGHTS § 16 (1776).

163. The case involved title to property of the Episcopal Church in Alexandria, in that part of the District of Columbia which had been ceded to the United States by Virginia.

164. *Terrett v. Taylor*, 9 Cranch 43, 49 (U.S. 1815).

the constitution, but has the additional weight that it was promulgated or acquiesced in by a great majority, if not the whole, of the very framers of the constitution.¹⁶⁵

Of the other cases cited by Mr. Justice Black after this inauspicious beginning, *Watson v. Jones*¹⁶⁶ was not a First Amendment case and will be considered below. *Davis v. Beason*¹⁶⁷ and *Reynolds v. United States*¹⁶⁸ upheld the validity of statutes of the Territories of Idaho and Utah, respectively, placing legal sanctions on the practice of polygamy; both cases hold that the free exercise clause does not confer immunity for practices otherwise criminal. In *Reuben Quick Bear v. Leupp*,¹⁶⁹ the Court refused to declare invalid a federal contract with the Bureau of Catholic Indian Missions to pay for the Catholic education of Indian children at the request of their parents from certain funds held by the federal government. These "treaty funds" and "trust funds," though held by the government, were considered as belonging to the Indians. They were not public moneys and hence did not fall under a *statutory* prohibition against expenditure of public moneys for sectarian purposes. Of the contract with the Bureau of Catholic Indian Missions, the Court said: "It is not contended that it was unconstitutional, and it could not be."¹⁷⁰ The Court further held that to forbid the Indians to spend their own money for sectarian purposes, even though their funds were administered by the federal government, would be an interference with the free exercise of their religion.

(2) The *Everson* opinion then states that the "broad meaning given the [First] . . . Amendment by these earlier cases" has been applied by the Court to state action involving an infringement of religious freedom. Seven cases are cited, all decided since 1940, upholding the free exercise of religion, especially freedom of evangelizing by Jehovah's Witnesses, against state interference.¹⁷¹ A casual reference is also made to *Bradfield v. Roberts*,¹⁷² holding that Congress was not precluded under the establishment clause from contracting with a Catholic hospital for the care of indigent patients in the District of Columbia.

(3) Against this background of judicial interpretation of the First Amendment, Mr. Justice Black finally reaches the crucial question

165. *Terrett v. Taylor*, 9 Cranch 43, 51 (U.S. 1815).

166. 13 Wall. 679 (U.S. 1872).

167. 133 U.S. 333 (1890).

168. 98 U.S. 145 (1878).

169. 210 U.S. 50 (1908).

170. *Id.* at 81.

171. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940)

172. 175 U.S. 291 (1899)

why the establishment clause should also be applied to the states *via* the Fourteenth Amendment. This problem is solved, neatly and with dispatch, by the bland assertion: "There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause."¹⁷³ It is assumed, but not shown, that the two clauses of the First Amendment are both interrelated and complementary; and their interrelation is asserted to be well summarized by a quotation from an 1843 South Carolina decision, cited with approval by an 1872 opinion of the Supreme Court—although neither case dealt with the First Amendment!

In the case relied on, *Harmon v. Dreher*,¹⁷⁴ the court refused to recognize any rights to church property in a Presbyterian minister who had been excommunicated and unfrocked by church authorities. Together with hundreds of cases before and since, the South Carolina court accepted as final the excommunication imposed by the church synod. It held that any re-adjudication of this question by a civil court would be an unwarranted intrusion by government into the internal affairs of a religious body, to the detriment of *religious freedom*. This was quoted with approval in *Watson v. Jones*,¹⁷⁵ where the court recognized as lawful owners of a Presbyterian church in Louisville that faction of the congregation which was recognized by the General Assembly of the Church. In both cases, even though civil property rights depended on membership in the church, a determination by lawful church authority on the question of membership was regarded as controlling and binding upon the civil courts. Both cases rely on general principles of American jurisprudence, rather than on constitutional guarantees,¹⁷⁶ and neither case mentions in this context the First Amendment.

The *Harmon* case certainly does not stand for the proposition for which it is cited in *Everson*—that the establishment and free exercise clauses of the First Amendment are so interrelated that both should be read into the "liberty" of the Fourteenth. The first dictum in the *Harmon* case, which says that civil liberty has been preserved by rescuing temporal institutions from religious interference, is most probably a reference to a peculiar South Carolina constitutional pro-

173. *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

174. *Speers Eq.* 87, 120 (S.C. 1843).

175. 13 Wall. 679, 730 (U.S. 1872).

176. "That opinion (*Watson v. Jones*) has been given consideration in subsequent church litigation—state and national. The opinion itself, however, did not turn on either the establishment or the prohibition of the free exercise of religion." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 110 (1952). The principle of the *Watson* case has been severely criticized by one authority on the ground that it is destructive of religious freedom. ZOLLMANN, *AMERICAN CIVIL CHURCH LAW* 198-235 (1917).

vision¹⁷⁷ making clergymen ineligible for state offices. Such a provision today would be suspect as a violation of the free exercise clause of the First Amendment¹⁷⁸—certainly it would not be regarded as a prohibition of establishment. Further, it is difficult to see what the interrelation, if any, expressed in the *Harmon* case has to do with the objective of the *Everson* opinion—the incorporation of the establishment clause into the Fourteenth Amendment. Whatever interrelation is expressed by the *Harmon* dicta,¹⁷⁹ it is at most some connection between the rescue of temporal institutions from religious interference and the protection of religious liberty from governmental interference. Does Mr. Justice Black equate “no law respecting an establishment of religion” with the rescue of “temporal institutions from religious interference”? It is ordinarily supposed that aid by the state to religion may result in domination of religious bodies by the state,¹⁸⁰ not vice versa. Nor does such freedom of temporal institutions from ecclesiastical domination appear prominent in the meaning of the establishment clause as defined by Mr. Justice Black in the very next paragraph of his opinion:

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 to or to remain away from church against his will or force him to 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

177. S.C. CONST. Art. I, § 23 (1790). The interrelation between this provision and the guarantee of religious freedom (S.C. CONST. Art. VIII, § 1 (1790)) becomes even more tenuous when we remember that it was retained from Article XXI of the South Carolina Constitution of 1778; this Constitution also provided in Article XXXVIII:

That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants, demeaning themselves peaceable and faithfully, shall enjoy equal religious and civil privileges.

178. Madison so regarded such proposals: MADISON, *Letter to Henry Lee* in 2 WRITINGS OF JAMES MADISON 288 (Hunt ed. 1901). In fact, it is precisely where there is an established church, as in England today and in the South Carolina of 1778, that such provisions occur, and there is a real need for a separation of church and state. Where both are officially recognized as parts of one sovereignty, a separation of powers is in order.

179. See comments in notes 177 and 178 *supra*.

180. See the remark of Mr. Justice Jackson in *Everson v. Board of Education*, 330 U.S. 1, 27 (1947) (dissenting opinion), on this danger.

organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."¹⁸¹

The Court has never since squarely faced the problem why the "liberty" of the Fourteenth Amendment should include the establishment clause of the First; and the cavalier solution attempted in the *Everson* case is far from satisfactory. The rest of the story is soon told. In *Illinois ex rel. McCollum v. Board of Education*,¹⁸² the Court assumed that it was so included and expressly refused to distinguish or overrule its "holding" to that effect in the *Everson* case.¹⁸³ The clause was there held to forbid the use of public school buildings to conduct classes in religion for pupils whose parents so requested. In *Doremus v. Board of Education*,¹⁸⁴ the Court made the same assumption but denied the standing of a taxpayer to enjoin the reading of the Old Testament and the Lord's Prayer in New Jersey public schools.¹⁸⁵ In the recent case of *Zorach v. Clauson*,¹⁸⁶ the Court allowed the New York public schools to release, during certain hours, those pupils who wished to attend religious instruction conducted off the school premises. The *Zorach* case again affirmed the "holding" of the *McCollum* opinion that the establishment clause was made applicable to the states by the Fourteenth Amendment.

It is clear from these later cases that the problem of the application of the establishment clause to the states has not been faced since the *Everson* decision. Indeed, the problem has been largely lost sight of. Since 1947, the Court has simply asked itself one question: Does the challenged action violate our concept of the "separation" which we assume should exist between church and state? If so, it will be held contrary either to the establishment clause of the First Amendment or to the free exercise clause, as seems best suited to the facts of the case. Thus, in *Zorach v. Clauson*,¹⁸⁷ Mr. Justice Douglas flatly stated: "The constitutional standard is the separation of Church and State." And in *Kedroff v. St. Nicholas Cathedral*,¹⁸⁸ the test for the Court was whether a New York statute "violates our rule of separation between church and state." The offending statute was therefore banned under the "free exercise" clause.

181. *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

182. 333 U.S. 203 (1948).

183. *Id.* at 211.

184. 342 U.S. 429 (1952).

185. A recent New Jersey case, *Tudor v. Board of Education*, 14 N.J. 31, 100 A.2d 857 (1953), held that the First Amendment's establishment clause was violated when the Board allowed distribution of New Testaments after school on public school premises by a Bible Society to those pupils whose parents so requested. The Supreme Court of New Jersey distinguished its earlier holding in *Doremus v. Board of Education*, 5 N.J. 435, 71 A.2d 732 (1950), *appeal dismissed*, 342 U.S. 429 (1952).

186. 343 U.S. 306 (1952).

187. *Id.* at 314.

188. 344 U.S. 94, 110 (1952).

SOME CONCLUSIONS

(1) In the state ratifying conventions and the first Congress, the relation of the federal government to religion was regarded as a problem in federalism. They feared, not only federal interference with individual religious freedom, but also federal interference with state establishments or quasi-establishments then existing. To them, there was a danger of such interference with state sovereignty by affirmative federal action to establish a national religion, or by negative action disestablishing state establishments.

(2) This concept found complete expression in the formula finally adopted for the First Amendment, as supplemented by the general reservation of powers expressed in the Tenth Amendment. The free exercise clause precluded federal interference with individual religious freedom. The establishment clause prevented any federal interference, whether affirmative or negative, with existing state establishments: it reserved all power in this regard to the several states.

(3) As a reservation of power, the establishment clause is not *per se* a constitutional guarantee of liberty. A clause which in effect told the states in 1789 that they had *all* power over religion so far as the Constitution was concerned, cannot in 1940 be read into the word "liberty" of the Fourteenth Amendment to mean that they have *no* power.

(4) If Madison and the other framers of the First Amendment considered the establishment clause to be anything more than a reservation of power to the states, it was as a political duty imposed upon the federal government. Even if meant as an additional safeguard to religious freedom from federal encroachment, it does not thereby become a constitutional right of the citizen. Hence, however wise this additional safeguard may be, it is not in itself a liberty, and certainly is not so fundamental as to be "implicit in the concept of ordered liberty" protected by the Fourteenth Amendment.¹⁸⁹

(5) Certainly the Fourteenth Amendment does, and should, protect the religious freedom of the citizen against state invasion. I have no fundamental quarrel with those who would achieve this effect by incorporating the constitutional guarantee of the First Amendment. This guarantee is, however, expressed in the free exercise clause. At the same time, any state action—whether called establishment or some sweeter name—which infringes upon the religious freedom of the individual, should be forbidden to the states under the liberty protected by the Fourteenth Amendment. But state activity which does not in any way infringe the religious freedom of the individual,¹⁹⁰ should not

189. Cf. *Palko v. Connecticut*, 302 U.S. 319, 324-326 (1937).

190. It is difficult to see how such infringement was present in the *Tudor* case, cited in note 185 *supra*, where every precaution was taken to see that no em-

be forbidden to the states simply because it happens to fit the Supreme Court's idea of a "law respecting an establishment of religion"—and still less on the even more doctrinaire ground that it violates their concept of "separation of church and state."

(6) The inclusion of the establishment clause into the liberty of the Fourteenth Amendment by the Supreme Court has no firm basis in the history of the clause or in logic; and the sole attempt to justify its inclusion has been unsatisfactory. Further, it is unnecessary. The religious freedom of American citizens has been more than adequately safeguarded by state constitutions¹⁹¹ and laws. I believe that freedom is safer in the hands of the legislatures and judges of forty-eight states¹⁹² than at the mercy of varying interpretations by nine men sitting in Washington.¹⁹³ Let the Supreme Court, under the liberty of the Fourteenth Amendment, prescribe minimal standards of religious freedom: the states are still free to enlarge these standards by their own constitutions¹⁹⁴ and laws. But the added restriction of the establishment clause by the Court is precisely that use of the Fourteenth Amendment which Holmes so much deprecated.¹⁹⁵ It substitutes the judgment of the Supreme Court for that of local representative bodies in determining the wisdom of such social experiments as were attacked in the *McCullum* and *Zorach* cases. It may eventually result in an abridgement of the very religious freedom which the Court desires so earnestly to safeguard.¹⁹⁶

barrassment came to pupils who were not to receive the Bibles. Nor was there any claim to this effect made in the *Everson*, *McCullum*, and *Zorach* cases—although in these it is easier to see how such constraint might be involved.

191. The various state constitutions contain, altogether, more than 900 provisions on the subject of religion and religious freedom.

192. Anyone conversant with the enormous mass of state cases on the subject will agree with the statement that religious freedom has been well protected on the state level.

193. As but one example of the extremes between which the Court has alternated, compare *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), with *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). While the movement of the Court has been toward greater liberality, there is no guarantee that this will always be true. Meanwhile, it is disquieting to note that, prior to 1940, those aggrieved by state action relied almost exclusively on the guarantees of religious freedom in the state constitutions; since then, almost exclusive reliance has been placed on the First and Fourteenth Amendments.

194. These are in general much more detailed provisions.

195. See his dissent in *Truax v. Corrigan*, 257 U.S. 312, 342, at 344 (1921).

196. Mr. Justice Reed, dissenting in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 238 (1948), points to some concrete possibilities, which could be multiplied *ad infinitum*. Consider, for instance, the extremely valuable aid given to organized religious groups by the exemption of their ministry and theological students from military service; and the very practical effect on the free exercise of religion if the broad interpretation of establishment in the *Everson* case were to overrule the holding in *Arver v. United States*, 245 U.S. 366, 389, 390 (1918), and *United States v. Stephens*, 245 Fed. 956 (D. Del. 1917), *aff'd per curiam*, 247 U.S. 504 (1918). The problem is magnified when consideration is given to the thousand and one areas where the state governments come into contact with religion.