MADISON'S RELIGION PROPOSALS JUDICIALLY CONFOUNDED: A STUDY IN THE CONSTITUTIONAL LAW OF CONSCIENCE

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I. Politics, Constitutional Ratification, and a Bill of Rights

On an occasion commemorating the transmittal of a proposed bill of rights by Congress to the states for adoption, it is first appropriate to recall the history of how it was that James Madison, the putative father of the Bill of Rights, came to be its progenitor. Fittingly, for the subject of this paper, the most pressing reason for Madison's efforts on behalf of the Bill of Rights was the political pressure to remedy the absence in the Constitution of a guarantee against the establishment of a national religion and the abridgment of the free exercise of religion. The pressure induced him to make campaign promises to propose appropriate constitutional amendments in the First Congress.

This paper will concentrate on Madison's proposals concerning religion: the adoption of some proposals in the First Congress; and the subsequent adoption and emendation by the Supreme Court of other proposals which were rejected by the First Congress. It will then discuss the oftentimes tortuous process by which these results were achieved and the subsequent conceptual difficulties this achievement entailed. Finally, it will suggest a simpler, consistent constitutional rationale for those results the public has generally accepted. It will indicate the remaining conceptual inconsistencies in the results the public has not generally accepted, and suggest that the coincidence of conceptual difficulty and public nonacceptance indicates the necessity of an early judicial re-examination both of the premises and the conclusions of certain decisions.

Reflecting the corporate wisdom of the constitutional fram-

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ers,[1] Madison did not "believe"[2] in the necessity for the inclusion

[1] Early in the Constitutional Convention, on May 23, 1787, Charles Pinckney proposed: "The legislature of the United States shall pass no law on the subject of religion, nor touching or abridging the liberty of the press: nor shall the privilege of the writ of habeas corpus ever be suspended, except in case of rebellion or invasion." 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 131 (J. Elliot 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]. The proposal was referred to the Committee of the Whole, which was appointed to consider the state of the American Union, *id.* at 132, where it languished. Instead, on August 20, 1787, Pinckney proposed: "No religious test or qualification shall ever be annexed to any oath or office under the authority of the United States." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 334-35, 340-42 (M. Farrand ed. 1911) [hereinafter FARRAND]. On August 30, he moved to add the substance of his proposal to one empowering Congress to establish qualifications for federal office and employment. *Id.* at 461, 468. His proposal was adopted and eventually became part of article VI of the Constitution. *Id.* at 579, 603.

The reason for Pinckney's substitution of his more modest proposal in place of the more striking declaration concerning religion and press does not appear. It would seem, however, that it was the general agreement of the framers that because the legislature of the United States would not, under the Constitution, have the power to pass laws concerning religion and press, such a broad declaration would be inappropriate. When later, opponents of the Constitution attacked it for its failure to include such a broad declaration, its supporters adopted that line of defense.

Hamilton made such a defense, the most detailed in THE FEDERALIST No. 84, at 575-87 (A. Hamilton) (J. Cooke ed. 1961). In fact, he argued that the Constitution did provide for certain protection of individual liberties including: limitations on the effect of a judgment of impeachment, art. I, § 3, para. 7; a general prohibition of a suspension of habeas corpus, art. I, § 9, para. 2; a prohibition of a bill of attainder or ex post facto laws, art. I, § 9, para. 3; a proscription against titles of nobility, art. I, § 9, para. 8; a requirement for trial by jury in criminal cases, art. III, § 2, para. 3; and restrictions on prosecutions for treason, art. III, § 3.

Moreover, because bills of rights were in origin stipulations between kings and subjects, they were not, he argued, strictly necessary where, as made evident in the preamble to the Constitution, the people had sacrificed nothing. Similarly a bill of rights was far less applicable to the Constitution which was intended to regulate the general political interests of the nation rather than every kind of personal and private concern. Indeed, under these circumstances bills of rights would be dangerous. It was argued:

> They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

THE FEDERALIST No. 84, *supra*, at 579. For a similar argument, *see* speech of James Wilson before the Pennsylvania State House, in PENNSYLVANIA AND THE FEDERAL CONSTITUTION 143-49 (1888).

[2] I place quotes around the word believe, because it should be understood that the word is not here being used in its strictest sense: the acceptance of the truth of a proposition on the authority of someone loved or respected and trusted—thus, the belief of a child in what the parents say, the belief of a member of a group in the words of the leader, or the belief of a person in the teachings of One who is regarded as God. Under an attenuated meaning, religious belief becomes an intellec-

of a bill of rights in the Constitution. Madison's belief was that of the practicing politician. He concluded, based on his calculated assessment of all the political circumstances, that it was more prudent that the Constitution not have a bill of rights.[3] In the Virginia ratifying convention, Madison, echoing Hamilton in *The Federalist Number 84*,[4] argued that because the new government did not have the specific power to abridge the free exercise of religion, it could not do so. It was a government of enumerated and delegated powers.[5] Moreover, he asked: "If an enumeration be made of our rights, will it not be implied, that every thing omitted is given to the general government?"[6] Earlier in the convention, defending the Constitution for its failure to provide a bill of rights for the protection of religion, Madison contended that the multiplicity of sects in any one state or in the United States as a whole was religion's best protection. Madison contended that "[i]f there were a majority of one sect, a bill of rights would be a poor protection for liberty."[7] Later, writing to Jefferson after the convention was over and after the Constitution had been ratified by the requisite number of states, he declared:

> My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others.[8]

This position may have originally been based on the understanding that the greatest danger to ratification lay in the people's fears of a central government with wide, excessive powers, and that in consequence nothing should be included in the Constitution

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tual assent to the articles of a specific creed. *See generally* J. TURNER, WITHOUT GOD, WITHOUT CREED 22-26 (1985) (discussing challenges to belief).

3 *See infra* notes 5-7, 15.

4 *See supra* note 1 and accompanying text.

5 3 ELLIOT'S DEBATES, *supra* note 1, at 620 (Virginia) (statement of Mr. Madison).

6 *Id.*

7 *Id.* at 330.

8 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 297 (1977) (footnote omitted) (emphasis in original) [hereinafter MADISON PAPERS]. For the chronology of the states' ratification of the Constitution, *see* C. WARREN, THE MAKING OF THE CONSTITUTION 819-20 (1928). Actually, New Hampshire supplied the requisite ninth vote of ratification on June 21, 1788, while the Virginia and New York conventions were in session. The Virginia ratification followed on June 25th, followed by New York on July 26th. *Id.* at 820. For the politics surrounding ratification, *see* R. RUTLAND, THE ORDEAL OF THE CONSTITUTION 245-47 (1966).

which could be used to excite these fears. The caution was justified. In opposing ratification Patrick Henry and many others played upon the people's fears of a central government with wide and excessive powers. Shrewdly, they hit upon the "necessary and proper" clause as the vulnerable spot in the framers' line of defense.[9] They argued, prophetically as it turned out,[10] that it was a "sweeping clause"[11] out of which in a broad construction all the powers of a full-fledged government could be summoned, exercised and justified, leading quickly to the consolidation of all crucial powers of government in the United States, the diminution of state power and the oppression of the people's liberties.[12] According to this view, the absence of a bill of rights in the Constitution was not an assurance of freedom, but a threat, particularly to the freedom of the press.[13]

Under the pressure of this argument, Madison and his friends gave ground. They secured ratification of the Constitution in the Virginia state convention by claiming little, if any, substantive content in the necessary and proper clause,[14] and by assuring that, fol-

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9 A finding that the argument was made as early as the Pennsylvania ratifying convention can be inferred from Wilson's defense of the clause, as "saying no more than that the powers we have already particularly given, shall be effectually carried into execution." 2 ELLIOT'S DEBATES, *supra* note 1, at 468 (Pennsylvania) (statement of Mr. Wilson). Later, Wilson asserted "that the powers are as minutely enumerated and defined as was possible, and . . . the general clause, against which so much exception is taken, is nothing more than what was necessary to render effectual the particular powers that are granted." *Id.* at 481 (Pennsylvania) (statement of Mr. Wilson). *See also* Hamilton's statement in THE FEDERALIST No. 33, at 203-06 (A. Hamilton) (J. Cooke ed. 1961), that the clause was technical in purpose, intended only to empower Congress to pass laws to carry into effect the powers specifically enumerated earlier in the section in which it was placed, art. I, § 8. In sum, he wrote: "The [necessary and proper clause], though it may be chargeable with tautology or redundancy, is at least perfectly harmless." THE FEDERALIST No. 33, *supra*, at 205.

10 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

11 *See* THE FEDERALIST No. 33, *supra* note 9, at 205 (Hamilton's acknowledgment of this characterization); 3 ELLIOT'S DEBATES, *supra* note 1, at 437 (Virginia) (Henry's reference to the "sweeping clause" in the Virginia convention).

12 This was the gist of Henry's speech in the Virginia convention. *See* 3 ELLIOT'S DEBATES, *supra* note 1, at 436-38 (Virginia).

13 *Id.* at 441-42 (Virginia) (speech of George Mason in the Virginia Convention). *See also id.* at 218, (Virginia) (speeches of James Monroe); *id.* at 445-49 (Virginia) (statement of Patrick Henry).

14 Several ratifiers repeated Hamilton's argument in THE FEDERALIST No. 33, *surpa* note 9, and Wilson's reasoning in the Pennsylvania convention, in their initial speeches during the Virginia convention. *See* 3 ELLIOT'S DEBATES *supra* note 1, at 206 (Virginia) (statement of Mr. Randolph); *id.* at 425 (statement of Mr. Nicholas); *id.* at 438-39 (statement of Mr. Madison). *But cf. id.* at 470-71 (Randolph's later statement acknowledging a somewhat larger meaning for the clause). Counsel for Maryland made use of Hamilton's statement in THE FEDERALIST No. 33 and of the statements in the convention cited above in his oral argument in McCulloch v.

lowing ratification, the friends of the Constitution would in the First Congress press for the adoption of amendments securing a bill of rights.[15] With this claim and assurance, Virginia ratified the Constitution[16] and because Virginia's ratification was crucial,[17] the new government of the United States was formed.

The future of the new government, however, was not secure. Patrick Henry rightly anticipated that the organization and operations of the federal government would result in the diminution of the powers and influence of state governments. Henry was particularly concerned with its impact in Virginia where his own personal influence was strong, and therefore, he continued his opposition to the new government. For this reason he was determined to undo ratification by working for a second constitutional convention which, among other things, would consider the adoption of a bill of rights and the substantial reduction of federal power.[18] Henry was also determined to prevent Madison from entering the new government and used his great influence within the Virginia legislature to block Madison's election to the United States Senate.[19] Henry next took

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Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See* Lynch, *McCulloch v. Maryland: A Matter of Money Supply*, 18 SETON HALL L. REV. 223, 284 (1988).

15 *See* Letter from James Madison to Rufus King (June 22, 1788) (written during the Virginia convention), *reprinted in* 11 MADISON PAPERS 167, *supra* note 8. In pertinent part, Madison stated:

> On the side of the Constitution it is in contemplation to preface the ratification with a declaration of a few obvious truths which can not affect the validity of the act, and to follow it with a recommendation of a few amendments to be pursued in the constitutional mode. This expedient is necessary to conciliate some individuals who are in general well affected, but have certain scruples drawn from their own reflections, or from the temper of their Constituents.

Id. The fact that Madison was not convinced of the necessity of a bill of rights is most evident from the last sentence.

At the convention, George Wythe introduced the resolution implementing the strategy set forth in Madison's letter. 3 ELLIOT'S DEBATES, *supra* note 1, at 586-87 (Virginia).

16 R. RUTLAND, *supra* note 8, at 248-50.

17 *Id.* at 245.

18 The idea for a second constitutional convention to consider the various amendments to the Constitution proposed by certain state conventions originated in New York. Governor Clinton of that state took up the idea and sent it in a circular letter to the governors of the other states, hoping to secure the support of their legislatures. *Id.* at 264-66. *See also id.* at 285 (Henry's support of the proposal).

19 *See* Letter from Edward Carrington to James Madison (Nov. 9, 1788), *reprinted in* 11 MADISON PAPERS, *supra* note 8, at 336; Letter from Henry Lee to James Madison (Nov. 19, 1788), *reprinted in* 11 MADISON PAPERS, *supra* note 8, at 356. Mr. Lee stated in pertinent part: "Mr. Henry on the floor [of the state legislature] exclaimed against your political character and pronounced you unworthy of the confidence of the people in the station of Senator. That your election would terminate in producing rivulets of blood throughout the land." *Id.*

"pains in forming the counties into districts for the election of [Representatives to the House] to associate with [the county of Madison's residence] such as [were] most devoted to his politics, and most likely to be swayed by the prejudices [leveled against Madison]."[20]

He then prevailed on Monroe to oppose Madison for the seat for that district.[21] Finally, he stirred up Baptist opposition to Madison in the district, telling them that Madison, as a framer of the Constitution which had failed to include a guarantee for religious liberty, was soft on freedom.[22]

Madison, recalling his past efforts on behalf of the Baptists in the Virginia legislature, assured them that he was a friend of religious liberty and that, if elected to Congress, he would support a movement to amend the Constitution and secure religious liberty.[23] He won.[24]

II. MADISON'S PROPOSALS FOR A BILL OF RIGHTS

Having failed in his effort to kill Madison's candidacy, Henry next persuaded Theodorick Bland, one of his supporters who had also been returned to Congress, to introduce in the House a resolution, adopted overwhelmingly by the Virginia legislature, calling for the convocation of a second constitutional convention.[25] There Henry's influence came to an end. Madison, rising in the House on the day before Bland presented the Virginia resolution, gave notice that he intended to bring before it the subject of constitutional amendments.[26] On this basis—Madison's

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20 Letter from James Madison to Thomas Jefferson (Dec. 8, 1788), *reprinted in* 11 MADISON PAPERS, *supra* note 8, at 384.

21 Letter from Edward Carrington to James Madison (Nov. 26, 1788), *reprinted in* 11 MADISON PAPERS, *supra* note 8, at 369.

22 Letter from James Madison to George Eve, a Baptist Minister (Jan. 2, 1789), *reprinted in* 11 MADISON PAPERS, *supra* note 8, at 404-05.

23 *Id. See also* Letters from James Madison to Thomas Mann Randolph (Jan 13, 1789), *reprinted in* 11 MADISON PAPERS, *supra* note 8, at 415-17; Letters from James Madison to a Resident of Spotsylvania County (Jan. 27, 1789), *reprinted in* 11 MADISON PAPERS, *supra* note 8, at 428-29. Eve, relying on Madison's past support of the Baptist cause in state political battles, actively supported him among the Baptists. *See* Letter from Benjamin Johnson to James Madison (Jan. 19, 1789), *reprinted in* 11 MADISON PAPERS, *supra* note 8, at 423-24. *See infra* note 35 (opinion of Senator Butler of South Carolina that Madison's subsequent introduction of proposals for constitutional amendments was lukewarm and in vindication of these campaign promises).

24 *See* 11 MADISON PAPERS, *supra* note 8, at 438 n.1.

25 Letters from George Lee Turbeville to James Madison (Oct. 27 and Nov. 10, 1788) 11 MADISON PAPERS, *supra* note 8, at 323-24 and 339-41. On Bland's efforts, *see* R. RUTLAND, *supra* note 8, at 298-99.

26 Bland presented the resolution of the Virginia legislature on May 5, 1789. 1

influence in the House was superior—the resolution of the Virginia legislature was filed the following day, and eventually forgotten.[27]

Five weeks later, Madison presented to the House his proposals for constitutional amendments.[28] The House was less than enthusiastic over the prospect of an early consideration of the subject.[29] Madison, however, insisted.[30] The great mass of those who opposed ratification, he claimed, did so because of its lack of a bill of rights.[31] He admitted that he had never considered the provision so essential as to make it improper to ratify the Constitution until amendments were added.[32] A bill of rights, he now said, would restrain abuses of power by both the executive and legislative branches, and more pertinently, restrain abuses of power by a majority of the community working through the legislature. Nevertheless, he conceded the force of the opponents' arguments.[33]

While it was true that the government of the United States was one of limited, enumerated powers, it had certain discretionary powers with respect to the means it might employ in the implementation of those powers. Referring to the argument that Henry and his supporters used in the Virginia ratifying convention, Madison pointed out that Congress could adopt such laws as it deemed necessary and proper, and in so doing could perhaps impinge upon personal freedoms.[34] He presented his proposals[35] which were eventually referred to a Select Committee

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ANNALS OF CONG. 248-49 (J. Gales ed. 1789). Madison's announcement was made just before adjournment on the preceding day. *Id.* at 247.

27 *Id.* at 251.

28 *Id.* at 424.

29 *Id.* at 425-29 (opinions of Justices Jackson, Burke, White, and Page).

30 *Id.* at 431. Madison urged:

> "And I do most sincerely believe, that if Congress will devote but one day to this subject, so far as to satisfy the public that we do not disregard their wishes, it will have a salutary influence on the public councils, and prepare the way for favorable reception of our future measures.

Id.

31 *Id.* at 432-33.

32 *Id.* at 436.

33 *Id.* at 437.

34 *Id.* at 437-38. For Madison's complete statement, *see id.* at 436-42. *See also* letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 11 MADISON PAPERS, *supra* note 8, at 295-300 (discussing Madison's perspective on the proposed constitutional alterations).

35 1 ANNALS OF CONG., *supra* note 26, at 434-36. Concerning these proposals, Senator Pierce Butler of South Carolina, writing to the future Justice James Iredell of the United States Supreme Court, on August 11, 1789, wrote:

composed of one member from each state.[36]

The Committee reported.[37] The House made certain revisions and forwarded them to the Senate[38] which in turn made revisions of its own.[39] A joint House-Senate Committee prepared its own compromise version which on September 24, 1789, was approved together with a resolution requesting the President to transmit to the governors of the thirteen states, including Rhode Island and North Carolina which had not as yet ratified the Constitution, copies of the adopted amendments.[40] The following day the Senate, also approving the compromise, concurred in that resolution.[41] On October 2, 1789, President George Washington, writing to the respective state governors, carried out this request.[42] In this fashion the Bill of Rights was delivered to the states for their action. If Madison was its insistent father and the First Congress its reluctant mother, Patrick Henry with his threats of a second constitutional convention may be viewed as the enforcer of the union from which the Bill of Rights ultimately issued.

But, like most enforcers Henry was not particularly pleased with the results. The adoption of the Bill of Rights meant there would be no second constitutional convention, no chance to limit the powers of the new government. It meant that his days of national influence were at an end and Madison's had only begun. Because history, like the world, loves a winner, it credits Madison, forgives his hesitation, overlooks the necessities which impelled him to perform, and remembers Henry mainly for his one grand line regarding liberty and death.

History also credits Madison with fashioning the language of the first amendment. This is true in a sense; but because Madison wished to preserve the Constitution and prevent a second constitutional convention, the amendments he originally

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> A few *milk-and-water* amendments have been proposed by Mr. M., such as liberty of conscience, a free press, and one or two general things already well secured. I suppose it was done to keep his promise with his constituents, to move for alterations; but, if I am not greatly mistaken, he is not hearty in the cause of amendments.

2 G. McREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 265 (1858) (emphasis in original).

36 1 ANNALS OF CONG., *supra* note 26, at 665.

37 *Id.* at 703.

38 *Id.* at 779.

39 *Id.* at 77.

40 *Id.* at 913-14.

41 *Id.* at 88.

42 30 WRITINGS OF GEORGE WASHINGTON 426-27 (J. Fitzpatrick ed. 1939).

proposed were a distillate of those recommended by the state ratifying conventions of New York, Massachusetts, New Hampshire, Maryland, South Carolina, North Carolina, and Virginia.[43]

He, therefore, included only such measures "as [were] most likely to pass" and which would "if passed, be satisfactory to a majority of those who have opposed the Constitution . . . ."[44] Virginia's proposals were probably the most important to Madison, because he was a resident of that state and had to run for re-election there.[45] He also desired to placate North Carolina and Rhode Island, so as to persuade them to enter the Union quickly.[46]

Madison, in fact, proposed three amendments regarding religion. The language of his first proposal, which formed the basis for the religion clauses in the eventual first amendment, was substantially changed.[47] His second and third proposals which he presented as matter for separate amendments were rejected.[48]

The first proposal contained three parts and read: "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."[49] The first part would appear supplemental to the provisions of article VI, which prohibited the requirement of a religious test as a qualification for any federal office or public trust.[50] It would further prohibit laws disqualifying someone from voting, serving on a jury, or holding property because of religion.

The first proposal was based on one recommended by the Virginia convention, which stated:

> That religion or the duty which we owe our Creator, and the manner of discharging it can be directed only by reason and

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43 E. DUMBAULD, THE BILL OF RIGHTS 36 (1957).

44 Letter from James Madison to Thomas Jefferson (June 13, 1789), *reprinted in* 12 MADISON PAPERS *supra* note 8, at 217-18.

45 E. DUMBAULD, *supra* note 43, at 21, 23 n.42.

46 1 ANNALS OF CONG., *supra* note 26, at 432.

47 *See infra* notes 49 and 75.

48 *See infra* notes 76-82.

49 1 ANNALS OF CONG., *supra* note 26, at 434. This proposal constituted the first paragraph of Madison's fourth amendment, which in form would have constituted an amendment of art. I, § 9 of the Constitution.

50 Article VI provides in part: "[B]ut no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI., cl. 3.

> conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.[51]

The Select Committee to which all of Madison's proposals were referred eliminated the first part of his first proposal, and reported the last two as follows: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."[52] In the House sitting as a Committee of the Whole, Representative Roger Sherman of Connecticut moved to strike the reported proposal as unnecessary. Madison, in reply, explained the words meant "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."[53]

When Representative Benjamin Huntington, also from Connecticut, expressed his fear that the clause might be broadly construed so as to disenable a federal court from enforcing a church member's duty to support the minister and to bear the expense of building a meeting-house as required by the congregation's by-laws,[54] Madison, foregoing the question of federal judicial jurisdiction, assured him that the proposal was designed to prevent the establishment of a national religion, whereby one or perhaps two sects could achieve pre-eminence and compel others to conform.[55] To satisfy Huntington, Madison moved an amendment, restoring the word "national" before "religion"—the phraseology in the proposal he had originally submitted to the Select Committee.[56]

Representative Samuel Livermore of New Hampshire, however, was not satisfied with either Madison's amendment or the version of the Select Committee.[57] His state, as well as Massachusetts and Connecticut, had some form of church establishment, and what he and his state may have wanted was some assurance that not only would the federal government not set up its own established church, but that it would not disestablish a state religion.[58] In any event,

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51 IV DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA (C. Bickford and H. Veit eds. 1986) [hereinafter BICKFORD].

52 1 ANNALS OF CONG., *supra* note 26, at 729.

53 *Id.* at 730.

54 *Id.*

55 *Id.* at 731.

56 *Id. See also supra* note 49 and accompanying text (language of Madison's first proposal).

57 1 ANNALS OF CONG., *supra* note 26, at 731.

58 In New Hampshire at that time, different denominations were supported at

reiterating the language contained in the constitutional amendment requested by the New Hampshire state convention,[59] Livermore moved that: "Congress shall make no laws *touching* religion, or infringing the rights of conscience."[60] Madison withdrew his amendment after the suggestion that the use of the word "national" smacked of a "consolidated" federal government, i.e. one of broad unenumerated powers.[61] Livermore's motion was then approved.[62] Within the week, however, the House, taking up the report of the Committee of the Whole, changed the wording again on the motion of Representative Fisher Ames of Massachusetts, so as to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[63] Subsequently, it was changed in committee to read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."[64] That version was sent to the Senate.[65]

In unreported proceedings, the Senate debated over the specifics of the House version. After rejecting a motion to strike the whole,[66] and various motions to change other language in the House version,[67] the Senate initially agreed to strike from the pro-

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public expense, depending on the choice of the individual communities. T. CURRY, THE FIRST FREEDOMS 185-88 (1986). Vermont, though not yet a state, had a similar system. *Id.* at 188-90. In Massachusetts and Connecticut, Congregationalism was the sole established church system. *Id.* at 174-84. *See* Sky, *The Establishment Clause*, 52 Va. L. Rev. 1395, 1413 (1966) (discussing the purpose of Livermore's amendment and the proposal of the New Hampshire convention).

59 IV BICKFORD, *supra* note 51, at 15.

60 1 ANNALS OF CONG., *supra* note 26, at 731 (emphasis added).

61 *Id.* Representative Elbridge Gerrys of Massachusetts made the suggestion. *Id.*

62 *Id.*

63 *Id.* at 766.

64 I DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 136 (L. De Pauw ed. 1972) [hereinafter DE PAUW].

65 All the proposals, however, were transmitted as separate articles of amendment to be added as a supplement to the Constitution rather than in amendments to specific constitutional provisions, the form Madison originally proposed. *Id.* at 135-36.

66 1 JOURNAL OF THE FIRST SESSION OF THE SENATE 116 (M. Claussen ed. 1977) [hereinafter M. CLAUSSEN].

67 First, the Senate agreed to strike from the House version the words "religion or prohibiting the free exercise thereof," and insert instead "one religious sect or society in preference to others." *Id.* This motion would have left intact the prohibition against the infringement of "the rights of conscience." *See supra* note 63. Thereby, the amendment would have read: "Congress shall make no law establishing one religious sect or society in preference to others, or to infringe the rights of conscience."

The Senate next rejected a motion to adopt as its own version the following

posed amendment the words "nor shall the rights of conscience be infringed."[68] Within a week, however, the Committee scrapped the House version entirely, so as to provide: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . . ."[69] This language, it has been suggested, could have enabled the federal government to provide financial support to churches, a result the Senators from the New England states and Senator Richard Henry Lee of Virginia, an ally of Henry, might have approved in principle. The New England states, as mentioned, largely supported establishment[70] and the Henry forces in Virginia also supported the cause of establishment.[71] Lee and Henry may have also hoped for a tactical political advantage. The Senate version, if adopted, would not satisfy the Baptists who had opposed the Virginia bill for state financial support of the churches, and could form the basis of a charge against Madison in the next election that he had not kept his promise regarding establishment and that the new government was not to be trusted.[72]

The Senate version of this and the other constitutional amend-

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amendment: "Congress shall not make any law, infringing the rights of conscience, or establishing any religious sect or society." 1 M. CLAUSSEN, *supra* note 66, at 116. This would seem to have been aimed at prohibiting the support of any religion, not just the one preferred religion, indicating a senatorial tolerance of the former practice.

The Senate next rejected a motion to adopt as its own version the following amendment: "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." *Id.* at 117. The reason for the rejection of the amendment seems to lie in the poor grammatical construction. The word, "thereof," seems to have no precise antecedent. And, awkwardly, the amendment shifted from the active voice in the first two clauses to the passive in the third.

68 1 M. CLAUSSEN, *supra* note 66, at 117.

69 *Id.* at 129.

70 *See supra* note 58.

71 *See* Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U. L. Rev. 1274, 1280 (1961) (discussing Lee's motivation). For a discussion of Henry's earlier support of establishment in Virginia against Madison and Jefferson, see Singleton, *Colonial Virginia as First Amendment Matrix: Henry, Madison and Assessment Establishment*, 8 JOURNAL OF CHURCH AND STATE no. 3 (Autumn 1966), *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY 157 (R. Alley ed. 1985).

72 *Cf.* Letter from James Madison to George Washington (Dec. 15, 1791) (concerning the delay of the Virginia Senate to ratify the amendment containing the religion clauses), *reprinted in* 12 MADISON PAPERS *supra* note 8, at 453. Madison attributed the delay to Henry's influence, but thought it would backfire and would hurt his cause with the Baptists. *Id.* He felt the Baptists would remember that Henry and his friends had voted against the disestablishment of the Virginia clergy. *Id.*

ments were forwarded to the House[73] which accepted them with three exceptions, one of which concerned the religion clauses.[74] At the House's insistence, the amendment was fashioned in its final form: "Congress shall make no law respecting an establishment of religion, or prohibiting a free exercise thereof . . . ."[75] In this version, the prohibition of congressional support beyond the subject of "articles of faith . . . or mode of worship" to "establishment," would eliminate the possibility of financial support to a church.

Madison's second proposal affecting religion was rejected. The proposal guaranteed: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[76] Evidently, he did not regard a religiously motivated decision not to bear arms as pertaining to the free exercise of religion.

The final clause of the proposal narrowly survived a motion to strike in the House.[77] Congressman Egbert Benson of New York, making the motion, considered the subject too complex to be satisfactorily controlled by a constitutional provision. It would be better, he said, to leave it to the discretion of Congress whose humanity could be relied on "to indulge this class of citizens in a matter they are so desirous of . . . ."[78] Eventually, however, the clause was eliminated in the Senate.[79] Without it, the proposal was adopted and ratified as the second amendment to the Constitution.

Madison's third proposal affecting religion was also rejected: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[80] Notably, he did not include the state establishment of religion in his list of proscriptions. Following his statement that he "conceived [his third

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73 1 ANNALS OF CONG., *supra* note 26, at 77.

74 The first exception concerned the originally proposed first amendment, which attempted to settle the number or representatives in the House. The second exception concerned a disagreement about the specification for jury trials in criminal cases. 1 THE JOURNAL OF THE HOUSE OF REPRESENTATIVES, 152 (M. Claussen ed. 1977); Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 8, at 402-03.

75 1 ANNALS OF CONG., *supra* note 26, at 88, 913.

76 *Id.* at 434. This language was originally the fourth paragraph of Madison's fourth proposal which in form would have amended article I, § 9 of the Constitution.

77 *Id.* at 751. The motion to strike failed, by a vote of 24 to 22. *Id.*

78 *Id.*

79 M. CLAUSSEN, *supra* note 66, at 119.

80 1 ANNALS OF CONG., *supra* note 26, at 435.

proposal] to be the most valuable amendment in the whole list,"[81] the House approved it in modified form. The Senate, however, presumably acting as the guardian of states' rights, rejected it.[82]

III. MADISON'S RELIGION PROPOSALS JUDICIALLY REALIZED

Two of Madison's three proposals which did not find their way through the First Congress—the protection of the civil rights of religious believers and worshippers, and the protection of the rights of conscience, speech and press from state action—eventually found their way into constitutional law, if not in the Constitution itself, through subsequent construction by the Supreme Court.[83] First, the Court decided to adopt his proposal, protecting the rights of the free exercise of religion, as well as the rights of free speech and free press, from state action.[84]

Following the Civil War, the substantial increase in federal power and the concomitant decrease in state power were reflected in the adoption of the fourteenth amendment. By the end of the nineteenth century, the Court had begun its broad construction of that amendment's due process clause, in the interest of protecting property rights from state legislative action.[85] By 1931, it had incorporated in that clause the first amendment rights of free speech and free press.[86] In 1940, in *Cantwell v. Connecticut*,[87] the Court decided that the fourteenth amendment's due process clause additionally incorporated both religion clauses of the first amendment.[88] While *Cantwell* was, in fact, a free exercise case,[89] the Court in *Everson v. Board of Education*,[90] in the face of an establishment clause claim, went beyond Madison's proposal and reaffirmed its decision to incorporate that clause.[91]

The Court has largely effected Madison's proposal to vindicate "the civil rights of . . . [those adversely affected] on account

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81 *Id.* at 755.

82 For a discussion of the minor changes in language of the version which the House approved, see *id.*

83 *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

84 *See supra* notes 80-82 and accompanying text.

85 For an account of the Court's incorporation of the amendment's due process clause, see Cohen v. Hurley, 366 U.S. 117, 154-60 (1940) (Brennan, J., dissenting).

86 *See* Near v. Minnesota, 283 U.S. 697 (1931).

87 310 U.S. 296 (1940).

88 *Id.* at 303.

89 *Id.* at 303-11.

90 330 U.S. 1 (1947).

91 *Id.* at 15.

of religious belief or worship."[92] In 1978, in *McDaniel v. Paty*,[93] the Court, acting under the free exercise clause, struck down a Maryland law prohibiting a clergyman from service as a delegate to the state's constitutional convention.[94]

The Court has not needed to read into constitutional law the substance of Madison's other proposal respecting exemptions from military service for persons of religious scruples, because in this regard Congress has, whenever it has provided for conscription, uniformly shown these persons the indulgence Representative Benson anticipated in the First Congress.[95]

The Court has gone further, however, by holding in *Welsh v. United States*[96] that where Congress exempted persons whose "religious scruples" were based on their relation to "a Supreme Being," Congress also "meant" to exempt persons of non-religious scruples. Justice Harlan's concurrence in *Welsh* made it clear that, in his view, the Court was driven to that determination by a forced construction of the statute at issue, because of the exigencies of the first amendment's establishment clause.[97]

The judicial process, however, by which Madison's proposals have been accomplished and by which the rights of conscientious objection have been extended, has involved substantial conceptual difficulties and the achievement of ends Madison had not contemplated. The process has also produced the implicit recognition of substantive constitutional rights which he had no intention of protecting and the development of constitutional doctrines which he probably would not have endorsed.

IV. MADISON'S RELIGION PROPOSALS JUDICIALLY CONFOUNDED

A. Madison's Third Proposal: "Liberty" in the Fourteenth Amendment and First Amendment Freedoms

By incorporating the free exercise clause of the first amendment into the due process clause of the fourteenth, thereby making its provision applicable to the states,[98] the Court effected the

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92 1 ANNALS OF CONG., *supra* note 26, at 434.

93 435 U.S. 618 (1978) (plurality opinion).

94 *Id.* at 626-29 (plurality opinion); *id.* at 630-35 (Brennan, J., concurring in judgment); *id.* at 642-43 (Stewart, J., concurring in judgment).

95 *See supra* notes 76-79 and accompanying text; *infra* notes 198-201 and accompanying text.

96 398 U.S. 333, 339-44 (1970).

97 *Id.* at 344-56 (Harlan, J., concurring in result).

98 Cantwell v. Connecticut, 310 U.S. 296 (1940). *See also supra* notes 87-88 and

substance of Madison's third proposal concerning religion.[99] In so doing, however, the Court generated its fair share of conceptual difficulty by either tending to suggest that religious speech was but a variant of ordinary speech or by holding that a decision motivated by a religious belief to remain silent in the face of official compulsion to speak was no more favored than a similar decision motivated without religious belief.[100] In other words, religious speech was not unique. The right to silence was founded not in the free exercise of religion, but was available to everyone in the inner recesses of his or her intellect and spirit, whose integrity the first amendment was intended to protect.[101]

Cantwell v. Connecticut,[102] the case in which the Court first decided that the word "liberty" in the due process clause of the fourteenth amendment incorporated the religion clauses of the first amendment,[103] also produced the first substantial obscurity. In *Cantwell*, for instance, despite its invocation of both religion clauses, and its statement that they were protected against state action,[104] the Court did not decide the case on the basis of the establishment clause. Because Cantwell was convicted for religious proselytization,[105] the establishment clause was not involved and Cantwell had not invoked it. Moreover, the Court's vindication of Cantwell's right of free exercise was based largely in terms borrowed from the freedom of speech cases so as to obscure the special characteristics of the right of free exercise and to merge it into the law of free speech.[106]

In part, this interpretation was due to the circumstances of the case. Cantwell claimed his conviction had deprived him of liberty without due process of law, through the denial of both his freedom of speech and his free exercise of religion in contravention of the fourteenth amendment.[107] The Court held that Cantwell need not obtain a license to solicit money for his religious cause, despite a statutory provision that a state official must determine the genuineness of the religious cause he was espous-

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accompanying text (discussing *Cantwell's* incorporation of both religion clauses of the first amendment).

99 *See supra* notes 80-82 and accompanying text.

100 *See infra* notes 109-121 and accompanying text.

101 *Id.*

102 310 U.S. 296 (1940).

103 *See supra* note 88 and accompanying text.

104 *Cantwell*, 310 U.S. at 303.

105 *See id.* at 300-03.

106 *See id.* at 303-11.

107 *Id.* at 300.

ing.[108] Adopting his argument, the Court applied prevailing precedents governing free speech and press and held that such a requirement amounted to a prior restraint and censorship of the practice of his religion.[109] The requirement, therefore, laid an equally forbidden burden upon the exercise of a fundamental liberty as protected under the fourteenth amendment.

The Court next struck down Cantwell's conviction which was secured under a common law charge of breach of the peace.[110] Again, the Court made use of precedents governing free speech and press. Such a charge, the Court declared, was of "a general and indefinite characterization . . . leaving . . . too wide a discretion in its application."[111] Further, because there was no evidence that his conduct was offensive, insulting, or likely to cause a clear and present danger to the public, his freedom to persuade others to his own thinking was protected. The *Cantwell* Court stated:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
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> The essential characteristic of these liberties is that under the shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.[112]

The opinion also acknowledged some limits to religious speech. One may not incite violence to deprive others of their equal right to the exercise of their liberties.[113] And one may not provoke one's listeners by profane, indecent, or abusive remarks directed to their person.[114] But one may, as Cantwell did, utter remarks about the

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108 *Id.* at 304-07.
109 *Id.*
110 *Id.* at 307-11.
111 *Id.* at 308.
112 *Id.* at 310.
113 *Id.* at 309.
114 *Id.* at 309-10.

other fellow's religion, which are so highly offensive as to make him feel like hitting him.[115] As long as "no truculent bearing, no intentional discourtesy, no personal abuse" were involved, the speaker was protected and the listener was presumably adjured, in Christian address, to turn the other cheek.[116]

Cantwell, in its bent to make new law by deciding for the first time that the free exercise of religion specified in the first amendment was a protected "liberty" of the fourteenth,[117] brushed aside some troublesome questions. Concededly, personal abuse goes to the heart of the "fighting words" exception to free speech.[118] But should it make any difference that Cantwell in the proselytization of his ideas was not truculent or intentionally discourteous? *Cohen v. California*[119] would suggest that such a consideration is the relic of a gentler generation.

Because case law supporting the content of free speech tends to go toward the absolute,[120] why should words of personal abuse be excepted? Presumably, because the statement is directed to the person of the listener, his family, or innamorata and it is intended to insult, the ordinary man is placed in such a dishonorable position as to give him no alternative, if he regards himself or his place in society with respect, but to fight. Moreover, in certain circumstances, the content of the speech may be so provocative as to make irrelevant the absence of an intent to insult. If this is the case, should spoken words of shame directed against members of one's religion, the religion itself, or the writings it holds sacred, be treated any differently if the listener and the society in which he dwells holds them in deep respect? *Cantwell* seems to say yes, without explaining why.

The answer seems to lie in the consideration that in Cantwell's case he was genuinely trying, no matter how maladroitly, to change his listener's mind, and therefore, to convert him to his own beliefs and way of life. His overture was apparently an act of friendship. It is in this context that the absence of truculence or discourtesy is significant, although in reality sometimes this kind of overture masks a desire to control. Therefore, Cantwell's speech was different from the ordinary case of fighting words, where the speaker's

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115 *Id.*

116 *Id.* at 310.

117 *Id.*

118 *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

119 403 U.S. 15 (1971) (Court reversed appellant's conviction under a breach of peace statute which he allegedly violated by wearing, in the corridor of a county courthouse, a jacket displaying the words "Fuck the Draft").

120 *See, e.g.*, Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988).

words are those of verbal warfare, designed to humiliate, provoke, and incite violence. In the case of either fighting words or words seeking religious conversion, the situation is different from the ordinary case of speech where one wishes, at most, to change the other's way of thinking.

The Court, however, did not make this distinction. Is it that the Court, as a matter of constitutional policy, did not treat religion, with its own unique compulsion to speak and its own unique sensitivities in the listener seriously enough? After all, as the Court's opinion suggests, in this country there are no absolutes, but many "types of life, character, *opinion* and belief . . . [and] many races and many creeds."[121] In the Court's view, therefore, practicality requires not only an overriding need for an official tolerance of all these subjects on the part of government, but a further governmental policy of exacting a similar tolerance on the part of individuals.

If in *Cantwell* the Court obscured the unique quality of religious speech, three years later, in *West Virginia State Board of Education v. Barnette*,[122] it held that the privilege of school children not to conform to a state's requirement of uniform speech and conduct was not even one arising out of the free exercise of religion, as their parents asserted. Rather, the privilege was one of intellectual and spiritual non-conformity, available to believers and non-believers alike, arising from the unwritten principles of the first amendment. Because the principles were unwritten, their content and application were uncertain.

In *Barnette*, the Court again upheld a challenge invoking the protection of the due process clause of the fourteenth amendment in a case involving alleged incursions upon religious freedom and freedom of speech, and invalidated the provisions of a state statute requiring public school children to salute the flag.[123] The plaintiffs in *Barnette*, members of the Jehovah's Witnesses, specifically relied on their religious beliefs as the basis for exempting their children from the obligation to salute the flag.[124] They claimed the flag was an "image" before which, pursuant to their reading of the Bible, they were forbidden to bow down or serve, and therefore, salute.[125] Their claim for free exercise of religion seemed to be stronger than their claim based on free speech.

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121 Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (emphasis added).
122 319. U.S. 624 (1943).
123 *Id.* at 642.
124 *Id.* at 629.
125 *Id.*

The gist of an infringement of free exercise is the government's coercion of a person's religious beliefs or the required participation of a person in some uniform ritual of religious worship. Thus, the abiding purpose of the clause is the preservation of an inner integrity. This integrity exists at a level deeper than thought—the level of belief where the person yields up his or her soul, to use the old religious term, to God. From which level emanates the impulse to do what the person believes right and refrain from doing what is believed wrong. While the gist of free speech is the right to say what you think and, by implication, to think what you please, speech is not necessarily related to belief. Speech and the thought which it expresses may be socially important, like political speech. Alternatively, speech may be both socially and personally trivial, like gossip or a radio talk show. Although they may overlap, the realms of free exercise and free speech then do not coincide. In *Barnette*, the plaintiffs' claims were rooted in belief and in free exercise.[126]

Justice Jackson in his opinion for the *Barnette* Court thoroughly confused the realms. Starting in free speech, he wrote that the display of a flag, as a symbol of opposition to government, was protected speech.[127] The flag salute was then a form of utterance—symbolic speech.[128] It "requires," he continued, "the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks."[129] To this extent, the opinion stayed within the realm of speech and thought.

Thereafter, however, the opinion veered back and forth between the realms of religion and speech, invoking words and phrases associated with religion, such as: belief, conversion, ritual, and ceremony; and with speech: attitudes of mind, censorship, and clear and present danger. Justice Jackson wrote:

> It is also to be noted that the compulsory flag salute and pledge requires an affirmation of a *belief* and an *attitude of mind*. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling *converts* to the prescribed *ceremony* or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that *censorship* or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a *clear and present danger* of action of a kind the State is empowered to

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126 *Id.*
127 *Id.* at 633.
128 *Id.* at 632.
129 *Id.* at 633.

> prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute *ritual* creates a clear and present danger that would justify an effort to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.[130]

Yet despite his frequent allusions to the religious dimensions of the case, Justice Jackson declined to posit the Court's decision on the free exercise clause, stating:

> While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.[131]

Going beyond *Cantwell*, Justice Jackson decided that when a fourteenth amendment challenge was based on the principles of the first amendment, the latter controlled.[132] Having seemed to have excluded plaintiffs' free exercise claim,[133] it would seem to follow that it was their right of free speech which he wished to vindicate. But once again, Justice Jackson fell into the imagery of religion. He characterized the state's appeal to patriotism as a form of "mysticism," implying that the ceremony was a ritual in a state-inspired and imposed religion.[134] This view, however, returns us to the heart of the plaintiffs' complaint—that the flag was an image before which the Bible says, thou shalt not bow down.[135]

Ultimately, Justice Jackson seemed to agree and appeared to convict the state of imposing its own brand of religion upon its citizenry. In this vein, by way of peroration, he declared: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be *orthodox* in politics, nationalism, religion, or other matters of opinion or force citizens to *confess*

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130 *Id.* at 633-34 (emphasis added).
131 *Id.* at 634-35 (footnote omitted).
132 *Id.* at 639.
133 *Id.* at 634-35.
134 *Id.* at 641.
135 *See id.* at 629.

by word or act their *faith* therein."[136]

By which particular star in his constitutional constellation Justice Jackson was guided, he did not in the end say. Did he consider the state practice, when viewed as a compulsory exercise, a species of state establishment of religion? He concluded in ambiguity: "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[137]

Justice Jackson did not refer to conscience. The Court's holding was broader. Ultimately, it was not a case of conscience at all. In refusing to give the salute, you would not have to give a reason. You might simply refrain, because you were lazy or contrary. It was a matter of personal freedom. The freedom included the right to refrain from worthy civic exercises, not only in response to some inner conviction, religious or otherwise, but out of whim or some simple, baser motive such as the desire to be bad. In effect, the first amendment was held to have protected freedom of the will and the liberty of the person to obey or not to obey the requirements of the state. The commandments of God, religion, or conscience were not the crucial determinant.

Nevertheless, because of the religious nature of Barnette's challenge and Jackson's allusions to belief, creed, and orthodoxy, the realm of free exercise of religion, and his broad references to the realm of intellect and spirit, it is easy to consider *Barnette* as a case of conscience. Even if it cannot be so designated, litigants with claims of conscience would be likely so to present it. The process of incorporation, therefore, had generated its fair share of conceptual obscurity.

B. Madison's First Proposal: The Civil Rights of Religious Belief, Conscience, and the Establishment Clause

Predictably, the appellant in *Torcaso v. Watkins*[138] presented *Barnette* as a conscience case. In *Torcaso*, the appellant refused to declare a belief in God on his application to become a notary, as required by Maryland statute, challenging the provision under the freedom clauses of the first amendment and the due process

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136 *Id.* at 642 (emphasis added).

137 *Id.*

138 367 U.S. 488 (1961).

clause of the fourteenth.[139] Torcaso argued that like Barnette he had the right not to speak.[140] The problem with the decision in *Barnette*, however, as we have seen, was that it had not located Barnette's right in the speech clause. Moreover, there was difficulty in locating Torcaso's right in the free exercise clause. As will shortly be discussed, his was not a case of free exercise. Nor, to use the language of the last part of Madison's first proposal, was his a case of "conscience" whose "full and equal rights [had been] impinged."[141]

Rather, Torcaso's was a case approaching, in the terms of the first part of Madison's first proposal, the abridgement of a person's "civil rights . . . on account of religious belief or worship."[142] It approached, but was not within the four corners of the proposal because the proposal pertained only to federal, not state, regulation.[143] Moreover, although Torcaso had been denied a civil right to become a notary, his application had not been denied on account of his religious belief, for instance, because he was a Catholic, Jew, or Muslim, and not a Protestant. Instead, it was denied because of his lack of religion, or more precisely, because of his refusal to declare a belief in God.[144]

In addition to his invocation of the freedom clauses of the first amendment and the due process clause of the fourteenth, Torcaso also relied on the establishment clause of the first amendment, the equal protection clause of the fourteenth, and the provision in article VI, paragraph 3 of the Constitution which guarantees that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[145] The shotgun approach to legal argument is usually an advocate's confession of weakness and despair, but in this case it succeeded. The Court upheld his claim, not under article VI, but with a judicial shotgun approach of its own, using both religion clauses of the first amendment and ultimately the fourteenth amendment.[146]

Desirous of the result, but having no constitutional text

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139 Torcaso v. Watkins, 6 L. Ed. 2d 982, 1531-32 (1961) (brief for appellant).

140 *Id.*

141 1 ANNALS OF CONG., *supra* note 26, at 434. *See supra* note 49 and accompanying text.

142 1 ANNALS OF CONG., *supra* note 26, at 434.

143 *See supra* note 50 and accompanying text.

144 Torcaso v. Watkins, 367 U.S. 488, 489 (1961).

145 Torcaso v. Watkins, 6 L. Ed. 2d 982, 1531-32 (1961) (brief for appellant).

146 *Torcaso*, 367 U.S. at 491-96.

whose plain meaning supported the recognition of the right Torcaso asserted, the Court blasted away in a demonstration of its inclination to afford to the non-believer all the rights the Constitution afforded believers.[147] In so doing, it passed on the text of the establishment clause, reading it in such a way as to restrict severely the special benefits believers could expect from government.[148] Despite the specific constitutional rights afforded the free exercise of religion, believers were put on notice that their protection was not special.

Although apparently relevant, article VI did not apply.[149] Its provisions pertained only to federal office.[150] Moreover, the Court, which had not yet begun the mass incorporation of the Bill of Rights into the due process clause of the fourteenth amendment,[151] did not use this case as an invitation to incorporate the non-Bill of Rights provisions of article VI and expand them to cover state office.[152]

Even after *Barnette's* liberal interpretation, however, proceeding by way of the first amendment presented difficulties. Does the free exercise of religion include the right to exercise no religion at all? Does it mean free exercise *with respect to*, rather than, *of* religion? If Torcaso was to prevail the answer would be yes, but the Court was reluctant to say so.

The Supreme Court could not rely on Madison or the framers of the first amendment. In the first part of his first proposal prescribing that the "civil rights of none shall be abridged on account of religious belief or worship,"[153] Madison most probably intended to extend the provision in article VI, paragraph 3 to prohibit a requirement of a religious test for the exercise of a civil right other than the right to hold public office. It is very doubtful, however, that he intended his proposal—or that his colleagues in the House understood it—to apply to non-believers.

Neither did he intend the third part of his first proposal, prohibiting the infringement of "the full and equal rights of con-

147 *Id.*

148 *Id.* at 492-96.

149 *Id.* at 491.

150 *See id.*

151 *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (fifth amendment double jeopardy); Klopfer v. North Carolina, 386 U.S. 213 (1967) (sixth amendment speedy trial); Edwards v. South Carolina, 372 U.S. 229 (1963) (first amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment).

152 *Torcaso*, 367 U.S. at 489 n.1.

153 1 ANNALS OF CONG., *supra* note 26, at 434.

science,"[154] to apply to non-believers, nor did his colleagues intend such an application in the substituted phrase, "the free exercise [of religion]."[155] Madison's Virginia campaign was waged on behalf of Jefferson's bill for religious freedom.[156] His own Memorial and Remonstrance was written to advance in Virginia the cause of the "free exercise of religion according to the dictates of conscience."[157] The language of the Virginia ratifying convention which Madison followed in presenting his proposal to the House repeated the language of his Memorial.[158] Moreover, in explaining the words the Select Committee had substituted for his proposal, Madison said they meant that Congress could not "compel men to worship God in any manner contrary to their conscience."[159]

In addition, a holding in *Torcaso* based on a rationale which frankly stated that the free exercise of religion included the right not to believe in God, might have then provoked a national storm—much like the decision announcing that freedom of speech includes the right to burn the American flag.[160] Justice Black, writing for the Court, approached the matter indirectly. Following the suggestion of Torcaso's counsel,[161] he first adverted to the establishment clause.[162] Justice Black had previously authored the Court's opinion in *Everson v. Board of Education*,[163] where for the first time he applied the establishment clause to the states, writing:

> 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, and 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.[164]

This rendering of the establishment clause was broad, in fact overbroad, if such an expression may be used in discussing judicial

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154 *Id.*
155 DE PAUW, *supra* note 64, at 136.
156 *See* Singleton, *supra* note 71.
157 8 THE PAPERS OF JAMES MADISON 298-306 (1973).
158 *See supra* note 51 and accompanying text.
159 1 ANNALS OF CONG., *supra* note 26, at 730.
160 *See* Texas v. Johnson, 109 S. Ct. 2533 (1989).
161 *See supra* note 139 and accompanying text.
162 Torcaso v. Watkins, 367 U.S. 488, 490 (1961).
163 330 U.S. 1 (1947).
164 *Id.* at 15.

language construing the first amendment. It cannot be doubted, as Justice Black stated, that one of the main vices of establishment is the requirement to pay tithes and taxes in support of a state-established church.[165] For the dissenter, it constitutes an assault upon the checkbook the more bitter because it is a collection for a cause which does not command personal support.

Without reference to the House debates in the First Congress, however, Justice Black and the dissenting opinions assumed that the establishment clause could be lifted into the fourteenth amendment and made applicable to the states.[166] If the vice of establishment was the expenditure of money, he did not discuss how it constituted an infringement of fourteenth amendment "liberty." Nor in view of the peculiar language of the first amendment prohibition, "no law respecting an establishment of religion,"[167] did Justice Black consider whether the word "respecting," like "touching" in the earlier amendment advanced by Representative Livermore of New Hampshire,[168] was intended to prohibit Congress from disestablishing a state religion. Moreover, Justice Black did not advert to the fact that Madison, upon whose positions in the state of Virginia he relied, had not included in his third proposal, for an amendment prohibiting the states from infringing upon the rights of free exercise of religion, speech, and press, an additional prohibition against state establishment.[169] Justice Black also assumed without discussion that aid to a religion forbidden under the first amendment's establishment clause included aid to the schools operated by the religion.[170]

Additionally, in his zeal to give a broad interpretation to the establishment clause, Justice Black confused it with the free exercise clause. That part of his statement concerning the right of whether to go to church or to believe in the religious doctrines of a church,[171] refers to the essence of "free exercise."[172] Any law af-

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165 *Id.* at 10.

166 *Id.* at 15. *See also supra* notes 54-75 and accompanying text (discussing House debates leading up to the establishment clause).

167 U.S. CONST. amend. I.

168 *See supra* note 60 and accompanying text.

169 *See supra* note 80 and accompanying text.

170 Everson v. Bd. of Educ., 330 U.S. 1, 5-18 (1947).

171 *Id.* at 15.

172 Madison's original proposal read: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 ANNALS OF CONG., *supra* note 26, at 729. In explaining the proposal, Madison stated "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." *Id.* at 730.

fecting the right to make such a decision would fall squarely within the first amendment's proscription in that regard.

This confusion was unnecessary because *Everson* did not involve a requirement for church attendance or the profession of religious doctrine. Instead, *Everson* involved the use of a local school district's money for busing district children to Catholic schools.[173] Therefore, the issue went directly to the heart of the establishment clause—whether government revenues were used to support a church.[174] The *Everson* Court held that they were not because the support was indirect.[175] Justice Reed, in a subsequent dissent in *McCollum v. Board of Education*,[176] argued further that the first amendment proscribed only such aid as can be ascribed to the performance of ecclesiastic functions.[177]

Placing this analysis in the context of conscience, the free exercise clause was designed as the bulwark against governmental intrusion of the inner spirit or upon spiritually motivated personal conduct, including adherence to doctrinal beliefs, church attendance, and worship. The establishment clause, however, was meant to constitute a restraint against the use of government money and support for purposes contrary to one's beliefs.

Justice Black, having been both overbroad and confused in his construction of the establishment clause in *Everson*, became simply obscure in *Torcaso*. Adding to the dictum of *Everson*, he gave voice in *Torcaso* to another pronouncement on the establishment clause, stating: "Neither [state nor Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[178]

Again, as in *Everson*, the pronouncement was both confusing and unnecessary. The establishment clause, as Justice Black correctly stated in *Everson*, was intended to prohibit governmental support of religion by aiding a church or churches.[179] The object of the proscription is the organized, collective entity. The Latin word *eccle-*

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173 *Everson*, 330 U.S. at 3.

174 *Id.* at 5.

175 *Id.* at 17-18.

176 333 U.S. 203 (1948).

177 *Id.* at 255-56 (Reed, J., dissenting). *See also infra* notes 244-88 and accompanying text (discussing the Court's holding in School Dist. v. Schempp, 374 U.S. 203 (1963)).

178 Torcaso v. Watkins, 367 U.S. 488, 493 (1961) (footnote omitted).

179 Everson v. Bd. of Educ. 330 U.S. 1, 15-16 (1947).

sia or the Greek word *synagogue* denotes a group of persons which as a group has a life of its own, with rules, rites, practices, and beliefs.[180] Any such group is of course made up of member-believers who as individuals live in society. Aid to the group or church, however, ordinarily does not constitute aid to the individual and vice versa.

Therefore, when a statute like the one in *Torasco* prefers believers and excludes non-believers in the qualification for even a minor public office,[181] it has not aided the religious group to which the believer belongs or aided "all religions as against non-believers."[182] It has preferred one individual over another individual. Of course, the preference is based on an individual's declaration of belief in the existence of God, but such a distinction is not one necessarily based on religion, or an adherence to a religious system. The person, while believing in God, may not attend any church. In addition, as Justice Black pointed out, there are "religions in this country which do not teach what would generally be considered a belief in the existence of God [such as] Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."[183]

Moreover, it cannot be said in this regard, as Justice Black did, that the statute preferred theistic religions over non-theistic religions.[184] Again, the statute favored theistically-minded individuals and excluded non-theistically minded individuals, not the groups to which they belonged. Finally, the statute in Madison's terms, those of the third part of his first proposal, cannot be said to have infringed "the full and equal rights of conscience,"[185] or, in the phraseology adopted by the framers, the "free exercise" of religion.[186] The worst that can be said against the statute is that it affects the civil rights of persons because of their belief in God or, more accurately, because of a lack of a belief in God. That right, however, was protected under the first part of Madison's proposal which the framers did not adopt.[187] The statute is objectionable only if there is an identifiable right under the Constitution not to be tested for one's beliefs concerning the existence of God.

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180 *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 718, 2318 (1971).

181 *See Torcaso*, 367 U.S. at 490.

182 *Id.* at 495.

183 *Id.* at 495 n.11.

184 *See id.* at 495.

185 *See* 1 ANNALS OF CONG., *supra* note 26, at 434.

186 *See* L. DE PAUW, *supra* note 64, at 136.

187 *See supra* notes 49-52 and accompanying text.

Of course, article VI prohibits the exaction of a religious test as a qualification for any federal office.[188] Irrespective of the smaller difficulty of making that provision apply to state office, there is the formidable difficulty of reading the exaction of a test for one's religion as a test of one's belief in God. The Court preferred to confuse this distinction and read it as one.[189] Without further explanation, it abruptly concluded: "This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and reli-

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188 U.S. CONST. Art. VI, § 3.

The records of the Constitutional Convention are silent concerning the scope of Pinckney's proposal prohibiting qualification based on a religious test. *See* 5 ELLIOT'S DEBATES, *supra* note 1. At the state ratifying conventions, supporters of the Constitution agreed it would extend to persons of every denomination and even to persons "who have no other guide, in the way to virtue and heaven, than the dictates of natural religion." 2 ELLIOT'S DEBATES, *supra* note 1, at 119 (Massachusetts) (statement of Daniel Shute). Another endorsed the prohibition of a religious test as a kind of disestablishment clause, whereunder "religion is ever a matter between God and individuals." *Id.* at 148-49 (Massachusetts) (statement of Isaac Backus). *See also* 3 ELLIOT'S DEBATES *supra* note 1, at 204 (statement of Edmund Randolph in the Virginia convention); 4 ELLIOT'S DEBATES *supra* note 1, at 193, 212 (statement of James Iredell in the North Carolina convention).

In the Connecticut convention, the ban on a religious test was also supported as a wedge against establishment, although perhaps not strictly necessary. 2 ELLIOT'S DEBATES *supra* note 1, at 202 (Connecticut) (Oliver Wolcott). In response to those who considered the prohibition not sufficiently respectful of God, Oliver Wolcott concluded that the article's requirement of an oath was "a direct appeal to that God who is the avenger of perjury [and] . . . a full acknowledgement of his being and providence." *Id.*

The South Carolina convention, mindful of the requirement in article VI that members of Congress and state legislatures, and all federal and state executive and judicial officers shall be bound by oath or affirmation to support the Constitution, proposed an amendment to article VI, whereby the prohibition against a religious test would be amended to read that no "*other*" religious test would be required. IV BICKFORD, *supra* note 51, at 14 (emphasis in original). The South Carolina delegation was concerned that the constitutional language would "militate against the sacred nature of an oath." *See* G. ANTIEAU, A. DOWNEY AND E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 106 (1974) [hereinafter ANTIEAU].

It should be noted that in the North Carolina convention Iredell also noted that the provisions of article VI would protect "pagans and Mahometans." 4 ELLIOT'S DEBATES, *supra* note 1, at 194. In addition, Luther Martin of Maryland, one of the framers, declared after the Constitutional Convention that article VI would protect persons of "downright infidelity or paganism." 3 FARRAND, *supra* note 1, at 227. In Iredell's case, it is not clear that he drew any distinction between Moslems and pagans, and in Martin's case, it is not clear whom he meant to include. As of 1788, however, it is doubtful that either of them meant to include atheists or agnostics. It is also doubtful that the framers would have conceived that their restriction on religious testing would have included them. *See* J. TURNER, *supra* note 2, at 44 ("America does not seem to have harbored a single individual before the nineteenth century who disbelieved in God.").

189 *See* Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

gion and therefore cannot be enforced against him."[190] The language of the conclusion which declared a constitutional right not to be tested for one's beliefs concerning the existence of God is neither the language of article VI, nor the language of the establishment clause to whose meaning Justice Black had devoted so much explanation.[191] Rather, it is the language of free exercise which the Court, wishing to spare itself an unpleasant public reaction, preferred to gloss over. Interestingly, a few years later in *McDaniel v. Paty*[192] Chief Justice Burger cited *Torcaso* as a case of free exercise.[193]

Ascribing such a right to the free exercise clause, however, does not escape the difficulty of the construction of article VI. Does the free exercise of religion involve not only the right to exercise no religion at all, but also the right not to believe in God at all? The Court did not explicitly say so. Now, that following Justice Black's departure, the Court has re-embarked upon the recognition of new substantive constitutional rights within or without the due process clauses of the fifth and fourteenth amendments,[194] *Torcaso* can be more easily justified as, within the due process clause of the fourteenth amendment, extending one of the fundamental purposes of article VI, to the support of the rights of conscience of all persons in the realm of public office holding. More fundamentally, *Torcaso* can be seen as advancing the protection of, in the language of *Barnette*, "the sphere of [the individual's] intellect and spirit."[195]

In any event, if in *Barnette* the Court recognized under the principles of the first amendment an individual right, uncoerced by the state, to be free to tell the state whether you love it and support it, the Court in *Torcaso* recognized a right, uncoerced by the state, to be

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190 *Id.*

191 *See id.* at 492-95.

192 435 U.S. 618 (1978).

193 *Id.* at 626-27.

194 *Compare* Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) (four justice plurality held that a restrictive zoning ordinance unnecessarily impaired the traditional right of family members to live together and thus offended substantive due process) *and* Eisenstadt v. Baird, 405 U.S. 438 (1972) (Court applied equal protection analysis to strike down a state law proscribing the distribution of contraceptives to married persons) *and* Roe v. Wade, 410 U.S. 113 (1973) (although violating substantive due process, the Court invalidated state's nearly complete bar on abortion as an infringement of the 'right of privacy') *with* Griswold v. Connecticut, 381 U.S. 479 (1965) (Black, J., dissenting) (Black found no textual basis in the Bill of Rights to support the Court's recognition of a fundamental 'right of privacy' used to invalidate a state statute prohibiting married perosns from using contraceptives).

195 Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

free not to say publicly whether you believe in God. Such a relationship or, more precisely, such a lack of relationship is by its nature personal and intimate. If, as the mystics tell us, God respects our freedom to choose whether to believe in Him,[196] the state of Maryland should do no less and not require one who seeks public office to confess publicly the status of his or her personal relationship with God.

In both cases, then, the Court was intent on achieving a result in which personal freedom and conscience would be protected. In *Barnette*, the inner freedom of the believer and non-believer were preserved equally. In *Torcaso*, the Court protected the freedom of conscience not to be compelled to declare a conformity to a particular religion and, more especially for the non-believer, a lack of belief in God. Whereas the language of the first amendment had been drafted to accommodate religious belief and practice,[197] the rationale of *Torcaso* in invoking the text of the establishment clause and the rationale of *Barnette* in applying the principles of the first amendment so as to accommodate the civil and personal rights of non-believers, was bound to produce present confusion and borrow future trouble for the constitutional rights of believers.

C. *Conscientious Objection: Religion and Equal Protection*

Constitutional confusion was intensified by the Court's disposition of the following conscientious objector cases: *United States v. Seeger*,[198] *Welsh v. United States*,[199] and *Gillette v. United States*.[200] Each was basically a "right of conscience" case, involving challenges to a statutory exemption which excluded persons from military service during the Vietnam War. The exemption

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196 *Cf.* RAISSA'S JOURNAL (1974). The author stated:

> If, in order to avoid the loss of any soul, God acted from absolute power, he himself would be shattering what his Wisdom has conceived, everything could become no matter what, there would be a chaos of gratuitous entities without specific natures; the structure of His own creation would collapse.
>
> What, in this case, would become of love itself by which souls conquer eternal life? Love which presupposes liberty of choice . . . . God leaves the soul free to slip away . . . .

Id. at 314-15 (footnote omitted). Later in the text the author explained: "*God knows what he permits.* He is not like a man who regretfully permits what he cannot prevent. He has let men go their own way armed with their freedom—and they go it." *Id.* at 365 (emphasis original).

197 *See* U.S. CONST. amend. I.

198 380 U.S. 163 (1965).

199 398 U.S. 333 (1970).

200 401 U.S. 437 (1971).

was confined to persons who "by reason of their religious training and belief . . . [were] conscientiously opposed to participation in war in any form."[201]

The statute defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological or philosophical views or a narrowly personal code."[202] In making this exemption, Congress exhibited the indulgence that Representative Benson had predicted when he advised there was no need for Madison's second proposal regarding religion.[203]

None of the litigants in *Seeger*, *Welsh*, and *Gillette* could qualify under the statute as construed by the Selective Service System.[204] Each challenged his disqualification in the light of the equal protection component of the due process clause of the fifth amendment and the free exercise clause.[205] They further challenged their disqualification on the ground that the statutory exemption, apparently confined to persons of religious scruples, offended the establishment clause.[206] To dispel the confusion arising from this latter challenge and the Court's acknowledgement, in effect, of the substantial merits of that challenge and to perceive the discrete lines of constitutional principle, it is necessary to digress and consider first the development of case law, not on the free exercise of conscience, but rather on the establishment of religion.

1. Digression: Establishment Clause

In *Everson*, the Court focused on the primary meaning of the establishment clause, agreeing unanimously that direct governmental aid to a church-supported school constituted "a law respecting an establishment of religion."[207] The Court divided,

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[201] 50 U.S.C.A. § 456(j) (West 1981) (Universal Military Training and Service Act).

[202] *Id.*

[203] *See supra* note 78 and accompanying text (discussing Benson's views).

[204] United States v. Seeger, 380 U.S. 163, 166-69 (1965); Welsh v. United States 398 U.S. 333, 335 (1970); *Gillette*, 401 U.S. at 439-41.

[205] United States v. Seeger, 13 L. Ed. 2d 1183, 1183-85 (1965) (briefs of respondents); Welsh v. United States, 26 L. Ed. 2d 875, 875-76 (1970) (briefs of petitioners); Gillette v. United States, 28 L. Ed. 2d 951, 951-54 (1971) (briefs of petitioners).

[206] *Seeger*, 13 L. Ed. 2d 1183-85 (briefs of respondents); *Welsh*, 26 L. Ed. 2d 875-76 (briefs of petitioners); *Gillette*, 28 L. Ed. 2d 951-54 (brief for petitioners).

[207] Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

however, on the issue of whether the reimbursement for money spent for bus transportation to Catholic schools constituted direct aid.[208] A majority decided that the reimbursement was not direct aid.[209] No justice questioned whether the establishment clause was meant to apply to the education of children in parochial schools, or whether, as Justice Reed later argued in *McCollum v. Board of Education*, it was meant to apply only to churches "performing ecclesiastical functions."[210] In dissent, Justice Jackson argued that the reimbursement was a direct aid to parochial schools. Justice Jackson specifically distinguished the public school system as one "organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion."[211]

McCollum, decided the year after *Everson*, involved the issue of direct aid in the public school system for religious instruction.[212] In a terse opinion authored by Justice Black, the Court held that a state-sponsored plan, whereby religious groups were allowed weekly access to public school classrooms to teach religion to the public school children constituted direct aid to the participating church groups and, under *Everson*, the establishment of religion.[213] Justice Jackson concurred, although expressing some concern that the plaintiff's complaint would, if taken absolutely, "ban all teaching of the Scriptures" in the public schools.[214] Dissenting with an argument that Justice Black did not rebut, Justice Reed contended that because the practice was consistent with one that Jefferson and Madison had advocated for the University of Virginia, it could not be contrary to the purposes of the first amendment.[215]

No one referred to the fact, fatal to the majority's assumption, that under the Northwest Ordinance of 1787[216] reenacted

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208 *Id.* at 16-18; *id.* at 24-28 (Jackson, J., dissenting); *id.* at 44-49 (Rutledge, J., dissenting).

209 *Id.* at 16-18.

210 *See* McCollum v. Board of Educ., 333 U.S. 203, 248 (1948) (Reed, J., dissenting).

211 *Everson*, 330 U.S. at 23-24 (Jackson, J., dissenting).

212 *McCollum*, 333 U.S. at 204-05.

213 *Id.* at 211-12 (citing *Everson*, 330 U.S. at 1).

214 *Id.* at 234-38 (Jackson, J., concurring).

215 *Id.* at 244-48 (Reed, J., dissenting).

216 The re-enactment of the Northwest ordinance under the 1789 constitution and the proposal of the Bill of Rights were both effected in the first session of the First Congress. Congress affirmed the Northwest Ordinance in August 1789. 1

by Congress in 1789, the religious and moral education of children in federally supported schools was contemplated. In fact, it could not have been otherwise, because there were at that time no public schools; education was under the sponsorship of the churches.[217]

While not directly responding to Justice Reed, Justice Frankfurter, in a concurring opinion, recounted the history of the United States in the nineteenth century as revealing a strong support for a public school system "free from sectarian control."[218] Justice Frankfurter, however, failed to mention another fact inconsistent with his thesis. In 1876, following the adoption and ratification of the fourteenth amendment, the proposed Blaine Amendment, added to its proscription of state laws "respecting any establishment of religion" the following prohibitions:

> No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational, or other institution, under the control of any religious or anti-religious sect, organization or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization or denomination, or to promote its interests or tenets.[219]

The prohibition in the second clause applies to the *McCollum* case[220] and the prohibition in the first clause to *Everson*.[221] In either case, the prohibition was beyond one "respecting an establishment of religion."[222] In 1876, as in 1789, it was understood that, in light of the Northwest Ordinance, establishment, as Justice Reed stated, pertained to the support of churches in their ecclesiastical functions.

Stat. 8 (1789). Congress approved the Bill of Rights the following month. *See supra* notes 40-41 and accompanying text.

217 *See generally* ANTIEAU, *supra* note 188, at 163-67 (Congress set aside grants of land for the support of schools without any limitation that the schools be public).

218 McCollum v. Board of Educ., 333 U.S. 203, 213-24 (1948) (Frankfurter, J., concurring).

219 4 CONG. REC. 5580 (1876).

220 *See supra* notes 212-15 and accompanying text.

221 *See supra* notes 207-11 and accompanying text.

222 U.S. CONST. amend I.

In *McGowan v. Maryland*,[223] decided just three weeks before *Torcaso*,[224] the Court upheld Maryland's Sunday closing laws against a challenge under the establishment clause, determining the state's purpose to be entirely secular—the provision for a uniform day of rest.[225] The Court, while agreeing that the original purpose of these laws was in many instances religious,[226] held that such laws had lost their religious purpose and continued in effect with a non-religious intention.[227] Were it otherwise, the Court intimated that it would have decided differently.[228] Again, it would seem that such a law would, by impinging upon a person's personal freedom in the matter of church attendance and worship, essentially involve the substance of the free exercise clause. Because it would not pertain to either financial support or the support of particular modes of worship, it would not involve the vices leading to the proscription of establishment. In any case, relying on *Everson* and *McCollum*, the Court observed: "But, the First Amendment, in its final form, did not simply bar a congressional *establishing a church*; it forbade all laws *respecting an establishment of religion*. Thus, this Court has given the Amendment a 'broad interpretation . . . in the light of its history and the evils it was designed forever to suppress . . . .' "[229]

These cases may be summarized as holding that the establishment clause forbids the government from supporting churches in the financial advancement of their educational mission in its own schools,[230] or in the public schools,[231] or in the non-financial advancement of their religious proscriptions, such as Sunday church attendance.[232] Justice Frankfurter, concurring in *McGowan*, added the following opinion:

> The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the colonies had done, make of religion, as religion, an object of legislation. . . . The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human con-

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223 366 U.S. 420 (1961).
224 367 U.S. 488 (1961).
225 *McGowan*, 366 U.S. at 450-53.
226 *Id.* at 431-32.
227 *Id.* at 433-45.
228 *Id.* at 453.
229 *Id.* at 441-42 (quoting Everson v. Board of Educ., 330 U.S. 1, 14-15 (1947)).
230 *See Everson*, 330 U.S. 1.
231 *See* McCollum v. Board of Educ., 333 U.S. 203 (1948).
232 *See* McCowan v. Maryland, 366 U.S. 720 (1961).

> duct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief.[233]

Justice Frankfurter did not specify the legislation he had in mind, but presumably it was of the kind affecting conscience, similar to the controversy involved in *Torcaso* which was pending before the Court.[234] As we have seen, however, the Court ultimately disposed of *Torcaso*, not under the establishment clause, but somewhat obliquely under the free exercise clause.

Engel v. Vitale[235] presented a different construction of the establishment clause. In *Engel*, the Court struck down the recitation of a nondenominational prayer,[236] composed by New York state officials, in a public school classroom in the presence of a teacher.[237] Justice Black, writing for the Court, expanded the meaning of the establishment clause so as to prohibit the government from the "business," as he put it, of composing official prayers for any group of Americans "as a part of a religious program carried on by [the] government."[238] Analogizing the composition of the prayer by the New York State Board of Regents to the promulgation of the Book of Common Prayer by the established Church of England,[239] Justice Black decried the placement of "the power, prestige and financial support of government . . . behind a particular religious belief." Justice Black speculated that because the required use of the Book of Common Prayer had led to disrespect and dissension from the one Established Church in England, the recommended use of the Regents' prayer would inevitably lead to the same unhappy results in New York.[240]

One need not quarrel with the result or with the holding that the Regents' prayer offended the establishment clause. The vice of *Engel* is not that the Board of Regents of the State of New York had literally established a church. The Board had done something even

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233 *Id.* at 465-66 (Frankfurter, J., concurring).

234 Torcaso v. Watkins, 367 U.S. 488, 489 (1961). *See also supra* note 139 and accompanying text (statute required applicants for notary public to declare a belief in God).

235 370 U.S. 421 (1962). *Engel* did not involve a church mission or proscription, and therefore, the Court went beyond the then existing precedents.

236 *Id.* at 422. The state Board of Regents adopted the law created by the New York constitution which provided: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." *Id.*

237 *Id.* at 424.

238 *Id.* at 425.

239 *Id.*

240 *Id.* at 431-33.

worse, acting like a church itself and following in the tradition of the emperors of Rome—Justice Black did not go back far enough in his history lesson. Certainly, such an action was against the spirit, if not the letter, of the establishment clause.

The following year, in *School District v. Schempp*,[241] the Commonwealth of Pennsylvania and the City of Baltimore avoided that pit, only to be deemed to have fallen into another by using the writings and prayers of the churches to which a majority of its students belonged.[242] The requirement of Bible reading and the recitation of the Lord's Prayer at the opening of each school day was stricken as offending the establishment clause by supporting, in a supposed departure from the Court's precedents, "the tenets of one or all orthodoxies."[243] The Court went on to impose a new two-pronged standard by which a governmental practice would be tested to withstand the strictures of the establishment clause. The practice must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[244]

The deficiencies of this standard, later expanded to a three-pronged test in *Lemon v. Kurtzman*,[245] have been discussed elsewhere. It is not at all clear how legislation inhibiting religion can in any sense be construed as establishing religion, since the essence of establishment is the support and advancement of religion.[246] For this reason, standing has been conferred upon the taxpayer to challenge the allegedly invalid use of governmental money to establish religion.[247] The requirement, that the challenged practice not inhibit religion, seems akin to that perverse interpretation of the third prong added in *Lemon*. That prong condemns aid to a church school even though given in support of the secular dimension of the school's activities for the reason that the necessity of state supervision to keep the school honest may entangle the state in the religious dimension of the school's operations and thereby inhibit the school's religious mission.[248] Again, it is not clear how the inhibition of a church

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241 374 U.S. 203 (1963).

242 *Id.* at 205-12. *Schempp* combined two companion cases which involved the identical issue of whether state action requiring schools to begin each day with readings from the Bible violated the first amendment establishment clause.

243 *Id.* at 222.

244 *Id.*

245 403 U.S. 602, 612-13 (1971). The third prong provides that "the statute must not foster 'an excessive government entanglement with religion.' " *Id.* (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).

246 *See supra* notes 231-33 and accompanying text.

247 *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968).

248 *See Lemon*, 403 U.S. at 612-22.

school's religious mission can constitute an establishment, or how, if it does, the taxpayer has sustained any harm to establish standing to raise the issue. Rather, in the case of a governmental inhibition of a church school's religious mission, the harm falls upon the school. It alone should have standing to complain.

More relevant to the development of a constitutional law of conscience is the fact that the two-pronged *Schempp* test, while purporting to summarize the holding of precedents, went beyond them. The precedents forbade a state from helping churches by aiding their mission of religious education in either the parochial or public schools[249] or by aiding ecclesiastical pronouncements such as church attendance.[250] Precedent also proscribed states from acting like a church and composing prayers.[251] The *Schempp* test forbade the state to support religious values.[252] For public school children, the Court moved the Constitution from a position of separation of Church and State to one of separation of God, or any other object of religion, and State. This, the *Schempp* majority declared, was the true meaning of Justice Rutledge's dissenting opinion in *Everson*, that "the object [of the establishment clause] . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding any form of public aid or support for religion."[253]

Even in this respect the majority was not faithful to its precedents, because in the same opinion Justice Rutledge, referring to the public schools, considered them as passing his test for secularity, despite their long-standing practice of Bible reading and recitation of prayer. The child of the religiously-minded parent, he wrote, forgoes the public school because:

> [The Constitution] forbids the public school . . . to give or aid him in securing the religious instruction he seeks . . . . [I]t is precisely for the reason that [the] atmosphere is wholly secular that children are not sent to public schools . . . . But that is a constitutional necessity, because we have staked the very existence of our country on . . . that complete separation between

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249 *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947) (private schools); McCollum v. Board of Educ., 333 U.S. 203 (1948) (public schools).

250 *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961).

251 *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

252 School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

253 *Id.* at 217 (quoting *Everson*, 330 U.S. at 31-32). In an interesting transposition of values, our society decrees that the public affirmation of God's existence or of the words and deeds attributed to Him in religious books are, like "the facts of life" for the Victorians, too indelicate for the ears of impressionable youth. From such as these they must be protected.

the state and religion . . . .[254]

Justice Jackson who joined in that opinion was even more explicit in his own separate concurrence. Justice Jackson wrote that the public school "is organized on the premise that secular education can be isolated from all religion teaching . . . ."[255]

In addition, the majority opinion in *Schempp* did not make much attempt, in contrast to the cases and opinions it had relied upon, to base its holding on the historical circumstances giving rise to the formulation of the religion clauses of the first amendment.[256] Justice Brennan, as though appreciative of this failing, wrote a long concurrence in which he strove to supply a historical perspective. He recalled first the distinction made by the majority opinion in *McGowan* that the language of the establishment clause forbade legislation not with respect to a church but to religion.[257] He then repeated Justice Frankfurter's observation in *McGowan* regarding the incompetence of the legislature to prescribe religious belief.[258] Ignoring the factual contexts giving rise to these utterances in *McGowan*—Sunday closing laws and the imposition of religious tests for office—Justice Brennan applied their rationale to the case before the Court,[259] public school Bible reading and prayer.

Justice Brennan judged the historical record ambiguous,[260] although he admitted that Jefferson and Madison might have considered such practices permissible.[261] Present circumstances, he stated, were too different from those confronting the framers of the establishment clause where the framers "gave no distinct consideration to the particular question whether the clause also forbade devotional exercises in public institutions."[262]

More importantly, Justice Brennan considered contemporary America today markedly different from the time the Bill of Rights was proposed and ratified, with the spread of public school education,[263] greater diversity with respect to the practice of religion,[264]

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254 *Everson*, 330 U.S. at 58-59 (Rutledge, J., dissenting).

255 *Id.* at 23-24 (Jackson, J., dissenting).

256 *See Engel*, 370 U.S. at 424-36; McGowan v. Maryland, 366 U.S. 420, 430-53 (1961); *Everson*, 330 U.S. at 8-18.

257 *Schempp*, 374 U.S. at 232-34; *McGowan* 366 U.S. at 441-43.

258 *Schempp*, 374 U.S. at 232-34; *McGowan*, 366 U.S. at 459-63 (Frankfurter, J., concurring).

259 *Schempp*, 374 U.S. 230-304 (Brennan, J., concurring); *McGowan*, 366 U.S. at 422-25.

260 *Schempp*, 374 U.S. at 237 (Brennan, J., concurring).

261 *Id.* at 235.

262 *Id.* at 237-38.

263 *Id.* at 238-39.

and the peculiar role of the public school in training Americans "in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions . . . neither theistic nor atheistic, but simply civic and patriotic."[265]

Justice Brennan found the Judaeo-Christian Bible inherently sectarian, and therefore, any version of it or the manner in which it was used was deeply offensive to persons in every community.[266] Bible reading constituted an establishment of religion, irrespective of a provision to excuse students who did not wish to participate. In any case, he relied on the supposed authority of *Barnette* and *Torcaso* to find that the procedure infringed the right of free exercise of those who wished to be excused.[267]

Neither Justice Brennan, nor the majority referred to the problem of teaching morality in public schools without reference to religion. But years later, in *Stone v. Graham*,[268] the Court, when faced with this problem, held that the posting of the Ten Commandments on the walls of public school classrooms was "plainly religious in nature" and constitutionally impermissible.[269] While the opinion did leave open their use "in an appropriate study of history, civilization, ethics, comparative religion, or the like," it was clear they could not be used to inculcate a sense of right conduct.[270]

Contrary to Justice Brennan's presentation of the historical record in *Schempp*, the framers of the first amendment in the First Congress did give, to use his language, a "distinct consideration to the particular question whether the clause also forbade devotional exercises in public institutions."[271] For example, as Justice Rehnquist pointed out in his dissent in *Wallace v. Jaffree*,[272] the House of Representatives took up a bill re-enacting the Northwest Ordinance of 1787 on the same day that Madison introduced his proposals for a bill of rights.[273] The Northwest Ordinance of 1787 provided that "Religion, Morality, and knowledge, being necessary to good gov-

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264 *Id.* at 240-41.
265 *Id.* at 241-42.
266 *Id.* at 287-94.
267 *Id.* at 288-93 (citing Board of Educ. v. Barnette, 319 U.S. 624 (1943); Torcaso v. Watkins, 367 U.S. 488 (1961)).
268 449 U.S. 39 (1980) (per curiam).
269 *Id.* at 41.
270 *Id.* at 42.
271 School Dist. v. Schempp, 374 U.S. 203, 237-38 (1963) (Brennan, J., concurring).
272 472 U.S. 38 (1985).
273 *Id.* at 100 (Rehnquist, J., dissenting).

ernment and the happiness of mankind, Schools and the means of education shall forever be encouraged."[274] In this light, the First Congress may be seen as not neutral in respecting religion and education. Moreover, the proposed Blaine Amendment in 1876, while expressing an opposition to state establishment of religion and any funding, federal, state or local, in support of religious schools, specifically added a proviso that "[t]his article shall not be construed to prohibit the reading of the Bible in any school or institution . . . ."[275]

Justice Stewart, the lone dissenter in *Schempp*, did not attempt a defense of the challenged school practices based on the historical record, but founded his position on his understanding of the core values of the religion clauses: the guarantee of liberty and the "safeguarding of an individual's right to free exercise of his religion . . . ."[276] Thus, for Justice Stewart, the cases involved the substantial free exercise claim of religiously minded parents to have their children's school day open with the reading of the Bible, in the circumstance that all states had a compulsory educational system.[277] If religious exercises were held impermissible, religion was placed at an artificial and state-created disadvantage.[278]

Justice Stewart concluded that the disputed practices did not constitute an establishment.[279] Because the program consisted of readings unaccompanied by commentary, they could not be considered instruction.[280] In practice, not all school boards in Pennsylvania carried out the reading and variations were permitted in some schools.[281] Neither teachers,[282] nor pupils[283] were required to participate, thus protecting their free exercise rights.

Provided that the school administration did not place its authority behind one or more particular readings or beliefs, and provided that coercion was avoided, Justice Stewart implied that the choice should be left to the local community and its school board to adopt practices reflecting the society from which the school draws

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274 *See An Ordinance for the Government of the Territory of the United States North West of the River Ohio, reprinted in* THE NORTHWEST ORDINANCE 119, 125 (F. Williams ed. 1989).

275 4 CONG. REC. 5580 (1876).

276 School Dist. v. Schempp, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting).

277 *Id.*

278 *Id.* at 313 (Stewart, J., dissenting).

279 *Id.*

280 *Id.* at 314 (Stewart, J., dissenting).

281 *Id.* at 315 (Stewart, J., dissenting).

282 *Id.* at 314 (Stewart, J., dissenting).

283 *Id.* at 319 (Stewart, J., dissenting).

its pupils.[284] Anticipating the developments reflected in *Widmar v. Vincent*[285] and in subsequent Congressional legislation,[286] he suggested, *inter alia*, that in some cases the exercises might be scheduled before or after the official school day.[287]

After *Schempp*, however, the Court deemed that the establishment clause commanded neutrality respecting religion and forbade, according to the second of the two-pronged *Schempp* test, the advancement of religion, including the advancement of God.[288] Equipped with this understanding, it is possible to perceive the effect the establishment clause would have on the construction of the free exercise clause in the decisions construing a statutory exemption from military service based on conscientious objection to war in any form.[289] The exemption, it will be recalled, was limited to an objection "by reason of religious training and belief . . . in . . . a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[290]

2. Conscientious Objection: Religion Clauses and Equal Protection

In *United States v. Seeger*[291] and companion cases, the Court avoided challenges to the military service statute's unconstitutionality by holding that petitioners had satisfied the statutory exemption.[292] First, it was argued that because the statute did not exempt non-religious conscientious objectors, it violated the first amendment's establishment and free exercise clauses. Second, it was claimed that its discrimination between different forms of religious conscientious objection, either internally derived or externally compelled, violated the equal protection component of the due process clause of the fifth amendment.[293] The petition-

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284 *Id.* at 314-20 (Stewart, J., dissenting).

285 454 U.S. 263 (1981) (affecting college and university students).

286 The Equal Access Act was held to apply in Mergens v. Board of Educ., 867 F.2d 1076 (8th Cir. 1989) and, following *Widmar*, deemed not to violate the establishment clause. The Supreme Court has granted certiorari for *Mergens*. Mergens v. Board of Educ., 109 S. Ct. 3240 (1989). *See also* Garnett v. Renton School Dist., 874 F.2d. 608 (9th Cir. 1989) (statute not applicable).

287 School Dist. v. Schempp, 374 U.S. 203, 318 (Stewart, J., dissenting).

288 *See infra* notes 292-307 and accompanying text.

289 *See infra* notes 292-352 and accompanying text.

290 50 U.S.C.A., § 456(j) (West 1981) (Universal Military Training and Service Act).

291 380 U.S. 163 (1965).

292 *Id.* at 187-88.

293 *Id.* at 165.

ers also claimed that their beliefs occupied a place in their lives parallel to that filled by the orthodox belief in God.[294]

In response to these claims, the Court first held that "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[295] The Court then proceeded to find that within such an expanded construction, each petitioner had proved his case for exemption.[296] One petitioner in fact admitted a belief in a "Supreme Being who was Creator of Man."[297] A second believed in a moral code "superior to his obligation to the state" and in "some power manifest in nature which helps man . . . ."[298] Seeger believed in "goodness and virtue for their own sakes," but not in God "except in the remotest sense," presumably as the unmoved mover or first cause.[299]

Once again, while the end result is not objectionable, the reasoning by which the Court attained its result gives rise to serious misgivings. It saw in the statutory inclusion of the phrase "Supreme Being" a Congressional intention not to use the word "God," as though in history the latter term had been reserved for a personal Deity intruding in human history.[300] On this latter supposition, Thomas Jefferson and Benjamin Franklin, deists but not theists,[301] would not, had they possessed pacifist principles, have qualified for a conscientious objection exemption. More properly, the Court could have come to the same conclusion by reading "Supreme Being" as also meaning the God implicit in nature, the God, if you will, of natural law, with which Madison himself was comfortable.[302] Construed in this fashion, the petitioners before the Court, latter day deists, if not eighteenth century deists, qualified for the exemption.

The situation of Elliott Ashton Welsh II, however, was a dif-

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294 *Id.*

295 *Id.* at 176.

296 *Id.* at 185-88.

297 *Id.* at 167.

298 *Id.* at 169.

299 *Id.* at 166.

300 *Id.* at 174-76.

301 J. TURNER, *supra* note 2, at 66-67. *See also* D. MALONE, JEFFERSON THE VIRGINIAN, 106-09 (1948) (Jefferson believed that the doctrine of supernatural revelation was the "first major obstacle to the freedom of the mind").

302 *See* Letter from James Madison to Frederick Beasley (Nov. 20, 1825), *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY *supra* note 71, at 85.

ferent matter.[303] Welsh based his claim to conscientious objection on beliefs found "by reading in the fields of history and sociology," and "on his perception of world politics."[304] These beliefs included a duty to abstain from violence toward another person, a duty which, he said, arose not out of a consideration "superior to those arising from any human relation," but on the contrary from the essence of human relationship as such.[305] In sum, he cited a natural law obligation, an obligation which Madison would have understood. Welsh, however, denied the existence of the divine law-maker, a denial which Madison would not have understood.[306]

Welsh, like Seeger and his companions, contended that the Selective Service System's failure to classify him as a conscientious objector was improper under the statute, or if not, that the statute was unconstitutional for essentially the same reasons advanced in the prior cases, adding the contention that the free exercise clause restrained governmental impositions on conscience.[307] The Supreme Court in *Welsh v. United States*, without a majority opinion, agreed with him.[308]

In a plurality opinion, Justice Black held that the statutory exemption extended to "those whose consciences, spurred by deeply held moral, ethical *or* religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[309] Justice Black argued that this construction was implicit in *Seeger*, which stated the test for a statutory exemption as whether the petitioner's beliefs "are *in his own scheme of things*, religious . . . whether . . . [they] play the role of a religion and function as a religion in the registrant's life."[310] All that was necessary, Justice Black explained, was that the beliefs be "held with the strength of traditional religious conviction."[311] He added:

> Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and

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303 Welsh v. United States, 398 U.S. 333 (1970).
304 *Id.* at 341-42.
305 *Id.* at 343.
306 *See supra* note 303 and accompanying text.
307 Welsh v. United States, 26 L. Ed. 2d 875, 875-76 (1970) (brief for petitioner).
308 *Welsh*, 398 U.S. at 339-44.
309 *Id.* at 344 (emphasis added).
310 *Id.* at 339 (emphasis in original).
311 *Id.* at 340.

> therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of *conscience* to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons.[312]

Thus, Justice Black concluded that because Welsh's beliefs functioned as a religion in his life, they were as entitled to the benefit of the statute's provisions as one whose beliefs were derived from traditional religious convictions.[313] The depth of sincerity in one's conviction was the relevant fact.[314] It was irrelevant that these beliefs were based to a substantial extent on considerations of public policy.[315] Construing the statute in this manner saved the plurality the necessity of considering the constitutionality of the statute, if the Court had, in fact, denied the exemption to one, such as Welsh, who believed in the proscriptions of natural law, but not in its origins in an originating Law-Maker.[316]

In his concurring opinion, which, joined with the plurality, formed a majority of the Court in Welsh's favor, Justice Harlan lamented Justice Black's statutory construction as an impermissible judicial reformulation of congressional intent. Congress, he declared, had clearly not meant to provide an exemption for one objecting on the basis of a merely personal ethical code. Justice Harlan, therefore, felt compelled to address the constitutional issue which he posed as follows: "[W]hether a statute that defers to the individual's conscience only when his views emanate from adherence to *theistic* beliefs is within the power of Congress."[317] Alone among the Court, Justice Harlan concluded that *Seeger* had been wrongly decided.[318] Congress, he declared, had not intended to exempt a conscientious objector based on deistic beliefs, but had meant to confer its exemption to those believing in a personal, providential and monitoring God.[319] Accordingly, Justice Harlan determined that Congress had discriminated against deists, against Seeger and his companions, and against others such as Welsh whose ethical position had been found without reference to any deity what-

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312 *Id.* (emphasis added).
313 *Id.* at 342-43.
314 *See id.*
315 *Id.* at 342.
316 *Id.* at 344.
317 *Id.* at 356 (Harlan, J., concurring in result) (emphasis added).
318 *Id.* at 344 (Harlan, J., concurring in result).
319 *Id.* at 344-45 (Harlan, J., concurring in result).

soever.[320] In Justice Harlan's view, such distinctions were the kind that the Constitution had meant to eliminate in the establishment clause. He primarily relied on the Court's decisions in *Torcaso*, *Engel* and *Schempp*.[321]

The implementation of the principle of neutrality commanded by these decisions, he explained, required an equal protection mode of analysis in which religious gerrymanders were eliminated.[322] The critical question was whether the scope of the legislation encircled a class so broad that it could fairly be concluded that all groups thought to fall within its natural perimeters were included. In *Welsh*, he considered that the radius encircling the statutorily favored class was the conscientiousness with which an individual opposed war in general; yet, the statute excluded conscientious individuals motivated by teachings of non-theistic religions and individuals guided by an inner conviction that bespoke secular, not religious reflection. Therefore, the statute accorded a preference to the theistically religious and disadvantaged adherents of religions that did not worship a Supreme Being.

The radius of the statutory exemption, Justice Harlan concluded, should have been broadened to accommodate anyone who as a matter of conscience could not comply with the statute. The proper judicial remedy was to extend the statute to accommodate conscience, and therefore, help Welsh.[323] In the end Justice Harlan agreed with Justice Black, but for constitutional, not statutory, reasons.

Justice Harlan's analysis has the virtue of being candid, but unfortunately it perpetuates and indeed makes explicit the confusion in the construction of the establishment clause that Justice Black had begun in *Torcaso*.[324] That clause, as stated above, was primarily intended to prohibit support to a church or churches. It was the free exercise clause, originating in the third part of Madison's first proposal, protecting "the full and equal rights of conscience,"[325] that was intended to protect the rights of religiously-minded individuals. Conscience inheres only in the individual. In presenting that propo-

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320 *Id.* at 356 (Harlan, J., concurring in result).

321 *Id.* (citing Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Engel v. Vitale, 370 U.S. 421 (1962); School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

322 *Id.* at 357 (Harlan, J., concurring in result).

323 *Id.* at 361 (Harlan, J., concurring in result).

324 *See supra* notes 160-78 and accompanying text.

325 *See supra* note 49 and accompanying text.

sal, Madison was primarily concerned with the personal right to be free of coercion in matters of church attendance and belief.

Madison probably had this distinction in mind between a prohibition of governmental support or establishment, and a specific provision guaranteeing freedom of religious belief when he presented his second proposal affecting religion providing that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[326] He hardly conceived that this proposal constituted an establishment. At the same time, it is clear that Madison could not have regarded an exemption from military service for the religiously scrupulous as falling within the protection of his earlier proposal respecting the "full and equal rights of conscience." These observations are re-enforced by the fact that two years later, after Congress had rejected his proposal for a constitutional amendment for the religiously scrupulous, but approved the Bill of Rights, Madison made essentially the same proposal, an exemption for the religiously scrupulous, in a bill providing for the organization of the state militia.[327] During the debate over this proposal, no one referred to the religion clauses in the proposed Bill of Rights.[328] Evidently neither the establishment nor the free exercise clause was considered pertinent. We may be sure that, if they were applicable, Madison would not have made the proposal.

These distinctions were obliterated in *Welsh*.[329] Both Justice Black, who in his opinions in *Everson* and *Torcaso* scoured the histories of Europe, the colonies and the composite states of the Union for a comprehensive explication of the establishment clause,[330] and Justice Harlan, who in so many other cases revealed himself as the student of constitutional history,[331] neglected the lessons of legislative history contained in the debates in the First Congress.

The reason for Justice Harlan's neglect lay in his evident desire to achieve some measure of equal protection for everyone's conscience, not just the conscience of the religiously scrupulous, and thereby update Madison's concerns to include the unbeliever. The difficulty with employing for that purpose an equal protection analy-

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326 *See supra* note 76 and accompanying text.

327 2 ANNALS OF CONG., *supra* note 26, at 1824, 1827.

328 *Id.* at 1824-27.

329 398 U.S. 333 (1970).

330 *See* Everson v. Board of Educ. 330 U.S. 1, 8-16 (1947); Torcaso v. Watkins, 367 U.S. 488, 490-92 (1961).

331 *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 155-229 (1970) (Harlan, J., concurring in part and dissenting in part); Reynolds v. Sims, 377 U.S. 533, 595-629 (1964) (Harlan, J., dissenting).

sis via the fifth amendment is that a classic equal protection objection may be countered, as Justice White did in his dissent in *Welsh*, with the argument that a statutory exemption limited to the religious can be justified as a Congressional accommodation of their "free exercise" of religion under the first amendment.[332] This justification is strengthened by the Court's earlier holding in *Sherbert v. Verner*,[333] that a governmental burden on a right of free exercise must, as in the case of a right of free speech and press, be justified by a compelling governmental interest.[334]

Because standard equal protection analysis is not sufficient to disable a congressional preference for religiously motivated conscientious objection, it becomes necessary to impute to the establishment clause an equal protection component of its own: a component which forbids by its very terms a positive legislative accommodation of a right the legislature considers to be one approaching free exercise dimensions, such as the right not to perform military service, or a right the legislature or the Court itself determines to be one of free exercise.[335]

This construction of the religion clauses has become overrefined, leading to results which can perhaps be justified in conceptual terms, but hardly in the world of common sense. Consider the results in the conscientious objection cases. In *Welsh*, the Court included in the statutory exemption everyone who sincerely opposed all wars, including some non-religiously affiliated objectors, to save the explicit exemption for the religiously affiliated.[336] Otherwise, in Justice Harlan's analysis, by its preference for the religiously affiliated objectors, Congress was deemed to have preferred, and thereby, established religion over non-religion. But in *Gillette v. United States*[337] decided the following year, the Court held that Congress' exclusion from the same statutory exemption of persons whose scruples, religious or otherwise, were limited to their partici-

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332 Welsh v. United States, 398 U.S. 333, 369-71 (1970) (White, J., dissenting). This accepts a construction of the free exercise clause as extending its protection beyond matters affecting the practice of religion as such to military service.

333 374 U.S. 398 (1963).

334 Query, whether Madison would have considered *Sherbert* a case of free exercise. If he regarded the scruple about bearing arms lest one kill someone, as not falling within the free exercise of religion according to the dictates of conscience, is it likely he would have considered the scruple about not working on the Sabbath as falling within it?

335 *See* Estate of Thornton v. Caldor Inc., 472 U.S. 703 (1985). *But cf.* Hobbie v. Unemployment Appeals Comm'rs., 107 S. Ct. 1046, 1051-52 n. 11 (tending to reconcile *Thornton* with Trans World Airlines v. Hardison, 432 U.S. 63 (1977)).

336 *See* Welsh v. United States, 398 U.S. 333, 335-44 (1970).

337 401 U.S. 437 (1971).

pation in a particular war rather than war as such, was constitutionally permissible. *Gillette* led to the conclusion that Congress can favor persons with one kind of religious scruple over another.[338] If favoring a religious person constitutes favoring the church or religion he belongs to, the interpretation was contrary to the Court's initial construction of the establishment clause in *Everson*. There the Court enjoined the adoption of laws which prefer one or more religions to another.[339] The interpretation is also contrary to its decision the following year in *Larsen v. Valente*.[340] Under *Welsh*, the fact that the preference in *Larsen* operated against a particular church rather than against one of its adherents is irrelevant. The inclusion of some non-religious objectors in the disfavored class, as in *Welsh*, would also appear to be irrelevant.

In *Gillette*, the Court's holding was founded principally on practical grounds, finding the administrative difficulty in judging the sincerity of an individual applicant's personal evaluation of the moral merits of a particular war overburdensome.[341] Such an evaluation the Court considered subjective.[342] The Court's reasoning, however, does not hold. The administrative determination in *Gillette* did not seem to be different in kind from that involved in *Welsh*. While in cases of claims based on an objection to war as such, it is fairly easy to test the sincerity of long-standing adherents of religious groups that formally espouse pacifism, it is more difficult to test the sincerity of recent converts to those groups. It is also difficult to determine the sincerity of religious or non-religious persons not belonging to those groups, whose scruples are rooted in an objection to war as such. In another context, not readily distinguishable from *Welsh*, the Court recently rejected a state's refusal to award unemployment benefits to a worker fired for sabbatarian reasons where his principles were personally derived and he did not belong to a religion with principles against sabbatarian employment.[343]

One further strand in *Welsh* needs to be disentangled: Harlan's reference to the prejudice exhibited in the statute to non-monothe-

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338 *Id.* at 448-62.

339 *See* Everson v. Board of Educ., 330 U.S. 1, 8-18 (1947).

340 456 U.S. 228, 255 (1982) (charitable solicitations act which exempted from registering and reporting requirements "only those organizations that received more than half of their total contributions from members or affiliated organizations" violated the establishment clause).

341 *Gillette*, 401 U.S. at 454-60.

342 *Id.* at 456.

343 *See* Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514 (1989).

istic religions.[344] This is incorrect. As stated before, the Congressional exemption did not run in favor of religions, but in favor of religious individuals.[345] In addition, the relevance of that preference with respect to Welsh himself is not clear because Welsh was not in fact an adherent of any religion, monotheistic or otherwise.[346] In a case which did involve such an adherent, it would have been appropriate for the Court to have expressly acknowledged the ambiguities of the term "religion" in the first amendment. While Madison and the First Congress, in proposing that amendment for adoption, did intend a monotheistic meaning,[347] the term "religion" is commonly used today to include other systems.[348]

Indeed, the great religions of the East, such as Buddhism and Hinduism, have been described as ways of liberation of the self rather than systems of relation between God and man. Buddhism and Hinduism concentrate in the realm of meditation and mental and physical techniques in search of an inner source which will remove the self from attachment to the outer world of the senses.[349]

Assuming that the practitioner of one of these techniques is led by an inner source to plead for a conscientious objection exemption, is that comparable to Welsh's claim which was based on an inner conviction resulting from his ethical and philosophical studies and reflections? The answer is yes. Both the claims of such a person and of Welsh are based in the same subjective world of the self which we can conveniently call "conscience." It is to the vindication of such claims of conscience, irrespective of any acknowledgement of divine prompting, that the tortured reasonings of *Torcaso*, *Seeger*, and *Welsh*, if not *Schempp*, labored, jumbling the Constitution and juggling the statutory exemption for conscientious objection. The question remains pressing today. If Congress should reinstate conscription, must it, in a provision for an exemption based on conscientious objection, include the claim of one who cannot ascribe the promptings of his conscience to a Supreme Being? The composite holding in *Welsh* is not a satisfactory precedent.

On behalf of such a litigant today, if we disregard the constitutional confusions discredited above, we would not argue that the right to such an exemption is fundamental. The Court has pointed out that it is statutory-based, as a perusal of the debates in the First

344 *See supra* note 321 and accompanying text.
345 *See supra* notes 290-91 and accompanying text.
346 *See supra* notes 304-06 and accompanying text.
347 *See, e.g., supra* notes 51, 53 and accompanying text.
348 22 FUNK & WAGNALLS NEW ENCYCLOPEDIA 179 (1983).
349 *Id.* at 185-89.

Congress reveals.[350] But it can be argued that it is an important right, approaching constitutional dimensions, as evidenced by Madison's second proposal in that regard. Further, as in the case of the important rights of voting and education, it may be argued that once the legislature has conferred such an important right at all, it must do so on substantially equal terms.[351] This is perhaps back-door statesmanship. It ignores the fact that Madison himself would have limited the exemption to persons of religious scruple. But, this kind of statesmanship has been effective in the past and it honestly describes what the Court wants and the public would probably accept.

D. Madison's First Proposal Revisited: Civil Rights of Conscience, the Religion Clauses, and the Right of Free Access to the Ballot

Some years after *Welsh*, the Court in *McDaniel v. Paty*[352] engaged in a similarly broad construction of the free exercise clause to accomplish the invalidation of a Tennessee statute disqualifying a clergyman from service as a delegate to the state's constitutional convention.[353] Characterizing *Torcaso* as a free exercise case, the Justices disagreed among themselves as to the clause's applicability. Four, led by Chief Justice Burger, regarded the statute as penalizing McDaniel for his *status* as a preacher, albeit not for his beliefs.[354] Three others, led by Justice Brennan, regarded it as penalizing both his beliefs and his status, although there was no proof as to McDonald's beliefs.[355] The latter, apparently in the face of history and experience, considered it an irrebuttable presumption that one who enters the ministry must be and remain a believer forever. All seven regarded the free exercise clause as offended.[356] Justice Brennan also regarded the statute as offending the establishment clause, even though it had been adopted in the name of the separation of church and state, not supporting either a church or a churchman, but hindering the latter.[357]

Neither opinion in *McDaniel v. Paty* is satisfactory. What the

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350 *See supra* notes 76-79 and accompanying text.

351 *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (education); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting).

352 435 U.S. 618 (1978) (plurality opinion).

353 *Id.* at 629 (plurality opinion).

354 *Id.* at 627 (plurality opinion).

355 *Id.* at 631-33 (Brennan, J., concurring).

356 *Id.* at 629 (plurality opinion).

357 *Id.* at 636 (Brennan, J., concurring).

statute compromised was not the free exercise of religion. McDaniel was unimpeded in both his religious beliefs and in his status. As Justice White perceptibly pointed out in his concurrence, the statute took away McDaniel's right to hold office.[358] Citing the precedent of *Bullock v. Carter*,[359] Justice White concluded that the statute denied McDaniel's important right of access to the ballot without a substantial reason, in violation of the equal protection clause.[360] Or, as Madison would have phrased it, the statute denied him not his "full and equal rights of conscience," but, in the language of the first part of his first proposal, his "civil rights . . . on account of religious belief or worship."[361] (We can presume that the clergyman, even if he had lost his beliefs, continued—a more objective test—to lead in worship.)

V. Summary and Conclusion

In summary, two of the proposals concerning religion which Madison made to the First Congress for constitutional amendments were adopted: a prohibition against the federal government from the establishment of "any national religion," and a prohibition against the federal government from the infringement of "the full and equal rights of conscience."[362] With some change in language, they were made part of the subsequent first amendment.[363] His other proposals were not adopted: a prohibition against the infringement by the federal government of a person's "civil rights on account of religious belief or worship;"[364] a provision for an exemption from military service for "religiously scrupulous" persons;[365] and a prohibition against the states from violating the "equal rights of conscience."[366]

The Supreme Court, however, has by its construction of the Constitution given effect to two of the proposals not adopted. First, in *Cantwell v. Connecticut*,[367] it read the due process clause of the fourteenth amendment as protecting from state action "the free exercise [of religion]," the phrase the framers used in the

358 *Id.* at 644-46 (White, J., concurring).
359 405 U.S. 134, 143 (1972).
360 McDaniel v. Paty, 453 U.S. at 618, 644-46 (White, J., concurring).
361 *See supra* note 49 and accompanying text.
362 *See supra* note 49 and accompanying text.
363 *See supra* notes 52-75 and accompanying text.
364 *See supra* note 49 and accompanying text.
365 *See supra* note 76 and accompanying text.
366 *See supra* note 80 and accompanying text.
367 310 U.S. 296 (1940).

first amendment in lieu of Madison's "equal rights of conscience."[368] It has done so, either in a manner which has not recognized the unique quality of religious speech and beliefs or in a manner which has merged the right of free exercise with a general right of freedom shared by everyone. In *Cantwell*, the Court treated the content and reception of proselytizing religious speech as interchangeable variants of ordinary speech. In addition, in *Board of Education v. Barnette*,[369] the Court merged the right of free exercise with a more general right of inner freedom.[370]

In *McDaniel v. Paty*,[371] the Court also effected the substance of Madison's proposal protecting a person's "civil rights . . . [from abridgement] on account of religious belief and worship." It did so by striking down a Tennessee law disqualifying a clergyman from participation as a delegate to a state constitutional convention.[372] The Court based its decision on the free exercise clause, although Madison had proposed separate constitutional protections for the "equal rights of conscience" and for "civil rights . . . on account of religious belief and worship." Direct interference with a person's religious belief and manner of worship was one thing. Penalizing a person's participation in public life because of his or her beliefs or worship was another.

The Court has not read into the Constitution the substance of Madison's proposal that the "religiously scrupulous" have a constitutional right to an exemption from military service. It has not needed to because Congress has uniformly granted it when providing for military conscription.[373]

The Court has also construed the Constitution to effect results that Madison did not propose. In *Everson v. Board of Education*,[374] the Court read the fourteenth amendment as prohibiting the states from adopting laws respecting an establishment of religion.[375] Moreover, the Court has broadly construed the establishment clause so as to extend its prohibition beyond the support of a church to the support of a church's education of

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368 *See supra* notes 102-121 and accompanying text.

369 319 U.S. 624 (1943).

370 *See supra* notes 122-37 and accompanying text.

371 435 U.S. 618 (1978).

372 *See supra* notes 353-62 and accompanying text.

373 *See supra* note 95 and accompanying text.

374 330 U.S. 1 (1947).

375 *See supra* notes 163-69 and accompanying text.

children either in its own schools or in public schools.[376] The Court has extended the establishment clause even more broadly to prohibit the inculcation of religious values or the recitation of prayer in the public schools even without any church participation.[377] The Court has also broadly construed the religion clauses of the first amendment (which one it is difficult to say) so as to protect the civil rights of non-believers,[378] practically compelling Congress to include on equal terms non-believers with persons of religious scruples in any future exemption for conscientious objection.

In reaching results Madison did not propose, the Court was bent on developing a constitutional law of conscience, as though the original language of Madison's proposal, guaranteeing "the full and equal rights of conscience," had been adopted, instead of the more restrictive "free exercise [of religion]." By his proposal, Madison intended to protect the conscience of religious believers, but a court which has accomplished so much under due process and equal protection could have managed a more expansive reading of conscience, had his proposal been adopted as offered. It could have become a "great" clause,[379] to use a phrase of Chief Justice Hughes, whereby the Court's present policy could have been easily achieved, protecting on equal terms the conscience of that now sizeable and influential minority which hardly existed at the time the Bill of Rights was framed, persons without belief in God.

Unfortunately, for the past and present development of constitutional law the word "conscience" does not appear in the Constitution, and it did not at the time the Court most needed it. At the time when *Barnette*, *Torcaso*, *Schempp*, and the conscientious objector cases were decided, it was considered shameful to recognize new substantive constitutional rights under the due process clause. *Lochner v. New York*[380] and the cases following it had given substantive due process a bad name.

The Court was, therefore, constrained to develop its new law of conscience along dubious lines. In *Barnette*, the compulsion to salute the flag was invalidated, not because it violated a person's religious convictions that such an exercise was a forbidden form

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376 *See supra* notes 212-22 and accompanying text.
377 School Dist. v. Schempp, 374 U.S. 203 (1963).
378 Torcaso v. Watkins, 367 U.S. 488 (1961).
379 Home Bldg. and Loan Ass'n. v. Blaisdell, 290 U.S. 398, 443 (1934) (referring to the contract clause).
380 198 U.S. 45 (1905).

of worship, as Barnette claimed, but because it intruded on everyone's freedom in that inner "sphere of intellect and spirit" which it was the province of the first amendment to protect.[381] In *Torcaso*, the Court set aside a requirement that a person seeking public office first declare a belief in God.[382] Both religion clauses of the first amendment were implicated. How the statute affected the free exercise of religion, when it did not compel the declaration of belief in any *church's* doctrine and when Torcaso, who did not choose to declare, may have had no religion, in church or out, the Court did not say. The opinion intimated that the statute established religion, but did not say how in fact the statute impinged upon the rights of individual conscience, and in no way, financial or otherwise, implicated state support of *any* church. Years later in *McDaniel*, the Court read *Torcaso* as a free exercise case.[383]

But the damage had been done. Non-believers or non-conformists now saw in *Torcaso*'s dictum a handy weapon in future litigation. In *Schempp*, the dictum broadened into a holding that a state requirement for Bible reading and the recitation of the Lord's Prayer at the opening of each public school day was an establishment of religion.[384] To vindicate the conscience of non-participating children, the establishment clause was read as not only forbidding state support of a church, but also as forbidding state support of the affirmation of God's existence, the inculcation of any values attributable to His commands, and the sponsorship of speech directed to Him.

With a burst of logic worthy of a professor of agency law, the Court converted the establishment clause into a "great" clause, whereby the constitutional prohibition against the work of the servant church or churches was extended to their divine master. Contrary to the prior history of the nineteenth and twentieth centuries, the Court moved the Constitution from a position of separation of Church and State to one of separation of God and State, at least for public school children. In consequence, parents who consciously desire for their children's education the cultivation of an awareness of God's existence and relevance, and the inculcation of appropriate values, must do so in a private school.

In the conscientious objector cases, culminating in *Welsh v.*

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381 *See supra* notes 127-37 and accompanying text.
382 *See supra* notes 138-97 and accompanying text.
383 *See supra* notes 352-61 and accompanying text.
384 *See supra* notes 241-87 and accompanying text.

United States,[385] the Court achieved the result that non-believing conscientious objectors desired: exemption from military service on equal terms with persons who objected to war because of their religious training.[386] Apparently influenced by its earlier dictum in *Torcaso* and its reasoning in *Schempp*, the Court confused the individual whose scruple the statute respected with the church with whose religious values his conscience had been imbued. In consequence the Court gave the statute a very broad construction so as to include a person of non-religious scruple.

The Court suggested that exempting only a person of religious training would have constituted a preference of religion over non-religion, and constituted, as Justice Harlan stated explicitly in a concurrence, an establishment of religion. This seems hardly credible becuase Madison who had proposed both a constitutional amendment and later, when that failed, a statutory provision for military exemption for persons of religious scruple, would hardly have done so had he considered he was thereby establishing a religion.

The reasoning quickly broke down in the case of *Gillette v. United States*,[387] where the Court sustained the same statute against a challenge brought by a person conscientiously objecting because of his religious training to the particular war the country was then waging, not to war in any form. The Court disallowed his objection, thus preferring persons with membership in a church which opposes war in general, to those with membership in a church which opposes only participation in a particular unjust war. Overall, the Court produced a result which treated a preference operating in favor of some believers against non-believers as an establishment, but a preference operating in favor of some believers against other believers as not.

The Court should re-examine its precedents. No one today would complain about the results in *Barnette* or *Torcaso*. The public would accept without fuss a constitutional right of conscience, founded in liberty in the due process clause. Despite the deference now uniformly given to every school child's conscience, the flag salute flourishes. Nor has Torcaso's victory in any way harmed those who would feel comfortable with a declaration of belief in God as a qualification for office-holding.

Public acceptance of the conscientious objector cases is per-

385 398 U.S. 333 (1970).
386 *See supra* notes 291-351 and accompanying text.
387 401 U.S. 437 (1971).

haps more problematic, turning on the difficulty of judging the sincerity of the applicant rather than on the principle of honoring conscience as such. The constitutional principle is easy. Once a right of conscience is recognized—in the case of conscientious objection, statutory rather than constitutional—it should be extended to non-believers under the equal protection component of the fifth amendment's due process clause. Recast this way, it should no longer be necessary to read into the establishment clause an equal protection component, whereby in a highly artificial fashion a statutory advancement of a person's religious beliefs is converted into the official establishment either of the church to which he *may* adhere—it is not necessary under the Court's definition of religion that he in fact adhere to any church—or of religion as such. The dictum in *Torcaso* and Justice Harlan's concurrence in *Welsh* should be disregarded.

In each of the cases discussed, the Constitution or a statute has first expressly granted to believers an exemption, and the Court, while in theory and many times in practice not harming the rights of believers, has later extended the exemption to non-believers.

The public school cases are different. The deference the Court has there shown to the conscience of non-believers or of a small believing minority has been given to the detriment of believing children. To reach the result in policy it wanted, the Court had to deny to a believing majority a right to include in their education an awareness of God's existence and an inculcation of the consequent appropriate personal and social values, at the same time as it confirmed the right of a minority to have the mention of both God and religious values excluded.

To do so, the Court had to characterize Bible reading and prayer as religion and rely on the establishment clause, despite the absence from the schools of any clergyman or church which the state was supposed to have supported. Paradoxically thereby, the establishment clause became the free exercise clause of non-believers and of a believing minority, vindicating their rights to the free exercise, not of religion, however, but of conscience.

Overall, the achieved results suggest a question. After *Barnette*, the state may not compel a student against conscience to participate in the quasi-religious ritual of a flag salute—the Court's characterization. How is it then that the state is not required, out of deference to the possibly adverse social pressures

a non-participating student may experience, to discontinue the salute? Instead, the case implies that the non-participating student is not directly coerced and any other coercion experienced is too indirect to be considered reaching constitutional dimension.

Yet, precisely out of deference to the possibly adverse social pressures a student may experience arising from non-attendance in an exercise in Bible reading or non-participation in the vocal recitation of prayer, the state and the children of a believing majority are compelled to forego them. In such a case, even though there is no direct compulsion to attend or participate, the possibly adverse social pressure which a student may experience is considered so direct as to reach constitutional dimension. The difference between the cases lies not in the text of the establishment clause, as the history of both the nineteenth and twentieth centuries discloses. It lies in policy, as Justice Brennan's concurrence in *Schempp* admitted.

The Court's consistent policy is the protection of minority rights. Pursuit of this policy, however, has led the Court into inconsistent doctrinal positions not only in *Barnette* and *Schempp*, but in its construction of the first amendment generally. To protect minorities, it has construed the speech clause as demanding the state's neutrality as to regulation of content. In furtherance of this objective, the Court has commanded the listener's toleration of non-personal speech, even when it offends the listener's religion.[388] The Court has also advised viewers, male and female, adult and child, if offended, to avert their eyes from words on a sign in a courthouse corridor, reading "Fuck the Draft;"[389] and more recently, despite the offense, to tolerate flag burning when done to express disapproval with other national policies.[390] The Court has also forbidden a board of education to remove from a school library books containing ideas deemed "[unorthodox] in politics . . . religion or other matters of opinion"[391] and, generally, has posited an academic freedom for public school teachers. In construing the religion clauses, however, the Court has required the state to restrict speech in public schools precisely because of its content which may include some speech about God (Bible reading) and all speech to God (prayer).

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388 *See supra* note 87 and accompanying text.

389 *See supra* note 119 and accompanying text.

390 *See supra* note 160 and accompanying text.

391 Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982) (plurality opinion).

The Court has not been completely unaware of this doctrinal inconsistency. Under the public forum doctrine, it has permitted the reintroduction of religious speech in state-run universities on student initiative and on limited terms.[392] But otherwise, the doctrinal inconsistency persists: To protect the sensibilities of a majority, the state may not prohibit the content of religious or non-religious speech of a provocative minority, regardless of offense. At the same time, however, to protect the sensibilities of a minority, the state must generally prohibit the content of religious speech in its own schools in disregard of the interests of a majority.

Parents, dissatisfied with this result, who wish their children's education to include speech about God and speech to God must send them to private schools of their own choice, and, as *Everson* and later cases following it made clear, at their own expense. The reason for the latter decision again lies not in the textual necessity of the establishment clause, as the history of both the eighteenth and nineteenth centuries disclosed, but in policy.

This policy judgment assumes six points. First, an appropriate church school is available within reasonable distance. Second, the parents have sufficient money to finance their children's education in the appropriate church school after payment for the necessities of life. This includes payment of local and state tax, a substantial percentage of which is allocated to the support of the religiously deficient public schools they prefer their children not attend. Third, the church school to which they may send their children has itself the financial resources to offer them an education in secular subjects reasonably comparable to that offered by the competing public school. Fourth, the difficult choice thereby placed on the parents and the possibly bad effects resulting from that choice—the failure of some children educated in a church school, as opposed to neighboring children educated in the public school, to realize their full potential—are of minimal concern to the government. Fifth, contrary to the already expressed determination of Congress, it is an improper governmental objective to foster the inculcation of rules of personal and social behavior in children from disadvantaged families because the school also includes in its inculcation a sense of God's existence and relevance. And sixth, again contrary to the expressed determination of Congress, it is improper for government to foster the

392 *See* Windmar v. Vincent, 454 U.S. 263 (1981).

inculcation of the religious value of chastity as an educational measure in the reduction of teenage pregnancies. Of course, the judgment may be made to maintain this policy, whatever its origins and its personal and social costs, and despite its inconsistencies, because it is deemed necessary for the continued integrity of the public school system. This again is another policy judgment.

In any case, it is a long way from Madison and his proposals concerning religion in the First Congress to the present substance of constitutional law. If all his proposals have been woven into the Constitution in one form or another, whether accepted by the First Congress for incorporation in the Bill of Rights, or later realized by the decisions of the Supreme Court, the process by which the Court has accomplished this has been a tortuous and confounded one. It has been the purpose here to sort out the confusion, simplify accepted constitutional law and, delineate the areas where inconsistency persists in the policy choices the Court has embodied in constitutional law in the name of the Constitution.