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THE IRRELEVANCE OF THE CONSTITUTION:  
THE RELIGION CLAUSES OF THE FIRST  
AMENDMENT AND THE SUPREME COURT\*

PHILIP B. KURLAND†

MEMORIAL LECTURES USUALLY BEGIN WITH amenities that deprive sincerity of its due. Yet, I must say because I know it to be true, that it is a privilege to be invited to deliver the Donald A. Giannella Lecture at the University that was his intellectual home. The invitation of Villanova University would be honor enough, especially on the occasion of the law school's silver anniversary. But the fact that the lectureship memorializes a distinguished faculty member, rather than a gracious donor or a famed jurist, doubles the honor, for implicit in the invitation is the suggestion that the speaker is expected to fill a part of the void that was left by the departure of a faculty member who was a vital part of this academy. Of course, in this case, there must be more to the wish than the fulfillment. Don Giannella spoke learnedly and cogently to the subject I am about to address, *inter alia*, in his two articles in the *Harvard Law Review*<sup>1</sup> and one in *The Supreme Court Review*.<sup>2</sup> Although I can only offer a footnote to his work, I hope that I can speak to the subject in the same spirit that he did: with concern, with honesty, and with a bias only in favor of the Constitution. At least, that is my aspiration, despite my shared recognition with T.S. Eliot of the cruelty implicit in a mixture of memory and desire.

The thesis of my lecture is that the Constitution has been essentially irrelevant to the judgments of the United States Supreme Court in the areas designated freedom of religion and separation of church and state. I would quickly add, moreover, that my allegation regarding the irrelevance of the Constitution is not limited to the interpre-

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1. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development. Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967) [hereinafter cited as *Religious Liberty Guarantee*]; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development. Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968) [hereinafter cited as *Nonestablishment Principle*].

2. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147.

tation of the so-called religion clauses of the first amendment.<sup>3</sup> The cases decided under that rubric are but examples, and not the most egregious examples at that, of the Court's substitution of its judgment for those of the founding fathers. Perhaps my tale is no more than still another version of *The Emperor's New Clothes*, but I have never been sure of the proper moral to be derived from that story. Was it that the child pierced the propaganda that had brainwashed the populace? Or was it that the adult population demonstrated more civility than could be expected from a child by indulging the Emperor in his peculiar form of exhibitionism?

To say that the Constitution is essentially irrelevant to Supreme Court decisionmaking, however, purports to be a statement of fact. To explain why that has come about is an exercise in speculation. To determine whether, if this proposition is true, the court's behavior should be approved or condemned is a question of judgment. I shall address, at least tangentially, each of these issues. But ultimately, it is for you to decide what case I have made.

The place to begin is at the beginning, or perhaps before that. As we all know, the Constitution was adopted without a Bill of Rights,<sup>4</sup> but with vehement demand for one. Proponents of such a device were seeking to secure hard-won freedoms against national government intrusions. For the most part, the Bill of Rights was aimed at preventing the repetition of evils recorded in English history. The opponents of the Bill of Rights were not in favor of denying these liberties, but rather were convinced that there was no need to provide negatives to powers that were never granted, lest the negative be pregnant with authorizations to act in fields of government which the Constitution did not specify in article I.<sup>5</sup>

Our nation's history begins with religious persecution. The emigrés from old England to New England's shores fled the home country in order to be free to worship as they pleased or as they believed they must. This was not, however, a principled adherence to a doctrine of freedom—or even tolerance—for religious beliefs not held by the majority. The origins of Rhode Island and Connecticut are evidence enough that the Massachusetts Bay Colony was no more willing to afford freedom of worship to nonadherents to the majority's faith than was the England of its day. One is reminded that Milton's plea for freedom of speech, in *Areopagitica*,<sup>6</sup> would not afford such

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3. U.S. CONST. amend. I. The first amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.*

4. *Id.* amends. I-X.

5. *Id.* art. I.

6. J. MILTON, PROSE WRITINGS 145 (Everyman ed. 1974).

freedom for "Popery"<sup>7</sup> no less for infidels, Jews, or Turks. It would seem that freedom of religion then was only freedom for one's own religion and not that of others.

State churches were the rule rather than the exception in our colonial origin. Nonetheless, the example of the Church of England, with political and social privileges for members and political and social disabilities for nonmembers, afforded the background for the antagonism toward a national established church. Indeed, the body of the Constitution speaks to the abolition of some such privileges that pertained to the Church of England. Thus, the Constitution provides in clause 3 of article VI that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."<sup>8</sup>

This clause was derived from a proposed bill of rights offered at the 1787 Federal Convention by Charles Pinckney.<sup>9</sup> Luther Martin, at the Maryland ratifying convention, pointed out that the provision was adopted without difficulty, but not without dissent:

The part of the system which provides, that *no religious test* shall ever be required as a qualification to any office or public trust under the United States, was adopted by a great majority of the convention, and without much debate; however, there were some members *so unfashionable* as to think, that a *belief of the existence of a Deity*, and of a *state of future rewards and punishments* would be some security for the good conduct of our rulers, and that, in a Christian country, it would be *at least decent* to hold out some distinction between the professors of Christianity and downright infidelity or paganism.<sup>10</sup>

James Madison refused to make much of this provision. In a letter to Edmund Randolph, he wrote: "As to the religious test, I should conceive that it can imply at most nothing more than that without that exception, a power would have been given to impose an oath involving a religious test as a qualification for office."<sup>11</sup> But Randolph, at the 1788 Virginia ratifying convention, made more of it, with an argument that was later to be adopted by the authors of *The Federalist*.<sup>12</sup> He said:

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7. *Id.* at 182.

8. U.S. CONST. art. VI, cl. 3.

9. See 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 342, 468 (1st ed. 1911).

10. 3 *id.* at 227 (emphasis added).

11. *Id.* at 297.

12. See THE FEDERALIST No. 52 (J. Madison), at 358 (B. Wright ed. 1961) [hereinafter cited as FEDERALIST].

Although officers, &c. are to swear that they will support this constitution, yet they are not bound to support one mode of worship, or to adhere to one particular sect. It puts all sects on the same footing. A man of abilities and character, of any sect whatever, may be admitted to any office or public trust under the United States. I am a friend to a variety of sects, because they keep one another in order. How many different sects are we composed of throughout the United States? How many different sects will be in congress? We cannot enumerate the sects that may be in congress. And there are so many now in the United States, that they will prevent the establishment of any one sect in prejudice to the rest, and will forever oppose all attempts to infringe religious liberty . . . .<sup>13</sup>

This conception of a multiplicity of factions as a check against the dominance of any of them, and the consequent protection of the rights of all minorities, was a central theme of the supporters of the proposed Constitution. Thus, Madison wrote in the *51st Federalist*:<sup>14</sup>

Whilst all authority in [the United States] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.<sup>15</sup>

The word “sects” is, of course, ambiguous. It could mean any organized religious group, or it could mean only divisions within the Christian religion. It has been assumed that the first is the proper meaning, thus including Jews, humanists, infidels, and Mohammedans. Joseph Story’s reading of article VI asserts: “[T]he Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.”<sup>16</sup> And it may be instructive that a 1796 treaty with Tripoli<sup>17</sup> provided that

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13. DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 151 (2d ed. Richmond 1805).

14. FEDERALIST, *supra* note 12, No. 51 (J. Madison).

15. *Id.* at 358.

16. J. STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873, at 731 (Boston 1833) (footnote omitted).

17. Treaty of Peace and Friendship, November 4, 1796, United States-Tripoli, art. XI, 8 Stat. 154.

“the government of the United States of America is not in any sense founded on the Christian religion.”<sup>18</sup> But the fact remains that it was close to the time of the Civil War before all religious qualifications for state office were abolished.<sup>19</sup> Moreover, the requirement of the Maryland Constitution that an office holder swear to his belief in God was not held invalid until 1961.<sup>20</sup> Indeed, in 1892, the Supreme Court had referred with approval to the Delaware Test Oath.<sup>21</sup> And in the same case, the Court declared that “this is a Christian nation.”<sup>22</sup> It is no wonder that at that time Lord Bryce could write: “[T]he National government and the State governments do give to Christianity a species of recognition inconsistent with the view that civil government should be absolutely neutral in religious matters.”<sup>23</sup> But back to the beginning.

When the time came, the First Congress adopted a Bill of Rights, which had been implicitly, if not explicitly, promised to secure the necessary ratification. The provisions that emerged as the first of the Bill of Rights were devoted to the issues of religious freedom and establishment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”<sup>24</sup> Before discussing the conflicts of opinion on the desirability and use for such provision, I should like to trace the genesis of the words that were ultimately utilized.

Madison’s original proposal for inclusion in the Bill of Rights declared: “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.”<sup>25</sup> The proposal continued: “No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”<sup>26</sup>

18. *Id.*, quoted in I. CORNELISON, *THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES* 163 (1895).

19. See Wright, *Introduction to FEDERALIST*, *supra* note 12, at 64.

20. *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).

21. DEL. CONST. of 1776, art. XXII, reprinted in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 469-70 (1892). The Delaware Test Oath required all officers to make and subscribe to the following oath: “I, A.B., do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.” DEL. CONST. of 1776, art. XXII, reprinted in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 469-70 (1892).

22. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

23. 2 J. BRYCE, *THE AMERICAN COMMONWEALTH* 701 (3d ed. 1895).

24. U.S. CONST. amend. I.

25. 1 ANNALS OF CONGRESS 434 (Gales & Seaton eds. 1789).

26. *Id.* at 435.

This proposal came to naught, however, and when the issue was mooted in House debate, the clause under consideration read: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."<sup>27</sup> Madison stated that these words meant to him "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."<sup>28</sup> Congressman Huntington, although agreeing with the Madisonian construction, feared that the clause might be construed by some as antireligious.<sup>29</sup> In his view, such a construction might lead to the infringement by the federal government of the powers of the states to support religion, for example, by the refusal to allow the national courts the power to enforce commitments "for a support of ministers or building of places of worship."<sup>30</sup>

Congressman Samuel Livermore wanted the provision to read: "Congress shall make no laws touching religion, or infringing the rights of conscience."<sup>31</sup> This motion was passed by the House by a vote of thirty-one to twenty.<sup>32</sup> Livermore, one of the unsung contributors to the founding of this nation and the creation of its Bill of Rights,<sup>33</sup> was a member of the Continental Congress. He was instrumental in bringing about New Hampshire's ratification as the ninth state to do so, and served as chief justice of the state even while he was both a Congressman and Senator.<sup>34</sup> As with Madison's original proposal, Livermore again wished to place restraints on state governments as well as the federal government. "[T]he equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."<sup>35</sup> The House committee approved this limitation on the states, but it was not adopted by the full House.<sup>36</sup> A few days later, on August 20, 1789, Fisher Ames of Massachusetts amended the proposed provision to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."<sup>37</sup>

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27. *Id.* at 729.

28. *Id.* at 730.

29. *Id.*

30. *Id.*

31. *Id.* at 731.

32. *Id.*

33. See A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 46 (rev. ed. 1964) [hereinafter cited as STOKES].

34. *Id.* at 46-48. Interestingly, Livermore was married to the daughter of the first minister of the Church of England to establish a parish in New Hampshire.

35. 1 ANNALS OF CONGRESS, *supra* note 25, at 755.

36. *Id.* at xx.

37. *Id.* at 766.

In the Senate, motions to change the language to prohibit only preferences for one religion over another were rejected.<sup>38</sup> The Senate did approve a provision reading: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . ." <sup>39</sup> The result was the necessity for a joint conference committee,<sup>40</sup> in which Madison played a large part in bringing forth the language that was adopted as the religion clauses of the first amendment.<sup>41</sup>

From this legislative history of the religion clauses, a few propositions can be derived that should be beyond debate. First, the restraints, whatever they were, were to be restraints only on the United States.<sup>42</sup> The states had not forfeited, by the promulgation of the amendment, any of their rights to establish a state religion<sup>43</sup> or to afford preferences to one religious sect over others.<sup>44</sup> Second, the national government could not establish a state religion or afford privileges to any religious group or impose disabilities on any individual on the basis of religious preference or affiliation.<sup>45</sup> Or, in sum, religion was to be no business of the national government.

A third proposition emerges from the legislative history of the religion clauses, I think, and that is that they were not separate and distinct conceptions, but rather a unified one. The existence of an established church implied intolerance for the nonestablished religions. The ban on a national church monopoly would factionalize the churches and thereby assure religious freedom.

The most important change in the original meaning, a change with which none would seem any longer to quarrel, came when the Supreme Court decided that the fourteenth amendment's due process clause<sup>46</sup> made the provisions of the first amendment religion clauses applicable to the states.<sup>47</sup> Of course, nothing in the history of the fourteenth amendment suggests that this was among its purposes or

38. See 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789-March 3, 1791, 151 (L. Grant De Pauw ed. 1972).

39. *Id.* at 166.

40. *Id.* at 181, 189, 192.

41. *Id.* at 181.

42. See *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 671, 694 (1845).

43. See S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 510 (1970 reprint of 1902 ed.); W. SWEET, *THE STORY OF RELIGION IN AMERICA* 189-93 (rev. ed. 1950). In fact, the disestablishment of state churches was not complete until 1833, when Massachusetts succumbed. See *id.* at 190.

44. See S. COBB, *supra* note 43, at 519.

45. See *id.* at 510.

46. U.S. CONST. amend. XIV, § 1. The due process clause provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." *Id.*

47. See notes 50-54 and accompanying text *infra*.



goals. The transmogrification occurred solely at the whim of the Court. An attempt to pass a constitutional amendment providing for the application of the religion clauses to the states, the Blaine Amendment,<sup>48</sup> failed in 1876,<sup>49</sup> eight years after the effectuation of the fourteenth amendment. Presumably, any infringement of religious freedom by a state now invokes the fourteenth amendment's ban on deprivation of liberty without due process of law. Any invalid contribution by a state toward the establishment of religion constitutes a deprivation of property without due process of law.

In any event, the Court without argument—certainly without cogent argument—held the free exercise clause of the first amendment<sup>50</sup> applicable to the states in 1940 in *Cantwell v. Connecticut*,<sup>51</sup> and the establishment clause<sup>52</sup> applicable to the states in *Everson v. Board of Education*<sup>53</sup> in 1947.<sup>54</sup> It has been said that Justice Brennan's concurring opinion in the second school prayer case<sup>55</sup> best spells out the justification for this belated recognition of what the framers of the fourteenth amendment had wrought.<sup>56</sup> I leave it to the reader to judge the forcefulness of his argument.<sup>57</sup> Neither the reader nor I can deny that the fourteenth amendment now makes the

48. H.R. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 5190 (1876). The Blaine Amendment provided that

[n]o State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

*Id.*

49. 4 CONG. REC. 5595 (1876).

50. U.S. CONST. amend. I. For the text of the free exercise clause, *see* note 3 *supra*.

51. 310 U.S. 296, 303 (1940). This conclusion was foreshadowed by dictum in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

52. U.S. CONST. amend. I. For the text of the establishment clause, *see* note 3 *supra*.

53. 330 U.S. 1 (1947).

54. *Id.* at 8.

55. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 253-58 (1963) (Brennan, J., concurring). In *Schempp*, Justice Brennan stated:

[T]he Fourteenth Amendment's protection of the free exercise of religion can hardly be questioned .... Even if we assume that the draftsmen of the Fourteenth Amendment saw no immediate connection between its protections against state action infringing personal liberty and the guarantees of the First Amendment, it is certainly too late in the day to suggest that their assumed inattention to the question dilutes the force of these constitutional guarantees in their application to the States. *It is enough to conclude that the religious liberty embodied in the Fourteenth Amendment would not be viable if the Constitution were interpreted to forbid only establishments ordained by Congress.*

*Id.* at 257-58 (footnotes omitted) (emphasis added).

56. *See* P. KAUPER, RELIGION AND THE CONSTITUTION 53-57, 72-74 (1964).

57. For a discussion of several arguments suggesting that the fourteenth amendment does not absorb the establishment clause and Justice Brennan's responses, *see* *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 254-58 (1963) (Brennan, J., concurring).

religion clauses applicable to the states. That is a *fait accompli*; whether it was effected by *ipse dixit* or by reason no longer matters.

The incorporation by the fourteenth amendment of the religion clauses, however, does not help to explicate their meaning. Whatever difficulties there may be in applying the provisions to actions by the national government are equally present when applying the provisions to the states. To resort to the suggestion by some Justices of a "two-tier" theory of the first amendment,<sup>58</sup> that is, to assume that the religion clauses are more stringent restraints on the national government than on the states, only compounds the confusion rather than relieving it.

Three distinct historical bases on which to ground the meaning of the religion clauses have been articulated. The so-called Madisonian position was that government should abstain from interference with religious belief or behavior so that each religious faction could compete on its own for adherents.<sup>59</sup> For Madison, as is indicated by the earlier quotation from *The Federalist*,<sup>60</sup> the multiplication of religious factions would assure freedom to each and the dominance of none.<sup>61</sup> To Thomas Jefferson is attributed the "wall of separation theory,"<sup>62</sup> utilized in the several opinions in the *Everson* case,<sup>63</sup> which sees the establishment clause as requiring strict separation of church and state for the protection of the state.<sup>64</sup> The third theory, labeled with Roger Williams' name, calls for the separation of church and state, but only to protect the church against corruption by the state.<sup>65</sup>

So far as the Supreme Court has chosen to assert which of these three constructions best bottoms the provisions of the religion clauses, it is clear that the Court first opted for the Jeffersonian "wall of separation," with such holes in the wall as it may desire to imagine or create.<sup>66</sup> As Shakespeare put it: "Thou wall, O wall! O sweet and

58. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 203 (1964) (Harlan, J., dissenting); *Roth v. United States*, 354 U.S. 476, 503-06 (1957) (Harlan, J., concurring in part and dissenting in part); *Beauharnais v. Illinois*, 343 U.S. 250, 288-95 (1952) (Jackson, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

59. See J. MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 WRITINGS OF JAMES MADISON 183 (1900). Madison adopted this position in 1785 in an attempt to dissuade the Virginia legislature from renewing Virginia's tax levy for the support of the established church. *Id.* at 183-84.

60. See text accompanying note 15 *supra*.

61. See *id.*

62. See T. JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 113 (H.A. Washington ed. 1854).

63. 330 U.S. at 16; *id.* at 29-30 (Rutledge, J., dissenting).

64. See T. JEFFERSON, *supra* note 62, at 113. See also P. KURLAND, *RELIGION AND THE LAW* 17 (1962).

65. For a discussion of Roger Williams' position, see P. KURLAND, *supra* note 64, at 17.

66. See 330 U.S. at 16.

lovely wall! Show me thy chink to blink through with mine eyne.”<sup>67</sup> In 1970, however, the Court seemed to have veered to the Williams’ argument in *Walz v. Tax Commission*<sup>68</sup> and has wobbled ever since.

The choice of the Jeffersonian wall with its notion of an absolute ban on any government practice that “aids or opposes” any religion,<sup>69</sup> rather than the Williams wall with a one-way door that would allow aid to religion but not infringement on religion, roused the ire of modern churchmen, most notably that of the late Professor Mark DeWolfe Howe and Professor Wilber G. Katz. I quote at length from Katz quoting Howe, lest any paraphrase that I may offer should be affected by my personal bias toward the Jeffersonian approach:

Professor Howe’s views were expressed in a series of lectures published under the title *The Garden and the Wilderness*. His criticism could scarcely have been more severe. He charged that “By superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer.” His principal complaint was that the Court’s Establishment Clause doctrine was spun exclusively out of the Jeffersonian threads in American church-state tradition. The Court erroneously assumed that the framers of the First Amendment “spoke in a wholly Jeffersonian dialect.” Howe’s thesis was that the American tradition of church-state separation includes not only the Jeffersonian threads, but also those running back to Roger Williams. Both Jefferson and Williams wrote metaphorically of a wall of separation, but they viewed the wall as serving quite different ends. Howe described the Jeffersonian principle of separation as rooted in deistic rationalism and anticlericalism, Church and state should be separated “as the safeguard of public and private interests against ecclesiastical deprivations and excursions.” Following this view, the Court seemed to have assumed that “the First Amendment intended to keep alive the bias of the Enlightenment which asserted that government must not give its aid in any form to religion lest impious clerks tighten their grip upon the purses and the minds of men.”

. . . Williams’ wall protected churches not only against restraints but also against the corrupting effects of the government support. Williams and his followers believed that “the spiritual freedom of churches is jeopardized when they forget the principle of separation.”

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67. W. SHAKESPEARE, *A MIDSUMMER NIGHT’S DREAM*, Act V, sc. 1, l. 11.172-73 (Cambridge University Press 1949).

68. 397 U.S. 664, 668 (1970).

69. See *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968).

In Howe's judgment, the First Amendment's prohibitions: . . . at the time of their promulgation were generally understood to be more the expression of Roger Williams' philosophy than of Jefferson's . . . . [T]he predominant concern at the time when the First Amendment was adopted was not the Jeffersonian fear that if it were not enacted, the federal government would aid religion and thus advance the interest of impious clerks but rather the evangelical hope that private conscience and autonomous churches, working together and in freedom, would extend the rule of truth.

The Williams principle of separation does not forbid all government aids to religion, but only those incompatible with full religious freedom.<sup>70</sup>

With all due respect, Howe and Katz are guilty of the same violations of "the arts of the historian" as they condemn in the Court. But they are half right. Little basis exists for the claim that the Jeffersonian "wall of separation" was the guide to the formulation of the first amendment's religion clauses, except that the theory was written by Madison, the Virginian who clearly espoused the Jeffersonian view, at least for Virginia.<sup>71</sup> Equally, support is absent for the argument that the clauses were framed in accordance with the doctrines of Roger Williams. The primary purpose of the amendment was to keep the national government out of religious matters. Madison, the prime mover of the amendment, thought the amendment unnecessary, except to calm the fears of those who worried that without it the national government would be capable of invading the realm of the states, a realm encompassing laws relating to religion.<sup>72</sup> The states were to be unaffected by the amendment.<sup>73</sup> States like Virginia were free to endorse, as they did, what Professor Howe called the Jeffersonian concern to "safeguard . . . public and private interests against ecclesiastical depredations and excursions."<sup>74</sup> Those like

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70. Katz, *Radiations From Church Tax Exemption*, 1970 SUP. CT. REV. 93, 96-97 (footnotes omitted), quoting M. HOWE, *THE GARDEN AND THE WILDERNESS* 4, 10, 2, 7, 2, 19 (1965).

71. See J. MADISON, *supra* note 59, at 183. In this work, Madison, like Jefferson, argued that separation of church and state is necessary for the preservation of a free society:

Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerants of the former. . . . The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people.

*Id.* at 185.

72. M. HOWE, *THE GARDEN AND THE WILDERNESS* 20-21 (1965).

73. See W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 8-10 (1964).

74. M. HOWE, *supra* note 72, at 2..

Massachusetts were left free to follow the pietistic views of Williams' "dread of the worldly competitions which might consume the churches if sturdy fences against the wilderness were not maintained."<sup>75</sup> No dominant single theory of church-state relations prevailed, except the notion that it was no business of the national government. As Professor Edmund S. Morgan has written:

In 1776 most colonies collected taxes for support of the ministry, and one church generally got the bulk of the funds, if not all of them, regardless of its size. In the southern colonies it was the Anglican church, in New England the Congregational. During the Revolution, partly because of the new disposition toward equality, the Anglican church everywhere lost its special position, and most states left the churches of every denomination to support themselves by voluntary donation of their members. But the New England states continued their support, still favoring the Congregationalists, in New Hampshire until 1817, in Connecticut until 1818, and in Massachusetts until 1833.<sup>76</sup>

Today's problems regarding a choice between the views of Jefferson and Williams derive, not from the language or purpose of the first amendment, but rather from the attempted application of the first amendment's language to state action, even though the amendment was clearly framed not to be applicable to the states at all. And, as I have suggested, there is no part of the history of the fourteenth amendment that provides any guidance whatsoever for the application of the religion clauses to the states. Thus, the constitutional provisions are not reasons for the decisions in the Court's church and state cases, but only an excuse for them. But Howe and Katz are right in their assertion that the Court uses the grab bag of history to choose arguments that support positions reached for reasons other than those which it marshals. This, however, is not different from the Court's general use of legal precedents, picking among them to support conclusions rather than being guided to conclusions by the precedents. That, of course, is easy when there are conflicting precedents to choose from, as there usually are in this area of constitutional law.<sup>77</sup> Sometimes a precedent is thought to be binding, even though it is conceded to be patently wrong, apparently because it dictates a result desired by the Justice who cannot otherwise justify either that result or the precedent.<sup>78</sup>

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75. *Id.* at 6.

76. E. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-89*, 96-97 (rev. ed. 1977).

77. See *Wolman v. Walter*, 433 U.S. 229, 265 n.2 (1977) (Stevens, J., concurring in part and dissenting in part). As Justice Stevens cautioned, "the doctrine of *stare decisis* cannot foreclose an eventual choice between two inconsistent precedents." *Id.*

78. See *Runyon v. McCrary*, 427 U.S. 160, 189 (1976) (Stevens, J., concurring).

Having long since abandoned the search for the original meaning of the religion clauses, the Court has come up with a formula for use in measuring the validity of governmental acts claimed to be in conflict with the first amendment. Alas, like Hamlet's reading matter, it is best described as "words, words, words."<sup>79</sup> And as Pascal told us: "The world is content with words; few think of searching into the nature of things."<sup>80</sup>

Some anguish is avoided for the Court, if not for its critics, by treating the religion clauses as two distinct mandates rather than as a single injunction. The determination of which clause is involved is accomplished by stamping a label on the case before considering the issues as one invoking either the free exercise clause or the establishment clause. In most situations, of course, to afford a privilege of freedom claimed for adherents to one religion necessarily results in aiding the religion over others or over the nonreligious. The labeling frequently accomplishes what the modernists would write into the Constitution—a provision that where there is a conflict between the free exercise clause and the establishment clause, the free exercise clause should prevail.<sup>81</sup> That no basis exists for such a proposition either in the language, the history, or the avowed purposes of the first amendment is overcome by the argument that such a construction best comports with our contemporary libertarian ethos.<sup>82</sup>

Even with the ease of judgment that derives from the creation of the dichotomy that the Court now indulges, the Court's rulings have resulted in decisions that are hardly compatible with each other. Such inconsistencies as the Court has wrought hardly suggest a constitutional principle that controls the Court's judgments. Unless, of course, it be that constitutional dictum once privately uttered by a deceased Justice: "So long as the principle is clear, what difference does its application make?"

Thus, in the area labelled freedom of religion, sometimes the question that seems to be asked is whether the government action imposes restraints on the individual because of his religious affiliation or practice or whether the imposition derives from grounds distinct from the religious beliefs or affiliations of the persons regulated? Sometimes the question is whether the regulation in fact inhibits freedom of religious exercise, whatever the nonreligious basis for the promulgated regulation? And here, as elsewhere, the right answer depends on the right question.

79. W. SHAKESPEARE, *HAMLET*, Act II, sc. 2, l. 1.193 (G. Kittredge ed. 1939).

80. B. PASCAL, *PROVINCIAL LETTERS*, Letter II 338 (1657) (Mod. Lib. ed. 1941).

81. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-7 (1978).

82. See *id.*

The decisions reveal that Mormons may be prosecuted for polygamy although it is—or was—mandated by their religion.<sup>83</sup> And Jehovah's Witnesses may be punished for violation of the child labor law by permitting or requiring children to engage in the street sale of literature, as their faith requires.<sup>84</sup> On the other hand, the Amish—and apparently only the Amish—may be exempted from the compulsory education laws because of their religious beliefs.<sup>85</sup>

Adverse economic effects on seventh-day observers resulting from the state's requirement of abstention from business affairs on Sunday are not invasions of religious freedom.<sup>86</sup> But adverse economic effects on seventh-day observers from unemployment compensation laws requiring availability for employment are invasions of religious freedom.<sup>87</sup> And the payment of benefits to those who have done compulsory military service, which is denied to those who have performed compulsory civilian service because of religious conscientious objections to military service, is not an infringement of religious freedom.<sup>88</sup>

While government is precluded from determining the validity of religious beliefs, the courts may determine whether the beliefs are sufficiently religious to qualify for the benefits of the free exercise clause of the first amendment.<sup>89</sup> Some religious beliefs command exemption from military service, while others do not.<sup>90</sup>

The result of all this is not the application of constitutional principles, but the determination of license to violate the laws with impunity wherever the Court is satisfied that the violations are the consequence of sincere religious beliefs that warrant judicial protection. Thus, the Court's most recent decision is that Jehovah's Witnesses are entitled to be free of New Hampshire's command that license plates display the state motto: "Live Free or Die."<sup>91</sup> But it should be pointed out that the Court derived this freedom, not from the religion clauses alone, but from the undifferentiated application of the entire first amendment.<sup>92</sup>

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83. *Reynolds v. United States*, 98 U.S. 145 (1878).

84. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

85. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See also Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 224-45 (1973).

86. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

87. *Sherbert v. Verner*, 374 U.S. 398 (1963).

88. *Johnson v. Robison*, 415 U.S. 361 (1974).

89. See *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Ballard*, 322 U.S. 78 (1944).

90. See *Gillette v. United States*, 401 U.S. 437 (1971). See generally Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31.

91. *Wooley v. Maynard*, 430 U.S. 705 (1977).

92. See *id.* at 714-15.

The Court's behavior in what it labels freedom of religion cases might be compared with the ancient royal prerogative of dispensation, pursuant to which the Crown could exempt individuals from conforming to the laws of Parliament, particularly for reasons of religious affiliation.<sup>93</sup> That the English Bill of Rights<sup>94</sup> deprived the Crown of such authority is regarded only as testimony to the accepted proposition that courts may be entrusted with arbitrary powers that cannot be left to the discretion of executive or legislative branch action. We are never told why.

When we turn to the establishment cases, the Court purports to have a more clearly defined formula for their resolution. As the Court stated in a recent decision:

The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.<sup>95</sup>

It becomes immediately apparent how the labeling of a case may be determinative of its outcome. There is no doubt, for example, that the exemption granted exclusively to the Amish in *Wisconsin v. Yoder*<sup>96</sup> would fall afoul of the establishment clause standards announced by the Court, unless the decision can be distinguished on the grounds that a state court judicial decree rather than a state legislative exemption was at issue.<sup>97</sup> And once again, the connection between the Court's rule and the constitutional mandate is certainly difficult to ascertain, although the excessive entanglement proposition may be traced to the Roger Williams notion and the secular purpose and effect proposition might be derived from the Jeffersonian argument. It should be noted, however, that the three-prong test requires that the governmental action satisfy each requirement and not simply one of them.<sup>98</sup>

93. See F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 302-06 (H.A.L. Fisher ed. 1961); 2 W. STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 583-84 (Clarendon Press 1880).

94. 1689, 1 W. & M., c.2.

95. *Wolman v. Walter*, 433 U.S. 229, 235-36 (1977), citing *Roemer v. Board of Pub. Works*, 426 U.S. 736, 748 (1976); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 772-73 (1973); and *Lemon v. Kurtzman*, 403 U.S. 602, 612, 613 (1971).

96. 406 U.S. 205 (1972).

97. See *id.* at 207, 213. cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (fourteenth amendment prohibits judicial enforcement of racially discriminatory covenants as unconstitutional state action).

98. See *Wolman v. Walter*, 433 U.S. 229, 235-36 (1977).



Nevertheless, the three-prong test has resulted in as much confusion and conflict under the establishment clause as the Court's decisions under the free exercise clause. How, for example, can a law which exempts churches from taxes that others must pay be justified as without the purpose or effect of advancing religious interests and without avoiding entanglement? Yet, that was the Court's conclusion in *Walz v. Tax Commission*.<sup>99</sup> A more tortured opinion would be hard to find.

The bulk of the establishment clause cases have been concerned with aid to private schools. And within this narrow but important area there is again no sign of consistency. Seemingly, the supplying of bus transportation by the government exclusively to parochial school students is valid.<sup>100</sup> So too, may a government make books available to parochial school students as well as public school students without violating the establishment clause.<sup>101</sup> It may not afford reimbursement for testing in church sponsored schools if the tests are created and administered by parochial school teachers,<sup>102</sup> but it may do so if the tests are state created.<sup>103</sup> So too, may the state provide funds for "diagnostic speech and hearing services and diagnostic psychological services,"<sup>104</sup> as well as "physician, nursing, dental, and optometric services in non-public schools."<sup>105</sup> Governmental supply of "therapeutic services" off the school premises does not violate the establishment clause, but the provision of such services on the school premises would.<sup>106</sup> Although "released time" for catechism classes on school premises has been held invalid,<sup>107</sup> "released time" for catechism classes off school premises has been held valid.<sup>108</sup>

If government may supply textbooks to parochial school students, it may not supply other instructional materials<sup>109</sup> even when they are "incapable of diversion to religious use."<sup>110</sup> Funding for school field

99. 397 U.S. 664 (1970).

100. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

101. *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

102. *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973).

103. *Wolman v. Walter*, 433 U.S. 229, 240 (1977), *citing* *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Board of Educ. v. Allen*, 392 U.S. 236, 245-46, 246 n.7 (1968); *and* *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

104. *Wolman v. Walter*, 433 U.S. 229, 242 (1977).

105. *Id.* (footnote omitted), *citing* *Meek v. Pittenger*, 421 U.S. 349, 364, 368 n.17 (1975); *and* *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971).

106. *See* *Wolman v. Walter*, 433 U.S. 229, 244-48 (1977).

107. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

108. *Zorach v. Clauson*, 343 U.S. 306 (1952).

109. *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977), *citing* *Meek v. Pittenger*, 421 U.S. 349, 359-62, 366 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 783 (1973); *and* *Board of Educ. v. Allen*, 392 U.S. 236, 248 (1968).

110. *Wolman v. Walter*, 433 U.S. 229, 248 & n.15 (1977), *quoting* OHIO REV. CODE ANN. §§ 3317.06(B)-.06(C) (Page Supp. 1977) (repealed).

trips is invalid, although it provides no more than transportation, because field trips involve an educational function and not, as in *Everson*, merely transportation to school.<sup>111</sup> Providing funds to a religious school, or its students or their parents violates the establishment clause,<sup>112</sup> even if the funds are usable only for maintenance and repairs of buildings.<sup>113</sup> All of this because “[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.”<sup>114</sup>

It may equally be said of church related colleges and universities that “[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.”<sup>115</sup> Yet, the Court has made it quite clear that both the national and state governments are free to dispense large sums of money to these colleges and universities, so long as the moneys are not directly used for sectarian purposes.<sup>116</sup>

The entanglement part of the Court’s triad is either empty or nonsensical. If entanglement means intercourse between government and religious institutions, then no law is more entangling than that which imposes governmental regulation on private schools as all compulsory education laws do. *Pierce v. Society of Sisters*<sup>117</sup> forbade state monopoly of lower school education but implicitly commanded that the state set and enforce proper standards of secular education for parochial schools.<sup>118</sup> The oversight demanded by these laws is certainly far greater than in the public aid to private school statutes that the Court has struck down.

If entanglement means the avoidance of conflict between religious factions over public issues, it says only that state regulation of, or contribution to, religious institutions will be limited to that which the public will placidly tolerate. By this test, the Supreme Court’s own opinions in the school prayer cases<sup>119</sup> and in the abortion cases<sup>120</sup> would themselves be violations of the first amendment.

111. *Wolman v. Walter*, 433 U.S. 229, 252-55 (1977).

112. *Sloan v. Lemon*, 413 U.S. 825 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

113. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973).

114. *Wolman v. Walter*, 433 U.S. 229, 250 (1977).

115. *Id.*

116. *See Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

117. 268 U.S. 510 (1925).

118. *See id.* at 535.

119. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

120. *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

The word entanglement is only an antonym for separation. The former assures no more guidance than the latter. The Court is left to decide how much separation is required or how much entanglement is too much entanglement. Once again, we are reminded of Professor Thomas Reed Powell's comments on the creation of a Restatement of the Commerce Clause: "In the usual form, the black-letter text would read: 'Congress may regulate interstate commerce.' A comment would add: 'The states may also regulate interstate commerce, but not too much.' And then, there would follow a caveat: 'How much is too much is beyond the scope of this Restatement.'" <sup>121</sup> We may also be reminded of Powell's remark when, in introducing Harlan Fiske Stone at a *Columbia Law Review* dinner, he said that Justice Stone was "neither partial, on the one hand, nor impartial, on the other." When we learn to parse that, we may also find the key to the Court's entanglement language.

The primary purpose and primary effect language lead us little way toward any fixed rule. Clearly the primary purpose and the primary effect of the New York tax exemption for church property in *Walz* was to aid the churches or their adherents. That was not only its primary purpose and effect, it was its sole purpose and effect. But it was held to have passed the test. <sup>122</sup>

It is clear that the Court expects that both the purpose and effect requirements be met before a state law can pass muster under the establishment clause. Should a law passed with the purpose of helping religious institutions, but which in fact did not do so, be considered a violation of the first amendment? True, we have seen the Court, for better or worse, pick up the notions of intent—which may be different from purpose—as the essence of a constitutional violation, as in recent racial segregation cases, for example. <sup>123</sup> But it is even less clear why we should be concerned in the church-state cases with unlawful motives rather than unlawful acts. Perhaps, if the road to hell is paved with good intentions, the road to constitutional violations is paved with bad ones.

In any event, the three-prong test hardly elucidates the Court's judgments. Nor does it cover the plastic nature of the judgments in this area. Judicial discretion, rather than constitutional mandate, controls the results.

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121. Freund, *Foreword*, in T. POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION IX* (1956).

122. *See* 397 U.S. at 680.

123. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

The lack of principles, no less constitutional principles, in these cases was plainly acknowledged by both Justice Powell and Justice Stevens in the recent case of *Wolman v. Walter*.<sup>124</sup> Justice Stevens would eliminate the chaos by returning to the absolutism of the Jeffersonian wall, but not without acknowledging the Roger Williams argument, because for him the two result in the same end.<sup>125</sup> Although one may wish that Stevens had relied on better authority than the argument of Clarence Darrow in *Scopes v. State*,<sup>126</sup> his position is a demand for consistency:

The line drawn by the Establishment Clause of the First Amendment must also have a fundamental character. It should not differentiate between direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other.<sup>127</sup>

He would return to the statement, but not the ruling, of Justice Black in *Everson*:<sup>128</sup> "Under that test, a state subsidy of sectarian schools is invalid regardless of the form it takes."<sup>129</sup> Nevertheless, he, too, would draw lines that would permit public health services and, perhaps, even public diagnostic and therapeutic services, although he had "some misgivings on this [latter] point."<sup>130</sup> But for him, the "Court's efforts to improve on the *Everson* test have not proved successful. 'Corrosive precedents' have left us without firm principles on which to decide these cases."<sup>131</sup> Justice Stevens' resort to Roger Williams' theory may be found in a footnote, where he said:

In *Roemer v. Maryland Public Works Bd.*, . . . I spoke of 'the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it.' This case presents an apt illustration. To qualify for aid, sectarian schools must relinquish their religious exclusivity. As the District

124. 433 U.S. 229, 262 (Powell, J., concurring in part and dissenting in part) (1977); *Id.* at 264 n.1 (Stevens, J., concurring in part and dissenting in part).

125. *Id.* at 265-66 (Stevens, J., concurring in part and dissenting in part).

126. Transcript of Oral Argument, *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). In *Scopes*, Darrow argued that "[t]he realm of religion . . . is where knowledge leaves off and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve." *Id.* at 7, reprinted in 433 U.S. at 264 (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

127. 433 U.S. at 265 (Stevens, J., concurring in part and dissenting in part).

128. See text accompanying notes 53-54 & 64 *supra*.

129. 433 U.S. at 265 (Stevens, J., concurring in part and dissenting in part).

130. *Id.* at 266 (Stevens, J., concurring in part and dissenting in part).

131. *Id.* (footnote omitted), quoting *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947) (Rutledge, J., dissenting).

Court noted, the statute provides aid 'to pupils attending only those nonpublic schools whose admission policies make no distinction as to . . . creed . . . of either its pupils or of its teachers . . . .' Similarly, sectarian schools will be under pressure to avoid textbooks which present a religious perspective on secular subjects, so as to obtain the free textbooks provided by the State.<sup>132</sup>

Because parochial schools do not have a single function, a religious mission only, the problem of aid to private schools exists. A parochial school is not a church. It is, indeed, required to provide an adequate education in secular subjects as measured by state law. It must be accredited as a grammar school in order for its pupils to attend without violating the compulsory education laws. It is performing a state function as well as a religious function. It is not a place of worship; it is a school. And this is the reason that Justice Powell would abide by the implicit inconsistencies in the rules that his brethren have established as the law of the establishment clause.<sup>133</sup> Justice Powell wrote in *Wolman*:

Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek v. Pittenger* . . . that "(s)ubstantial aid to the educational function of (sectarian) schools . . . necessarily results in aid rather than the institutions. . . . The persistent desire of a number would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions . . . . The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial

132. 433 U.S. at 266 n.7 (Stevens, J., concurring in part and dissenting in part) (citations omitted), quoting *Roemer v. Board of Pub. Works*, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting); and *Wolman v. Essex*, 417 F. Supp. 1113, 1116 (S.D. Ohio 1976), *aff'd in part and rev'd in part sub nom. Wolman v. Walter*, 433 U.S. 229 (1977). It is interesting to note that Justice Stevens was a law clerk to Justice Rutledge when the latter wrote the strong separationist opinion in *Everson*. Justice Rutledge stated:

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools . . . . In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. . . . Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from being entangled in corrosive precedents.

330 U.S. at 63 (Rutledge, J., dissenting) (citations omitted).

133. See text accompanying note 134 *infra*.

schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.<sup>134</sup>

Although accepting the reason behind the first amendment's religion clauses supplied by his fellow Virginians, Jefferson and Madison, Justice Powell further suggests that the wall should nevertheless be torn down, at least a little way:

It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable.<sup>135</sup>

These are strange words to be heard from Justice Powell, for they tell us two different things. First, that the religion clauses were meant to prevent evils that no longer threaten. Second, that the principles of the first amendment's religion clauses can be dispensed with so long as whatever violations which may occur are subject "to the continuing oversight of" the Supreme Court. What is in the "public interest" is to be measured, not by constitutional rules, but by judicial "oversight."

It would seem to me, however, that if the Constitution is to be rewritten by the judiciary, it should be written in terms of principles and not by way of ad hoc judgments to which no principle seems applicable. Many years ago, when I was young and naive, I wrote a piece describing what I thought was a principled constitutional

134. 433 U.S. at 262 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted), *quoting* *Meek v. Pittenger*, 421 U.S. 349, 366 (1975).

135. 433 U.S. at 263 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted).

ground for application of the religion clauses.<sup>136</sup> Strangely enough, now that I am old and cynical, I still think there is merit in what I said then.

My suggestion was based on the proposition that the religion clauses were not separate mandates but a single one and that the underlying proposition was assurance of equality of treatment.<sup>137</sup> I said then:

The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.<sup>138</sup>

That proposition met with almost uniform rejection. The strong adherents to religious faith damned it<sup>139</sup> or ignored it. The freedom riders ridiculed it.<sup>140</sup> Even so tolerant a critic as Professor Giannella would amend it beyond recognition.<sup>141</sup> And certainly the Supreme Court refused to have anything to do with it. Forgive me then if I sin by continuing to take pride in it. But it is not mere pride of authorship or stubbornness that leads me to this adherence—not that I lack either quality. I still think it best represents the meaning of the words and the intention of the authors of the amendment, certainly those of James Madison<sup>142</sup> and Samuel Livermore.<sup>143</sup> It still offers a proper rationalization for most of the cases that the Court has decided. It still offers a basis for the principled application that the Constitution would seem to demand. It would not resolve all questions, for there would necessarily remain, for example, the issue of what is religion? But that question is present whatever construction is given to the religion clauses.

I am so old-fashioned as to think that the provisions of the Constitution are only the mere “parchment barriers” that Madison feared they would become,<sup>144</sup> if they are no more than the current reflection of the predilections of the sitting Justices. Justice Story once told us: “The great mass of human calamities, in all ages, has been the

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136. P. KURLAND, *supra* note 64.

137. *Id. passim*.

138. *Id.* at 112.

139. See Katz, *supra* note 70, at 108.

140. See Pfeffer, Book Review, 15 STAN. L. REV. 389 (1963).

141. See *Religious Liberty Guarantee*, *supra* note 1; *Nonestablishment Principle*, *supra* note 1; Giannella, *supra* note 2.

142. See text accompanying notes 25-30 *supra*. See also STOKES, *supra* note 33, at 45-48.

143. See text accompanying notes 30-36 *supra*. See also STOKES, *supra* note 33, at 49-61.

144. *Federalist*, *supra* note 12, No. 48 (J. Madison), at 343.

result of bad government, or ill adjusted government; of a capricious exercise of power, a fluctuating public policy, a degrading tyranny, or a desolating ambition.”<sup>145</sup> These were the evils that a Constitution was framed to prevent. The Constitution cannot serve its function so long as it is regarded by the Court and the nation as a *tabula rasa* on which the Court is free to scribble at will.

Justice Powell’s proposition that the evils at which the religion clauses were directed no longer threaten us states the primary problem that I raise—and leave with you. How should the Court undertake to decide cases for which there is no basis for resolution in the constitutional text? For, if one puts aside cases of clear constitutional violations—assuming the fourteenth amendment’s incorporation of the first—as where the state requires a religious loyalty oath,<sup>146</sup> or where the state undertakes to prescribe compulsory religious ceremonies,<sup>147</sup> the modern day cases fall within neither the language of the first amendment nor the intent of its authors.

The Court has made clear its answer. When the Constitution affords no mandate, it will fill the hiatus with ersatz constitutional rules of its own making. This is neither a novel approach nor one limited to the construction of the religion clauses. One need look only to *Lochner v. New York*<sup>148</sup> and *Adkins v. Children’s Hospital*<sup>149</sup> for earlier examples, or to *Griswold v. Connecticut*<sup>150</sup> and to *Roe v. Wade*<sup>151</sup> and *Doe v. Bolton*,<sup>152</sup> for more recent ones, all more blatant usurpation of the constitution making function than the cases that I have canvassed here.

Of course, the Court might have said that in the absence of clear constitutional interdiction, the legislative judgment will control. That is what Chief Justice Marshall held when he started the Court on its road to judicial review in *Marbury v. Madison*.<sup>153</sup> He said there, it will be recalled, that “the framers of the constitution contemplated that instrument as a rule for the government of *courts* as well as of the legislature.”<sup>154</sup> But that is not the road that the Court has cho-

145. J. STORY, *Lecture on the Science of Government*, in MISCELLANEOUS WRITINGS 147, 150 (Boston 1835).

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

147. See *Engel v. Vitale*, 370 U.S. 421 (1962). See also Kurland, *The Regents’ Prayer Case: “Full of Sound and Fury, Signifying . . .”*, 1962 SUP. CT. REV. 1.

148. 198 U.S. 45 (1905).

149. 261 U.S. 525 (1923).

150. 381 U.S. 479 (1965).

151. 410 U.S. 113 (1973).

152. 410 U.S. 179 (1973).

153. 5 U.S. (1 Cranch) 137 (1803).

154. *Id.* at 179-80 (emphasis in original).



sen and it is probably not going to turn back on the powers it has assumed. The corruption of power affects the judiciary no less than the executive.<sup>155</sup>

Surely, in a would-be democracy, the people are entitled to know who their masters are. When the Court pretends to gather its judgments from the mandates of the Constitution it is engaging in flagrant misrepresentation. Even when it attempts to extrapolate from the limited commands that the basic document affords, it is usually engaged in a fraud that would get lesser men penal servitude for violation of the federal mail fraud statute<sup>156</sup> or the Federal Trade Commission Act.<sup>157</sup>

I would conclude, then, by quoting Judge Learned Hand. The Court's use of the language and history of the religion clauses operates

to disguise what they are doing and impute to [its rulings] a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision. If we do need a third chamber, it should appear for what it is, and not as the interpreter of inscrutable principles.<sup>158</sup>

The point, here, then is not that the Court has reached the wrong results in many or any of its church-state decisions. As declarations of what the Constitution should have said if it had spoken to the question, they may well be better than their alternatives. The question remains whether in the absence of clear constitutional mandate, the Court should have spoken at all in many of these cases. That concern is shared even by one who as academic has applauded and, as advocate, has urged the results that the Court has declared in the name of the Constitution. As Archibald Cox said in his 1975 Chichele Lectures at Oxford, delivered under the auspices of All Souls College:

The rules of constitutional law written by the Warren Court . . . impress me as wiser and fairer than the rules they replace. I would support nearly all as important reforms if proposed in a legislative chamber or a constitutional convention. In appraising them as judicial rulings, however, I find it necessary to ask whether an excessive price was paid by enlarging the sphere and changing the nature of constitutional adjudication.<sup>159</sup>

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155. See R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); A. BICKEL, *THE MORALITY OF CONSENT* 120-23 (1975); P. KURLAND, *WATERGATE AND THE CONSTITUTION* (1978); L. LUSKY, *BY WHAT RIGHT?* (1975).

156. 39 U.S.C. §§ 3005-3007 (1970 & Supp. V 1975).

157. 15 U.S.C. §§ 41-77 (1976).

158. L. HAND, *THE BILL OF RIGHTS* 70 (Harvard University Press 1958).

159. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 102 (1976).

The question I leave with you, then, is whether the American body politic would have been stronger or weaker had the Court abstained from supplying us with its personal preferences and left the state and national legislatures to determine those public issues on which there was no certain constitutional mandate under the first amendment's religion clauses. I urge only, contrary to the prevailing views within legal academia, that there is more than one side to the argument.