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The William and Mary Quarterly, Third Series, Volume 8, Issue 1, James Madison,
1751-1836: Bicentennial Number (Jan., 1951), 3-24.

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The William and Mary Quarterly
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Madison: On the Separation of Church and State

Irving Brant*

TO James Madison, author of the American Bill of Rights, freedom of religion was the fundamental item upon which all other forms of civil liberty depended. Its maintenance would not automatically preserve the entire liberty of the citizen. But without it the other rights were sure to be destroyed.

In the area of religion, as Madison saw it, the basic element was freedom of conscience. But in the protection of that freedom, the fundamental requirement was a total separation between government and religion. In the first legislative endeavor of his life, when he was 25 years old, he wrote a guarantee of freedom of conscience into the Virginia Constitution of 1776, whence it spread into other state charters. In his second creative action for civil liberty, he wrote separation of church and state into the federal Constitution. Then in his later years, in an "Essay on Monopolies," which was lost and unpublished until 1914, he linked these two defenses to each other and to human rights in general.

For the first expression of his belief in separation of church and state one must go back at least to 1774, when 23-year-old Madison wrote to William Bradford:

If the Church of England had been the established and general religion in all the northern colonies as it has been among us here, and uninterrupted tranquility had prevailed throughout the continent, it is clear to me that slavery and subjection might and would have been gradually insinuated among us. Union of religious sentiments begets a surprising confidence, and ecclesiastical establishments tend to great ignorance and corruption; all of which facilitates the execution of mischievous projects.¹

For the germ of this belief one can go still farther back, to the choice in 1769 of Princeton over Williamsburg as the seat of Madison's collegiate studies. Health conditions and alumni loyalties played a part, but only a

* Mr. Brant is the author of the definitive life of Madison now in progress which has dealt with his subject's career 1751-1800. He is writing the fourth and final volume.

¹ James Madison, *The Writings of James Madison*, edited by Gaillard Hunt (New York, 1900-1910), I, 19.

part, in that decision. The Reverend Mr. Horrocks, president of William and Mary College, was the reputed head of a powerful group seeking to establish an American Episcopate with himself at the head of it. Madison's father was an Episcopal vestryman but wanted no authoritarian bishop over him. Church establishment in Virginia was displaying its by-products—the stoning and jailing of Baptist preachers, maintenance of corrupt and dissolute rectors under the tithe law and other statutes. On the contrary side Princeton offered President Witherspoon, newly come from Scotland, whose Presbyterian activities led an observer to write in the summer of 1769: "Our Jersey College is now talking as if she was to be a bulwark against Episcopacy." There is more reason to believe that hostility to church establishment led Madison to Princeton, than that the choice of a school fixed his principles.²

Madison was not a church member, but attended church (regardless of denomination) with regularity and reserved the unorthodoxy of his mature years for fireside conversation. In college he traveled with a slightly impious crowd—impious by eighteenth-century standards—the sophisticated American Whigs as opposed to the devout and fervent Cliosophists. All championed religious liberty. His concern over the subject became manifest after he returned to Virginia in 1772. In the following year, he asked Bradford to send him a draft of the origin and principles of the Pennsylvania Constitution, "particularly the extent of your religious toleration." Dr. Samuel Stanhope Smith, taking his bride (Anna Witherspoon) to the Madison home in 1775, was invited to bring also Josiah Tucker's *Apology for the Church of England as by Law Established* and Phil Tumeaux's *Essay on Toleration*—a defense of dissenting ministers. In between these two requests, Madison paid a visit to Philadelphia, desiring (he told Bradford) "again to breathe your free air." In Virginia:

Poverty and luxury prevail among all sorts; pride, ignorance and knavery among the priesthood, and vice and wickedness among the laity. This is bad

² "James Madison's Autobiography," edited by Douglass Adair, *William and Mary Quarterly*, 3d. ser., II (1945), 191-209; William C. Rives, *History of the Life and Times of James Madison* (Boston, 1866-1868), I, 11; Irving Brant, *James Madison* (Indianapolis, 1941-), I, 67-71. Alexander and Thomas Martin, whose persuasions helped send Madison to Princeton, were Episcopalians. Both were graduates of the New Jersey Presbyterian college, which had been as aggressive against church and state under Presidents Davies and Finley as it was later under Witherspoon. Alexander Martin, as governor of North Carolina, opposed the favored position of his own church and defended the "enthusiast" cults, but was less extreme than Madison in his opposition to public financial support of religion.

enough, but it is not the worst I have to tell you. That diabolical, hell-conceived principle of persecution rages among some and to their eternal infamy, the clergy can furnish their quota of imps for such business. . . . There are at this [time] in the adjacent county [Culpeper] not less than five or six well-meaning men in close jail for publishing their religious sentiments which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all.

At the time of this writing—the spring of 1774—Baptists and Presbyterians were planning an appeal to the Virginia Assembly, but that body, Madison felt, was “too much devoted to the ecclesiastical establishment to hear of the toleration of dissentients.” Again contrasting Virginia and Pennsylvania he wrote to Bradford: “The sentiments of our people of fortune and fashion on this subject are vastly different from what you have been used to. That liberal catholic and equitable way of thinking as to the rights of conscience, which is one of the characteristics of a free people and so strongly marks the people of your province is but little known among the zealous adherents to our hierarchy.”³

In this, one may note a contrast between the quiet spirit of Madison the student and the spirit of Madison the reformer—a spirit which makes it easy to understand the man’s lifelong zeal for religious freedom. Something else, however, becomes notable at this point. In speaking of the polemic literature of religion, and of the struggles waged by others, he refers to *establishment* on the one hand, *toleration* on the other. But in expressing his own conception of the contest, the contrast is between establishment and the *rights of conscience*. As early as 1774, he had come to think of religious toleration (the ultimate goal of most reformers) as only the halfway point on the road to freedom.

With this conviction Madison became an Orange County delegate to the Virginia Convention of 1776. Advised by the Continental Congress to set up a system of civil government, this convention responded by asking Congress to declare the United Colonies free and independent, then proceeded to draft a constitution and bill of rights.

George Mason, liberal Anglican, wrote in his draft of the Declaration of

³ William Meade, *Old Churches, Ministers and Families of Virginia* (Philadelphia, 1857), II, 99 (lamenting Madison’s heterodoxy); Madison, *Writings*, I, 20-21, 23.

Rights that as duty to the Creator can be governed only by reason and conviction, "all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience." In committee, Madison pointed out that "toleration" made freedom a favor sanctioned by the established sect, rather than a natural and inalienable right. The convention accepted his version, which declared that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."

While securing this amendment, Madison failed to obtain approval of a declaration "that no man or class of men ought, on account of religion to be invested with peculiar emoluments or privileges." This was designed to knock out the tithe system and disestablish the Episcopal church. However, Madison contended steadily thereafter that any form or degree of church establishment violated the rights of conscience, and was unconstitutional under the article actually adopted. That too was the immediate interpretation of Article XVI by Virginia Dissenters. Seeing no automatic relief from Episcopal oppression, they flooded the next legislative assembly with petitions for statutory enforcement of the guarantee of freedom. From Prince Edward County came the appeal of citizens who looked on this article "as the rising sun of religious liberty, to relieve them from a long night of ecclesiastical bondage." They asked that without delay, "all church establishments might be pulled down, and every tax upon conscience and private judgment abolished." Other requests for action came from Albemarle, Amherst, Buckingham, Richmond and Culpeper counties. Over the mountains in Scotch-Irish Augusta County, the militia and other freeholders met to instruct their delegates. Free exercise of religion according to the rights of conscience, they asserted, meant that there should be no "favoring some to the hurt of others." Demanding "that no religious sect whatever be established in this commonwealth," they notified "interested bigots, illiberal politicians" and disguised enemies to freedom that men who had rushed to arms to defend the common cause were not to be trifled with. Deny them their patrimony of equal liberty and the consequences "may shake this continent and demolish provinces."⁴

In the legislature, strategic factors worked for and against Episcopal

⁴ Brant, *Madison*, I, 241-248, 293-298; *Journals, Virginia House of Delegates*, October session, 1776; *Virginia Gazette* (Purdie), October 18, 1776; Thomas Jefferson, "Autobiography," *Writings of Thomas Jefferson* (Washington, 1905), I, 57-62.

influence. Thomas Jefferson came home from Congress and took over the House of Delegates leadership relinquished by Patrick Henry (a supporter of the established church) when he became the state's first governor. Dissenters and liberal Anglicans would have had things their own way, except for the "rotten borough" system which built up the conservative tidewater representation and pulled down the West. Even with this handicap, Jefferson, Madison and their allies put through a resolve for the abrogation of laws requiring church attendance and punishing the holding of certain beliefs, and for the repeal of acts for the support of the clergy. When the actual repeal bill came up, church leaders Edmund Pendleton and Robert C. Nicholas were able to cut it to a mere suspension of religious tax levies until the next session of the assembly. That was enough. Once relieved of tithes, the people of Virginia forced a renewal of the suspension year after year, until in 1779 the basic law was repealed.

The established clergy, whose moral delinquencies cut down voluntary financial support from the Episcopalian laity, became terrified at the loss of public funds. Laymen allied with the clergy foresaw the doom of religion and a general wave of licentiousness in the people. At the 1784 spring session of the General Assembly, they made a double move to renew and tighten the links of state and church. A resolution was introduced to levy a general assessment for the support of teachers of religion (each taxpayer to designate the sect to which his money should go). A bill was proposed for the incorporation of the Protestant Episcopal church, including an innocent-looking clause whose purpose (as Madison construed it) was to insure life tenure for clergymen by making it impossible for the lay vestries to remove them. Through the inclusion of all sects in the financial provision, the Anglicans hoped to seduce the Presbyterian clergy to support the assessment plan, leaving the Baptists as the only opponents who were both united and powerful. (Catholics and Quakers were opposed, but weak; Methodists were divided.) The incorporation measure was expected to give the Episcopal church special privilege without giving it a monopoly. The prospect of state support produced such a change in the Presbyterian divines that Madison said he did not "know a more shameful contrast" than between their earlier and later attitudes. However, the Presbyterian laity and the Scotch-Irish preachers in the Shenandoah Valley held to their principles, and so did the Reverend John B. Smith of Hampden-Sydney College, the leading Presbyterian of the state. He termed the incorporation

proposal "an express attempt to draw the state into an illicit connection and commerce" with the Anglicans, and was equally vehement against the assessment.⁵

Madison at this time had just re-entered the legislature after four years in the Continental Congress. Jefferson was a diplomat in France. Patrick Henry, following his retirement as governor, had been for five years the undisputed overlord of the General Assembly. Madison named him years later as the sponsor of the assessment bill, but the great orator was a cautious man who never waged an open fight unless he foresaw victory. On this occasion, Madison wrote to Jefferson, the friends of the assessment measure "did not choose to try their strength in the house," while the incorporation bill "was preserved from a dishonorable death by the talents of Mr. Henry. It lies over for another session."⁶

Reconvening in October, 1784, the legislature found on its doorstep a litter of petitions supporting the two measures, and not one against them. Confident now, Patrick Henry came forward with a resolve that the people "pay a moderate tax or contribution annually" for the support of the Christian religion or some Christian church. Madison took the lead against him. Ordinary political lines were wiped out as tidewater conservatives backed their chronic enemy, Patrick Henry, while such Henry-worshippers as French Strother and Spencer Roane joined Madison, the Nicholas brothers and Zachariah Johnston in opposition. Rising to answer the great orator, Madison argued that religion was totally outside the purview of civil authority, and that a law compelling people to support it financially was a violation of the constitutional guarantee of freedom of conscience. To refute Henry's claim that religion was decaying through lack of financial support, he launched a general assault on religious establishments as corrupters of both state and church. The nations whose fall Henry described had state churches. The flourishing eras of the Christian religion were not those in which the state fostered it, but when it was in conflict with the prevailing laws—as in primitive Christianity, in the Reformation, in the reaction of Dissenters against restraint. For declining morals and religion the remedy was not church establishment but laws to cherish virtue, a better administration of justice, personal example, the education of youth. Madison's speech is preserved not in its full text but in topical notes which

⁵ John B. Smith to Madison, June 21, 1784, *Writings*, II, 213n.

⁶ Madison to Jefferson, July 3, 1784, *ibid.*, II, 56-62.

conclude with his instructions to himself for the discussion of Christianity: "Panegyric on it, on our side."⁷

Patrick Henry won the first test of strength on the assessment bill, but the publicity aroused the state and brought hostile petitions. Madison helped maneuver Henry out of the legislature by electing him governor once more. The Episcopal incorporation bill, stripped of its most obnoxious features, was allowed to pass, in order (Madison wrote) to cool the eagerness of its votaries for a much greater evil. Forty-five to thirty-eight, the assessment bill was then postponed till the following November.⁸

The 1795 spring elections, bringing defeat to many advocates of this measure, caused Madison to regard its postponement as akin to death. George and Wilson Cary Nicholas, however, warned him that the rotten tidewater boroughs might give the bill a majority in the legislature which it lacked among the people. Their appeal for an address to the public brought from Madison his famous "Memorial and Remonstrance against Religious Assessments."⁹

Designed for general signature and presentation to the state assembly, the memorial opened with a statement that the subscribers, as faithful members of a free state, were bound to protest against a dangerous abuse of power and to give the reasons for their remonstrance. These were set forth in fifteen numbered paragraphs.

Quoting what he himself had implanted in the Declaration of Rights, Madison declared that religion must be left to the conviction and conscience of every man. That was not only the right of the citizen, but his duty toward the Creator, and was "precedent both in order of time and degree of obligation, to the claims of civil society. . . . We maintain therefore that in matters of religion, no man's right is abridged by the institution of civil society, and that religion is wholly exempt from its cognizance."

Society at large having no control over it, still less could religion be governed by its creatures and vice-regents, the legislature. To preserve a free government, its departments must be held within their proper spheres, but more especially, none of them must "overleap the great barrier which defends the rights of the people. The rulers who are guilty of such an en-

⁷ Madison, "Notes of Speech Against Assessments for Support of Religion," *Writings*, II, 88.

⁸ After 1784, the Virginia legislature met once instead of twice a year.

⁹ Madison, "Memorial and Remonstrance Against Religious Assessments," *Writings*, II, 183-191.

croachment . . . are tyrants. The people who submit to it . . . are slaves."

Such language represented no figurative use of the symbols of force. It was a tangible threat. Armed revolution was but one year past, and had no moral terrors. "It is proper," Madison went on, "to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it."

A state which could establish Christianity, he observed, could with equal ease establish a particular sect. The authority which could force a citizen to pay three pence (the amount of the war-provoking tax on tea) for the support of any one establishment could force him to conform to any other establishment. The memorial then launched into a more specific attack on the bill, denying that civil magistrates were competent to say what societies were Christian, denying the need of the Christian religion for an establishment to uphold it and challenging the value of religious establishments in general. What had been their fruits in fifteen centuries? "Pride and indolence in the clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution."

No more, Madison argued, was this establishment necessary for the support of civil government. In the past, ecclesiastical societies had erected a spiritual tyranny on the ruins of civil authority, or had upheld the thrones of political tyranny. In no instance had they been the guardians of the liberties of the people. The proposed establishment was a departure from that generous policy which offered "an asylum to the persecuted and oppressed of every nation and religion." It differed from the Inquisition only in degree. It would hasten the emigration of citizens by revoking their liberty. It would destroy that moderation and harmony which religious liberty had produced, and transform Christian forbearance into animosities and jealousies. It was adverse to the diffusion of the light of Christianity. Being too obnoxious for enforcement, it would enervate the laws in general by offering so striking an example of impotency in the government.

In his final paragraph, Madison came back to the Virginia Declaration of Rights. The right to free exercise of religion was held by the same

tenure with all our other rights. It was equally the gift of nature, and was set forth in the basic law "with equal solemnity, or rather studied emphasis." Either, then, the legislature "may sweep away all our fundamental rights; or . . . they are bound to leave this particular right untouched and sacred."

Spread hastily throughout the state, and eagerly received, this memorial started such an avalanche of petitions to the legislature that the assessment bill was suffocated beneath them. Under the momentum of their voteless victory, Madison and his allies brought out of its pigeon hole the Bill for Religious Liberty which Jefferson had drafted in 1779 as part of the (as yet unenacted) revisal of state laws. Both in substance and history, the bill represented a statutory implementation of Madison's 1776 constitutional guarantee. It wrote into law the specific protections asked for in the petitions of Virginia Dissenters, which they as well as Madison regarded as implicit in the rights of conscience. Designed by Jefferson to destroy the tithe system and other privileges by anathema as well as by prohibition, it fitted perfectly into the reaction against all religious assessments. "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves," said the preamble, "is sinful and tyrannical." Neither should he be compelled to support the teachers of his own religious persuasion. By this law, religious tests for office were abolished, old laws against heresy were overridden, and it was guaranteed that no man should be compelled to "frequent or support any religious worship, place or minister whatsoever." The vital clauses of the bill passed without a single alteration, Madison wrote to Jefferson in Paris, "and I flatter myself have in this country extinguished forever the ambitious hope of making laws for the human mind."¹⁰

Two facts, significant for the future, stand out in this fight against religious assessments. Over and over, Madison termed tax support "an establishment of religion." He also regarded any compulsory contribution to religion, through taxes, as a violation of the individual taxpayer's religious liberty. Hence financial support of religion was unconstitutional if the basic law either forbade an establishment of religion or guaranteed the rights of conscience.

This same issue arose about the same time in the federal field, but far

¹⁰ William W. Hening, *Statutes at Large, being a collection of all the laws of Virginia, from the first session of the legislature in 1619* (Richmond, 1819-1823), XII, 84; Madison to Jefferson, January 22, 1786, *Writings*, II, 214-226.

less pointedly, when a committee of the Confederation Congress offered a western land ordinance which set aside one section in each township for public schools and one section for the support of religion. A vote in the full Congress striking out the religious grant led Madison to write in 1785: "How a regulation so unjust in itself, so foreign to the authority of Congress, so hurtful to the sale of public land, and smelling so strongly of an antiquated bigotry, could have received the countenance of a committee is truly matter of astonishment."¹¹ The Articles of Confederation contained no specific bar to government support of religion. He did not question the power of Congress to make a grant for public schools in the western territories. The religious grant was regarded as unconstitutional because religion, in his view, was totally outside the cognizance of civil authority.

In the Federal Convention of 1787, Madison took no part in the brief debate over a bill of rights. Impatience to adjourn, he remarked later, was a factor in the scant attention paid to George Mason's demand for guarantees of liberty in the new Constitution. The omission, however, had to be defended when Mason and Patrick Henry, in their campaign against ratification, made it a foremost issue in the Virginia convention of 1788. The discussion centered there on trial by jury and freedom of the press, but Madison made a detailed reply to Henry's alarm (directed chiefly at the Baptists) over the absence of any clause making religion secure. Now, however, depreciating instead of emphasizing the value and validity of a religious guarantee, he pointed to the reckless readiness of legislatures to override the constitutional provision he himself had written for Virginia. Would that state's bill of rights "exempt the people from paying for the support of one particular sect, if such sect were exclusively established by law?" It would be a poor protection, if a majority of the people were of one sect. Religious freedom, he asserted (following Voltaire), "arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society." There was not a shadow of right in the general government to intermeddle with religion. "Its least interference with it would be a most flagrant usurpation"; moreover, as a simple matter of fact, the United States abounded in such a variety of sects that no one of them would be able to overreach that bar and persecute the rest.¹²

¹¹ *Journals of the Continental Congress*, April 23, 1785; Madison to Monroe, May 29, 1785, *Writings*, II, 143-145.

¹² Madison, *Writings*, V, 176.

To insure ratification of the new federal charter, Madison and his lieutenants finally promised to help plant a bill of rights in it through amendments to be submitted by Congress to the states. Had this promise not been given, he wrote to Richard Peters of Pennsylvania, the Constitution "would have been *certainly* rejected." Patrick Henry then offered a sheaf of twenty libertarian articles for recommendation to Congress by the convention. For strategic reasons, Madison ignored the obnoxious wording of the religious clause, which first guaranteed the rights of conscience and then furnished a loophole for financial support of all churches by providing that "no particular religious sect or society ought to be favored or established by law in preference to others."¹³

This half-hidden sabotage in the article on religious freedom was a warning to Madison of difficulties ahead, but the existing conditions made it a spur rather than a deterrent. A promise for a bill of rights had been given and (he wrote to Peters) "as an honest man I feel bound by this consideration." To Jefferson, who in the fall of 1787 had reacted violently against the omission of guarantees of liberty from the new Constitution, Madison explained his position in detail after the Virginia convention adjourned: "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."

To some extent, though not completely, he thought, these civil rights were reserved to the people by the manner in which the federal powers were granted. That and several other factors reduced the importance of the bill of rights in his eyes: "There is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power."

No less was the danger that declared rights, especially that of religious freedom, would be overridden by governments which were the instrument of an impassioned majority opinion:

In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit pro-

¹³ Jonathan Elliot, *Debates* (Washington, 1836), III, 657-659.

vision contained in that instrument for the rights of conscience, it is well known that a religious establishment would have taken place in that state, if the legislative majority had found as they expected, a majority of the people in favor of the measure; and I am persuaded that if a majority of the people were now of one sect, the measure would still take place and on narrower ground than was then proposed, notwithstanding the additional obstacle which the law has since created.¹⁴

Madison's desire for a protective clause became more acute when he went home from the Confederation Congress at the end of 1788 and found that to defeat him for the new House of Representatives Patrick Henry's lieutenants were telling the Baptists that he had "ceased to be a friend to the rights of conscience." To the Reverend George Eve, his chief Baptist supporter, he wrote at once that it was his sincere opinion that the Constitution ought to be revised, and the first Congress should submit amendments covering "all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, etc."¹⁵

In his paramount emphasis upon religious liberty as the core of all freedoms, Madison differed somewhat from Jefferson, whose mind centered on freedom of the press, trial by jury and habeas corpus, and from Mason, who was steeped in generalities about the original principles of government. So it was with first thought of a comprehensive clause on religion that Madison undertook to redeem the pledge he had given at the Virginia convention to have guarantees of liberty written into the Constitution. On June 8, 1789, he laid a bill of rights before Congress, including this clause: "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, abridged."

A committee of which he was the No. 2 member (Vining of Delaware chairman), retained both of his major objectives in a shortened revision: "No religion shall be established by law, nor shall the equal rights of

¹⁴ Jefferson to Madison, December 20, 1787, *Writings of Thomas Jefferson*, VI, 385-393; Madison to Jefferson, October 17, 1788, *Writings*, V, 269-275; Madison to Richard Peters, August 19, 1789, Library of Congress, Acq. 1226D1. The law referred to was the Statute of Religious Liberty.

¹⁵ Madison to George Eve, January 2, 1789, *Writings*, V, 319n.

conscience be infringed." To a New York congressman who feared that this tended to abolish religion, Madison explained its meaning: "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." From another quarter fear was expressed that it would close the federal courts to suits to collect contributions pledged to churches, since financial support "might be construed into a religious establishment." To meet this apprehension, Madison suggested that the word "national" be inserted before "religion." "He believed that the people feared one sect might obtain a pre-eminence, or two combine together and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced it would point the amendment directly to the object it was intended to prevent."

Madison withdrew the latter motion when it was pointed out that Antifederalists associated the word "national" with the abolition of state governments. The House then approved a wording offered by Livermore of New Hampshire and modeled after a proposal by that state's ratifying convention: "Congress shall make no laws touching religion, or infringing the rights of conscience."

This broad but ambiguous clause gave way a few days later to a substitute offered by Fisher Ames of Massachusetts: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."

It is probable that Madison wrote the Ames version and resorted to his common device of submitting it through another. Besides definitely limiting the prohibition to acts of Congress, it deviated from the committee version only by the insertion of language taken from Madison's speech explaining the original proposition. Ames, up to this time, had done nothing but jeer at the whole subject of a bill of rights in his private letters. However, he would have been ready enough to co-operate in promoting a change which would both attain Madison's objective and relieve the fear of New Englanders that the constitutional amendment might interfere with their established state churches.¹⁶

When the clause reached the United States Senate it passed into the

¹⁶ *Annals of Congress* (House), June 8, August 13, 15, 20, 1789; Fisher Ames to George Minot, June 12, 1789, *Works of Fisher Ames*, edited by Seth Ames (Boston, 1854), I, 53-54.

hands of enemies. Senator Richard Henry Lee of Virginia had been an all-out supporter of the 1784 religious assessment bill.¹⁷ Grayson of the same state was his Antifederalist ally. The clause which the Senate approved and sent back to the House bore all the earmarks of a combination between the established churches of North and South—the Congregationalists and Episcopalians. It protected religious creeds but left the way open to federal financial aid to religion by providing that Congress should “make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion.” Both of the provisions on which Madison relied for complete separation of state and church were gone.

Madison was chairman of the House members of the conference committee on the Bill of Rights. Since his associates, Vining and Sherman, had shown no interest in the clause on religion, and since the House won a complete victory in conference, there can be little or no doubt that Madison shaped the final draft which came from the committee and became a part of the Constitution. Broadening the previous language of the House and adding the useful part of the Senate clause, it reads: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”

When this and the other provisions of the Bill of Rights came before the Virginia legislature for ratification, it ran afoul of the Antifederalist campaign to sabotage the new government through substantive amendments. The House voted almost unanimously for ratification. In the Senate, by a vote of eight to seven, four amendments were stricken out of the House resolution, including the one on freedom of religion and the press. The eight opposition senators then published a signed statement, alleging that the clause on religion did not protect the rights of conscience. It did indeed, they said, forbid establishment of a national religion, but Congress might “levy taxes to any amount for the support of religion or its teachers.”

Strangely enough, every senator who had a notorious record of opposition to religious liberty was among the eight who voted against the article and complained that it was not drastic enough. Every conspicuous defender of religious liberty voted to ratify. The explanation can be found in a letter written to Madison by Hardin Burnley, House member from Orange County. The opposition in the Senate, said Burnley, did not result

¹⁷ Richard Henry Lee to Madison, November 26, 1784, *Letters of Richard Henry Lee*, edited by James C. Ballagh (New York, 1911-1914), II, 304-307.

from dissatisfaction with the amendments, but from an apprehension "that the adoption of them at this time will be an obstacle to the chief object of their pursuit, the amendment on the subject of direct taxation." In other words, the most popular amendments were defeated in order to throw the whole subject back on Congress, with a resulting chance to secure a new amendment emasculating the taxing power, and the project was furthered by a public appeal designed to frighten the Baptists and other opponents of religious assessments. Madison predicted that the Senate's obstructive course would recoil on the authors of it rather than inspire the public to a new attack on the Constitution.

"One of the principal leaders of the Baptists," he wrote to George Washington, "lately sent me word that the amendments had entirely satisfied the disaffected of his sect and that it would appear in their subsequent conduct."¹⁸ And so it proved not only in Virginia, but in the other states when the ten amendments became part of the fundamental law in 1791.

What did Madison believe he had obtained in the religious guarantee of the First Amendment? If an establishment of religion covered what he said it did in his "Memorial and Remonstrance," the amendment insured a total separation of church and state in the federal field, including a ban on all forms of financial assistance to religious bodies. But in soothing the fears of congressmen in 1789, he had said in debate that the people feared the pre-eminence of one sect, or that two sects would combine to establish a religion, and the purpose was to prevent Congress from establishing "a national religion." In telling what the people feared, did he cover the entire purpose and effect of the article, as he saw it, or did he confine his explanation to that portion of its scope which was certain to win the needed support of New England congressmen?

There is no need to guess at the answer, for Madison has given it himself. One year later, in 1790, he explained why, in an amendment to the census bill, he had excluded professional men from an enumeration by occupations: "As to those who are employed in teaching and inculcating the duties of religion, there may be some indelicacy in singling them out, as the general government is proscribed from interfering, in any manner

¹⁸ Hardin Burnley to Madison, November 28, December (misdated November) 5, 1789, Madison MSS, Library of Congress; Madison to Washington, November 20, 1789, *Writings*, V, 425-429; Madison to Washington, January 4, 1790, Madison MSS, Library of Congress. For the records of individual state senators, see Brant, *Madison*, III, Chapter XXII, note 16.

whatever, in matters respecting religion; and it may be thought to do this, in ascertaining who [are] and who are not ministers of the gospel."¹⁹

Here was the broadest conceivable definition of the constitutional guarantee, made publicly by the author of the amendment to the same group of men who had approved it. Nobody challenged his statement. The question of financial support of religion came squarely before Madison as President when Congress in 1811 passed a bill granting certain lands to a Baptist church at Salem, Mississippi. There was ample warrant for the legislation, in simple justice. The church had been accidentally built on public land through an error in surveying, and the grant was designed to correct the error through a trivial gift. But Madison saw a momentous future issue in the question of power to do so. He vetoed the measure "Because the bill in reserving a certain parcel of land of the United States for the use of said Baptist church comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'"²⁰

A week earlier he had vetoed a bill to incorporate a church within the District of Columbia, holding that this too was an establishment of religion within the meaning of the Constitution. In both of his veto messages, Madison misquoted the Constitution by using the phrase "a religious establishment" instead of "an establishment of religion." This was a significant accident. In two recent cases before the Supreme Court, lawyers upholding the power of government to support religious schools contended that the First Amendment was weakened when the words "make no law establishing religion" were changed to "make no law respecting an establishment of religion." Instead of being broadened by the word "respecting," they argued, the amendment was reduced from a ban on the *establishing* of religion to the prohibition of "a religious *establishment*," the drafter having in mind "The Establishment" of England. That is, Congress was forbidden to set up a full-fledged state church. Madison's misquotation of the Constitution, however, makes it plain that he gave the word "establishment" the same meaning in both phrases, and made

¹⁹ *Annals of Congress* (House), January 25, February 2, 1790; Madison to Jefferson, February 14, 1790, *Letters and Other Writings of James Madison* (Philadelphia, 1865), I, 507.

²⁰ James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* (Washington, 1896-1899), I, 490.

both of them synonymous with the ban on "establishing" religion. Any federal financial aid whatsoever to religious institutions would be unconstitutional under any of the wordings, as interpreted by Madison.²¹

During Madison's lifetime there was no federal bar to support of religion by individual states. That prohibition came into being as a by-product of the Fourteenth Amendment, which forbids any state to deprive any person of life, liberty or property without due process of law. In opinions which gained strength gradually through the years, the Supreme Court held that religious liberty, as defined in the First Amendment, is a right protected by the Fourteenth.²² Thus a prohibition originally directed against Congress alone became binding on state governments also. This was a belated fulfillment of one of Madison's objectives. In the sheaf of amendments which he first submitted to Congress in 1789, No. 5 provided that *no state* should violate the equal rights of conscience, freedom of the press or trial by jury in criminal cases. This, he told the House, was the most valuable of the whole list, but he did not arouse the New Englanders by saying why.²³ In the earlier Virginia fight, he had described the guarantee of equal rights of conscience as a bar to the legal establishment of religion. This proposed federal amendment, if interpreted in line with his views, would have disestablished state churches throughout the Union. It passed the House, but was killed in the Senate.

Religious freedom as a state issue came before Madison in a minor way when he collaborated with Jefferson in creating and organizing the University of Virginia. Theological professorships were almost universal in colleges, and there was a general expectation in church circles that part of the money provided by the legislature to support the university would go to a chair of religion. Opposed to this course and believing it contrary to the Declaration of Rights, but not wishing to raise a public controversy,

²¹ *Ibid.*, 489-490 (Madison's veto); *Everson v. Board of Education*, U. S. Supreme Court, October term 1946 (No. 52), brief *amici curiae* of the National Council of Catholic Men and National Council of Catholic Women, 25-26; *People of Illinois ex rel. McCollum v. Board of Education*, October term 1947 (No. 90), appellees' brief, 56-59.

²² Dissenting opinions of Justice Field and Justice Harlan in *O'Neil v. Vermont*, 144 U.S. 323 (1892); Harlan's dissenting opinions in *Maxwell v. Dow*, 176 U.S. 581 (1900) and *Twining v. New Jersey*, 211 U.S. 78 (1908); *Gitlow v. New York*, 268 U.S. 652 (1925); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

²³ *Annals of Congress* (House), August 17, 1789.

Jefferson and Madison induced the Board of Visitors to omit theological professorships. To forestall or at least to reduce the expected criticisms (as Madison explained it to Edward Everett in 1823) the Visitors were "merely authorized to open a public hall for religious occasions, under *impartial* regulations; with the [additional] opportunity to the different sects to establish theological schools so near that the students of the University may respectively attend the religious exercises in them." Or the young men could attend church in the nearby village of Charlottesville. The Board of Visitors' report to the legislature, written by Jefferson, described this proposed arrangement with an enthusiasm for pious exercises not ordinarily expressed by him. His approval of it was cited to the Supreme Court in the recent McCollum case as a justification of the "released time" system of religious teachings in public schools. Madison's letters make it plain, however, that he and Jefferson were employing a lesser evil to escape the greater one. The Fourteenth Amendment being half a century in the future, they had no federal constitutional barrier to help them escape the dilemma. Madison summarized the situation to Everett in these words: "A University with sectarian professorships, becomes, of course, a sectarian monopoly; with professorships of rival sects, it would be an arena of theological gladiators. Without any such professorships, it may incur for a time at least, the imputation of irreligious tendencies, if not designs. The last difficulty was thought more manageable than either of the others."²⁴

Two years later he wrote to Frederick Beasley that "public opinion seems now to have yielded" to the incompatibility of theological professorships with a *state* institution. He repeated his account of the use of a public hall for religious exercises which students were free to attend or not as they chose, and said that it presented some difficulties but seemed the best plan of escaping the other problem. At the age of 82, in correspondence with the Reverend Jasper Adams, principal of Charleston College, South Carolina, he reaffirmed his lifelong position by roundly asserting the benefits of a complete separation of religion from all the workings of civil government, except for the preservation of order and the protection of each sect against trespass on its legal rights.²⁵

²⁴ Madison to Edward Everett, March 19, 1823, *Writings*, IX, 124-130; Report of Board of Visitors, University of Virginia, to the president and directors of the Literary Fund (i.e. to the legislature), October 7, 1822, *Writings of Thomas Jefferson*, XIX, 410-416.

²⁵ Madison to Frederick Beasley, December 22, 1824, *Writings*, I, 210-213; Madison to "Rev. Adams, Charleston S. C.," 1832, *ibid.*, IX, 484-488. Adams sent Madison

It was in his "Essay on Monopolies,"²⁶ written some time after he retired from the presidency, that Madison most clearly demonstrated the consistency and vigor of his views on separation of church and state, and the broad scope he gave to the First Amendment. Condemning all monopolies except those granted for a limited time to authors and inventors, he warned against the "silent accumulations and encroachments by ecclesiastical bodies." The American states, he said, "have the noble merit of first unshackling the conscience from persecuting laws, and of establishing among religious sects a legal equality." If some states had not gone as far as they should, all of them could instruct the most enlightened states of the old world, "and there is one state at least, Virginia, where religious liberty is placed on its true foundation and is defined in its full latitude."

In the Virginia Statute of Religious Liberty, said Madison, the separation between human laws and natural rights is traced as distinctly as words can admit, and the limits of political authority are established with as much solemnity as the forms of legislation can express. States which retained "any aberration from the sacred principle of religious liberty" should "revise and purify" their systems, making themselves "pure and complete" examples of "freedom of the mind." He then outlined the perils of any measures short of this.

"Strongly guarded as is the separation between religion and government in the Constitution of the United States," asserted Madison, "the danger of encroachment by ecclesiastical bodies may be illustrated by precedents already furnished in their short history." He told of his veto, as President, of bills to incorporate one church and make a land grant to another. The most notable encroachment, he asserted, was that attempted in Virginia, "to establish a general assessment for the support of all Chris-

a printed copy of his sermon before a convention, on the relationship of Christianity to civil government, and asked for his comments on it. The Reverend Jasper Adams was principal and professor of moral and political philosophy of Charleston College, whose trustees included Episcopalian, Congregational and German Lutheran ministers. His zeal for public support of church schools may have been connected with the fact that his own college, after a long shutdown due to lack of funds, had reopened in 1824 and a year later came into competition with the state-supported South Carolina College. Adams then undertook a difficult but successful campaign to raise money for a new building. See Charleston City Directory for 1835-1836, pp. 146-147, 158.

²⁶"Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments," in "Madison's 'Detached Memoranda,'" edited by Elizabeth Fleet, *William and Mary Quarterly*, 3d. ser., III (1946), 551-562; Gaillard Hunt, ed., "Aspects of Monopoly One Hundred Years Ago," *Harper's Magazine*, CXXVII (1914), 489.

tian sects." He condemned the excessive wealth of ecclesiastical corporations in Europe, and asked whether the United States was awake to the dangerous tendency of "the multiplied incorporations of religious congregations," many of them unlimited either in duration or in the amount of property they might acquire and hold. Returning then to the Constitution, Madison asked whether the appointment of chaplains to the two houses of Congress was consistent with it, or with the pure principle of religious freedom:

In strictness the answer on both points must be in the negative. The Constitution of the United States forbids everything like an establishment of a national religion. The law appointing chaplains establishes a religious worship for the national representatives, to be performed by ministers of religion, elected by a majority of them; and those are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the constituent as well as of the representative body, approved by the majority, and conducted by ministers of religion paid by the entire nation.

In addition to the conflict with constitutional principles, the essayist contended, the establishment of congressional chaplainships was "a palpable violation of equal rights." Election of chaplains by the majority "shut the door of worship against the members whose creeds and consciences forbid a participation in that of the majority. . . . Could a Catholic clergyman ever hope to be appointed a chaplain? To say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern the minor."

Chaplainships in the army and navy, Madison thought, suffer from the same constitutional defect. He doubted, moreover, whether in their appointment, more heed was not given to the temporal interest of the shepherds than the spiritual interest of the flock. If there were situations, like that of navies with insulated crews, where his reflections did not wholly apply, we should nevertheless always "keep in mind that it is safer to trust the consequences of a right principle, than reasonings in support of a bad one." The chaplainships, he granted, were too well fixed to be disturbed. What then? Why, this step "beyond the landmarks of power" must not be

treated as a legitimate precedent. Rather, "apply to it the legal aphorism *de minimis non curat lex*" (the law does not concern itself with trifles), or class it (this too was in Latin) with the blemishes which either carelessness has caused to spread or which human nature too little guards against.²⁷

Religious proclamations by the executive, recommending thanksgivings and fasts, were classed by Madison as "shoots from the same root with the legislative acts reviewed. Although recommendations only, they imply a religious agency, making no part of the trust delegated to political rulers. . . . They seem to imply and certainly nourish the erroneous idea of a *national* religion." As President, he recalled, he had intended to issue no religious proclamations, following Jefferson's example in that respect. When this became known, (through his failure to invoke divine help in the War of 1812) Congress passed a resolution asking him to issue a proclamation. "It was thought not proper to refuse a compliance altogether; but a form and language were employed which were meant to deaden as much as possible any claim of political right to enjoin religious observances."

It is astonishing how many controversial questions of fact are answered in this "Essay on Monopolies." Within the last few years books, articles and Supreme Court briefs have said:

1. *That Madison did not intend the First Amendment to be as broad as the Virginia Statute of Religious Liberty, nor to ban tax support of religion.* In the "Essay on Monopolies" he presents both the First Amendment and the Virginia statute as complete guarantees of the separation of church and state, and cites the Virginia assessment bill as the most notable warning of the danger of ecclesiastical encroachment on the federal guarantee.

2. *That the appointment and payment of congressional chaplains is proof of constitutional power to support churches and church schools through taxation.* Madison cites their establishment as a violation of the Constitution—one which can perhaps be disregarded as trivial or the result of negligence, but must never be allowed to "have the effect of a legitimate precedent."

3. *That the presence of the term "national religion" in Madison's first version of the First Amendment, and his suggestion that the word "national" be inserted in a later version, prove that he was aiming only*

²⁷ *Cum maculis quas aut incuria fudit, aut humana parum cavit natura.*

at prohibition of the establishment of a national church. But in the "Essay on Monopolies" he discusses the First Amendment as if the word "national" were still in it, yet continues to give it the utmost scope. Chaplainships are said to be unconstitutional because the Constitution "forbids everything like an establishment of a national religion." The naming and payment of chaplains "involve the principle of a national establishment." The President, in his opinion, has no constitutional power to proclaim a day of religious attendance, because it implies or nourishes "the erroneous idea of a *national* religion."

Whatever inconsistencies there may be in Madison's position on other public questions, none can be found in his record upon freedom of religion. As a boy defending jailed Baptist ministers, as a young legislator helping to frame the Virginia Declaration of Rights, as a defender of his state against the devotees of religious establishments, as a member of Congress drafting the national Bill of Rights, as a President enforcing it, and as an elder statesman surveying the country from a Virginia farm, he never once narrowed his objective, and never ceased to think of the dangers that lurked in small deviations. His opinion of the Virginia Statute of Religious Liberty, which he regarded as co-extensive with the First Amendment, reveals the spirit in which he approached every phase of his lifelong self-appointed task, and stands as his permanent message to the American people: "This act is a true standard of religious liberty: its principle the great barrier against usurpations on the rights of conscience. As long as it is respected and no longer, these will be safe. Every provision for them short of this principle, will be found to leave crevices at least through which bigotry may introduce persecution; a monster, that feeding and thriving on its own venom, gradually swells to a size and strength overwhelming all laws divine and human."²⁸

²⁸ "Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments," 551-562.