Thomas Jefferson, Religious Freedom, and the Supreme Court

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Most American scholars are reasonably well aware of the contributions of Thomas Jefferson (and his younger colleague, James Madison) to the establishment of the legal framework for religious freedom in the United States.1 Perhaps many are less aware of Jefferson’s “second life” in the Supreme Court’s several encounters with Jefferson and with the religion clauses of the First Amendment. This article will, first, review briefly Jefferson’s lifelong commitment to religious liberty, which he regarded as the foundation of all liberties. Second, attention will be given to Supreme Court decisions in this troubled arena, with some comment on Jefferson’s continued relevance—to use a tame and tired word—within the contemporary American scene.

Jefferson first burst onto the public stage—beyond the borders of Virginia—in 1774 with the publication of his “Summary View of the Rights of British Americans.”2 Though the thrust of this tract is undeniably political, one memorable line—even set to music—hints at a broader stance. “The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them.” In this sentence, “liberty” has no qualifying or limiting adjective. Liberty is of a piece, not segmented, not compartmentalized (though, of course, with respect to slavery, it tragically turned out to be).

An earlier version of this paper was presented to the American Historical Association, Seattle, Washington, 10 January 1998.


2. This can be conveniently found in Merrill Peterson, Jefferson: Writings (New York: Library of America, 1984), 105–122; quotation from 122.

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Church History 67:4 (December 1998)
The year 1776 stands alone in all American history, to be sure, as recently highlighted in Pauline Maier’s *American Scripture*. The very next year, however, saw Jefferson’s initial effort to ensure religious freedom in his own “country” (that is, Virginia) even before he had any assurance that the Revolution would end in an American victory. Virginia, of course, had an established church throughout the colonial period, the earliest ecclesiastical establishment in the country’s history. The Declaration of Independence demanded and the logic of the Revolution required, first of all, a political separation of the colonies from England. But separation of the civil from the ecclesiastical order needed to be the equally essential second step—this to be accomplished as swiftly as possible. “Swift,” however, is not a word readily applied to the legislative process, then or now. Jefferson’s Bill for Establishing Religious Freedom lingered and languished on or near or below the legislators’ desks for nearly a decade until, with some modifications, it finally passed in 1786.

Why so much hesitation, even anxiety, about declaring what, in Jefferson’s view, the Revolution so clearly demanded? Just as Americans were to be politically free, so they were to be religiously free. It would be impossible to sustain one without the other. To Thomas Jefferson, this truth was self-evident. But if the prospect of political liberty terrified some, similarly the prospect of religious liberty terrified others. The notion of a civil society, and a brand-new one at that, launching out on its own without the support and sanction of an official church was frightening, if not irresponsibly reckless. Even if one agreed, however reluctantly, that the Church of England should no longer enjoy any special privilege, surely this did not require that Christianity itself be demoted to the status of simply another “also-ran”—one sect among many, all fighting for survival, if not some kind of place in the public square.

With much support from the Tidewater region of Virginia, Patrick Henry proposed a kind of halfway house between the colonial pattern of Anglican establishment and the Jeffersonian/Revolutionary pattern of a full and complete religious liberty—a religious anarchy, if you will. Henry’s Bill for Establishing a Provision for Teachers of the Christian Religion (which initially seemed destined to pass) called for making Christianity the official religion of the new state, with all

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denominations that met certain broad guidelines to receive tax monies for their livelihood and expansion. 5 James Madison's renowned "Memorial and Remonstrance" emerged as the roadblock designed to thwart Henry's proposal, so attractive to so many. Madison's petition, bearing a great many signatures, especially from settlers in the backcountry, did its job magnificently well. 6 Now the bill of Patrick Henry was quietly set aside, as the long-delayed bill of Thomas Jefferson was taken up and, at last, passed.

Jefferson's bill called not for toleration, but for freedom, not for mere disestablishment, but for a full and complete separation of the civil from the ecclesiastical. One should now exchange the comfort of custom for the fresh and exhilarating air of a revolution in the religious affairs of humankind. The time had finally come for the creation of a society where "our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry." 7 When Madison wrote to Jefferson in Paris that his bill had now become law in Virginia, the often cool and restrained Jefferson was ecstatic. For centuries, he noted, the human mind had "been held in vassalage by kings, priests and nobles." But no more, thanks to the action of the Assembly of Virginia. Furthermore, "it is honorable for us," he wrote Madison, "to have produced the first legislature who has had the courage to declare that the reason of man may be trusted with the formation of his opinions." 8

A constitution was drawn up in 1787 and a bill of rights two years later. As some justices of the U.S. Supreme Court have recently taken pains to point out, Jefferson, since he was the new nation's minister to France, played no direct role in the drafting or ratifying of either. Yet, in his letter to Madison responding to the work of the Constitutional Convention, Jefferson's first objection was to the absence of anything like a bill of rights. Madison had pointed out that some delegates thought such a delineation of rights unnecessary since the new central government held only those rights clearly spelled out, and since many states had their own declarations. Jefferson thought otherwise. "A bill of rights," he replied, "is what the people are entitled to against every government on earth, general or particular, and what no just govern-

6. The text of Madison's "Memorial" has been repeatedly reprinted, including often by the Supreme Court itself. For text and context, see Alley, Madison on Religious Liberty.
7. For text and context, see Peterson and Vaughan, Virginia Statute.
8. Smith, Correspondence, 1: 488–89.
ment should refuse, or rest on inference.” Religious liberty, to mention his first example of what such a bill should contain, needed to be carved into the fundamental frame of Virginia’s government; so it needed to be carved into the nation’s very constitution.

Having seen Virginia enact his statute in 1786 and having seen the United States ratify the first ten amendments to the Constitution in 1791, Jefferson—one might suppose—would now conclude that religious liberty was firmly secured. Jefferson never so concluded. If he had been disposed to do so, the passionate presidential campaign of 1800 would have persuaded him otherwise. Religion emerged as the centerpiece in the contest between John Adams and Thomas Jefferson, the latter being portrayed as the enemy of all morality and religion, of those morals (as one propagandist put it) that “guard the chastity of our wives and daughters from seduction and violence.” For his part, Jefferson complained bitterly, though privately, that the “eastern states” will be the last to support him since they are under “the dominion of the clergy, who had got a smell of union between church and state.” After leaving the presidency, he spoke even more intemperately of how religious scholastics had perverted the simple morals of Jesus into “an engine for enslaving mankind . . . into a mere contrivance to filch wealth and power to themselves.”

Once elected to the presidency, Jefferson welcomed the opportunity afforded him by a congratulatory letter from the Baptist Association of Danbury, Connecticut. He first explained to the group why he, unlike his predecessors, Washington and Adams, would proclaim no fast days or feast days. These were religious exercises, to be left to the supervision and control of religious authorities, not the province of those who held a purely civil office. But this letter of Jefferson’s holds a unique place in the judicial history of the United States because of this single long sentence.

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions

9. Smith, Correspondence, 1: 512–13. The sixteen words relating to religion in the First Amendment are these: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Court regularly distinguishes between (and capitalizes) the Establishment Clause and the Free Exercise Clause.

10. Most of Jefferson’s correspondence pertaining to his own religious views may be found in the extraordinarily valuable volume edited by Dickinson W. Adams, with introduction by Eugene R. Shenk, Jefferson’s Extracts from the Gospels (Princeton: Princeton University Press, 1939). The first volume in the second series of the Papers of Thomas Jefferson, this book also contains the best exposition of the “Jefferson Bible.” Quotations are from 324 and 345 (hereafter, Extracts).
only, and not opinions, I contemplate with solemn reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.\textsuperscript{11}

Jefferson's final phrase has had a shelf life of startling longevity, of course, and I shall return to it below.

Before abandoning Jefferson's own involvement in the cause of religious liberty, however, it should be noted that even after leaving the presidency the remaining years of his life (nearly two decades) demonstrate his unrelenting, unrelaxing vigilance on behalf of religious liberty. Regardless of the legal safeguards, public opinion, Jefferson noted, could itself be an Inquisition.\textsuperscript{12} Therefore, one must be ever alert to reinforce and revitalize the First Amendment, never trusting to the law of inertia to preserve one's freedoms.

When he and John Adams renewed their friendship and their correspondence, they constantly compared notes on how religious liberty was doing. It was not doing well in New England, Adams sadly reported, where ecclesiastical establishments continued in Connecticut, Massachusetts, and New Hampshire. He wrote Jefferson that he should spend a year in Boston, listening to the sermons and reading the clergy's publications so that he could see for himself that "spiritual tyranny" was gradually reasserting itself. Then in 1814 when the pope renewed the Jesuit order, Adams grew more glum. "Shall we not have swarms of them here?" he inquired of Jefferson. Religious liberty requires us to give the Jesuits an asylum in America, he conceded, but we must ever be on our guard.\textsuperscript{13}

Not all the news was black, however. In 1817 and 1818, Connecticut removed the last vestiges of the Congregational establishment. "I join you," Jefferson wrote Adams, "in sincere congratulations that this den of priesthood is at length broken up and that a Protestant popedom is no longer to disgrace the American history and character." About the same time, New Hampshire took similar steps in the direction of religious liberty, but both Jefferson and Adams bemoaned the failure of Massachusetts to join in "the resurrection . . . to light and liberality."\textsuperscript{14}

Meanwhile, Jefferson was busy in Virginia fending off the Presbyte-

\textsuperscript{11} Peterson, Jefferson: Writings, 510 (the letter is dated 1 January 1802). In the final version of his letter, he omitted, on the advice of his attorney general, his explanation for proclaiming no fasts or feasts.

\textsuperscript{12} Adams, Extracts, 375, 401, 402.


\textsuperscript{14} Cappon, Adams-Jefferson Letters, 2: 512.
rians as he sought to establish a truly secular and modern university, his University of Virginia. Not the laity, but the Presbyterian clergy seemed determined to frustrate Jefferson’s plans and arouse his ire. That ire erupted in his comment to William Short in 1820 that “[t]he Presbyterian clergy are the loudest, the most intolerant of all sects, the most tyrannical and ambitious, ready at the word of the lawgiver, if such a word could now be obtained, to put the torch to the pile, and to rekindle in this virgin hemisphere, the flames in which their oracle Calvin consumed the poor Servetus.”15 The Jeffersonian vigil had not grown weak, nor would it ever, even down to his last weeks in 1826.16

Yet Jefferson’s religious rhetoric lay fallow through much of the nineteenth century, at least so far as the federal judiciary was concerned. In that century, the U.S. Supreme Court had little occasion to turn its attention to the religion clauses of the First Amendment or to Jefferson’s comments thereon. But the Mormon practice of polygamy did win the attention of the Court as well as of the public in general. In the first of the so-called “Morman cases” in 1879 (Reynolds v. United States), Chief Justice Morrison Waite spoke for a unanimous Court in finding polygamy to be “odious” and “an offence against society.” He reached this finding, however, only after reviewing Virginia’s history in the critical 1770s and 1780s, giving explicit attention to Madison’s “Memorial and Remonstrance” and to Jefferson’s Statute for Establishing Religious Freedom.17 So Jefferson stands at the beginning of the Court’s consideration of the Free Exercise Clause of the First Amendment.

He is not as central to succeeding free exercise cases, though his words hover around the edges in opinions that, after 1940, are rarely unanimous. (After 1940, the Court—by way of the Fourteenth Amendment—applied the First Amendment to the states; one effect of this action was to greatly multiply the number of church-state cases reaching the Supreme Court.) In the second of the well-known cases involving Jehovah’s Witnesses and the saluting of the flag in public schools (West Virginia State Board of Education v. Barnette, 1943), for

15. Adams, Extracts, 393.
17. Decisions of the Supreme Court are found in any governmental depository library under the title of U.S. Supreme Court Reports. For the briefs of selected major cases, see Landmark Briefs and Arguments of the Supreme Court of the United States, an ongoing series issued by University Publications of America, Bethesda, Maryland. For convenient reference, see Robert T. Miller and Ronald B. Flowers, Toward Benevolent Neutrality: Church, State, and the Supreme Court, 5th ed. (Waco, Tex.: Baylor University Press, 1996). Reynolds v. United States, 98 U.S. 145 (1879); quotations, 164, 165.
example, Justice Frank Murphy in a concurring opinion declared that the "trenchant words" in Jefferson's Bill for Establishing Religious Freedom "remain unanswerable": "all attempts to influence [the mind] by temporal punishments, or burdens, or civil incapacitations, tend only to beget habits of hypocrisy and meanness." Then Murphy added his own rather trenchant words: "Any spark of love for country which may be generated in a child . . . by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full." He concluded: "It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies." 18

In what is probably the high point of free exercise guarantees, Sherbert v. Verner in 1963, Justice William Brennan, speaking for the Court (7 to 2) did not cite Jefferson. 19 Quite likely he felt that some twenty years of pursuing the Jeffersonian path gave the Court a sufficiently strong record that enabled him to appeal to decisions recent enough to be in the memory of many of those then serving on the high bench. And, in fact, he did appeal to a case, decided fifteen years earlier, in which Jefferson figured prominently. That case had declared that no state may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." 20 Brennan simply noted that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." 21

The spirit of neither Jefferson nor Brennan survived a generation later in another free exercise case: Employment Division of Oregon v. Smith (1990). Here, Justice Antonin Scalia for the Court (6 to 3) stood Sherbert and much besides on its head. The government, he argued, may "enforce generally applicable prohibitions of socially harmful conduct" without making obedience to such law dependent upon an individual's religious beliefs. To find otherwise, he continued, "contradicts both constitutional tradition and common sense." As America's society becomes more religiously diverse, the attempt to accommodate all religious points of view "would be courting anarchy." It would also

20. Sherbert v. Verner, 410; the case alluded to here, Everson v. Board of Education, is discussed below.
be to indulge in a "luxury" that a strong government can ill afford. He concluded:

It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in, but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself. 22

Not surprisingly, Justice Scalia does not quote Thomas Jefferson. More surprisingly, the dissent likewise leaves Jefferson aside, preferring to concentrate on the abandonment (as the dissenters saw it) of the "consistent and exacting standard" previously used "to test the constitutionality of a state statute that burdens the free exercise of religion." Justice Sandra Day O'Connor concurred in the result of the Court's deliberation, but strongly objected to its line of reasoning. "In my view," she wrote, "today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty." She also argued, as other justices before her had, that religious liberty enjoyed "a preferred position" in the Constitution, and the Court should not countenance any infringement "unless required by clear and compelling governmental interest 'of the highest order.'" After reviewing a large number of previous free exercise cases, O'Connor observed: "The Court today gives no convincing reason to depart from settled First Amendment jurisprudence." With respect to the novel notion that "those religious practices that are not widely engaged in" may necessarily suffer some disadvantage, O'Connor sharply responded that, in her view, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." 23

After so strong a concurring opinion, little was left for the three dissenters. Justice Harry Blackmun (joined by Justice William Brennan and Justice Thurgood Marshall) expressed similar shock that the line of defense for the free exercise of religion had so suddenly shifted. The majority, Blackmun noted, managed to conclude "that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford." On the contrary, Blackmun asserted, "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could have thought religious intolerance 'unavoid-

able,' for they drafted the Religion Clauses precisely in order to avoid that intolerance."24

The public at large shared the dissenters' dismay. For roughly half a century, the Jeffersonian dedication to religious liberty had guided the Court, and the Court in turn had educated the citizenry to the principles, and even the passion, that underlay Jefferson's zeal. Congress, in large part sharing the sentiment, responded to the mood. In 1993 it overwhelmingly passed a Religious Freedom Restoration Act (RFRA), designed to undo the damage—as it was widely perceived—that the Smith decision inflicted upon the First Amendment.25 Questions arose early whether RFRA was constitutional, and lower courts gave some encouragement to the new law's supporters. Early in 1997, for example, the Ninth U.S. Circuit Court of Appeals upheld the constitutionality of RFRA, arguing that the congressional action only made "concrete" the liberty "assured by the First Amendment." That the opinion was written by Judge John T. Noonan only gave more encouragement to RFRA backers, since Noonan was no stranger to Jeffersonian liberty nor to church-state questions at large.26

Later that year, however, in a widely watched case (Boerne v. P. F. Flores), the Supreme Court by a 6-3 vote found RFRA to be unconstitutional. Speaking for the majority, Justice Anthony Kennedy explained that the case turned not on religious liberty directly but upon another constitutional principle that Jefferson, along with the delegates to the Constitutional Convention, had embraced: namely, separation of powers. The Congress had taken upon itself the right to say what the First Amendment really meant, and this was the prerogative of the Court, not the Congress. "Our national experience teaches that the Constitution is best preserved," Kennedy wrote, "when each part of the government respects both the Constitution and the proper actions and determinations of the other branches." The "federal balance" must be preserved.27

As might well be expected, Justice Sandra Day O'Connor dissented most vigorously. "I remain of the view," she stated, "that Smith was wrongly decided, and I would use this case to reexamine the Court's

holding there." We need, she pointed out, to get "First Amendment jurisprudence back on course." To that end, she provided a long review of the nation's history, with particular attention to Madison and Jefferson. Similarly, she carefully reviewed the Court's precedents in the area of free exercise. Both the history of the nation and the history of the Court prove, she concluded, that "Smith is demonstrably wrong" and that the case cried out to be reheard.28

The supporters of RFRA, surely encouraged by O'Connor's words, cast about for some way to get Jeffersonian jurisprudence back on track. Meanwhile, with respect to free exercise, the sage of Monticello is not doing as well by the century's end as he had done in the nineteenth and most of the twentieth century.

The other religion clause, having to do with the establishment of religion, has seen Jefferson nearer the center of the Court's decisions, sometimes with the majority, sometimes with the dissenters, and sometimes with both. Modern jurisprudence in this area begins with a 1947 case coming out of New Jersey and having to do with the busing of parochial school students at public expense (Ewerson v. Board of Education). Speaking for a bare majority (5 to 4), Justice Hugo Black cited Madison's "Memorial and Remonstrance" as well as Jefferson's Bill for Establishing Religious Freedom. He then quoted from President Jefferson's letter to the Danbury Baptists and seemed to be leading inexorably to the conclusion that public monies must not be used for private school purposes. His four-sentence conclusion is a zinger: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."29

The four dissenters could believe neither their ears nor their eyes. Justice Jackson offered the most pointed observation: "The case which most irresistibly comes to mind," he wrote, "as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering, 'I will ne'er consent,'—consented.'" The longest dissent, written by Justice Wiley Rutledge and joined in by the other three, not only cites Madison and Jefferson but at great length reviews Virginia's and the nation's history in the critical decades at the end of the eighteenth century. Rutledge observes: "For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general."30 That truth seemed clearer in the age of the Revolution than it does in our own time. In Ewerson v. Board of Education, all nine justices paid

homage to Jefferson; our third president, however, would clearly have found the position of the four dissenters far more congenial.

The next year, 1948, in a "released time" case out of Illinois (McCollum v. Board of Education), the dissenters, now in the majority, were happier. Citing Jefferson once again, they (under the leadership of Justice Felix Frankfurter) averred: "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped."31 Mr. Jefferson could perhaps rest easily in his grave—though he surely knew better. The single dissent, registered by Justice Stanley Reed, hinted at a small cloud on the horizon. "A rule of law," Reed wrote, "should not be drawn from a figure of speech."32 Fifteen years later (Abington v. Schempp), another solitary dissenter, Potter Stewart, in dismissing the Jeffersonian wall as a "sterile metaphor" made that cloud a little larger and a little darker.33

In a private school case in 1968 (Board of Education v. Allen), the majority found that the State of New York could lawfully purchase textbooks for students in private schools, grades 7 through 12. One of three dissenters, Justice Hugo Black, thought that the Court took a small step leading down a long road: a road that linked "state and churches together in controlling the lives and destinies of our citizenship." He added that "[i]t was to escape laws precisely like this that a large part of the Nation's early immigrants fled to this country." Noting that America is "composed of people of myriad religious faiths, some of them bitterly hostile to and completely intolerant of the others," Black sought refuge in the metaphor (not sterile for him) of the Jeffersonian wall. "I still believe," he wrote, "that the only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide."34 Church-state controversy for the next thirty years often revolved around the question of whose religious rights most needed protecting: those of the feeble minority, or those of the powerful majority.

By 1985, the complexities of private school aid had the justices "concurring in part and dissenting in part" as the path through that thicket grew ever more obscure (see, for example, School District of the City of Grand Rapids v. Ball, a "shared time" case). But it was a public school case in that same year that called forth the most thunderous

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rejection of the role of Jefferson and Madison in earlier Court decisions. The Alabama case (*Wallace v. Jaffree*) concerned a state law that provided for a period of silent meditation in the public school classroom. The Court by a 6-3 vote found Alabama's law to be unconstitutional since its legislative history made clear that the law intended to bring prayer into the public school. This Court, Justice John Paul Stevens declared, "has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."\(^{35}\) The opinion was strong, but it was not unanimous.

Chief Justice Warren Burger dissented from "today's curious holding." Justice Byron White dissented, a bit peevishly. But the lengthy and passionate dissent of Justice William Rehnquist suggested that a new day might be dawning for Jeffersonian intent and Jeffersonian language in the deliberations of the Supreme Court. Justice (now Chief Justice) Rehnquist declared that "unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years." For several pages, Rehnquist proceeded to unload as much of that freight as possible. America's early history is held up for scrutiny: Madison and Jefferson in Virginia, Madison in Philadelphia, the First Congress, the first four presidents, Justice Joseph Story of the Supreme Court during much of the first half of the nineteenth century—and so on. It was true, Rehnquist acknowledged, that the Court in the 1940s and beyond had often relied on Jefferson for its decisions, but in the process it had also relied on bad history.

"*Stare decisis* may bind courts as to matters of law," he declared, "but it cannot bind them as to matters of history." Finding in his review of history no demand that government be neutral between religion and irreligion and certainly finding "no historical foundation for the proposition that the Framers intended to build the 'wall of separation,'" Rehnquist announced that the time had come for Jefferson's metaphor to "be frankly and explicitly abandoned." The framers, he agreed, did prohibit the establishment of a national church. Beyond that, however, we have moved in ways and to degrees that they would never have intended, Rehnquist stated. The time had come to return to the original purposes of the constitutional framers, of whom Jefferson—away in Paris—was not one. "Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson.*"\(^{36}\)

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If Jefferson is not doing too well with the Free Exercise Clause as the twentieth century ends, he likewise suffers severe challenge with respect to the Establishment Clause. Overall, the First Amendment does not enjoy the best of health, as latter-day amendments are proposed to "clarify" the language of the late eighteenth century.

Currently, the Religious Freedom Amendment (H.R. 78) proposed by Representative Ernest Istook of Oklahoma further threatens the Jeffersonian and Madisonian understanding of the First Amendment. This amendment provides that "[t]he people's right to pray and to recognize their religious beliefs, heritage or traditions on public property, including schools, shall not be infringed." While doing violence to the even-handedness of the First Amendment, the Istook proposal paves the way for the majority to set the religious agenda everywhere, including in the public schools. If Jefferson's views protected religious minorities in the mildly pluralistic America of his day, that protection is more urgently required in the abundantly pluralistic America of today.

The thousands of visitors who each year flock to the Jefferson Memorial read these words inscribed around the inside of the dome: "For I have sworn on the altar of God eternal hostility against every form of tyranny over the mind of man." Few will realize that the tyranny that Jefferson had clearly in mind was religious. As he explained in this letter to Benjamin Rush, written in the midst of a bitterly partisan political campaign, most of his opponents still hoped to secure "an establishment of a particular form of Christianity thro' the U.S. . . . especially the Episcopalians and Congregationalists." They believe me, said Jefferson, to be an enemy to their schemes, and, he added, "they believe truly." The final words may most properly belong to the late Justice William Brennan. Writing in dissent, he observed in 1986 (Goldman v. Weinberger) that "[t]hrough our Bill of Rights, we pledged ourselves to attain a level of human freedom and dignity that had no parallel in history. Our constitutional commitment to religious freedom and to acceptance of religious pluralism is one of our greatest achievements." With respect to any amending of that Bill of Rights, let the buyer—and the citizen—beware.

38. Adams, Extracts, 320.
40. Goldman v. Weinberger, 475 U.S. 503 (1986); quotation, 523.