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A Restatement of the Intended Meaning of the Establishment Clause in Relation to Education and Religion

John Remington Graham*

I. Introduction

On January 1, 1802, President Thomas Jefferson wrote Mssrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson an innocent and gracious letter:

Gentlemen:-The affectionate sentiments of esteem and approbation which you are so good to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing. Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign 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. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties. I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your association, assurances of my high respect and esteem.¹

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¹. THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332-33 (A. Koch & W. Peden eds. 1944) [hereinafter cited as SELECTED WRITINGS].
Mr. Jefferson did not intend his decorative metaphor of “a wall of separation between Church and State” to be a precise formulation of legal principle, as the full text of the letter—a social event, not an executive proclamation—plainly shows. Given the general and figurative sense of the words as used in context, the phrase is little more than a literary flourish of innocuous significance. Yet some have seized upon this language as if it were a venerable landmark carved in legal stone. The Danbury Baptist Letter, which is much discussed, but seldom read, is supposed to demonstrate that the establishment clause prohibits any contact between government and religion.  

If that abstract principle were taken as universal law in this country, and strictly applied without qualification, it would be unconstitutional for any organ, branch, magistrate, or employee of the government of the United States, or of any state, by any official act or use of property, to promote, protect, or acknowledge any usage, belief, practice, phrase, symbol, institution, conduct, or undertaking having even a remotely religious meaning. It would be unconstitutional to permit a magistrate of government to take an oath instead of an affirmation when assuming the duties of office. The preamble of the Minnesota Constitution, which says that the people are grateful to God for the gift of freedom, would be legally improper. Our coinage would reflect an unconstitutional trust in God. Pope John Paul II, who was welcomed with full state honors in communist Poland, could not be permitted to say Mass on the government-owned mall near the Washington Monument. Naturally, it would be unconstitutional to tax church property differently than other private property. And, of course, any governmental tax relief or spending tending to foster the welfare of religious schools, or to ease the burdens of parents sending their children to such institutions, would be constitutionally prohibited.  

There are only a few ways out of this cul-de-sac. We must either grant that all these implications follow from the notion of separation of church and state as a constitutional principle and see to it that the supposed demands of the first amendment are fully enforced, or we must acknowledge that complete separation of church and state is politically too demanding, and escape the
more unpopular consequences, case by case, by using some pragmatic formula made as palatable as possible by judicial rhetoric. We can, however, take another, more fundamental approach: we can reexamine the original meaning of the establishment clause to determine whether there is something radically unsound about the separation doctrine. This article will pursue the last-mentioned alternative.

One particularly difficult problem under the establishment clause is caused by various statutes or other governmental acts designed to promote religion as a phase of education. In this area the cases have applied the idea of separation of church and state with varying degrees of rigor. An examination of some of the more sweeping separationist decisions of our day provides insight into what absolute separationism really means.

In *Tudor v. Board of Education,* the New Jersey Supreme Court held that a public school board resolution permitting free distribution of copies of the King James Bible to students on the premises of primary and secondary schools, after hours and with parental consent, violated state and federal guarantees against governmental establishment of religion. The King James Bible is one of the greatest works of religious literature ever published. If free distribution of a book containing the thrilling story of David and Goliath were unconstitutional, the same would hold for an anthology including the tale of St. George and the Dragon. Suppose some organization wished to distribute copies of the *Bhagavad Gita* in which the General Arjuna and the Lord Khrishna discourse on the eternal significance of battle. Or suppose the work were Plato's *Phaedo* in which Socrates eloquently discusses life after death before drinking hemlock. If the New Jersey Supreme Court were right, it would appear inescapable that authorized distribution of any of these works to children on public school premises, even after hours and with parental consent, would be unconstitutional. This construction would be manifestly correct if the establishment clause required literal separation of, hence no contact between, government and religion.

In *Committee v. Nyquist,* the United States Supreme Court struck down a state law providing for direct grants to qualifying primary and secondary nonpublic schools for maintenance and repair of facilities and equipment, tuition reimburse-

ment to parents of children attending such private schools, and certain income tax relief to such parents. Against this backdrop, in *MCLU v. State*, the Minnesota Supreme Court held unconstitutional, as a law respecting an establishment of religion, an intricate statutory scheme of tax credits for parents paying educational costs to send their children to nonpublic primary and secondary schools. The statute disallowed credits to the extent of costs for material used in religious instruction, and was designed to make it financially possible for lower-income families to enjoy private education, whether secular or sectarian, thereby reducing the cost of public schools borne by taxpayers of the state. The opinion of the court was written by Justice Todd, who considered certain precedents of the United States Supreme Court, particularly *Committee v. Nyquist*, and concluded that the measure was invalid. The crucial principle, or *ratio decidendi*, was that if a statute has not a primary tendency, but any tendency to advance the interests of religious denominations, it cannot pass constitutional muster. Justice Yetka wrote in a concurring opinion,

I do not fear that the legislation at issue in the instant case would somehow foster the establishment of any religion. . . . Our legislature appears now to be barred from making any reasonable effort to insure that nonpublic education will survive except for the very wealthy. However, the highest court of our land has spoken, and this court must adhere to its word.6

Perhaps the Minnesota Supreme Court was right in its reading of the *Nyquist* case. If there can be no relationship at all between government and religion, there simply can be no direct or indirect public support of private education. Justice Yetka, therefore, may have been perfectly accurate in his comments concerning such a doctrine.

Since *Committee v. Nyquist* there has been further litigation, as if to ask the Justices of the United States Supreme Court if they really meant what they seemed to say. The answer has been an equivocal "maybe, maybe not."7 While a simplistic

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6. 302 Minn. at 236, 224 N.W.2d at 354-55 (Yetka, J., concurring).
7. See, e.g., *Committee for Pub. Educ. v. Regan*, 444 U.S. 646 (1980)(New York statute appropriating public funds to reimburse nonpublic schools for performing various services mandated by the State does not violate establishment clause if its purpose does not advance religion); *Wolman v. Walter*, 433 U.S. 229 (1977)(statute authorizing various forms of aid to nonpublic schools, most of which are sectarian, is not unconstitutional);
doctrine of church-state separation has the virtue of predictability, its great vice is an eventual government monopolization of education.

II. PRELIMINARY CRITIQUE

A central premise of the judicial trend being discussed is that tax support of public education is religiously neutral. A few years ago, Dr. Onalee McGraw published an incisive challenge to this assumption. She claims that evidence indicating a fall of academic standards in public schools can be explained by the infusion of humanistic values into the curricula of instruction. She argues that children in public schools are systematically taught situation ethics, ethical relativism, and the like; and that these systems actually displace or compete with traditional, natural-law values of Judeo-Christianity. She contends further that this process of indoctrination has been so over-emphasized in some places as to exclude adequate focus on reading, writing, factual knowledge, logical reasoning, and mathematics.

This proposition should no doubt be considered with caution. And in the view of this writer, it misses the mark to condemn the religious philosophy of Humanism, which rests on a tradition as old as Epicurus, and to extol the precepts of Judeo-Christianity. But it is relevant to note that a distinctive moral system is taught with the help of public funds in some public schools. In a proper legal sense, Humanism is a religion, and a venerable one at that. Educators are not to be condemned for attempting to teach children how to think in moral terms. No education would be sufficient, or even possible, without instruction concerning what ought to be, as well as what is.

This consideration provides us with a key. The first amend-

Roemer v. Maryland, 426 U.S. 736 (1976)(statute providing public aid to qualifying colleges and universities does not violate first amendment’s establishment clause); Meek v. Pittenger, 421 U.S. 349 (1975)(loans of instructional materials and equipment to non-public schools violates establishment clause). In an attempt to reconcile the notions of “separation of church and state” and “religious neutrality,” the Court used a three-pronged test, which had its apparent genesis in Lemon v. Kurtzman, 403 U.S. 602 (1971). According to this contemporary doctrine, to pass constitutional muster a statute must have an essentially secular purpose, must neither advance nor inhibit religion, and must not excessively entangle government with religion. Id. at 612-13.


ment ordains that there shall be "no law respecting an establishment of religion, or prohibiting the free exercise thereof." The word "religion" appears only once. Manifestly, the establishment clause and the free exercise clause deal with the same subject matter. On the face of the Constitution, whatever amounts to "religion" for purposes of free exercise is also "religion" for purposes of no establishment.11

Section 6(j) of the Universal Military Training and Service Act of 1951, and the Military Selective Service Acts of 1967 and 197112 provided exemption from conscription to persons who are conscientiously opposed to participation in war in any form by reason of religious training and belief. This provision has been interpreted to include persons who are opposed to all war, whether they believe in God or not, even if they belong to no religious sect, and who express their deeply held beliefs solely in worldly terms.13 While these cases ostensibly turn on statutory construction rather than constitutional principle, an idea of "religion" defined in the broadest possible way emerges. This legal conception of religion is measured by depth of belief concerning right and wrong, and is at least influenced by the religion clauses of the first amendment.

Given a definition this broad, "religion" must permeate virtually all phases of human life including education. Thus defined, religion cannot be extracted or separated from any system of education, public or private. Why, therefore, should anyone be surprised to learn that Humanism should be taught or that some other religious influence, such as Hinduism or Judeo-Christianity, should be felt in public schools? Even if a teacher avoids the use of theological language or symbols in the classroom, he will, should, and must teach something about the foun-

11. Cf. Rutledge, J., dissenting in Everson v. Board of Educ., 330 U.S. 1 at 32. The United States Supreme Court has nevertheless adopted the contra-textual position that "religion" is broader for purposes of free exercise than for purposes of establishment. Specifically, under present case law, "religion" in the free exercise clause means any deeply held belief system which determines right and wrong for an individual, whether theistic, nontheistic, agnostic, atheistic, or antitheistic. In the establishment clause, "religion" means a formal organization or institution which teaches or promotes a religious doctrine, program, ritual, or ideology as an integral part of its mission. For a helpful analysis of how the United States Supreme Court arrived at this curious position, see L. Tribe, AMERICAN CONSTITUTIONAL LAW 826-33 (1978).
dations of right and wrong — and this amounts to "religion" in the legal sense under consideration here. If we take religion as the foundation of conscience, so as to encompass the whole human family, all education is religious, even in public schools. And why should this not be so? Religion does not cease to be taught simply because the institution is a so-called "nonsectarian" or "public" school. Religion and education are permanently married, regardless of the name of the institution, the source of revenues, or the method of instruction.14

Clearly, then, there is some rudimentary deficiency in current judicial trends concerning the application of the establishment clause to statutes which provide for various kinds of public support of private schools. In order to untangle the difficulty, we must go to the roots of the problem. With that end in view this article will attempt, principally by analysis of legal history, to propound a number of propositions:

(1) The establishment clause is a corollary of, and historically developed from, the free exercise clause, which, in turn, evolved as a step beyond the Toleration Acts. (2) Both the free exercise clause and the establishment clause were premised on and presuppose the existence of God. (3) The notion of religion is exactly the same for purposes of both the establishment clause and the free exercise clause, viz., recognition of the ultimate foundation of conscience and morality. (4) The free exercise clause guarantees governmental noninterference with peaceable religious freedom. (5) The establishment clause, aside from doing away with an official state religion supported by public monies, guarantees government neutrality toward or equal protection of all religions peaceably practiced. (6) In the constitutional sense, all persons have a religion, whether or not they believe in a personal deity or spiritual reality. (7) In the constitutional sense, religion inescapably permeates every phase of human life in which questions of right and wrong must be decided. (8) Whether public or private, sectarian or secular, all education is necessarily religious in the eyes of the law. (9) Support of education, including the religious phases thereof, is a proper function of government, so long as religious neutrality is observed. (10) Governmental assistance to private education, even if sectarian,

14. Cf. Toscano, A Dubious Neutrality: The Establishment of Secularism in the Public Schools, 1979 B.Y.U. L. Rev. 177 (explores questions relating to whether the concept of religious neutrality required in the public schools is real or illusory and suggests an alternative to the present religious neutrality doctrine).
is not only constitutionally permissible, but constitutionally obligatory, to the extent that such aid is requisite to achieve governmental neutrality in matters of religion.

III. THE HISTORICAL FOUNDATIONS

A. Principles of Constitutional Interpretation

Initially, it will be well to consider a time-honored rule of constitutional interpretation which was stated by Justice Story as follows:

The safest rule of interpretation, after all, will be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure the ends proposed.15

We should heed the words of Justice Gray that the "scope and effect of . . . many . . . provisions of the Constitution are best ascertained by bearing in mind what the law was before."16 Thus Justice Black reminds us, "It is never to be forgotten that, in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."17 Moreover, it has traditionally been held that the Constitution must be interpreted according to what was intended and cannot be changed save by amendment.18 To be sure, there are other theories of constitutional interpretation suggesting that the courts should be free to change the fundamental law by interpretation reflecting their own views of public policy; but, this writer substantially agrees with the position of Professor Raoul Berger19 and other contemporary scholars that the proper aim of constitutional interpretation should be ascertainment of the intended meaning, no more or less. It is beyond the scope of this article to do more than examine the intended meaning of the religion clauses of the first

17. Adamson v. California, 332 U.S. 46, 72 (1947)(Black, J., dissenting)(quoting Ex parte Bain, 121 U.S. 1, 12 (1887)).
amendment, particularly the guarantee against the establishment of religion as applied to the problem of public support of private education, and to seek out along those lines a more equitable solution than currently exists under contemporary case law.

B. The Law of the Mother Country

In the aftermath of the struggle between Pope Clement VII and King Henry VIII, the Crown became the head of the Church of England. As such the King could convene, prorogue, restrain, regulate, or dissolve all ecclesiastical synods or convocations, nominate and license elections of bishops, veto episcopal elections contrary to his nominations, and vest his bishops with temporal powers and estates; moreover, he could decide in dernier resort all appeals in ecclesiastical causes, both temporal and spiritual. Parsons of the established church were entitled to the enjoyment of public lands, or glebes, and compulsory taxes, or tithes, under episcopal, and ultimately royal jurisdiction.

The common law condemned the crimes of apostacy (renunciation of previously professed Christianity), heresy (denial of essential doctrines of the church), blasphemy (contemptuous reproaches of sacred personages), as well as witchcraft, conjuration, sorcery, enchantment, and the like. Anciently, the punishments for these offenses were severe: in Query XVII of Notes on Virginia, Thomas Jefferson observed that the common-law crime of heresy was punishable by burning at the stake pursuant to the writ of haeretico comburendo.

In due course these old common-law crimes were displaced by more moderate acts of Parliament. By the Statute of 9 & 10 William III, Chapter 32 (1699), it was provided that if any professed Christian denied the truth of the religion, the divine authority of the Bible, the divinity of the persons of the Holy Trin-

20. 1 W. BLACKSTONE, COMMENTARIES* 279-80, 377-80.
21. Id. at 383-87; 2 id. at 24-33.
22. 4 id. at 42-44.
23. Id. at 44-45.
24. Id. at 59.
25. Id. at 60-65.
26. SELECTED WRITINGS, supra note 1, at 274; 4 W. BLACKSTONE, COMMENTARIES* 46, 48.
27. 4 W. BLACKSTONE, COMMENTARIES* 49-52.
ity, or either the singularity or the existence of God, he could lose capacity to hold any public office or trust on conviction for the first offense. And, on conviction for the second offense, one could lose capacity to be a suitor in court, a guardian, executor, legatee, or purchaser of lands, and could also suffer imprisonment for three years. By the Statutes of 1 Edward VI, Chapter 1 (1547), and 1 Elizabeth I, Chapter 1 (1558), reviling the Sacrament of the Lord's Supper was made punishable by imprisonment; while the Statute of 1 Elizabeth I, Chapter 2 (1558), provided that a minister speaking in derogation of the Book of Common Prayer was subject to the loss of benefice and imprisonment. Moreover, those who refused to attend services of the established church or other approved denominations were made liable to suffer money forfeitures.28

Protestant dissenters from the Church of England were at one time subject to a number of disabilities and restrictions.29 But by the Act of Toleration30 in 1689, such dissenters were relieved of these disabilities and restrictions if they did not deny the Holy Trinity, took oaths or affirmations against popery, registered their congregations with the established church, and kept open meeting houses, and if their teachers acknowledged one true Christian faith as well as the doctrine of sacraments. Catholics, by contrast, were simply not tolerated. They were subject to heavy penalties and disabilities for hearing Mass, teaching school, keeping arms, and even for traveling to London. Their priests were deported and could be made liable for high treason should they stay in the kingdom for three days without conformity to the established church.31

The established church was also protected by the Corporation Act,32 which act ordained that no person could hold public office, unless within the previous year he received the Sacrament of the Lord's Supper according to the rites of the Church of England and took an oath of allegiance to the Crown. The Test

28. See Act for the Uniformity of Common Prayer and Service in the Church, and Administration of the Sacraments, 1558, 1 Eliz. 1, c. 2, § 4; Act to Retain the Queen's Majesty's Subjects in Their Due Obedience, 1581, 23 Eliz. 1, c. 1, § 5; Act for the Better Discovering and Repressing of Popish Recusants, 1606, 3 Jac., c. 4, § 27.
29. 4 W. BLACKSTONE, COMMENTARIES* 53-54.
30. Act of Toleration, 1689, 1 W. & M. 1, c. 18.
31. Id. at 54-59.
32. Act for the Well-Governing and Regulation of Corporations, 1661, 13 Car. 2, c. 1, § 12.
Act, provided that no person could hold civil or military office unless he took an oath of allegiance to the Crown and made a formal declaration against transubstantiation.

C. The Law of Colonial Virginia

Virginia was settled primarily by adherents of the Church of England. It is therefore not surprising to see colonial statutes similar to those of the mother country. During the embryonic days of the colony, a statute was enacted for compulsory taxation to support the established church. Other early statutes barred Catholics from holding office, and Quakers from the colony. At this same period of colonial infancy, there were statutes enacted to regulate the ministry and proprietary operations of the established church, and even the manner by which subjects were to keep the sabbath. All of these laws were amplified and continued up to the outbreak of the American Revolution.

There was also a general reenactment of the Statute of 9 & 10 William III, which punished certain forms of heresy and apostacy, together with adoption of the Toleration Act of 1 William & Mary, which gave limited relief to Protestant dissenters.

From the foregoing survey, we may deduce several characteristic features of the laws of England and colonial Virginia respecting matters of religion:

1. The King, who was chief executive magistrate of the civil state, was also temporal head of an established church.
2. The established church held public lands, and was supported by taxes paid by all persons without regard to religious belief.
3. The established church was regulated by public law.
4. Failure to conform to the doctrines and practices of the established church, however peaceable, could result in criminal penalties, civil disabilities, and monetary or proprietary forfeitures, unless excused by acts of toleration.

33. Act for Preventing Dangers Which May Happen From Popish Recusants, 1672, 25 Car. 2, c. 2, §§ 2-10. Compare the Test Act with U.S. Const. art. VI, cl. 3: "[N]o religious Test shall ever be required as a Qualification to any Office or public trust under the United States." Id.
34. 1 Virginia Statutes at Large 144, Act 9 (W. Hening comp. 1823).
35. Id. at 268-69, Act 51.
36. Id. at 532-33, Act 6.
37. Id. at 241, Act 1.
38. Id. at 434, Act 3.
39. 3 id. at 358-59, ch. 30.
D. The 16th Article of the Virginia Bill of Rights

These were conditions which the Virginia Convention of 1776 sought to abolish at the dawn of independence. This extraordinary assemblage, born in the throes of revolution, was the concrete, legal form of the new sovereign, which had displaced King George III who had violated the fundamental law, made war on his American subjects, constructively fled from the realm when his royal governor left by sea, and therefore abdicated by operation of the same principle of the English Constitution that wrought the ouster of King James II in 1688. On June 29, 1776, Virginia formally seceded from the British Empire.

A few weeks before this act of secession, the convention framed the famous Virginia Bill of Rights of 1776, which set forth essential conceptions of a republican form of government. Only the 16th Article need concern us here. As originally proposed, the provision read:

That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force or violence; and, therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under color of religion, any man disturb the peace, the happiness, or the safety of society; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

On motion of James Madison, the proposal was amended, then adopted on June 12, 1776, so as to read:

That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

The original draft of what became the 16th Article guaranteed the "fullest toleration in the exercise of religion." The final version guaranteed the "free exercise of religion." This little

40. 1 W. BLACKSTONE, COMMENTARIES* 152, 245.
41. 1 VIRGINIA STATUTES AT LARGE 50-51 (W. Hening comp. 1823).
42. C. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 62 (1900).
43. Id. at 62.
twist of phrase might first go unnoticed, but it was of enormous significance: it denoted a transition from the toleration of religious dissent in the presence of an established church associated with the sovereign power of the civil commonwealth, to equal and peaceable exercise of religious freedom, entirely disassociated with any established church. The seminal idea was that “free exercise,” which was a step beyond “toleration,” included an implicit abolition of the “establishment.” And this seminal idea was amplified by the Virginia General Assembly in the ensuing years.

At the time of independence, there was still an established church in Virginia which enjoyed glebes and tithes. And the old colonial laws punishing various acts of religious dissent were still on the books.

The first General Assembly under the Virginia Constitution of 1776 immediately repealed all laws penalizing heresy, apostacy, and nonconformity; exempted all dissenters from payment of tithes and taxes in support of the established church; and suspended the operation of the most recent colonial statute providing for compulsory taxation to support the established church. The suspension of such tax liability was continued further, then abolished in 1779.45

Still, the established Church of England in Virginia held title to public property, and was the official or established church of the Commonwealth. There was naturally a question of whether even this greatly reduced condition was lawful under the 16th Article of the Virginia Bill of Rights. Moreover, there was the question regarding the validity of the general assessment, a proposed scheme whereby every citizen should be compelled to pay a tax in support of some religious denomination of his own choosing. The great repealer of the first General Assembly expressly provided, “That nothing in this act contained shall be construed to affect or influence the said question of assessment.” These matters were subsequently dealt with by the Virginia General Assembly in the controversies over general assessment, church incorporation, and glebes liquidation.

44. 9 VIRGINIA STATUTES AT LARGE 164-65 (W. Hening comp. 1823).
45. 10 id. at 111, 197.
46. 9 id. at 164-65.
E. The Virginia Statute of Religious Freedom

In 1779 a bill was introduced in the Virginia General Assembly which provided substantially that Christianity, in one form or another, was the established religion of the Commonwealth; that all denominations of Christianity were entitled to the same peaceable rights of worship and practice; that all denominations of Christianity were entitled to incorporation and official recognition, so long as they subscribed to certain fundamental tenets, such as the existence of God and the divine authority of the Bible; and that every freeholder should pay compulsory taxes to support the clergy and places of worship of the Christian denomination of his choice. This bill, after some debate, died without action one way or another.

But a similar bill, only slightly watered down, was introduced in the Virginia General Assembly on December 2, 1784. The preamble of the bill read as follows:

Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society, which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens as from their circumstances and want of education cannot otherwise attain such knowledge; and it is judged such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved, by abolishing all distinctions of pre-eminence amongst different societies or communities of Christians. . . .

The initial debate was very heated and resulted in a layover of the bill to the 1785 session, largely for the purpose of securing the sentiments of the people of the Commonwealth. A great many petitions and memorials were presented on the subject, the most notable of which was the Remonstrance composed by James Madison. Madison’s Remonstrance eloquently condemned the proposed general assessment as contrary to the guarantee of free exercise of religion in the 16th Article of the Virginia Bill of Rights, as against the spirit of the American

47. H. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA 58-61 (1910).
48. Id. at 99.
49. C. JAMES, supra note 42, at 129.
50. Id. at 256-62 (appendix G).
Revolution, as unnecessary to the support of the civil government, as tending to frustrate the emergence of religious truth, and as contrary to the interests of public policy and domestic peace.

One noteworthy passage in the Remonstrance said,

The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature, an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their minds, cannot follow the dictates of other men. It is unalienable, also, because what is a right towards man is a duty towards the Creator. It is a duty of every man to render to the Creator such homage, and such only, as he believes is acceptable to him. This duty is precedent, both in order of time and in degree of obligation to the claims of civil society.\(^{51}\)

It is apparent that Madison saw religion as a duty to God commanded by conscience, more fundamental than the duty to government commanded by law. In other words, Madison perceived religion as the paramount duty of conscience. It will be recalled that in 1776 the General Assembly of Virginia abolished all laws which punished the profession of atheism.\(^{52}\) Yet it is indisputable that this enactment was constitutionally required by, and intentionally passed in, obedience to the 16th Article of the Virginia Bill of Rights, which was premised on the existence of God. Here we have a curious legal paradox: by law God exists, yet by the same law a citizen may deny the existence of God. In order to resolve this difficulty, it is necessary to say that God has a legal existence for all persons, whatever their philosophical or theological beliefs may be.

It is undeniable that all persons have some primary obligation of conscience drawn by some moral idea or impulse. Whatever the moral imperative or standard may be in specific terms for any individual, such must be his God for legal purposes. In other words, God may be legally defined as, and must have been considered by Madison to be, the foundation of conscience.

The 16th Article of the Virginia Bill of Rights said that religion is duty to God according to conscience. If we translate this

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51. Id. at 256.
52. 9 Virginia Statutes at Large 164-65 (W. Hening comp. 1823).
into the legal framework just proposed, religion will be seen as following the ultimate dictates of conscience; or, to say the same thing in another way, the fundamental decisions of conscience—those which pertain to the most important questions in life—are religious acts in the eyes of the law. The right to make and execute such determinations, free from governmental interference, was protected by the 16th Article of the Virginia Bill of Rights, subject only to the limitation that no such religious or conscientious act be harmful to others.

When the Virginia General Assembly met in late 1785, not only was the bill for general assessment defeated, but a bill previously authored by Thomas Jefferson was introduced, and then passed on January 19, 1786. This was the famous Virginia Statute of Religious Freedom. The enactment began with an invocation: "Almighty God hath made the mind free." This was in perfect conformity with the invocation of the "Laws of Nature and Nature's God" in the Declaration of Independence as drafted by Jefferson and adopted, without alteration in this respect, by the Second Continental Congress. Far from ordaining a separation of church and state, the Virginia Statute of Religious Freedom proclaimed a cooperative friendship between the two: the existence of God who made the mind free was the statutory reason for governmental recognition of religious freedom.

Furthermore, this governmental friendship with religion was not to be confined to Christianity, but was to extend to all religions equally. Hence Jefferson said in his autobiography:

Where the preamble declares that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word "Jesus Christ," so that it should read, "a departure from the plan of Jesus Christ, the holy author of our religion"; the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination.

Surely Jefferson would likewise have endorsed the very expansive definition of religion recognized relative to the military

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53. 12 id. at 84, ch. 34; SELECTED WRITINGS, supra note 1, at 311-13.
54. SELECTED WRITINGS, supra note 1, at 22.
55. Id. at 47.
draft in cases such as United States v. Seeger56 and Welsh v. United States.57 There was a well-implemented system of compulsory military service in Jefferson’s day, and it appears that conscientious objection to such duty was actually considered as a right included in the free exercise of religion.58 Hence, the then-existing constitutions of New Hampshire, New York, Vermont, and Pennsylvania all made reference to those who were “conscientiously scrupulous of bearing arms;”59 whereas the constitutional ratification conventions of Virginia, North Carolina, and Rhode Island, in dealing with the same problem, mentioned those who were “religiouly scrupulous of bearing arms.”60 This is another way in which the virtual identity of religion and conscience was made manifest for legal purposes. If in law religion is conscience, then in law everyone has a religion. If in law God is the foundation of conscience, then in law everyone has a God. These very broad and interacting ideas of God, religion, and conscience were part of American legal usage when Madison and Jefferson forged the principles which became the free exercise and establishment clauses of the first amendment.

The preamble of the Virginia Statute of Religious Freedom reasoned that, since God is the author of religious truth and human freedom, religious truth will best become known if left uninterrupted by governmental coercion and favoritism. The main body of the statute was short and to the point:

Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.61

The statute simply said that a man cannot be taxed to support an official religion or an established church, and shall not

59. 4 AMERICAN ChARTERS, CONSTITUTIONS, AND ORGANIC LAWS 2455 (F. Thorpe ed. 1907); 5 id. at 2637, 3083; 6 id. at 3740-3741.
60. 1 J. Elliot, DEBATES ON THE FEDERAL CONSTITUTION 335 (1869); Id. Vol. 3 at 659; Id. Vol. 4 at 244.
61. 12 VIRGINIA STATUTES AT LARGE 86 (W. Hening comp. 1823).
be subject to any civil disability or criminal punishment on account of his peaceable and free exercise of religion. It did not lay down a sweeping and absolute rule that government and religion may never, under any circumstances, come into contact. It did not say that government may not encourage all religions on equal terms.

The concluding section or paragraph of the statute said that religious freedom is a natural right. This necessarily means that it is a right of all human beings, including those who do not believe in personal deity or spiritual reality. The universality of religion contemplated by the statute serves to equate religion and conscience for legal purposes.

Finally, it should not be overlooked that the establishment clause of the Virginia Statute of Religious Freedom was simply a further exposition and clarification of the free exercise clause of the Virginia Bill of Rights. What one clause said about God, religion, and conscience was carried over into the other without alteration.

F. The Incorporation Act and Liquidation of the Glebes

On January 5, 1785, the Virginia General Assembly passed an "Act for Incorporating the Protestant Episcopal Church," which detailed the manner of deciding church questions, appointing officers and vestries, selecting and removing ministers and holding church property, etc. The statute specifically reserved to the reorganized church the glebes or lands acquired for the old establishment at public expense prior to the revolution. Just after the enactment of the Virginia Statute of Religious Freedom, the evangelical denominations petitioned against the Incorporation Act because the Act maintained a degree of state control over church government and did not disturb church ownership of state-acquired property. On January 8, 1787, after a spirited controversy, the Virginia General Assembly passed a repealer which abolished all state regulation of churches but left ownership of the glebes in the hands of the Episcopal Church.

The final stage of political controversy centered around the old glebes. The evangelical denominations argued that, "The colony had unjustly taxed dissenters to furnish glebes and

62. Id. Vol. 11 at 532, ch. 49.
63. Id. Vol. 12 at 266, ch. 12.
churches for the establishment; the remedy was confiscation of the ecclesiastical property for the benefit of all citizens equally.”64 By way of defense, the Episcopal Church contended that “the contest for the glebes, churches, and chapels is not of a religious nature, but is to be decided by the rules of private property.”65 After years of struggle, the Virginia General Assembly succumbed to evangelical pressure, and, on January 20, 1802, passed a Confiscatory Act66 providing for the liquidation of the glebes as they became vacant by reason of the deaths of incumbent parsons, and stipulating that liquidation proceeds were to be used for the benefit of the poor and other public purposes.

The validity of the measure was raised by suit in equity brought by the vestrymen and church wardens of a vacant parish to enjoin sale of the glebe.67 They contended that the church corporation could not be deprived of vested property rights retroactively and without just compensation, a perfectly sound proposition having nothing to do with religion as such. The Chancellor dismissed the bill, and an appeal was taken. The four judges of the Virginia Supreme Court were divided equally, so the decree of dismissal stood. Judges Tucker and Roane held essentially that the title of the established church was good before the revolution, having been vested by public donation; that the established church was dissolved by operation of the revolution; that, by reason thereof, title reverted back to the successor of the donor, which could only be the Commonwealth of Virginia; and that, therefore, the complainants had no title on which to sue for relief. Judges Carrington and Lyons answered that the revolution neither dissolved the established church, nor divested title to its lands then held, inasmuch as the governmental alteration of that time did not affect private property previously vested, and could only have prospectively changed the legal relation between the government and the church. Since the complainants were representatives of the legitimate successor to the old corporation, Judges Carrington and Lyons insisted that relief should have been granted.

A similar case reached the United States Supreme Court,68 in which Justice Story held that the vestry of a vacant parish

64. H. EKENRODE, supra note 47, at 130.
65. Id. at 136, 142.
66. Id. at 147.
67. Turpin v. Locket, 10 Va. (6 Call) 113 (1804).
was the legitimate successor to the pre-revolutionary corporation. The church, the Court held, was not dissolved by the Revolution and continued to hold title to the parish glebe. Therefore, it was adjudged that the vestry was entitled to equitable intervention. That would seem to indicate final judicial condemnation of the Confiscatory Act.

Notwithstanding the downfall of the Confiscatory Act for technical reasons, there can be no doubt of the constitutional principle, applicable at least prospectively, that no church or religious body may hold state-donated property acquired by state tax revenue. This is a perfectly natural inference from the Virginia Statute of Religious Freedom.

G. **Derivation of the Religion Clauses of the First Amendment**

Before attempting a summary of the foregoing, it would be well to consider how and why the free exercise and establishment clauses of the first amendment to the United States Constitution derive from, and therefore recapitulate respectively, the 16th Article of the Virginia Bill of Rights and Virginia Statute of Religious Freedom. In adopting the Federal Constitution, the Virginia Convention of 1788 annexed to its Ordinance of Ratification a long declaration of rights or proposed amendments to the new charter of the Union.

The 20th of these declarations reads as follows:

That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others. 69

It is obvious that the language just quoted was paraphrased from the 16th Article of the Virginia Bill of Rights, save for the last clause which was a brief recapitulation of the Virginia Statute of Religious Freedom. James Madison, who had been a prominent member of the Virginia Convention of 1788, and one of the authors of the 20th declaration under consideration

69. 3 J. ELLIOT, supra note 60, at 659.
here, was elected to the United States House of Representatives in the First Congress. There he ably executed his promise to secure a Federal Bill of Rights in order to secure the acceptance of the new Constitution. Among his proposals in Congress on June 8, 1789, was an article which read:

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

After further deliberations, the House proposed an amendment which said, "Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed."

Following a joint conference between the House and Senate, Congress proposed, on September 25, 1789, the full Federal Bill of Rights as we now have it, including the language, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Congress was full of rejoicing. Lest there be any doubt of an intent not to ordain a complete separation of government and religion, let it be well noted that the House and Senate passed the following resolution on September 26, 1789:

Resolved, That a joint committee of both Houses be appointed to wait on the President of the United States, to request that he should recommend to the people of the United States a day of public thanksgiving and prayer, to be observed, by acknowledging with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to

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70. Id. at 656.
71. See B. Patterson, The Forgotten Ninth Amendment 86-217 (1955). This reprints portions of Volume 1 of Gales & Seaton's Annals of Congress covering the debates leading to the proposal of the Federal Bill of Rights to the several states for adoption.
72. Id. at 110.
73. Id. at 60-62, 196, 209. For an excellent, recent analysis of the debates in the First Congress in 1789 leading to the formulation of the present language in the free exercise and establishment clauses of the first amendment, see M. Malbin, Religion and Politics: The Intentions of the Framers of the First Amendment (1978). The author seeks to demonstrate that individual members of Congress who participated in these debates, and whose remarks were preserved in Gales & Seaton's Annals of Congress, believed the religion clauses they were framing would not prohibit nondiscriminatory governmental assistance to all religions on equal terms, contrary to the so-called "Everson Rule," supra note 2.
74. B. Patterson, supra note 71, at 86.
75. Id. at 89.
establish a constitution of government for their safety and happiness.\textsuperscript{8}

What then did Thomas Jefferson mean by the words "a wall of separation between Church and State" in the Danbury Baptist Letter? His reference was to the establishment clause in the first amendment and the Virginia Statute of Religious Freedom. In other words, he was not writing about a general prohibition of contact or interaction between government and religion at all. The so-called "wall of separation" simply meant that there shall be no official religion of state supported by public revenues, that there shall be no penalties for the peaceable and free exercise of religion, and that all religions shall enjoy equal protection and friendship of the government.

There is another point about the Danbury Baptist Letter which is often overlooked. Jefferson plainly stated that the religion clauses of the first amendment were designed to protect the "rights of conscience." He certainly had in mind a sweeping idea of religion, an idea large enough to encompass the fundamental or primary demands of conscience for all men. Religion in this sense is so pervasive that it simply cannot be literally separated, or severed of all contact, from the operations of government. Jefferson's "wall of separation," therefore, should not be taken as a rigid rule that the government must never touch the religious affairs of men.

IV. GENERAL SUMMARY AND SPECIFIC FOCUS ON EDUCATION

From this survey, we may take a panoramic view of the intended meaning of the religion clauses of the first amendment:

(1) The civil government may not be associated with an official, preferred, or established church or religion; (2) Nevertheless, government and all forms of religion equally stand in perpetual friendship; (3) No church, ministry, or place of worship run by a particular denomination may be supported by tax revenues, or hold property purchased with tax revenues; (4) No legal disabilities, forfeitures, or penalties of any kind may be consequent on the peaceable exercise of religion; (5) God has a legal existence, which may be officially acknowledged, and a legal definition, \textit{viz.}, the foundation of conscience; (6) For legal purposes, religion is recognition, in word or deed, of God or the ultimate

\textsuperscript{76} Id. at 216.
basis of morality; And (7) the civil government may not regulate the peaceable exercise of religion, including the conduct of the religious affairs of any church, ministry, place of worship, or individual.

When the free exercise and establishment clauses are put into proper perspective, it is easier to understand why active governmental support of private and sectarian education is not unconstitutional, even where religious denominations are tangibly aided, so long as overall religious neutrality is observed.

For reasons already explained, this writer considers the intended meaning of the word "religion" in the first amendment to be a practical synonym of conscience or recognition of the ultimate basis of morality. If this theory is right, then religion, in the legal sense, is so broad as to be an inevitable permeation into virtually all phases of human life and society. One can be a militant atheist, or a devout churchman; but, in either case, there is a religion in the eyes of the law, for both undeniably seek a final measure of right and wrong. Given this premise, it follows that religion, whether so designated or not, is a necessary unavoidable part of education, as much so as physics or grammar. Hence, if tax subsidies, credits, deductions, or other direct or indirect relief to education were unconstitutional whenever religion of one kind or another were promoted, such support of all education would be unconstitutional. It is most evident that our constitutional guarantees of religious liberty were never intended to inhibit the activities of civil government in promoting education. From this it follows that public support of private education, whatever its religious content may be, is generally consistent with our fundamental law.

Nevertheless, in the interests of fairness to those who think otherwise, let it be postulated that the framers of the first amendment had a much narrower idea of religion in mind than this writer has supposed. Assume, for the sake of discussion, that our forefathers considered religion to be a personal relationship between man and spiritual God, a theological deity as such. In that case, an atheist or humanist would have no religion in the legal sense. All or most persons who do not believe in a Supreme Being would find no legal protection in the religion clauses of the first amendment. It is hard to imagine how this could be reconciled with the lofty thinking of James Madison and Thomas Jefferson. And, assuming that this narrow idea were the intended meaning of the word "religion" in the first
amendment, and that the intended meaning must control constitutional interpretation, some very large changes would have to be made in our contemporary jurisprudence. Out would go cases such as *Torcaso,*77 *Seeger,*78 and *Welsh.*79

But even assuming all this, what of the problem of public support of private education under the intended meaning of the establishment clause? It is clear enough that the establishment clause originated from the Virginia Statute of Religious Freedom, which merely prohibited tax support of religious worship or ministry, and prohibited legal disabilities or penalties imposed on account of individual religious belief or practice. The statute did not mention, much less prohibit, public support of any kind of education. If it said anything about this subject by way of implication, it said that public support of all education shall be as equal as possible, regardless of whether the teaching reflects one sectarian viewpoint or another. Even given the narrow view of religion here supposed, a denial of public money on account of religious content or perspective built into an educational curriculum would be a legal discrimination against religion, a civil disability, which the Virginia Statute of Religious Freedom and the establishment clause of the first amendment were designed to forbid.

In any event, tax support of a church, ministry, or place of worship was considered constitutionally different from tax support of education. As evidence of this, we may note the satisfaction of a clergyman in Virginia around 1850, who commented that, despite the Virginia Statute of Religious Freedom, "Religion and morals have not suffered. Four colleges, two theological seminaries, and the University have been added to the public institutions for instruction."80 Indeed, Thomas Jefferson, the author of the Virginia Statute of Religious Freedom, clearly recognized "moral philosophy" as a normal part of public education in Query XV of *Notes on Virginia.*81 And in a letter of April 21, 1803, to Dr. Benjamin Rush, Mr. Jefferson outlined his view that the principles of Judeo-Christianity—"religion" properly so-called—were an indispensible part of the evolution of moral phi-

78. 380 U.S. 163 (1965).
80. C. JAMES, supra note 42, at 140.
81. SELECTED WRITINGS, supra note 1, at 267.
As father of the University of Virginia, Jefferson certainly envisioned religion as an important phase of education.\textsuperscript{82} The Northwest Ordinance,\textsuperscript{84} which was reenacted by the same Congress that framed the Federal Bill of Rights, contained two noteworthy provisions: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments . . . . Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."\textsuperscript{85} It is impossible to reconcile this language with an interdiction of direct or indirect tax support of education simply because some part thereof is religious.

Finally, let it be observed that the Statutes of 1 James I, Chapter 4 (1603) and 3 James I, Chapter 5 (1606) provided that if a parent sent his child abroad for education under Roman Catholic auspices he would forfeit 100 pounds. Likewise, the Statute of 3 Charles I, Chapter 2 (1628) ordained that if a parent sent his child abroad for education in a Catholic institution to strengthen the religious conviction of the youth, he would incur important substantial disabilities and forfeit all his property.\textsuperscript{86} While it is doubtful whether these statutes were ever received in America,\textsuperscript{87} the 16th Article of the Virginia Bill of Rights states:

\begin{quote}
That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.
\end{quote}

\textsuperscript{82} Id. at 566-70.
\textsuperscript{84} Northwest Ordinance, ch. 8, 1 Stat. 51 (1789).
\textsuperscript{85} Id.
\textsuperscript{86} 1 W. Blackstone, \textit{Commentaries*} 451.
\textsuperscript{87} The Virginia Convention of 1776, which enacted the 16th Article of the Virginia Bill of Rights, also passed a general provision for the reception of English common law which said,
Rights and the Virginia Statute of Religious Freedom, thus also the free exercise and establishment clauses of the first amendment, were certainly designed to prohibit features of this kind.

In other words, our constitutional mandate of religious liberty prohibits government from imposing financial or other penalties on parents who have chosen to send their children to schools organized or managed by some religious denomination. Parents plainly have the fundamental right to choose the religious exposure of their children in education,88 without suffering government-created discrimination. Granting this, it is surely unconstitutional not to accommodate in some degree those parents who send their children to private schools for the sake of religious exposure.

When government establishes a system of public education, expenditures for fixed costs simply must be paid by public revenues raised from taxable wealth without regard to other considerations. Otherwise, the undoubtedly legitimate end of government-maintained education would be altogether impossible.

But government expenditures to pay the variable costs of education are another matter. As to these, there is room for flexibility to account for different kinds of education, including public, private, secular, and sectarian forms. With respect to such outlays, the aim of government should be to equalize the benefit made available to each student within each category for which support is provided, regardless of religious exposure in educational experience. While mathematical precision is not achievable, this should be required to the extent practically possible, because all education is religious, and all religions are properly equal before the law.

Therefore, if a parent sends his child to a private school, the child should receive the same practical equality of variable-cost benefit from public money as any other child in the community. On the other hand, the parent should not be required to pay more for that practical equality of variable-cost benefit than his tax liability would otherwise indicate. To whatever extent tax adjustments or school subsidies may be needed to achieve this end, in the admittedly rough terms in which government must operate, they ought to be granted. The reason is that, without

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these aids, the parent would suffer a money forfeiture in consequence of selecting the religious exposure of his child's education, the same sort of thing that the Statutes of 1 and 3 James I imposed, and that the first amendment was intended to forbid.

V. Conclusion

Our constitutional guarantee against the establishment of religion has been warped by a destructive dogmatism built upon a mild figure of speech. The establishment clause, in its intended meaning, prohibits any government-ordained religion, but does not require absolute separation of church and state. In its primary thrust, the establishment clause was intended to guarantee equal protection of all religions peaceably practiced. When considered in relation to its origins, the establishment clause not only allows public support of private schools, including those which are explicitly and formally religious, but actually requires the government to do whatever is reasonably necessary to assure that all proper education is treated with practical equality. The support of education is certainly a legitimate function of government, and all education is religious. Therefore, our judiciary should jettison all traces of separationism in passing on the constitutionality of statutes supporting private education. Instead, it is time for the courts of this country to consider statutes supporting public and private education together, and to adopt a new constitutional standard that will assure practical equality of variable-cost government support for each child, regardless of the religious exposure in his educational experience, and without imposing unnecessary burdens on parents who have made a conscientious choice of nonpublic schooling. This is true freedom of religion, and a blessing the first amendment was intended to secure.