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Lois M. Eveleth

Salve Regina University, evelethl@salve.edu

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JEFFERSON'S WALL AND THE QUESTION OF RELIGION

Lois Eveleth
Salve Regina University, RI

Few metaphors have attained the level of recognition that Thomas Jefferson's wall has, the *wall of separation between church and State*. He used the wall metaphor in January 1802 in a letter to three spokesmen of the Baptist Association in Danbury, Connecticut. The First Amendment was but eleven years old in 1802 when he used the occasion of this letter to comment approvingly on what the First Amendment says of the inability of Congress to make laws respecting religion. Passing from the realm of mere metaphor and becoming more than merely the felicitous phrasing of Jeffersonian rhetoric, the wall became a staple of constitutional interpretation in the mid-twentieth century. To the present time, the trend of constitutional interpretation inspired by the metaphor has been to establish and/or confirm a secular polity, one from which all religion is removed.

Numbers of issues present themselves, not surprisingly in such a highly nuanced topic as religion and in so complex an area as constitutional development. One such question is historical. Since religion did indeed matter to the Founding Fathers generally, and even to Thomas Jefferson, what can we make of the trend to remove any connection between religion and politics, even while appealing to the Founding Fathers, in this case Jefferson? How can the decision to be guided by original intent seemingly run counter to original intent? Joseph Lieberman, then-candidate for Vice President in the 2000 presidential campaign, offered a telling comment:

The line between church and state is an important one and has always been hard for us to draw...but in recent years we have gone far beyond what the Framers ever imagined in separating the two...and constructed a 'discomfort zone' for even discussing our faith in public settings—ironically making religion one of the few socially accepted targets of intolerance.¹

Whether or not Senator Lieberman is right in saying that religion is a target of intolerance, his comment testifies to the secularizing trend of recent constitutional interpretation. Moreover its presence in a Presidential campaign indicates how mainstream any discussion is.

This present essay seeks to examine this supposed secularism, by exploring whatever is meant by the phrase *far beyond what the Framers ever imagined*. Is the secularizing trend, as defined here, consistent with the original intent of the Founding Fathers, and, if so, to what extent is this so? 'Original intent' will be limited in this essay to the person of Thomas Jefferson, who is admirably suited to represent that illustrious group. Although he was not present at the Constitutional Convention, he was enthusiastic about the document and its amendments. That his metaphor is central to the secularizing trend is an especially telling reason for having Jefferson represent the original intent of the Framers of the Constitution. In addition to the oft-cited letter to the Danbury Baptist Association, his *Bill for Academic Freedom* and a section of the *Notes on the State of Virginia* are clear statements of his intention to eliminate the sect-preference of Anglicanism in Virginia and, by implication, sect-preference elsewhere. For these reasons, my strategy here is this: examine the letters of Thomas Jefferson, as well as several of his works relevant to the question of religion, in order to determine whether his view of religion is consistent with the secularizing trend attributed by scholars to the Everson decision.

In 1779 Jefferson introduced this, his first great bill to the Virginia Assembly, as a measure that would make optional both a citizen's religious affiliation and his financial support of a church. God has made man's mind free, and it is "...an impious presumption...for either civil or ecclesiastical rulers to

establish and maintain false religions.”² A citizen’s civil rights do not, or should not, depend on his religious affiliation, nor should his worthiness for public office. Such religious requirements do not even serve religion well, in that the so-called believer is seeking only his personal gain and will conform only externally. A person’s opinions are not the concern of government. Given the establishment of the Anglican Church, the bill provoked debate sufficient to delay passage until 1786. Gradually, though, not only did the thinking move to Jefferson’s position of sect-neutrality, but Virginia’s population of non-Anglicans increased in a few years. Both conviction and demography cooperated to assure some official relief for Baptists, Quakers, Presbyterians, et al.

From this same period of time we have his *Notes on the State of Virginia*. His appointment to France began in 1784, and it was there in 1785 that he published the *Notes*, to great acclaim and translation into Italian, German, and French. One of the twenty-three sections or queries provides his appraisal of religion in Virginia. The Anglicans have been intolerant of non-Anglicans right from the early days of the seventeenth century. Presbyterians and Quakers have endured a range of civil and religious oppressions and sometimes even death (e.g. Quakers who return to Virginia for a third time). His estimate is that, at the time of writing this document, fully two-thirds of the inhabitants are dissenters. Virginia’s laws establish a “religious slavery.” The scope of government is limited to external actions that involve or injure others, but “...it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg...”³ Error needs the support of the state, but truth can prevail on its own. Not all the states were like Virginia. He cites Pennsylvania and New York, where there is no establishment of religion or sect-preference. Diversity of religions has been found to be an advantage, where all groups mutually balance and correct each other.

Throughout his numerous letters, written over many years, references to religion pervade, references to any and all dimensions of religion. He declares himself a Christian, unequivocally, though gives a damning review to Christianity.⁴ Jesus himself was “...the most innocent, the most benevolent, the most eloquent and sublime character that ever has been exhibited to man.” There are many allusions to Christ, and Jefferson’s admiration and commitment are clear. The moral teachings of this great man far surpass any principles found in ancient philosophies or in Judaism. Jefferson’s quarrel lies with Christianity as a system or as an organized religion. Christ may have been a great man and great moral teacher, but his teachings have been misinterpreted and corrupted by “unlettered and ignorant men,” by priests who have built artificial structures upon these simple and eloquent moral teachings, “...for the purpose of deriving from it pence and power...”⁵ Moreover, churches are intolerant of each other, excluding those whom they consider unbelievers and heretics. All churches are heretics to other churches. And so emerges his individualistic position. “I have never permitted myself to meditate on a specified creed. These formulas have...made of Christendom a slaughter-house.” “I am a sect by myself, as far as I know.”⁶

Seeing himself as a sect of one helps explain his Syllabus and his Bible. Jefferson had been inspired by Dr. Joseph Priestley, who had written a comparison of Socrates and Jesus. Discussions, via letters, with Dr. Benjamin Rush proceeded in the same vein. Consequently, Jefferson turned his hand to something similar to Priestley’s project, though on a larger scale. His objective was both to compare Christ’s moral teachings with those of others as well as distinguish what Christ himself taught from interpretations by Christian churches. In 1803 his *Syllabus of an Estimate of the Merit of the Doctrines of Jesus Compared with Those of Others* appeared. He juxtaposes the moral teachings of Christ with ancient philosophies and declares Christ’s morality superior, because his incorporates duties to others in society. Ancient moralists emphasize the excellence and tranquility of oneself and are not concerned with the social. Jewish morality, according to Jefferson, is undeveloped, and he passes over it quickly. What is now published as *The Jefferson Bible* began as cutout excerpts from the four Gospels pasted into a blank book. His intention was to separate out what was truly a teaching of Christ from misrepresentations or interpretations imposed, over the centuries, on Christ’s teachings. He thought this an easy task, as easy as separating “the diamond from the dunghill.”⁷ Both the Syllabus and the Bible had limited circulation among family and friends in his lifetime, at his request and under his strict

supervision. He wanted, as he explained to John Adams, to remain "clear of religious disputes before the public."⁸

Jefferson's view of religion is what may be termed minimalist. Theology, as the intellectualizing of one's faith, is a religious activity that can be expected of an intellectual. There is no theologizing here, no search for conceptual frameworks or patterns of reasoning that might help an intellectual such as Jefferson. Responding once to a minister who asked what he thought happened to souls when they left the body at death, the Sage of Monticello answered that he simply did not think about such questions. He was concerned only with acting well, or "...nourishing the good passions and controlling the bad."⁹ Still, in this same sentence he expresses his hope of a life after death. Somehow believing in immortality, he offers no reflections on how this may be possible, nor does he express any doubts about this same possibility. He explains away Jesus' teaching of a future life as "...an important incentive, supplementary to the other motives to moral conduct."¹⁰ As for the doctrine of the divinity of Jesus, Jefferson writes that the question of his being part of the Godhead is "...foreign to the present view."¹¹ Public ceremonies and rituals, another phase of organized religion, were of no interest to him. His letters never mention regular church attendance, for instance. A famous incident, one that served to reduce his popularity, was his refusal to declare a day of fasting and thanksgiving, as Presidents Washington and Adams had done before him. He offered something of an explanation in a letter to Levi Lincoln, his Attorney-General: "I know it will give great offense to the New England clergy; but the advocate of religious freedom is to expect neither peace nor forgiveness from them."¹² An organized religion, to the extent that it is organized, has been institutionalized over long periods of time, and Jefferson is rejecting this facet of religion. As he strips away the institutional facet, he minimizes the power that any well-organized institution can exert. There is no central authority but only small group consensus at a local level. This is to his taste, and we can see some analogy with his distaste for a strong central government in the new nation. This distrust of more organized religions is of a piece with his political view that strong central government must be distrusted and held at bay by the individual states.

Religion is not an institution, nor a theology, nor a set of rituals; religion is morality. "I must ever believe that religion substantially good which produces an honest life...(we) judge of the tree by its fruit."¹³ Religion is an indispensable guide in a person's life, in that each one must make choices, hoping that he chooses the good rather than the bad. The basic principle is "...to do whatever is right, and leave consequences to Him who has the disposal of them."¹⁴ If one accepts this view that human actions shape society, as Jefferson clearly did, the practice of morality is necessary for the well-being of society. On doctrinal matters we "schismatize", but moral choices bring us together. Jefferson believed that, while dogmas and creeds separate us, basic moral choices are essentially the same, thus stabilizing and bringing together the many diverse individuals in society. "...the interests of society require the observation of those moral precepts only in which all religions agree."¹⁵ In another letter we read: "It is a religious duty to obey the laws of our country...it is a religious duty to assist our sick neighbors..."¹⁶ Religion or morality instructs us how to live well together, and so religion or morality is a necessary condition for a united and thus stable society.

Assigning so important a role, viz. social stability, to religion is consistent with the concern of the Founding Fathers for unity in the new nation and is analogous with the rejection by the Democratic Republicans of a strong central government. The individualism, freedom and self-determination built into the civil framework found expression here, in Jefferson's reflections on the nature and role of religion. An individual believer thinks for himself, is not bound by the beliefs and judgments of others, and is free to express himself religiously in his own way. The idea that no rulers or clerics or government can come between a person and God finds frequent expression. The implication is clear, i.e. that unity in beliefs and creeds will not be possible. Unity being necessary, it must be provided for and accounted for by something other than beliefs and ideas. A stabilizing unity has to come, not from any central government, nor from any priests and clerics imposing creeds, nor from anything external. Unity will move from parts to whole, growing in a consensus of individuals who, because they find themselves in agreement, become a group. One of his explanations lies in a contrast he draws between the consent of

presbyters in a small church, as opposed to the dictates of bishops in hierarchical churches like the Anglican and the Catholic.¹⁷ But if, like Jefferson, each person may well be a sect of one and never become part of a group, sect, or organized religion, unity will be a product not of beliefs, but will instead result from actions.

Religion or morality is the basis of any unity; this is Jefferson's Enlightenment optimism. "...my religious reading has long been confined to the moral branch of religion, which is the same in all religions; while in that branch which consists of dogmas, all differ, all have a different set. The former instructs us how to live well and worthily in society..."¹⁸ Beliefs, doctrines, creeds all tend to divide, but a small set of moral principles, held in common, is a basis for unity. Jefferson believed that the Creator "...has taken care to impress its precepts (of morality) so indelibly on our hearts that they shall not be effaced by the subtleties of our brains."¹⁹

The view of the human person that is taken for granted is one that was fairly pervasive in the Age of Reason. The use of reason is the distinguishing feature of a person, a reasonability that finds expression in actions freely deliberated and chosen. If a person uses his capacities for reason and freedom, he improves himself and, consequently, each person doing this, society as a whole is improved. God gives personal revelation to people, and in doing so provides also "...conviction of its authenticity to the reason he has bestowed as the umpire of truth."²⁰ An individual's reason is a gift from God and is sufficient for human life in society, an "umpire of truth" within. Writing to John Adams, he remained convinced of his moral-sense position, that "...if thinking men would have the courage to think for themselves, and to speak what they think, it would be found they do not differ in religious opinions as much as is supposed."²¹ Doctrines are divisive, even while principled action is unifying.

We find, therefore, religion and morality to be coextensive terms in the writings of Jefferson. His understanding of religion, though, is such that it cannot be identified with theology, or ritual, or institutions. These are divisive. A guide to all human life in society, religion is a necessary element in human experience and is one expression of human reasonability and freedom in the guidance of a person's actions. It is necessary too for unity in human society. While his own preference is for the moral teachings of Jesus, he argues against community sect-preference for one religion or tradition.

EVERSON V. BOARD OF EDUCATION (1947)

The full array of Supreme Court decisions that are concerned with church-state relations and have been passed down since 1947 would constitute a separate study in itself, a study that is not attempted here.²² *Everson v. Board of Education* (1947) was clearly a decision that inaugurated contemporary Constitutional interpretation on church-state relations, or, in the words of Susan Jacoby in her recent study *Freethinkers, A History of American Secularism*, it "...broke new ground by redefining the scope of the establishment clause of the First Amendment ..." (Jacoby, 292). Constitutional scholar Gerard V. Bradley writes that this court decision "...effectively opened the modern era of church-state jurisprudence." (Bradley, p.1)²³

Everson was concerned with bus transportation to school. A New Jersey law authorized local school districts to provide transportation for all children to school. One town authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money reimbursed parents who chose to send their children to Catholic parochial schools, schools that blended religious teaching with secular education. The challenge against this use of tax money going toward the support of religious education, even though indirectly, was based on the non-establishment clause of the First Amendment. This clause had been extended by the Fourteenth Amendment (1868) to apply to the individual states as well as to Congress. Justice Hugo Black delivered the five to four majority opinion of the Court:

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.

The reasoning behind this decision upholding the New Jersey law and reimbursement program was ironic, in that it made clear use of the Jefferson metaphor but nonetheless found that this wall had not been breached. The reasoning behind the decision begins with describing the history and context in which the First Amendment was fashioned.

The colonists remembered their European past, the religious violence and persecutions in particular, the “evils, fears, and problems” connected to establishment or sect-preference. James Madison is quoted with approval when he writes, “...cruel persecutions were the inevitable result of government-established religions.” It was not only a European phenomenon, though, for most colonial charters provided for the establishment of a particular religion. These charters were an extension of British law and practice, but now, as the colonists were entering a period of disengagement from Great Britain, religious liberty was bound to accompany political liberty.

No one state was responsible for the First Amendment, but Virginia provided leadership and stimulus. It was Virginia “...where the established church had achieved a dominion and influence in political affairs and where many excesses attracted wide public attention.” The First Amendment, and particularly its clause on religion, emerged within, and possibly because of, Virginia’s special struggle. The years of this struggle were the context of the First Amendment, beginning with the *Declaration of Independence* (1776); then, following this: Jefferson’s introduction of his Bill for Religious Freedom (1779); the war, ending in 1783; Patrick Henry’s proposed bill in Virginia for taxes to support all teachers of the Christian religion (1784); passage of Jefferson’s Bill for Religious Freedom (1786); the writing and ratification of the second Constitution (1787-1789); the Bill of Rights (1791).

Not all the states blended the struggle for political and religious liberty as Virginia did, and it was not until the Fourteenth Amendment that the restraint on Congress in this regard was extended as a restraint on the states as well. As the idea of tax money to pay ministers and to support church buildings and property had rankled Virginians in the 1780’s, similarly, state aid to church schools has been a frequently-raised question for the Supreme Court. Generally, states have observed their constitutions. Their decisions, however, show how difficult it is to draw a line “...between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions that teach religion.”

Parents may send their children to a religious rather than a public school, if that school meets secular educational requirements. These requirements have been met in the case of New Jersey. The state of New Jersey does not support the Catholic schools and “...does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”

Justice Jackson wrote the dissenting opinion.

Catholic schools intentionally foster Catholic beliefs and values, and, while they serve the public purpose of educating the young, the Court “...cannot make public business of religious worship or instruction.” The principle of religious freedom has the effect of removing every form of religion from the realm of public business. The First Amendment has the dual advantage of “...preventing both state intrusion into religion and religious intrusion into state matters.”

Neither should one argue that large amounts of money are not involved. As Madison said in the 1784 assessment debate, “not even three pence” could be required without violating the principle of religious freedom. We must not allow time to pass in a gradual way, letting usurped power tangle this question in precedents. The principle asserted in the First Amendment must be observed rigidly if we would preserve the state’s neutrality. Admittedly the price is high. “Like St. Paul’s freedom, religious liberty with a great price must be bought.”

The argument that prohibition of this reimbursement would be discriminatory and so the reimbursement must be allowed to stand does not work. Even if the State were inclined to provide transportation for children of all faiths, there would always be someone left out of the reimbursement. Even if this were possible, that all religious groups were being reimbursed, there would be non-religious citizens not enjoying the benefit, and we would still have a situation in which some citizens would be supporting the beliefs of other citizens. The violation of the First Amendment is not removed by multiplying the money to

all sects, i.e. sect neutrality. "The Constitution requires, not comprehensive identification of state with religion, but complete separation."

SEARCHING FOR CONSISTENCY

Justices Black and Rutledge began the interpretive tradition that reads Jefferson's wall as meaning an absolute separation, and it was they who chose to make a 145-year-old metaphor the basis of a landmark legal document. Jefferson the lawyer probably would not have done so himself, if we may use his document language as representative of his legal language, e.g., the *Declaration of Independence*, and *Bill for Religious Freedom*. Judicial interpretation that has followed Everson has also chosen to imitate Jefferson the letter-writer rather than Jefferson the lawyer, and, doing so, has a flexibility in interpretation that is allowed easily by all such rhetorical flourishes and figures of speech. Interpretations of any textual material vary with reader, time, and circumstance; interpreting another person's metaphor, *a fortiori*, only complicates the hermeneutical task.

More than a problem with metaphors, though, there is a problem with how religion is understood. Differences in the definition or understanding of religion are notable here. To Jefferson, religion is coterminous with morality. This is a narrower definition than that which the Everson court uses. In the latter case, instruction is part of religion; transportation is part; a building is part of religion; most importantly, the opinions of a person who happens to be a member of a religious denomination are part of a religion. Because none of these—opinions, buildings, transportation, and instruction—may legitimately be part of public policy, they receive no public money from the public purse. Everson establishes a no-aid formula in the First Amendment. To Jefferson, morality is beneficent for all the citizens and essential for social unity. Because religion is defined as morality, it too is beneficent and essential. In his letters he does not depart from this view.

There are two episodes that are intriguing examples of his public support of religion. In 1803 Jefferson asked the Senate to ratify a treaty with the Kaskaskies Indians, and, among the provisions of this treaty, was the erection of a Catholic church and the salary of a Catholic priest. This is expressly what Everson denies, viz. that education in a Catholic school can be considered public business and thus deserving of public money. Jefferson explains his reason to Governor Benjamin Harrison. The Kaskaskies nation was one of several Indian groups who occupied lands along the Mississippi River, and they

should be soothed and conciliated by
liberalities... The occupation of New Orleans,
hourly expected, by the French, is already
felt like a light breeze by the Indians... under
the hope of their protection they will immediately
stiffen against cession of lands to us.²⁴

President Jefferson is here spending public money for a Catholic church and a Catholic priest, with the expressed goal of acquiring Indian lands before the French arrive. The date of this letter shows that it was written just thirteen months after the more-often-quoted Danbury letter. At another time Jefferson wrote to President Madison to urge him to continue one of Jefferson's projects, on-going from his own administration. Madison should direct the War Department to support a school in Detroit for Indians that is run by Father Richards. The War Department must buy the land and its buildings, and grant an additional four hundred dollars annually for running expenses. The reason is that the Indians, learning self-reliance and civility, "...would deprecate war with us as bringing certain destruction on their property."²⁵ We learn from these episodes that Jefferson understood the Indians' desire for a church and priest of their own, and, knowing this, was not loath to use this desire for a larger political purpose. Perhaps too the episode says that his wall metaphor need not be taken seriously, since he himself did not.

Despite the political use of religion in this incident, Jefferson consistently and convincingly wrote of the desirability and social necessity of religion-as-morality, as we have seen above.

Religion is not beneficent, in the Everson view. Justice Jackson says this clearly. The First Amendment was intended "...not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life...". Neither is religion essential to public unity and well being, and this, by implication: if religion were necessary to public life, it would not be cut out of public life as being divisive. The justices' reading of history provides the context for their decision, and persecutions are emphasized in their historical overview. Religion must be divisive, then.

Sect-neutrality was not conceived of as a serious alternative, even while Justice Jackson mentions this possibility, only to discount it as inconsistent with tradition:

...if the present statute and its application were shown to apply equally to all religious schools of whatever faith, yet in the light of our tradition it could not stand...The person who embraces no creed also would be forced to pay for teaching what he does not believe.²⁶

Sect-neutrality is thus rejected "in light of our tradition..." even while the first four Presidents did indeed give public money for churches and clerical persons in the territories."²⁷ The only justification offered for their definition of 'establishment' as absolute separation is history, but their reading of history is incomplete.

There was no mystery in the eighteenth century about the meaning of 'establishment': 'establishment' meant an official sect-preference; a preference for a particular religious tradition or even for a particular sect or denomination. Non-establishment meant that there should be no sect-preference, or no state church, or, that there should be sect-neutrality. The Everson court did indeed break new ground when it re-defined 'establishment' as absolute separation.

The Court is not obliged to look to the original intent of the Founding Fathers as precedent, since, as Legal Realism persuades us, a judge having to decide a hard case, one in which precedent does not offer help, may have to be aware of social change and be sensitive to prevailing mores. Departing from original intent may even be desirable. Everson begins and ends with an historical overview of the eighteenth century, though, and bases its decision on the assumption on what they think is original intent. They see their decision as flowing from, dependent on, and justified by what the Founders intended. The sole premise supporting Everson is original intent, but they have not followed original intent. Herein lies the irony of one of the great watersheds in American legal history.

ENDNOTES

¹ Quoted in Susan Jacoby, *Freethinkers, A History of American Secularism*. NY: Henry Holt, 2004. P.353

² The text of the Bill is available in Padover's edition, p.947.

³ Also available in Padover, pp.674-675.

⁴ To Dr. Benjamin Rush, April 21, 1803. Also, To Dr. Joseph Priestley, April 9, 1803.

⁵ To Mrs. M. Harrison Smith, August 6, 1816.

⁶ To Ezra Styles, Esq., June 25, 1819.

⁷ To Dr. Joseph Priestley, Nov.7, 1819, in Padover. Unless otherwise noted, as here, all references to the letters are made to the 1853 edition.

⁸ To John Adams, August 22, 1813.

⁹ To Rev. Isaac Story, December 5, 1801.

¹⁰ To Dr. Benjamin Rush, April 21, 1803.

¹¹ In Jefferson's *Syllabus*, in Padover, p.949.

¹² To Levi Lincoln, January 1, 1802.

¹³ To Mr. Miles King, September 26, 1814.

¹⁴ To Dr. Logan, October 31, 1813.

¹⁵ To James Fishback, September 27, 1809

¹⁶ To Wendover (first name not given), March 13, 1815, in Padover, p.953.

¹⁷ "This is a plea," Jefferson writes in his *Notes on Religion*, "for government by a presbytery which resembles republican government." In Padover, 941. These *Notes* were, literally, notes to be used in speeches in the Virginia Assembly, ca.1776.

¹⁸ To Mr. Leiper, January 21, 1809.

¹⁹ To James Fishback, September 27, 1809.

²⁰ To Mr. Miles King, September 26, 1814.

²¹ To John Adams, August 22, 1813.

²² Over the last half of the twentieth century, constitutional development of church-state separation came with a number of key decisions. Among these: *Lemon v. Kurtzman* (1971); *Mueller v. Allen* (1983); *Agostini v. Felton* (1997); *Mitchell v. Helms* (2000). *Everson v. Board of Education* was the watershed decision: 330 U.S. 1, 15 (1947). All citations herein are taken from Everson.

²³ Jacoby, p.292. Gerard V. Bradley, *Church-State Relationships in America*, NY: Greenwood Press, 1987, p.1.

²⁴ To Governor Benjamin Harrison, February 27, 1803.

²⁵ To the President, December 7, 1809.

²⁶ Justice Jackson, writing the Dissent in Everson.

²⁷ Bradley, p.101.

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