2004

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THE MYTH OF SEPARATION:
AMERICA’S HISTORICAL EXPERIENCE
WITH CHURCH AND STATE

Patrick M. Garry*

The 2004 presidential campaign once again thrust religion into the political debate. John Kerry criticized President Bush for using his faith to seek support from religious leaders and organizations. The Catholic Church criticized John Kerry’s position on abortion, and Kerry supporters in turn attacked the Church for overstepping its bounds. Democrats opposed President Bush for his faith-based initiative, claiming that it violated separation of church and state, and Republicans argued that Democrats were trying to banish religion from the public square. Underlying these debates, however, was the nation’s historical and constitutional experience with church-state relations.

RELIGIOUS BEGINNINGS

In eighteenth century America, religion was as publicly practiced as politics, with civil laws often reflecting religious values.1 A failure to subscribe to a religious faith during this period “remained scarcely more plausible than disbelief in gravity.”2 Public accommodations of religion were frequent, and few people believed that they constituted any kind of establishment of religion.3

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3. Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685, 714 (1992). Generally, whenever conflicts occurred between civil laws and religious beliefs, the latter were accommodated; these accommodations were never seen as amounting to impermissible establishments. Id. at 714-15.
A significant influence in the founding of America was the quest for religious freedom. Massachusetts, Rhode Island, Pennsylvania, and Maryland were all founded for religious reasons, by settlers seeking relief from the dictatorship of state-established religions in Europe. But the new Americans were not trying to abandon a world in which religion and government were interconnected. They were simply attempting to make the New World into a better image of God's Kingdom. To them, the lesson of religious intolerance in Europe was not that church and state should be strictly separated, but that a corrupt government had in turn corrupted a state religion.

The religious inspiration of the earliest colonies can be seen in their charters. The First Charter of Virginia described the colony as serving "'the Glory of his Divine Majesty.'" The Fundamental Orders of Connecticut declared its purpose "'to maintain and preserve the liberty and purity of the gospel of our lord Jesus which we now profess.'" In addition, there was the well-documented Puritan desire to create a City on the Hill, a commonwealth committed to the truths of the gospel.

The Supreme Court has said that the religion clauses of the First Amendment are heavily grounded in the history surrounding their adoption. It is a full and rich history, since religion often provided the first political blueprint for the new colonial governments. And yet, throughout much of the modern Establishment Clause jurisprudence, the courts have largely ignored this history. Instead, they have abridged this history and focused almost single-mindedly on only one figure—Thomas Jefferson—and only one concept—the "wall of separation."

EIGHTEENTH CENTURY VIEWS ON THE DEMOCRATIC NEED FOR RELIGION

Not only does the "wall of separation" metaphor have almost no historical basis, but it is actually contradicted by the relationship between religion and government in eighteenth century America. With religious leaders having "contributed to the political discourse of the

6. Id.
Revolution, and the Bible [being] the most widely read and cited text," religion was naturally seen as "central to the life of the new nation." To Americans of the constitutional period, religion was a necessary prerequisite for a virtuous citizenry. According to John Adams, there is "no government armed with power capable of contending with human passions unbridled by morality and religion." He further wrote that "religion and virtue are the only foundations not only of republicanism and of all free government but of social felicity under all governments and in all the combinations of human society."

The constitutional Framers "saw clearly that religion would be a great aid in maintaining civil government on a high plane," and hence would be "a great moral asset to the nation." This was why George Washington urged his fellow Virginians to appropriate public funds for the teaching of religion. His objective was not to establish a religion, but to maintain a democratic government. Washington saw religion as an incubator for the kind of civic virtue on which democratic government could be based. As a general in the revolutionary army, he required church attendance by his soldiers, and in his Farewell Address to the nation at the end of his presidency he warned that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

Since late eighteenth century Americans agreed that the kind of civic morality needed to sustain self-government could only be developed through religious observance, it was expected that the


15. Id.

16. Id. at 271.

17. Id.


"courts would foster the observance of religion." Thus, churches became the "primary institutions for the formation of democratic character and the transmission and affirmation of community values." The notion that the religion clauses were intended to foster a strict policy of state neutrality or indifference toward religion would have been met with, to use Justice Story's words, "universal disapprobation, if not universal indignation." In his latest book, Separation of Church and State, Philip Hamburger writes that separation was never intended by the Framers of the First Amendment. With law being an expression of morality, and morality being derived from religion, it was seen as both impossible and undesirable to completely separate state from religion. Consequently, the constitutional principles of church-state relations arose out of a "framework wherein Protestant Christianity and American culture intertwined." By the 1780s, the justification for governmental support for religion had ceased having any real theological component. The need to glorify or worship God did not explain the late eighteenth century belief in the value of religion for the new republic. Instead, there was only "the civic justification that belief in religion would preserve the peace and good order of society by improving men's morals and restraining their vices."
GOVERNMENT RECOGNITION AND SUPPORT OF RELIGION

Eighteenth-century government constantly supported religion. It provided land for churches and religious schools. It collected taxes to support ministers and missionaries. It "outlawed blasphemy and sacrilege," as well as "unnecessary labor on the Sabbath." "No one seriously disputed the close relation between government and the institutions of religion." Indeed, as of 1789, six states still maintained some formal system of public-supported religion.

Stating that the "good order and preservation of" civil government depended upon "religion and morality," the Massachusetts Constitution of 1780 provided for the "support and maintenance of public Protestant teachers of piety, religion and morality." In Pennsylvania, civil law prohibited blasphemy and enforced Sabbath observances. The Maryland Constitution of 1776 authorized the state legislature to "lay a general and equal tax, for the support of the Christian religion," leaving to each individual the power to designate which cause or denomination should receive his tax money. Similar provisions were included in the original constitutions of Connecticut and New Hampshire, whose constitution also stated that no person of one sect would have to pay for the support of another sect. In the Northwest Ordinance, Congress had even set aside land to finance schools teaching religion and morality.

The Framers did not perceive a serious tension between government and religion. They ratified the Bill of Rights during an age

28. Id.
29. Id.
30. McConnell, supra note 5, at 2193.
33. Statutes at Large of Pennsylvania (1779), 9:313; Pennsylvania Statutes, 1794, reprinted in JAMES DUNLOP, GENERAL LAWS OF PENNSYLVANIA 151-54 (1847).
34. 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1689 (Francis Newton Thorpe ed., 1909).
35. CURRY, supra note 1, at 186.
of close and ongoing interaction between government and religion. \textsuperscript{38} Congress appointed and funded chaplains who offered daily prayers, presidents proclaimed days of prayer and fasting, and the government paid for missionaries to the Indians. \textsuperscript{39} And those who advocated government support of religion saw it as “compatible with religious freedom”; they did not equate it with establishment. \textsuperscript{40}

\textbf{THE PUBLIC EXPRESSION OF RELIGIOUS VIEWS}

Religious beliefs found frequent expression in the acts and documents of early American legislative bodies. Four references to God appear in the Declaration of Independence. \textsuperscript{41} In setting up a government for the Northwest Territory in 1787, the Continental Congress charged it with furthering “‘religion, morality and knowledge’” in the Territory. \textsuperscript{42} Early in its first session, the Continental Congress resolved to open its daily sessions with a prayer, \textsuperscript{43} and in 1782 it supported “‘the pious and laudable undertaking’” of printing an American edition of the Scriptures. \textsuperscript{44}

Later, when the First Congress—the very same Congress that created the Bill of Rights—reenacted the Northwest Ordinance in 1789, it declared that religion and morality were “necessary [for] good government.” \textsuperscript{45} This language gives support to the claim that the First Congress considered facilitation of religious exercise in the public sector permitted by the First Amendment. \textsuperscript{46} Congress also consistently permitted invocations and other religious exercises to be performed in public facilities or buildings. \textsuperscript{47} Even Thomas Jefferson, who was

\sloppy footnotes

40. CURRY, supra note 1, at 217.
41. ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 85 (1964).
42. \textit{Id}.
43. WITTE, supra note 27, at 58.
45. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. III, ch. 8, 1 Stat. 52 (1789). The Northwest Ordinance was originally enacted by the Continental Congress in 1787, and then reenacted and adopted in 1789 by the First Congress.
46. Peters, supra note 39, at 772.
47. SMITH, supra note 44, at 103-04
probably the most separationist of any of the founding generation, supported a proposal inviting religious sects to conduct worship services at the University of Virginia, a state institution. 48

THE EIGHTEENTH CENTURY UNDERSTANDING OF ESTABLISHMENT

According to historian Thomas Curry, the classical concept of an exclusive state church dominated the American image of an establishment of religion throughout the colonial and constitutional periods. 49 A state preference of one denomination over others was what was primarily thought to be an establishment of religion, as the Framers did not want to duplicate the English experience with the established Anglican church. 50

Separation of church and state was a concept focused on ensuring the institutional independence and integrity of religious groups, preventing government from dictating articles of faith or interfering in the internal operations of religious bodies. 51 As Elisha Williams wrote, every church should have the "right to judge in what manner God is to be worshiped by them, and what form of discipline ought to be observed by them, and the right also of electing their own officers" free of interference from government officials. 52 In the American view, the most repressive aspect of establishment was in government intrusion into religious doctrines and liturgies. 53 The English ecclesiastical law, for instance, had formally required use of the King James version of the Bible and of the liturgies and prayers of the Book of Common Prayer. 54 It had also demanded adherence to the Thirty-Nine Articles of Faith. 55

Although modern jurisprudence focuses on "advancement of religion" as a "key element of establishment," in eighteenth century America the key element taken from the Anglican experience was "control." 56 In England, it was the state that controlled the church, not

48. Id. at 104.
49. CURRY, supra note 1, at 146, 192.
50. Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 668 (1970) (stating that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.").
52. ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS 46 (1744).
53. WITTE, supra note 27, at 51.
54. Id.
55. Id.
56. McConnell, supra note 5, at 2131.
the church that controlled the state.\textsuperscript{57} Government officials dictated the appointment of ministers, and civil law controlled religious doctrine and articles of faith.\textsuperscript{58} The doctrines and liturgy for public worship were governed by Parliament, which enacted legislation restricting public worship by Catholics, Puritans and Quakers. Indeed, an array of penal laws punished Catholics, Puritans and Quakers who attempted to openly exercise their religious faith outside of the official church.\textsuperscript{59}

The effects of the English establishment were twofold: to prohibit public religious worship outside of the Anglican Church; and to maintain government control over the doctrines of the Church of England itself, rather than leaving such ecclesiastical questions to the internal deliberations of clergy and laity.\textsuperscript{60} From the time of Elizabeth I, people not attending Anglican services were subject to monetary fines, the amount of which depended on the length of absence.\textsuperscript{61} Marriages could be lawfully performed only by ministers of the Church of England, and the law expressly declared illegitimate the offspring of marriages performed outside the Anglican Church.\textsuperscript{62} Thus, based on the English experience, Americans focused their opposition to an establishment of religion not on the various kinds of government support of religion, but on an image of tyranny.\textsuperscript{63}

\textbf{THE TRADITION OF NONPREFERENTIAL AID TO RELIGION}

Among late eighteenth century Americans, there was overwhelming agreement that government could provide special assistance to religion in general, as long as such assistance was given without any preference among sects.\textsuperscript{64} Both before and after the Revolution, Americans made a

\begin{itemize}
  \item 57. \textit{id.} at 2133.
  \item 58. \textit{id.} at 2138.
  \item 60. McConnell, \textit{supra} note 5, at 2132-33.
  \item 63. \textit{Curry, supra} note 1, at 211.
  \item 64. Patrick W. Carey, \textit{American Catholics and the First Amendment in All Imaginable Liberty: The Religious Liberty Clauses of the First Amendment} 115 (Francis Graham Lee ed., 1995). Even in Virginia, with the established Anglican Church, the growing sentiment in the late eighteenth century was that, while government could indeed give aid to religion, there should be equal treatment in such aid. SMITH, \textit{supra} note 44, at 45. This view that no single religion should be aided to the exclusion of others existed side-by-side during the founding era with the view that Christianity should be exclusively aided, though in a nondenominational sense and with tolerance toward other beliefs. \textit{id.} at 56.
\end{itemize}
conscious distinction between two types of state action: the granting of exclusive privileges to one church, and a non-exclusive assistance to all churches. Only the former was considered to be an “establishment” of religion. According to Thomas Cooley, the Establishment Clause prohibited only “[w]hatever establishes a distinction against one class or sect . . . to the extent to which the distinction operates unfavorably.”

Even while accepting the proposition that religion and morality were indispensable supports to republican government, the Framers recognized that granting exclusive privileges and monopoly status to one religious sect would only weaken religion, not strengthen it. Madison, for one, declared that established religion tends toward “indolence in the Clergy, ignorance and servility in the laity.” Therefore, just as free markets were seen as producing a strong economy, disestablishment and free exercise were believed necessary to produce strong religions.

During the Constitutional Debates, Governor Samuel Johnston explained his support for the First Amendment and attempted to allay the fears of opponents by saying that “there is no cause of fear that any one religion shall be exclusively established.” To the Virginia Ratifying Convention of 1788, James Madison stated that religious liberty existed in America because of “that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society.” Richard Henry Lee, who thought any religion should be supported so as to foster public morality, did not consider disestablishment to mean the removal of government’s “general ability to promote all religion.”

65. CURRY, supra note 1, at 209.
66. Id. “The dominant image of establishment Americans carried with them from the colonial period on was that of an exclusive government preference for one religion.” Id. at 210.
71. Madison, supra note 69, at 88.
72. JAMES MADISON 8:149 (Papers Hutchinson et al. eds., 1962).
The non-preferentialist tradition was firmly embraced by the Framers' generation.73 "It is revealing," historian Charles Antieau has noted, "that in every state constitution in force between 1776 and 1789 where 'establishment' was mentioned, it was equated or used in conjunction with 'preference.'"74 North Carolina's constitution of 1776 stated that there "'shall be no establishment of any religious church or denomination . . . in preference to any other.'"75 Both the Delaware and New Jersey constitutions provided that "'there shall be no establishment of any one religious sect . . . in preference to another.'"76 (Later, over the course of the nineteenth and twentieth centuries, thirty-two different state constitutions would contain a "no preference" clause.77 The Arkansas Constitution of 1874 provided a typical example: "Religion [and] morality . . . being essential to good government, . . . no preference shall ever be given, by law, to any religious establishment.")78

According to the nonpreferential tradition, the religion clauses were designed to foster a spirit of accommodation between religion and the state, as long as no single church was officially established and governmental encouragement of religion did not deny any citizen freedom of religious expression.79 The very text of the First Amendment supports this view. The use of the indefinite article "an," rather than definite article "the," before "establishment of religion" indicates the drafters were concerned with government favoritism toward one sect, rather than with favoritism of religion over non-religion.80 This notion is further supported in the congressional debates over the Establishment Clause. On August 15, 1789, Madison stated that he "apprehended the meaning of the words to be that Congress should not establish a religion, and enforce the legal observation of it by law."81 This view was repeated in 1803 by Chief Justice Jeremiah Smith of New Hampshire who, subscribing to the view that an establishment constituted an exclusive government church, declared that New Hampshire had no establishment.

73. JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 134 (1967).
75. CURRY, supra note 1, at 151.
76. Id. at 159.
77. WITTE, supra note 27, at 91.
78. ARK. CONST. OF 1874 art. II, §§ 24, 25.
79. DREISBACH, supra note 22, at 54.
80. MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 89 (1996). The clause was not a prohibition on favoritism toward religion in general. See DREISBACH, supra note 22, at 70.
81. 1 ANNALS OF CONG. 758 (Joseph Gales ed., 1789) (emphasis added).
even though the state had a tax system which provided financial support to all denominations. Likewise, Connecticut, Massachusetts and Vermont did not consider their financial support of all churches to be an establishment of religion.

When James Madison spoke of the proposed Establishment Clause as pertaining only to the establishment of a particular "national religion," he conveyed his willingness to accommodate those who wanted "nondiscriminatory assistance" to religion in general. During the 1789 debates, Madison recognized that some people feared the dominance of one sect, or the possibility that two might combine to establish a religion to which others would have to conform. At the Virginia Ratifying Convention, where delegates debated and voted on the proposed First Amendment, Madison spoke of the Establishment Clause in terms of an exclusive government preference for one religion. Edmund Randolph also spoke of "the establishment of any one sect, in prejudice to the rest." Patrick Henry, arguing for the need of the First Amendment, insisted that "no particular religious sect or society ought to be favored or established, by law, in preference to others." As Thomas Curry notes in his history of the First Amendment, "By emphasizing the 'exclusive' favoring of 'one particular sect,' Americans appeared to draw a careful distinction between such an exclusive establishment and a non-exclusive establishment or favoring of several or all sectors." Even Rhode Island, which never gave any financial support to religion, proposed during its ratifying convention that the First Amendment provide that "no particular sect or society ought to be favored or established by law, in preference to others."

Because of their wide belief in the doctrine of non-preferentialism, early Americans never conceived of any strict separation of church and state. In their view, such separation would hinder the free exercise of

83. CURRY, supra note 1, at 191.
85. LEVY, supra note 1, at 80.
86. Id.
87. Id. at 70.
88. Id. at 71.
89. CURRY, supra note 1, at 198.
90. THEODORE FOSTER, MINUTES OF THE CONVENTION HELD AT SOUTH KINGSTOWN, RHODE ISLAND, IN MARCH, 1790, WHICH FAILED TO ADOPT THE CONSTITUTION OF THE UNITED STATES 93 (Robert C. Cotner trans., 1970) (1929).
religion.\textsuperscript{91} Indeed, the strict separationist view was wholly rejected by "every justice on the Marshall and Taney courts."\textsuperscript{92} Until the mid-twentieth century, American courts consistently endorsed the importance of religion in the nation’s public life.\textsuperscript{93}

**THE FRAMERS’ VIEW OF RELIGION**

The Framers of the First Amendment did not want government to become a-religious.\textsuperscript{94} George Washington believed that religion was inseparable from good government, and that "no true patriot" would strive to erode the political influence of religion.\textsuperscript{95} Jefferson, in his *Notes on Virginia*, expressed the sentiment that belief in divine justice was essential to the liberties of the nation: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?"\textsuperscript{96}

At around the time of the drafting of the First Amendment, individual states were ratifying their own constitutions and passing their own laws governing religion. In Georgia, a bill for the "support of the public duties of religion" passed the legislature in 1785 by a vote of forty-three to five.\textsuperscript{97} The Delaware legislature declared in 1787 that it was their "duty to countenance and encourage virtue and religion by every means in their power."\textsuperscript{98} In 1789, the New Jersey Legislature appointed a committee to "report their opinion on what may be proper and competent for the Legislature to do in order to promote the Interest

\textsuperscript{91} JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 702-03 (Carolina Academic Press 1987) (1833). According to Story, the Establishment Clause merely helped to effectuate the inalienable right of free exercise by preventing any particular sect from being established at the national level. *Id.*

\textsuperscript{92} MCCLELLAN, supra note 73, at 134. On the other hand, the more separationist view espoused by Jefferson "was clearly not shared by a large majority of his contemporaries." *Id.* at 136. Strict separationists have ignored the historical data in their effort to build their case. They have selectively used snippets of history to justify an otherwise historically unsupported position. SMITH, supra note 44, at 55-56.


\textsuperscript{94} ANTIEAU ET AL., supra note 74, at 187-88 (describing the Framers’ understanding of the presence of religious ideals in governmental institutions).


\textsuperscript{96} THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 278 (Adrienne Koch & William Peden eds., 1944).

\textsuperscript{97} REBA CAROLYN STRICKLAND, RELIGION AND THE STATE IN GEORGIA IN THE EIGHTEENTH CENTURY 166 (1939).

\textsuperscript{98} 2 LAWS OF THE STATE OF DELAWARE 1700-1797, at 878-79 (1797).
of Religion and Morality among all ranks of People in this State." 99 A system of compulsory financial support for religion continued to prevail in Massachusetts, Connecticut, New Hampshire and Vermont. 100

The religion clauses of the First Amendment provide for a legal separation between church and state, not a moral separation. 101 To the Framers, a government isolated from religious influence was just as unintended as a civil government devoid of moral influences. 102 The notion that the constitutional Framers were afraid of religious influences over the state "is nonsense." 103 The whole justification of the Revolution had been interwoven with claims that freedom was a God-given right. 104

According to the most eminent nineteenth century constitutional scholars, the Framers did not intend to expunge religious influence from society or even foster a climate of detached neutrality towards religion. 105 The primary objective of the First Amendment was not to insulate society from religion, but to advance the interests of religion. 106 With the Free Exercise Clause, the Framers wanted to create an environment in which the strong moral voice of religious congregations could influence the federal government and where the clergy could speak out boldly, without fear of retribution, on matters of public

100. McConnell, supra note 5, at 2158.
102. See HAMBURGER, supra note 23, at 10.
105. See STORY, supra note 91, at 663 (stating that "[a]t the time of the adoption of the Constitution, and of the [first] amendment to it . . ., the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship"); see also THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 224-25 (1898) (stating that it "was never intended by the Constitution that the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects").
morality and the nation's spiritual condition. Although the early Americans may have believed in separation of church and state, they believed in dividing church from state, not God from state. Moreover, the purpose of the separation was not to protect the state from religion, but to protect religious institutions from being regulated and corrupted by the state.

**DRAFTING AND DEBATING THE FIRST AMENDMENT**

The Pilgrim laws, including the Mayflower Compact and the Pilgrim Code of Law, exerted a strong influence on the ideas underlying the new U.S. Constitution. Within several decades of coming to America, the Puritans had adapted their religious covenants to a system of civil law and political governance. The U.S. Constitution and Bill of Rights, adopted a century and a half after the initial pilgrimage, reflected those Puritan religious covenants that had been turned into political compacts.

The Framers' principal concern in drafting the Establishment Clause was to ensure equality among religions, not between religion and non-religion. They did not think that the government should adopt a position of being a-religious or certainly anti-religious. To the contrary, they believed that government had an affirmative duty to support religion.

During the years immediately preceding enactment of the First Amendment, interest in some form of official support for religion was on the rise. Many leaders were convinced that public virtue was declining, and this led to a loss of confidence in democracy. The decline was attributed to the paucity of public religious worship and

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107. DREISBACH, supra note 22, at 84; see also ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 127, 166-67, 184, 209 (1955).
109. Id. at 294.
111. Id. at 476.
112. WITTE, supra note 27, at 47.
113. ANTEAU ET AL., supra note 74, at 187-88 (describing the Framers' understanding of the presence of religious ideals in governmental institutions).
114. CURRY, supra note 1, at 190.
115. McConnell, supra note 5, at 2194.
116. Id.
teaching, a result of the collapse of the established Anglican church.\textsuperscript{117} Consequently, nearly every state witnessed a movement to strengthen some kind of broadly inclusive religious establishment within its borders. Just as the creation of the American republic coincided with a dismantling of the pro-monarchical Church of England, it simultaneously inspired a concern for strengthening religion, which in turn would promote republican virtue.\textsuperscript{118}

On April 15, 1789, before debating the religion clauses, the First Congress voted to appoint two chaplains of different denominations to serve in each house for the duration of the debates.\textsuperscript{119} During the ensuing proceedings on the Establishment Clause, one Framer voiced his fear that “it might be thought to have a tendency to abolish religion altogether.”\textsuperscript{120} Mr. Gerry thought the amendment would be better if it stated that “no religious doctrine shall be established by law.”\textsuperscript{121} Madison said he understood the amendment to mean that Congress “should not establish a religion, and enforce the legal observation of it by law.”\textsuperscript{122} Benjamin Huntington feared that the Establishment Clause “might be taken in such a latitude as to be extremely hurtful to the cause of religion.”\textsuperscript{123} He specifically feared that the public support of ministers or the building of churches “might be construed into a religious establishment.”\textsuperscript{124} Finally, he hoped that the amendment would be interpreted so as “not to patronize those who professed no religion at all.”\textsuperscript{125} Madison, in explaining the term “establishment,” stated that the primary fear of the drafters was that “one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.”\textsuperscript{126}

Much of the debates centered on the meaning of establishment as being the prohibition of government favoritism of one sect over others. But there is another aspect worth noting, an aspect that encompasses the whole eighteenth century dialogue over religious establishment. As one historian has noted, it is a remarkable feature of the religion debates that

\textsuperscript{117} THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 1776-1787, at 74, 81-82 (1977) (describing the link between the decline in public worship and public virtue).

\textsuperscript{118} McConnell, supra note 5, at 2196.

\textsuperscript{119} I ANNALS OF CONG., 18-19, 233 (Joseph Gales ed., 1789).

\textsuperscript{120} ABRIDGEMENT OF THE DEBATES OF CONGRESS FROM 1789-1856, at 137 (Joseph Gales & W.W. Seaton eds., 1857).

\textsuperscript{121} Id.

\textsuperscript{122} Id.

\textsuperscript{123} Id.

\textsuperscript{124} Id.

\textsuperscript{125} Id. at 138.

\textsuperscript{126} Id.
the advocates of the existing state establishments "tended to offer secular justifications grounded in the social utility of religion, whereas the most prominent voices for disestablishment often focused more on the theological objections." 127 In other words, the state needed religion more than religion needed the state. And this was why governmental support of religion during this period "had nothing to do with religious belief." 128

None of the twenty drafts of the First Amendment religion clauses in 1788 and 1789 ever included the principle of separation of church and state. 129

THE POST-RATIFICATION ENVIRONMENT

Scholars have noted that "close ties between religion and government continued...even after the adoption of the Bill of Rights." 130 The first four presidents included prayers in their first official acts as president. 131 This is evidence that "some forms of public prayer were not believed to constitute an establishment of religion." 132 Indeed, these prayers set a tradition that continued to endure for another two hundred years. Until the late twentieth century, a congressional law still required the president "to set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer." 133

In an 1811 case affirming a conviction for blasphemy, Chief Justice Kent of the New York Supreme Court stated that in America "the morality of the country is deeply ingrafted upon Christianity." 134 A year earlier, Massachusetts Chief Justice Theophilus Parsons in a religious establishment case noted the connection between the public good and the

127. McConnell, supra note 5, at 2205.
128. CURRY, supra note 1, at 183.
129. WITTE, supra note 27, at 91.
132. Van Patten, supra note 4, at 23. Even though Article VI of the Constitution barred religious tests from being a qualification for federal office, at the state level religious tests for office were commonplace. See generally Gerard V. Bradley, The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself, 37 CASE W. RES. L. REV. 674 (1987). Indeed, they survived decades longer than any other aspect of religious establishment. This shows how much the Framers intended to keep a religious influence on government and public affairs.
state of public morality: "The object of a free civil government . . . cannot be produced but by the knowledge and practice of our moral duties." To Justice Parsons, civil laws were not sufficient to achieve order and justice. He argued that society has a strong interest in behavior that cannot be legally enforced—behavior like charity and hospitality, benevolence and neighborliness, familial responsibility and patriotism. The best way to inculcate such values, according to Parsons, was to support religion. Later, in 1844, the U.S. Supreme Court noted the close relation of church and state when it recognized that "the Christian religion is a part of the common law . . . ."

Even the 1833 Massachusetts state constitutional amendment which abolished the mandated payment of tithes for religion left intact the provisions that commended religious ceremony and morality. The preamble of the constitution continued to assert that it was "a covenant" between God and the people of Massachusetts. Similar endorsements of religious morality appeared in other state constitutions. Connecticut, Delaware, and Maryland stated that it was the duty of citizens to worship God. Another six constitutions repeated the language of the Northwest Ordinance that "religion, morality and knowledge" were necessary for good government.

During the post-constitutional period, federal statute mandated the refunding of import duties paid on vestments, paintings, and furnishings for churches, and on plates for printing the Bible. In 1819, New Hampshire passed a law authorizing towns to support Protestant ministers, a law that remained on the books for the rest of the century. But education was the area involving perhaps the closest ties between church and state. The school systems in many places were operated by religious groups, funded by local taxes. In New York in 1805, for instance, schools run by Presbyterian, Episcopalian, Methodist, Quaker,

135. Barnes v. First Parish in Falmouth, 6 Mass. 401, 404-05 (Mass. 1810).
136. Id. at 405.
137. See id. at 405-06 (stating that legislation alone is not enough to invoke these behaviors. These values must "flow[] from the disposition of the heart" and only a "superior power, whose laws extend" to the heart can prevent society from being a terrible place).
139. WITTE, supra note 27, at 94.
140. Id. at 96.
142. COBB, supra note 62, at 516.
and Dutch Reformed groups all received public support.\textsuperscript{144} Later, these groups were joined by Baptists, Catholics, and Jews.\textsuperscript{145}

Tocqueville observed in 1833 that in America "[a]lmost all education is entrusted to the clergy."\textsuperscript{146} Through the middle of the nineteenth century, it was common practice for religious schools in New York, New Jersey, Connecticut, Massachusetts, and Wisconsin to be supported by state-generated revenue.\textsuperscript{147} In 1850, the California legislature gave religious organizations control over a large part of the state's education budget, since it was those organizations that were educating the burgeoning immigrant population.\textsuperscript{148} Up until 1864, education in the District of Columbia was provided entirely through private and religious schools, which received public support.\textsuperscript{149} And many of the nation's first public schools and state universities had mandatory courses in religion and required attendance at daily chapel and Sunday worship services.\textsuperscript{150}

Aside from education, there was a strong religious character to whatever social welfare systems existed in the community.\textsuperscript{151} Government depended on churches and religious organizations for providing many social services in the community.\textsuperscript{152} Even by the end of the nineteenth century, the federal government was financing the construction of religiously affiliated hospitals.\textsuperscript{153}

**REMAINING VESTIGES OF RELIGION'S PUBLIC ROLE**

Many signs of America's historical religious identity survive today. Witnesses in courts swear on the Bible and take an oath that concludes "So help me God." Presidential proclamations invoke God. The


\textsuperscript{145} See id.


\textsuperscript{147} Kaestle, supra note 21, at 166-67.


\textsuperscript{149} Richard J. Gabel, Public Funds for Church and Private Schools 173-79 (1937).

\textsuperscript{150} William Clayton Bower, Church and State in Education 1-3, 36, 40 (1944).

\textsuperscript{151} Philip R. Popple & Leslie Leighninger, Social Work, Social Welfare, and American Society 103-07 (1990). It was religious organizations that performed most social services, including education. Bower, supra note 150, at 23-24 (stating that "the earliest education in America was predominantly religious").

\textsuperscript{152} Mark E. Chopko, Religious Access to Public Programs and Governmental Funding, 60 Geo. Wash. L. Rev. 645, 647 (1992).

\textsuperscript{153} Bradfield v. Roberts, 175 U.S. 291, 296-97 (1899).
Supreme Court opens its sessions with the invocation "God save the United States and this honorable Court," and above the seat of the Chief Justice hangs the Ten Commandments. In the House and Senate chambers appear the words "In God We Trust." The Great Seal of the United States proclaims "Annuit Coeptis," which means "He [God] has smiled on our undertaking," and under the seal is inscribed the phrase from Lincoln's Gettysburg Address, "This nation under God." Engraved on the metal cap of the Washington Monument are the words "Praise be to God." Both houses of Congress, as well as many state legislatures, precede their daily work with a prayer given by a public-funded legislative chaplain. The national currency carries the motto "In God We Trust," and schoolchildren pledge allegiance to "one nation under God."

Up until the latter part of the twentieth century, state and local governments continued to endorse religious symbols and ceremonies. The Ten Commandments and various Bible verses were inscribed on the walls of public buildings. Flags flew at half mast on Good Friday. Christmas and Easter were official holidays. Government-sponsored chaplains were appointed to state legislatures, prisons, and hospitals. Thanksgiving Day prayers were offered by governors and mayors. States and municipalities donated land, services, and materials to poorer churches. Property grants and tax subsidies were furnished to religious schools and charities. Tax exemptions were accorded to the real and personal property of many churches, clerics, and charities. And the courts did not interfere in these arrangements. They gave each state and locality great leeway to determine for themselves the proper relationship between state and religion.

Eventually, however, the Court began turning away from history as a guide to its religion decisions. In a 1963 opinion, Justice Brennan warned against a "too literal quest for the advice of the Founding Fathers." This warning soon became reality, as the Court began constructing its high and impregnable "wall of separation" between church and state. Instead of protecting religion and preserving the nation's religious heritage, the Court used this "wall of separation" to institutionalize a growing social animosity to religion. And in doing

154. Witte, supra note 27, at 97.
156. See, e.g., Epperson v. Arkansas, 393 U.S. 97, 106 (1968).
157. See, e.g., Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 717-18 (1994) (O'Connor, J., concurring) (urging the Court to "bring our Establishment Clause jurisprudence back to... government impartiality, not animosity, toward religion").
so, the Court has inverted the status of religion. At the time the Constitution was written, crèches were permitted on public property and blasphemy was punishable by law. Two centuries later, crèches are banned and blasphemy is being publicly funded, as exemplified by the National Endowment of the Arts' support of Andre Serrano's "Piss Christ."

THE MODERN MISUSE OF HISTORY

The single most influential concept in the modern First Amendment doctrines regarding relations between church and state is the "wall of separation" metaphor. This constitutional notion of separation of church and state, however, did not arise until the Supreme Court's decision in Everson v. Board of Education. In upholding the constitutionality of a program allowing parents to be reimbursed for the costs of transporting their children to and from parochial schools, the Court gave its view of the Establishment Clause:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

158. See id. at 753 (Scalia, J., dissenting) (referring to the "recent tendency in the opinions of this Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration").
159. See Lynch v. Donnelly, 465 U.S. 668, 686 (1984) (noting the use of crèches by the American government and people for the two preceding centuries); see also Witte, supra note 27, at 53 (recognizing laws prohibiting blasphemy in the late 1700s).
162. Id. at 15-16.
The specific examples listed above by the Court—establishing an official church, aiding or giving preference to any one religion, forcing a person to profess a belief in any religion—seem straightforward enough and consistent with history. But it was the last sentence of this long quote that has proved to be the curse of Establishment Clause jurisprudence over the past half-century, for it is anything but indicative of the Framers' intentions regarding the constitutional treatment of religion. Not only did the Framers not believe in a wall of separation between church and state, but they never even once used such a phrase during the debates on the First Amendment.

One year after Everson, the Court decided Illinois ex rel. McCollum v. Board of Education, striking down a public school program that provided for one hour of religious instruction per week by sectarian teachers in public school classrooms. In its decision, the Court maintained that the “wall of separation” articulated in Everson “must be kept high and impregnable.” This metaphor continued to influence the development of First Amendment doctrine, leading in 1971 to the infamous decision in Lemon v. Kurtzman. In striking down two state statutes that provided public money to parochial schools, the Court articulated what would be known as the three-part Lemon test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; ... finally, the statute must not foster an ‘excessive government entanglement with religion.’”

Throughout the next decade and a half, the Lemon test became the staple by which courts adjudged Establishment Clause issues. Given
the separationist stance of *Lemon*, however, the decisions continued to express the kind of hostility to religion that had become linked with the "wall of separation" metaphor. Consequently, the "net effect" of the decisions coming down from the Burger Court during the 1970s was to "raise the wall of separation to a height never before reached." 172

Contained within the post-Lemon case law has been a persisting tension toward religion. In Tennessee's *Settle v. Dickson County School Board*, public school officials refused to let a student submit a paper on the life of Jesus Christ for a ninth-grade English class. 173 New Jersey school officials removed and relocated a kindergartner’s drawing of Jesus Christ from a display of student posters depicting things for which they were grateful. 174 A court ruled that coaches could not participate in their student-player prayers. 175 School authorities refused to allow the distribution of brochures advertising a summer Bible camp. 176 The American Civil Liberties Union claimed the Establishment Clause was violated when the Ten Commandments appeared in a public display of such documents as the Mayflower Compact, the Declaration of Independence, the Magna Carta, and the Bill of Rights. 177

In addition to the Lemon test, Jefferson's "wall of separation" metaphor led to two other establishment tests: the Endorsement test 178 and the Coercion test. 179 Each has resulted "in a growing and permanent displacement of religion from the public square." 180 By taking such a separationist approach, the courts have communicated to the American

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173. 53 F.3d 152, 154 (6th Cir. 1995).


180. Barton, *supra* note 95, at 400.
public a "categorical opposition to the intermixing" of religion and politics.181 But to the extent that the First Amendment requires separation, it does so as a way of preventing government intrusion on personal and institutional religious autonomy. The constitutional intent behind separation was as a means of protecting religion, not the secular state.182 The Framers never intended "to use the idea of separation to authorize discrimination against religion within the public sphere."183 As the United States Court of Appeals for the Fifth Circuit has written, the First Amendment "does not demand that the state be blind to the pervasive presence of strongly held views about religion with myriad faiths and doctrines," nor that religion and government "be ruthlessly separated."184 Likewise, Justice Goldberg has observed that:

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . . 185

Not only does the "wall of separation" metaphor contradict the spirit of the First Amendment, but it provides a completely inappropriate constitutional precedent or doctrine. As Justice Reed pointed out, a rule of law should not be constructed from a figure of speech lifted from a letter Thomas Jefferson wrote years after the First Amendment was ratified.186 Furthermore, according to numerous historical studies, the Court’s reliance on Jefferson and his “wall of separation” metaphor has been misplaced.187

Daniel Dreisbach argues that Jefferson’s actions throughout his public career suggest a belief that “state governments were authorized to accommodate and even prescribe religious exercises.”188 Dreisbach also

182. Carter, supra note 103, at 296.
184. Van Orden v. Perry, 351 F.3d 173, 178 (5th Cir. 2003).
argues that while Jefferson's "wall" separated the institutions of church and state, the "wall of separation" used in *Everson v. Board of Education* more expansively separates religion from all civil government. 189

There are strong historical indications that the "wall of separation" metaphor does not even reflect Jefferson's own views. His actions as president, for instance, do not seem to reconcile with a belief in a strict separation of state and religion. During Jefferson's presidency, Congress approved the use of the Capitol building as a church building for Christian worship services, 190 which Jefferson attended on Sundays. 191 Jefferson even approved of paid government musicians assisting the worship at those church services. 192 He also approved of similar worship services in his own Executive Branch, both at the Treasury Building and at the War Office. 193 Later, "[w]hen Jefferson founded the University of Virginia, he designated space in its Rotunda for chapel services and indicated that he expected students to attend weekly divine services." 194

Some scholars argue that, even if the *Everson* court's use of the "wall of separation" metaphor does reflect Jefferson's views, those views did not at all represent those of the individuals actually responsible for drafting and ratifying the First Amendment. 195 First of all, not only did Thomas Jefferson not participate in the debates on the First Amendment, he was not even in the country at the time. 196 Second, during the period preceding ratification of the First Amendment, state and colonial legislatures had often enacted public programs assisting religion, and there exists no evidence that any of the Framers considered

189. DREISBACH, supra note 188, at 125.
190. 10 ANNALS OF CONG. 797 (1800).
192. Id. at 89.
193. Id.
194. Barton, supra note 95, at 409.
195. HAMBURGER, supra note 23, at 109, 162 (contending that at the time Jefferson expressed such views, they were not "widely published or even noticed"). "[T]he dissenters who campaigned for constitutional barriers to any government establishment of religion had no desire more generally to prevent contact between religion and government." Id. at 13. See also Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 317 (1986) ("The original intention behind the establishment clause... seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion."). Steven Smith argues that the Establishment Clause was designed to protect the established state religions from federal interference; and as such, "[t]he religion clauses were understood as a federalist measure, not as the enactment of any substantive principle of religious freedom." SMITH, supra note 188, at 30.
such accommodations unconstitutional. 197 Furthermore, during the debates over the First Amendment, not one of the ninety Framers ever mentioned the phrase "separation of Church and State." 198 Yet it seems logical that if this had been their objective for the First Amendment, at least one would have mentioned the phrase that, through the Everson decision, would later come to shape the constitutional relationship between church and state.

CONCLUSION

The distorted use of the "wall of separation" metaphor was outlined in then-Justice Rehnquist's dissent in Wallace v. Jaffree. 199

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment. 200

Whether due to its lack of historical support or its practical unworkability, the Everson "wall" has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." 201

The misapplication of Jefferson's metaphor has led the Courts to create a confusing maze of case law restricting public expressions of religious belief, exactly contrary to the Framers' intent. The metaphor has been commandeered by secularists to not only infringe on the free

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197. McConnell, supra note 3, at 693.
198. The Congressional Records from June 8 to September 24, 1789 chronicle the months of discussions and debates of the ninety Framers of the First Amendment. 1 ANNALS OF CONG. 440-948 (Joseph Gales ed., 1789).
199. 472 U.S. at 91-114 (Rehnquist, J., dissenting).
200. Id. at 92 (Rehnquist, J., dissenting).
201. Id. at 107 (Rehnquist, J., dissenting).
speech, free exercise, and free association rights of religious groups and individuals, but to push religion to the fringes of civil society.

One explanation for this half-century of misuse of Jefferson’s metaphor has been given by Richard John Neuhaus. According to Neuhaus, “secularized elites” in academia and the judiciary became embarrassed by the profoundly religious nature of America’s founding and historical development.202 They manufactured a revisionist history which tried to explain why the Framers did not hold the beliefs that in fact the Framers said they held. In the course of this effort, the elites have attempted “to strip the public square of religious opinion that does not accord with their opinion.” 203

In the words of Justice Arthur Goldberg, the strict separationist approach carries an attitude of “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.”204 Using an inappropriate “wall of separation” metaphor, the establishment doctrines of the past have tried to reduce religion in scope and strip it of any special consideration.205 But the First Amendment does not strive or even function to create a religion-free, secular society.

203. Id.
205. Carter, supra note 103, at 309.