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## The Myth of Church-State Separation

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# THE MYTH OF CHURCH-STATE SEPARATION

DAVID E. STEINBERG\*

I.	INTRODUCTION .....	623
II.	LAWS AND STATEMENTS IN THE EARLY FEDERAL GOVERNMENT.....	625
	A. <i>Early Federal Laws and Practices</i> .....	625
	1. Thanksgiving Proclamations .....	625
	2. Legislative Prayer and Military Chaplains .....	626
	3. The Kaskaskia Indian Treaty.....	626
	4. References to Religion in the Northwest Territory Ordinance, the Declaration of Independence and State Constitutions.....	627
	5. Conscientious Objector Provisions .....	6
	B. <i>Religion And The Federal Republic: The Civic Republicans</i> .....	629
	1. Summary .....	630
III.	THE DRAFTING OF THE ESTABLISHMENT CLAUSE.....	630
IV.	ESTABLISHMENT CLAUSE FEDERALISM .....	633
	A. <i>What Separation Of Church and State Meant to Jefferson</i> .....	634
	B. <i>Other Federalist Interpretations of the Establishment Clause</i> .....	635
	C. <i>Was Federal Support For Religion Consistent With Federalism?</i> .....	637
V.	<i>EVERSON V. BOARD OF EDUCATION: THE ORIGINS OF ESTABLISHMENT CLAUSE DISTORTION</i> .....	638
	CONCLUSION .....	643

## INTRODUCTION

In the Establishment Clause of the First Amendment,<sup>1</sup> the framers supposedly intended to mandate a separation of church and state. The Supreme Court has

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<sup>1</sup> U.S. CONST. amend. I.

treated this statement as a truism.<sup>2</sup> Given how the Establishment Clause is equated with church-state separation, one finds surprisingly little evidence that the framers intended anything like church-state separation.

This article asserts that the church-state separation interpretation of Establishment Clause history is simply wrong. The framers were focused on the first five words of the amendment, which read: “*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” The original Establishment Clause was a guarantee that the federal government would not interfere in state regulation of religion—whatever form that state regulation took. Rather than enacting the Establishment Clause to mandate a separation of church and state, the framers adopted the clause to protect divergent state practices—including state establishment of religion, which continued in several states when the Establishment Clause was enacted. As Thomas Jefferson himself later acknowledged, the Establishment Clause had much in common with the Tenth Amendment, which also protected states’ rights from federal interference.

Part II of this article reviews federal laws and practices at the time when the Establishment Clause was enacted. Part II notes that the prevalence of government aid to religion in early America is inconsistent with contentions that the Establishment Clause mandated a separation of church and state.

Part III reviews some of the congressional discussions that resulted in the enactment of the Establishment Clause. Part III concludes that nothing in the legislative history relating to the Establishment Clause suggests that the framers intended to endorse a separation of church and state. To the contrary, this history indicates that by adopting the Establishment Clause, the framers agreed that the federal government would not interfere in state religious regulation.

Part IV concludes that with respect to the Establishment Clause, the framers were committed to the principal of federalism. Of the framers, Jefferson has been closely connected with arguments for church-state separation, given his Jefferson’s letter that described a “wall of separation between Church and State.”<sup>3</sup> Although Jefferson wrote about the Establishment Clause on a number of other occasions, none of these writings advocated a policy of church-state separation. Instead, Jefferson wrote that the power to regulate religion must “rest with the States, as far as it can be in any human authority.”<sup>4</sup> In other words, Jefferson viewed the Establishment Clause as endorsing the non-interference principle described in Part III.

After discussing Jefferson’s writings, Part IV reviews other statements about the Establishment Clause penned during the framing period. Jefferson’s federalist description of the Establishment Clause was not an aberration. Like Jefferson, other

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<sup>2</sup> See, e.g., *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (citing “the wall of separation that must be maintained between church and state” as a basis for striking down some forms of state aid to private religious schools); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (holding that prayer in the public schools “breaches the constitutional wall of separation between Church and State”).

<sup>3</sup> Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), in 16 *THE WRITINGS OF THOMAS JEFFERSON* 281, 282 (Andrew A. Lipscomb ed., 1905).

<sup>4</sup> Letter from Thomas Jefferson to the Rev. Samuel Miller (Jan. 23, 1808), in 11 *THE WRITINGS OF THOMAS JEFFERSON* 428, 428 (Andrew A. Lipscomb ed., 1905) (hereinafter “Letter to Reverend Miller”).

framing era sources largely omit any discussion of church-state separation. Also like Jefferson, framing era sources again and again state that the Establishment Clause was adopted to preclude federal interference in state regulation of religion.

Part V reviews the origins of modern Establishment Clause activism in *Everson v. Board of Education*.<sup>5</sup> Part V discusses the surprisingly sloppy and inaccurate statement of Establishment Clause history in *Everson*, which culminated with Justice Hugo Black's conclusion that the framers enacted the Establishment Clause to mandate a separation of church and state.

Part V discusses the bitter irony in the modern Supreme Court's Establishment Clause activism. The framers enacted the Establishment Clause as a shield, to protect state religious regulation from federal interference. However, the Supreme Court has transformed the Establishment Clause into a sword, which gives federal judges the power to meddle in areas traditionally reserved to the states. Through bad history and questionable public policy, the Supreme Court has created an Establishment Clause that is the exact opposite of what the framers intended.

## II. LAWS AND STATEMENTS IN THE EARLY FEDERAL GOVERNMENT

Early federal laws and practices are entirely inconsistent with the argument that the Establishment Clause mandated the separation of church and state. Just three days before Congress enacted the Establishment Clause, the same Congress approved a salary for a chaplain to lead Congress in prayer. Presidents Washington, Adams, and Madison each established a national holiday for prayer. In addition, a number of early statesmen—including President Washington—spoke of the importance of an active role for religion in public life. In short, the practices and statements of the early federal government were contrary to a separation of church and state.

### A. *Early Federal Laws and Practices*

#### 1. Thanksgiving Proclamations

The first Congress urged President Washington to proclaim “a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.”<sup>6</sup> President Washington selected November 26, 1789 as a day of thanksgiving to offer “our prayers and supplications to the great Lord and Ruler of Nations . . . .”<sup>7</sup> Although Jefferson broke from this practice when he served as President, both John Adams and James Madison designated special days for Thanksgiving and prayer.<sup>8</sup>

<sup>5</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>6</sup> GEORGE WASHINGTON, PROCLAMATION FOR A NATIONAL THANKSGIVING (Oct. 3, 1789), *reprinted in* 12 THE WRITINGS OF GEORGE WASHINGTON: BEING HIS CORRESPONDENCE, ADDRESSES, MESSAGES, AND OTHER PAPERS, OFFICIAL AND PRIVATE 119 (1834).

<sup>7</sup> GEORGE WASHINGTON, PROCLAMATION FOR A NATIONAL THANKSGIVING (Oct. 3, 1789), *reprinted in* 1 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 64 (1899).

<sup>8</sup> JOHN ADAMS, PROCLAMATION FOR A NATIONAL FAST (Mar. 6, 1799) (quoting Proverbs 14:34), *reprinted in* 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 172, 173 (1850) (recommending that “that Thursday, the twenty-fifth day of

## 2. Legislative Prayer and Military Chaplains

As Christopher Lund has demonstrated,<sup>9</sup> legislative prayer was a widely recognized practice in early America. The first federal legislative prayer dates from the 1774 meeting of the Continental Congress in Philadelphia.<sup>10</sup> In the following years, both the House and Senate began their sessions with a prayer. By 1789, the practice was so well-established that both houses of Congress appointed chaplains. On September 22, 1789, Congress enacted a statute, setting the chaplains salaries at \$500 a year.<sup>11</sup> This act was passed just three days before Congress reached agreement on the bill of rights—including the Establishment Clause.<sup>12</sup>

Like legislative prayer, federal support for military chaplains was in place long before Congress adopted the Establishment Clause and continued after the clause was enacted. In 1775, the Continental Congress approved the first army chaplain.<sup>13</sup> In addition to authorizing legislative prayer, the first Congress enacted a statute that provided for chaplains for the army.<sup>14</sup> The practice of appointing and paying army chaplains has continued up to the present day.<sup>15</sup>

The practice of appointing and compensating chaplains involved the direct financial support of religion by the federal government. If the Establishment Clause required a separation of church and state, such direct federal financing of religion would have been inconsistent with the clause. Nonetheless, the first Congress approved such financial support, without any suggestion that the aid violated the Establishment Clause. This congressional action raises considerable doubt about whether the framers read the Establishment Clause as requiring a separation of church and state.

## 3. The Kaskaskia Indian Treaty

In 1803, President Thomas Jefferson proposed a treaty with the Kaskaskia Indian Tribe. Jefferson's proposal would appropriate federal funds to build a Catholic church on the tribe's lands, and would provide a salary to support a Catholic priest who would tend to the tribe's spiritual needs. The treaty ultimately ratified by

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April next, be observed, throughout the United States of America, as a day of solemn humiliation, fasting, and prayer"); JAMES MADISON, A PROCLAMATION, *reprinted in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 513 (James D. Richardson ed., 1899) (noting James Madison's July 9, 1812 Proclamation calling for a day of thanksgiving and prayer).

<sup>9</sup> Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171 (2009).

<sup>10</sup> *Id.* at 1177.

<sup>11</sup> Act of Sept. 22, 1789, ch. 17, 1 Stat. 70-72.

<sup>12</sup> *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). *See also* Lund, *supra* note 9, at 1184.

<sup>13</sup> Klaus J. Herrmann, *Some Considerations on the Constitutionality of the United States Military Chaplaincy*, 14 AM. U. L. REV. 24, 24-25 (1964).

<sup>14</sup> Act of Mar. 3, 1791, ch. 28, 1 Stat. 222-24.

<sup>15</sup> *See* Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 167, 167 (2007) (describing military chaplains as "[p]atently unconstitutional under almost any view of the Establishment Clause").

Congress provided: “And whereas the greater part of said tribe have been baptized and received into the Catholic Church, to which they are much attached, the United States will give annually, for seven years, one hundred dollars towards the support of a priest of that religion, who will engage to perform for such tribe the duties of his office, and also to instruct as many of their children as possible, in the rudiments of literature, and the United States will further give the sum of three hundred dollars, to assist the said tribe in the erection of a church.”<sup>16</sup>

Notably, this treaty was proposed by President Jefferson. Courts and scholars have long associated Jefferson as the foremost proponent of the separation of church and state.<sup>17</sup> Yet it was Jefferson who convinced Congress to fund both the construction of a Catholic church, and the funding of a Catholic priest.

#### 4. References to Religion in the Northwest Territory Ordinance, the Declaration of Independence and State Constitutions

Outside of the First Amendment, and the Article IV provision prohibiting religious tests as a qualification for office,<sup>18</sup> the United States Constitution makes no reference to religion or God. But during the framing period, it was common for constitutions and official documents to include such references. As Professor Daniel L. Dreisbach observes: “The Declaration of Independence (1776), The Articles of Confederation (1781), virtually all state constitutions, and other official documents are replete with claims of Christian devotion and supplication to the Supreme Being.”<sup>19</sup>

The Declaration of Independence begins by noting that all persons “are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”<sup>20</sup> During the framing period, state constitutions also commonly referred to God or religion. For example, the Massachusetts Constitution of 1780 declared: “It is the right as well as the duty of all men . . . to worship the

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<sup>16</sup> CHESTER JAMES ANTIEAU, ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* 167 (1964).

<sup>17</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (noting the wall separation metaphor, which appeared in a letter written by Jefferson to the Danbury Baptist church). See also *infra* text accompanying notes 61-62 (showing that Jefferson read the Establishment Clause as guaranteeing federalism, rather than as a separation of church and state).

<sup>18</sup> Article VI, clause 3 of the Constitution provides in part: “[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI, cl. 3.

<sup>19</sup> Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 928-29 (1996).

<sup>20</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Supreme Being, the great Creator and Preserver of the universe.”<sup>21</sup> The Virginia Constitution of 1776 described religion as “the duty we owe to our Creator . . . .”<sup>22</sup>

In an enactment much closer in time to the adoption of the First Amendment, the first Congress enacted a charter to govern the Northwest Territory in 1787. Article III of the Northwest Territory Ordinance provided: “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>23</sup> In this law, many of the same men who would later approve the First Amendment described “[r]eligion, morality, and knowledge” as “being necessary to good government.” One should ask whether these same men, when they adopted the Establishment Clause just a few short years later, now suddenly believed in the separation of church and state.

### 5. Conscientious Objector Provision

In 1775, the Continental Congress exempt religious conscientious objectors from service in the Revolutionary War. The conscientious objector resolution read:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.<sup>24</sup>

During the Civil War, conscription initially was left to the individual states. However, after the federal government took control of the conscription process, the 1864 draft act exempted members of pacifist religious denominations from military service.<sup>25</sup> That same year, the Confederacy also exempted religious conscientious objectors from conscription.<sup>26</sup>

Many years later, Justice John Harlan, Jr. stated that the conscientious objector provisions violated the Establishment Clause because these provisions were inconsistent with “the neutrality principle.”<sup>27</sup> Justice Harlan was correct in his

<sup>21</sup> MASS. CONST. OF 1780, pt. 1, art. II, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS 1889 (Francis N. Thorpe ed., 1909).

<sup>22</sup> VA. CONST. OF 1776, DECLARATION OF RIGHTS, § 16, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS 3814 (Francis N. Thorpe ed., 1909).

<sup>23</sup> Northwest Territory Ordinance of 1787, 1 Stat. 50.

<sup>24</sup> RESOLUTION OF JULY 18, 1775, *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 189 (W. Ford ed. 1905 & photo. reprint 1968).

<sup>25</sup> *See* United States v. Seeger, 380 U.S. 163, 170-71 (1965).

<sup>26</sup> *Id.*

<sup>27</sup> *Welsh v. United States*, 398 U.S. 333, 357 (1970) (Harlan, J., concurring). The *Welsh* court plurality attempted to overcome the issue of religious favoritism by extending the conscientious objector statute to any person who “deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time . . . .” *Id.* at 340.

observation that the conscientious objector provisions accorded special treatment to objectors with a religious opposition to war, as opposed to individuals who did not want to fight for other reasons. But contrary to Justice Harlan's conclusion, no evidence suggests that the framers believed that such a preference for religious motivations violated the Establishment Clause.

*B. Religion And The Federal Republic: The Civic Republicans*

An important strand of early American thought asserted that religion was an essential component of what George Washington referred to as "national morality."<sup>28</sup> Those who agreed with Washington on the connection between religious belief and good government have become known as "civic republicans." John Witte, Jr. writes that "consistent with Puritan views, civic republicans sought to imbue the public square with a common religious ethic and ethos—albeit one less denominationally specific and rigorous than that countenanced by the Puritans."<sup>29</sup> As Witte correctly observes, civic republican thought was one of many competing views on church-state relationships.<sup>30</sup> Nonetheless, the proponents of an active role for religion in government included Benjamin Franklin, George Washington, and John Adams. Given the stature of these proponents, the framing era views on the importance of religion to political life cannot be dismissed lightly.

George Washington noted in his farewell address: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens."<sup>31</sup> Washington continued: "And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."<sup>32</sup>

John Adams made a similar point in his correspondence, writing that the United States Constitution "was made only for a moral and religious people. It is wholly inadequate to the government of any other."<sup>33</sup> Adams continued that government was not "capable of contending with human passions unbridled by morality and religion."<sup>34</sup> Connecticut Senator Oliver Ellsworth described religious institutions as

<sup>28</sup> George Washington, Farewell Address (Sept. 17, 1796), in 1 DOCUMENTS OF AMERICAN HISTORY 173 (Henry Steele Commager ed., 7th ed. 1963).

<sup>29</sup> John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 386 (1996). See also Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?*, 8 U. PA. J. CONST. L. 431, 451-52 (2006) ("In republican democratic terms, Protestantism supposedly imbued citizens with virtue and shaped their understanding of the common good.").

<sup>30</sup> Witte, *supra* note 29, at 378-88.

<sup>31</sup> Washington, *supra* note 28, at 173.

<sup>32</sup> *Id.*

<sup>33</sup> Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in 9 LIFE AND WORKS OF JOHN ADAMS 229 (1854).

<sup>34</sup> *Id.*



“eminently useful and important” to the new Republic.<sup>35</sup> And Supreme Court Justice Joseph Story observed that “it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects.”<sup>36</sup>

The civic republican perspective also was reflected in the Northwest Territory Ordinance. As noted above, Article III of the Northwest Territory Ordinance provided that “[r]eligion, morality, and knowledge” were “necessary to good government and the happiness of mankind.”<sup>37</sup>

A separation of church and state would be contrary to the philosophy expressed by these civic republicans. Rather than desiring a separation of church and state, civic republicans viewed religion and morality as essential components of the state. For this reason, assistance and support of religion were critical state functions.

### 1. Summary

In the early years of the United States, the actions of the federal government were not consistent with a desire to separate church and state. To the contrary, the federal government endorsed legislative prayer, hired chaplains, built a church and hired a priest for the Kaskaskia Indian Tribe, and spoke of the importance of religion in the Northwest Territory Ordinance. The ordinance was consistent with the philosophy of the civic republicans, who saw religion as necessary for good government. In short, nothing in the early history of the federal government suggested an intent to separate church and state.

## III. THE DRAFTING OF THE ESTABLISHMENT CLAUSE

A number of other authors have written a detailed, point-by-point description of each event that eventually resulted in the enactment of the Establishment Clause.<sup>38</sup> This section is not intended to duplicate their work. Instead, this section focuses on particular events in the enactment of the Establishment Clause. These events illustrate that a church-state separation principle was precisely contrary to what the framers intended. Instead, the framers sought to insure that the federal government would not interfere with state regulation of religion.

Congress enacted the Establishment Clause and the other provisions of the Bill of Rights in response to concerns raised by the Anti-Federalists. The Anti-Federalists sought to prevent the formation of a federal government, arguing that states should not ratify the new Constitution. The Anti-Federalists consistently stressed that the federal government would exercise tyrannical power, usurping state authority. For example, an Anti-Federalist who wrote under the pen name “Federal Farmer” wrote:

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<sup>35</sup> Oliver Ellsworth, *Report of the Committee to Whom Was Referred the Petition of Simeon Brown and Other* (1802), in 11 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 371, 373 (Christopher Collier ed., 1967).

<sup>36</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 723 (1833) (Fred B. Rothman & Co. 1991).

<sup>37</sup> Northwest Territory Ordinance of 1787, art. III, 1 Stat. 50.

<sup>38</sup> See, e.g., THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 198-222 (1986).

“Instead of seeing powers cautiously lodged in the hands of numerous legislators, and many magistrates, we see all important power collecting in one centre, where a few men will possess them almost at discretion.”<sup>39</sup>

In their opposition to the Constitution the Anti-Federalists emphasized that the federal government would attempt to preempt state regulation of religion. Professor Kurt Lash observes that among the Anti-Federalists, “the most common objection in regard to congressional power and the subject of religion was that Congress might attempt to regulate that subject as one of its express or implied responsibilities.”<sup>40</sup> As noted by Lash, the criticisms leveled by an Anti-Federalist writing under the pen name “An Old Whig” were typical:

[I]f a majority of the continental legislature should at any time think fit to establish a form of religion, for the good people of this continent, with all the pains and penalties which in other countries are annexed to the establishment of a national church, what is there in the proposed constitution to hinder their doing so? Nothing; for we have no bill of rights, and every thing therefore is in their power and at their discretion.<sup>41</sup>

Similarly, at the New York ratifying convention, antifederalist Thomas Tredwell wished “that sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing over our consciences by a religious establishment.”<sup>42</sup>

Those who sought ratification of the Constitution emphasized that the document did not give the federal government any authority to regulate religion. For example, when he spoke to the Virginia ratifying convention in 1788, Madison said: “There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.”<sup>43</sup> As noted below, framers such as James Iredell in North Carolina and Edmund Randolph in Virginia repeated Madison’s assertion that the federal government had no power over religion.<sup>44</sup>

To obtain ratification of the Constitution, the Federalists promised to amend the Constitution after the states had ratified the document. Professor Robert Natelson writes that a central purpose of these amendments was to reassure moderates “that the states would retain wide jurisdiction exclusive of the central government.”<sup>45</sup>

<sup>39</sup> Letter from the “Federal Farmer” (Letter 5) (Oct. 13, 1787), in *THE ORIGINS OF THE AMERICAN CONSTITUTION* 295 (Michael Kammen ed., 1986).

<sup>40</sup> See Kurt T. Lash, *Power and the Subject of Religion*, 59 *OHIO ST. L.J.* 1069, 1084-85 (1998).

<sup>41</sup> *Essays of An Old Whig*, *PHILADELPHIA INDEP. GAZETTER*, Oct. 1787, Feb. 1788, reprinted in 3 *THE COMPLETE ANTI-FEDERALIST* 37 (Herbert J. Storing ed., 1981).

<sup>42</sup> 1 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 399 (2d ed. 1836).

<sup>43</sup> JAMES MADISON, *REMARKS BEFORE THE VIRGINIA RATIFYING CONVENTION* (June 12, 1788), reprinted in 5 *THE FOUNDERS’ CONSTITUTION* 88 (Phillip B. Kurland & Ralph Lerner eds., 1987).

<sup>44</sup> See *infra* text accompanying notes 69-70.

<sup>45</sup> Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 *WM. & MARY BILL RTS. J.* 73, 83 (2005).

Even with this promise, Professor Natelson reports that in several states the decision to ratify the Constitution passed by an extremely narrow margin.<sup>46</sup>

In drafting the Bill of Rights, Congress sought to reassure uneasy constituents that the federal government would not interfere with the regulation of religion that took place in the states. The original text of what became the Establishment Clause was consistent with this purpose. James Madison's original version of the First Amendment religion clause provided: "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.*"<sup>47</sup>

Madison's draft was changed into the modern religion clauses largely as a result of Representative Fisher Ames, who successfully proposed the following change in Madison's language: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."<sup>48</sup> Much more clearly than Madison's proposal, Ames' language focuses on limiting the power of Congress *and not* the states. One must also note that Ames was a representative of the State of Massachusetts. Ames' home state continued to enforce laws supporting the dominant Congregational Church for years after Congress enacted the Establishment Clause. To take just one example, Massachusetts collected "religious assessments"—tax revenues paid directly to the Congregational Church.<sup>49</sup> This practice continued until 1833.<sup>50</sup>

To read the Establishment Clause as mandating a separation of church and state would mean that Fisher Ames wanted to require a separation of church and state, even though the state that Ames represented did not practice such a separation. Why would Fisher Ames promote such a constitutional amendment? The more plausible explanation is that Ames—and everyone else in Congress—regarded the Establishment Clause as limiting only the federal government, and not the states. Far from mandating a separation of church and state, the framers enacted the Establishment Clause to preserve diverse state methods of religious regulation—including *state establishments*.

Another exchange during the framers' discussion of the First Amendment indicates that the amendment was designed to protect state religious establishments, rather than to mandate a separation of church and state. During discussion of the Establishment Clause in the House of Representatives, Madison was questioned about whether the Establishment Clause might prohibit state establishments of

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<sup>46</sup> For example, Virginia ratified the Constitution by a vote of 89-79. In New York, the vote was 30-27. In New Hampshire, the Constitution was ratified by a vote of 57-47. *Id.* at 83 n.52. See also 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION xli-xlii (Merrill Jensen et al. eds., 1976).

<sup>47</sup> 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (emphasis added).

<sup>48</sup> *Id.* at 796 (1789) (proposal of Fisher Ames, Aug. 20, 1789).

<sup>49</sup> Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 778 (2005) ("The standing order in Massachusetts, New Hampshire and Connecticut, however, were not convinced and viewed their systems of religious assessments as respecting rights of conscience. More important, they did not associate their systems with 'religious establishments.'").

<sup>50</sup> PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 213 (2002).

particular religions. In response, Madison stated “that the purpose of his amendment was to recognize restrictions on congressional power. He meant to assure [Congressman] Sylvester and [Congressman] Huntington that *the amendment would not abolish state establishments*, which seems to have been their fear.”<sup>51</sup>

Throughout the discussions of the Establishment Clause in the First Congress, one searches in vain for any statement that the Establishment Clause was designed to mandate a “wall of separation” between church and state. Instead, the amendment was enacted to insure that the federal government would not interfere with state regulation of religion—whatever form that regulation would take. The Establishment Clause was cited as a means of protecting diverse state regulations of religion—including state establishments—rather than a proposal for mandating a universal separation of church and state.

#### IV. ESTABLISHMENT CLAUSE FEDERALISM

Over the past 20 years, federalism has emerged as the central theme in attempts to understand the Establishment Clause. Justice Clarence Thomas has endorsed this Federalist interpretation. In a concurring opinion filed in *Elk Grove Unified School District v. Newdow*,<sup>52</sup> Justice Thomas wrote: “[T]he Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right.”<sup>53</sup> Similarly, Professor Steven D. Smith has asserted that the religion clauses were “purely jurisdictional in nature.”<sup>54</sup> In other words, Congress adopted the clauses “merely to assign jurisdiction over matters of religion to the states.”<sup>55</sup> A number of other commentators have advanced similar readings of the Establishment Clause.<sup>56</sup>

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<sup>51</sup> 1 ANNALS OF CONG. 757-79 (Joseph Gales ed., 1834) (emphasis added).

<sup>52</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

<sup>53</sup> *Id.* at 50 (Thomas, J., concurring).

<sup>54</sup> STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 17 (1995).

<sup>55</sup> *Id.* at 26.

<sup>56</sup> See, e.g., David O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1142 (1988) (discussing the “federalistic motivation for the establishment clause”); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1191 (1990) (stating that the Establishment Clause left religious regulation to the states); Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585, 588 (2006) (endorsing a federalism interpretation of the Establishment Clause); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004) (indicating that the religion clauses were intended to leave “local regulations of religion not only untouched by, but also protected from, national encroachment”); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003) (describing the Establishment Clause as a “‘federalism-based’ guarantee,” which “merely delineates the proper roles of the federal and state governments with respect to religious establishments”).

A. *What Separation Of Church and State Meant to Jefferson*

The term “separation of church and state” appeared rarely, if at all, in discussions about the Establishment Clause in the First Congress, and in the state ratifying conventions. Yet in his now famous 1802 letter to the Danbury Baptists, Thomas Jefferson wrote: “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 & State.”<sup>57</sup> Jefferson was a deliberate writer, who chose his words carefully. When Jefferson chose the words “wall of separation between church and state,” what did he mean?

In his book on Jefferson’s metaphor, Daniel L. Dreisbach concludes that Jefferson’s “wall” was intended to separate the federal government from regulation of religion, which was left to the states. As Dreisbach observes: “There is little evidence to indicate that Jefferson thought the [wall of separation] metaphor encapsulated a *universal* principle of religious liberty or of the prudential relationships between religion and *all* civil government (local, state, and federal).”<sup>58</sup> Instead, the metaphor “affirmed the policy of federalism.”<sup>59</sup>

Throughout his lifetime, Jefferson repeatedly stated his federalist views of the Establishment Clause. In response to the Alien and Sedition Acts of 1798, Jefferson drafted the Kentucky Resolutions. Jefferson’s draft states his view of the First Amendment and the Establishment Clause as a federalist provision. The Alien and Sedition Acts were flawed because they regulated speech—a power that the Constitution had reserved for the states. But beyond the acts themselves, Jefferson’s Kentucky Resolutions contained a remarkably clear statement of the Establishment Clause as a federalist provision. Jefferson wrote that the federal government had “no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution . . . [A]ll lawful powers respecting the same did of right remain, and were reserved to the states, or to the people . . . .”<sup>60</sup>

In 1805, Jefferson returned to this federalist theme in his second inaugural address. In the address, Jefferson asserted:

In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general [i.e. federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution

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<sup>57</sup> Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association, *supra* note 3, at 281-82.

<sup>58</sup> DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 70 (2002).

<sup>59</sup> *Id.* at 69.

<sup>60</sup> THOMAS JEFFERSON, KENTUCKY RESOLUTIONS OF 1798 AND 1799, *reprinted in* 5 THE FOUNDERS’ CONSTITUTION 131, 132 (Philip B. Kurland & Ralph Lerner eds., 1987) (hereinafter KENTUCKY RESOLUTIONS).

found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies.<sup>61</sup>

Once again, the passage provides a clear statement of Jefferson's federalist interpretation of religious regulation. Religious exercise was "independent of the powers of the federal government," and could be regulated only by "State or Church authorities."

In a January 23, 1808 letter to Rev. Samuel Miller, Jefferson again stated this federalist theme clearly. Jefferson wrote:

I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion [the First Amendment], but from that also which reserves to the States the powers not delegated to the United States [the Tenth Amendment] . . . It must then rest with the States, as far as it can be in any human authority.<sup>62</sup>

Like the prior statements, this passage treats the First Amendment as a jurisdictional provision that prevents the *federal government* from "intermeddling with religious institutions." Any power to legislate with respect to religion must "rest with the states." Dreisbach concludes:

Jefferson's "wall," like the First Amendment affirmed the policy of federalism. This policy emphasized that all governmental authority over religious matters was allocated to the states . . . Insofar as Jefferson's "wall," like the First Amendment, was primarily jurisdictional (or structural) in nature, it offered little in the way of a substantive right or universal principle of religious liberty.<sup>63</sup>

#### B. Other Federalist Interpretations of the Establishment Clause

The preceding section focuses on Jefferson's federalist view of the Establishment Clause, because Jefferson authored the "separation of church and state" metaphor that has proven so influential. However, Jefferson's federalist views were not unique or idiosyncratic. To the contrary, during the founding period everyone understood that the Establishment Clause was a federalist provision. In other words, the Establishment Clause was enacted *in order to prevent federal interference with state regulation of religion, whatever form that regulation took*.

After Jefferson, Madison is the framing era figure who receives the most attention in the Supreme Court's early *Everson* decision. Justice Rutledge actually attached Madison's *Memorial and Remonstrance Against Religious Assessments* as an appendix to his *Everson* dissent. Like Jefferson, Madison did not endorse a separationist interpretation of the Establishment Clause.

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<sup>61</sup> Thomas Jefferson, Second Inaugural Address (Mar. 4 1805), in 3 THE WRITINGS OF THOMAS JEFFERSON 320, 323 (Andrew A. Lipscomb ed., 1905).

<sup>62</sup> Letter to Reverend Miller, *supra* note 4, at 428.

<sup>63</sup> DREISBACH, *supra* note 58, at 69.

Instead, Madison endorsed the same non-interference principle described by Jefferson. For example, at the Virginia Ratifying Convention in 1788, Madison said that under the Constitution, “[t]here is not a shadow of right in the general government to intermeddle with religion.”<sup>64</sup>

When Jefferson published the Kentucky Resolution in 1798, Madison published the Virginia Resolution. Like the Kentucky Resolution, Madison’s resolution relied on the principle of federalism to protest the federal Alien and Sedition Acts. Notably, the Virginia Resolution asserted that the federal government had no power to regulate “the liberty of conscience, and of the press,” because such powers had not been “delegated by the Constitution, and consequently withheld from the [federal] government.” In arguing that the federal government lacked the power to regulate the press, the Virginia Resolution relied on the premise that the federal government obviously lacked any power to interfere with the regulation of religion in the individual states. Madison wrote: “Any construction or argument, then, which would turn the amendment into a grant or acknowledgment of power, with respect to the press, might be equally applied to the freedom of religion.”<sup>65</sup>

Later in life, Madison came to endorse a separation of church and state, similar in many ways to modern separationist views. In 1822, after Madison had served his two terms as president, Madison wrote to Edward Livingston, a prominent Louisiana lawyer who would later represent the state in the House of Representatives. In this letter, Madison noted his “approbation” when the first Congress had “appointed Chaplains, to be paid from the Natl. [National] Treasury.”<sup>66</sup> Madison also sought to qualify his Thanksgiving proclamations as “absolutely indiscriminate, and merely recommendatory; or rather mere designations of a day, on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith & forms.”<sup>67</sup> Madison concluded: “Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters, is of importance.”<sup>68</sup>

Madison’s statements in his letter to Livingston refer only to the relationship between the federal government and religion. Nothing in this letter, or in other late writings by Madison, contends that the federal government should interfere with state regulation of religion. To the contrary, Madison may have argued for a complete separation between the federal government and religion, in order to prevent the federal government from interfering with state religious regulation. At any rate, it is unclear whether this letter, written by Madison in 1822, sheds much light on the original intent of the framers of Establishment Clause, enacted more than 20 years earlier.

Like Jefferson and Madison, other framers endorsed the non-interference principle. In their view, the individual states had plenary power to determine church-state relationships. The First Amendment guaranteed that the federal

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<sup>64</sup> MADISON, *supra* note 43, at 88.

<sup>65</sup> 4 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 577 (2nd ed. 1836).

<sup>66</sup> Letter from James Madison to Edward Livingston (July 10, 1822), *in* 5 *THE FOUNDERS’ CONSTITUTION* 105 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

government would not interfere in whatever arrangements the states made. For example, consider James Iredell's statement before the North Carolina Ratifying Convention:

Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. *Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.*<sup>69</sup>

Similarly, during Virginia's Ratification Convention, Governor Edmund Randolph stated that under the Constitution, "no power is given expressly to Congress over religion."<sup>70</sup>

In his treatise on the Constitution, Joseph Story noted the framers' views that all power to regulate religion remained exclusively with the states. Story wrote: "[T]he whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions . . ." <sup>71</sup> Similarly, William Rawle wrote in 1829: "The first amendment prohibits congress from passing *any law respecting an establishment of religion, or preventing the free exercise of it.* It would be difficult to conceive on what possible construction of the Constitution such a power could ever be claimed by congress."<sup>72</sup>

### *C. Was Federal Support For Religion Consistent With Federalism?*

With the enactment of the Establishment Clause, the framers seemed to agree with James Madison's 1788 statement before the Virginia Ratifying Convention, where Madison asserted: "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpion."<sup>73</sup> But at the same time, the federal government designated holidays for prayer, authorized legislative prayer, appointed and compensated chaplains, and engaged in other acts designed to endorse and support religion. If the federal government lacked the power to "intermeddle with religion," how did the government have the authority to enact these measures that supported religion?

At one point, Thomas Jefferson suggested that the federal government lacked such authority. Unlike Presidents Washington and Adams before him and President Madison after him, Jefferson refused to issue Thanksgiving proclamations. In his 1808 letter to Rev. Samuel Miller, Jefferson explained that he refused to issue these proclamations because the Constitution prohibited the federal government "from

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<sup>69</sup> *Debate in North Carolina Ratifying Convention* (July 30, 1788), reprinted in 5 THE FOUNDERS' CONSTITUTION 90 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

<sup>70</sup> 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 204 (2d ed. 1836).

<sup>71</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 992, at 702 (Carolina Academic Press 1987).

<sup>72</sup> WILLIAM RAWLE, *A View of the Constitution of the United States* (2d ed. 1829), reprinted in 5 THE FOUNDERS' CONSTITUTION 106 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>73</sup> MADISON, *supra* note 43.



intermeddling with religious institutions, their doctrines, discipline, or exercises.”<sup>74</sup> Whether Jefferson in fact consistently viewed the Constitution as completely prohibiting any federal action in support of religion is debatable. As noted above, in 1803 Jefferson had endorsed a treaty with the Kaskaskia Indian Tribe that authorized the use of federal funds to finance the construction of a church on the tribe’s land and to compensate a Catholic priest for the tribe.<sup>75</sup> This treaty suggests that in Jefferson’s view, the federal government could support religion without running afoul of the Establishment Clause.

Even if Jefferson in fact read the Establishment Clause as mandating a complete prohibition on federal support for religion, the other framers seemed to agree on a less restrictive reading of the clause. Consistent with the many statements quoted above, the Establishment Clause prohibited the federal government from interfering with any state’s regulation of religion.<sup>76</sup> However, this did not mean that the federal government was categorically prohibited from aiding religion. The federal government could aid religion, *as long as this aid did not interfere with state religious regulation.*

In reviewing the federal support of religion described in Part II, it is apparent that none of these federal actions conflicted with state religious regulation.<sup>77</sup> Authorizing prayers before meetings of the *federal* Congress, and appointing chaplains for the *federal* army would not conflict with state religious regulation. Similarly, funding a church and priest for the Kaskaskia Indian Tribe would not conflict with state religious regulation, because the tribe was outside the states’ jurisdiction.

Of the early federal initiatives relating to religion, the days of prayer proclaimed by early presidents were the only federal enactments that might possibly infringe on state authority. But because all of the American states continued to endorse religion and prayer as a positive force, it is hard to see how a day of prayer would interfere with state religious regulation. At least this seems to have been the judgments of Presidents Washington Adams, and Madison—who all issued Thanksgiving resolutions.

#### V. *EVERSON V. BOARD OF EDUCATION*: THE ORIGINS OF ESTABLISHMENT CLAUSE DISTORTION

In *Everson v. Board of Education*,<sup>78</sup> the Supreme Court laid the foundation of modern Establishment Clause doctrine—including the emphasis on a “separation of church and state.” As discussed above, the framers intended that the Establishment Clause would operate as a shield, insulating state regulation of religion from the federal government. Beginning with *Everson*, modern doctrine has effectively stood the Establishment Clause on its head. *Everson* and other modern Establishment Clause cases have effectively turned the Establishment Clause into sword, authorizing the federal government to interfere in areas traditionally regulated by the states.

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<sup>74</sup> Letter to Reverend Miller, *supra* note 4, at 428.

<sup>75</sup> See *supra* text accompanying note 16.

<sup>76</sup> See *supra* text accompanying notes 60-72.

<sup>77</sup> See *supra* text accompanying notes 6-26.

<sup>78</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

*Everson* dealt with a New Jersey statute which required local school boards to reimburse private school students for the cost of bus transportation to school.<sup>79</sup> Justice Black's majority opinion claimed to review the history of the Establishment Clause. However, the history was not that of the Establishment Clause itself, but rather, of the successful battle for an end to religious assessments in the State of Virginia. This was a serious error.

According to the *Everson* majority, the dispute about the proper relationship between church and state "reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church."<sup>80</sup> The Court noted that Thomas Jefferson and James Madison "led the fight against this tax."<sup>81</sup> The *Everson* majority further noted Madison's Memorial and Remonstrance Against Religious Assessments, where Madison purportedly argued:

that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.<sup>82</sup>

The Court continued that the Virginia legislature not only declined to renew the tax levy, but also enacted Jefferson's Bill for Religious Liberty.<sup>83</sup> The *Everson* Court then quoted Jefferson's bill: "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 . . . ."<sup>84</sup>

The Court's myopic focus on Virginia was odd. In *Everson*, the Justices were interpreting the federal Establishment Clause, not the Virginia Bill for Religious Liberty. This perplexing focus on the events in Virginia led the Court to make a serious error, which would distort the development of Establishment Clause law to the present day. Writing for the *Everson* majority, Justice Black now asserted: "This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."<sup>85</sup>

The goals of Jefferson and Madison in advocating the Virginia Bill for Religious Liberty, and their goals in advocating the First Amendment were entirely different. In the Virginia Bill for Religious Liberty, Jefferson and Madison were advocating an approach for the single State of Virginia to a single problem—assessments collected

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<sup>79</sup> See *id.* at 3, n.1.

<sup>80</sup> *Id.* at 11.

<sup>81</sup> *Id.* at 11-12.

<sup>82</sup> *Id.* at 12.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 13.

<sup>85</sup> *Id.*

by the state, and paid to the dominant Anglican Church. In the First Amendment, the framers were attempting to define the proper relationship between the federal government and the states. This First Amendment was a complicated project because the thirteen states had developed several different approaches to the relationship between church and state. To say that Madison and Jefferson had “the same objective” in drafting the Virginia Bill for Religious Freedom and the First Amendment was simply wrong.

While Jefferson and Madison clearly played a pivotal role in the enactment of the United States Constitution and the First Amendment, Justice Black’s myopic *Everson* focus on Jefferson and Madison renders his historical account incomplete and inaccurate. For example, Justice Black completely ignores George Washington’s Farewell Address, where Washington advocated the importance of religion in public life. While Madison and Jefferson were important framers, they were not the only framers.

Even with respect to the views of Madison and Jefferson, Justice Black’s account is seriously misleading. Robert Cord writes that after reading the *Everson* decision, “one might come to the conclusion that Madison and Jefferson fought the battle for religious freedom in Virginia, wrote a few letters on the subject, and then retired.”<sup>86</sup> Justice Black’s majority opinion fails to mention any of the Federalist writings by Jefferson and Madison. The *Everson* opinion completely omits any discussion of the Kentucky and Virginia resolutions, even though scholars always have treated these resolutions as some of the most important political documents from the early United States. Either Justice Black was unaware of the resolutions or—worse yet—deliberately declined to discuss the resolutions, because such a discussion would undermine Justice Black’s church-state separation principle.

While the *Everson* majority opinion spent considerable time discussing the Virginia dispute on religious assessments, Justice Black entirely ignores the adoption of the federal Establishment Clause, even though this is the provision at issue in *Everson*. As Robert Cord writes: “[T]he *Everson* opinion is devoid of any attempt to explore the actions and debates of the First Congress which proposed to the States what would become the First Amendment.”<sup>87</sup> Obviously, this was a serious omission. For example, the *Everson* Court entirely ignores the house discussion of the First Amendment, where Madison assured Representative Sylvester and Representative Huntington that the Establishment Clause “would not abolish state establishments.”<sup>88</sup> This discussion is yet another piece of critical evidence that is not mentioned by the *Everson* Court.

Given these wholesale omissions, it is not surprising that Justice Black’s discussion of Establishment Clause history contains misstatements. Consider Justice Black’s concluding statement about the history of the Establishment Clause:

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<sup>86</sup> ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 120 (1982).

<sup>87</sup> *Id.* at 121.

<sup>88</sup> Munoz, *supra* note 56, at 627 (citing 1 ANNALS OF CONG. 757-79 (Joseph Gales ed. 1834)).

The “establishment of religion” clause of the First Amendment means at least this: 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 . . . . 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.<sup>89</sup>

Justice Black continued: “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.’”<sup>90</sup>

Much of this statement is demonstrably wrong. Consider Justice Black’s statement that “neither a State nor the Federal Government” could pass laws that “aid all religions.” This article has presented a list of examples where the federal government *did* aid religion—including Thanksgiving proclamations, legislative prayer, the conscientious objector provision, and land grants to churches.

Also, when the Establishment Clause was adopted, several states maintained established churches.<sup>91</sup> If the Establishment Clause *really did* provide that a state could not aid religion, then the representatives from those states never would have voted for an amendment that outlawed their state’s practices. To the contrary, one of the key proponents of the First Amendment was Fisher Ames, whose home state of Massachusetts collected tax assessments to support the dominant Congregational Church. Justice Black’s account of history also ignores Madison’s own statement during the house debates, that the Establishment Clause “would not abolish state establishments.”<sup>92</sup> This statement directly contradicts Justice Black’s claim that under the Establishment Clause, states could not aid religion.

As a historical account, Justice Black’s *Everson* majority opinion is an abject failure. But given the multitude of errors, one suspects that this opinion never really was about a faithful rendition of the original understanding of the Establishment Clause.<sup>93</sup> Instead, the opinion was about reshaping history for another purpose.

The *Everson* opinion was all about power. Justice Black and his colleagues saw the Establishment Clause as a means for the federal courts to exercise power. Indeed, Supreme Court decisions since *Everson* have used the Establishment Clause to intrude into a variety of areas previously reserved for the states. Federal courts have cited the Establishment Clause as a means of regulating private school

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<sup>89</sup> *Everson*, 330 U.S. at 15-16.

<sup>90</sup> *Id.* at 16.

<sup>91</sup> Connecticut did not eliminate its established church until 1818; New Hampshire eliminated its established church in 1819, and Massachusetts did so in 1833. *CORD*, *supra* note 86, at 4.

<sup>92</sup> Munoz, *supra* note 56, at 627 (citing 1 ANNALS OF CONG. 757-79 (Joseph Gales ed. 1834)).

<sup>93</sup> Ultimately, the *Everson* Court upheld the New Jersey bus reimbursement statute. *Everson*, 330 U.S. at 17. To decide this case, the Court need only have issued a brief opinion concluding that the New Jersey statute was constitutional. In the final analysis, Justice Black’s extended discourse about the Establishment Clause was nothing more than dicta.

funding,<sup>94</sup> public school curriculum and events,<sup>95</sup> religious symbols,<sup>96</sup> and miscellaneous cases involving state religious regulation.<sup>97</sup>

The Court's intervention in state affairs reached a particularly low point in *Epperson v. Arkansas*.<sup>98</sup> In *Epperson*, the Court invalidated an Arkansas law that prohibited public school instructors from teaching the evolutionary account of man's origins. The law intended to promote teaching creationism, or the biblical account of man's origins.

The *Epperson* Court wrote the anti-evolution law violated the Establishment Clause, because the law wasn't "neutral."<sup>99</sup> The Justices wrote that Government "may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."<sup>100</sup>

Of course, the anti-evolution law wasn't "neutral." But any regulation specifying school curriculum won't be neutral. For example, laws requiring that students learn basic science and scientific methods aren't "neutral." Religious believers may view such courses as improperly elevating empirical testing as the basis for wisdom, as opposed to the importance of belief based on faith. Similarly, one might object to a curriculum that required (or prohibited) Ernest Hemingway's classic short novel *Old Man And The Sea*, given the explicit religious symbolism used throughout the book.<sup>101</sup> But given the popularity of both Hemingway and this book, no court has held that *Old Man and The Sea* amounts to an establishment of religion.

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<sup>94</sup> Compare *Zelman v. Simons-Harris*, 536 U.S. 639 (2002) (upholding a state voucher program, where most voucher payments went to families with students attending private religious schools), with *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down a state statute that authorized salary supplements for private school teachers).

<sup>95</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that a prayer at a graduation ceremony violated the Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (finding that a law mandating that public schools cannot teach evolution violated the Establishment Clause).

<sup>96</sup> Compare *McCreary Cnty. v. ACLU of Kentucky*, 545 U.S. 844 (2005) (holding that a Ten Commandments display in a courthouse violated the Establishment Clause), with *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that a Ten Commandments display at the Texas state capital did not violate the Establishment Clause).

<sup>97</sup> *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (illustrating a state law that gave employees the right to refuse work on their sabbath violated the Establishment Clause); *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (creating a public school district that coincided with the neighborhood boundaries of a religious sect violated the Establishment Clause).

<sup>98</sup> *Epperson*, 393 U.S. at 97.

<sup>99</sup> See *id.* at 103.

<sup>100</sup> *Id.*

<sup>101</sup> Hemingway's short novel remains a popular work of literature, commonly assigned in high school courses. Hemingway's novel is about an old and unsuccessful fisherman who catches a huge marlin, only to have the fish devoured by sharks as he sails home. Religious symbolism is prominent throughout the book. The fisherman is named "Santiago"—Spanish for saint. When he returns home exhausted, Santiago struggles to carry his ship's mast to his shack—much as Christ carried the cross to his crucifixion. And when Santiago sees the sharks coming for the marlin, Hemingway's book reads: "'Ay,' he said aloud. There is no

*Epperson* involved the specter of federal intervention in its most heavy-handed and distasteful form. While the Justices cited the Establishment Clause as authority for their objections to teaching creationism over evolution, this was clearly a pretext for federal judges who simply didn't accept the plausibility of a creationist account of man's origins. In *Epperson*, the Justices seemed to be dictating to the Arkansas legislature how to run the state's schools.

The Establishment Clause activism in cases like *Everson* and *Epperson* represents a bitter irony. The Establishment Clause was enacted to insulate state religious regulation from the federal government. Yet in *Epperson*, the United States Court used the Establishment Clause—a provisions designed to protect state decisions from federal interference—as a basis for overturning a state legislative decision regarding school curriculum.

Modern Establishment Clause cases have literally turned the clause on its head. The Establishment Clause was meant as a shield, to protect state religious regulation. But the Supreme Court has turned the Establishment Clause into a sword, precisely for the purpose of overturning these state decisions.

#### V. CONCLUSION

A review of early American history demonstrates that the framers did not intend a separation of church and state. The federal government appointed and compensated chaplains and priests, authorized legislative prayers, issued Thanksgiving proclamations, and endorsed many other measures intended to support religions.

When the framers enacted the First Amendment clause prohibiting an "establishment of religion," what did they mean? Madison's first draft of the First Amendment is instructive. This draft provided: "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."<sup>102</sup> As indicated by the subsequent remarks of Jefferson, Madison, and others, the Establishment Clause that eventually found its way into the First Amendment adopted this federalism principle. The federal government had no power to intrude on state regulation of religious institutions, whatever form the state regulations might take. Regardless of whether states enacted a no-aid policy, or provided generous preferential aid to a single state-established church, the federal government was powerless to interfere.

During the framing period, no one believed that the Establishment Clause imposed a "wall of separation" between church and state. The Establishment Clause was not designed to isolate the state from religion. Rather, Jefferson's metaphorical wall *was designed to protect state regulation of religion from interference by the federal government*. In other words, the Establishment Clause was a shield, designed to protect the states from the federal government. Paradoxically, the Supreme Court has used the Establishment Clause as a sword, to strike down state laws regulating religion. In these decisions, the Court has turned the Establishment Clause on its head.

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translation for this word and perhaps it is just a noise such as a man might make, involuntarily, feeling the nail go through his hands and into the wood." ERNEST HEMINGWAY, *THE OLD MAN AND THE SEA* (1952).

<sup>102</sup> 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789) (emphasis added).

The concept of “separation of church and state” is an entirely artificial construct, having no basis in the language or history of the Establishment Clause. Nonetheless, the so-called “church state separation principle” has served a purpose for the Supreme Court. The Court has used this metaphor as a basis for regulating state aid to private schools, religion in the public schools, religious symbols, and other controversies.

Perhaps the Court can justify such decision by invoking public policy—although the wisdom of such second-guessing of discretionary legislative decisions is highly problematic. However, it is not possible to justify the Court’s intervention based on a historical church-state separation principle. No such historical principle exists.