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A "Spacious Conception": Separationism as an Idea

Few constitutional concepts are as familiar to the average American as separation of church and state. Most Americans can recognize or restate the concept in its basic formulation[1]—in contrast to other constitutional principles such as federalism or the dreaded dormant commerce clause—and studies indicate that Americans generally support the principle of church–state separation, though people diverge greatly on what that principle means.[2] The Supreme Court first employed the principle in 1878 as a shorthand for the meaning of the First Amendment's Establishment Clause[3]—although church–state separation as a popular concept had been around much longer[4]—and in 1947, in *Everson v. Board of Education*, the Court turned the phrase into constitutional canon.[5] Because *Everson* was the first modern nonestablishment case incorporating the clause through the Fourteenth Amendment, the Court felt obliged to define the principle. There, Justice Hugo Black anointed

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1 *See* News Release, First Freedom Ctr., Most Americans Conflicted on Church–State Separation, National Survey Finds (Oct. 3, 2005). *But cf.* Anna Johnson, *Study: Few Americans Know First Amendment*, SFGATE.COM, Mar. 1, 2006, http://sfgate.com/cgi-bin/article.cgi?file=/N/a/2006/03/01/national/a055535S79.DTL (noting that "[o]nly one in four Americans can name more than one of the five freedoms guaranteed in the First Amendment").

2 *See, e.g.*, News Release, First Freedom Ctr., *supra* note 1.

3 *See* Reynolds v. United States, 98 U.S. 145, 164 (1878).

4 *See* Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1672-74 (2003) (reviewing PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002)); John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH & ST. 15, 16-34 (2006) (discussing the history of separationism in Europe).

5 *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

Thomas Jefferson and James Madison as the authoritative expositors of the meaning of nonestablishment and free exercise of religion.[6] Borrowing the phrase from an 1802 letter written by Jefferson, Black declared:

> 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. 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."[7]

Since *Everson*, jurists, historians, and legal scholars have debated whether the Framers of the First Amendment truly intended to create a regime of church–state separation and, if so, what that concept meant to the designers of the clause.[8] Few constitutional concepts have been more powerful, revered, or hotly contested. Within both the courts and the academy, debate has raged between separationists and accommodationists over the significance of, and the correct interpretation to be given to, the writings of Jefferson and Madison on one hand, and contemporary practices suggesting a potentially more accommodating regime on the other hand.[9] The ability to capture the historical essence of church–state separation provides the victor with commanding historical authority to shape public policy and opinion and constitutional law itself.[10]

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[6] *Id.* at 13 (declaring that Jefferson and Madison played "leading roles").

[7] *Id.* at 15-16 (quoting *Reynolds*, 98 U.S. at 164).

[8] *See, e.g.*, CHESTER JAMES ANTIEAU, ARTHUR T. DOWNEY & EDWARD C. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES (1964); MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); WILBUR G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1964); J.M. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949); Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949); John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371.

[9] *See* text accompanying *supra* note 8 and *infra* note 11.

[10] Justice Wiley Rutledge stated in his *Everson* dissent that "[n]o provision of the

For the first forty years following *Everson*, advocates of a stricter or more secular interpretation of church–state separation held sway in the academy and on the Court. Influential works by Edwin S. Gaustad, Leonard Levy, William Lee Miller, Leo Pfeffer, and others[11] and opinions by Justices Black, Brennan, Stevens, and Souter reaffirmed the *Everson* interpretation of the Establishment Clause and its history.[12] Things began to change in the mid-1980s as a new round of scholarship arose to question the accepted historical account of the Founding period, reflecting in part the increasingly conservative culture of the Reagan era. In 1982, Robert L. Cord published a highly influential revisionist history of the Religion Clauses, *Separation of Church and State: Historical Fact and Current Fiction*. Cord's attack was twofold: he documented early practices and perspectives that conflicted with the accepted *Everson* interpretation, and he challenged the separationist pedigrees of Jefferson and Madison, which was even more heretical.[13] Other revisionist accounts by Gerard Bradley, Daniel Dreisbach, Michael J. Malbin, Michael McConnell, John Noonan, and Rodney Smith also challenged the *Everson* rendition. All of these works relied on contemporary statements and practices to show that the Founders did not intend a regime of strict separation of church and state.[14] More recently, this new interpretation of the historical record sur-

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Constitution is more closely tied to or given consent by its generating history than the religion clause of the First Amendment." 330 U.S. at 33 (Rutledge, J., dissenting).

[11] *See, e.g.*, EDWIN S. GAUSTAD, FAITH OF OUR FATHERS: RELIGION AND THE NEW NATION (1987); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC (1985); LEO PFEFFER, CHURCH, STATE, AND FREEDOM (rev. ed. 1967); LEO PFEFFER, GOD, CAESAR, AND THE CONSTITUTION: THE COURT AS REFEREE TO CHURCH–STATE CONFRONTATION (1975).

[12] *See* Lee v. Weisman, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring); County of Allegheny v. ACLU, 492 U.S. 573, 646-49 (1989) (Stevens, J., concurring in part and dissenting in part); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230-37 (1963) (Brennan, J., concurring); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 210-12 (1948).

[13] *See* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982). An earlier revisionist monograph of a similar theme was MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978).

[14] *See* GERARD V. BRADLEY, CHURCH–STATE RELATIONSHIPS IN AMERICA (1987); DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT (1987); MALBIN, *supra* note 13; JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE (1987); RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITU- **R**

rounding the Religion Clauses has received support from two influential works: Philip Hamburger's *Separation of Church and State* and Daniel Dreisbach's *Thomas Jefferson and the Wall of Separation of Church and State*.[15] Like their predecessors, both books assert that the *Everson* version of church–state separation was alien not only to contemporaries of the Founding, but also to Jefferson and Madison themselves. All in all, these works reflect the increasingly common view that separation of church and state is hostile to religion and people of faith and is inconsistent with our constitutional traditions, a view that was popularized in Professor Stephen Carter's *The Culture of Disbelief*.[16]

This new accounting of the Founding period has found its way into Supreme Court opinions as justices have battled over the superior interpretation of the original understanding and purpose of the Establishment Clause. The two most significant decisions of the 1980s that reinterpreted the Founding era were *Marsh v. Chambers*[17] and *Lynch v. Donnelly*.[18] In both cases, Chief Justice Burger eschewed relying on the established analytical standard (i.e., the *Lemon* test), preferring instead to look to "contemporaneous understanding[s]" of the Establishment Clause and an "unambiguous and unbroken history of more than 200 years" to validate legislative chaplains and government-sponsored religious displays.[19] While not directly disputing the *Everson* historical account, Chief Justice Burger offered his alternative version, remarking that there was "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[20]

The first significant rebuttal to the Court's longstanding interpretation of the Founding period came in Justice William Rehn-

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TIONAL INTERPRETATION (1987); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

[15] *See* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002); HAMBURGER, *supra* note 4.

[16] *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

[17] 463 U.S. 783 (1983).

[18] 465 U.S. 668 (1984).

[19] *See id.* at 673; *Marsh*, 463 U.S. at 792. Highlighting that the First Congress authorized the appointment of paid chaplains only three days after approving the Bill of Rights, Chief Justice Burger concluded in *Marsh* that "[c]learly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment." 463 U.S. at 788.

[20] *Lynch*, 465 U.S. at 674.

quist's 1986 dissent in *Wallace v. Jaffree*.[21] Relying heavily on Cord's analysis, Justice Rehnquist minimized Jefferson's contribution to the drafting of the Establishment Clause (Jefferson was in France at the critical time) and distinguished the Virginia assessment controversy of 1785 from the drafting of the First Amendment (the former being a local state conflict), concluding that there is "simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."[22] Rather, the Founders intended only for the Establishment Clause "to prohibit the establishment of a national church, and perhaps to prevent discrimination among sects. [Madison and Jefferson] did not see it as requiring neutrality on the part of government between religion and irreligion," Justice Rehnquist insisted.[23]

This revisionist accounting of the Founding has appeared more frequently in recent church–state cases, forcing the Court liberals to defend the previously dominant separationist interpretation. Heated disagreements over the correct historical interpretation of the Establishment Clause have taken place between Justices Stevens and Souter on one side, and Justices Scalia and Thomas on the other.[24] Most recently in the Ten Commandments case of *McCreary County v. ACLU of Kentucky*, Scalia recounted numerous religious acknowledgments made by early public officials, asserting that the Establishment Clause "was enshrined in the Constitution's text, and these official actions show *what it meant*. . . . What is more probative of the meaning of the Estab-

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[21] 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

[22] *See id.* at 106 (citing THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS (1985)). Although Rehnquist cited to Cord only once in his opinion, *Wallace,* 472 U.S. at 104 (citing CORD, *supra* note 13), his discussion of the drafting of the First Amendment, the Northwest Ordinance, presidential Thanksgiving Day proclamations, the treaty with the Kaskaski Indians, and the later commentary by Story and Cooley closely tracked the information and arguments contained in Cord. *Compare id.* at 92-107, *with* CORD, *supra* note 13, at 4-47.

[23] *Wallace,* 472 U.S. at 98. Justice Rehnquist's polemic led Justice O'Connor to respond in her concurrence that "[a]lthough history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here," suggesting that important religious liberty values exist independently of the historical experience. *See id.* at 81 (O'Connor, J., concurring in the judgment).

[24] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring); Mitchell v. Helms, 530 U.S. 793, 828-29 (2000); *Mitchell*, 530 U.S. at 870-72 (Souter, J., dissenting); Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 852-63 (1995) (Thomas, J., concurring); Lee v. Weisman, 505 U.S. 577, 612-26 (1992) (Souter, J., concurring); *Lee*, 505 U.S. at 632-42 (Scalia, J., dissenting).

lishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?"[25] In a nutshell, the Court's accommodationists argue that the ubiquity of religious behavior laws, government preferences, and official religious pronouncements 200 years ago indicates that the Framers viewed the clause to prohibit only government coercion of religion or, perhaps, sect preferences by law.[26] And more significantly for the Court's originalists, this history should control in legal disputes involving the Establishment Clause.[27]

Indubitably, this resurgence in historical scholarship on and off the Court has benefited the originalist/accommodationist position. In one sense, accommodationists are simply giving payback for forty years of separationist proof-texting that relied chiefly on Jefferson's *Bill for Religious Freedom* and Madison's *Memorial and Remonstrance*.[28] However, both separationists and accommodationists have committed the same historical error: they have sought to validate their understanding of nonestablishment by "discovering" and then freezing in time a notion of church–state separation that was purportedly espoused by the Founders and reflected in the culture at the time of the Founding. Justice Rehnquist reflected this approach in his *Wallace* dissent:

> The true meaning of the Establishment Clause can only be seen in its history. As the drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled

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[25] McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2754-55 (2005) (Scalia, J., dissenting). Complementing Justices Scalia and Thomas's historical analysis has been their penchant for an originalist interpretation of constitutional provisions—this approach is limited to the textual language or the "intentions" of the Framers. *See* William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1240 (1986) (defining interpretivism as "the judicial practice of giving meaning to a legal text in accordance with the original purposes or intentions of those who enacted it").

[26] *See, e.g.*, *Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."). *See also Rosenberger*, 515 U.S. at 854-56 (Thomas, J., concurring) (arguing that Madison's writings support a position of nonpreferential treatment of religion, but then distinguishing Madison's "more extreme notions of the separation of church and state," and observing that "the views of one man do not establish the original understanding of the First Amendment").

[27] *See* Van Orden v. Perry, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring) ("[O]ur task would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses.").

[28] *See, e.g.*, *Mitchell*, 530 U.S. at 870-71 (Souter, J., dissenting).

> decisionmaking that has plagued our Establishment Clause cases since *Everson*.[29]

Justice Brennan, speaking for the separationists, advocated a strikingly similar approach—though leading to different conclusions—writing that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment."[30]

This shared historical approach is misguided for three reasons: first, the record of the Founding era is so diverse, incomplete, and unreliable that it is impossible to divine an accurate or consensus understanding of church–state separation, even if one existed. Also, the Founders' own statements indicate that they did not believe their interpretations of the Constitution's provisions carried any weight as to the meaning of the document. Most important, however, the Founders' conception of separationism was dynamic and incomplete, and purposefully so. To the Founders, *separation was an unfolding idea, not an accomplished reality*. The Founders did not believe that their recent struggle for religious freedom had been perfected; nonetheless, they were willing to espouse an idea of separation that would take time to achieve. Multiple notions of church–state separation, which were constantly developing and being refined informed the discussion. Although many people believed they were experiencing the fullest realization of religious liberty to date, none would have wanted to have his rights confined to the early manifestations, particularly at such a nascent stage. Consequently, the Founders would have been perplexed and frustrated by the current effort to cabin their understanding of church–state separation and to rely on then-existing practices as evidence of what separation meant.

This Article argues that the true historical meaning of church–state separation can only be understood as the Founders likely envisioned: separation was a dynamic, unfolding *idea* that could not be explained or limited by the practices of the Founding period. Relatedly, the Founders would have eschewed reli-

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[29] Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

[30] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

ance on selective writings of any of the early leaders to establish the meaning of the concept. Because people proposed various conceptions of democracy, equality, representation, and religious liberty in the active newspaper and pamphlet campaign of the late eighteenth century and then refined those concepts over again, no writing or document encapsulated or froze the idea of separation, not even Madison's grand *Memorial and Remonstrance*.

This does not mean that the views of various Founders are irrelevant; on the contrary, it is possible to identify broad principles that arose out of that "great public discourse," principles that inform modern discussions about the appropriate relationship between religion and government. However, modern-day commentators err when they attempt to identify a true "original" meaning of church–state separation based on historical writings and practices.[31] Instead, they need to recognize the Founders' concept: an unfolding, "spacious conception" that was not bounded by any era or practice.[32]

Part I of this Article briefly traces some of the seventeenth and eighteenth century notions of church–state separation that informed the Founders' understandings. Part II recounts the dynamic period of disestablishment during the late eighteenth century and considers whether the Founders likely viewed notions of church–state separation and religious liberty as static concepts. Part III then examines three contemporary events: the Northwest Ordinance, the advent of legislative chaplains, and the Thanksgiving proclamations, all three of which are regularly cited in attempts to discredit the *Everson* rendition of the Founding.

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[31] Professor Hamburger makes a distinct but related comment. He argues that separation of church and state, as a distinct concept, was foreign to the founding generation and that the notion of "separation" did not develop until the mid-nineteenth century in conjunction with Protestant opposition to Catholics and their education system. *See* HAMBURGER, *supra* note 4, *passim*. Thus, Hamburger acknowledges that separationism was a developing concept.

[32] *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring). For an important recent study on the development of separation of church and state during the nineteenth century, see MARK DOUGLAS MCGARVIE, ONE NATION UNDER LAW: AMERICA'S EARLY NATIONAL STRUGGLES TO SEPARATE CHURCH AND STATE (2004).

I

THE SEPARATIONIST IMPULSES

Those notions of church–state separation that were influential during the Founding period can be traced chiefly to the Protestant Reformation, the Enlightenment, and Whig politics.[33] Expressions of disengaging secular authority from the church arose during the Reformation. John Calvin, in his *Institutes of the Christian Religion*, wrote that the "spiritual kingdom" and the "political kingdom . . . must always be considered separately," due to the "difference and unlikeliness between ecclesiastical and civil power."[34] Yet, while most Protestant leaders such as Calvin and Martin Luther emphasized that the church and the state were distinct institutions with separate spheres, they viewed them as relying on the same divine authority and engaging in complementary, reinforcing roles. The institutional distinction between church and state did not lead to disestablishment or any practical sense of separation.[35] Only radical reformers, such as the Anabaptists, rejected the idea of religious establishments. Anabaptists called for a separating wall between the regenerate church and the corrupting world.[36]

Coming out of reformed Calvinism, British and American Puritans also insisted on distinct civil and religious institutions, denying political authority to church leaders. However, the Puritans did not forswear formal establishments or government support of religion. Instead, they based many of their civil laws on Biblical mandates while maintaining a system of religious assessments.[37] It fell to radical Separatist and short-time Baptist Roger Williams to make the most complete argument for church–state separation in early colonial America.[38] In a now-

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[33] *See* Witte, *supra* note 4, at 16-28.

[34] *See* DREISBACH, *supra* note 15, at 72 (quoting JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION (1559)). R

[35] Laycock, *supra* note 4, at 1673 ("[I]nstitutional separation implied neither disestablishment nor religious liberty."). R

[36] *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 11-12 (2d ed. 2005) (citing THE COMPLETE WRITINGS OF MENNO SIMONS 1496–1561, at 29, 117-20, 158-59, 190-206 (John Christian Wenger ed., Leonard Verduin trans., 1984)); SCHLEITHEIM CONFESSION (1527), *in* HOWARD J. LOEWEN, ONE LORD, ONE CHURCH, ONE HOPE, AND ONE GOD: MENNONITE CONFESSIONS OF FAITH IN NORTH AMERICA 79-84 (1985).

[37] WITTE, *supra* note 36, at 24.

[38] *See generally* EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 38-44 (1991); EDMUND S. MORGAN, ROGER WILLIAMS: THE

familiar passage, Williams argued for a "wall of Separation between the Garden of the Church and the Wilderness of the world."[39] Rhode Island, the colony Williams established, would distinguish itself from the rest of British America by rejecting a religious establishment while achieving a high degree of separation between governmental and ecclesiastical institutions. Although Williams is now viewed as a visionary,[40] his influence at the time was limited; as William McLoughlin has noted, even Williams's successor as a pietistic separationist, Isaac Backus, preferred to point to Pennsylvania as the model of religious liberty, instead of "irreligious" Rhode Island.[41]

Even though many of the Founders were aware of this religious history, it is unlikely that they were familiar with specific documents or writings, particularly those of Roger Williams. Rather, the Founders gained inspiration principally from the works of Enlightenment[42] and Whig writers.[43] Foremost among Enlightenment writers for the Founding generation was John Locke, author of the influential *Second Treatise on Government* (1690) and *A Letter Concerning Toleration* (1689).[44] Locke's political writings refuted the doctrine of the divine right of kings and established a theory of a "social contract" by which people, the ultimate sources of authority, delegated to the government the responsibility of creating an ordered society.[45] Locke's theories stood in sharp contrast to the notion of a government based on divine authority or that secular law is subject to religious mandates. In *A Letter Concerning Toleration*, Locke wrote that "the care of souls is not committed to the civil magistrate. . . . [Thus]

CHURCH AND THE STATE 86-142 (1967) (discussing Williams's theological argument for separation of church and state).

[39] GAUSTAD, *supra* note 38, at 43. R

[40] *See* HOWE, *supra* note 8, at 18. R

[41] WILLIAM G. MCLOUGHLIN, SOUL LIBERTY: THE BAPTISTS' STRUGGLE IN NEW ENGLAND, 1630–1833, at 257-58 (1991).

[42] *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 26 (1967) ("More directly influential in shaping the thought of the Revolutionary generation [than classical writers] were the ideas and attitudes associated with the writings of Enlightenment rationalism.").

[43] *Id.* at 34-45.

[44] *See* ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 72-78 (1996); WITTE, *supra* note 36, at 26.

[45] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 408-12 (Peter Laslett ed., 2d ed. 1967) (1690); *see also* KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 57-58 (1989).

the civil power ought not to prescribe articles of faith, or doctrines, or forms of worshipping God, by civil law."[46] Rather, "the whole power of civil government is concerned only with men's civil goods, is confined to the care of the things of this world, and has nothing whatever to do with the world to come."[47]

Philip Hamburger attempts to minimize Locke's commitment to church–state separation by inference and omission, arguing that despite such statements, Locke "made no direct objection to government support for religion."[48] Using the *absence* of an express statement to refute general statements to the contrary is not good historical analysis.[49] First, Locke's writings must be viewed in the context of their time, which was when notions of religious toleration and a division of ecclesiastical and civil functions were in their nascent stages. Locke's advocacy for *any* form of religious and civil separation must be seen as significant, even if his views pale in comparison to modern conceptions.[50] However, even Hamburger acknowledges that Locke did envision a church "absolutely separate and distinct from the commonwealth," a notion that would restrict the influence of each institution on the other.[51] The authority of the clergy cannot "in any way be extended to civil affairs," Locke insisted, "because the church itself is absolutely separate and distinct from the commonwealth and civil affairs. The boundaries on both sides are fixed and immoveable."[52] The point is not whether Locke offered a complete model of church–state separation, but whether he challenged existing regimes by advancing principles upon which the Framers could build their own conceptions.[53]

Other influential Enlightenment works included Montes-

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[46] JOHN LOCKE, A LETTER CONCERNING TOLERATION 67-69 (Raymond Klibansky ed., J.W. Gough trans., Oxford, Clarendon Press 1968) (1689).

[47] *Id.* at 71.

[48] HAMBURGER, *supra* note 4, at 53.

[49] Locke's statements, while lacking in exactness, indicate his opposition to enforced taxation of religion. He remarked that "[n]o man, therefore, with whatsoever ecclesiastical office he may be dignified, can deprive any other man who is not of his church or faith of life, liberty, or any part of his worldly goods on account of religion." LOCKE, *supra* note 46, at 87. R

[50] *See* KRAMNICK & MOORE, *supra* note 44, at 72-78. R

[51] HAMBURGER, *supra* note 4, at 54 (quoting LOCKE, *supra* note 46, at 85). R

[52] LOCKE, *supra* note 46, at 85. R

[53] *See* KRAMNICK & MOORE, *supra* note 44, at 77-78 (asserting that for Locke and the Founders, a shift in understanding had occurred regarding the purpose of laws). R

quieu's *The Spirit of Laws*,[54] which, among other matters, advocated toleration of religious belief and freedom of worship,[55] and the writings of Henry St. John, Lord Bolingbroke, who discounted the divinity of the scriptures and a religious basis of the law.[56] The Founding generation, particularly a young Thomas Jefferson, imbibed and recited Montesquieu and Bolingbroke.[57] The works of the radical Whig philosophers like John Trenchard and Thomas Gordon, the authors of *Cato's Letters* (1723), were also influential during the Founding era.[58] Trenchard and Gordon were strong advocates of freedom of expression and government accountability and spoke out against corruption in the government and the Anglican Church.[59] Later opposition writers who advocated for reforms in politics and the church included John Cartwright, Richard Price, and Joseph Priestly.[60] Priestly, who corresponded with many of the Founding generation before fleeing to America, called for the repeal of the Test and Corporation Acts and the disestablishment of the Church of England, insisting on an even greater separation of religious and secular realms than had Locke.[61] However, the "key book" of the generation was *Political Disquisitions*, written by Whig schoolteacher and theorist James Burgh.[62] Like many radical Whigs, Burgh spoke out against religious establishments, warning of "a church's getting too much power into her hands, and turning religion into a mere state engine."[63] In his book *Crito*, Burgh called for building "an impenetrable wall of separation between

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[54] *See* BAILYN, *supra* note 42, at 27-29; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 152-53 (1998). R

[55] CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748).

[56] ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY, AND THEOLOGY 19-40 (1998).

[57] *See* BAILYN, *supra* note 42, at 27-30; JAYNE, *supra* note 56, at 19-40; WOOD, *supra* note 54, at 150-53. R R

[58] BAILYN, *supra* note 42, at 35-54 (examining the influence of several Whig writers on the Founders); WOOD, *supra* note 54, at 291-305. R R

[59] BAILYN, *supra* note 42, at 35-36. R

[60] *Id.* at 41.

[61] KRAMNICK & MOORE, *supra* note 44, at 80-82. R

[62] *Id.* (quoting BAILYN, *supra* note 42, at 41). *See also* CARLA H. HAY, JAMES BURGH, SPOKESMAN FOR REFORM IN HANOVERIAN ENGLAND 42-43 (1979); Oscar Handlin & Mary Handlin, *James Burgh and American Revolutionary Theory,* 73 PROC. OF MASS. HIST. SOC'Y at 38-57 (1961) (examining Burgh's influence on American colonial thought and the Founders). R

[63] JAMES BURGH, 1 CRITO, OR, ESSAYS ON VARIOUS SUBJECTS 7 (1766–1767).

things sacred and civil."[64] Burgh's fans and subscribers included not only Jefferson, but also George Washington, John Adams, John Hancock, John Dickinson, Roger Sherman, and James Wilson, a "who's who" of the Founding generation.[65]

All of these sources were widely read by the Founders and are generally considered by historians to be ideologically central to the Founding of the nation.[66] They informed thought when revolutionary leaders began the process of creating republican states out of former British colonies. To be sure, other ideological strains influenced the Founding generation, including classical antiquity, the common law, natural law, and even Protestant evangelical and Puritan covenant thought.[67] James Otis, among others, urged a fundamental natural law, derived from God, to serve as the source of natural and political rights.[68] However, Cornelia Le Boutillier has demonstrated that when the Founders wrote about natural law, they usually gave it a utilitarian meaning rather than a transcendental meaning.[69] Even so, no one in the Founding generation argued in favor of increasing church–state ties and only a small number advocated retaining the status quo of religious establishments.[70] The point is that the Founders imbibed multiple sources that promoted various conceptions of religious toleration, freedom of conscience, disestablishment, and church–state separation. Because all sources critiqued the status quo (or earlier church–state arrangements), it

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[64] 2 *id.* at 119.

[65] HAY, *supra* note 62, at 42. **R**

[66] *See* BAILYN, *supra* note 42, at 54 ("Within the framework of these ideas, Enlightenment abstractions and common law precedents, covenant theology and classical analogy—Locke and Abraham, Brutus and Coke—could all be brought together into a comprehensive theory of politics."). **R**

[67] *See id.* at 22-54; WOOD, *supra* note 54, at 1-124. **R**

[68] *See* WOOD, *supra* note 54, at 292-94. *See also* T. JEREMY GUNN, A STANDARD FOR REPAIR: THE ESTABLISHMENT CLAUSE, EQUALITY, AND NATURAL RIGHTS 99-103 (1992) (providing a background to the Revolution, beginning with the idea of natural rights). **R**

[69] CORNELIA GEER LE BOUTILLIER, AMERICAN DEMOCRACY AND NATURAL LAW 110 (1950) ("[T]he Founding Fathers, as they employed the notion of natural law . . . gave it very often a utilitarian meaning. Such a utilitarian meaning is logically in opposition to the transcendental meaning which relates to man's rational nature: it supplies a contrary premise.").

[70] The leading exception was the orthodox Congregationalist Timothy Dwight, who was later president of Yale College. *See* TIMOTHY DWIGHT, THE DUTY OF AMERICANS, AT THE PRESENT CRISIS (New Haven, Conn., Thomas & Samuel Green 1798), *reprinted in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA 1730–1805, at 1365-94 (Ellis Sandoz ed., 1991).

should not be surprising that none provided a completed version of church–state separation (at least by modern conceptions). Inconsistencies abounded. What was important to the Founders and what should be important to our modern efforts to understand the period is that the ideas were dynamic and unfolding.

II

Founding Perspectives and Developments

Revisionist historians such as Philip Hamburger and Daniel Dreisbach have sought to discredit the *Everson* rendition by arguing that many of the Founders possessed multiple and often conflicting understandings of church–state relationships.[71] This lack of a consensus (or of internal consistency in some of the Founders) is seen as a weakness. On the contrary, the historical record of the period between 1775 and 1800 indicates a dynamic development in thought about church–state relations and a movement away from religious establishments and government favoritism of religion to a regime of greater religious toleration and liberty and of increasing disengagement between religious and civil institutions.[72]

An initial caution must be made about any reliance on the historical record.[73] The historical record of any period—the Founding period being no exception—is always incomplete. We have only those documents that have survived the eons and have been transcribed and compiled.[74] Direct legislative history about the First Amendment Religion Clauses amounts to less than two pages of House debate recorded in the *Annals*, involving only eight Representatives out of ninety-one members of the First Congress.[75] There is no doubt that other important, unrecorded discussions about the purpose and meaning of the Religion Clauses took place during the House Committee on Style (which

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[71] *See* Hamburger, *supra* note 4, at 1-9, 144-92; Daniel L. Dreisbach, *A New Perspective on Jefferson's Views on Church–State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context*, 45 Am. J. Legal Hist. 172 (1991).

[72] *See infra* text accompanying notes 96-177.

[73] A similar discussion to the one in this text through the text accompanying *infra* note 79 was originally published in Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 Creighton L. Rev. 761, 795-96 (2005).

[74] *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 Tex. L. Rev. 1, 38 (1986).

[75] The debate is recounted in Gunn, *supra* note 68, at 41-67, and Green, *supra* note 73, at 780-94. R R

Madison chaired), in likely unrecorded House debates, in the unrecorded Senate debate that accompanied the proposals recorded in the *Senate Journal*, and in the state ratifying debates. This does not include the possible letters, pamphlets, and important notations written on loose scraps of paper that are lost to time. In addition, the records that do exist may be woefully inaccurate, as they were transcribed by people who made mistakes and self-edited as they went along (not to mention allegations that the transcriber for the *Annals* was frequently inebriated).[76] Madison stated that the accuracy of the reported debates of the First Congress was "not to be relied on."[77]

> The face of the debates shews [sic] that they are defective, and desultory, where not revised, or written out by the Speakers. In some instances, he makes them inconsistent with themselves, by erroneous reports of their speeches at different times on the same subject. [The reporter] was indolent and sometimes filled up blanks in his notes from memory or *imagination*.[78]

Historian John Murrin noted that "[t]he records of the [Constitutional] Convention are corrupt, incomplete, or vague on many issues, making them an extremely perilous arbiter."[79]

Moreover, remarks contained within documents whose accuracy can be presumed can easily be misunderstood. The Framers used terms and phrases that were familiar in the late eighteenth century and frequently employed rhetoric that was intentionally vague, hyperbolic, or duplicitous.[80] Their remarks also arose within particular contexts that may not be apparent from the documents themselves. A prime example is Madison's proposal during the House debates to insert the word "national" before "religion" in the proposed language: "no religion shall be estab-

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[76] *See* Hutson, *supra* note 74, at 36-38 (discussing the excessive drinking of the reporter, Thomas Lloyd, and relating that his notes were "frequently 'garbled' and that he neglected to report speeches whose texts are known to exist elsewhere"). **R**

[77] *Id.* at 38 (quoting Letter from James Madison to Edward Everett (Jan. 7, 1832)).

[78] *Id.*

[79] John M. Murrin, *Fundamental Values, the Founding Fathers, and the Constitution*, *in* TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION 1, 6 (Herman Belz et al. eds., 1992) [hereinafter TO FORM A MORE PERFECT UNION].

[80] *See* Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 413 (1986) (noting that "political rhetoric was as loose then as it is now").

lished by law."[81] Some have argued that this proposal indicates that Madison envisioned the Establishment Clause prohibition to be quite narrow: to prevent only the establishment of a national church or religion as existed in Britain.[82] Not only does this interpretation conflict with Madison's vision reflected in his other works,[83] but it takes the event out of context. Madison was responding to concerns of Benjamin Huntington of New Hampshire that the proposed language could be used to inhibit the existing establishments in the New England states.[84] Madison offered his proposal to clarify that the proposed First Amendment, like the rest of the Bill of Rights, applied to powers of the national government only, and did not suggest that the establishment of a "national religion" represented the overriding concern of the Framers.[85] The point is that the context in which a writing was created may be as important as its words.

We should also be cautious about drawing meaning from the Founders' use of religious language. Historians have long documented the ubiquity of religious rhetoric and imagery in early discourse, which is hardly surprising considering the earlier influence of religion on education and intellectual thought.[86] Unfortunately, this provides opportunity for pseudo-histories (and pseudo-historians) to use the Founders' religious statements to proof-text conservative religious interpretations of the Founding period.[87] However, the more common and habitual religious rhetoric was during the Founding period, the less significance we

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[81] *See* 1 ANNALS OF CONG. 758-59 (Joseph Gales ed., 1790).

[82] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting); CORD, *supra* note 13, at 7. **R**

[83] *See generally* JAMES MADISON ON RELIGIOUS LIBERTY (Robert S. Alley ed., 1985) (discussing documents and commentary that demonstrate Madison's expansive view of church–state separation); Donald L. Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427 (1983) (same).

[84] *See* 1 ANNALS OF CONG. 758.

[85] *See id.* at 758-59.

[86] *See generally* GAUSTAD, *supra* note 11; JAMES H. HUTSON, THE FOUNDERS ON RELIGION: A BOOK OF QUOTATIONS (2005); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987); Harry S. Stout, *Religion, Communications, and the Ideological Origins of the American Revolution*, 34 WM. & MARY Q. 519 (1977). **R**

[87] *See, e.g.*, DAVID BARTON, THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE? (3d ed. 1992); JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS (1987); GOD OF OUR FATHERS (Josiah Benjamin Richards ed., 1994); TIM LAHAYE, FAITH OF OUR FOUNDING FATHERS (1987).

can attach to any particular statements; neither should we draw any conclusions from the aggregate use of religious language other than that it reflected contemporary eighteenth century practices.[88] Religious language was one of several familiar idioms of public discourse available to the Founding generation.[89] The religious statements of George Washington are a favorite proof-texting source for the Supreme Court's conservatives (among others);[90] however, as Paul Boller and Edwin Gaustad have demonstrated, while Washington liberally used religious language, he was a rationalist deist whose support for disestablishment and religious equality grew through his political career.[91] While his rhetoric may sound extremely religious to our postmodern ears, Washington's careful use of nonsectarian, allegorical language common to religious rationalists indicates instead a break from the earlier Puritan and evangelical cultures.[92] Thus, the precise meanings of the Founders' religious statements may be ambiguous at best.[93]

Finally, persuasive evidence exists that the Framers believed that constitutional interpretation should be drawn from the express language of the document, not from the statements of those who drafted the language, and particularly not from later statements unconnected to the drafting of the documents themselves. According to H. Jefferson Powell, "[t]he framers shared the traditional common law view—so foreign to much hermeneutical thought in more recent years—that the import of the document they were framing would be determined by reference to the in-

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[88] *See generally* JAMES H. HUTSON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC (2003) (documenting the ubiquity of religious rhetoric in early discourse); FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA (2003) (same).

[89] *See* Isaac Kramnick, *The Discourse of Politics in 1787: The Constitution and Its Critics on Individualism, Community, and the State*, *in* TO FORM A MORE PERFECT UNION, *supra* note 79, at 166, 167-68. **R**

[90] *See, e.g.*, Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005).

[91] *See* GAUSTAD, *supra* note 11, at 76-77; Paul F. Boller, Jr., *George Washington and Religious Liberty*, 17 WM. & MARY Q. 486, 489 (1960). **R**

[92] *See* GAUSTAD, *supra* note 11, at 76-77; Boller, *supra* note 91, at 489. **R**

[93] *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) ("[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed.").

trinsic meaning of its words or through the usual judicial process of case-by-case interpretation."[94] Elbridge Gerry is reported to have said that "all construction of the meaning of the Constitution, is dangerous or unnatural, and therefore ought to be avoided."[95] Thus, Justice Brennan once remarked, "[a] too literal quest for the advice of the Founding Fathers upon the issues of these cases seems . . . futile and misdirected."[96]

With this caution in mind, several factors suggest that the Founding period was one of dynamic development in attitudes toward church–state relationships. First, the American Revolution came at the end of a period of religious experimentalism and expansion commonly called the First Great Awakening. Although known for its emotional revivals that challenged the staid religious practices of the established churches, the Great Awakening's greatest significance was breaking down forces of religious uniformity and substituting notions of religious equality and voluntaryism.[97] Historians have documented how democratic ideas flowed into the religious movement (and out again), undermining assumptions about the necessity of state supported religion.[98] In turn, as the Revolution approached, a "strange coalition of rationalists and pietistic-revivalistic sectarians . . . provided much of the propelling energy behind the final thrust for the religious freedom that was written into the constitution of the new nation."[99] What the Great Awakening cemented, however, was the notion that participation in and support of religious worship should be voluntary, not compelled by the state.

With the advent of the Revolution, approximately half of the new states (New York, New Jersey, Pennsylvania, Delaware, Rhode Island, and North Carolina) abolished any remnants of religious establishments with forced assessments.[100] Granted, church establishments had never worked well, or at all, in any of these former colonies, so disestablishment was not difficult to

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[94] *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903-04 (1985).

[95] 1 ANNALS OF CONG. 574 (Joseph Gales ed., 1790).

[96] *Schempp*, 374 U.S. at 237 (Brennan, J., concurring).

[97] *See* JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE 164-224 (1990); SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 16-43 (1963).

[98] *See generally* NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 6-11 (1989).

[99] MEAD, *supra* note 97, at 35. **R**

[100] *See* LEVY, *supra* note 11, at 25-62. **R**

achieve.[101] However, the point is that none of these new states considered moving in the opposite direction toward increasing church–state ties, even though they were arguably free to do so.[102] And granted, most of these disestablished states retained other practices far removed from a modern regime of separation, such as religious requirements for public officeholding and participating in legal proceedings, (i.e., oath requirements), official acknowledgments of religion and a host of religiously based sumptuary laws (e.g., blasphemy and Sabbath laws).[103] These states, however, had taken the first steps toward separationism and several shortly began to abolish other religious disqualifications they had retained from the colonial era. For example, in 1786, Pennsylvania liberalized its religious requirements for public officeholding and its constitution of 1790 omitted earlier references to "Almighty God" as the source for republican government.[104] They were not going backward.

The remaining eight states retained or reauthorized their existing structures of religious assessments and legal preferences for Christianity. By the end of the Revolution, however, even the more formal Anglican establishments in Virginia and South Carolina had given way to what are now called "multiple establishments," which provided that a taxpayer could have his assessment paid to his own church or, as was more common in New

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[101] *Id.*

[102] *See, e.g.*, J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA 60-78 (1990) (noting that after a restrictive trend during the Revolutionary War with the enforcement of religious behavioral laws, Pennsylvania adopted a constitution in 1790 that was quite "radical" on issues of disestablishment and toleration).

[103] William Penn, *Essay II*, INDEP. GAZETTEER (Phila.), Jan 2-3, 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST § 3.12.18, at 174-75 (Herbert J. Storing ed., 1981). For example, Penn observed:

> [W]e find it declared in every one of our [state] bills of rights, "that there shall be a perfect liberty of conscience, and that no sect shall ever be entitled to a preference over the others." Yet in Massachusetts and Maryland, all the officers of government, and in Pennsylvania the members of the legislature, are to be of the Christian religion; in New-Jersey, North-Carolina, and Georgia, the protestant, and in Delaware, the trinitarian sects, have an exclusive right to public employments; and in South-Carolina the constitution goes so far as to declare the creed of the established church. Virginia and New-York are the only states where there is a perfect liberty of conscience.

Id. (footnote omitted). *See also* FROST, *supra* note 102, at 71-72. **R**

[104] *See* FROST, *supra* note 102, at 74-77; Letter from Benjamin Rush to Richard Price (Apr. 22, 1786), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 57 (Philip B. Kurland & Ralph Lerner eds., 1987).

England, to that church chosen by the majority vote of the parish.[105] However, this description does not reveal the ongoing dynamism in those states. In 1786, Virginia rejected a bill that would have allowed tax assessments for religious worship, adopting in its stead Jefferson's "Act for Establishing Religious Freedom" that had lain dormant since 1779.[106] In addition, by 1789, four other states had moved away from maintaining religious establishments in the sense understood as tax support for religious worship.[107] The first Georgia and Maryland constitutions allowed for religious assessments, but neither state ever instituted a system.[108] Maryland voters rejected a proposed assessment in 1785, indicating a quick reversal of opinion, while a Georgia law of the same year apparently never went into effect.[109] New constitutions in Georgia in 1789 and 1798, respectively, removed the religious test for officeholding and abolished all authority for assessments.[110] Although the 1778 South Carolina Constitution declared a "general establishment" of Protestantism, limiting church incorporation and public officeholding to Protestants, it inconsistently provided that no person could be compelled to support any religious body.[111] Thus, South Carolina's "establishment" amounted only to "a method of incorporating churches, and no church received public tax support."[112] South Carolina's constitution of 1790 omitted the remaining reference to an establishment and removed earlier religious restrictions on public officeholding.[113] Finally, in 1786, Vermont rewrote its constitution

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105 *See* LEVY, *supra* note 11, at 26; 2 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630–1833, *passim* (1971). **R**

106 *See* THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 144-72 (1977); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 135-48 (1986); Thomas Jefferson, Virginia Act for Establishing Religious Freedom (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 84.

107 *See* CURRY, *supra* note 106, at 152-58; LEVY, *supra* note 11, at 47-49. **R**

108 *See* CURRY, *supra* note 106, at 152-58. **R**

109 *Id.* at 153-56.

110 *Id.* at 153 (citing 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, H.R. DOC. No. 357, at 779, 784, 789, 800-01 (Francis Newton Thorpe ed., 1906) [hereinafter FEDERAL AND STATE CONSTITUTIONS]).

111 *Id.* at 150 (citing 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 110, at 3251-53, 3255-56). **R**

112 *Id.*

113 *Id.* at 151 (citing 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 110, at 3664). **R**

of 1777, reaffirming that "no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience," but removing the previous contradictory provision requiring "support" of public worship.[114] All of these developments reveal a progression of thought about the meaning of church–state separation and freedom of conscience at the state level.

To be sure, active religious establishments continued into the nineteenth century in three states: Connecticut, Massachusetts, and New Hampshire.[115] However, even in those states, the idea of a religious establishment was not particularly popular, and opposition to tax assessments and religious preferences was strong and growing.[116] Increasingly, early Americans believed that enforced tax support of one religion generally violated rights of conscience.[117] As Thomas Curry has written, by the time of the ratification of the Constitution, "[t]he belief that government assistance to religion, especially in the form of taxes, violated religious liberty had a long history."[118]

As a result of pressure from within and without, officials in Massachusetts, Connecticut, and New Hampshire were increasingly reticent to admit to having a religious establishment due to the negative connotation the term carried with its association with hated European establishments.[119] John Adams referred to

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[114] *Id.* at 188-89 (citing 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 110, at 3740, 3743, 3752). Despite this change to Article III, in 1787 Vermont enacted a law authorizing churches to levy and collect contributions of support from their members, a law that existed until 1807. 2 MCLOUGHLIN, *supra* note 105, at 801-12. **R**

[115] *See* LEVY, *supra* note 11, at 26-44. **R**

[116] *See* CURRY, *supra* note 106, at 162-92. **R**

[117] *See, e.g.*, VT. CONST. of 1786, chap. I, art. 3, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 85 (stating "that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience"); JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS paras. 3-4 (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 82 (arguing that enforced assessments violate rights of conscience). *See also* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 917 (1986).

[118] CURRY, *supra* note 106, at 217. *Accord* Laycock, *supra* note 117, at 917 ("[T]ax support for churches was deeply controversial and widely thought inconsistent with religious liberty."). **R**

[119] Laycock, *supra* note 117, at 906. As Chief Justice Jeremiah Smith of New Hampshire declared in an 1803 decision: **R**

> [A] religious establishment . . . is where the State prescribes a formulary of

the Massachusetts arrangement as "a very slender one, hardly to be called an establishment."[120] However, Adams, like most assessment supporters at the time, would not have viewed the system as violating rights of conscience because no one, at least in theory, was forced to pay for another's religion.[121] Connecticut jurist Zephaniah Swift wrote in the 1790s that

> [e]very christian may believe, worship, and support in such manner as he thinks right, and if he does not feel disposed to join public worship, he may stay at home and believe as he pleases, without any inconvenience, but the payment of his tax to support public worship in the located society where he lives.[122]

Swift denied that Connecticut maintained a religious establishment, which he associated with systems that favored one church exclusively.[123]

By the final decade of the eighteenth century, however, the New England argument that nonpreferential multiple establishments did not violate rights of conscience was losing ground to the more compelling arguments found in Jefferson's Act for Establishing Religious Freedom[124] and Madison's *Memorial and Remonstrance*.[125] Increasingly, people shared Jefferson's view that forcing a man even "to support this or that teacher of his

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> faith and worship for the rule and government of all the subjects. Here the State do [sic] neither. It is left to each town and parish, not to prescribe rules of faith or doctrine for the members of the corporation, but barely to elect a teacher of religion and morality for the society, who is to be maintained at the expense of the whole. The privilege is extended to all denominations. There is no one in this respect superior or inferior to another.

Muzzy v. Wilkins, 1 Smith 1, 9 (N.H. 1803) (internal citations omitted).

120 *See* ISAAC BACKUS, A HISTORY OF NEW ENGLAND 1774–75, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 65.

121 The Massachusetts Supreme Judicial Court wrote in upholding a challenge to the state's religious assessment system that

> the first objection seems to mistake a man's conscience for his money, and to deny the state a right of levying and of appropriating the money of the citizens, at the will of the legislature, in which they all are represented. . . . The great error lies in not distinguishing between liberty of conscience in religious opinions and worship, and the right of appropriating money by the state. The former is an unalienable right; the latter is surrendered to the state, as the price of protection.

Barnes v. First Parish in Falmouth, 6 Mass. (5 Tyng) 401, 408-09 (1810).

122 ZEPHANIAH SWIFT, 1 A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT 146 (Arno Press 1972) (1795).

123 CURRY, *supra* note 106, at 184.

124 Jefferson, *supra* note 106, at 84-85.

125 *See* MADISON, *supra* note 117, at 82-85. **R**

own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern."[126] Madison's case for why multiple establishments violated rights of conscience convinced Virginia, in 1786, to join the ranks of the disestablished states of North Carolina, New York, New Jersey, Pennsylvania, Delaware, and Rhode Island, and served as an example to disestablishment forces in Maryland, Georgia, and South Carolina.[127] By the time of the drafting of the First Amendment, therefore, compelled assessments for the support of religion existed in only three New England states and were unevenly enforced.[128] Douglas Laycock has written that "[b]y the time of the first amendment, church taxes were repealed or moribund outside New England, and they were not working well in the [three] New England states that still tried to collect them."[129] This movement away from religious assessments and the expanding notion of rights of conscience thus demonstrate the dynamic nature of the Founding period.

Derek Davis, in his important study of religion and the Continental and Confederation Congresses, documents a similar progression in attitudes toward religious liberty and church–state separation at the early national level.[130] Davis indicates that the Continental Congress adopted several religious practices also engaged in by the colonial and early state legislatures (chaplaincies, legislative prayers, and Thanksgiving and fast day observances),[131] endorsed the printing of the Bible,[132] and considered making purchases of the Bible during the Revolutionary War.[133] These practices were not new, however, and were often adopted without much debate or thought.[134] In contrast, in 1776 Con-

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126 Jefferson, *supra* note 106, at 84.

127 *See* CURRY, *supra* note 106, at 146-48.

128 *See* LEVY, *supra* note 11, at 25-62. *See also* 2 MCLOUGHLIN, *supra* note 105, at 962-70 (discussing the difficulty in administering the assessment in Connecticut). According to McLoughlin, the New Hampshire Constitution of 1783 and subsequent law authorizing assessments "did not *require* towns to levy taxes for the support of religion; [they] simply said they might do so 'agreeably to the Constitution.'" *Id.* at 850. **R**

129 Laycock, *supra* note 117, at 917. **R**

130 DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774–1789: CONTRIBUTIONS TO ORIGINAL INTENT (2002).

131 *See id.* at 73-90 (discussing the historical context of legislative and military chaplaincies).

132 *See id.* at 144-48.

133 *Id.* at 195.

134 *Id.* at 91.

gress considered a proposal by John Dickinson that would have prohibited states from disadvantaging anyone on account of his religion or compelling the attendance at or support of "any religious Worship, Place of Worship, or Ministry, contrary to his or her Mind," effectively abolishing religious assessments nationwide.[135] Congress rejected the proposal as infringing on the rights of the states, but likely it went further toward separation than many were willing to go at the time.[136] However, such ideas were percolating. Also, the Confederation Congress broke with the then-prevailing state practice of religious tests for officeholding, "a sure sign that the meaning of religious liberty in America was progressive and tended increasingly to 'separate' church and state."[137] And in one of its final acts, the Congress refused to provide land grants for churches and houses of worship when it approved the land ordinance for the Northwest Territory in 1787.[138]

Davis acknowledges that when one considers the entirety of Congress' religious activity, it "operated almost exclusively within an accommodationist paradigm."[139] Davis asserts, however, that this fact "recedes in significance . . . when it is recognized that the separationist paradigm was at that time only beginning to be recognized for its advantages to national life."[140] He concludes that "[a]ll of the evidence, then, when examined in historical context, supports separationism as that paradigm of church–state thought that best captures the progressively evolving intentions of the Founding fathers."[141]

The closest that Americans have come to having a national discussion about the meaning of religious liberty and church–state separation occurred during the ratification of the Constitution. That discussion centered on two interrelated issues: (1) calls for an amendment to the Constitution to protect religious liberty, and (2) the debate over the Article VI, clause 3 prohibition against religious tests for national officeholding. Like the more formal legislative actions addressed above, this discussion dem-

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135 *See id.* at 158-61; WITTE, *supra* note 36, at 74-75.

136 *See* DAVIS, *supra* note 130, at 161; WITTE, *supra* note 36, at 75. R

137 DAVIS, *supra* note 130, at 202. R

138 *See* Ronald A. Smith, *Freedom of Religion and the Land Ordinance of 1785*, 24 J. CHURCH & ST. 589, 589 & n.1 (1982).

139 DAVIS, *supra* note 130, at 227.

140 *Id.*

141 *Id.*

onstrates an evolution in attitudes toward the idea of separation of church and state.

The proposed Constitution met with immediate opposition from so-called anti-federalists who feared the new frame of governing would shift power from the states to the national level, infringing on individual liberties and states' rights. Anti-federalists pointed to the absence of a bill of rights limiting national power as a cardinal defect of the proposed constitution.[142] While some raised the issue merely to defeat ratification, others pushed for a series of amendments as a condition for ratification.[143] Although federalists like James Madison and Alexander Hamilton initially opposed a bill of rights on the ground that one would imply the existence of powers the national government did not possess, they shortly acceded to the arguments for amendments to the Constitution upon ratification.[144]

Among the numerous calls for amendments were calls for provisions to protect religious rights. The debate over amendments gave people throughout the nation the opportunity to rethink ideas about religious liberty and church–state separation. Through numerous petitions, pamphlets, and letters to newspapers, Americans expressed sentiments that indicate an awareness of past religious liberty.[145] These writings also indicate that peo-

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[142] *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 137-73 (1988) (discussing the political dynamic surrounding the calls for a bill of rights).

[143] *See id.*

[144] *See* THE FEDERALIST NO. 84 (Alexander Hamilton). *Compare* James Madison, Statement at Virginia Ratifying Convention (June 12, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 88 (expressing doubt that "a bill of rights [provides] security for religion"), *with* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776–1786, at 562, 564 (James Morton Smith ed., 1995) ("My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect . . . .").

[145] *See, e.g.*, A Farmer, *Essay VII*, MD. GAZETTE (Balt.), Apr. 11, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, § 5.1.107, at 63. Expressing a concern for religious tyranny based on history, "A Farmer" stated: **R**

> Civil and religious liberty are inseparably interwoven—whilst government is pure and equal—religion will be uncontaminated:—The moment government becomes disordered, bigotry and fanaticism take root and grown—they are soon converted to serve the purpose of usurpation, and finally, religious persecution reciprocally supports and is supported by the tyranny of the temporal powers.

Id.

ple believed that religious freedoms were still unfolding and that they were unwilling to be satisfied with what had been achieved to date.[146] And, significantly, the writings reveal an understanding of the temporal quality of their situation: that they could not presume future conditions and could only try to equip the nation to deal with future threats to liberty.[147] The Pennsylvania writer "An Old Whig" wrote in 1788:

> The fact is, that human nature is still the same that ever it was: the fashion indeed changes; but the seeds of superstition, bigotry and enthusiasm, are too deeply implanted in our minds, ever to be eradicated . . . . They are idiots who trust their future security to the whim of the present hour . . . .
>
> The more I reflect upon the history of mankind, the more I am disposed to think that it is our duty to secure the essential rights of the people, by every precaution; for not an avenue has been left unguarded, through which oppression could possibly enter in any government . . . . We ought therefore in a *bill of rights* to secure, in the first place, by the most express stipulations, the sacred rights of conscience.[148]

Others called for greater limitations on religious influences in government:

> Religion, is certainly attended with dangerous consequences to government: it hath been the cause of millions being slaughtered . . . but in a peculiar manner the christian religion . . . is of all others the most unfavourable to a government founded upon nature; because it pretends to be of a supernatural divine origin, and therefore sets itself above nature.[149]

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[146] For an example, see William Penn quoted at *supra* note 103, in which he expressed dissatisfaction with the retention of religious tests under a majority of early state constitutions. **R**

[147] *See* William Lancaster, Statement at North Carolina Ratifying Convention (July 30, 1788), *in* 4 ELLIOT'S DEBATES 212, 215 (William S. Hein & Co. 1996) (Jonathan Elliot ed., 2d ed. 1836) ("[L]et us remember that we form a government for millions not yet in existence.").

[148] An Old Whig, *Essay V*, INDEP. GAZETTEER (Phila.), Oct. 1787–Feb. 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, §§ 3.3.27-28, at 35-36. *Accord* Centinel, *Essay II,* FREEMAN'S J. (Phila.), Nov. 7, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, § 2.7.55, at 152 ("[B]ut there is no declaration, that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against his own free will consent; and that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul [sic], the right of conscience in the free exercise of religious worship . . . ."). **R** **R**

[149] ARISTOCROTIS, THE GOVERNMENT OF NATURE DELINEATED, OR AN EXACT

And, as anti-federalist Thomas Tredwell stated in the New York ratification convention: "I could have wished also 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."[150]

Generally, the letters and pamphlets that circulated from 1787 through 1789 expressed concerns about preserving rights of conscience and preventing government preference of particular sects, a condition that many felt still existed in several of the states.[151] The petitioners desired *greater* security for religious freedoms, to be achieved in part through greater separation of the religious and governmental realms. The perfect arrangement had yet to be realized.[152] At the same time, a smaller number of writers, commenting chiefly during the debate over prohibiting religious tests, spoke about the necessity of religion for the preservation of government: "[W]ithout the prevalence of *Christian piety, and morals*, the best republican Constitution can never save us from slavery and ruin."[153] That some people disagreed with the need for greater separation and were forced to defend the status quo confirms that their views were under attack and that a dynamic transformation was underway.

In the end, a handful of state ratifying conventions recommended proposed amendments to the Federal Constitution to protect religious rights.[154] Every proposal sought to *enhance* the cause of religious liberty; the primary goals were to protect free-

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PICTURE OF THE NEW FEDERAL CONSTITUTION (1788), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, § 3.16.14, at 206. R

150 Thomas Tredwell, Statement at New York Ratifying Convention (July 1, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 147, at 396, 399. R

151 *See, e.g.*, Penn, *supra* note 103, §§ 3.12.11-19, at 171-75. R

152 *See* Oliver Wolcott, Statement at Connecticut Ratifying Convention (Jan. 9, 1788), *in* 2 ELLIOT'S DEBATES, *supra* note 147, at 201, 202 ("Knowledge and liberty are so prevalent in this country, that I do not believe that the United States would ever be disposed to establish one religious sect, and lay all others under legal disabilities. But as we know not what may take place hereafter . . . I cannot think it altogether superfluous to . . . secure[ ] us from the possibility of such oppression."). R

153 Charles Turner, Statement at Massachusetts Ratifying Convention (Feb. 5, 1788), *in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, § 4.18.2, at 219, 221. *See also* David, Letter in Response to Elihu, MASS. GAZETTE, Mar. 7, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, § 4.24.3, at 247; *A Proposal for Reviving Christian Conviction*, VA. INDEP. CHRON., Oct. 31, 1787, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, § 5.8.2, at 126. R

154 *See* THE COMPLETE BILL OF RIGHTS 11-13 (Neil H. Cogan ed., 1997). Minority blocks in three additional state conventions (Maryland, Massachusetts, and Pennsylvania) also urged religious freedom amendments. *Id.* at 11-12.

dom of conscience and guarantee sect equality.[155] The anti-federalist minority in Maryland proposed "[t]hat there be no national religion established by law, but that all persons be equally entitled to protection in their religious liberty."[156] However, the majority of the religious proposals came from states that had already abolished religious establishments and guaranteed religious conscience in their constitutions (e.g., Virginia, North Carolina, Pennsylvania, and New York), indicating a desire to advance those principles at the national level. For example, the Virginia convention proposed a federal amendment affirming an "unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others."[157] North Carolina, also lacking a religious establishment, proposed an amendment that tracked the language of Virginia's.[158]

Of the states with active establishments, only the proposal from the New Hampshire convention can arguably be interpreted as expressing a desire to protect existing religious establishments from the federal government ("Congress shall make no Laws touching Religion, or to infringe the rights of Conscience").[159] However, there is no legislative history of the New Hampshire proposal to explain whether its language expressed only a national concern or a federalism one, too.[160] In contrast, Pennsylvania, which was undergoing a liberalization in church–state arrangements, wanted to continue with its trend unencumbered by the national government, proposing that "the United States shall [not] have authority to alter, abrogate, or infringe any part of the constitutions of the several states, which provide for the preservation of liberty in matters of religion."[161]

An additional example of the dynamic nature of the period is

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[155] *See id.*

[156] *See id.* at 11. According to Leonard Levy, the proposal failed, not because the federalist majority disagreed with its substance, but because they "wished to ratify unconditionally for the purpose of demonstrating confidence in the new system of government." LEVY, *supra* note 11, at 69. **R**

[157] THE COMPLETE BILL OF RIGHTS, *supra* note 154, at 13. **R**

[158] *See id.* at 12.

[159] *Id.* The issue over whether the drafters of the Establishment Clause viewed its purpose in using federalism terms as protecting existing religious establishments is considered in Green, *supra* note 73, at 763.

[160] *See* LEVY, *supra* note 11, at 70. **R**

[161] THE COMPLETE BILL OF RIGHTS, *supra* note 154, at 12. **R**

found in the ratification controversy over the Article VI, clause 3 prohibition against religious tests for national officeholding. A majority of states, including those that had abolished religious assessments, initially retained requirements for a belief in the "Christian God" or the ability to take an oath premised on the belief in accountability for sins after death.[162] The drafters of the Constitution broke with that tradition, however, adopting without dissent a proposal by Charles Pinckney of South Carolina to bar "religious test[s] . . . as a qualification" for federal officeholding.[163] The delegates to the Constitutional Convention were not charting new ground, however, as religious test laws had increasingly been criticized as instruments of religious persecution and civil disqualification.[164]

During the state ratification debates, anti-federalists seized on the document's prohibition of religious tests, with several alleging that it encouraged atheism in the new country.[165] Critics claimed the no-religious-test clause was "dangerous and impolitic,"[166] with one New Hampshire writer maintaining that "according to this [provision] we may have a Papist, a Mohomatan, a Deist, yea an Atheist at the helm of Government."[167] Relating a concern shared by many, Luther Martin told the Maryland Assembly that "in a Christian country, it would be at least decent to hold out some distinction between the professors of Christianity

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162 *See* ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 37 (rev. ed. 1964).

163 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 468 (Max Farrand ed., rev. ed. 1937). Roger Sherman of Connecticut voiced hesitation, but concluded that "the prevailing liberality [was] a sufficient security [against] such tests." *Id.*

164 *See* Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), *reprinted in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 634; Letters from Benjamin Rush to Richard Price (Oct. 15, 1785 & Apr. 22, 1786), *reprinted in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 636; Penn, *supra* note 103, §§ 3.12.11-19, at 171-75; Noah Webster, *On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions from Office*, Mar. 1787, *reprinted in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 636. **R**

165 *See What the Anti-Federalists Were* For, *in* 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, at 1, 22-23; Turner, *supra* note 153, at 221. **R**

166 Henry Abbot & James Iredell, Debate the Ban on Religious Tests: Could Not the Pope Be President? (July 30, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 902, 902 (Bernard Bailyn ed., 1993) (statement of Henry Abbot) [hereinafter THE DEBATE ON THE CONSTITUTION].

167 A Friend to the Rights of the People, *Anti-Federalist, No. I*, FREEMAN'S ORACLE (N.H.), Feb. 8, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, § 4.23.3, at 242. **R**

and downright infidelity or paganism."[168]

Although the potential impact of the no-religious-test clause troubled many anti-federalists, the provision indicated more generally that the Constitution and the new government relied on secular–rationalist principles rather than on religious sentiments. During the ratification debates, anti-federalists decried what they perceived as a deliberate attempt by the Constitution's supporters to disassociate the new government from a religious foundation: "[A]ll religion is expressly rejected from the Constitution. Was there ever any State or kingdom, that could subsist, without adopting some system of religion?"[169] Connecticut delegate William Williams also expressed concern over the absence of "an explicit acknowledgement of the being of a God, his perfections and his providence" in the Constitution.[170] In order to remedy the error, Williams proposed alternative language to be inserted in the Preamble acknowledging "the one living and true God, the creator and supreme Governour of the world . . . his universal providence and the authority of his laws."[171] Williams, who otherwise supported ratification, acknowledged his suggested wording had no chance of being approved.[172] Still, Williams's proposal typified the frustration of a small but vocal group who found fault with the Constitution's secular character.

What is significant about the debate over the no-religious-test clause is that its Federalist defenders came to view the purpose of the clause as not merely diffusing religious controversy at the national level, but as inexorably linked to advancing religious liberty and church–state separation. James Iredell of North Carolina tied religious test requirements directly to despised religious establishments.[173] The proposed prohibition at the na-

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[168] Luther Martin's Letter on the Federal Convention of 1787 (Jan. 27, 1788), *in* 1 ELLIOT'S DEBATES, *supra* note 147, at 344, 386. **R**

[169] Samuel, Letter to the Editor, INDEP. CHRON. & UNIVERSAL ADVERTISER, Jan. 10, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 103, § 4.14.7, at 195. *See also A Proposal for Reviving Christian Conviction*, *supra* note 153, § 5.8.2, at 126 ("[T]he most approved and wisest legislators in all ages, in order to give efficacy to their civil institutions, have found it necessary to call in the aid of religion; and in no form of government whatever has the influence of religious principles been found so requisite as in that of a republic."). **R** **R**

[170] William Williams, *To Obtain Blessings from the Most High*, AM. MERCURY (Hartford, Conn.), Feb. 11, 1788, *reprinted in* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 166, at 193. **R**

[171] *Id.*

[172] *Id.* at 194.

[173] *See* Abbot & Iredell, *supra* note 166, at 903. **R**

tional level, Iredell insisted, was "one of the strongest proofs . . . that it was the intention of those who formed this system, to establish a general religious liberty in America."[174] Zachariah Johnston of Virginia echoed the belief that "the exclusion of tests, will strongly tend to establish religious freedom."[175]

Equally significant was the fact that Federalist defenders of the no-religious-test clause did not recoil from the anti-federalist charge about the irreligious character of the Constitution. Oliver Ellsworth, writing as "A Landholder" in the *Connecticut Courant*, defended the no-religious-test clause as the only means of avoiding religious tyranny and preventing discord among the numerous religious sects throughout the nation.[176] It was the anti-federalists' criticism that the Constitution lacked a religious foundation, however, that presented "the true principle, by which this question ought to be determined."[177] Emphasizing the *civil* nature of the government in his reply, Ellsworth asserted that "[t]he business of civil government is to protect the citizen in his rights, to defend the community from hostile powers, and to promote the general welfare."[178] Civil government had no jurisdiction over religious matters and "no business to meddle with the private opinions of the people."[179] In the end, the Federalists prevailed and the no-religious-test clause became the model for the gradual abolition of similar requirements at the state level.[180]

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The purpose of this Section has not been to argue that all of the Founders, or even a majority of them, were dyed-in-the-wool separationists. To be sure, Jefferson and Madison were exceptional for their views on church–state relationships. Rather, the point is that the last quarter of the eighteenth century was one of dramatic change in the legal arrangements and popular attitudes

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174 *Id.*

175 Zachariah Johnston, Statement at Virginia Ratifying Convention (June 25, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 166, at 751, 752. *See also* Edmond Randolph, Statement at Virginia Ratifying Convention (June 10, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 147, at 194, 204-05. R R

176 A Landholder, or Oliver Ellsworth, *No Religious Test Shall Ever Be Required*, CONN. COURANT, Dec. 17, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 166, at 523-24. R

177 *Id.* at 524.

178 *Id.*

179 *Id.*

180 *See* STOKES & PFEFFER, *supra* note 162, at 245-48 (examining the no-religious-test debate in Maryland). R

toward church–state relationships. Religious liberty was an unfolding idea and notions of religious equality rights of conscience, and church–state separation were dynamic and developing. Nothing in relation to this issue was static. As a result, no writing or practice could represent or encapsulate "the" popular understanding of church–state separation.

III

The Ambiguity of Contemporary Practices

The above discussion suggests that late eighteenth century statements and practices concerning religion are unreliable as guides for resolving modern church–state controversies. Because the Founders viewed church–state separation as an unfolding idea, not an accomplished reality, no document or practice can accurately represent contemporary perspectives about the issue. Nonetheless, commentators, judges, and lawyers continue to mine the historical record for supporting evidence from the past, usually to show that the Founders did not intend to adopt a regime of church–state separation purportedly represented in *Everson v. Board of Education*. Three events have commonly been viewed as significant and frequently referenced: the appointment of chaplains by the First Congress, the practice of Thanksgiving Day proclamations, and the adoption of the Northwest Land Ordinance of 1787.[181]

The practice of legislative prayer and worship services had a long history in America by the time Congress appointed the first congressional chaplains in 1789. New England had a tradition of election and fast sermons and legislative prayer dating back to the seventeenth century, and over time, the practices moved to other colonies.[182] The pending crisis with Great Britain and the need of Americans to identify their cause with God and his providence led the First Continental Congress to adopt the practice of opening its sessions with prayer,[183] soon to be followed by the appointment of two paid congressional chaplains, an Anglican priest and a Presbyterian minister, who served from 1776 to

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[181] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 99-103 (1985) (Rehnquist, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 674-78 (1984); Marsh v. Chambers, 463 U.S. 783, 787-88 (1983).

[182] *See generally* Political Sermons of the American Founding Era 1730–1805, *supra* note 70.

[183] Witte, *supra* note 36, at 72. *See, e.g.*, 1 Journals of the Continental Congress, 1774–1789, at 26 (Worthington C. Ford et al. eds., 1904); 2 *id.* at 12.

1784.[184] The chaplains offered prayers, scripture readings, and an occasional sermon—all supportive of the patriot cause—and delegates would periodically attend local worship services en masse.[185] At the beginning of the war with Britain, the Continental Congress also established military chaplains for the Continental Army, a corps that has continued until this day.[186] Finally, as the war ensued, the Continental Congress periodically issued proclamations calling for public prayer, fasting, and piety, including the first Thanksgiving proclamation on November 1, 1777.[187] Based on this precedent, the First Congress voted in April of 1789 that each house would appoint its own chaplain to open each legislative session with a prayer.[188] Congress enacted a statute providing for the payment of the chaplains on September 25, 1789, the vote coming within a week of the final approval of the language of the Bill of Rights.[189] Several days after the language of the Bill of Rights was approved, Congress passed a resolution asking newly inaugurated President Washington to proclaim a national day of thanksgiving, which he did on October 3, 1789,[190] the first of several thanksgiving proclamations during his administration.[191]

Relying chiefly on this legislative record, the Court in *Marsh* upheld the Nebraska chaplaincy system, calling the history "unambiguous and unbroken" and legally conclusive.[192] In a similar fashion, Chief Justice Rehnquist relied on an "unbroken history of official [religious] acknowledgement[s]," including Washington's Thanksgiving Day proclamation, as support for government displays of the Ten Commandments[193] and the acknowledgement of God in the Pledge of Allegiance.[194] Two problems exist with this line of analysis. First, it presumes that legislative chaplain-

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184 *See* DAVIS, *supra* note 130, at 66, 73-77; WITTE, *supra* note 36, at 72. **R**

185 DAVIS, *supra* note 130, at 74-77. **R**

186 *Id.* at 80-83.

187 *See id.* at 83-88; WITTE, *supra* note 36, at 72-73.

188 DAVIS, *supra* note 130, at 76. **R**

189 Marsh v. Chambers, 463 U.S. 783, 788 (1983). *See also* DAVIS, *supra* note 130, **R** at 76-77.

190 George Washington, Proclamation: A National Thanksgiving, (Oct. 3, 1789), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 94.

191 DAVIS, *supra* note 130, at 90. **R**

192 *Marsh*, 463 U.S. at 792.

193 Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (quoting Lynch v. Donnelly, 465 U.S. 668, 674 (1984) (internal quotation marks omitted)).

194 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 26-27 (2004) (Rehnquist, C.J., concurring).

cies and religious proclamations were static and noncontroversial. Yet, the Continental Congress created the legislative chaplaincy in response to the urgencies of war and likely extended the office by default or with little thought.[195] While a majority of officials likely supported legislative chaplaincies, some disagreed with the practice: John Jay and John Rutledge both objected to the appointment of a chaplain by the Continental Congress out of concern that it would show preference for some faiths.[196] James Madison also objected to the practice—albeit much later, after leaving public office—arguing that "[t]he establishment of the chaplainship to Congs [sic] is a palpable violation of equal rights, as well as of Constitutional principles."[197] Madison believed that "[r]eligious proclamations by the Executive recommending thanksgivings and fasts are shoots from the same root" as chaplaincies.[198]

However, even if the majority of contemporaries approved of the practices in isolation, that does not indicate that they ever considered whether paid chaplaincies or religious proclamations were consistent with the Establishment Clause. Chaplaincies and thanksgiving proclamations were carryovers from an earlier period; the practices "were reflexive, even episodic; indeed, the evidence from the proceedings of the First Congress gives little indication that the constitutional legitimacy of these practices were given more than a modicum of serious thought."[199] Justice Souter has noted that the "practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next."[200] Also, contemporaries familiar with the more doctrinal actions of colonial governments viewed these practices as being nondenominational and religiously inclusive in character, particularly considering how limited religious diversity was at the time. George Washington made every effort to phrase

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195 DAVIS, *supra* note 130, at 91. **R**

196 *Id.* at 73-74.

197 James Madison, Detached Memoranda (c. 1817), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 104-05 [hereinafter Madison, Detached Memoranda]. *Accord* Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 104, at 105 (stating that Madison disapproved of the action approving chaplains in 1789).

198 Madison, Detached Memoranda, *supra* note 197, at 105. **R**

199 DAVIS, *supra* note 130, at 223. **R**

200 Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring).

his religious proclamations and statements in inoffensive, generic terms, avoiding references to Jesus Christ, and frequently using deist terms for God.[201] His letters later in life reveal a sensitivity toward dissenting faiths and a commitment to religious equality.[202] However, the purposeful inclusiveness behind such actions is lost when historical practices are used to validate government preferences for particular belief systems, for which Justice Scalia advocated in *McCreary*.[203] In essence, the fact that many of the Founders likely viewed these practices as innocuous, considering their recent past (if they contemplated them at all), does not mean that they would have viewed these practices as being suited for the more religiously pluralistic twenty-first century.

The ambiguity that results from relying on earlier acts and practices as evidence of the Founders' intent is also demonstrated by the Northwest Land Ordinance of 1787, which was passed by the Confederation Congress and reaffirmed by the First Congress in 1791. Some people have argued that language contained in the third article of the Ordinance, stating that "[r]eligion, morality and knowledge [are] necessary to good government and the happiness of mankind,"[204] indicates that Congress believed that government relied on and was partially responsible for religion.[205] In *Wallace*, Justice Rehnquist opined that this language "confirm[s] the view that Congress did not mean that the Government should be neutral between religion and irreligion."[206] This language, however, must be read within the context of earlier versions of the Ordinance, particularly the failed 1785 proposal, which would have provided actual land grants "for the support of religion."[207] Despite the efforts of pro-establishment members from New England, Congress rejected both the public support of religion and language encouraging "institutions for the promotion of religion," finally settling on the ultimate phra-

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[201] *See, e.g.*, Boller, *supra* note 91, at 498. **R**

[202] *See id.* at 500-06.

[203] McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2754-55 (2005).

[204] The Northwest Ordinance (July 13, 1787), *reprinted in* SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION, 1764–1788, AND THE FORMATION OF THE FEDERAL CONSTITUTION 226, 231 (Samuel E. Morison ed., 2d ed. 1965).

[205] MALBIN, *supra* note 13, at 14-15. **R**

[206] Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting).

[207] *See* GAUSTAD, *supra* note 11, at 151-56; Smith, *supra* note 138, at 589-602. **R**

seology.[208] Although the final language was included to placate the traditionalists, it is also likely that the compromise language bothered few members, especially in light of the religious rhetoric common at that time.[209] Clearly, though, the rhetoric had its limits and Congress was unwilling to place any substance behind the language of the Ordinance.[210] Viewed in this context, the Northwest Ordinance is not an endorsement of religion that undermines the *Everson* interpretation; rather, it depicts the progression of separationist thought during the period away from the financial and symbolic support of religion.

CONCLUSION

The lure of history as a guide for constitutional adjudication is irresistible. History provides a powerful source of authority by offering an aura of continuity and objectivity, which in turn legitimizes legal arguments and judicial decisionmaking.[211] In a constitutional democracy that embraces popular sovereignty as the supreme authority, the understandings of those who drafted and ratified the Constitution clearly matter.[212] History also purportedly serves as an external constraint on judicial subjectivity by providing an independent and apolitical source of information.[213]

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[208] *See* Smith, *supra* note 138, at 596-97, 601. R

[209] *See* GAUSTAD, *supra* note 11, at 152-56. R

[210] *See* Smith, *supra* note 138, at 599, 601-02. James Madison saw the attempted land grant as being akin to a religious establishment. In a 1785 letter to James Monroe, Madison wrote that he was glad that R

> Cong[ress] had expunged a clause contained in the first for setting apart a district of land in each Township for supporting the Religion of the majority of inhabitants. How a regulation so unjust in itself, so foreign to the Authority of Cong[ress], so hurtful to the sale of public land, and smelling so strongly of antiquated Bigotry, could have received the countenance of a [committee] is truly [a] matter of astonishment.

Letter from James Madison to James Monroe (May 29, 1785), *in* 2 THE WRITINGS OF JAMES MADISON 1783–1787, at 143, 145 (Gaillard Hunt ed., 1901).

[211] HOWE, *supra* note 8, at 167-68. *See also* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 660 (1987) ("The exercise of antimajoritarian judicial review is legitimate only when it can be shown to rest not on judicial choice but on the preferences associated with an earlier (super-)majority through the ratification or amendment processes."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854, 862 (1989) (emphasizing that judicial review must be viewed as legitimate in a popular democracy). R

[212] *See* Scalia, *supra* note 211, at 854, 862 (arguing that originalism is "more compatible with the nature and purpose of a Constitution in a democratic system"). R

[213] Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 908 (1993). One of the few points upon which Justice Scalia and Erwin Chemerinsky apparently agree is that judges strive to pro-

Modern constitutional theory can thus be described, in the words of Larry Kramer, as "'Founding obsessed' in its use of history."[214] The Founding has become that incomparable and seminal event in American history, such that we treat it as "conclusive and sacred" and the Constitution's authors and ratifiers as "special and privileged" in their apparent understanding of its contents.[215]

> [W]e ask about these Foundings because what the Founders thought binds us today, or because we need to translate their assumptions and values to present circumstances, or in order to synthesize them with commitments made during other Foundings, the historical inquiry in constitutional interpretation is disproportionately devoted to understanding these discrete moments.[216]

Not only do we treat the Founding as sacred and unique, we tend to view it as a static and completed event. It is as if all human knowledge and wisdom came together for one brief, fifteen-year moment; as if long-developing notions of democracy, freedom, equality, and religious freedom reached their apex between 1775 and 1790 and ceased developing, particularly from the perspective of the Founders. The Founding, it seems, is that moment in time at which the Founders "bequeathed their values and deeds to the present."[217] Our job as judges and lawyers is merely to discover and then apply those settled understandings of church–state separation.

This Article argues that this view of the Founding period is wrong, and that the Founders understood that they lived in a dynamic period and expressed ideas and ideals that were yet to be achieved. Religious liberty and separation of church and state, concepts that had been percolating for many years, were tried out on a scale never before experienced. As the states experimented with different versions of separation, weighing those concepts against earlier and existing practices, attitudes developed. Because separation was an unfolding idea, no single document or practice accurately encapsulated the concept. For that very rea-

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duce decisions that appear to derive support from external sources as opposed to personal opinion. *Compare id.* at 908, *with* Scalia, *supra* note 211, at 862. **R**

[214] Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1628 (1997).

[215] *Id.* at 1627-28.

[216] *Id.* at 1628.

[217] CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 175 (1969).

son, none of the Founders would have been willing to restrict the concept to the situation existing at any particular time, including their own. They would have eschewed the modern tendency to cabin the idea of separation by referring to particular practices or states, particularly as a means to proof-text modern practices and actions.

This does not mean that history provides no guidance. Recurring and consistent statements that reflect broad principles or points of consensus can be instructive for modern application of the Religion Clauses. Those principles that emerge from state disestablishment and the debates surrounding ratification and the drafting of the Bill of Rights include concerns for rights of conscience, no-compelled support of religion, no-delegation of government authority to religious institutions, and equal treatment of all sects.[218] However, "our use of the history of their time must limit itself to broad principles, not specific practices."[219] By so doing, we can view church–state separation as the Founders viewed it: as a "spacious conception" and an unfolding idea.

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[218] These values are discussed in more detail in Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111 (2002).

[219] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 241 (1963) (Brennan, J., concurring).