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THE IMAGE AND THE REALITY:
THOMAS JEFFERSON AND THE FIRST AMENDMENT

DAVID BARTON*

Thomas Jefferson had a significant impact on America, American government, and American culture, and his influence continues today. His words help shape policies on everything from the scope and limits of the federal government to the growth and development of scientific inquiry. His most recognizable current role is as a singular authority on religion in the public square.

JEFFERSON AND THE SUPREME COURT

In 1947 in *Everson v. Board of Education*, the Supreme Court acknowledged Thomas Jefferson as an authority on the First Amendment's religion clauses:

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which . . . Jefferson played such [a] leading role[ ] . . . .

Having recognized Jefferson as an authority on religion in the Constitution, the Court announced the single Jefferson phrase (from among his more than sixty volumes of writings) that would become its canon for the First Amendment:

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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."\(^2\)

Using Jefferson's metaphor, the Court announced:

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.\(^3\)

Subsequent to \textit{Everson}, the Supreme Court constructed three additional religion tests it believed to be inconsequential variations on Jefferson's metaphor. Based on Jefferson's authority the government cannot establish religion (Establishment Test, 1947),\(^4\) or permit a religious activity unless its purpose is primarily secular and its implementation excludes the civil sector (Lemon Test, 1971).\(^5\) Additionally, if a government entity allows a public religious activity, that activity will be unconstitutional if it appears that the government is "endorsing" religion (Endorsement Test, 1984).\(^6\) Finally, if a single individual is uncomfortable in the presence of a public religious activity and is placed "in the dilemma of participating . . . or protesting,"\(^7\) then that religious activity is unconstitutional (Psychological Coercion Test, 1992).\(^8\)

Each test has been progressively more restrictive, resulting in a growing and permanent displacement of religion from the public square.

Since and including its 1947 \textit{Everson} pronouncement, the Court has rendered forty-four Establishment Clause decisions.\(^9\) Of those forty-four cases, Jefferson was cited authoritatively in sixteen cases\(^10\) with his "wall of separation between Church and

\(^2\) Id. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

\(^3\) Id. at 18.

\(^4\) See generally id.


\(^8\) Id. at 638 (Scalia, J., dissenting).

\(^9\) These are cases brought before the Court under, or decided on the basis of, the Establishment Clause.

State" metaphor (or some slight modification thereof) cited in an additional eight cases. Of the remaining twenty cases, all of them relied on a case in which Jefferson had been invoked as a primary authority in reaching the decision. There was no Establishment Clause decision which did not refer to Jefferson, his metaphor, or a case relying on him. Therefore, Jefferson was invoked as an authority, either directly or indirectly, in one hundred percent of Establishment Clause cases.


13. While the forty-four cases noted above were brought under or decided on the basis of the Establishment Clause, there are a number of other cases not brought before the Court on that basis but which nevertheless contain a lengthy exegesis on the Establishment Clause. In virtually every one of these additional cases, the Court follows its pattern of invoking Jefferson, his metaphor, or a previous case in which Jefferson had been a primary authority. Therefore, even if these cases were added to the forty-four listed above, the one-hundred percent rate would essentially remain unchanged. Other cases with a discussion of the Establishment Clause include:

Not surprisingly, federal courts of appeals have followed the Supreme Court's use of Jefferson, citing him authoritatively or invoking his metaphor in dozens of cases in the past half century. Additionally, there are scores of similar citations by federal district courts. Because of the "selective incorporation" of the Bill of Rights into the Fourteenth Amendment, even State courts rely heavily on Jefferson.

Consequently, courts have assembled a tight package of now predictable Jefferson quotes and activities on which they rely to sanction policy decisions made in his name. Yet there are vast numbers of Jefferson quotes and actions which, should they be considered seriously by the Court, would cause at least a serious reassessment of its landmark Establishment Clause rulings and quite probably a dramatic reversal.

14. A search revealed a minimum of forty cases, representing all federal circuits. See, e.g., ACLU v. Capitol Square Review, 243 F.3d 289, 295–96 (6th Cir. 2001); Chandler v. James, 180 F.3d 1254, 1259 (11th Cir. 1999); Strout v. Albanese, 178 F.3d 57, 61, 64 (1st Cir. 1999); Helms v. Picard, 151 F.3d 347, 363, 375 (5th Cir. 1998); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1481 (3d Cir. 1996); Cammack v. Waihee, 944 F.2d 466, 472 (9th Cir. 1991) (Pregerson, J., dissenting); Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 124 (7th Cir. 1987); Donovan v. Tony and Susan Alamo Found., 722 F.2d 397, 402 (8th Cir. 1983); Lanner v. Wimmer, 662 F.2d 1349, 1351–53 (10th Cir. 1981); Brandon v. Bd. of Educ., 635 F.2d 971, 973–74 (2d Cir. 1980); United States v. Snider, 502 F.2d 645, 664 (4th Cir. 1974) (Widener, J., dissenting).


This is not to imply that Jefferson was a fervent religionist; he was not. Neither does it follow, however, that he was an ardent secularist. Jefferson's religious views and activities are documented at length; his writings on religion are prolific and at times even self-contradictory. In fact, his statements about religion are such that opposing positions can each invoke Jefferson as its authority.

Regardless of one's personal predilections about Jefferson and religion, there are significant but little known historical facts from his written words and documented actions on religion in the public square. History will show that most if not all of Jefferson's actions abysmally fail each of the four religious tests the contemporary Court has erected in his name.

JEFFERSON'S PRESIDENTIAL ACTIONS REGARDING RELIGIOUS EXPRESSION

In 1800, when Washington, D.C., became the national capital and the President moved into the White House and Congress into the Capitol, Congress approved the use of the Capitol building as a church building for Christian worship services. It was in this most recognizable of all government buildings—the Capitol—that President Jefferson attended church each Sunday. President Jefferson even sanctioned paid government musicians assisting in the worship at those church services. He also effected similar Christian worship services on Sunday in his own Executive Branch, both at the Treasury Building and at the War Office.

John Quincy Adams, a U.S. Senator during the Jefferson administration, made frequent references to these services. Typical of his almost weekly journal entries are these:

[R]eligious service is usually performed on Sundays at the Treasury office and at the Capitol. I went both forenoon and afternoon to the Treasury . . . .

Attended public service at the Capitol, where Mr. Ratoon, an Episcopalian clergyman from Baltimore, preached a sermon.

17. 10 Annals of Cong. 797 (1800).
18. The First Forty Years of Washington Society 13 (Gaillard Hunt ed., 1906); see also James Hutson, Religion and the Founding of the American Republic 84 (1998).
19. Hutson, supra note 18, at 89.
20. Id. at 89; see also 1 John Quincy Adams, Memoirs of John Quincy Adams 265 (Charles Francis Adams ed., Phila., J.B. Lippincott & Co. 1874).
21. Id. at 268 (Oct. 30, 1803).
The Rev. Manasseh Cutler, a U.S. Congressman during the Jefferson administration (as well as a chaplain in the Revolution and a physician and scientist) similarly recorded in 1804:

*December 23, Sunday.* Attended worship at the Treasury. Mr. [James] Laurie [pastor of the Presbyterian Church] alone [preached]. Sacrament [communion]. Full assembly. Three tables; service very solemn; nearly four hours. Cold day.\(^{23}\)

By 1867, the church in the Capitol had become the largest church in Washington, and the largest Protestant church in America.\(^{24}\)

These activities in federal buildings that Jefferson encouraged and in which he participated would fail all four of the tests erected by the Court under his authority.

In 1801, President Jefferson urged local governments to make land available specifically for Christian purposes\(^{25}\)—a clear violation of the *Lemon*, Establishment, and Endorsement tests.

In an 1803 federal Indian treaty, President Jefferson provided $300 to “assist the said Kaskaskia tribe in the erection of a church” and to provide “annually for seven years $100 towards the support of a Catholic priest.”\(^{26}\) He also signed three separate acts setting aside government lands for the sole use of religious groups so that Moravian missionaries might be assisted in “promoting Christianity”\(^{27}\)—a clear violation of all four of the Court’s tests.

In 1804, President Jefferson assured a Christian religious school in the newly purchased Louisiana Territory that it would

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23. 2 *WILLIAM PARKER CUTLER & JULIA PERKINS CUTLER, LIFE, JOURNALS, AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D.* 174 (Cincinnati, Robert Clarke & Co. 1888).

24.  *HUTSON, supra* note 18, at 91.


27.  11 *ANNALS OF CONG.* 1,332 (1802) (“An Act in addition to an act, entitled ‘An act in addition to an act regulating the grants of land appropriated for military services, and for the Society of the United Brethren for propagating the Gospel among the Heathen’”); 12 *ANNALS OF CONG.* 1,602 (1803) (“An Act to revive and continue in force an act, in addition to an act, Entitled ‘An act in addition to an act regulating the grants of land appropriated to military services, and for the Society of the United Brethren for propagating the Gospel among the Heathen,’ and for other purposes.”); 12 *ANNALS OF CONG.* 1,279 (1804) (“An Act Granting Further Time for Locating Military Land Warrants, and for Other Purposes”).
receive "the patronage of the government," he even closed presidential documents with the appellation, "In the year of our Lord Christ" (see inset).

Why would President Jefferson be so overtly encouraging of Christianity? As he explained to a friend while walking to church together:

No nation has ever existed or been governed without religion. Nor can be. The Christian religion is the best religion that has been given to man and I, as Chief Magistrate of this nation, am bound to give it the sanction of my example.30

Significantly, Jefferson's own actions as President miserably fail every religious test contemporary courts have erected in his name, demonstrating that Jefferson would not sanction those tests.

JEFFERSON'S REFUSAL TO ISSUE NATIONAL PRAYER PROCLAMATIONS

One action cited to counteract such overwhelming evidence is President Jefferson's refusal to proclaim national days of prayer. As Justices Brennan and Marshall noted in Marsh v. Chambers:

Thomas Jefferson . . . during [his] respective [term] as President, . . . refused on Establishment Clause grounds to declare national days of thanksgiving or fasting.31

Justice Kennedy similarly noted in Allegheny v. ACLU:

29. See, for example, his Presidential Act of October 18, 1804 (on file with author).
In keeping with his strict views of the degree of separation mandated by the Establishment Clause, Thomas Jefferson declined to follow this tradition [of issuing national proclamations].

Yet Jefferson stated that he refused to issue such proclamations not because of scruples about religion in the public square but rather because of separation of powers:

It is only proposed that I should recommend not prescribe a day of fasting and prayer. . . . I am aware that the practice of my predecessors may be quoted. But I have ever believed, that the example of state executives led to the assumption of that authority by the General [federal] Government, without due examination, which would have discovered that what might be a right in a state government, was a violation of that right when assumed by another.


33. Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), in 4 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 104 (Thomas Jefferson Randolph ed., Boston, Gray & Bowen 1830) [hereinafter MEMOIR OF THOMAS JEFFERSON]. Although Jefferson refused to issue national proclamations, he openly acknowledged that in this he differed from his predecessors (and his successors as well). If Jefferson's standard is the correct one, then were George Washington and John Adams acting unconstitutionally in issuing their proclamations? Significantly, if Jefferson's constitutional credentials are compared with those of either Washington or Adams, Jefferson's are clearly inferior. Jefferson had no hand in the Constitution, and according to his own account wrote only a single letter expressing his belief that a Bill of Rights should be added to the Constitution. However, George Washington was the President of the Constitutional Convention and John Adams' signature is one of only two that appears on the Bill of Rights. Therefore, if there is a disagreement as to constitutional interpretation, on what basis do Jefferson's credentials surpass those of his predecessors? And while Jefferson's refusal to issue national prayer proclamations is cited authoritatively, ignored is the fact that Jefferson's successor, James Madison, issued more national prayer proclamations than any other President until George W. Bush. However, rather than mention Madison's practices, courts instead cite Madison's Detached Memoranda in which he denounces such proclamations and his own practices. See, e.g., Lee v. Weisman, 505 U.S. 577, 617 (1992) (Souter, J., concurring); Marsh, 463 U.S. at 791 n.12; ACLU v. Capitol Square Review, 243 F.3d 289, 296, 318 (6th Cir. 2001); O'Malley v. Brierley, 477 F.2d 785, 792–93 (3d Cir. 1973). Significantly, the Detached Memoranda was only "discovered" in 1946 in the papers of Madison biographer William Cabell Rives and was first published more than a century after Madison's death by Elizabeth Fleet. Elizabeth Fleet, Madison's "Detached Memoranda", 3 WM. & MARY Q. (n.s.) 534 (1946). In that work, Madison expressed his opposition to many of his own earlier beliefs and practices and set forth a new set of beliefs formerly unknown even to his closest friends. Since Madison never made public or shared with his peers his sentiments found in the Detached Memoranda, and since his own public actions were
Separation of powers is generally understood in its horizontal application (between the three branches of the federal government, or between the three branches of a State government) rather than in its vertical usage (between the federal government and the State governments). Jefferson understood its vertical usage and declared his belief that the Tenth Amendment caused national prayer proclamations to be improper:

I consider the government of the United States as interdicted by the constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise of religion, but from that also which reserves to the states the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in any religious discipline, has been delegated to the General Government. It must then rest with the States...34

Jefferson therefore warned:

[W]hen all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the centre of all power, it will render powerless the checks provided of one government on another...35

Jefferson believed that the vertical separation of powers between the State and federal governments was the least understood aspect of our system:

With respect to our State and federal governments, I do not think their relations correctly understood by foreigners. They generally suppose the former subordinate to the latter. But this is not the case. They are co-ordinate departments of one simple and integral whole. To the State governments are reserved all legislation and administration, in affairs which concern their own citizens only, and to the federal government is given whatever concerns foreigners, or the citizens of other States; these functions alone being

at direct variance with this later writing, it is difficult to argue that it reflects the Founders' (plural) intent toward religion. For courts to use that writing as authoritative is a flagrant abuse of historical records, choosing a long unknown *ex post facto* document in preference to those concurrent with the framing and implementation of the First Amendment.

34. *Memoir of Thomas Jefferson*, supra note 33, at 103–04 (emphasis added).

made federal. The one is the domestic, the other the foreign branch of the same government; neither having control over the other, but within its own department.36

Thus, it was Jefferson's understanding of federalism and separation of powers that was largely behind his refusal to issue a national prayer proclamation. Confirmation is provided by the fact that although he refused to issue such a call as President, he did so as a State Governor;37 and he also authored the State law entitled "A bill, for appointing days of public fasting and thanksgiving."38 Consequently, the charge that "Thomas Jefferson . . . refused on Establishment Clause grounds to declare national days of thanksgiving or fasting"39 is fallacious.

It is in light of Jefferson's understanding of separation of powers that his other actions in directly promoting and aiding Christianity may best be understood. President Jefferson enacted federal treaties that directly funded Christian missionaries and Christian church buildings for Indians, but the Constitution had placed treaties solely within the power of the federal government and out of State jurisdiction. President Jefferson attended, supported, and helped establish Christian worship services in federal government buildings, therefore not intruding on any of the States' powers. Similarly, he told religious schools in federal territories that they would receive the support and patronage of the federal government, thus violating no State powers. And he signed his own federal presidential documents with the appellation "In the year of our Lord Christ," thus usurping no State prerogatives.

Significantly, all of President Jefferson's religious activities at the federal level occurred more than a decade after the First Amendment had been adopted, thus demonstrating that he saw no violation of the First Amendment in any of his actions. In fact, no one did; not even his enemies raised a voice of dissent against his federal religious practices. Furthermore, since what Jefferson did under the First Amendment was permissible at the

36. Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), in 16 THE WRITINGS OF THOMAS JEFFERSON, supra note 35, at 47.
37. 2 OFFICIAL LETTERS OF THE GOVERNORS OF THE STATE OF VIRGINIA, The Letters of Thomas Jefferson 64–66 (H.R. McIlwaine ed., 1928) (Nov. 11, 1779); see also 1 THE WRITINGS OF THOMAS JEFFERSON, supra note 35, at 9–10 (Jefferson's encouragement of a day of fasting and prayer for June 1, 1774, when the British blockaded Boston).
38. 8 THE PAPERS OF JAMES MADISON 396 (Robert A. Rutland et al. eds., 1973).
federal level, then when the Court applied the First Amendment limitations against the States through the Fourteenth Amendment, corresponding activities at the State level would have remained permissible even under that Amendment.

JEFFERSON'S NON-PRESIDENTIAL ACTIONS REGARDING RELIGIOUS EXPRESSION

In addition to Jefferson’s call for a statewide day of prayer as Governor of Virginia he also praised the use of the Charlottesville courthouse for religious services. As a State Legislator he authored and introduced a number of bills with solely religious content, giving legal sanction to specific religious observances.

As a Virginia delegate to the Continental Congress, Jefferson was placed on a congressional committee to draft a governmental seal; he recommended that the seal depict a story from the Bible and that the new government motto include the word “God.”

Additionally, when Thomas Jefferson authored his plan of education, he considered religious study an inseparable part of the study of law and political science:

[I]n my catalogue, considering ethics, as well as religion, as supplements to law in the government of man, I had placed them in that sequence.

When Jefferson founded the University of Virginia, he designated space in its Rotunda for chapel services and indicated that he expected students to attend weekly divine services. He further declared his expectation that students participate in the various religious schools that he had invited to locate adjacent to and upon the University property.

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41. See supra note 37 and accompanying text.
42. Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), in 4 Memoir of Thomas Jefferson, supra note 33, at 358-59; letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), in 15 The Writings of Thomas Jefferson, supra note 35, at 404.
43. 8 The Papers of James Madison, supra note 38, at 396.
46. 19 The Writings of Thomas Jefferson, supra note 35, at 449–50 (“a meeting of the Visitors of the University . . . on Monday the 4th of October, 1824 . . . ”).
47. Id. at 449.
48. Id. at 449–50.
Mr. Jefferson, as one of the founders of the University of Virginia, a school which from its establishment in 1819 has been wholly governed, managed and controlled by the State of Virginia was faced with the same problem that is before this Court today: the question of the constitution limitation upon religious education in public schools. In his annual report as Rector, to the President and Directors of the Literary Fund, dated October 7, 1822, approved by the Visitors of the University of whom Mr. Madison was one, Mr. Jefferson set forth his views at some length. These suggestions of Mr. Jefferson were adopted and ch. II, § 1, of the Regulations of the University of October 4, 1824, provided that:

"Should the religious sects of this State, or any of them, according to the invitation held out to them establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour."

Thus the "wall of separation between church and state" that Mr. Jefferson built at the University which he founded did not exclude religious education from that school.49

Unfortunately much of the historical record of Thomas Jefferson has been excluded from the public debate and therefore a false impression of Jefferson and his intent has been constructed. Neither at the State nor the federal level does Jefferson demonstrate any proclivity toward the obsessive secularization for which courts have used him.

THE SUPREME COURT'S MISPORTRAYAL OF JEFFERSON HISTORY

Because of the importance of history in constitutional interpretation, historical accuracy is essential. As Chief Justice Rehnquist has noted:

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history . . . .50

A flawed view of history will lead to errant conclusions about the intent of a clause and therefore an improper application of its constitutional principles. In short, in constitutional interpretation, bad history leads to bad public policy.

In its landmark religion cases, the Court has utilized demonstrably egregious historical errors about Jefferson in reaching its decisions—errors not in interpretation but in fact. Once the Court makes an inaccurate portrayal of Jefferson history, that erroneous representation is often cited authoritatively in subsequent cases, thus perpetrating and reinforcing the error. Nine categories of the Court’s factual errors will be presented below.

1. The Wrong Clause

In the landmark Everson case in 1947, the Court introduced what has become one of its most frequently repeated passages:

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."51

This same Everson-citing-Reynolds passage has also been used in McCollum v. Board of Education,52 McGowan v. Maryland,53 Torcaso v. Watkins,54 Board of Education v. Allen,55 Marsh v. Chambers,56 and Lee v. Weisman.57

It is understandable that the Everson Court should cite the 1879 Reynolds case, for it was the only Supreme Court case prior to Everson to invoke Jefferson’s “wall of separation” metaphor. However, Reynolds—contrary to the Court’s assertion—used Jefferson’s “wall of separation” in reference to the Free Exercise rather than the Establishment Clause, thus pointing it toward a completely different purpose. A review of the circumstances surrounding Jefferson’s writing of his “wall of separation” phrase, as well the Court’s pre-Everson use of that metaphor, is essential to understanding how modern courts have inverted Jefferson’s intention.

The election of President Jefferson—America’s first Anti-Federalist (Republican) President—was particularly well received by Baptists since that denomination was largely Anti-Federalist.

52. 333 U.S. at 211.
55. 392 U.S. 236, 251 (1968) (Black, J., dissenting).
This political disposition was understandable, for from the early settlement of Rhode Island in the 1630s to the time of the federal Constitution in the 1780s, the Baptists had often found their free exercise suffering from the centralization of power, with their ministers being beaten, imprisoned, and tyrannized. So opposed were the Baptists to the centralization of power that it was the only denomination where a majority of its clergy across the nation voted against the ratification of the Constitution, and the predominately Baptist State of Rhode Island overwhelmingly rejected its adoption.

The election of Jefferson elated Baptists across the nation, for Jefferson had long championed the cause of Virginia Baptists and opposed the centralized power of the State-established Anglican Church in his State. Jefferson received numerous letters of praise from Baptist organizations throughout his Presidency, and among the first of them was that from the Danbury Baptist Association penned on October 7, 1801. Typical of the


59. See, e.g., John Eidsmo, Christianity and the Constitution 353 (1987) (Of all the clergy who attended the various state ratifying conventions for the federal Constitution, the only denomination from which the majority of its representatives voted against the ratification of the Constitution was the Baptists). Eidsmo compiled the figures from James Hutchinson Smylie, American Clergyman and the Constitution of the United States of America (1954) (unpublished Ph.D. dissertation, Princeton Theological Seminary).

60. Robert Allen Rutland, The Birth of the Bill of Rights 155 (1955) (“The Rhode Island legislature had sent the Constitution to the towns instead of calling a convention. In the town meetings the Constitution had been defeated, 237 yeas to 2,708 nays.”).


others, it expressed its gratitude to God for his election and offered its prayers of blessing for the President:

Among the many millions in America and Europe who rejoice in your election to office, we embrace the first opportunity . . . to express our great satisfaction in your appointment to the Chief Magistracy in the United States. . . . [W]e have reason to believe that America's God has raised you up to fill the Chair of State out of that goodwill which he bears to the millions which you preside over. May God strengthen you for the arduous task which Providence and the voice of the people have called you. . . . And may the Lord preserve you safe from every evil and bring you at last to his Heavenly Kingdom through Jesus Christ our Glorious Mediator.63

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The complete letter to Jefferson states:

The address of the Danbury Baptist Association in the State of Connecticut, assembled October 7, 1801.

To Thomas Jefferson, Esq., President of the United States of America

Sir,

Among the many millions in America and Europe who rejoice in your election to office, we embrace the first opportunity which we have enjoyed in our collective capacity, since your inauguration, to express our great satisfaction in your appointment to the Chief Magistracy in the United States. And though the mode of expression may be less courtly and pompous than what many others clothe their addresses with, we beg you, sir, to believe that none is more sincere.

Our sentiments are uniformly on the side of religious liberty: that religion is at all times and places a matter between God and individuals, that no man ought to suffer in name, person, or effects on account of his religious opinions, that the legitimate power of civil government extends no further than to punish the man who works ill to his neighbor. But sir, our constitution of government is not specific. Our ancient charter, together with the laws made coincident therewith, were adapted as the basis of our government at the time of our revolution. And such has been our laws and usages, and such still are, that Religion is considered as the first object of Legislation, and therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted, and not as inalienable rights. And these favors we receive at the expense of such degrading acknowledgments, as are inconsistent with the rights of freemen. It is not to be wondered at therefore, if those who seek after power and gain, under the pretense of government and religion, should reproach their fellow men, should reproach their Chief Magistrate, as an enemy of religion, law, and good order, because he will not, dares not, assume the prerogative of Jehovah and make laws to govern the Kingdom of Christ.

Sir, we are sensible that the President of the United States is not the National Legislator and also sensible that the national government
However, within that letter of congratulations, the Danbury Baptists expressed their grave concern over the threats they believed were posed against free exercise by constitutional religion clauses:

Our sentiments are uniformly on the side of religious liberty: that religion is at all times and places a matter between God and individuals, that no man ought to suffer in name, person, or effects on account of his religious opinions, that the legitimate power of civil government extends no further than to punish the man who works ill to his neighbor. But sir, our constitution of government is not specific. . . . Religion is considered as the first object of legislation, and therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted, and not as inalienable rights.\textsuperscript{64}

Such constitutional acknowledgments about religion intimated to the Danbury Baptists that free-exercise was a government-given (thus an alienable) rather than a God-given (hence inalienable) right and to this they strenuously objected. They believed that government should interfere with public religious expression only when someone’s religious practices caused him, as they explained, to “work ill to his neighbor.”\textsuperscript{65}

Jefferson understood their concern; it was his own. He had frequently emphasized the inability of the government to regulate, restrict, or interfere with the free-exercise of religion:

\begin{quote}
cannot destroy the laws of each State, but our hopes are strong that the sentiment of our beloved President, which have had such genial effect already, like the radiant beams of the sun, will shine and prevail through all these States—and all the world—until hierarchy and tyranny be destroyed from the earth. Sir, when we reflect on your past services, and see a glow of philanthropy and goodwill shining forth in a course of more than thirty years, we have reason to believe that America’s God has raised you up to fill the Chair of State out of that goodwill which he bears to the millions which you preside over. May God strengthen you for the arduous task which providence and the voice of the people have called you—to sustain and support you and your Administration against all the predetermined opposition of those who wish to rise to wealth and importance on the poverty and subjection of the people.

And may the Lord preserve you safe from every evil and bring you at last to his Heavenly Kingdom through Jesus Christ our Glorious Mediator.

Signed in behalf of the Association,
Neh.}h Dodge, Eph’m Robbins, The Committee, Stephen S. Nelson.
\end{quote}

\textsuperscript{64} \textsuperscript{ld.}

\textsuperscript{65} \textsuperscript{ld.}
No power over the freedom of religion... is delegated to the United States by the Constitution...

Our excellent Constitution... has not placed our religious rights under the power of any public functionary.

I consider the government of the United States as interdicted [prohibited] by the constitution from meddling with religious institutions... or exercises.

In matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of the General [federal] Government.

Since Jefferson believed that the government was to be powerless to interfere with religious expressions (i.e., the Free Exercise Clause), in his reply to the Danbury Baptists on January 1, 1802, he assured them that the federal government would never meddle with the free exercise of religion:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

66. 8 The Works of Thomas Jefferson, supra note 61, at 459 (Kentucky Resolutions).


69. 14 Annals of Cong. 78 (1805); see also 1 James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789-1897, at 379 (D.C., James D. Richardson ed., 1899) (Mar. 4, 1805).

70. Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), in 16 The Writings of Thomas Jefferson, supra note 35, at 281-82.

The complete letter from Jefferson reads:
Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson
Jefferson’s reference to “natural rights” confirmed his belief that religious liberties were inalienable rights, for according to the rhetoric of that day, “natural rights” were those rights that God Himself had guaranteed to man—a definition confirmed by Founding Fathers James Wilson, John Adams, John Dickinson, George Mason, John Quincy Adams, and others. Therefore, when Jefferson assured the Baptists that by following their “natural rights” they would violate no social duty, Jefferson was affirming to them that the free exercise of religion was indeed an inalienable God-given right and therefore beyond federal intrusion. Consequently it was not surprising that when the

Washington, January 1, 1802
Gentlemen,—
The affectionate sentiment of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing. Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature would “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties. I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem.

71. See, e.g., definitions by individuals such as Richard Hooker, a political philosopher on whom the Founders relied, in 1 Richard Hooker (1553-1603), The Works of Richard Hooker 207 (1845).
74. 1 The Political Writings of John Dickinson, Esquire, Late President of the State of Delaware, and of the Commonwealth of Pennsylvania 111-12 (1801).
75. 1 Kate Mason Rowland, The Life of George Mason 244 (N.Y., G.P. Putnam’s Sons 1892).
Supreme Court first invoked Jefferson’s 1802 letter in the *Reynolds v. United States* case in 1879, it was in relation to the Free Exercise Clause.

The *Reynolds* case dealt with the Mormon practice of polygamy in the federal territories, a practice prohibited by federal law. To rebut any use by the Mormons of Jefferson’s letter to defend their “free exercise” from government intrusion, the Court published his full letter to establish its context and his meaning (unlike contemporary courts that now publish only eight words from his letter — “a wall of separation between Church and State”). After noting Jefferson’s narrow exceptions to the general prohibition against federal intrusion on free exercise, the Court concluded:

Coming as this does from an acknowledged leader of the advocates of the measure, it [Jefferson’s letter] may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere [religious] opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.\(^{77}\)

That Court then quoted from Jefferson’s Virginia Statute to establish further his intent:

‘[T]he rightful purposes of civil government [are] for its officers to interfere when principles break out into overt acts against peace and good order.’ In this . . . is found the true distinction between what properly belongs to the church and what to the state.\(^{78}\)

With this even the Danbury Baptists had agreed; for while declaring that the government should be prohibited from interfering with or limiting religious activities, they also had agreed that it was a legitimate function of government “to punish the man who works ill to his neighbor.”\(^{79}\) Jefferson had already declared this as his position twenty years before the Danbury letter:

The legitimate powers of government extend to such acts only as are injurious to others.\(^{80}\)

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78. *Id.* at 163 (quoting 12 *Hening’s Stat.* 84).
The Reynolds Court, therefore, and others (for example, Commonwealth v. Nesbit\(^81\) and Lindenmuller v. People\(^82\)), identified actions into which—if perpetrated in the name of religion—the government did have legitimate reason to intrude. Those activities included human sacrifice, polygamy, bigamy, concubinage, incest, infanticide, parricide, advocacy and promotion of immorality, etc. Such acts, even if perpetrated in the name of religion, would be stopped by the government since they were “subversive of good order” and were “overt acts against peace and good order.” However, agreeing with Jefferson, the Reynolds Court acknowledged that the government would never interfere with traditional or non-subversive religious practices.

Therefore, the modern Court is wrong: Reynolds’ use of Jefferson’s phrase did not summarize the intent of the Establishment Clause; it summarized the intent of the Free Exercise Clause—as Jefferson had intended. Imagine the results if Jefferson’s metaphor were used as originally applied: virtually every one of the Court’s Establishment Clause decisions of recent years would be reversed because the “wall” would prohibit the government from interfering with the “free exercise of religion” at graduations, in athletic events, city seals, courthouse displays, etc. That is, since a prayer at a football game is neither subversive nor an overt act against the peace and safety of the state, it is therefore an act protected by, not prohibited by, Jefferson’s wall of separation. Nevertheless, the Court now cites Jefferson in Establishment Clause cases and virtually ignores him in Free Exercise cases—a complete reversal both of Jefferson’s intent and of the Court’s original usage of him.

2. The Wrong Model

The Court regularly invokes Virginia, particularly the 1786 Virginia Statute for Religious Freedom, as its historical model for interpreting the First Amendment. For example, in Everson the Court declared:

This Court has previously recognized that the provisions of the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute.\(^83\)

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81. 34 Pa. 398 (1859).
82. 33 Barb. 548 (N.Y. Gen. Term 1861).
The assertion is that the Virginia Statute was the prototype for the First Amendment and that the Court "previously recognized" this prototype in *Reynolds*, *Watson*, and *Davis*. This claim is spurious.

Contrary to the Court's assertion, on no occasion in *Davis v. Beason* did the Court ever mention the Virginia Statute. However, the Mormon plaintiffs used the Virginia Statute to argue that the government should not interfere with their polygamy. The Court rejected that argument and instead pointed to the fact—as it had previously done in *Reynolds*—that in 1788, two years after the Virginia Statute, Virginia established the death penalty for polygamy. The Court's rejection of the appellants' arguments using the Virginia Statute was absolute:

> Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world . . . , must be suspended in order that the tenets of a religious sect . . . may be carried out without hindrance.  

Thus, *Davis v. Beason* did not "recognize" that the Virginia Statute had any relation to the First Amendment; and the Court rejected the appellants' arguments invoking the Virginia Statute on the basis of "the general consent of the Christian world" and "the laws of . . . Christian countries."  

The *Everson* Court was also wrong in citing *Watson v. Jones*; not once in that case was the Virginia Statute—or even Virginia—even mentioned.

In the third case cited by *Everson*, the Court quoted from the Virginia Statute to establish that polygamy was one of the few actions permitting the government to interfere with a religious expression.

In short, not one of the three cases cited by the *Everson* Court provided any "recognition" of the First Amendment as a corollary to the Virginia Statute. Nevertheless, the Court now believes the Virginia Statute to be the basis of and the standard for religious liberty in America. For example, in *Engel v. Vitale*, the Court declared:

> In 1785–1786, those opposed to the established Church, led by James Madison and Thomas Jefferson . . . opposed all religious establishments by law on grounds of principle

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84. *Davis*, 133 U.S. at 343.
85. *Id.*
86. *Id.* at 341.
[and] obtained the enactment of the famous "Virginia Bill for Religious Liberty."\(^8\)

In *McDaniel v. Paty*, the Court again declared:
The struggle for separation of church and state in Virginia . . . influenced developments in other States . . . . \(^8^9\)

And in *McGowan v. Maryland*, Justices Frankfurter and Harlan similarly declared:
This Court has considered the happenings surrounding the Virginia General Assembly's enactment of "An act for establishing religious freedom," written by Thomas Jefferson and sponsored by James Madison, as best reflecting the long and intensive struggle for religious freedom in America, as particularly relevant in the search for the First Amendment's meaning.\(^9^0\)

What was the history of the Virginia Statute, and what effect did it have on religious liberty in America? Was it truly the American model?

In Virginia, the Church of England (the Anglican Church) was the only legally recognized denomination even though the members of other denominations (Baptists, Presbyterians, Quakers, etc.) were more numerous. To redress this inequity, in 1779 Jefferson authored the Virginia Statute to disestablish the Anglican Church and place all denominations on an equal footing; however, Jefferson was unable to obtain passage of the Statute and before he could do so, a congressional appointment called him overseas to represent American interests during the Revolution. In his absence, James Madison championed the bill and led the fight for its passage, finally achieving disestablishment in 1785.

The Court believes that what Madison and Jefferson did with this celebrated Statute was the norm for the entire nation. It was not. Much of what Madison and Jefferson fought for and eventually accomplished in Virginia had already occurred in many other States well prior to the Virginia Statute.

For example, a decade earlier in 1776, North Carolina had enacted a disestablishment constitutional clause declaring:
There shall be no establishment of any one religious church or denomination in this state in preference to any other, neither shall any person, on any pretence whatsoever, be compelled to attend any place or worship contrary

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to his own faith or judgment, nor be obliged to pay for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry contrary to what he believes right, or has voluntarily and personally engaged to perform; but all persons shall be at liberty to exercise their own mode of worship.\(^9\)

New Jersey had enacted disestablishment in its constitution the same year.\(^9\) The next year, 1777, the New York Constitution disestablished:

Whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind; this convention doth further, in the name and by the authority of the good people of this state, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state to all mankind.\(^9\)

Vermont also disestablished in 1777.\(^9\) Delaware gave equal denominational protection\(^9\) well before Virginia; and Pennsylvania\(^9\) and Georgia\(^9\) had also established religious liberty prior to the Virginia Statute. Furthermore, as early as 1773, Samuel Chase and William Paca (signers of the Declaration) led

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91. The Constitutions of the Several Independent States of America; The Declaration of Independence; The Articles of Confederation Between the Said States; The Treaties Between His Most Christian Majesty and the United States of America—And the Treaties Between Their High Mightinesses the States General of the United Netherlands and the United States of America, 138 (Boston, Norman & Bowen 1785) [hereinafter The Constitutions of the Several Independent States of America] (North Carolina 1776, § 34).

92. Id. at 73–74 (N.J. Const. of 1776, § 19).

93. Id. at 67 (N.Y. Const. of 1777, § 38).


95. The Constitutions of the Several Independent States of America, supra note 91, at 91 (Del Const. of 1776, Declaration of Rights, § 2).

96. Id. at 77 (Pa. Const. of 1776, Declaration of Rights, § 2).

97. Id. at 166 (Ga. Const. of 1777, § 56).
Maryland's fight to end the system of State-ordered tithes, something Jefferson and Madison did not attempt in Virginia until years later.

Further confirmation that Virginia did not lead the nation was provided at the Constitutional Convention. The other delegates rejected the Virginia plan in preference for the Connecticut plan and voted down forty of Madison's seventy-one proposals (sixty percent).

Despite what the Court claims, Virginia was not the model for the nation, and the Virginia Statute was not the sole source of religious liberty in America; many other States made substantial progress prior to that in Virginia. If the Court insists on having a State model by which to interpret the federal Constitution's religion clauses, perhaps it should look instead to Pennsylvania, Delaware, New York, Maryland, or a State that made progress well before Virginia.

3. The Wrong Expert

The Court regularly invokes Thomas Jefferson as one of its two historical authorities capable of establishing original intent. As the Court explained in *Everson*:

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles . . . .

(Similar recognitions are found in other cases, including the declaration that Jefferson and Madison were "the architects of the First Amendment.")

Although contemporary courts adjudge Jefferson an authority on the Constitution's First Amendment, Jefferson asserted that he was an authority on neither the Constitution nor the Bill of Rights. In fact, when a Jefferson supporter declared in a written work that Jefferson was a leading constitutional authority, Jefferson instructed him to correct that error:

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98. 1 JOHN V.L. McMAHON, AN HISTORICAL VIEW OF THE GOVERNMENT OF MARYLAND FROM ITS COLONIZATION TO THE PRESENT DAY 380-400 (Balt., F. LUCAS JR., Cushing & Sons, and William & Joseph Neal 1831).


102. Sch. Dist. of Abington, 374 U.S. at 234-35.
One passage, in the paper you enclosed me, must be corrected. It is the following, "and all say it was yourself more than any other individual, that planned and established it," i.e., the Constitution. I was in Europe when the Constitution was planned, and never saw it till after it was established.\textsuperscript{103}

Since Jefferson did not participate in framing the Constitution and was not even in America when it was framed, he properly acknowledged that he could not be considered an authority. Furthermore, Jefferson had only a minimal influence on the Bill of Rights:

On receiving it [the Constitution while in France] I wrote strongly to Mr. Madison urging the want of provision for the freedom of religion, freedom of the press, trial by jury, habeas corpus, the substitution of militia for a standing army, and an express reservation to the States of all rights not specifically granted to the Union. . . . This is all the hand I had in what related to the Constitution.\textsuperscript{104}

In short, Jefferson arrived back in America two years after the Constitution was written and signed and almost two months after the language of the First Amendment had been completed.

Significantly, there were fifty-five individuals directly involved in framing the Constitution at the Constitutional Convention and an additional ninety in the first federal Congress that framed the First Amendment and Bill of Rights. Allowing for the overlap of nineteen individuals who were both at the Constitutional Convention and a part of the first Congress,\textsuperscript{105} there were one hundred and twenty-six individual participants in the framing of the Constitution and the Bill of Rights. Jefferson was not one of either group, yet today he is cited as if he single-handedly authored those documents. (Additional authorities capable of establishing the intent of the Constitution and the First Amendment would include the members of the State ratifying conventions wherein extensive debates were held on the

\textsuperscript{103} Letter from Thomas Jefferson to Dr. Joseph Priestly (June 19, 1802), in 10 The Writings of Thomas Jefferson, supra note 35, at 325.

\textsuperscript{104} Id.

\textsuperscript{105} Ten members of the Constitutional Convention also served in the first federal Senate (William Few, Richard Bassett, George Read, Pierce Butler, William Paterson, Robert Morris, Oliver Ellsworth, William Samuel Johnson, Caleb Strong, and John Langdon) and nine members of the Convention served in the first federal House (Abraham Baldwin, James Madison, Hugh Williamson, Daniel Carroll, George Clymer, Thomas Fitzsimons, Roger Sherman, Elbridge Gerry, and Nicholas Gilman).
meaning and intent of each clause; Jefferson was in not in those conventions either.)

If not Jefferson, who, then, was responsible for the First Amendment and the Bill of Rights? James Madison? Definitely not. In fact, during the Constitutional Convention, Virginian George Mason had advocated that a Bill of Rights be added to the Constitution, but the other Virginians at the Convention—including James Madison—opposed any Bill of Rights and their position prevailed. Consequently, George Mason, Elbridge Gerry, Edmund Randolph, and others at the Convention refused to sign the new Constitution because of their fear of insufficiently briddled federal power.

Mason and the others returned to their home States to lobby against the ratification of the Constitution until a Bill of Rights was added. As a result of their voices (and numerous others who agreed with them), the ratification of the Constitution almost failed in Virginia, Massachusetts, New Hampshire, and New York. Rhode Island flatly refused to ratify it, and North Carolina refused to do so until limitations were placed upon the federal government. Although the Constitution was eventually ratified, a clear message had been delivered: there was strong sentiment demanding the inclusion of a Bill of Rights.

When the Constitution was considered for ratification in Virginia, the reports from June 2 through June 25, 1788, make clear that in Virginia, Patrick Henry, George Mason, and Edmund

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107. 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 306 (Jonathan Elliot ed., D.C. 1836) (Sept. 12, 1787) [hereinafter ELLIOT'S DEBATES].

108. See George Mason, Edmund Randolph, & Elbridge Gerry, in DICATIONARY OF AMERICAN BIOGRAPHY.


110. Massachusetts Ratification Debates, February 6, 1788, in 2 ELLIOT'S DEBATES, supra note 107, at 176–81.


112. New York Ratification Debates, July 26, 1788, in 2 ELLIOT'S DEBATES, supra note 107, at 413.

113. 5 COLLECTIONS OF THE RHODE ISLAND HISTORICAL SOCIETY 320–21 (Providence, Knowles & Vose 1843) (March 24, 1788).

114. North Carolina Ratification Debates, August 1–2, 1788, in 4 ELLIOT'S DEBATES, supra note 107, at 242–51.
Randolph led the fight for the Bill of Rights, again over James Madison's opposition.\textsuperscript{115} Henry's passionate speeches of June 5 and June 7 resulted in Virginia's motion that a Bill of Rights be added to the federal Constitution; on June 25, the Virginia Convention selected George Mason to chair a committee to prepare a proposed Bill of Rights,\textsuperscript{116} with Patrick Henry and John Randolph as members.\textsuperscript{117} Mason incorporated Henry's arguments as the basis of Virginia's proposal on religious liberty.\textsuperscript{118}

Although Madison had opposed a Bill of Rights, he understood the grim political reality that without one, it was unlikely the new Constitution would receive widespread public acceptance.\textsuperscript{119} Consequently, he withdrew his opposition, and in the federal House of Representatives he introduced his own versions of the amendments offered by his State.

Very little of Madison's proposed religious wording made it into the final version of the First Amendment; and even a cursory examination of the debates in Congress surrounding the formation of that Amendment quickly reveals the influence of Fisher Ames and Elbridge Gerry of Massachusetts, Samuel Livermore of New Hampshire, John Vining of Delaware, Daniel Carroll and Charles Carroll of Maryland, Benjamin Huntington, Roger Sherman, and Oliver Ellsworth of Connecticut, William Paterson of New Jersey, and others on that Amendment.\textsuperscript{120}

The Court is wrong: neither Jefferson nor Madison was responsible for the First Amendment. As correctly noted by Chief Justice Rehnquist:

\begin{quote}
[T]he Court's opinion in Everson—while correct in bracketing Madison and Jefferson together in their exertions in their home state leading to the enactment of the Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of
\end{quote}

\textsuperscript{115} James Madison, Virginia Ratification Debates, June 24, 1788, in 3 Elliott's Debates, \textit{supra} note 107 at 616–22.

\textsuperscript{116} 1 Rowland, \textit{supra} note 75, at 244.

\textsuperscript{117} Virginia Ratification Debates, June 25, 1788, in 3 Elliott's Debates, \textit{supra} note 107, at 655–56.

\textsuperscript{118} 1 William Wirt Henry, Patrick Henry, Life, Correspondence and Speeches 430–31 (N.Y., Charles Scribner's Sons 1891); \textit{see also} 1 Rowland, \textit{supra} note 75, at 244; 3 Elliott's Debates, \textit{supra} note 107, at 659 (Virginia Ratification Debates, June 27, 1788).

\textsuperscript{119} 1 Annals of Cong. 448–50 (1789); \textit{see also} Wallace v. Jaffree, 472 U.S. 38, 99–99 (1985) (Rehnquist, J., dissenting); Letter from James Madison to George Eve (Jan. 2, 1789), in 5 The Writings of James Madison 319 n.4 (Gaillard Hunt ed., 1904).

\textsuperscript{120} See 1 Annals of Cong. 440–948 (1789), for the records chronicling the debates surrounding the framing of the First Amendment.
the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights. The repetition of this error in the Court’s opinion in *Illinois ex rel. McCollum v. Board of Education* and, *inter alia*, *Engel v. Vitale* does not make it any sounder historically. Finally, in *Abington School District v. Schempp* the Court made the truly remarkable statement that “the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.” On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history.121

The Court’s failure to rely on Founders other than Jefferson (or Madison) seems to imply that no other Founders were qualified to address First Amendment issues or that no pertinent recorded statements exist from the other Founders. Both implications are wrong: numerous Founders played pivotal roles, and thousands of their writings do exist.

However, if the Court insists that only a Virginian may speak for the nation on the issue of religion, then why not George Mason, the “Father of the Bill of Rights”? Or Richard Henry Lee who not only framed Virginia’s proposals but who also was a Member of the first federal Congress where he helped frame the Bill of Rights? Or George Eve and John Leland who exerted significant external influence on the internal proceedings of the State ratifying convention and the first federal Congress? Or why not George Washington? In fact, constitutionally speaking, as President of the Convention that framed the Constitution, and as President of the United States who oversaw the framing of the First Amendment and the Bill of Rights, Washington is perhaps a far more qualified spokesman than Madison, and definitely more so than Jefferson. Perhaps the reason that these other Virginians are ignored (as are most of the other Framers) is because both their words and actions unequivocally contradict the Court’s current positions.

George Washington provides a succinct illustration. During his inauguration, Washington took the oath as prescribed by the Constitution but added several religious components to that offi-

cial ceremony. Before taking his oath of office, he summoned a Bible on which to take the oath, added the words "So help me God!" to the end of the oath, then leaned over and kissed the Bible.122 His "Inaugural Address" was filled with numerous religious references,123 and, following that address, he and the Congress "proceeded to St. Paul’s Chapel, where Divine service was performed."124

Only weeks later, Washington signed his first major federal bill125—the Northwest Ordinance, drafted concurrently with the creation of the First Amendment.126 That act stipulated that for a territory to become a State, the "schools and the means of education" in that territory must encourage the "religion, morality, and knowledge" that was "necessary to good government and the happiness of mankind."127 Conforming to this requirement, numerous subsequent State constitutions included that clause,128 and it still appears in State constitutions today.129 Furthermore, that law is listed in the current federal code, along with the Constitution, the Declaration, and the Articles of Confederation, as one of America’s four “organic” or foundational laws.130

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123. 1 Richardson, supra note 69, at 51-54 (Apr. 30, 1789).
124. 1 Annals of Cong. 29 (1789).
125. Acts Passed at a Congress of the United States of America, Begun and Held at the City of New-York, on Wednesday the Fourth of March, in the Year M,DCC,LXXXIX: And the Independence of the United States, the Thirteenth 47 (Phil., Francis Childs & John Swaine 1791) (Aug. 7, 1789).
126. 1 Annals of Cong. 685 (1789) (passage by the House); Id. at 57 (1789) (passage by the Senate).
128. See, e.g., M.B.C. True, A Manual of the History and Civil Government of the State of Nebraska 34 (Omaha, Gibson, Miller, & Richardson 1885) (NEB. Const. 1875, art. I, § 4); The Constitutions of All the United States According to the Latest Amendments 389 (Lexington, Thomas T. Skillman 1817) (Mississippi 1817, art. IX, § 16); The Constitutions of the United States of America, supra note 127, at 345–46 (Ohio 1802, art. VIII, § 3); (House of Representatives, Mis. Doc. No. 44, 35th Cong., 2nd Sess., Feb. 2, 1859, 3–4, Kansas 1858, art. I, § 7).
Finally, in his "Farewell Address," Washington reminded the nation:

Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that Man claim the tribute of Patriotism, who would labor to subvert these great pillars of human happiness. . . . The mere Politician, equally with the pious Man, ought to respect and to cherish them.\textsuperscript{131}

Washington—indisputably a constitutional expert—declared that religion and morality were inseparable from good government, and that no true patriot, whether politician or clergyman, would attempt to weaken the relationship between political prosperity and the influence of religion and morality. Nonetheless, the Court persists in reaching conclusions exactly the opposite of those set forth by this constitutional expert, thus causing Chief Justice Rehnquist to query:

History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.\textsuperscript{132}

By utilizing Jefferson and Madison as the only spokesmen for the First Amendment, contemporary courts have chosen one who was out of the country at the time of its formation and another who felt it unnecessary.

4. The Wrong Rigidity to the Metaphor

In \textit{Everson v. Board of Education}, the Court declared:

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.\textsuperscript{133}

In \textit{McCollum v. Board of Education}, four Justices reemphasized that position:

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped.\textsuperscript{134}

\textsuperscript{131} \textsc{George Washington, Address of George Washington, President of the United States, to His Fellow Citizens, on Declining Being Considered as a Candidate for Their Future Suffrages} 22–23 (Balt., George & Henry S. Keatinge 1796).


\textsuperscript{133} \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 18 (1947).

\textsuperscript{134} \textit{McCollum v. Bd. of Educ.}, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).
Recent Courts have interpreted Jefferson’s “wall” to be fixed and inflexible, requiring a segregation of faith from public life. Yet despite frequent repetitions to the contrary, the “wall of separation” metaphor was not intended by Jefferson to be a wall of secularization. In fact, Jefferson used another metaphor with reference to religion that proffered much less than the rigid “wall” image. Before examining his other simile, it is crucial to understand why the “wall” metaphor was included in Jefferson’s 1802 letter.

The New England Federalist clergy were some of the most ardent opponents of Jefferson and his Republican supporters. Even though the State religious establishments empowering the Federalist clergy were averse to Jefferson, these establishments were completely permissible under the Constitution which forbade only federal establishments. Nevertheless, Jefferson’s personal view that all denominations should be placed on equal footing\textsuperscript{135} was applauded by Baptists across the nation—especially in New England where they were accustomed to ill treatment by the Federalist clergy.

Jefferson’s Federalist enemies in New England embraced every occasion to calumniate him, and found one such welcome opportunity in his refusal to call for a national day of prayer. New Englanders were great believers in proclaimed days of prayer such as those issued by Presidents George Washington and John Adams, for this was a practice deeply embedded in their own history: between 1620 and 1815, over 1,400 official prayer proclamations had been issued in New England States\textsuperscript{136} (This practice was rarely observed in the Southern States however, even by the most evangelical Southern leaders such as Governor Patrick Henry.) The New England Federalists gleefully ascribed Jefferson’s reticence to issue national prayer proclamations as proof of his atheism.

In addition to the charge of atheism, New England Federalists also accused Jefferson of being a murderer, the Anti-Christ, a thief, and a cohort of foreign convicts; they reported that he was secretly plotting the destruction and overthrow of the Constitution; that he defrauded a widow and her children; the nation was alerted that he planned to abolish the navy and starve the farmers; and citizens were warned that if Jefferson were elected, he

\textsuperscript{135} Letter from Thomas Jefferson to Elbridge Gerry (Jan. 26, 1799), in 9 The Works of Thomas Jefferson, supra note 61, at 18.

would confiscate and burn every Bible in America.\textsuperscript{137} (This charge was so widely disseminated that in New England Bibles were actually buried upon Jefferson's election so that he could not find and burn them.\textsuperscript{138})

Jefferson truly had many unscrupulous enemies, but the Baptists were not among them. Therefore, when Jefferson received the letter of praise from the Danbury Baptists, courtesy required a reply. It also gave Jefferson an opportunity to lash out at their common enemy, so his reply directly attacked the New England Federalist clergy. Jefferson derisively compared them to British Loyalists since, as he pointed out, it had also been the practice of the British Monarch to issue national prayer proclamations.

Before dispatching his reply, Jefferson consulted the two members of his administration most familiar with the political landscape in New England: Postmaster Gideon Granger of Connecticut and Attorney General Levi Lincoln of Massachusetts. Both men had been victims of attacks by the New England Federalists and were well acquainted with the situation of the minority Baptists. Based on Lincoln's familiarity with the New England mindset, Jefferson asked him to review his draft and recommend necessary changes:

Averse to receive addresses, yet unable to prevent them, I have generally endeavored to turn them to some account, by making them the occasion, by way of answer, of sowing useful truths and principles among the people, which might germinate and become rooted among their political tenets. The Baptist address, now enclosed, admits of a condemnation of the alliance between Church and State, under the authority of the Constitution. It furnishes an occasion, too, which I have long wished to find, of saying why I do not proclaim fastings and thanksgivings, as my predecessors did. The address, to be sure, does not point at this, and its introduction is awkward. But I foresee no opportunity of doing it more pertinently. I know it will give great offence to the New England clergy; but the advocate of religious freedom is to expect neither peace nor forgiveness from them. Will you be so good as to examine the


\textsuperscript{138} MacClenny, \textit{supra} note 137, at 172.
answer, and suggest any alterations which might prevent an ill effect, or promote a good one, among the people? You understand the temper of those in the North, and can weaken it, therefore, to their stomachs: it is at present seasoned to the Southern taste only. I would ask the favor of you to return it, with the address, in the course of the day or evening. Health and affection.\textsuperscript{139}

Lincoln responded promptly to Jefferson's request and suggested several changes that Jefferson incorporated. Jefferson's initial response had been twenty-five handwritten lines; after Lincoln's revisions, seven of those lines—nearly thirty percent of the text—were stricken.\textsuperscript{140} Lincoln recognized that the President's strong attack on the New England clergy would indeed please his Southern supporters, but he warned that attacking the proclaiming of days of prayer would hurt him among his Republican supporters in New England who still cherished that practice. (Lincoln rightly believed that Jefferson's letter would be widely publicized—as it was in several newspapers within only months after Jefferson penned it.\textsuperscript{141}) The tone of the letter was greatly softened and the language meliorated by Lincoln's suggestions.\textsuperscript{142}

On Friday, January 1, 1802, Jefferson sent his revised reply to the Danbury Baptists with his now infamous “wall of separation” metaphor. Two days later, on Sunday, January 3, 1802, Jefferson went to the U. S. Capitol where he attended church services in the House of Representatives, the sermon being preached by his Republican friend, Baptist minister John Leland.\textsuperscript{143} Clearly, Jefferson's understanding of his “wall of separation” did not exclude that religious activity—conducted in a government building with operating expenses paid by government funds.

Jefferson's “wall” was simply a fresh descriptor for what he had long been advocating: the government should be completely powerless to interfere with religious expressions. As Jefferson explained to Noah Webster, if the government was permitted even once to interfere with religious expression, additional encroachments would surely follow:

\begin{itemize}
\item \textsuperscript{139} Letter from Thomas Jefferson to the Attorney General, Levi Lincoln (Jan. 1, 1802), in \textit{10 The Writings of Thomas Jefferson}, supra note 35, at 305.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id.
\end{itemize}
It had become an universal and almost uncontroverted position in the several States, that the purposes of society do not require a surrender of all our rights to our ordinary governors . . . and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shown a disposition to weaken and remove. Of the first kind, for instance, is freedom of religion.  

Notice that Jefferson here used a "fence" metaphor—that the fence would obstruct the wrong (the action of governors upon our rights) but not the right (the freedom of religion). Jefferson's "fence" metaphor, like his "wall" metaphor, was pointed toward the Free Exercise and not the Establishment Clause.  

Contrary to the assertion in McCollum, Jefferson's separation did mean something significantly less than separation—at least the way the Court now interprets separation.

5. The Wrong Text Selections

While the Court repeatedly cites Jefferson's "wall" metaphor in a sweeping, all-encompassing, one-size-fits-all manner, it often ignores succinct Jefferson writings pointedly germane to issues before the Court. For example, in Edwards v. Aguillard the Court struck down Louisiana's balanced-treatment law stipulating that if either evolution or creation was presented "in classroom lectures, textbooks, library materials, or other programs," that "each shall be taught as a theory rather than proven scientific fact."  

Even though the statute further mandated that instruction be limited to an examination only of "scientific data" and the "scientific evidence" for either position, and never mentioned religion, God, or the Bible, the Court nevertheless found it an unconstitutional establishment of religion in violation of Jefferson's "wall." Yet Jefferson had clearly set forth an opposite position concerning government interference in the free inquiry between faith and science:

146. Id.  
147. Id. (emphasis added).
Had not the Roman government permitted free enquiry, Christianity could never have been introduced. Had not free enquiry been indulged, at the aera of the Reformation, the corruptions of Christianity could not have been purged away. If it be restrained now, the present corruptions will be protected, and new ones encouraged. Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was once forbidden as a medicine, and the potato as an article of food. Government is just as infallible, too when it fixes systems in physics. Galileo was sent to the Inquisition for affirming that the earth was a sphere; the government had declared it to be as flat as a trencher, and Galileo was obliged to abjure his error. This error however at length prevailed, the earth became a globe, and Descartes declared it was whirled round its axis by a vortex. The government in which he lived was wise enough to see that this was no question of civil jurisdiction, or we should all have been involved by authority in vortices. In fact, the vortices have been exploded, and the Newtonian principle of gravitation is now more firmly established, on the basis of reason, than it would be were the government to step in, and to make it an article of necessary faith. Reason and experiment have been indulged, and error has fled before them. It is error alone which needs the support of government. Truth can stand by itself. Subject opinion to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desireable? No more than of face and stature. Introduce the bed of Procrustes then, and as there is danger that the large men may beat the small, make us all of a size, by lopping the former and stretching the latter. Difference of opinion is advantageous. . . . Reason and persuasion are the only practicable instruments. To make way for these, free enquiry must be indulged.148

Jefferson specifically declared that it was outside the jurisdiction of government to establish any type of orthodoxy in science by precluding the investigation or pursuit of truth, regardless of whether it was supported or opposed by religious or civil authorities. The Court ignored this succinct writing in deference to a

broad metaphor, resulting—quite literally—in the Court using Jefferson to overrule Jefferson.

Another example of how Jefferson's authoritative declarations are ignored is provided by his unequivocal pronouncement that:

No power to prescribe any religious exercise or to assume authority in any religious discipline has been delegated to the General Government. It must then rest with the States.\textsuperscript{149}

Notwithstanding this unambiguous pronouncement, the "general government" uses Jefferson as its authority to strike down State religious policies on: school prayer (\textit{Engel v. Vitale}\textsuperscript{150}), acknowledgment of a Creator (\textit{Epperson v. Arkansas}\textsuperscript{151} and \textit{Edwards v. Aguillard}\textsuperscript{152}), display of the Ten Commandments (\textit{Stone v. Graham}\textsuperscript{153}), as well as numerous other State policies on religious exercises\textsuperscript{154} that Jefferson had affirmed as properly "resting with the States."

And consider the number of courts that—using Jefferson's "wall"—have disallowed religious symbols from the government square,\textsuperscript{155} even though Jefferson himself proposed that government seals and phrases incorporate religious symbols and words.\textsuperscript{156}

\begin{itemize}
  \item \textsuperscript{149} Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), in 4 \textit{Memoir of Thomas Jefferson}, \textit{supra} note 33, at 103–04.
  \item \textsuperscript{150} 370 U.S. 421, 428 (1962).
  \item \textsuperscript{151} 393 U.S. 97, 106 (1968).
  \item \textsuperscript{152} 482 U.S. 578 (1987).
  \item \textsuperscript{153} 449 U.S. 39 (1980).
  \item \textsuperscript{155} See, \textit{e.g.}, Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) (crèches); \textit{Stone}, 449 U.S. 39; Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002) (monotheism in the Pledge of Allegiance); Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995); Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679 (6th Cir. 1994) (displays of religious artwork in public buildings); Harvey v. Cobb County, 15 F.3d 1097 (11th Cir. 1994); Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991); Kuhn v. City of Rolling Meadows, 927 F.2d 1401 (7th Cir. 1991); Friedman v. Bd. of Comm’rs, 781 F.2d 777 (10th Cir. 1985) (religious symbols in city seals); Warsaw v. Tehachapi, No. CV F-90-404 (E.D. Cal. Aug. 23, 1990); Ring v. Grand Forks Pub. Sch. Dist., 483 F. Supp. 272 (D.N.D. 1980) (public displays of the Ten Commandments); Lowe v. City of Eugene, 459 P.2d 222 (Or. 1969) (public crosses).
  \item \textsuperscript{156} \textit{Report on a Seal for the United States, with Related Papers, August 20, 1776, in 1 The Papers of Thomas Jefferson}, \textit{supra} note 44, at 494–97.
\end{itemize}
If the Court were to use Jefferson’s germane words as its authority rather than his incongruous metaphor, it would arrive at different conclusions.

6. The Wrong Standard

The Court has been unequivocally clear—as in Zorach v. Clauson—that:

The constitutional standard is the separation of Church and State.\(^{157}\)

This declaration is often repeated, albeit with inconsequential variations such as “... the ‘wall of separation’ required by the Constitution...”\(^{158}\) or “... the constitutional wall of separation between Church and State...”\(^{159}\)

Why is “separation” the “constitutional standard” rather than “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof”? On what basis does a metaphor from a private letter written eleven years after the First Amendment supercede the express language of that Amendment?

Perhaps the answer rests in the declaration of Charles Evans Hughes, the Court’s Chief Justice from 1930 to 1941:

We are under a Constitution, but the Constitution is what the judges say it is.\(^{160}\)

That this is now the standard for constitutional interpretation was made evident in the highly publicized Pledge of Allegiance decision by the three-judge panel in the Ninth Circuit. The majority resorted not to the Constitution but instead set forth its “constitutional standard” under Jefferson’s wall:

Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in Lemon v. Kurtzman; the “endorsement” test, first articulated by Justice O’Connor in her concurring opinion in Lynch, and later adopted by a

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majority of the Court in County of Allegheny v. ACLU; and the "coercion" test first used by the Court in Lee (1991). 161

That court struck down the Pledge of Allegiance policy because "the policy and the Act fail the endorsement test . . . the coercion test . . . [and] the Lemon test" 162 but not because the policy violated the wording of the Constitution.

When confronted with the absence of constitutional language in these tests, separation advocates respond that Jefferson's metaphor (and the religion tests derived from it) accurately summarizes the intent of those who framed the First Amendment. To examine this thesis, the advice of Jefferson to Supreme Court Justice William Johnson is apropos:

On every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed. 163

The Congressional Records from June 8 to September 24, 1789 chronicle the months of discussions and debates of the ninety Framers of the First Amendment. 164 During those debates, not one of the ninety ever mentioned the phrase "separation of Church and State." It seems logical that if this had been their objective for the First Amendment, at least one would have mentioned that phrase; not one did.

The Court's proclivity to substitute its own phrases and tests for the Constitution's express wording causes legal scholars to describe the Court as a "continuing Constitutional Convention." 165 George Washington warned against allowing change in this manner:

If, in the opinion of the people, the distribution or the modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may

162. Id. at 608, 609, 611.
163. Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), in 4 Memoir of Thomas Jefferson, supra note 33, at 373.
164. 1 Annals of Cong. 440–948 (1789).
be the instrument of good, it is the customary weapon by which free governments are destroyed.\textsuperscript{166}

Constitution signer Alexander Hamilton echoed this warning:

[The] Constitution is the standard to which we are to cling. Under its banners, \textit{bona fide} must we combat our political foes, rejecting all changes but through the channel itself provides for amendments.\textsuperscript{167}

Contrary to the Court's assertion, the constitutional standard is not the private metaphor of any single individual but rather the Constitution itself.

7. \textit{The Wrong Purposes and Motivations}

By wrongly interpreting Jefferson's metaphor, the Court has imputed a historically untenable purpose to the First Amendment. For example, in \textit{Abington v. Schempp}, the Court asserted:

There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. . . . This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity.\textsuperscript{168}

But there is an answer. In fact, there are several answers, for there are multiple erroneous assertions in this passage.

First, the charge that the First Amendment was "to take every form of propagation of religion out of the realm of things that could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense" is easily refuted by Jefferson. Recall that in his official capacity he engaged in direct federal funding of religion at taxpayer expense—both in treaties and in the use of government buildings for religious purposes.

Second, the religion clause in the Bill of Rights was not "first in the Bill of Rights because it was first in the forefathers' minds." In the original Bill of Rights as sent to the States for ratification,

\textsuperscript{166} \textit{Washington}, \textit{supra} note 131, at 22.


the religion amendment was actually the third amendment, preceded by an amendment addressing congressional representation and an amendment stipulating that no congressional pay raise could take effect without an intervening election. Therefore, based on the Court's logic, congressional representation and congressional pay raises were more important to the Founders than freedom of religion.

Further evidence that this was not "first in the forefathers' minds" is provided by the States' recommendations to the federal Congress for a Bill of Rights. Connecticut, New Jersey, Pennsylvania, Georgia, and Delaware made no proposals and therefore suggested no protections for religion. Maryland did submit a list of proposals, but no religious protections were included, and its minority report listed religious protections twelfth. Similarly, Pennsylvania proposed no Bill of Rights, but its minority report listed religious protections first. Massachusetts' proposals to the federal Congress did not include protection for religion, and even its minority report made no mention. South Carolina did submit a list of proposals, but without mention of any religious protections. New Hampshire listed religious protections eleventh in its proposals for the Bill of Rights, New York listed it fourth, North Carolina twenti-

169. Benjamin Harrison, Address During the Virginia Ratification Debates (June 25, 1788), in 3 Elliot's Debates, supra note 107, at 628.
170. Id.
174. Maryland Ratification Debates, Apr. 21, 1788, in 2 Elliot's Debates, supra note 107, at 549–53.
175. Maryland Ratification Debates, Apr. 28, 1788, in 2 Elliot's Debates, supra note 107, at 552–53.
177. Massachusetts Ratifying Convention, Feb. 7, 1788, in 1 Elliot's Debates, supra note 107, at 322–23.
178. Complete Bill of Rights, supra note 176, at 12.
179. South Carolina Ratifying Convention, May 23, 1788, in 1 Elliot's Debates, supra note 107, at 325.
180. New Hampshire Ratification Debates, June 21, 1788, in 1 Elliot's Debates, supra note 107, at 326.
eth, and Virginia twentieth. When James Madison submitted his proposals in the first federal Congress in 1789, religious protections were fourth in his list. In May of 1790, Rhode Island proposed amendments, and religion appeared fourth in its list, but that proposal occurred months after the Bill of Rights had already been hammered out and sent to the States for ratification. Religion clauses appeared "first in the forefathers' minds" only in the minority report of Pennsylvania.

Sequential order was important, however, and the clause that occupied first position most frequently was the language that eventually became the Ninth and Tenth Amendments. For example, first in the list of Massachusetts' proposals was:

That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States, to be by them exercised.

A nearly identical clause was first in the proposals from North Carolina, Virginia, New Hampshire, South Carolina, Rhode Island and Pennsylvania. By this proposal, the States secured to themselves religious freedoms since the Constitution gave no express powers to the federal government pertaining to religion. Therefore, contrary to the assertions by the Abington Court, religious freedoms were not first in the forefathers' minds (limitations on federal powers were), and there was no intent to quarantine religion from taxpayers.

182. North Carolina Ratification Debates, Nov. 21, 1789, in 4 Elliot's Debates, supra note 107, at 244.
183. Virginia Ratification Debates, June 26, 1788, in 3 Elliot's Debates, supra note 107, at 659.
185. Rhode Island Ratification Debates, May 29, 1790, in 1 Elliot's Debates, supra note 107, at 334-37.
186. Massachusetts Ratification Debates, Feb. 6, 1788, in 2 Elliot's Debates, supra note 107, at 177.
187. North Carolina Ratification Debates, Aug. 1, 1788, in 4 Elliot's Debates, supra note 107, at 244.
188. Virginia Ratification Debates, June 27, 1788, in 3 Elliot's Debates, supra note 107, at 659.
190. South Carolina Ratification Debates, May 23, 1788, in 1 Elliot's Debates, supra note 107, at 325.
191. Rhode Island Ratification Debates, May 29, 1790, in 1 Elliot's Debates, supra note 107, at 336.
Another statement that Jefferson would demur was made by Justices Frankfurter and Harlan in *McGowan v. Maryland* and Justice Brennan in *Abington v. Schempp*:

The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation.\(^{193}\)

It is absurd to suggest that the First Amendment kept religion from being the object of national legislation any more than the Virginia Statute kept religion from being the object of State legislation. To the contrary, at the same time that Jefferson authored and introduced the Virginia Statute—which the Court identifies as its interpretative corollary for the First Amendment—he simultaneously authored and introduced a number of bills in which religion was the object of legislation. Those bills included "A Bill for Saving the Property of the Church Heretofore by Law Established," "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers," "A Bill for Appointing Days of Public Fasting and Thanksgiving," and "A Bill Annulling Marriages Prohibited by the Levitical Law and Appointing the Mode of Solemnizing Lawful Marriage."\(^{194}\) Therefore, while Jefferson was disestablishing religion in the Virginia Statute, he was also making it the direct object of legislation. Furthermore, Jefferson had made religion the object of federal legislative action through the ratification of his Kaskaskia treaty directly appropriating federal funds and activities toward Christian evangelization. Notwithstanding these troublesome facts, the claim by these Justices became enshrined as the second prong of the *Lemon* test (a statute may not advance religion)\(^{195}\)—a prong built on an egregiously defective historical analysis. As Chief Justice Rehnquist observed:

[T]he *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests.\(^{196}\)


\(^{194}\) 8 THE PAPERS OF JAMES MADISON, supra note 38, at 396.


Another declaration that Jefferson would remonstrate is Justice Black’s claim in *Board of Education v. Allen* that:

[T]he only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide.\(^{197}\)

Jefferson emphatically declared that protection for minorities came from a different source:

[T]he will of the majority, the natural law of every society, is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived.\(^{198}\)

In his First Inaugural Address, he reemphasized this principle:

[T]hough the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights which equal law must protect.\(^{199}\)

Despite today’s deprecations about the so-called “tyranny of the majority,” majoritarianism is actually the guardian of all the people’s rights. In every case where a constitutional protection has been established for any minority, whether by race, gender, social status, or age, each protection was conferred by the consent of the majority of eligible enfranchisees at that time. For example, it was Anglo males (and a small segment of Free Blacks) that established the constitutional protections for the minority group *slaves* by enacting the Thirteenth, Fourteenth, and Fifteenth Amendments. That is, slaves received their rights from the majority consent of non-slaves in three-fourths of the States. Similarly, the constitutional rights given to the minority group *women* in the Nineteenth Amendment were accorded them by the majority males. In like manner, the constitutional rights extended to the minority group *poor* by abolishing the poll tax in the Twenty-Fourth Amendment came at the insistence of the non-poll-tax paying majority. Additionally, the Twenty-Sixth Amendment right giving the minority group *eighteen- to twenty-one-year-olds* the right to vote came from voters over the age of twenty-one that comprised the majority.

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199. 1 Richardson, *supra* note 69, at 322 (Jefferson’s First Inaugural Address, Mar. 11, 1801).
In other words, all minority rights in the Constitution, and all explicit protections for minorities, have in all cases been established by the majority. However, in no case did the majority cede its own rights; it simply extended them so that both the majority and the minority might enjoy the same privileges. Furthermore, contrary to what is alleged today, the Bill of Rights was not enacted to safeguard the minority; rather it was enacted to safeguard every individual from federal intrusion and micromanagement.

Regrettably, however, the alleged "tyranny of the majority" has now been replaced with the actual "tyranny of the minority"—especially apparent in decisions rendered since the Court's "psychological coercion test" established in *Lee v. Weisman*. In that case challenging commencement prayers, a single family ostensibly offended by prayer successfully enjoined the rest of the nation from its constitutional guarantee for the free exercise of religion. As the dissent noted:

The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests of the other side. They are not inconsequential. . . . The narrow context of the present case involves a community's celebration of one of the milestones in its young citizen's lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make.

Similarly, in *Santa Fe Independent School District v. Jane Doe* a few students first prevented a community, and then the entire nation, from enjoying prayers at athletic events; and in *Newdow v. United States Congress* a single individual stopped students at schools in nine States from saying "under God" in the Pledge of Allegiance. Additional examples are legion; but under the Court's view of the Constitution, dissenting individuals now have the power of veto over the majority's religious expressions, thereby allowing one person to deprive the majority of its own constitutional guarantee for the "free exercise of religion."

Clearly, the Court uses Jefferson's metaphor to reach conclusions with which Jefferson would strenuously disagree and that directly contradict his own beliefs and practices.

201. Id. at 645–46 (Scalia, J., dissenting).
203. 292 F.3d 597 (9th Cir. 2002).
8. The Wrong Image

Jefferson has been used by contemporary courts as the impetus to secularize the public square, and from that secular outcome certain conclusions have been deduced. For example, Jefferson is now described in terms that he would dispute—as in \textit{McDaniel v. Paty} when the Court declared:

The struggle for separation of church and state in Virginia, which influenced developments in other States—and in the Federal Government—was waged by others in addition to such secular leaders as Jefferson, Madison, and George Mason.\textsuperscript{204}

In \textit{Abington v. Schempp}, Justice Brennan similarly asserted:

It has rightly been said of the history of the Establishment Clause that "our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams."\textsuperscript{205}

Brennan has juxtaposed Jefferson with Roger Williams, portraying one as a religionist and the other as a secularist. (Significantly, contrary to Brennan's assertion of Roger Williams' "fervent sectarianism," Williams founded Rhode Island as the first non-sectarian Colony in America—a Colony in which all faiths and denominations, and even those who had no religious beliefs, were welcomed.) Very few individuals fit the categories of being either a religionist or a secularist.

Nevertheless, according to the Court, Jefferson was a "secular leader" rather than a "civil leader." This description connotes a wrong image of Jefferson. This is illustrated by applying the same adjective to the other Founders. For example, signers of the Declaration would be "secular leaders" under the Court's description even though a number of them were ministers of the Gospel or were involved in Christian ministry: John Witherspoon, Lyman Hall, Robert Treat Paine, and William Williams all served in the pulpit; Francis Hopkinson was a church music director and compiled America's first purely American hymnbook; Dr. Benjamin Rush founded the Sunday School movement in America and the first Bible Society; etc. (Similar examples exist among those who framed the Constitution.) While all of these individuals were "civil leaders," to describe them as "secular leaders" is misleading. Nonetheless, the Court now uses "secular" as

\begin{itemize}
\item \textsuperscript{204} McDaniel v. Paty, 435 U.S. 618, 629 n.9 (1978).
\item \textsuperscript{205} Abington Sch. Dist. v. Schempp, 374 U.S. 203, 259–60 (1963) (Brennan, J., concurring).
\end{itemize}
a synonym for “civil,” and vigorously enforces the civil square as being a secular square.

Yet to many, Jefferson is a “secular leader,” for unlike the overwhelming majority of the other Founders, Jefferson makes statements that seem to indicate an intolerance toward both Christianity and the clergy. However, a closer examination of Jefferson’s anti-cleric statements reveals that they are not directed toward all clergy but rather toward Federalist-thinking clergy. (As a Republican, Jefferson was opposed to autocracy whether in church or State.) Overlooked or ignored are Jefferson’s large and generous contributions to Christian churches, the numbers of Christian ministers who praised Jefferson, and Jefferson’s own letters of praise for numerous clergymen. In fact, it was Jefferson who encouraged the lifting of restrictions against clergy in his own State:

I observe in [the Virginia] constitution an abridgment of [a] right... I do not approve. It is the incapacitation of a clergyman from being elected.

Jefferson was not anti-clergy, only anti-autocratic and anti-hierarchical clergy. (Recall, too, that in Jefferson’s Danbury letter he attacked the Federalist clergy, praised the Baptists, and then went to church with his Republican pastor friend, the Rev. John Leland.)

206. See, e.g., THOMAS JEFFERSON, JEFFERSON'S MEMORANDUM BOOKS 1154, 1196, 1405 (James A. Bear Jr. & Lucia C. Stanton eds., 1997) (his entry for March 8, 1824: “I have subscribed to the building of an Episcopal church, $200; a Presbyterian do. [ditto], $60; a Baptist do. [ditto], $25”; similar gifts occurred to other churches on May 15, 1805 and January 6, 1807).


Nevertheless, there are instances in Jefferson’s writings very critical of organized religion; but Jefferson provided insight as to why at one time he was anti-religious and therefore why it is not surprising to find such statements. Jefferson early had been enamoured with the writings of anti-religious philosopher David Hume and later confessed:

I remember well the enthusiasm with which I devoured it [Hume’s work] when young, and the length of time, the research and reflection which were necessary to eradicate the poison it had instilled into my mind.

It is not surprising, then, that quotes made by Jefferson before he had “eradicated Hume’s poison” from his mind would be hostile to religion. Yet these quotes are not reflective of where he finished his life or of the religious beliefs he held while President. Jefferson is a secularist only when his quotes are selectively utilized and his actions completely ignored.

Nonetheless, having accepted that Jefferson is a “secular leader,” many therefore pronounce him a deist—a statement Jefferson repudiates; his declaration about his personal faith is


succinct. To Secretary of Congress, Charles Thomson, Jefferson declared:

_I am a real Christian, that is to say, a disciple of the doctrines of Jesus._213

And to fellow signer of the Declaration, Dr. Benjamin Rush, he similarly announced:

To the corruptions of Christianity I am indeed opposed; but not to the genuine precepts of Jesus himself. I am a Christian in the only sense in which He wished any one to be; sincerely attached to His doctrines in preference to all others.214

While Jefferson might fail the standard of being a Christian by an orthodox definition (on occasion he expressed his doubts about the divinity of Christ215), there is no evidence to impute any charge of deism to Jefferson. A deist believes in an impersonal God uninvolved with mankind and embraces the "clockmaker theory" that there was a God who made the universe and wound it up like a clock but it now runs of its own volition; the clockmaker is gone and therefore does not respond to man.216 None of Jefferson's religious writings from any period of his life reveal anything less than his strong conviction in a personal God,217 and that every individual would stand before God to be judged by Him.218

Yet in a further attempt to prove Jefferson's irreligion, it is alleged that he wrote his own "Bible," cutting out the portions of Scriptures that he believed were "objectionable" and "unreasonable."219 This derogatory reference to a so-called "Jefferson Bible"


214. Letter from Thomas Jefferson to Dr. Benjamin Rush (Apr. 21, 1803), in 3 MEMOIR OF THOMAS JEFFERSON, supra note 33, at 506.

215. Id.

216. AMERICAN HERITAGE DICTIONARY, 2ND COLLEGE EDITION ("Deism"); see also WEBSTER'S NEW WORLD DICTIONARY COLLEGE EDITION (1964) ("Deism").

217. See, e.g., Letter from Thomas Jefferson to David Barrow (May 1, 1815), in 11 THE WORKS OF THOMAS JEFFERSON, supra note 61, at 471; JEFFERSON, supra note 80, at 237-38 (Query XVIII); Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), in 11 THE WORKS OF THOMAS JEFFERSON, supra note 61, at 419-20.


219. ENCYCLOPEDIA OF RELIGIOUS CONTROVERSIES IN THE UNITED STATES 238 (George H. Shriver & Bill J. Leonard eds., 1997); DICTIONARY OF CHRISTIAN-
is of recent derivation and there is, in fact, no such single Jefferson work.

Jefferson prepared a religious work in 1804 that he titled The Philosophy of Jesus of Nazareth Extracted from the Account of His Life and Doctrines Given by Matthew, Mark, Luke, and John; Being an Abridgement of the New Testament for the Use of the Indian Unembarrassed with Matters of Fact or Faith beyond the Level of Their Comprehensions. According to Jefferson, this work for the Indians was a “digest of His [Jesus’] moral doctrines, extracted in his own words from the Evangelists, and leaving out everything relative to his personal history and character.” In essence, this work was the “red letters” of Jesus cut out of the New Testament and compiled into a short pithy work to be read by the Indians.

By 1813, Jefferson had prepared a second work, The Philosophy of Jesus, that he described to John Adams:

We must reduce our volume to the simple evangelists, select, even from them, the very words only of Jesus. . . . There will be found remaining the most sublime and benevolent code of morals which has ever been offered to man. I have performed this operation for my own use by cutting verse by verse out of the printed book, and arranging the matter . . . . The result is an octavo of forty-six pages, of pure and unsophisticated doctrines, such as were professed and acted on by the unlettered Apostles, the Apostolic Fathers, and the Christians of the first century.

Jefferson also discussed this work with long-time friend Charles Thompson, telling him:

[I], too, have made a wee-little book . . . which I call the Philosophy of Jesus; it is a paradigma of His doctrines, made by cutting the texts out of the book, and arranging them on the pages of a blank book, in a certain order of time or subject. A more beautiful or precious morsel of ethics I have never seen; it is a document in proof that I am a real Christian, that is to say, a disciple of the doctrines of Jesus,
very different from the Platonists who call me infidel and
themselves Christians.\textsuperscript{224}

In 1819, Jefferson prepared a third work titled The Life and
Morals of Jesus of Nazareth.\textsuperscript{225} This work was for his own use and
was simply an expansion of the shorter one he had compiled for
the Indians. In this version, Jefferson cut the teachings of Jesus
from Bibles in four different languages and placed them parallel,
side by side. As his grandson explained after Jefferson's death:

I now possess [Jefferson's] blank volume, red morocco,
gilt, lettered on the back "The Morals of Jesus" — into
which he pasted extracts in Greek, Latin, French, and
English, taken textually from the four Gospels, and so
arranged that he could run his eye over the readings of the
same verse in four languages. . . . [H]e was in the habit of
reading nightly from it before going to bed.\textsuperscript{226}

(Significantly, in 1904, this work was reprinted by the federal
government and distributed to Members of Congress\textsuperscript{227} — a distri-
bution that continued for the next half-century.\textsuperscript{228})

Jefferson often expressed his personal affinity for the teach-
ings of Jesus\textsuperscript{229} and was not offended by the Bible. He frequently
used its references in his own writings\textsuperscript{230} and was a financial
backer of the Virginia Bible Society.\textsuperscript{231} In fact, during the period
of Jefferson's own economic crisis so extreme that he arranged a
personal loan\textsuperscript{232} and offered to sell his library to Congress to

\textsuperscript{224} Letter from Thomas Jefferson to Charles Thompson (Jan. 9, 1816),
in 14 The Writings of Thomas Jefferson, supra note 35, at 385.

\textsuperscript{225} Thomas Jefferson, The Life and Morals of Jesus of Nazareth
Extracted Textually from the Gospels in Greek, Latin, French, and
English (1904).

\textsuperscript{226} 3 Randall, supra note 221, at 671–72.

\textsuperscript{227} Jefferson, supra note 225, at 19.

\textsuperscript{228} Introduction to Jefferson, supra note 220, at xv–xvi.

\textsuperscript{229} See, e.g., Letter from Thomas Jefferson to Dr. Benjamin Waterhouse
(June 26, 1822), in 15 The Writings of Thomas Jefferson, supra note 35, at
383; Letter from Thomas Jefferson to Edward Dowse (Apr. 19, 1803), in 10
The Writings of Thomas Jefferson, supra note 35, at 376–77; Letter from
Thomas Jefferson to James Fishback (Sept. 27, 1809), in 12 The Writings of
Thomas Jefferson, supra note 35, at 315; Thomas Jefferson, Syllabus of an
Estimate of the Merit of the Doctrines of Jesus, Compared with Those of
Others (Apr. 21, 1803), in 3 Memoir of Thomas Jefferson, supra note 33, at 509.

\textsuperscript{230} See Letter from Thomas Jefferson to Mrs. John Adams (July 22,
1804), in 11 The Writings of Thomas Jefferson, supra note 35, at 43–44; Let-
ter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), in 11 The Works

\textsuperscript{231} Letter from Thomas Jefferson to Samuel Greenhow (Jan. 31, 1814),
in 14 The Writings of Thomas Jefferson, supra note 35, at 81.

raise additional funds to help relieve his own economic distress. Jefferson made his very generous contribution to the Virginia Bible Society.

Despite Jefferson's unequivocal acknowledgments of a personal God, his frequent use of Bible passages, and his support of a local Bible Society, the belief persists that he was no more than a deist—a belief exacerbated by the Court's description of him as a "secular" rather than a "civil" leader. This description by the Court is misleading but tends to reinforce its policy of disallowing faith in the civil arena.

9. The Wrong Conclusion—A Godless Document

Many believe that the Court's rulings progressively secularizing the public square are simply reflective of the secularism inherent in the Constitution itself. As Justices Brennan and Marshall explained in *Marsh v. Chambers*:

Even before the First Amendment was written, the Framers of the Constitution broke with the practice of the Articles of Confederation and many state constitutions, and did not invoke the name of God in the document. This "omission of a reference to the Deity was not inadvertent; nor did it remain unnoticed." The omission of "God" from the Constitution was intentional, but for reasons quite different from those alleged by Brennan and Marshall. The Founders omitted such references for two reasons.

The first reason was to avoid redundancy. They intended that the Declaration and the Constitution be inseparable documents; and since religious values had been instilled in the first,
there was no need to repeat in the second. This designed inter-
relationship was analogous to that between a legal entity's Arti-
cles of Incorporation and its By-Laws. The Articles of
Incorporation call that entity into legal existence and the By-
Laws set forth how it will be governed under its Articles; the By-
Laws must always operate within the framework and purposes set
forth in its Articles and may neither nullify nor supersede them.

That there was the same indissoluble connectedness
between the Declaration and the Constitution was made clear by
John Quincy Adams:

The Declaration of Independence and the Constitution of
the United States are parts of one consistent whole,
founded upon one and the same theory of government.237

Samuel Adams confirmed:

This Declaration of Independence was received and rati-
fied by all the States in the Union and has never been
disannulled.238

So clear was the interdependent relationship between these
two documents that the Supreme Court affirmed:

The latter [the Constitution] is but the body and the letter
of which the former [the Declaration of Independence] is
the thought and the spirit, and it is always safe to read the
letter of the Constitution in the spirit of the Declaration of
Independence.239

Even today, more than two centuries after its writing, the
Constitution still cannot be properly interpreted or correctly
applied apart from the Declaration. For example, Article I, sec-
tion 5, paragraph 4 of the Constitution is the redress of grievance
4 in the Declaration;240 Article I, section 4, paragraphs 1 and 2

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143 U.S. 457, 467-68 (1892).


238. Samuel Adams, Address to the Legislature of Massachusetts (Jan. 17,
1794), reprinted in 4 SAMUEL ADAMS, THE WRITINGS OF SAMUEL ADAMS 557 (Harry


240. "He has called together Legislative Bodies at Places unusual, uncom-
fortable, and distant from the Depository of their public Records, for the sole
Purpose of fatiguing them into Compliance with his Measures." THE DECLARA-
TION OF INDEPENDENCE ¶ 6 (U.S. 1776).
are the redress of grievances 5 and 6;241 Article I, section 8, paragraph 4 is the corollary for grievance 7;242 Article I, section 8, paragraph 9 for grievance 8;243 and many other such couplets.244 Additional evidence that the two documents are interconnected and inseparable is found in Article VII of the Constitution, wherein the Constitution directly attaches itself to the Declaration:

Done in convention by the unanimous consent of the States present the seventeenth day of September in the Year of our Lord one thousand seven hundred and eighty seven, and of the independence of the United States of America the twelfth.245

Furthermore, Presidents date their governmental acts from the year of the Declaration rather than the year of the Constitution,246 and the admission of territories as States into the United States was often predicated on an assurance by the State that its constitution would violate neither the Constitution nor the Declaration.247 In fact, many of the original States included the entire Declaration of Independence (or lengthy portions thereof) in the preamble or content of their own constitu-

241. "He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People. He has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the Dangers of Invasion from without, and convulsions within." Id. ¶ 7–8.

242. "He has endeavored to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the conditions of new Appropriations of Lands.

243. "He has obstructed the Administration of Justice, by refusing his assent to Laws for establishing Judiciary Powers." Id. ¶ 10.

244. Other examples include Article I, section 8, clause 12, and Article I, section 10, clause 3 (addressing grievance 11); Article I, section 8, clause 14 (addressing grievance 12); Article I, section 8, clause 3 (addressing grievance 16); Article I, section 7, clause 1 (addressing grievance 17); Article I, section 8, clause 10 (addressing grievance 26).

245. U.S. CONST. art. VII.

246. See, e.g., 1 RICHARDSON, supra note 69, at 80 (President George Washington, Aug. 14, 1790); id. at 249 (President John Adams, July 22, 1797); id. at 357 (President Thomas Jefferson, July 16, 1803); id. at 473 (President James Madison, Aug. 9, 1809).

247. See, e.g., 34 Stat. 269 (1907) (Oklahoma’s enabling act of June 16, 1906); 13 THE STATUTES AT LARGE, TREATIES, AND PROCLAMATIONS OF THE UNITED STATES OF AMERICA 48 (George P. Sanger ed., Boston, Little, Brown & Co. 1866) (Nebraska’s enabling act of Apr. 19, 1864); id at 33 (Colorado’s enabling act of Mar. 21, 1864); id. at 31 (Nevada’s enabling act of Mar. 21, 1864).
again demonstrating that the Declaration was inseparable from constitutional government. In short, the Declaration and the Constitution were viewed as inseparable and interdependent documents; a violation of the principles of the Declaration was just as serious as a violation of the provisions of the Constitution.

The second reason the Founders omitted overt acknowledgments of God in the Constitution was because of federalism. Virtually every State constitution at that time was replete with religious references, and overt Christian pronouncements are even found in the constitutions of New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, as well as the Charter of Rhode Island (that governed that State until it adopted its first constitution in 1842). Since religion was so thoroughly covered in the State constitutions, and since religion was an issue that had not been enumerated to the jurisdiction of the federal government, the Framers avoided language in the Constitution that could be construed as displacing, usurping, or superceding the religious character of the State constitutions.

As the understanding of both federalism and the interdependent relationship between the Declaration and the Constitution has been widely lost or ignored, many—including Justices Brennan and Marshall—mistakenly assert that the Founders placed no explicit moral or religious values into the Constitution. They are wrong. The Constitution does contain religious acknowledgments.

Religion in the Constitution

The Constitution directly incorporates specifically Christian phrases and beliefs on two occasions and indirectly on a third.


249. The Constitutions of the Several Independent States of America, supra note 91, at 4 (N.H. Const. of 1783, art. I, § 6 (1783)).

250. Id. at 6–7 (Mass. Const. of 1780, pt. 1, art. I, § 3 (1780)).

251. Id. at 73–74 (N.J. Const. of 1776, §§ 18–19 (1776)).

252. Id. at 81 (Pa. Const. of 1776, ch. II, § 10 (1776)).

253. Id. at 91, 99–100 (Del. Const. of 1776, Declaration of Rights, § 3; Const. § 22 (1776)).

254. Id. at 107 (Md. Const. of 1776, Declaration of Rights, § 33 (1776)).

255. Id. at 138 (N.C. Const. of 1776, § 32 (1776)).

256. Id. at 152–54 (S.C. Const. of 1778, § 38 (1778)).

257. Id. at 37–39, 51–52 (R.I. Charter (1663)).
1. "In the Year of our Lord"

Article VII concludes the Constitution with the declaration:

Done in convention by the unanimous consent of the States present the seventeenth day of September in the Year of our Lord one thousand seven hundred and eighty seven . . . .

The use of the phrase "in the year of our Lord"—acknowledging the reckoning of time based on the birth, life, and death of Jesus Christ—is a specific recognition of Christianity.

The Constitution could have closed, as did many legislative documents of that day, simply by citing the year. For example, in the document submitted by each State reporting its ratification of the Constitution, several did not use the appellation "in the Year of our Lord," including Connecticut, Massachusetts, Maryland, New Hampshire, North Carolina, and Virginia. However, Delaware, Pennsylvania, New Jersey, Georgia, South Carolina, New York, and Rhode Island did use that pronouncement. Therefore, although there was no obligation to do so, the Constitution deliberately embraced a uniquely Christian rhetoric by including the clause "in the year of our Lord." As noted by a judge in the Seventh Federal Circuit Court of Appeals:

From the beginning of the republic, much of the federal government's symbology has been Christian—down to the dating of the Constitution itself, which concludes:

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the

258. 1 ELLIOT'S DEBATES, supra note 107, at 327 (Virginia Notice of Ratification, June 26, 1788).
259. Id. at 321 (Connecticut Notice of Ratification, Jan. 9, 1788).
260. Id. at 323 (Massachusetts Notice of Ratification, Feb. 7, 1788).
261. Id. at 324 (Maryland Notice of Ratification, Apr. 28, 1788).
262. Id. at 325–27 (New Hampshire Notice of Ratification, June 21, 1788).
263. Id. at 333 (North Carolina Notice of Ratification, Nov. 21, 1789).
264. Id. at 327 (Virginia Notice of Ratification, June 26, 1788).
265. Id. at 319 (Delaware Notice of Ratification, Dec. 7, 1787).
266. Id. at 320 (Pennsylvania Notice of Ratification, Dec. 12, 1787).
267. Id. at 321 (New Jersey Notice of Ratification, Dec. 18, 1787).
268. Id. at 324 (Georgia Notice of Ratification, Jan. 2, 1788).
269. Id. at 325 (South Carolina Notice of Ratification, May 23, 1788).
270. Id. at 331 (New York Notice of Ratification, July 26, 1788).
271. Id. at 335 (Rhode Island Notice of Ratification, May 29, 1790).
Year of our Lord one thousand seven hundred and Eighty seven . . . . 272

2. "Sundays excepted"

A second clear recognition of Christianity in the Constitution is the "Sundays excepted" clause. 273 Only a generation ago when Sunday laws (or Blue Laws) were still in effect in most States, there was a widespread consciousness of the inherently religious and Christian construction of this clause. This understanding had been present since the origin of the Constitution. In fact, in 1846 when it was argued in one courtroom that Sunday laws were a violation of the constitution since they were based on specific Christian teachings, the response was clear:

Christianity is a part of the common law of the land, with liberty of conscience to all. It has always been so recognized . . . . The U.S. Constitution allows it as a part of the common law. The President is allowed ten days [to sign a bill], with the exception of Sunday. The Legislature does not sit, public offices are closed, and the Government recognizes the day in all things. . . . The observance of Sunday is one of the usages of the common law recognized by our U.S. and State Governments.

. . .

. . . Christianity is part and parcel of the common law. 274

3. The Taking of Oaths

A third incorporation of religious principles into the Constitution is in the provisions regarding oaths. 275 While today these

If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.
Id.
275. U.S. Const. art. I, § 3, cl. 6 ("The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation."); U.S. Const. art. II, § 1, cl. 8 ("Before he enter on the execution of his office, he shall take the following oath or affirmation. . . ."); U.S. Const. art. VI, cl. 3 ("The Senators and Representatives, aforementioned, and the members of the several State legislatures, and all executive and judicial officers,
provisions are not considered religious, they definitely were at the time of the framing—and for generations afterwards. Supreme Court Justice James Iredell, a ratifier of the U. S. Constitution appointed to the Court by George Washington, noted:

According to the modern definition [1788] of an oath, it is considered a "solemn appeal to the Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments, according to that form which would bind his conscience most."276

Signer of the Constitution Rufus King similarly explained:

[In o]ur laws . . . by the oath which they prescribe, we appeal to the Supreme Being so to deal with us hereafter as we observe the obligation of our oaths.

The Pagan world were, and are, without the mighty influence of this principle, which is proclaimed in the Christian system—their morals were destitute of its powerful sanction while their oaths neither awakened the hopes, nor the fears which a belief in Christianity inspires.277

Signer of the Declaration John Witherspoon confirmed:

An oath is an appeal to God, the Searcher of hearts, for the truth of what we say and always expresses or supposes an imprecation of His judgment upon us if we prevaricate. An oath, therefore, implies a belief in God and His Providence and indeed is an act of worship. . . . Persons entering on public offices are also often obliged to make oath that they will faithfully execute their trust. . . . In vows, there is no party but God and the person himself who makes the vow.278

In fact, so integral was religion to oaths that George Washington queried:

[W]here is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths,

both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution.”)

276. James Iredell, Address (July 30, 1788), in 4 Elliot’s Debates, supra note 107, at 196 (North Carolina Ratification Debates).


278. 7 John Witherspoon, supra note 210, at 139-40, 142 ("Lectures on Moral Philosophy," Lecture 16 of Oaths and Vows).
which are the instruments of investigation in Courts of Justice?\textsuperscript{279}

Courts also recognized that the taking of oaths—particularly those by a witness in the courtroom with a hand upon a Bible—was a clear recognition of Christianity. As explained by one early court:

In the Courts over which we preside, we daily acknowledge Christianity as the most solemn part of our administration. A Christian witness, having no religious scruples against placing his hand upon the book, is sworn upon the holy Evangelists—the books of the New Testament, which testify of our Savior’s birth, life, death, and resurrection; this is so common a matter that it is little thought of as an evidence of the part which Christianity has in the common law.\textsuperscript{280}

(Numerous early constitutional experts confirm that an oath was inseparable from a religious belief.\textsuperscript{281})

Clearly, the Constitution is not a religion-free document; it contains three clauses that specifically give it not only a religious but also a specifically Christian construction. The Constitution now seems religion-free only because in recent years the Court first invalidated the religious construction of constitutional clauses and then construed the Constitution to be independent of the Declaration.

CONCLUSION

Over recent decades there has been a steady succession of religious practices halted by the Court under Jefferson’s authority; but why did Jefferson never once speak out against the practices that he is now used to proscribe?

\textsuperscript{279} Washington, supra note 131, at 23.
Consider how long specific religious practices were deemed to be constitutional by civil authorities until finally disallowed by contemporary courts using the name of Jefferson:

- Requiring a belief in God to hold public office (158 years, from 1789 to 1961);
- Holding organized prayer in public schools to begin each school day (160 years, from 1789 to 1962);
- Conducting organized Bible reading to begin public school days (161 years, from 1789 to 1963);
- Teaching students about a Creator in public education (164 years, from 1789 to 1966);
- Posting the Ten Commandments in public buildings (178 years, from 1789 to 1980);
- Displaying nativity scenes in government structures (187 years, from 1789 to 1989); and
- Allowing adults to offer invocations and benedictions at school functions (190 years, from 1789 to 1992).

The Court has halted such long-standing religious practices, including many established by signers of the Constitution, because it has made numerous historical errors concerning Jefferson, including:

- Applying Jefferson’s “wall of separation” to the Establishment Clause rather than the Free Exercise Clause;
- Using Virginia as the national prototype in obtaining religious liberty and achieving disestablishment when it was not;
- Establishing Jefferson as its principal expert when he had no direct role in the framing of the Bill of Rights or the Constitution;
- Interpreting Jefferson’s metaphor as a fixed, rigid, inflexible bulwark against religious expressions in the public square;
- Disregarding Jefferson’s pertinent statements about specific issues before the Court;
- Subjugating explicit constitutional language to a general figure of speech;
- Claiming Jefferson intended to prevent religion from being the subject of legislation and to isolate it from taxpayer expense;
- Describing Jefferson as a leader in secularism; and
- Asserting that the Constitution was deliberately designed as a secular, godless document.

These errors in historical fact have led to outcomes the opposite of those intended and practiced by Jefferson himself, demonstrating that bad history does indeed result in bad public
policy. Furthermore, the Court’s discriminating use of Jefferson’s words and actions intimate that he is used more as an excuse for, rather than a cause of, the Court’s rulings.

The fact that much of the Court’s current Establishment Clause jurisprudence is constructed upon a faulty historical foundation was succinctly documented by Chief Justice Rehnquist who—unlike so many other Justices—has demonstrated a complete aversion to picking and choosing select historical examples to buttress his dispositions. In fact, his dissent in *Wallace v. Jaffree* is perhaps the most comprehensive historical examination conducted by any Justice in any decision of the Supreme Court. In his impressive history-laden opinion, Rehnquist first presented twenty-four pages of First Amendment history chronicling the words and actions of several of its framers and then concluded with a barbed indictment of the Court’s historical mistakes and its abuse of Jefferson:

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

Rehnquist therefore concluded:

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

But the greatest injury of the “wall” notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The “crucible of litigation,” is well adapted to adjudicating factual disputes on the basis of testimony presented

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283. *Id.* at 92.
in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.\footnote{Id. at 107 (quoting Berkey v. Third Avenue R. Co., 155 N.E. 58, 61 (1926)) (citations omitted).}