

THE HISTORICAL TEST:

THE JUDICIAL STANDARD EMERGING FROM COLONIAL POLITICAL AND
RELIGIOUS HISTORY TO BE APPLIED TO CONSTITUTIONAL CHALLENGES BASED
ON THE RELIGION CLAUSES OF THE FIRST AMENDMENT

by

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INTRODUCTION

The current use of the “wall of separation” between church and state as a legal defense for the removal of the expression of American religious culture from governmental institutions and the prohibition of the free exercise of individuals working within them goes contrary not only to the original intent of the Founders and the Framers but also to the religious, political, and legal history and traditions of the United States of America. Courts, county school boards, teachers, and individuals, unwittingly devoid of the knowledge of the substantial role religion (primarily Protestant Christianity) played in the birth and formation of the United States are taking the Establishment Clause of the First Amendment beyond its scope: they are using it as a weapon against the free exercise of religion and abusing it by extending its interpretation beyond separating the jurisdiction of each institution. If the historical reasons or contentions for the separation of church and state were to be applied to the Establishment Clause as they were argued, it can be deduced that neither Congress nor any state legislature, after the incorporation of the First Amendment to the states, has never violated the clause, since there has never been a governmental declaration of a legally recognized national denomination or religion. The two jurisdictions have remained separate since the beginning. However, the presence of American religious culture within the public sphere has also been present since the birth of this country. Therefore, the “separation of church and state” can only be interpreted as the separation of jurisdiction of each institution and not the separation of the American religious culture from the public sphere.

Since the Supreme Court ruled in Everson v. School Board of Education, 330 U.S. 1 (1947), “separatists” have increasingly used the legendary phrase and the Establishment Clause to chisel away at this nation’s religious heritage from the public arena, especially in public primary and secondary schools, encompassing an age when a child’s development and formation of moral values is crucial. This thesis will argue that a historical standard or test emerges from the original intent of the Framers, extracted from historical documents. The standard, though simple, is not simplistic; it condenses from the fervent arguments of those whose right to religious freedom of conscience was threatened. Applying this standard to constitutional challenges based on the religion clauses of the First Amendment will help to halt “separatists” from eradicating religion from the public sphere and bring consistency to court rulings without vanishing America’s religious heritage into historical and political obscurity.

The purpose of the First Amendment was to separate the legal institutions of church and the state, not to separate or eradicate religious expression from or within governmental institutions. Evidence from the Journal of the Continental Congress, Supreme Court decisions, historical documents, and the lives and actions of the Founders and Framers support the conclusion that the terminology they used in legal documents and the religious principles they practiced while holding public office do not support that their original intent was to separate religion (Christianity) from the public sphere, but rather that the separation was to be between the civil and religious institutions. The Ten Commandments and certain books of the Torah (Pentateuch), which are revered in Christianity and Judaism, respectively, are more than

religious documents; they are historical documents from which much of Western civilization derives its laws. To deprive Americans of the historical and literary importance religion has in the founding of this country is as damaging as withholding from their academic experiences any other historical document which contributed to the formulation of the American legal system. That current separation doctrine allows for the teaching of religious documents within history and literature brings to question why there is so much litigation when they are taught within those parameters. If the violation occurs when they are taught as revealed truth, then the mere posting or engraving of Biblical phrases should not present a problem. Much of this type of litigation would be frivolous if the citizenry were more knowledgeable about the importance of religion, mainly Protestantism, and the actual issues that precipitated the two clauses. Diligently investigating American history will unearth that the intent of the Establishment and Free Exercise Clauses as applied today is much different from what the Framers envisioned.

The original intent of the Framers is neither indiscernible nor unattainable; it can be deduced from historical documents. Numerous Supreme Court opinions refer to the intent of the Framers in formulating their arguments. Of all the legal topics for which original intent may be sought and deduced, the area covering the Establishment and Free Exercise Clauses are the simplest to decipher because the contentions are few and clear, and supported by an abundance of historical and legal material. The religious prohibitions enforced today do not find their strength in history, the Bill of Rights, or the Constitution. There is a preponderance of evidence in early American documents supporting the conclusion that the separation of these two institutions was to be the severance of the legal alliance between them, not the disunion of religious and legal principles that promote social order, a mutual interest of both institutions.

ASCERTAINING ORIGINAL INTENT

The overwhelming evidence behind the Establishment and Free Exercise Clauses reaches far back into American colonial history. In the colonies, dissident Christians, such as the Baptists and Quakers, suffered much persecution because their religious conscience ran contrary to the beliefs sanctioned by colonial governments, some of which were tied to religious institutions. After the Revolutionary War, religious dissenters were concerned that the federal government would charter or create a national church. In fact, their concern was more like dread. Justice Joseph Story pinpoints the origin and nature of the trepidation:

We are not to attribute this prohibition [on the federal government] of a national religious establishment to an indifference to religion in general, and especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution,) but to a dread by the people of the influence of ecclesiastical power in matter of government; a dread, which their ancestors brought with them from the parent country, and which, unhappily for human infirmity, their own conduct, after their emigration, had not, in any just degree, tended to diminish... Probably, at the time of the adoption of the Constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the State, so far as such encouragement was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it

a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.¹

According to Story, the First Amendment, drafted to restrict the power of the federal government, is to eliminate the temptation so easily available to those in power: to legislate the exclusivity of that power. Thus, the legal separation of the institutions of church and state is imperative, accomplished by commissioning the Establishment Clause of the First Amendment as guardian over the Free Exercise Clause and placing the freedom of religion among the first fundamental freedoms mentioned in the Bill of Rights: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The phrase “separation of church and state,” however, is nowhere to be found in the document and yet, it has become an appendage to it, to which the courts have progressively given equal weight. With the incorporation of the First Amendment via the Fourteenth Amendment, the several states are likewise prohibited from proclaiming a religious sect as the state-sanctioned religious institution. Prior to the Fourteenth Amendment, however, the states were free to establish a state church.

Also not mentioned in the Constitution is the prohibition on federal and state employees from exercising their religious freedom or their constitutionally protected fundamental right of religious speech—whether it be informational or persuasive, written, oral, or symbolic—while performing their employment duties. Finally, there is no textual evidence that the Constitution explicitly or implicitly prohibits non-state employees—private citizens, including children—from exercising the same rights should they be exercised on government property, such as carrying a Bible or writing about a biblical story for a class assignment.

The people of the United States have tacitly consented to adhere to the Constitution since its ratification, thus heightening the importance of understanding the vision the Framers concerning the First Amendment. As with any historical document, its clearest meaning is obtained by studying the events, language, and social context in which it was written. These set the parameters within which a historical document will reveal its most accurate, initial meaning. It would be improper to superimpose contemporary language use and events upon a historical document to derive its interpretation, and since the country’s political and legal foundations along with individual freedoms are at stake, it is imperative that those using the Constitution as a legal defense are intimately familiar with the historical parameters within which it was written to derive its most accurate meaning.

Some say, however, that the original “intent” of the Framers is irrelevant; since they are long gone, what they intended is no longer applicable. Others like Justice Brennan say that the meaning of the Constitution is evolving, changing according to what it means in our time. Justice Brennan feels “[it] is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.”² Raoul Berger quotes A. S. Miller as saying that the Constitution should be left “to succeeding generations...to rewrite the ‘living’ Constitution anew.”³ However, the Constitution cannot be rewritten if it is to remain the standard against which deviance is to be measured. The “specific,

¹ Joseph Story, A Familiar Exposition of the Constitution of the United States 2d ed. (New York: Harper, 1859; reprint, Lake Bluff, Illinois: Regnery Gateway, 1986), 314, 316.

² William J. Brennan Jr. “The Constitution of the United States Contemporary Ratification,” in Constitutional Interpretation, 5th ed. Ducat and Chase (St. Paul: West Publishing, 1972), 62.

³ Raoul Berger, Government by Judiciary: The transformation of the Fourteenth Amendment, 2d ed., with a foreword by Forrest McDonald (Indianapolis: Liberty Fund, 1997), 402.

contemporary questions” are the ones changing, not the Constitution. That particular facts change over the years does not mean that the standard against which they are measured has to change along with them. Modern facts can still be judged against the initial concept the Framers had in mind precisely by studying the conclusions they derived when they applied the Constitution to their own contemporary facts. Perhaps in doing so, Supreme Court opinions would be more consistent and less troublesome to legislators and the legal profession.

It is misleading to say that the attempt to accurately gauge the intent of the Framers is arrogant and impossible, for some of them speak contrary to Brennan. Alexander Hamilton is quoted as saying that “[t]o avoid arbitrary discretion in the courts, it is indispensable that they [the judges] should be bound down by *strict rules* and precedents, which serve to define and point out their duty in every particular case that comes before them”⁴ (emphasis in the original). Justice Brennan would agree that the courts should be bound to precedence; however, the rules and early precedence then applied to generate it should be the guide and standard because of their proximity to the ratification of the Constitution. Furthermore, those who witnessed or participated in its creation were the ones applying the rules and precedence to their contemporary issues. It is not inconceivable that to Hamilton, an evolving Constitution was far from “strict rules and precedents”; the Constitution *was* the strict rule.

Justice Joseph Story, one of the fathers of American jurisprudence, quotes Justice Blackstone on the interpretation of the Constitution as follows:

§ 400. I. The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties. Mr. Justice Blackstone has remarked, that the intention of a law is to be gathered from the words, the context, the subject matter, the effects and consequence, or the reason and spirit of the law. He goes on to justify the remark by stating, that words are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar, as their general and popular use; that if words happen to be dubious, their meaning may be established by the context, or by comparing them with other words and sentences in the same instrument; that illustrations may be further derived from the subject-matter, with reference to which the expressions are used; that the effect and consequence of a particular construction is to be examined, because, if a literal meaning would involve a manifest absurdity, it ought not to be adopted; and that the reason and spirit of the law, or the causes, which led to its enactment, are often the best exponents of the words, and limit their application.⁵

That the “spirit of the law” be considered in interpreting the Constitution does not mean that the Constitution itself should be “rewritten” as society evolves. In fact, saying that the Constitution is a “living” document is a misnomer that defeats the purpose of the document, which is to be the standard against which all laws are measured. A standard cannot change; only the facts to which it is applied do. What is, therefore, the “spirit” of the Establishment and Free Exercise clause? By studying the arguments ardently presented by those whose religious liberty was at stake, the “spirit” was to prohibit the legislative declaration of a national church, to keep the legal

⁴ Ibid, 404.

⁵ Joseph Story, [Commentaries on the Constitution of the United States](http://www.constitution.org/js/js_000.htm), [book on-line]; available from http://www.constitution.org/js/js_000.htm, accessed 14 November 2001.

institutions of church and state separate so that there would be no religious “test” to run for or hold public office, and to prohibit religious taxation of people who were not represented within the denomination imposing the tax.⁶ That “spirit” has not changed and it can be applied today to a myriad of scenarios regardless of the particular facts of the case. To avoid “literal meanings [that] would involve a manifest absurdity,” there is no better guide to constitutional meaning than early jurisprudence, legislative enactments, and the plain, ordinary meaning of words within their cultural contexts.

The Oxford English Dictionary offers the definition of the word “establish” as used in colonial times:

Establishment

I. Action or means of establishing.

1. The action of establishing; the fact of being established: in various senses of the vb. 1688 *Col. Rec. Penn.* I. 226 That such Sanction and Establishment may be as Effectual and binding as any Law. 1739 BUTLER *Serm.* Wks. (1874) II. 225 The bare establishment of Christianity in any place...is a very important and valuable effect. 1788 W. GORDON (*title*) *The History of the rise, progress and establishment of the United States of America.*
2. *esp.* The ‘establishing’ by law (a church, religion, form of worship). (See ESTABLISH v. 7.) ¶a. In early use, the settling or ordering in a particular manner, the regulating and upholding of the constitution and ordinances of the church recognized by the state. ¶b. In 17th-18th c. occasionally the granting of legal status to (other religious bodies than that connected with the state). c. Now usually, the conferring on a particular religious body the position of a state church. 1640-1 LD. DIGBY *Sp.* in *Rushw. Hist. Coll.* (1721) IV. 172 A Man...that made the Establishment by Law the Measure of his Religion. 1706-7 *Act 5 Anne c. 5 Securing Ch. Eng.*, Acts of Parliament now in Force for the Establishment and Preservation of the Church of England.⁷

Establish

7. From 16th c. often used with reference to ecclesiastical ceremonies or organizations, and to the recognized national church or its religion; in early use chiefly *pass.* in sense (*esp.* in phrase *by law established*, i.e., ‘prescribed or settled by law’)...Hence, in recent use: To place (a church or a religious body) in the position of a national or state church. 1660 CHAS. II *Declar. Eccl. Affairs* 25 Oct 8 The...esteem we have for the Church of England, as it is established by Law. 1731 CALAMY *Life* (1830) I. i. 73 Opposition to the church by law established. 1731 SWIFT *Presbyterian’s*

⁶ Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, MA: Harvard University Press, 1992), 263.

⁷ Oxford English Dictionary, s.v. “establishment,” [database on-line]; available from <http://dictionary.oed.com>. Accessed 20 April 2002.

Plea Merit Wks. 1776 IV 260 Which [Presbyterian] sect was established in all its forms by...an ordinance of the lords and commons.⁸

Definitions 2 and 7 are of particular interest because they make a clear connection between the establishment of a church or religion with the state through law. The colonial usage of the word clearly shows that in relation to a church or religion, the word “establish” or “establishment” has no application other than a declaration by the legislative branch giving a religious organization exclusive recognition and privilege.

There are several examples where political leaders have emphasized the importance of the plain understanding of words used at the time of ratification. In his inaugural address, Thomas Jefferson promised to oversee the Constitution “according to the *safe* and *honest* meaning contemplated by the *plain* understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated [it]”⁹ (emphasis added). In ascertaining the meaning of the word “commerce,” Chief Justice Marshall stated in Gibbons v. Ogden that all Americans understood the meaning of the word as they used it at the time of the ratification:

To ascertain the extent of the power [of Congress to regulate commerce], it becomes necessary to settle the meaning of the word [commerce]...Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse... if commerce does not include navigation, the government of the Union has no direct power over that subject...All America understands, and has uniformly understood, the word “commerce” to comprehend navigation. It was understood, and must have been so understood, when the Constitution was framed...The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.¹⁰

Justice Sutherland in Euclid v. Ambler Co., 272 U.S. 365 at 387 (1926) stated, “the meaning of the constitutional guaranties never varies, [although] the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operations.” The meaning that “never varies” must be referring to the original intent of the Framers, which is knowable to a great degree through the study of their political and personal actions, beliefs, and statements within the culture and events from which it emerged. Thus, the immutable meaning of any constitutional principle must determine whether the varying contemporary issues to which it is applied are constitutional. The importance of the original intent is so great that James Madison gave this warning: “[if] the *sense* in which the Constitution was accepted and ratified by the Nation... be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers.”¹¹ That “sense” is derived from the original intent embedded in the culture and events that generated it.

⁸ Oxford English Dictionary, 2nd ed., s.v. “establish.”

⁹ Berger, 405.

¹⁰ Gibbons v. Ogden, 22 U.S. 1 (1824) at 190.

¹¹ Berger, 4.

The “sense” which is embodied in the Establishment and Free Exercise clauses is clear and narrow; its historical conception is easily identified and defined. In his book, Taking Rights Seriously, Ronald Dworkin illustrates the existence of “conceptions” within each concept presented in the Bill of Rights. According to him, the principles, concepts, or “sense” in the Constitution and especially in the Bill of Rights, carry within them a number of different “conceptions.” He gives the example of the concept of “fairness.” Within it, there are many conceptions of what constitutes fairness. He recounts his example thus:

Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my “meaning” was limited to these examples, for two reasons. First, I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant that family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind¹² (emphasis in original).

Dworkin argues that judges can use political philosophy to decide what a conception of a concept might be. He states that the constitutional text only provides concepts like due process, cruel and unusual punishment, and free exercise of religion. The document does not, however, provide the conceptions within those concepts. It is precisely because of the lack of textual “conceptions” that we must intently look at early American history to articulate them.

In his scenario, Dworkin states that he has in mind examples (the conceptions) of fairness (the concept). It is therefore not unreasonable to infer that for a concept to be conceived there must be an initial conception, at least one conception that generates the concept; concepts are not generated in a vacuum. There must be at least one conception of fairness to generate an inclusive concept of fairness; there must be at least one conception of due process or commerce for their concept to be birthed. That initial conception sets the parameters for the others following, determining whether they legitimately belong within the concept. The same applies to the two clauses of the First Amendment at issue as well as to the word “religion” itself.

In Reynolds v. United States, 98 U.S. 145 at 162 (1879), Chief Justice Morrison R. Waite found it necessary to go outside the Constitution to determine the meaning of the word “religion”: “We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than *to the history of the times in the midst of which the provision was adopted*. The precise point of the inquiry is, what is the religious freedom which has been guaranteed” (emphasis added). Eleven years later, the Court in Davis v. Beason, 133 U.S. 333 at 342 (1890), defined “religion” as a term that

has reference to one’s view of his relations to his Creator, and to the obligations they imposed of reverence for his being and character, and of obedience to his will. . . . With man’s relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief

¹² Ronald Dworkin, Taking Rights Seriously (Cambridge, MA: Harvard University Press, 1978), 134.

on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.

According to the Court, religion has a Supreme Being, the Creator, or Maker, whom mankind obeys, reveres, and with whom mankind has a relationship. It is fascinating to note here that it took approximately one hundred and ten years after the ratification of the Constitution for the Court to find it necessary to define religion. It was not until the introduction of Mormonism that the Court addressed this issue. Most probably, the reason for this is that up until that time, most of the existing denominations were actually sects of the same religion, Christianity. There was no need for definition before this time because “the safe and honest meaning [of religion] contemplated by the plain understanding of the people” was Christianity. Therefore, the “conception” within the “concept” of religion in the First Amendment is very narrow: its parameters are set by Christianity, including the teachings of Old Testament Judaism from which Christianity derives its historical and theological context and origin. Islam, and to a lesser degree Hinduism, also qualify as “religions” under the Davis definition because they too have at least one god who requires allegiance and obedience.

Among all the fundamental freedoms protected in the First Amendment, the free exercise of religion and the prohibition on religious establishment are the least complicated. Although the “concept” of the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection of the Fourteenth Amendment may have numerous “conceptions,” which are outside the scope of this thesis, the conceptions of religion within the Establishment and Free Exercise Clauses must align themselves to these narrow issues: 1) the establishment of a national religion to which special privileges are rendered, 2) the religious test to hold public office, and 3) the financial support of the established national religion via taxes paid by citizens not represented within that religion. These issues culminated in the drafting of the First Amendment and surfaced in the years between the early 1600s and the ratification of the Constitution in 1789. In order to arrive at an understanding of the initial conceptions within the concepts of religious establishment and free exercise in the First Amendment, an investigation of the historical context covering those one hundred and ninety years is imperative.

COLONIAL UNDERPINNINGS OF THE RELIGION CLAUSES

The Church of England traditionally enjoyed legally established preeminence over other denominations, which was supported by the Crown.¹³ During his reign in the late sixteenth and early seventeenth centuries, King James I was not tolerant of religious dissenters from the Anglican Church. He persecuted Separatists, some of which were Baptists, and vowed to “make them conform themselves, or [he would] harrie them out of the land.”¹⁴ These religious migrants fled England and found asylum in Holland. The ones who settled in Leiden became the Pilgrims who made their way to Plymouth Rock in 1620. To distinguish themselves from the Puritans and other Separatists, the Plymouth congregation drafted the Baptist Confession of 1612, whose Article 84 declared the following:

¹³ Gordon S. Wood, The Radicalism of The American Revolution (New York: Alfred A. Knopf, 1992), 17.

¹⁴ James E. Wood, Jr. “Introduction,” in Baptists and the American Experience, ed. James E. Wood, Jr. (Valley Forge: Judson Press, 1976), 11.

That the magistrate is not by virtue of his office to meddle with religion, or matters of conscience, to force or compel men to this or that form of religion, or doctrine: but to leave the Christian religion free, to every man's conscience, and to handle only civil transgressions (Rom. xiii), injuries and wrongs of man against man, in murder, adultery, theft, etc., for Christ only is the king, and lawgiver of the church and conscience (James iv. 12).¹⁵

This is perhaps the first document advocating the separation of church and state.¹⁶ Although the Article pertains only to Christians because it was a Christian sect asserting the separation, the argument remains universal. The Article focuses on the separation of the *office* of the king from religious matters. Only Christ is to be king over the church, its only lawgiver. The document states that the magistrate is not authorized “by virtue of his office” to legislate and compel the citizenry to adhere to a state-sanctioned form or doctrine of religion, that being the Church of England. Civic office does not give the magistrate the legal authority to meddle within the sphere of religion. There is, however, no mention of any separation of Christian values, principles, or symbols, i.e., Christian culture, from the civic realm. To acknowledge the moral principles derived from Christianity that will promote good social order is not contrary to keeping the two institutions separate. The separation was purely legal in nature, that being, statutory: the state cannot statutorily declare establishment of one denomination over another.

Another Separatist, Leonard Busher, while zealously fighting for the full freedom of religious conscience of all people back in England, including Jews and Catholics, he specifically vocalized his support of religious freedom for the Baptists:

King and magistrates are to rule temporal affairs by the swords of their temporal kingdoms, and bishops and ministers are to rule spiritual affairs by the Word and Spirit of God, the sword of Christ's spiritual kingdom, and not to intermeddle one with another's authority, office, and function... It is not only unmerciful, but unnatural and abominable, yea, monstrous, for one Christian [Anglican] to vex and destroy another [Baptist] for difference and questions of religion.¹⁷

The focus of this passage is for the Church and State “not to intermeddle one with the other's authority, office, and function.” These three areas—authority, office, and function—are those related to governmental authority, not individual practice. The tone of these two proclamations is one calling for religious plurality within a Christian community and a nation that does not have a legally established religion. Since the contending religions had a common origin, it was crucial that the state did not legally recognize or privilege one over the other.

By contrast, the Puritans were more concerned with securing religious purity within the decadence of the Church of England than with religious freedom of conscience. To them, religious freedom represented the Crown's protection against Catholicism.¹⁸ In their analysis of the Anglican Church during the rule of the Stuarts, its theological and practical tendencies

¹⁵ Gordon Wood, 12-13.

¹⁶ Ibid.

¹⁷ James E. Wood, Jr., 13.

¹⁸ Jeffrey M. Kahl, “The Righteous Cause of Liberty: Christianity and the American Revolution.” Master's Thesis, Ashland Theological Seminary, 1997, 18.

moved too closely to that of the Roman Catholic Church, thus destroying the protection of their religious liberty.¹⁹ The Puritan John Winthrop and the others at the Massachusetts Bay Colony did not necessarily want to separate from the Church of England. According to their belief, God had made a special covenant with them, commissioning them to live according to the Scriptures, to reform the Church, and to demonstrate to their brethren in England that their community will be as a “city upon a hill,”²⁰ a beacon for the rest of Christendom, and a pure theocratic entity. It was imperative for the Puritans that the church and civil government remain together to achieve a truly moral society, although ministers could not hold public office nor could they exercise any political authority. Membership in their Congregationalist churches and in the community was the measure of an individual’s commitment to Christianity. To them, democracy was deplorable and religious tolerance of other dissident Christians was actually anti-Christian.²¹ The Congregationalist pastor John Cotton believed that “theocracy” was “the best forme of government in the commonwealth, as well as in the church.”²²

It is important to understand the Puritan’s desire to keep the church and state together because it is the backdrop against which the argument for the separation of the two institutions is staged. Roger Williams, initially a Puritan, was banished by the Puritans from the Massachusetts Bay Colony to Rhode Island for his “radical” theology and his extreme views, among which was the separation between church and state. He insisted that the civil magistrates had no business punishing people for their religious beliefs, that the state is not religious or Christian, and that civil authority is “natural, human, and civil.”²³ Williams cared so much about the church that he insisted that the two entities be separate. According to the authors Isaac Kramnick and R. Laurence Moore, “since [Williams] came to believe that no organized church possessed all of God’s truth, he concluded that any effort to sanction by law an official religion impeded the advance of God’s millennial church.”²⁴ The key in their statement is “the sanction by law of an *official* religion” (emphasis added). Williams further stated, “no civil government or country can be truly called Christian, although true Christians be in it.”²⁵ These early ideas of separation of church and state do not in any way support the exclusion of religion in the public sphere nor do they prohibit the exercise of Christian morals and values, or the display of religious symbols, within the civil or public arena. Kramnick and Moore themselves emphasize that Williams’ contention was with the sanctioning of an official religion; government “should not declare an *official church* or a state religion”²⁶ (emphasis added). Williams was not concerned with religious principles, wording, or symbols being brought within governmental walls. What this colonial American sought was a legal separation of the two entities so that membership in the church would not qualify participation in public office. The common denominator in all his statements is the separate source and exercise of authority: the government’s and the church’s authority do not overlap; they have distinct origins, functions, and spheres.

Williams was very much persecuted for his religious beliefs and the political implications they carried. However, contrary to Kramnick and Moore’s opinion, Williams was not “inventing

¹⁹ Ibid.

²⁰ Matthew 5:14.

²¹ James E. Wood, Jr., 15.

²² Ibid.

²³ Ibid., 16.

²⁴ Isaac Kramnick and R. Laurence Moore, The Godless Constitution: The Case Against Religious Correctness (New York: W. W. Norton & Co., 1996), 52.

²⁵ James E. Wood, Jr., 16.

²⁶ Kramnick, 58.

a godless politics.”²⁷ In fact, they fail to define what they mean by “godless Constitution” and ignore the numerous times that Congress appropriated funds for the support of ministers and provided statutory formations of religious schools.²⁸ What Williams was trying to create was an *institutionally* “non-denominational” polity, and the two are very different. “Religion” denotes a dogma, a ritual, a creed, and a set of rules within a set entity. A Supreme Being is the recipient of worship and faith, and that faith, that trust, is carried within people, affecting how they will comport themselves in all aspects of their life, even their political life. If it were true that Roger Williams’ intent was to withdraw all religious references from the political sphere, then he would not have approved Rhode Island’s 1663 charter. The charter strictly prohibited any persecution by the state of any person exercising freedom of religion:

[We h]ave therefore thought ffit, and doe hereby publish, graunt, ordeyne and declare, That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion²⁹

It is very interesting, however, that in the same legal document the following statement is found: “...whereby oure sayd people and inhabitants, in the sayd Plantationes, may be soe religiously, peaceably and civilly governed, as that, by their good life and orderlie conversations, they may win and invite the native Indians of the countrie to the knowledge and obedience of the onlie true God, and Saviour of mankinde...”³⁰

Did he who advocated separation of church and state contradict himself? Is it contradictory for the signers of this document to have said that the behavior of the citizens of Rhode Island should have been of such godly manner that they “may win and invite the native Indians of the countrie to the knowledge and obedience of the onlie true God, and Savior of mankinde” and still demand freedom of religion from state control? The “God and Savior” to whom they referred is the Christian God and Savior, Jesus Christ. If there was a contradiction in fact concerning the separation of church and state, this document does not reveal it. The document does reveal that the authors included within a legal document a religious goal, from which it can be inferred that their intention was to separate the institutions, not to bar the inclusion of words and meanings with religious values. Whether the document promotes religion in private life only and not public life is not the issue; the issue is that religious terminology was included in a legal, political document, which today some would argue as unconstitutional, violating the Establishment Clause of the First Amendment. The belief may be private, but the document expressly declares a public religious goal.

²⁷ Ibid., 62.

²⁸ Erez Kalir, “Book Note: Is the Constitution “Godless” or Just Nondenominational?” *Yale Law Journal*, 106 Yale L.J. 917, (1996): 919. See also, *Northwest Ordinance; July 13, 1787*, Avalon Project at Yale Law School [database on-line]; available from <http://www.yale.edu/lawweb/avalon/nworder.htm>, Section 14, Article 3. Accessed 21 April 2002.

²⁹ *Charter of Rhode Island and Providence Plantations - July 15, 1663*, Avalon Project at Yale Law School [database on-line]; available from <http://www.yale.edu/lawweb/avalon/states/ri04.htm>. Accessed 18 November 2001.

³⁰ Ibid.

Kramnick and Moore use Roger Williams' life and statements to support a Constitution void of religion. But they neglect to acknowledge that Williams' contention was strictly one of institutional establishment of religion by legislation, which would in turn would hinder religious freedom of conscience. It should be noted that John Clarke, who was largely responsible for the issuance of the 1663 charter, is considered both as the Father of Rhode Island as well as the Father of American Baptists.³¹

Christian doctrine played a major role in influencing the politics of the American Revolution; the Baptists in particular spearheaded the severance of religious and political institutions.³² The Great Awakening of the mid eighteenth century had a great impact on colonial life. This protestant, evangelical movement focused on personal accountability before God, personal revelation of the Scriptures, individual repentance and salvation through faith in Christ, and called into question the entire Puritan societal system.³³ It also sought to erase the contentions between Protestant sects. As George Whitefield eloquently said, "Don't tell me you are a Baptist, and Independent, a Presbyterian, a dissenter... tell me you are a Christian, that is all I want." It was also the catalyst for the increase in dissenting religious groups, causing the "New Lights" to split from the "Old Lights" who were the forerunners of Unitarianism³⁴ and saw the New England community as a Christian society whose continuity was ordained by God and was threatened by the individualistic salvation of the New Lights. To the Old Lights, America was a "holy commonwealth"³⁵ and the separation of church and state threatened its stability. "Awakened" New Light Congregationalists who refused to adhere to their Old Light church doctrines and insisted on ordaining their own pastors formed their own "Separate" Congregational churches, many of which became Baptist.

The individual responsibility toward faith in God translated to the political ideology of civil and religious separation, since "Christ and His Scriptures are the only binding authorities for individual Christians."³⁶ Therefore, civil government had no authority to dictate what a person should believe about God and religion. One of the most outspoken Baptist preachers arguing for religious liberty and the separation of church and state was Isaac Backus. He, like many other colonial preachers, wrote pamphlets to propagate their view and turn the tide of religious as well as political opinion. History of New England was Backus' most influential work in which he makes it clear religious oppression was not the principle upon which New England was established, and that such oppression was an intruder that came afterwards. The founders of New England fled England for freedom of conscience. With the subtitle of his pamphlet, "with Particular Reference to the Denomination of Christians Called Baptists," he inferred that the Baptists were the true successors of the New England founders' mission: religious freedom of conscience.³⁷ His political theory based civil authority on the consent of the governed and demonstrated that power becomes corrupt when civil and ecclesiastical authorities

³¹ James E. Wood, Jr., 17.

³² Bailyn, 245-72.

³³ Mark A. Noll, "From the Great Awakening to the War for Independence: Christian Values in the American Revolution" in Christian Scholar's Review 12, no. 2 (1982): 100-1.

³⁴ *Ibid.*, 101.

³⁵ *Ibid.*, 103.

³⁶ Kahl, 39.

³⁷ Winthrop S. Hudson, "Baptists, the Pilgrim Fathers, and the American Revolution" in Baptists and the American Experience, edited by James E. Wood, Jr. (Valley Forge: Judson Press, 1976), 29-30.

intermingle.³⁸ The desire for religious liberty of conscience paralleled the secular liberty the colonists sought from England; fighting the tyranny hindering religious and political self-governance were concurrent and righteous revolutionary causes. Dissent from well-grounded Anglican laws was the non-violent weapon of choice.

The Church of England was suffering dissent throughout the colonies. As early as 1740, New Light Presbyterians in Virginia defied ecclesiastical mandates, and Roman Catholics held public office although there were laws excluding them. Many dissenting groups were exempt from paying church taxes and Anglican Communion. Separatists in Connecticut and Massachusetts were so persuaded that they were “the only true orthodoxy...[that they] refused to accept the legal benefits available to officially recognized dissenters.” They insisted that liberty of conscience was an “unalienable right of every rational creature,” and demanded “complete separation of church and state.”³⁹

By contrast, and because the “established” Anglican Church was so tenuous, recognized dissenters in Connecticut and Massachusetts enjoyed tolerance in worship and exemption from Church taxes to such an extent that John Adams described the situation as “the most mild and equitable establishment of religion that was known in the world, if indeed [it] could be called an establishment.”⁴⁰ His statement is revelatory in that it equates entrenched religious concessions with dissenters to the deeply rooted laws of the Church of England, which was the one and only established church possessing the supreme authority and power sanctioned by the state, and reveals the colonial, Dworkin “conception” of what was considered the establishment of religion during the Revolutionary Era. It is obvious that in the mind of John Adams “establishment” had more to do with the requirements a church placed on the citizens of a locale rather than the individual religious practices of individuals within their private as well as public spheres.

The colonial conception of establishment is further refined by William Livingston, a pamphleteer and New York lawyer who, with a group of colleagues, campaigned against the privileges of the Church of England’s college in New York, mounting the offense within the pages of the Independent Reflector in 1753. As Bernard Bailyn describes it, the issue Livingston confronted was the “right of any one religious group [the Anglicans] to claim for itself *exclusive privileges* of public support...[He] advanced for the first time in American history the conception that public institutions, because they were ‘public,’ should be if not secular at least non-denominational”⁴¹ (emphasis added). The main contention was not that a religion was receiving public funding, but that it received it in exclusion of all other religions; only the members of the Anglican Church at the expense of dissenters enjoyed the privileges.

That to the colonists the word “establishment” meant nothing other than the government’s disbursement of privileges or favors to one religious sect over another and enforcing legal requirements on the population regardless of its religious make-up is evident by the fears and accusations the dissenters hurled against the Anglican Church and the King based on their legal and ecclesiastical inseparability. The clergy in Virginia protested against the Two Penney Act of 1759, which they contended illegally devalued their salaries. Their protest was so successful that it defeated the Act in England and prompted the Bishop of London to issue a

³⁸ Isaac Backus, “An Appeal to the Public for Religious Liberty,” in On Church, State and Calvinism, ed. William G. McLoughlin (Cambridge: Harvard University Press, 1968), 316-325.

³⁹ Bailyn, 248-9.

⁴⁰ Diary and Autobiography of John Adams, III, 312, quoted in Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, MA: Harvard University Press, 1992), 248.

⁴¹ Bailyn, 250.

castigatory letter “denouncing the people of Virginia for [their] disrespect to the Church of England, laxness in dealing with dissenters, and a desire ‘to lessen the influence of the crown and the maintenance of the clergy.’” Patrick Henry actually defended the Act, stating that “the only use of an established church and clergy in society is to enforce obedience to civil sanctions, and ...when a clergy cease to answer these ends, the community have no further need of their ministry, and may justly strip them of their appointment.” Instead of being worthy agents of the state, these dissenting Anglican ministers “ought to be considered as enemies of the community, and...very justly deserved to be punished with signal severity.”⁴²

Contrary to Henry’s views, Virginians were adamantly opposed to the merger of church and state. Jonathan Mayhew, a pamphleteer experienced in both politics and theology, attacked the Church of England’s appointment of East Apthorp as missionary of its Society for the Propagation of the Gospel outside of Harvard College, warning that “[i]f the Church of England were ever established in New England, religious oaths would be demanded as they were in England ‘and all of us [would] be taxed for the support of bishops and their underlings.’”⁴³ Such a widespread establishment of the Church would require an act of Parliament or royal proclamation. According to Mayhew, neither Parliament nor the crown had any right to interfere with the internal affairs of the colonies through the manipulation of religious institutions:

If bishops were speedily to be sent to America, it seems not wholly improbable, from what we hear of the *unusual* tenor of some late Parliamentary acts and bills for raising money on the poor colonies *without their consent*, that provisions might be made for the support of these bishops, if not of all the Church clergy also, in the *same way* (emphasis in original).⁴⁴

Fifty-four years after the Mayhew-Apthorp controversy, John Adams credited it as

spread[ing] an universal alarm against the authority of Parliament. It excited a general and just apprehension that bishops, and dioceses, and churches, and priests, and tithes, were to be imposed on us by Parliament. It was known that neither King, nor ministry, nor archbishops could appoint bishops in America without an Act of Parliament; and if Parliament could tax us, they could establish the Church of England with all its creeds, articles, tests, ceremonies, and tithes, and prohibit all other churches, as conventicles and schism shops.⁴⁵

The essence of the contention was the integration of the religious polity with the civil polity, thus compelling the population to pay for the support of a religion alien to their own without receiving reciprocal benefits.

During the years of the Great Awakening, Separate Baptists, New Light Presbyterian, and Methodists flooded Virginia, all of them violently hostile to coercion in any form, and all of them demanding full religious freedom. Nonetheless, the House of Burgesses tried to pass a bill

⁴² Ibid., 252-3.

⁴³ Jonathan Mayhew, *Observations...* (Boston, 1763), 20-1, 26, 155-56; Richard J. Hooker, “The Mayhew Controversy,” *Church History*, 5 (1936), 254, Adams, *Works*, X, 288, as quoted in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1992), 256.

⁴⁴ Ibid.

⁴⁵ Bailyn, 257.

requiring dissenters to meet only during daylight hours in licensed meeting halls with doors unlocked; preaching and baptizing slaves was strictly prohibited and “dissenters suspected of disloyalty could be forced to take the test oath and to swear to the articles of the Church of England.”⁴⁶ The dissenters protested with a vengeance, demanding that all Protestant and non-conformist preachers have the right to “preach in all places and at all seasons without restraint.”⁴⁷ Furthermore, they fervently argued that the pursuit of civil liberty was equal to the pursuit of religious freedom of conscience to preach and teach anywhere in the colonies. The Virginian electorate ordered the Burgesses to work on a declaration “that no religious *sect* whatever be established in this commonwealth”⁴⁸ (emphasis added). Finally, persecuted Baptists, Presbyterians, and enlightenment idealists urged James Madison to write the phrases pertinent to religious freedom in the Virginia Declaration of Rights. Article XVI of the Declaration states the following:

That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.⁴⁹

Delegates from three Virginia counties emphasized that, in light of the inevitable military struggle with Britain, they sought “equal privileges” in both religion and civil affairs, since to establish one denomination over another would be a great injustice, and demanded that “without delay all church establishments might be pulled down, and every tax upon conscience and private judgment abolished.”⁵⁰ Presbyterians from Hanover County demanded that “no ecclesiastical establishment” be enacted and that no religious group be granted the “exclusive or separate emoluments or privileges...to the common reproach and injury of every other denomination” culminating in the abolition of “all partial and invidious [religious] distinctions.”⁵¹ By their own admission, the non-conformist religious groups considered “establishment” equal to granting privileges to one religious group over another, and instead of demanding no privileges at all, they wanted privileges for all.

In Massachusetts, the attack on Apthorp was just as heated. His reply to a series of articles attacking his extravagant lifestyle and his “identification of Christian orthodoxy with episcopacy” shook the profound fears of the non-Anglican community throughout the colonies, reverberating most strongly in New England, where they feared that America was about to establish an episcopate. The disdain for the union of church and state was not vaguely

⁴⁶ G. MacLaren Brydon, Virginia’s Mother Church and the Political Conditions Under Which It Grew, II, 249 ff., 367 ff., quoted in Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, MA: Harvard University Press, 1992), 258.

⁴⁷ *Ibid.*, 378-80, 381, 555, 556, 557, quoted in Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, MA: Harvard University Press, 1992), 259.

⁴⁸ *Ibid.*

⁴⁹ Virginia Declaration of Rights, Avalon Project at Yale Law School [database on-line]; available from <http://www.yale.edu/lawweb/avalon/states/ri04.htm>. Accessed 7 March 2002.

⁵⁰ Bailyn, 260.

⁵¹ William T. Hutchison, *et al.*, eds., Papers of James Madison (Chicago: University of Chicago Press, 1962), I, 112, 170-5; Brudin, Virginia’s Mother Church, II, 562-3, 564, 565, 566, quoted in Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, MA: Harvard University Press, 1992), 261.

verbalized: “We regard neither pope nor prince as head of the church; nor acknowledge that any Parliaments have power to enact articles of doctrine of forms of discipline or modes of worship or terms of church communion.”⁵² Isaac Backus and his supporters resented civil government’s power to dole out religious favors to whomever it deemed worthy and to tax them without their consent to support the theology contrary to their convictions, accusing it of hypocrisy for demanding liberty from England:

[The established church] has declared the Baptists to be irregular, therefore the secular power still *force* them to support the worship which they conscientiously dissent from.... [M]any who are filling the nation with the cry of LIBERTY and against *oppressors* are at the same time themselves violating that dearest of all rights, LIBERTY of CONSCIENCE...[They call themselves] *Sons of LIBERTY*, but they treat me like *sons of VIOLENCE*⁵³ (emphasis in original).

“Taxation without representation” became the revolutionary cry of the Baptists. They rebelled against taxes supporting a religious institution, which went contrary to their fundamental beliefs. In his Appeal to the Public for Religious Liberty, Backus argued, “religious liberty is so blended with civil that if one falls it is not to be expected that the other will continue.” Only an act of the legislature can decide which sect is worthy of civil privileges and which one is not, making the selection arbitrary and subject to a majority vote. To their shame, Backus condemned them with their own words: “[H]ave we not as good right to say you do the *same thing*, and so that wherein you judge others you condemn yourselves?...[Just like] the present contest between Great Britain and America, is not so much about the greatness of the taxes already laid as about submission to their taxing power, so...our greatest difficulty at present concerns the submitting to a taxing power in ecclesiastical affairs.”⁵⁴ To the Baptists and all dissenters, religious freedom of expression was not something an earthly government had the power to bestow on a select few. The right to worship as their conscience dictated was not a “favor” or “privilege” dispensed at the will of the legislature; it was an inalienable right the Creator imparted to all human beings.

Against this long battle for religious freedom, the Baptists were rightly concerned that the right to worship without governmental compulsion would be abridged or eradicated. Eleven years after the ratification of the Bill of Rights, the Baptists’ apprehension that the separation would not be maintained was still fresh on their minds as evidenced in a letter the Danbury Baptist Association sent to President Thomas Jefferson on October 7, 1801. The Association expressed their concern that “what religious privileges [they] enjoy (as a minor part of the State) [they] enjoy as *favors* granted, and not as inalienable rights”⁵⁵ (emphasis added). The phrase “separation of the church and state,” which is not found in the Bill of Rights, is actually found in

⁵²Amos Adams, Religious Liberty an Invaluable Blessing, (Boston: Levertt, 1768), quoted in Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, MA: Harvard University Press, 1992), 262.

⁵³ Isaac Backus, A Seasonable Plea For Liberty of Conscience. Against Some Late Oppressive Proceedings, Particularly in the Town of Berwick in the County of York, (Boston: 1770), 8, 3, 14, quoted in Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, MA: Harvard University Press, 1992), 263. See also, Edwin S. Gaustad, “Baptists and the Making of a New Nation” in Baptists and the American Experience, edited by James E. Wood, Jr., (Valley Forge: Judson Press, 1976) 32.

⁵⁴ Backus, “An Appeal...”.

⁵⁵ “Thomas Jefferson on the Separation of Church and State,” First Amendment Cyber-Tribune [database on-line]; available from <http://w3.trib.com/FACT/1st.jeffers.2.html>. Accessed 28 November 2001.

the President's reply to them on January 1, 1802: "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."⁵⁶ From the Association's statement, the fear they projected to President Jefferson was not that they would be prohibited from exercising their religious rights, but rather that their rights would be taken away by the state if those rights were indeed granted *favor* or privileges and not inalienable rights. Furthermore, in light of the historical debates evidenced above, their concern focused on the establishment of a sect of Christian religion as the sanctioned, legislatively approved religion, respecting it over others, and bestowing special favors and privileges on it.

The Baptist Association differentiated between granted favors and inalienable rights. Surely Thomas Jefferson was familiar with the term "inalienable rights" which he penned in the Declaration of Independence. According to Jefferson and all who ascribed to the Declaration, inalienable rights were inherent, in-born, given to men by "their Creator." That is why no legislature could enact laws to encroach them. The source of these rights was not worldly; rather, the source was above and beyond human authority. To comprehend the legal difference between the two, definitions are in order. Black's Law Dictionary defines favors as acts "of kindness or generosity, as distinguished from one that is inspired by regard for justice, duty, or right."⁵⁷ Several definitions of the word "inalienable" help in ascertaining the full scope of the meaning. Black's defines inalienable as "not subject to alienation; the characteristic of those things which cannot be bought or sold or transferred from one person to another..."⁵⁸ The Oxford English Dictionary is especially revelatory because it gives definitions of words as they were used in a particular historical context. The word "inalienable" was used as follows:

Inalienable, a.

Not alienable; that cannot be alienated or transferred from its present ownership or relation. 1611 COTGR., Inalienable, unalienable; which cannot be sold, or passed away. . 1743 J. MORRIS Serm. vii. 197 God...gives all men their being, and has an unalienable claim to their obedience. 1809-10 COLERIDGE Friend (1865) 120 This right of the individual to retain his whole natural independence...is absolutely inalienable.⁵⁹

The definitions are not restricted to the mere selling of one's rights, but also include their transfer, repudiation, surrender, and eradication.⁶⁰ Whether possessors of such rights are active or passive agents, neither they nor any outside agent or entity can compel the separation of these rights from the possessor. By contrast, favors are "acts of generosity" transferred from one person or entity to another, or legislatively enacted. So are legal privileges. The members of the Danbury Baptist Church were not concerned that they themselves would sell, transfer, or surrender their rights to another, or be compelled to do so; they were concerned that the federal government would take away their rights if they were to be construed as government-granted

⁵⁶ Ibid.

⁵⁷ Black's Law Dictionary, 6th ed., s.v. "favors."

⁵⁸ Ibid., "inalienable."

⁵⁹ Oxford English Dictionary, s.v. "inalienable," [database on-line]; available from <http://dictionary.oed.com/cgi/entry/00113765>. Accessed 20 April 2002.

⁶⁰ Webster's Revised Unabridged Dictionary and WordNet, s.v. "inalienable" [database on-line]; Available from <http://www.dictionary.com/doctor/>. Accessed 19 February 2002.

favors instead of favors or inalienable rights granted by the Creator. The source of the liberty made all the difference.

Jefferson's reply to them reassured that the "wall of separation" was a wall barring only the legislative body of government, the external entity, from establishing a particular sect of the Christian religion and prohibiting the free exercise of all religion. The text does not indicate that the people are barred from any action. Contrary to Kramnick and Moore's view that "a wall of separation, after all, prevents trespassing *in both directions*,"⁶¹ the First Amendment is only prohibiting one party from such trespass. A physical wall may prevent two parties from trespass, but a legal wall may prevent only one party from acting—much like an injunction—and that one party is the legislative branch, whether it is Parliament or Congress (emphasis added).

It is not difficult to deduce from historical revolutionary pamphlets and other documents that the consensus among the colonists and the consequent intent of the Framers was that government could not bestow special privileges to one Christian sect and deny them to others. Government could not legislatively establish one Christian sect over another in the same manner that the Church of England was the national church nor could government compel members of nonconformist religions to pay taxes to support a government-approved established religious institution. If one sect was endowed with special privileges, all should receive the same consideration. Furthermore, government could not bar anyone from public office because of the content of his or her religious convictions or lack thereof. The Establishment Clause of the First Amendment has already effectively accomplished all these goals, and participation in the republican form of government guarantees representation in the legislature to secure the equal treatment. Nothing in the Clause or in the historical record alludes to the prohibition of government funding of religion as long as it is available to all religions, even if one religion is in the majority within a particular community. Thus, the Dworkin "conception" within the Establishment Clause is very narrow. Its enlargement can occur only by ignoring colonial history.

LEGAL, GOVERNMENTAL, AND BIOGRAPHICAL EVIDENCE

That the Establishment Clause did not prohibit the inclusion of the Christian religious culture within governmental documents, buildings, and events finds support in the governmental documents themselves. The Continental Congress, the United States Congress, and various courts' decisions give an accurate record of the inclusion religious culture into the political and legal spheres well into the nation's second century of its existence. The Declaration of Independence is the cornerstone of this inclusion:

WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that

⁶¹ Kramnick, 43.

among these are Life, Liberty, and the Pursuit of Happiness-That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed...

There are two phrases that warrant specific attention: “the Laws of Nature and of Nature’s God” and “that all Men...are endowed by their Creator.” Regardless of some of the Founders’ personal religious beliefs, the fact remains that they all ascribed to this wording penned by Thomas Jefferson, a presumed deist. In his commentaries on the law, Sir William Blackstone defines “the Law of Nature” and “Nature’s God”:

Law of Nature. This law, being coeval with mankind and dictated by God Himself, is obligatory upon all. No human laws are of any validity if contrary to this, as they derive their force and authority from this original.

Revealed Divine Law. In compassion for the imperfections of human reason, God has mercifully at times discovered and enforced His laws by direct revelations. These are found in the Holy Scriptures... The revealed law is of greater authenticity, than the moral system framed by ethical writers, termed the natural law, because one is the law of nature, as declared to be by God Himself; the other is only what, by the light of human reason, we imagine to be that law.

Foundation of Human Law. Upon these two foundations, the law of nature and the law of revelation, depend all human laws; i.e., no human laws should contradict them.⁶²

Blackstone is one of the two most evoked legal authorities by the Founders.⁶³ Although prior to Christianity other civilizations had the concept of natural law, it is plain to understand from Blackstone’s definitions what he defined as the law of nature and who was nature’s God. According to him, the law of nature is found in the Holy Scriptures, which the God of nature revealed.

According to the Founders, the second phrase names the source of human rights: the Creator. As Blackstone states, “The will of [man’s] Maker is called the law of nature. Man is entirely a dependent being, subject to the laws of his Creator, to whose will he must conform.”⁶⁴ These laws are not merely physical laws, but also moral laws. Otherwise, there would be no need to mention them within the context of the legal profession.

Having the Creator as the source of rights instead of Parliament is an important contrast; the colonists had to separate themselves from England at a fundamental level. Quoting Blackstone, Bernard Bailyn states that, to the English, Parliament was the “ ‘supreme, irresistible, absolute, uncontrolled authority in which...the rights of sovereignty, reside...’ and that in England this ‘sovereignty of the British constitution’ was lodged in Parliament, the

⁶²Bernard C. Gavit, ed. Blackstone’s Commentaries on The Law (Washington: Washington Law Book Co., 1941), 27.

⁶³ Donald S. Lutz, The Origins of American Constitutionalism (Baton Rouge: Louisiana State University Press, 1988), 142.

⁶⁴ Gavit, 26.

aggregate body of King, Lords, and Commons, whose actions ‘no power on earth can undo.’”⁶⁵ Therefore, Blackstone states that God and His revealed laws set the parameters for all laws that government (Parliament and Congress) may enact, but the power of Parliament, entrusted not to contradict God’s laws, is absolute. Parliament was the “creator and interpreter, not the subject, of law; the superior and master of all other rights and powers within the state.”⁶⁶ The colonists, then, had to show Parliament’s legislation as violating God’s laws in order to have legal and moral grounds for the separation. After all, by nature “government [is] necessarily hostile to human liberty and happiness;...it exist[s] only on the tolerance of the people whose needs it serves; and that it could be, and reasonably should be, dismissed—overthrown—if it attempted to exceed its proper jurisdiction.”⁶⁷ Once Parliament violated the laws of God, the colonists were free to rebel against it.

In John Locke’s Second Treatise of Government, the colonists found the “philosophical justification for *natural* rights” and the “moral rationale for declaring independence from the British government”⁶⁸ (emphasis in original). The importance of this discourse is that the Declaration of Independence acknowledges the Creator as the source of natural or inalienable rights—an entity outside and beyond the human realm—and withdraws it from Parliament, a political body within the human realm. It is obvious that in the Founders’ minds there was no contradiction in mentioning God in a political document.

The Continental Congress also bore witness to the inclusion of the Almighty God, Jesus Christ, Holy Ghost, and Christian, among other religious terms and events, in its record. For example, on September 6, 1774, Congress resolved that the Rev. Mr. Duché should open the assembly on the following day with prayer.⁶⁹ Rev. Duché was an Episcopalian minister, that fact bringing some contention among the Quakers, Anabaptists, Presbyterians, and Congregationalists “because [they] were so divided in religious sentiments...[and] could not join in the same act of worship.”⁷⁰ However, John Adams considered him “a zealous friend of Liberty and his country.”⁷¹ His letter to his wife Abigail gives an extraordinary account of the reading and prayer:

Mr. Samuel Adams arose and said he was not bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.... The motion [to have Rev. Duché open Congress] was seconded and passed in the affirmative. Accordingly, next morning he appeared with his clerk and in his pontificals, and read several prayers in the established form; and then read...the thirty-fifth Psalm. You must remember this was the next morning after we heard the horrible rumor of the cannonade of Boston. I never saw a greater effect upon an audience. It seemed as if Heaven had ordained that Psalm to be

⁶⁵ Bailyn, 201.

⁶⁶ Ibid.

⁶⁷ Ibid., 47.

⁶⁸ Kahl, 11.

⁶⁹ Journals of the Continental Congress, 1774-1789, Volume I: September 5, 1774 to October 26, 1774, [database on-line]; available from <http://lcweb2.loc.gov/ammem/amlaw/lwjcLink.html>. Accessed 11 October 2001.

⁷⁰ Charles Francis Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution (New York: Hurd and Houghton, 1876), 37.

⁷¹ Ibid., 38.

read on that morning. After this, Mr. Duché, unexpected to everybody, struck out into an extemporary prayer, which filled the bosom of every man present.⁷²

To Silas Deane and John Adams, the reading of Psalms 35 was providential and extremely appropriate for the opening to the Congress.

On March 16, 1776, the Congress called for a day of fasting and humiliation in light of the impending war:

The Congress... [d]esirous, at the same time, to have people of all ranks and degrees duly impressed with a solemn sense of God's superintending providence, and of their duty, devoutly to rely, in all their lawful enterprizes, on his aid and direction, Do earnestly recommend, that Friday, the Seventeenth day of May next, be observed by the said colonies as a day of humiliation, fasting, and prayer; that we may, with united hearts, confess and bewail our manifold sins and transgressions, and, by a sincere repentance and amendment of life, appease his righteous displeasure, and, through the merits and mediation of *Jesus Christ*, obtain his pardon and forgiveness; humbly imploring his assistance to frustrate the cruel purposes of our unnatural enemies; and by inclining their hearts to justice and benevolence, prevent the further effusion of kindred blood. But if, continuing deaf to the voice of reason and humanity, and inflexibly bent, on desolation and war, they constrain us to repel their hostile invasions by open resistance, that it may please the *Lord of Hosts*, the *God of Armies*, to animate our officers and soldiers with invincible fortitude, to guard and protect them in the day of battle, and to crown the continental arms, by sea and land, with victory and success: Earnestly beseeching him to bless our civil rulers, and the representatives of the people, in their several assemblies and conventions; to preserve and strengthen their union, to inspire them with an ardent, disinterested love of their country; to give wisdom and stability to their counsels; and direct them to the most efficacious measures for establishing the rights of America on the most honourable and permanent basis--That he would be graciously pleased to bless all his people in these colonies with health and plenty, and grant that a spirit of incorruptible patriotism, and of pure undefiled religion, may universally prevail; and this continent be speedily restored to the blessings of peace and liberty, and enabled to transmit them inviolate to the latest posterity. And it is recommended to *Christians* of all denominations, to assemble for public worship, and abstain from servile labour on the said day⁷³ (emphasis added).

On Saturday, November 1, 1777, the record shows the use of the words Almighty God, Jesus Christ, and Holy Spirit in a declaration setting aside a day of thanksgiving:

Forasmuch as it is the indispensable duty of all men to adore the superintending providence of *Almighty God*; to acknowledge with gratitude their obligation to him for benefits received, and to implore such farther blessings as they stand in

⁷² Ibid., 37.

⁷³ *Journals of the Continental Congress*, 1774-1789, Volume IV: January 1, 1776 to June 4, 1776, 209, [database on-line]; available from <http://lcweb2.loc.gov/ammem/amlaw/lwjclink.html>. Accessed 11 October 2001.

need of; and it having pleased him in his abundant mercy not only to continue to us the innumerable bounties of his common providence, but also to smile upon us in the prosecution of a just and necessary war, for the defence and establishment of our unalienable rights and liberties; particularly in that he hath been pleased in so great a measure to prosper the means used for the support of our troops and to crown our arms with most signal success: It is therefore recommended to the legislative or executive powers of these United States, to set apart Thursday, the eighteenth day of December next, for solemn thanksgiving and praise; that with one heart and one voice the good people may express the grateful feelings of their hearts, and consecrate themselves to the service of their divine benefactor; and that together with their sincere acknowledgments and offerings, they may join the penitent confession of their manifold sins, whereby they had forfeited every favour, and their humble and earnest supplication that it may please God, through the merits of *Jesus Christ*, mercifully to forgive and blot them out of remembrance; that it may please him graciously to afford his blessing on the governments of these states respectively, and prosper the public council of the whole; to inspire our commanders both by land and sea, and all under them, with that wisdom and fortitude which may render them fit instruments, under the providence of *Almighty God*, to secure for these United States the greatest of all human blessings, independence and peace; that it may please him to prosper the trade and manufactures of the people and the labour of the husbandman, that our land may yet yield its increase; to take schools and seminaries of education, so necessary for cultivating the principles of true liberty, virtue and piety, under his nurturing hand, and to prosper the means of religion for the promotion and enlargement of that kingdom which consisteth "in righteousness, peace and joy in the *Holy Ghost*." ⁷⁴ (emphasis added).

These early governmental records, no doubt, were before the ratification of the Constitution on September 17, 1787. Nonetheless, the Congressional records contain references to God in both the House and Senate records showing reverence to Him and establishing days of thanksgiving:

Resolved, That a Joint Committee of both Houses be directed to wait upon the President of the United States, to request that he would recommend to the People of the United States, a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many signal favors of *Almighty God*, especially by affording them an opportunity peaceably to establish a Constitution of Government for their safety and happiness⁷⁵ (emphasis added).

⁷⁴ *Journals of the Continental Congress, 1774-1789*, Vol. IX: October 3, 1777 to December 31, 1777, 855; Vol. XI: May 2, 1778 to September 1, 1778, 476; Vol. XIII: January 1, 1779 to April 22, 1779, 235, [database on-line]; available from <http://lcweb2.loc.gov/ammem/amlaw/lwjclink.html>. Accessed 11 October 2001.

⁷⁵ *Journal of the House of Representatives of the United States, 1789-1873*, Friday, September 25, 1789, 123, [database on-line]; available from <http://lcweb2.loc.gov/ammem/amlaw/lwjclink.html>. Accessed 8 February 8, 2002.

There are nine other mentions of God or Almighty just in the records of the First Congress alone.⁷⁶

Furthermore, the Continental Congress approved the printing of the first English Bible in America. The inability to obtain Bibles from England because of the war prompted Mr. Robert Aiken to take it upon himself to print the first American edition of the English Bible. Congress had oversight of the project, and asked the two congressional chaplains, Rev. Dr. White and Rev. Mr. Duffield, to give reports. Upon the completion of the project, Congress ordered that the Bible be printed:

Whereupon, Resolved, That the United States in Congress assembled, highly approve the pious and laudable undertaking of Mr. Aitken, as subservient to the interest of religion as well as an instance of the progress of arts in this country, and being satisfied from the above report, of his care and accuracy in the execution of the work, they recommend this edition of the Bible to the inhabitants of the United States, and hereby authorise him to publish this recommendation in the manner he shall think proper.⁷⁷

There are numerous documents indicating that neither the Continental Congress nor the Congress of the United States had any problems in including religious terms, seeking guidance from God, or declaring particular days as religious in nature.

President George Washington had no reservation with the mention of God within the political context and connecting religion and morals to a healthy republic. In his Farewell Address, the first President of the United States did not mince in expressing his intent:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation deserts the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?...

⁷⁶ The Library of Congress website, <http://lcweb2.loc.gov/ammem/hlawquery.html>, provides engines for word searches for any of these religious terms.

⁷⁷ *Journals of the Continental Congress, 1774-1789*, Vol. XXIII: August 12, 1782 to December 31, 1782, 573, [database on-line]; available from <http://lcweb2.loc.gov/ammem/amlaw/lwjclink.html>. Accessed 11 October 2001.

Observe good faith and justice towards all nations; cultivate peace and harmony with all. Religion and morality enjoin this conduct; and can it be, that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and at no distant period, a great nation, to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence. Who can doubt that, in the course of time and things, the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? Can it be that Providence has not connected the permanent felicity of a nation with its virtue?⁷⁸

It is clear from this speech that the President was urging America to guard religion as its guide to good policy and national health.

The peace treaty with Britain in 1783 also includes specific Christian language. Its beginning statement reads thus: “In the Name of the most Holy and undivided Trinity.”⁷⁹ None other than Benjamin Franklin, allegedly one of the most well known deists of his time and with whom John Adams and John Jay joined, signed this treaty and apparently did not object to its wording. Upon receiving word that the treaty had been executed, George Washington submitted his resignation as commander-in-chief of the Continental army. In his June 8, 1783 circular letter, he prays that God would protect the country and “would most graciously be pleased to dispose us all to do justice, to love mercy and to demean ourselves [alluding to Old Testament, Micah 6:8] with that charity, humility, and [peaceful] temper of the mind which were the characteristics of the Divine Author [alluding to Jesus Christ, Hebrews 12:2] of our blessed religion, without an humble imitation of whose example in these things, we can never hope to be a happy nation.”⁸⁰ The Divine Author and finisher of “our blessed religion” is Jesus Christ, whom Washington urged the American people to imitate or suffer an unhappy existence as a nation. That he used the word “Divine” to describe the “Author” demonstrates Washington’s belief in the divinity of Christ, showing no reservation in evoking His name to guide this country.

Not only do words on legal documents point to the original intent of the Constitution’s signers but also their public actions. In addition to being a signer of the Constitution, Thomas McKean authored the constitutions for Pennsylvania and Delaware and Commentaries on the Constitution of the United States of America, served as governor of both states, and was Chief Justice of the Pennsylvania Supreme Court. In Respublica v. John Roberts, 1 Dall 39 (Pa. 1778), Chief Justice McKean held no reservation in instructing Mr. Roberts, who was convicted of treason and sentenced to death, to seek God’s mercy and forgiveness for his “manifold transgressions and sins...to rely upon the merit and passion of a dear Redeemer...and to be [persistent] at the Throne of Grace.”⁸¹ John Hancock, President of the Continental Congress and elected governor of Massachusetts, made a proclamation on October 15, 1791 which included the following statement: “that all may bow to the scepter of our Lord Jesus Christ, and the whole

⁷⁸ Washington's Farewell Address 1796, Avalon Project at Yale Law School [database on-line]; available from <http://www.yale.edu/lawweb/avalon/states/ri04.htm>. Accessed 23 January 2002.

⁷⁹ David Barton, A Spiritual Heritage Tour of the United States Capital (Aledo, Texas: Wallbuilders, 2000), 34.

⁸⁰ *Ibid.*, 35.

⁸¹ William B. Reed, Life and Correspondence of Joseph Reed (Philadelphia: Lindsay and Blakiston, 1847) 36-7.

earth be filled with His glory.”⁸² Another signer who became governor of Massachusetts was Samuel Adams. In his 1795 and 1797 proclamations, he requested that the citizens would pray “that the peaceful and glorious reign of our Divine Redeemer may be known and enjoyed throughout the whole family of mankind” and for the expeditious establishment of that “holy and happy period when the kingdom of our Lord and Savior Jesus Christ may be everywhere established, and all the people willingly bow to the scepter of Him who is the Prince of Peace.”⁸³ These are but a few of the evidences demonstrating that the Founders and Framers did not intend to remove Christian culture from the public realm. Therefore, it is not difficult to deduce that the meaning of the religion clauses, when exercised by those holding executive offices, did not include building an impenetrable wall between church and state, which also suggests that the separation was to be one of institutions.

The early judiciary had no problem recognizing the source of our nation’s moral code and its integral part in the fiber American history. During President James Madison’s presidency, the Supreme Court of New York heard The People v. Ruggles. Here, Chief Justice James Kent, who with Justice Joseph Story is considered a father of American Jurisprudence,⁸⁴ stated that “we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those imposters,”⁸⁵ referring to “the religion of Mahomet or of the Grand Lama.” The most significant case reflecting our Christian heritage is Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). The Church had hired E. Walpole Warren, an English clergyman residing in New York, to serve as its rector and pastor in alleged violation of the Act of Congress of February 26, 1885, 23 Stat. 332, c. 164. The Circuit Court ruled in favor of the United States and on appeal; the Supreme Court was to determine whether the court below had erred. The Act prohibited the hiring of aliens for labor of “any kind.” According to Justice Brewer, although the violation did fall within the letter of the statute, “we cannot think Congress intended to denounce with penalties a transaction like that in the present case” (at 459), meaning, a transaction of hiring a pastor. The Justice also argued that the title of the Act serves as a guide to the intent of the Act:

No one reading such a title [an Act “to Prohibit the Importation of Foreigners and Aliens under Contract to Perform Labor”] would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms labor and laborers does not include preaching and preachers; and it is to be assumed that words and phrases are used in their *ordinary meaning*...the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors and pastors... the intent of Congress was simply to stay the influx of this cheap unskilled labor (at 463, 65; emphasis added).

⁸² Barton, Spiritual Heritage, 30.

⁸³ *Ibid.*, 31-2.

⁸⁴ David Barton, Original Intent: The Courts, The Constitution, and Religion (Aledo, Texas: Wallbuilder Press, 1999) 49.

⁸⁵ The People v. Ruggles, 8 Johns 290 (1811) at 296.

Here, the Court not only relies on “ordinary meaning” of words and the “intent” of Congress, but also focuses on the contemporary problem Congress was really addressing: cheap, unskilled labor. To include any other type of labor would be applying the law beyond its scope.

Having stated its ruling, the Court focuses the remainder of the opinion on the religious nature of the United States’ history, stating that “no purpose of action against religion can be imputed to any legislation, *state or national*, because *this is a religious people*” (emphasis added). The Court proceeds to recount a chronology of religious endeavors connected to this country, from its discovery by Christopher Columbus, to the charters of Virginia, Connecticut, Pennsylvania, and Delaware, to the Declaration of Independence, and to state constitutions making the appeal to God the closing statement in oaths of office. The Court goes on to say that all these documents related to American history speak with one voice, with no dissonance, that “[t]here is a universal language pervading them all, having one meaning; they affirm and reaffirm that this a religious nation” (at 470). The volume of evidence the Court presented lead it to only one conclusion: “These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that *this is a Christian nation*. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?” (at 471; emphasis added). The answer the Court gave was “No.”

Does this decision lead to the conclusion that there is an established American Christian church? Justice Brewer also answers this in the negative: Using Pennsylvania as an example, he stated, “Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . *not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men*” (at 471; emphasis added). It is obvious from this decision that the Supreme Court did not consider the proclamation that this country is a “Christian nation” as a violation of the Establishment Clause; it only made a historical religious assessment. Christian far right activists may deduce from the decision that there was a legal establishment of Protestant Christianity once the Supreme Court uttered the phrase. Such a deduction is logically and legally incorrect; it does not, however, diminish the importance of Protestantism’s historical position nor does it marginalize the historical issues that should be controlling the interpretation and application of the Establishment and Free Exercise Clauses. Christianity has never been legally established as the national religion—the Amendment stands fulfilled. However, it is equally wrong for leftists to use the right’s erroneous conclusion of this case to eradicate all resemblance of Christianity from the public arena. Christianity, specifically Protestantism, is one of the components that made this country great, and any blight on American history has been a result of blatant disregard and willful violation of Christian principles toward other human beings solely for the purpose of amassing personal economic gain.

The preponderance of historical documentation not only supports the conclusion that those who founded the nation, for the most part, embraced Christian principles (or at least acknowledged their consciences were pierced by them), but also reaffirms that they believed their implementation was crucial to the nation’s survival. It was Thomas Jefferson who warned that in order to ensure the survival of the American experiment, there was an enormous need for social virtue. The source of this virtue, according to Jefferson, was the Christian religion. The documentation also shows that the current “dissonance” between church and state interaction is of recent fabrication and reactionary, and the fear of constitutional violation when there is a display or a mention of anything related to religion is unfounded. The Church of the Holy Trinity

case and the aforementioned documents are crucial in demonstrating original intent because they differentiate between the inclusion of religion in private and public life from the establishment of religion.

THE ERROR OF DEISM

The leftist separatists as well as the conservative Christian right have made erroneous arguments about the religious adherences of the Framers. The former say that the Framers were all deists; the latter say they were all Christians. Their religious stance, however, is to some degree irrelevant because their particular religious inclinations or lack thereof do not change the fact that early American governmental and personal documents acknowledge God's involvement and intervention in the Revolution and in the birth of this country, crediting Him as the source of the inalienable rights for which the colonists gave their lives, their fortunes, and their sacred honor. The pervasiveness of the argument, however, merits some discussion.

Deist beliefs hold that God set the universe in motion and then withdrew from intervention, thus rendering prayer useless since He does not intervene in human affairs. Concerning Jesus Christ, deists do not consider Him deity, nor do they hold that His death atones for sin. God does not reveal Himself through the Bible, but rather, He reveals His will through human reason and empirical evidence. It is quite true that very few of the Framers were deists or Unitarian; however, some leftists erroneously claim that all were. This is simply not true.

According to Dr. John Eidsmoe, law professor at Faulkner University, of the fifty-five men present at the Constitutional Convention, only three were deists and one was undeclared, comprising only 5.5% of the delegates: Benjamin Franklin and James Wilson of Pennsylvania, Hugh Williamson of North Carolina, and James McClung of Virginia, respectively.⁸⁶ Twenty-eight of the delegates were Episcopalian, the rest being Presbyterian, Congregationalists, Lutherans, Dutch Reformed, Methodists, and Roman Catholics.⁸⁷ Dr. John Morris, a member of Los Angeles-based Atheists United, includes other Framers in the company of deists: Ethan Allen, George Washington, Thomas Jefferson, James Madison, John Adams, and Thomas Paine along with Benjamin Franklin. He mentions them in his 1995 Los Angeles Times article declaring that "most" of the Framers were deists.⁸⁸ These seven are obviously not the majority, and over half of them did not participate in the Constitutional Convention: Thomas Jefferson, John Adams, Thomas Paine, and Ethan Allen. Both Dr. Morris and Dr. Eidsmoe come to the consensus, however, that Benjamin Franklin would be the most likely to be a deist, although he was not antagonistic toward religion. One of his friends, Ezra Stiles, president of Yale, asked Franklin for his religious creed, if he had one, to which he responded,

Here is my creed. I believe in one God, Creator of the universe: that he governs the world by his providence. That he ought to be worshipped. That the most acceptable service we can render to him is doing good to his other children. That

⁸⁶John Eidsmoe, Christianity and the Constitution: The Faith of Our Founding Fathers, with a foreword by D. James Kennedy (Grand Rapids: Baker Book, 2000) 41-3.

⁸⁷ Ibid.

⁸⁸ Steven Morris, "America's Unchristian Beginnings; Founding Fathers: Most, Despite Preachings Of Our Pious Right, Were Deists Who Rejected The Divinity Of Jesus," Los Angeles Times August 4, 1995. [database on-line]; available from <http://www.ffrf.org/fitoday/march96/morris.html>. Accessed 21 October 2001.

the soul of man is immortal and will be treated with justice in another life respect[ing] its conduct in this. These I take to be the fundamental principles of all sound religion, and I regard them as you do, in whatever sect I meet with them.⁸⁹

Although according to Franklin Jesus Christ was not divine, He did teach the “best system of morals and religion that ‘the world ever saw.’”⁹⁰ The fact that Benjamin Franklin is the most obvious deist in the congregation of the Founders and Framers surely does not lead to the conclusion that “most” of them were deists.

It is inconclusive whether George Washington was a deist. Dr. Morris mentions that Washington “referred to Providence as an impersonal force, remote and abstract” and that in his numerous writings he never proclaims to be a Christian.⁹¹ His August 20, 1778, letter to Brigadier-General Nelson, however, indicates to the contrary and explains why Washington guards his outward mention of God:

The hand of Providence has been conspicuous in all this, that he must be worse than an infidel that lacks faith, and more than wicked that has not gratitude enough to acknowledge his obligations. But it will be time enough for me to turn preacher when my present appointment ceases; and therefore I shall add no more on the doctrine of Providence.⁹²

That the hand of Providence is obvious “in all this” concerning the Revolution does not support the claim that Washington’s God is “impersonal, remote, and abstract.” Furthermore, Dr. Morris’ argument is weak in that none of the statements he makes in support of Washington’s deism actually proves he was not a Christian. The fact that he did not declare himself a Christian in his “voluminous correspondence,” or that he appointed John Murray, a Universalist, as army chaplain over the objections of his soldiers, or that Washington did not utter a religious word or ask for a clergyman to attend to him on his dying bed does not substantiate Dr. Morris’ assertion. All they prove is that Washington kept his beliefs private. In fact, the argument of silence may be a two-edged sword. Dr. Eidsmoe takes note of the fact that, unlike Thomas Paine who was vocal in his humanistic references to Jesus Christ, these types of references do not appear anywhere in Washington’s writings.⁹³ Further indications that Washington may have been a Christian are found in The Maxims of Washington, which includes statements from Chief Justice John Marshall and Justice Elias Boudinot affirming that Washington “was a sincere believer in the Christian faith” and that “the General was a Christian.”⁹⁴ Finally, Nelly Custis, Washington’s adopted daughter writes to historian Jared Sparks these words in a letter:

I should have thought it the greatest heresy to doubt his firm belief in Christianity. His life, his writings, prove that he was a Christian. He was not one of those who act or pray, “that they may be seen of men.” He communed with his God in

⁸⁹ Edwin S. Gaustad, “Disciples of Reason,” Christian History. The American Revolution: Christianity’s Overlooked Role in the Bold Venture to Gain Independence 15, no. 2 (1996): 28.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Eidsmoe, 137.

⁹³ Ibid., 138, footnote 73.

⁹⁴ Barton, Spiritual Heritage, 74.

secret... Is it necessary that any one should certify, "General Washington avowed himself to me a believer in Christianity"? As well may we question his patriotism, his heroic, disinterested devotion to his country. His mottoes were, "Deeds, Not Words"; and "For God and My Country."⁹⁵

The argument may be made that this is only hearsay. The fact remains, however, that the Justices are reliable sources and that Nelly Custis lived with the Washingtons for twenty years,⁹⁶ making her also a reliable witness to the habits and practices of her adoptive father. That Washington was a prominent Mason, an order requiring the belief in God but not Christ, does not minimize the importance of his closing statements in a letter circulated to the governors of the thirteen states in 1783:

...most graciously be pleased to dispose us all, to do Justice, to love mercy, and to demean ourselves with that Charity, humility, and pacific temper of mind, which were the Characteristicks of the Divine Author of our blessed Religion [referring to Jesus Christ in Hebrews 12:2], and without an humble imitation of whose example in these things, we can never hope to be a happy nation.⁹⁷

There is only one "Divine Author" of the Christian faith: Jesus Christ. If Washington was a Masonic deist, this passage sheds doubt on his adherence to the Masonic and deist beliefs.

Dr. Morris comes to the same erroneous conclusion concerning John Adams. In his article, Dr. Morris states that Adams did not respect the clergy's "pretended sanctity" but considered them "absolute dunces."⁹⁸ It does not render his Christianity non-existent for Adams to assess the organized religion of his day with such words or to utter this statement: "As I understand the Christian religion, it was, and is, a revelation. But how has it happened that millions of fables, tales, legends have been blended with both Jewish and Christian revelation that have made them the most bloody religion that ever existed?" Any Christian today can utter these words verbatim in criticism of corporate religions and still remain true to his or her traditional religious creed. That during Adams' presidency "the Senate ratified the Treaty of Peace and Friendship, which states in Article XI that 'the Government of the United States of America is not in any sense founded on the Christian religion'"⁹⁹ proves nothing about his personal faith or lack of it. The statement is actually true: *legally*, the government of the United States is not founded on the Christian religion, thus reinforcing the argument that the Constitution's Bill of Rights refers only to institutional separation. Dr. Morris is making the mistake of confusing legal establishment with non-legal religious expressions. He actually helps to reinforce the argument that the prohibition the Framers had in mind with the First Amendment was purely a legal establishment of a national church.

Dr. Morris' error continues with his assessment of James Madison. It is of no consequence that Madison believed that "[r]eligious bondage shackles and debilitates the mind and unfits it for every noble enterprise"; it is not religion that Madison is criticizing, it is the

⁹⁵ Ibid., 141.

⁹⁶ Ibid., 140.

⁹⁷ Paul F. Boller, George Washington and Religion, (Dallas: Southern Methodist University Press, 1963)

71.

⁹⁸ Morris.

⁹⁹ Ibid.

bondage to it. Nor is it evidence of Madison's deism that the legal establishment of religion has produced nothing but bad fruit: "During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity; in both, superstition, bigotry and persecution."¹⁰⁰ Two key phrases in this statement deserve scrutiny: "almost fifteen centuries" and "legal establishment of Christianity." At the time Madison made these statements, eighteen centuries had passed since Jesus Christ died and resurrected, and since the feast of Pentecost initiated Christianity. His calculations left three centuries unaccounted. It would not be far fetched to deduce that Madison was referring to the merger of church and state by Constantine in the fourth century. History recounts the corruption that can be expected when the religious and the civil have a symbiotic relationship and render each other favors for the survival of their power and riches. Since Constantine, Christianity has been "established" by the state; such establishment is precisely what the colonial religious dissidents wanted to undo.

Dr. Morris deceives his readers by taking these quotes out of context, for the document which he quotes—Madison's "Memorial and Remonstrance"—argues neither against Christianity nor does it provide evidence that Madison was not a Christian. It argues, rather, against the legal establishment of one religion at the exclusion and expense of others through taxation. Dr. Morris' quotes come from section seven of the document, precipitated by Patrick Henry's "Bill printed by order of the last Session of General Assembly [of Virginia], entitled 'A Bill establishing a provision for Teachers of the Christian Religion.'" Section six of the document argues that Christianity needs no monetary support through secular edicts; it survived for three hundred years without the support or endorsement of the secular state:

6. ... the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.¹⁰¹

In section four, Madison writes: "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of *divine origin*, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us"¹⁰²

¹⁰⁰ Ibid.

¹⁰¹ James Madison, "Memorial and Remonstrance Against Religious Assessment [1785]" [database online]; available from http://www.paganlibrary.com/reference/james_madison_remonstrance.php. Accessed 16 March 2002.

¹⁰² Ibid.

(emphasis added). Dr. Morris would be hard pressed to prove from this document that Madison, along with all those who prescribed to it, was not a Christian.

Finally, it is highly probable that Thomas Jefferson was not a Christian, although like Franklin, he was by no means antagonistic toward Christianity. Jefferson studied the Bible like a history book; he read it like he would read Aristotle or Cato. He rejected the divinity of Jesus, but saw the morals He taught as the way to assure peace with one's neighbor and entrance to heaven: "I am a real Christian, that is to say, a disciple of the doctrines of Jesus, ...sincerely attached to his doctrines, in preference to all others...[which is] very different from the Platonists, who call me infidel, an themselves Christians and preachers of the gospel, while they draw all their characteristic dogmas from what its Author never said nor saw."¹⁰³ To his friend Maria Cosway, Jefferson writes, "The religion you so sincerely profess tells us we shall meet again; and we have all so lived as to be assured it will be in happiness."¹⁰⁴ To him, admission to heaven is based on adherence to the principles of Christianity, not on belief and faith in the divinity, atonement, and resurrection of Jesus Christ.

There is evidence, however, that may cast some doubt on the claim that Jefferson was a deist, especially in light of his "Notes on the State of Virginia," where he gives an indication that the Almighty is not so distant, aloof, and uninterested in human affairs:

And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever....¹⁰⁵

Jefferson's condescension was not against Christianity in its purest form but rather against the men who abused it for self-enrichment, which was precisely the same contention expressed by the dissenting religions of the colonies:

...the Christian religion, when divested of the rags in which they have enveloped it, and brought to the original purity and simplicity of its benevolent institutor, is a religion of all others most friendly to liberty, science, and the freest expansion of the human mind.¹⁰⁶

His contempt for the religious elite who controlled both the civil and religious aspects in Virginia was epitomized in his comment concerning Calvin, which he wrote to John Adams:

I can never join Calvin in addressing his god. He was indeed an Atheist, which I can never be; or rather his religion was Daemonism. If ever man worshipped a false god, he did. The being described in his 5 points is not the God whom you

¹⁰³ Eidsmoe, 240; Gaustad, "Disciples," 31.

¹⁰⁴ Eidsmoe, 236.

¹⁰⁵ Thomas Jefferson, *Notes on the State of Virginia* (1782), Avalon Project at Yale Law School [database on-line]; available from <http://www.yale.edu/lawweb/avalon/jefvfram.htm>. Accessed 16 March 2002.

¹⁰⁶ Thomas Jefferson to Moses Robinson, 23 March 1801, [database on-line]; available from <http://odur.let.rug.nl/~usa/P/tj3/writings/brf/jefl138.htm>. Accessed 17 March 2002.

and I acknowledge and adore, the Creator and benevolent governor of the world...¹⁰⁷

Jefferson's own words shed doubt on the extent of his adherence to deism; were he the staunchest of deists, however, would not diminish the meaning of his writings within the colonial historical context. Nonetheless, for Dr. Morris to emphatically say that the Framers, of which he only mentions seven, were deists is misleading and historically inaccurate.

Contrary to Dr. Morris' brief analysis, there were many Founders and Framers who professed Christianity. For example, Charles Cotesworth Pinckney and John Langdon founded the American Bible Society. Some of its vice presidents include notable figures like John Jay, a writer of the Federalist Papers and the first Supreme Court Chief Justice; John Marshall, Chief Justice; Justice Smith Thompson; Justice Bushrod Washington; and Elias Boudinot, President of Congress. James McHenry founded the Baltimore Bible Society and believed that the Bible was the only antidote for crime, "In vain, without the Bible, we increase penal laws and draw entrenchments around our institutions. Bibles are strong entrenchments. Where they abound, men cannot pursue wicked courses." Upon his deathbed after his fatal duel with Aaron Burr, Alexander Hamilton called for Rev. J. M. Mason and Rev. Benjamin Moore. Rev. Mason recounts that Hamilton clasped his hands in a posture of prayer and looking toward Heaven said, "I have a tender reliance on the mercy of the Almighty, through the merits of the Lord Jesus Christ." To his son who was about to attend Princeton College, Jacob James exhorted, "I flatter myself you will be what I wish, but don't be so much flatterer as to relax of our application—don't forget to be a Christian. I have said much to you on this head, and I hope an indelible impression is made." Reverend John Peter Gabriel Muhlenberg pastored two churches, and was also a Major-General in the Continental Army. His statue stands in the Small House Rotunda in the Capital Building. James Wilson, a signer of the Declaration of Independence, the Constitution, and Justice of the Supreme Court, lectured his law students by asking them

[H]ow shall we, in particular cases, discover the will of God? We discover it by our conscience, by our reason, and by the Holy Scriptures. The law of nature and the law of revelation are both divine: they flow, though in different channels, from the same adorable source. It is, indeed, preposterous to separate them from each other. The object of both is—to discover the will of God—and both are necessary for the accomplishment of that end.

Charles Thomson translated what is known today as the Thomson's Bible. Benjamin Rush founded "The First Day Society," the precursor to the Sunday school; and Rev. Dr. John Witherspoon was an ordained minister and wrote the introduction to the first American family Bible. At a public King's (Columbia) College graduation, its first president William Samuel Johnson, who also signed the Constitution, exhorted his graduates to "[r]emember that it is in God you live and move and have your being," alluding to Acts 17:28.

John Quincy Adams an early interpreter who was also a devout Christian. On the Fourth of July, 1837, "the Inhabitants of the Town of Newburyport" invited Adams to give an oration in honor of 62nd birthday of the United States. He began the speech with these questions:

¹⁰⁷ Lester J. Cappon, ed., The Adams-Jefferson Letters (Chapel Hill: The University of North Carolina Press, 1959) 591.

“Why is it, friends and fellow citizens, that you are here assembled? Why is it, that, entering upon the sixty-second year of our national existence, you have honored [me] with an invitation to address you? Why is it that next to the birthday of the Savior of the world, your most joyous and most venerated festival [occurs] on this day? Is it not that in the chain of human events the birthday of the nation is *indissolubly linked* with the birthday of the Savior? That it forms a leading event in the progress of the Gospel dispensation? Is it not that the Declaration of Independence first organized the social compact on the foundation of the Redeemer’s mission on Earth?—That it laid the cornerstone of human government on the first precepts of Christianity?¹⁰⁸ (emphasis added).

No doubt, John Quincy Adams was not saying that the United States was legally established on the Christian religion; it is obvious, however, that the “first precepts of Christianity” are the cornerstone for the nation, and those Founders and Framers who were Christian had no reservation in exercising their freedom of conscience publicly, even within their public service. Numerous other less-known patriots boldly proclaimed their Christianity publicly and privately. Suffice it to say, the evidence supporting the inclusion of the Christian heritage of this country in the public sphere is overwhelming, and that inclusion is not violative of the Establishment Clause. This rich religious heritage is the backbone for the First Amendment’s securing the free exercise of religion and protecting that exercise against government intrusion.

JEFFERSON’S INTERPRETATIONS OF THE RELIGION CLAUSES

Due to his disdain for the arrogance exuding from the established clergy and religious hierarchies, and their constant quarreling about dogma culminating in religious intolerance of minority denominations, Jefferson dedicates most of his political life to the separation of the two institutions of church and state. The crucial clause in his Virginia Declaration of Rights, actually written by James Madison, declares that religion “can be directed only by reason and conviction...all men are equally entitled to the free exercise of religion according to the dictates of conscience.”¹⁰⁹ The Presbyterians, persecuted Baptists, and those of minority denominations, together with those of the enlightenment, influenced the writing of this clause. Those Christians who wanted to maintain the symbiotic relationship between church and state, however, cried from their pulpits to vote against Jefferson’s ascendance to the presidency: “Should the infidel Jefferson be elected to the Presidency, the seal of death is that moment set on our holy religion, our churches will be prostrated, and some infamous prostitute, under the title of Reason will preside in the sanctuaries now devoted to the worship of the Most High.”¹¹⁰ The Baptists, being the most vocal of the dissenters, had most to lose if a legally recognized religion were to be established in America. It is with this fear that the Baptists in Danbury write to the President in 1801, and his comforting words assuring the “wall of separation” between the church and the state subsided their apprehension.

¹⁰⁸ Barton, *Spiritual Heritage*, 23- 25, 36-7, 63, 67, 69, 70-1, 72, 85.

¹⁰⁹ Bailyn, 260.

¹¹⁰ Kramnick, 89.

THE HISTORICAL TEST

The First Amendment as written seem too simple for American society to assimilate, complicating its meaning and clogging its application just to placate the need for incessant legal and philosophical calisthenics. The Free Exercise and Establishment Clauses of the First Amendment address only the historical contentions that precipitated them: 1) no legal establishment of one sect of Christianity or another religion as the national religion; 2) no legal prohibition against the free exercise of religious conscience of any religions, especially minority ones; 3) no taxation of the citizenry for the support of a legally preferred religion and 4) no religious test as a prerequisite to hold public office. The first three contentions can be categorized as the “historical test” or standard applicable to litigation touching the religion clauses. Since Article VI of the Constitution addressed the last contention, the “historical test” need not include it. To secure the freedom to exercise religious conscience, the Bill of Rights proscribes the federal government, and subsequently state governments via the 14th Amendment, from affirmatively engaging in the first two contentions. If seen as working together, the Establishment Clause actually protects the Free Exercise Clause. By not establishing one denomination over another through governmental edict, the Establishment Clause guarantees that all religions are free from governmental meddling, have freedom of expression, and that all religious people have freedom of conscience. Jefferson’s “wall of separation”—if applied to the contentions within the confines of their historical meaning—reduces to one conception: that governments in the United States may not prefer or proscribe one religion over another or hinder the freedom of religious expression and practice. Jefferson’s Bill for the Establishment Religious Freedom summarizes his views:

WE the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.¹¹¹

Jefferson’s absolute separation of church and state is explicit in the statement “that no man shall be compelled to...support any religious worship...whatsoever.” Though Jefferson ascribed to the most rigid form of separation that prohibited almost all aid and support, the majority of the Framers, however, did not share his view.

According to Michael J. Malbin, most of the Framers ascribed to erecting a wall of separation, but that wall only prohibited the state from preferring one religion to another.¹¹² To them, non-discriminatory aid and support of all religions was not violative of the Bill of Rights. His analysis of the Framers’ intent additionally supports the view that the Establishment Clause also prohibited the federal government from establishing a legally recognized national religion, like the Anglican Church was in England and in Virginia. If this is the historical consensus,

¹¹¹ Thomas Jefferson, “Draft for a Bill for Establishing Religious Freedom” (1779), [database on-line]; available from <http://odur.lct.rug.nl/~usa/P/tj3/writings/draft1779.htm>. Accessed 17 March 2002.

¹¹² Lee Epstein and Thomas G. Walker, Constitutional Law For a Changing America: Rights, Liberty, and Justice, 4th ed. (Washington: CQ Press, 2001), 143.

there is no reason to favor the opinions of one man when at least fifty-four other competent Framers did not agree. In drafting the Bill of Rights, Madison did not adhere to Jefferson's "Bill for Religious Freedom" as his template. His main concern was prohibiting the establishment of a national religion and its preferential treatment. This is precisely the contention the colonists had with the Church of England and with "established" churches in Massachusetts that wanted to preserve their society as a Christian Commonwealth. There is nothing more to add and nothing more to fabricate. Precious legal time would not have been wasted on the myriad of legal cases dealing with this issue had judges and legislators been consistent in the application of this simple test. There would be no discrimination in applying this principle across the board, as non-profit 503(c)(3) status is available to all religions. The only individuals that would encounter problems asserting First Amendment violations would be those who have no "god," since the historical definition of religion in this country has "God" as the central figure to whom mankind renders worship, allegiance, gratitude, and obedience. That the non-religious has no standing in the religion clauses is self-evident and not inconsistent given the historical contentions. Furthermore, there are social benefits the non-religious may reap from uniform support of religion, since accountability to authority and moral rectitude reinforced through religious teaching will minimize social loss, as James McHenry rightly observed.

In his "Notes," Jefferson defined the parameters of the Free Exercise Clause; by coercion, governments can reach religious actions under only one condition. Misinformation about the following statement muddies legal waters concerning this one condition:

The error seems not sufficiently eradicated[: that being] that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rulers can have authority over such natural rights *only as we have submitted to them*. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. *The legitimate powers of government extend to such acts only as are injurious to others*. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.¹¹³ (emphasis added).

According to Jefferson's Lockean view, the one role of government was to protect body and property from injury, since thoughts or utterances of personal religious beliefs do not result in picked pockets or broken legs. Locke's view on the right to property, among other possessions, which Jefferson purports as the counterbalance to the right of conscience, falls within the civil realm and is self-explanatory:

The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests.

Civil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like.

It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general and to every one of his subjects in particular the just possession of these things belonging to this life. If anyone presume to violate the laws of public justice and equity, established for the

¹¹³ Jefferson, Notes.

preservation of those things, his presumption is to be checked by the fear of punishment, consisting of the deprivation or diminution of those civil interests, or goods, which otherwise he might and ought to enjoy. But seeing no man does willingly suffer himself to be punished by the deprivation of any part of his goods, and much less of his liberty or life, therefore, is the magistrate armed with the force and strength of all his subjects, in order to the punishment of those that violate any other man's rights.

Now that the whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls, these following considerations seem unto me abundantly to demonstrate.¹¹⁴

The “things” which government is to protect are life, liberty, and property, which in the Declaration of Independence the latter was substituted by “pursuit of happiness.” Those actions, therefore, which government can proscribe are those that cause injury in the Lockean sense, which is what Jefferson sustained. The question the courts should ask in determining whether a violation of the religion clauses has occurred is, like Joseph Priestly asked in the 1790s, “How is any person injured by my holding religious opinions which he disapproves of?”¹¹⁵ In other words, what is one individual’s personal injury (damage) when another individual acts upon his religious belief? Under Jefferson’s own interpretation, two parties have to be involved for there to be an injury in the exercise of religion, not just one. Such actions fall under the purview of fraud, battery, rape, contract, and murder statutes. Handling of snakes, ingesting peyote, or refusing to work on the Sabbath has only one “injured” party: the participant. The only actions Jefferson’s interpretation suggests are under governmental control are those injurious to others and those which the people have submitted to the government. If religious practices result in health hazards, those practices may be regulated to prevent an epidemic without proscribing the practices themselves.

JUDICIAL VACILLATION

Problems will emerge, however, when the legislative and judicial branches of the government interpret any Amendment without analyzing first the historical contentions, neglecting their origin and nature, and not applying the historical test to contemporary scenarios. To reiterate, Justice Story stated that the First Amendment was not to be an “indifference to religion in general, especially Christianity.”¹¹⁶ Christianity holds a unique and influential position in American history, which gives particular meaning to the birth of this country. To marginalize, deny, or neglect this influence historically and politically would be a miscarriage of judicial interpretation. For example, in Reynolds v. United States, the Court misuses Jefferson’s interpretation of government intervention in religious practices. At the time of this case, Mormonism was a minority religion and relatively new. In 1874, Congress outlawed polygamy

¹¹⁴ John Locke, “A Letter Concerning Toleration” (1689), [database on-line]; available from <http://odur.let.rug.nl/~usa/D/1651-1700/locke/ECT/toleraxx.htm>. Accessed 17 March 17, 2002; Kramnick, 92.

¹¹⁵ Kramnick, 82.

¹¹⁶ Story, 314.

and arrested George Reynolds, a Mormon, for engaging in the practice. A unanimous court held that the Amendment barred Congress from enacting laws that proscribed expressions of beliefs but not actions, making a distinction between beliefs and actions. If the question posed by Mr. Priestly were to be applied to this case, who would be the injured party in particular? Is there any evidence that polygamy is violative “of social order or subversive of the good order?”¹¹⁷ Are the women involved coerced to marry a polygamist? Is the practice prohibited in the Old Testament? That the practice may have been offensive to the justices, and understandably so to Christians, is not an issue warranting legal consideration. If Congress could not show that polygamy was in fact subversive to good social order within Utah where it was practiced, then according to historical contentions, Congress had no right to enact the law nor did the Supreme Court have the duty to uphold it. Rather, it is the duty of the courts to serve as a check and balance to legislative enactments, since the people, as individuals, are virtually powerless against the power, authority, and resources of the state. If behavior subversive to good social order did occur, it occurred against Mormons and their beliefs. Many Mormons died at the hands of intolerant factions; therefore, the people committing the murders were the ones subversive to good order, against whom there are plenty of laws on the books.

Concerning the standing of the non-religious, the Supreme Court overstepped its power to interpret the law. In a series of decision, starting with United States v. Ballard,¹¹⁸ the Court expanded the meaning of religious conscience. In Ballard, the Court held that the constitutionality of religious belief is not based on the truth of the belief but the sincerity by which the truth is held. This decision, however, did not dismiss the traditional definition or “religion” as stated in Reynold v. United States and Davis v. Beason. United States v. Seeger (1965) raised the question concerning religious objection to the Viet Nam war as an exception to serve in the military. The law in question was “§6(j) of the Universal Military Training and Service Act of 1948 which, as a prerequisite of exempting a conscientious objector from military service, required belief in a relation to a Supreme Being involving duties superior to those arising from any human relation.” Seeger sought exemption from the draft because of religious beliefs but did not want to say one way or the other whether he believed in a “Supreme Being.” The Court held the following:

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief [*166] "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not. We have concluded that the beliefs of the objectors in these cases meet these criteria.¹¹⁹

¹¹⁷ Reynolds v. U.S., 98 U.S. 145 (1879) at 164.

¹¹⁸ United States v. Ballard, 322 U.S. 78 (1944).

¹¹⁹ United States v. Seeger, 380 U.S. 163 at 166.

Therefore, the sincerity of the belief had to only parallel the orthodox belief in a Supreme Being. In Welsh v. United States (1970), however, the Court expanded the “sincere belief” doctrine to apply to those who wanted a religious exemption from the draft based on a sincere belief not grounded in religion:

The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency. In applying [the law’s] exclusion of those whose views are “essentially political, sociological, or philosophical” or of those who have “a merely personal moral code,” it should be remembered that these exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors by “religious training and belief.”¹²⁰

Here is where the Court went beyond the historical contentions that occasioned the drafting of the religion clauses. If the “sincerely held belief” to military service were applied not across the board but only to those whose religion traditionally objected to participation in war, like the Quakers, then the Court would have been true to its test while upholding laws requiring all others to service in the armed forces. Alternatively, the Court could have been true to the original intent of the Framers and applied the religion clauses only to the religious.

The Braunfeld v. Brown (1961)¹²¹ case is also indicative of the Court ignoring not just American history but also religious history. Pennsylvania blue laws prohibited Abraham Braunfeld from opening his clothing and furniture store for business on Sundays. Although the government had a legitimate interest in setting aside a day for rest and family/community togetherness, it did not take into consideration that the day of rest here legislated originated in the Jewish faith (a minority religion), that day being Saturday, not Sunday. The religious and historical issues the Court should have considered are that the “Sabbath” has its roots in the Old Testament, which Christians revere, that Judaism is a minority religion just like the Baptists were in colonial times, and that one religious group adheres to Saturday as its day of family and community togetherness inflicts no personal injury on anyone; it did not “pick anyone’s pocket or break anyone’s leg.” Pennsylvania could have found a reasonable, alternate way to achieve its goals and still accommodate both faiths, such as indicating on the occupational license which day of rest the owner observed. In actuality, the Pennsylvania law preferred one religion to another, which is precisely what the First Amendment’s history was intended to prohibit.

Sherbert v. Verner (1963) erased the strict distinction between beliefs and actions, indicating that the Court acknowledged a causal connection between beliefs and actions. The facts of the case are that after thirty-five years of working at a textile mill, Adell Sherbert’s employer informed her that, from that day forth, work on Saturdays would be compulsory. Sherbert, a Seventh Day Adventist, did not comply, resulting in her termination. When she applied for unemployment, the state denied her benefits because she had not accepted other job opportunities also mandating work on Saturdays, contending that giving her unemployment benefits would fraudulently deplete state unemployment fund. The Court finally realized that religious beliefs and actions are not detached and exclusive; it is precisely because of her

¹²⁰ Welsh v. United States, 398 U.S. 333 at 343-4.

¹²¹ Braunfeld v. Brown, 366 U.S. 599 (1961).

religious beliefs that the state denied her unemployment benefits, putting the two interests in conflict:

For “if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.” Braunfeld v. Brown, *supra*, at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.¹²²

In fact, if the individual holds the belief that a Supreme Being exists and requires unconditional obedience in the presence of conflicting loyalty, the pressure on the adherent can be overwhelming. It isn't clear why the Court distinguished Sherbert from Braunfeld. The only reason it gives is that the alternatives the state would have at its disposal to achieve the same goal would be, according to the Court, monumental:

In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in Braunfeld v. Brown, *supra*. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants] . . . religious beliefs more expensive," 366 U.S., at 605. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case -- a *strong state interest in providing one uniform day of rest for all workers*. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable¹²³ (emphasis added).

There is no substantial difference between the potential administrative problems in Braunfeld and the perceived fraudulent depletion of unemployment funds in Sherbert. The focus has to remain on the fundamental right to exercise religion without government intrusion. It is no less burdensome on South Carolina to pay unemployment benefits to a person who refuses to work on Saturdays than it is for Pennsylvania to type on an occupational license that the owner's religion prohibits work on Saturdays. It was unnecessary for the Court to distinguish the cases. Nonetheless, that the Court recognized the causal effect of religious beliefs on actions was a breakthrough.

¹²² Sherbert v. Verner, 374 U.S. 398 at 404.

¹²³ *Ibid.*, 408-9.

The war on drugs caused the Court to vacillate on the distinction between beliefs and actions. In Employment Division, Department of Human Services of Oregon v. Smith (1990),¹²⁴ the majority totally ignored the historical issues upon which it should consistently base all its decision. Alfred Smith and Galen Black were members of the Native American Church, which used peyote in its religious rituals. Unfortunately, both men also worked at a private drug rehab center. Upon discovering their practice, the rehab fired them because possession of peyote in Oregon is a criminal offense. Both men filed for unemployment but an Oregon law denied them benefits for “misconduct.” The law did not exempt peyote as sacramental substance. By a vote of 6-3, the Supreme Court ruled against them.

Not losing sight that religious beliefs and actions have a causal relationship, the Court had an excellent opportunity to apply the historical test to this case: it involved a minority religion; the use of peyote was ceremonial and would “injure” no one (in the Jeffersonian sense) but the person ingesting it; and the commerce involved in its acquisition by the church was already regulated (the church already had a permit to use the peyote). Although Justice O’Connor concurred with the majority, she did point out that a “law of general applicability” such as the one challenged in this case (the prohibition of peyote use) is precisely the type of law that commonly violates fundamental rights. Contrary to Justice Scalia—who wrote the opinion stating that if a law of general applicability, neutral in content, has an incidental effect on religion, the law has not violated the First Amendment—Justice O’Connor argued that it would be absurd for any legislature to draft a law of specific applicability against the First Amendment because it would be immediately struck down.

In light of the evidence presented in the case, which Justices Blackmun, Brennan, and Marshall used in their dissent, the majority clearly missed the mark in ruling for Oregon. They agreed with Justice O’Connor that the real issue was “whether exempting respondents from the State’s general criminal prohibition ‘will unduly interfere with fulfillment of the governmental interest.’”¹²⁵ Their answer was “no.” Significantly, the dissent focused on the very issue that Jefferson uttered: there must be an injured party for the government to restrict religious actions. Oregon relied on mere speculation of potential harm to an ordered society, not an individual. Had the majority adhered to Jefferson’s injury standard, Smith and Black would be exercising their religion and Oregon would still be able to prosecute illegal possession of peyote. Oregon showed no proof that a decision for Smith and Black would result in rampant criminal use of peyote disrupting social order. The Court could have reversed and suggested in its decision that an exemption for religious use of peyote be written in the statute, thus preserving religious exercise as well as social order.

In the case Church of the Lukumi Babalu Aye v. City of Hialeah (1993), the federal court ruled correctly by striking down six ordinances that prohibited animal sacrifices, defined as “to unnecessary kill, torment, or mutilate and animal in a public or private ritual or ceremony not for the primary purpose of food consumption.” The Hialeah law facially violated the First Amendment because it singled out rituals or ceremonies of a religious in nature and practiced by Santeria. Had Hialeah eliminated the phrase “ritual or ceremony,” thus making the ordinance a “law of general applicability,” the law would still violate the First Amendment as applied. As a minority religion like the Native American Church in Smith, the historical contentions apply to Santeria, requiring that a religious exemption be written into the law.

¹²⁴ Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

¹²⁵ *Ibid.*, 905, 906.

Attempts to discredit the prominent place Christianity (and its religion of origin, Judaism) has had in American history have increased as other religions have grown in number and as individuals drift from the historical criteria for the Establishment and Free Exercise Clauses. Common among these objections is the display of the Ten Commandments in courthouses or on school property. The Supreme Court has applied several tests to determine violations that are beyond the scope of the historical criteria. One is the secular purpose test. At first glance, this test seems to be legitimate. However, it carries a presupposition that displaying or even teaching the morals embedded in the Commandments has no secular purpose. The reduction of the social costs of crime may be a legitimate secular purpose, especially if they are displayed in primary and secondary schools where students are developing their moral duty to society. As President George Washington stated: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports... Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."¹²⁶ If respect for religion, especially Christianity, were to be fostered in public schools, if for no other reason than because it had an important part in the birth of this country and because it is part of the basis of our legal system, perhaps there would be no need for metal detectors at school doors.

The courts have considered secular purposes for the display of the Ten Commandments, but the evidence to reach their conclusion that the display did not violate the Establishment Clause is restrictive. In *Suhre v. Haywood County*, (1997), the Court held that the sixty-seven-year-old display of the Ten Commandments at the county courthouse had a legitimate secular purpose because "(1) it was installed with the secular purpose of instilling respect for the judicial system; (2) it did not have a primary effect of advancing religion by government endorsement because it was surrounded by secular symbols, such as the sword and scales of justice; (3) it did not entangle church with state because government funds were not used beyond the minute amount of necessary for cleaning the display; (4) no religious organization was connected with the display; and (5) the government did not call attention to the display."¹²⁷ These qualifiers were not considered in early American jurisprudence. For instance, it is obvious that having a religious symbol surrounded by secular objects was not a protection against First Amendment violations. Most of the paintings in the Capital Rotunda have religious themes and are not surrounded by secular paintings. The stained glass window of George Washington praying on his knees is not surrounded by secular or other sectarian depictions. That a display of the Ten Commandments had existed for sixty-seven years gives the indication that there was no major contention about it when it first went up, and within the historical test, any problems now would be unfounded. The fact that the face of Moses in the Old House Chamber (National Statuary Hall) is the only one facing forward while the other three are profiles implies that he was given prominence. It is quite evident that the courts have not been consistent in their decision-making; adhering to the historical issues of the First Amendment should simplify the Court's jurisprudence and set a clearer path for lower courts and legislators.

Issues in recent years have gone so far beyond the historical contentions and Jefferson's restraints on free exercise that it is amazing that some cases are not deemed frivolous more frequently. Sometime in February of 2002, in Franklinton, Louisiana, the American Civil Liberties Union filed a suit in federal court seeking removal of signs on the outskirts of town

¹²⁶ Washington's Farewell Address 1796.

¹²⁷ James L. Underwood, "The Proper Role of Religion in the Public Schools: Equal Access Instead of Official Indoctrination." *Villanova Law Review* 46 Vill. L. Rev. 487 (2001): 499.

saying, “Jesus is Lord over Franklinton.” The contention was not the fact that parish road crews erected it on state roads, even though area churches paid for it; the contention was the message: “Can you imagine the hostility that Jews, Muslims, members of other minority faiths and non-believers must feel when living in or passing through that community?”¹²⁸ The message and the reaction to it are irrelevant. The issue is that sign is not an establishment of religion. Had the sign said “Mohammad is Lord over Franklinton,” it would have been constitutional according to the historical test, even if this country were “deeply ingrafted upon Christianity.” The issue is that minority religions, like the Baptists in colonial times, have as much right to the freedom of religious expression as majority ones.

In the same year, the ACLU filed another suit in Washington, D.C., where both houses of Congress approved legislation allowing the use of the Capitol Rotunda for their prayer sessions. Barry Lynn of the Americans United for Separation of Church and State complained saying, “If members of Congress want a religious service, they can go to their houses of worship. The U.S. Capitol is not a revival tent.”¹²⁹ The Capitol, however, has been used for more than just prayer sessions. In 1800, the Congress used it to hold church services. This is confirmed in John Quincy Adams’ Memoirs dated October 23 and 30, 1803, respectively: “Attended public service at the Capitol where Mr. Ratoon, an Episcopalian clergyman from Baltimore, preached a sermon,” and “religious service is usually performed on Sundays at the Treasury office and at the Capitol. I went both forenoon and afternoon to the Treasury.”¹³⁰ That Mr. Lynn (or any other student of law and history) may be unaware of this use of the Capitol Building is indicative of the marginal place the contributions of religion to American history has in academia.

CONCLUSION

Original intent is not difficult to decipher or obtain, nor is it arrogant to attempt to obtain it. The preponderance of historical evidence supports the conclusion that the issues surrounding the First Amendment’s religious clauses were few and well defined: 1) no legal establishment of one sect of Christianity or another religion as the national religion; 2) no taxation of the citizenry for the sole support of one legally privileged religion; 3) no religious test as a prerequisite to hold public office; and 4) no legal prohibition against the free exercise of religious conscience of any religions, especially minority ones. Contrary to popular contemporary belief, the original intent of the Framers was not to remove the American Christian culture from the public sphere; the public sphere has been inundated with Christian symbols since the birth of this country. If the Court were to adhere to these issues as a “historical test” for the Establishment and Free Exercise Clauses, their opinions would be more consistent and truer to the historical context of the Amendment. As America becomes more diverse and more individuals of different religions other than the traditionally American Protestant religions begin to assert this fundamental right, the application of the historical test would not be discriminatory against them. To the contrary, if the legislatures and courts were consistently to prefer all religions instead of none, there may even be a decrease in litigation.

¹²⁸ David Limbaugh, “Yet More Assaults on Christianity,” [database on-line]; available from <http://www.townhall.com/columnists/davidlimbaugh/dl20020202.shtml>. Accessed 2 February 2002.

¹²⁹ Ibid.

¹³⁰ Barton, Spiritual Heritage, 80.

One solution to defusing the controversy with the Establishment and Free Exercise Clauses is to give a more thorough education on the early history of the United States, not steering away from the Judeo-Christian foundations that so abound. That the Christian religion is predominant is a fact of history and Biblical references should not be eradicated from public life because they are historical and legal, as well as a religious. Christianity holds a special place in American history precisely because it was the predominant religion of the time in America; had it been Islam or Hinduism, they would have had the honored place. As Thomas Jefferson said, the American experiment in republicanism would survive only if there is an incredible amount of social virtue. The source of that virtue, as so many of the Founders and Framers repeatedly affirmed, is the Christian Bible.

On Feb. 15, 1954, Time magazine quoted Chief Justice Earl Warren, as a liberal jurist, as follows:

“I believe no one can read the history of our country without realizing that the Good Book and the spirit of the Savior have from the beginning been our guiding geniuses ... I believe the entire Bill of Rights came into being because of the knowledge our forefathers had of the Bible and their belief in it: freedom of belief, of expression, of assembly, of petition, the dignity of the individual, the sanctity of the home, equal justice under law, and the reservation of powers to the people”¹³¹

The Chief Justice’s acknowledgment should be taken more seriously when a claim of First Amendment violation enters the courtroom. The individual fundamental right is the one to be protected from the governmental encroachment perpetuated by religious historical ignorance. There is no violation in applying the historical standard consistently across the board; it may eliminate the test articulated in Lemon, requiring that the challenged law have a secular purpose, that its principal effect neither advances nor inhibits religion, and that the law does not foster an excessive entanglement with religion.¹³² A vast majority of early American laws did not have a strict secular purpose; the laws, especially federal laws, did not advance or inhibit one denomination of religion, but they did favor Christianity simply because that was the traditional religion from which the moral and legal basis of this country came. Excessive entanglement with religion is an issue only when the courts take the view that government should be religiously neutral; it would not be an issue if government were to view the First Amendment as not prohibiting the non-discriminatory aid and support of all religions as the majority of the Framers envisioned it. The phrase “separation of church and state” has become the very thing they did not intend, and it has been abused to limit freedoms instead of to protect them. Litigants desire to see legislatures and courts reach actions that have nothing to do with “social duty” or “good order.” They want to infringe on public as well as private expressions of religion just because they bring offense. The Amendment never shields against getting offended, and courts

¹³¹ Linda Bowles, “Demonizing Religion,” [database on-line]; available from <http://www.townhall.com/columnists/lindabowles/lb20020115.shtml>. Accessed 15 January 2002.

¹³² Lemon v. Kurtzman, 403 U.S. 602 (1971).

should not entertain such causes of action. Without attending to the historical contentions that precipitated the religion clauses, misapplication, marginalization, and misunderstanding of the role of religion in the founding of this country will be inevitable, the dilution of the Framers' original intent will continue, and governmental encroachment on religious freedoms will expand.

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