

THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE AND ITS APPLICATION TO EDUCATION

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I. INTRODUCTION

On the rare occasion when the United States Supreme Court reverses itself, as in *Brown v. Board of Education*,¹ the more recent decision logically should be the more enlightened. This was not the case, however, when the Court reversed *Aguilar v. Felton*,² as well as portions of *School District of Grand Rapids v. Ball*,³ in *Agostini v. Felton*.⁴ While *Agostini* countered much of the ill-founded precedent to the original decisions, it did nothing to enlighten the understanding of the original meaning of the First Amendment religion clauses. The reversals of *Aguilar* and *Grand Rapids* even further complicated the Court's misguided understanding of the Amendment and added yet one more reconstructed meaning while attempting at the same time to retain harmony with the original wording.

This article demonstrates that the authors of the Constitution created, in language appropriate to their time, a uniformly pro-religion Amendment and executed decisions consistent with that meaning. Over the last half-century, the Court has wrongly interpreted the Amendment, resulting in decisions contradictory not only to Founding-era interpretations, but to its own decisions as well.

The Court in *Aguilar* held that the payment of salaries to New York's public school teachers who provided supplemental special education to educationally and economically deprived students in parochial schools fostered an "excessive entanglement of church and state."⁵ In *Grand Rapids*, the Court held that a Michigan state plan to fund the salaries (mostly of non-public school teachers) and the

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¹ 347 U.S. 483 (1954) (reversing the separate-but-equal principle, as it applied to education, that was declared constitutionally sound in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

² 473 U.S. 402 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203, 236 (1997).

³ 473 U.S. 373 (1985), *overruled in part by* *Agostini*, 521 U.S. at 236 (1997).

⁴ 521 U.S. 203 (1997).

⁵ 473 U.S. at 414.

curriculum expenses for special education programs in non-public schools had the primary and unconstitutional effect of advancing religion.⁶

Regarding the precedents for these two decisions, the Court in *Meek v. Pittenger*⁷ held unconstitutional the provision of state-paid teachers for remedial teaching, counseling and guidance, and testing services within parochial schools because it advanced religion.⁸ Earlier, in *Lemon v. Kurtzman*,⁹ the Court set forth the three-part *Lemon* Test to be used in Establishment Clause cases. Under the *Lemon* Test, in order to be constitutional, government actions must (1) have a secular and not a religious purpose; (2) neither advance nor prohibit religion; and (3) cause no excessive government entanglement with religion.¹⁰ Because of excessive entanglement, the Court in *Lemon* found state aid to parochial schools, even for exclusively secular instructional purposes, to be a violation of the First Amendment.¹¹

In spite of the precedents that justified the *Aguilar* and *Grand Rapids* decisions, the Court reversed itself in *Agostini*. Whereas *Aguilar* kept public school teachers off the premises of the religious schools and *Grand Rapids* denied public funds for educational activities of religious schools, *Agostini* permitted both.¹² In fact, Justice O'Connor claimed that these practices do "not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."¹³

Although the *Lemon* Test was in effect by the time the Court decided *Aguilar* and *Grand Rapids*, Justice O'Connor's statement in *Agostini* that the three *Lemon* criteria are not violated indicated that the meanings of the criteria changed. Also, in *Board of Education v. Grumet*,¹⁴ Justice O'Connor suggested in her concurrence that the Court may need to reconsider, if not reverse, their *Aguilar* decision in an appropriate case.¹⁵ It is clear in the concurring opinions that the Court

⁶ See 473 U.S. at 397.

⁷ 421 U.S. 349 (1975).

⁸ See *id.* at 372.

⁹ 403 U.S. 602 (1971).

¹⁰ See *id.* at 612-13.

¹¹ See *id.*

¹² See *Agostini*, 521 U.S. at 234-35.

¹³ *Id.* at 234.

¹⁴ 512 U.S. 687 (1994).

¹⁵ See *id.* at 717-18.

did not agree how Establishment Clause cases should be evaluated. The Justices acknowledged that they needed a limiting principle to guide reconsideration, and perhaps initial considerations, of the Establishment Clause.¹⁶ Evidently the majority felt that the Court's own constructions, such as the "child benefit" theory,¹⁷ student impressionability,¹⁸ social ostracism,¹⁹ and student understandability,²⁰ were inadequate for the task. In fact, it has been argued that, for the greater part of this century, the Court has been without a principled basis for interpreting the religion clauses of the First Amendment.²¹

It is time for a clear explication of a principle for interpreting the Establishment Clause of the First Amendment. While the last fifty-plus years, since *Everson v. Board of Education*,²² have seen a proliferation of interpretative principles that the Court itself has constructed, interpretations during the time period prior to 1947 were not tortured with these add-on interpretations. As this article demonstrates, the time period closest to the inception of the First Amendment holds the key to proper interpretation.

This article advances the argument that contemporary interpretations of the First Amendment are incorrect because the religion clauses have been misinterpreted. These inaccurate interpretations, particularly of the Establishment Clause, are the result of a faulty understanding of Thomas Jefferson's well-known phrase, "wall of separation between church and State."²³ The correct meaning of the Amendment is found in discerning its foundational intent. Once we know the foundational intent, we have *the* principle for interpretation. That intent, and the resulting hermeneutical principle, is federalism.

II. CONTEMPORARY INTERPRETATIONS

The Court's accepted baseline for interpreting the First Amendment religion clauses remains its 1947 decision in *Everson v. Board of*

¹⁶ See *id.* at 721.

¹⁷ *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).

¹⁸ See *Tilton v. Richardson*, 403 U.S. 672 (1971).

¹⁹ See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

²⁰ See *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

²¹ See Stephen V. Monsma, *The Wrong Road Taken*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS* 123, 129 (Jo Renee Formicola & Hubert Morken eds., 1997) [hereinafter *EVERSON REVISITED*].

²² 330 U.S. 1 (1947).

²³ Letter from Thomas Jefferson to Nehemiah Dodge et al. (Jan. 1, 1802), in *THOMAS JEFFERSON: WRITINGS* 510 (Merrill D. Peterson ed., 1984).

Education.²⁴ Practically all recent First Amendment decisions relating to education reference the *Everson* argument in one way or another. "It is, in short, a defining First Amendment religion case."²⁵ For all of *Everson's* influence, the Court's interpretation of Jefferson's "wall of separation between church and State"²⁶ set a precedent in education that is antithetical to the original meaning of the First Amendment's religion clauses. The *Everson* decision is, in the eyes of some, "one of the worst decisions made by the Supreme Court."²⁷

Justice Black's opinion in *Everson* set the standard for what is known as the separationist doctrine:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

That wall must be kept high and impregnable. We could not approve the slightest breach.²⁸

Paradoxically, this standard, which has set a precedent for so many religion and education cases since then, was not used to decide *Everson*. In fact, the *Everson* Court found that the practice of reimbursing parents for bus fares, including parents of parochial school children, was not in violation of the Constitution because of what has come to be known as the principle of nondiscrimination.²⁹ This alternate principle holds that it would have been discriminative and thus wrong constitutionally, according to the very same wall-erecting First Amendment, to deny the reimbursement benefit to parents of parochial students.³⁰ Here, Justice Black said that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."³¹

The *Everson* decision promoted two competing interpretive principles but favored only one. A major problem emanating from

²⁴ 330 U.S. 1 (1947).

²⁵ Daniel L. Dreisbach, *Everson and the Command of History: The Supreme Court, Lessons of History, and Church-State Debate in America*, in *EVERSON REVISITED*, *supra* note 21, at 23.

²⁶ Letter from Thomas Jefferson to Nehemiah Dodge et al., *supra* note 23, at 510.

²⁷ Monsma, *supra* note 21, at 123.

²⁸ 330 U.S. at 15-16, 18 (citations omitted).

²⁹ *See id.* at 17.

³⁰ *See id.* at 17-18.

³¹ *Id.* at 18.

Everson is in the Court's failure to articulate how and when to apply either of the principles it espoused.³² By this act of ambiguity, the Court has spawned two contradictory streams of First Amendment interpretations—separationism and nondiscrimination.³³

A. Separationism

The separationists hold that there must be a strict separation between civil authority and religion.³⁴ Writings of colonial leaders such as Thomas Jefferson and James Madison are used to support the belief that government and religion must be independent of each other.³⁵ This view results in a "broad" interpretation of the Establishment Clause such that government is prohibited from supporting or promoting religion even where no particular sect or religion is favored.³⁶ The soundness of the separationist perspective is immediately suspect merely from the many well-established religion-government interactions that have persisted for more than just a few years. For instance, our coinage declares, "In God We Trust"; chapels are constructed on military bases; and religious institutions enjoy various government services such as fire protection, police protection, and water and sewer maintenance, while being exempted from supportive taxation.

Despite these interactions between religion and government, the separationist position prevailed just one year after being articulated in *Everson*. The Court ruled in *McCullum v. Board of Education*³⁷ that it was unconstitutional to hold in-class religious instruction within public school buildings even if provided by non-paid clergy.³⁸ Writing for the Court, Justice Black stated,

Here not only are the [S]tate's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.³⁹

³² See Angella C. Carmella, *Everson and Its Progeny: Separation and Nondiscrimination in Tension*, in *EVERSON REVISITED*, *supra* note 21, at 103.

³³ See DANIEL L. DREISBACH, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* 48 (1987).

³⁴ See *id.* at 47.

³⁵ See *id.* at 99.

³⁶ *Id.* at 48.

³⁷ 333 U.S. 203 (1948).

³⁸ See *id.* at 212.

³⁹ *Id.*

Yet, four years later, the boundaries of separation of church and state were relaxed. *Zorach v. Clauson*⁴⁰ held that religious instruction during school hours was constitutionally permissible as long as it occurred off premises.⁴¹ In this case, the boundary line apparently was not so much concerned with the students receiving religious instruction during the machinery of compulsory attendance time, but instead that public funds were “appropriately” not involved in the “released time” provision.⁴² But this relaxation of a hard-line separationist orientation ignored the potential for the use of public funds to enforce the truancy laws for those who may have violated released time attendance requirements.⁴³

The relaxation of separationism in the 1950s to “accommodate” the interests of religion was short-lived via a series of decisions in the 1960s. Whether the issue was the reciting of a non-denominational prayer in public school,⁴⁴ the reading of Bible verses,⁴⁵ the loaning of public school textbooks to parochial school children,⁴⁶ the teaching of evolution,⁴⁷ or the use of taxpayer monies to provide services and textbooks to religious schools,⁴⁸ the Court assertively guarded against doing anything that was perceived as advancing religion. By 1971, the separationist position was firmly reinforced via the three-part *Lemon* Test, which continued to enforce the separationist doctrine well into the 1980s.⁴⁹ In 1985, *Aguilar v. Felton*⁵⁰ prohibited public school teachers from offering supplemental special education to parochial school children federally entitled to this benefit.⁵¹ But whether the perspective is separationism or accommodationism, the reference point for both is rooted in Justice Black’s dictum that neither a state nor the federal government can aid one, all, or any religion in order to keep “high and impregnable” Jefferson’s wall of separation between church and state.⁵² The legacy of *Everson*, however, is two-dimensional, if not bipolar. At one pole is the separationist, resisting government involvement. At the other pole is

⁴⁰ 343 U.S. 306 (1952).

⁴¹ *See id.* at 315.

⁴² *Id.*

⁴³ *See id.* at 324 (Jackson, J., dissenting).

⁴⁴ *See Engel v. Vitale*, 370 U.S. 421 (1962).

⁴⁵ *See School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

⁴⁶ *See Board of Educ. v. Allen*, 392 U.S. 236 (1968).

⁴⁷ *See Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁴⁸ *See Flast v. Cohen*, 392 U.S. 83 (1968).

⁴⁹ *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁵⁰ 473 U.S. 402 (1985).

⁵¹ *See id.* at 414.

⁵² *Everson*, 330 U.S. at 18 (1947).

governmental proactivity of insuring nondiscrimination—in other words, making sure the religious are treated as equally as those who are not religious.

B. Nondiscrimination

Whereas the separationist and accomodationist views focus on the degree of government aid to or involvement in religion, nondiscrimination focuses on a different dimension. Nondiscrimination focuses on the comparison between religious and secular counterparts. Specifically, the nondiscrimination view holds that there should be general equivalence or parity of treatment for both religious and secular recipients.

The Court allowed the use of public buildings for religious purposes on the basis of nondiscrimination in *Widmar v. Vincent*,⁵³ even though the Court prohibited such use in *McCullum* on the basis of the separationist perspective.⁵⁴ Similarly, in *Mueller v. Allen*,⁵⁵ the Court held that even if an educational tax deduction primarily benefited parochial school students, they were entitled to it on the basis of treating all recipients non-discriminatorily.⁵⁶ Furthermore, the Court ruled in *Witters v. Washington Department of Services for the Blind*⁵⁷ that state funding for the visually impaired was not unconstitutional, even if used by the recipient for Bible college attendance, because the funding was neutrally or non-discriminatorily available.⁵⁸ While the separationist “high and impregnable wall” argument did not prevail in the preceding three cases, it did nonetheless invalidate a New Jersey plan, similar to that permitted in *Mueller*, to give an income tax deduction to parents of nonpublic school children because it had the effect of advancing religion.⁵⁹ The fact that public school taxation may be a discriminatorial levy against nonpublic school attendees was apparently irrelevant to deciding discrimination. Similarly, while nondiscrimination allowed special education funds in *Witters* to go to a religious institution, separationism denied nonpublic school education programs in *School District of Grand Rapids v. Ball*,⁶⁰ even if for a secular purpose, because

⁵³ 454 U.S. 263 (1981).

⁵⁴ See 333 U.S. at 212.

⁵⁵ 463 U.S. 388 (1983).

⁵⁶ See *id.* at 403.

⁵⁷ 474 U.S. 481 (1986).

⁵⁸ See *id.*

⁵⁹ See *Public Funds for Pub. Schs. v. Byrne*, 590 F.2d 514, 520 (3d Cir. 1979), *aff'd*, 442 U.S. 907 (1979).

⁶⁰ 473 U.S. 373 (1985), *overruled in part by Agostini*, 521 U.S. at 236.

the programs had the potential for advancing the cause of a religious institution.⁶¹ Conversely, the Court ruled that a special education provision of a sign-language interpreter for a Catholic school student did not violate the Establishment Clause and, thus, was constitutionally permissible because such a program “neutrally provide[s] benefits to a broad class of citizens defined without reference to religion.”⁶² This is seemingly at odds with the operative separationist perspective that public funding to parochial schools furthers the purposes of such schools and, thus, promotes an establishment of religion. The shift in the interpretive paradigm from separationism to nondiscrimination is likewise evident in the *Rosenberger v. University of Virginia*⁶³ case, which allowed public funds to support a student Christian publication.⁶⁴ Instead of being viewed from the separationist tradition as unconstitutionally promoting a religion, the financial support was found constitutionally valid because a contrary ruling would have been discriminatory.⁶⁵

The brief review above not only highlights the conflict between what Justice O’Connor in *Rosenberger* has called the two “bedrock principles,”⁶⁶ separationism and nondiscrimination, but it also reveals that no clear criterion exists for determining which principle applies and when. In fact, several cases have appeared before the Court because the defendant assumedly acted on one of the principles, only to be rebuffed by the Court in its preference for the alternate principle.⁶⁷

The lack of a consistent interpretation regarding Establishment Clause issues is no doubt functionally related to the fact that the two prevalent “bedrock” principles of separationism and nondiscrimination are not mutually exclusive. It is possible for federal aid that is applied non-discriminatorily to benefit religion in a significant way. The reality of this balancing act is affirmed in the *Public Funds for Public Schools v. Marburger*⁶⁸ opinion: “the interest of the public lies not so much in the continuation of aid to nonpublic schools as it does in the continued vitality of the Establishment Clause.”⁶⁹ This is illustrated by two similar instances involving textbooks and instructional materials. In *Board of*

⁶¹ See *id.*

⁶² *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

⁶³ 515 U.S. 819 (1995).

⁶⁴ See *id.* at 845-46.

⁶⁵ See *id.*

⁶⁶ *Id.* at 847 (Blackmun, J., dissenting).

⁶⁷ See, e.g., *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

⁶⁸ 358 F. Supp. 29 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

⁶⁹ *Id.* at 43.

Education v. Allen,⁷⁰ the Court decided that the loan of textbooks by New York public schools to parochial school students was neutral toward religious schools, benefiting parents and children but not the schools, and therefore did not violate the Establishment Clause.⁷¹ Likewise, in *Meek v. Pittenger*,⁷² the state of Pennsylvania's loan of books directly to parochial schools, and not to the students, was permitted.⁷³ However, the loan of instructional materials was not permitted in *Meek* since the materials advanced the mission of religious schools against the Establishment Clause in a way that the books did not.⁷⁴

C. Pragmatic Results

Confusing as the conflict is between the two "bedrock" concepts of separationism and nondiscrimination, it is even more difficult to align the practical outcomes of recent Establishment Clause decisions with one another. For instance, regarding textbooks and instructional materials, the purchase of books with public tax dollars for use in sectarian schools,⁷⁵ a tax deduction for books,⁷⁶ and the loan of textbooks to parochial school students⁷⁷ were all found constitutionally sound. Financial aid to support secular-only instruction in a parochial school,⁷⁸ the loan of instructional materials other than texts to parochial schools,⁷⁹ the loan of instructional materials to parents,⁸⁰ and the funding of instructionally-purposed field trips⁸¹ were found by the Court to violate the Establishment Clause. On one hand, the publicly funded promotion of religious educationally oriented films in a public school during "off-hours"⁸² and a religiously oriented newspaper on a public college campus⁸³ was deemed consistent with the First Amendment. Yet religious instruction in public schools with a provision for

⁷⁰ 392 U.S. 236 (1968).

⁷¹ *See id.* at 248.

⁷² 421 U.S. 349 (1975).

⁷³ *See id.* at 372-73.

⁷⁴ *See id.* at 372.

⁷⁵ *See Cochran v. Board of Educ.*, 281 U.S. 370 (1930).

⁷⁶ *See Mueller*, 463 U.S. at 390 & n.1.

⁷⁷ *See Board of Educ. v. Allen*, 392 U.S. at 238; *Meek*, 421 U.S. at 353; *Wolman v. Walter*, 433 U.S. 229 (1977).

⁷⁸ *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁷⁹ *See Meek*, 421 U.S. at 354.

⁸⁰ *See Walter*, 433 U.S. 234.

⁸¹ *See id.*

⁸² *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

⁸³ *See Rosenberger*, 515 U.S. at 822-23.

nonparticipation was ruled a violation of the First Amendment.⁸⁴ Regarding the issue of transportation, public school bus fares for parochial students are reimbursable to the parents,⁸⁵ but the funding of transportation for field trips for parochial school students violates the First Amendment.⁸⁶

Decisions related to instruction and instructional content have likewise generated an unfathomable mix of contradictory results. For instance, use of public funds for secular-only instruction in parochial schools is prohibited,⁸⁷ but secularized sex-education funding is permitted,⁸⁸ and use of public funds in parochial schools for a deaf interpreter for any kind of instruction is also permitted.⁸⁹ In the public school setting, religious instruction during regular school hours does not violate the First Amendment⁹⁰ unless it is offered on public school property.⁹¹ However, a religious club can meet on public school premises if the meeting occurs after hours.⁹² Even with a provision for religious instruction in public schools,⁹³ certain religiously-oriented qualifications apply—namely, instructional content cannot exclude evolution⁹⁴ or require that it be balanced with Creationism teachings,⁹⁵ and the Ten Commandments cannot be posted, even in demonstration, as a basis of Western law.⁹⁶

Restrictions on religious content are particularly notable in the area of prayer and Bible readings. The restrictions amount to a ban on school-sponsored prayer (even if non-denominational),⁹⁷ Bible reading,⁹⁸ graduation prayers,⁹⁹ and even voluntary prayer or a moment of silence.¹⁰⁰

⁸⁴ See *McCollum*, 333 U.S. at 204.

⁸⁵ See *Mueller*, 463 U.S. at 390 n.1.

⁸⁶ See *Walter*, 433 U.S. at 232.

⁸⁷ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁸⁸ See *Bowen v. Kendrick*, 487 U.S. 589 (1988).

⁸⁹ See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

⁹⁰ See *Zorach*, 343 U.S. at 308.

⁹¹ See *McCollum*, 333 U.S. at 204-05.

⁹² See *Board of Educ. v. Mergens*, 496 U.S. 226 (1990).

⁹³ See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

⁹⁴ See *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁹⁵ See *Edwards v. Aguillard*, 482 U.S. 578 (1987).

⁹⁶ See *Stone v. Graham*, 449 U.S. 39 (1980).

⁹⁷ See *Engel v. Vitale*, 370 U.S. 421 (1962).

⁹⁸ See *Abington Township*, 374 U.S. at 205.

⁹⁹ See *Lee v. Weisman*, 507 U.S. 577 (1992).

¹⁰⁰ See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

Despite the Court's care to safeguard public funds so that they are not used to promote religious interests, its record in the area of facilities funding signals a favoring of the opposite goal. Use of public funds for a building project at a Baptist college and other religiously affiliated colleges has been held constitutionally sound.¹⁰¹ In fact, provisions of accountability to insure that these facilities be devoted primarily to secular purposes were ruled unconstitutional in violation of the excessive entanglement guideline.¹⁰² Excessive entanglement with religion was also used to prohibit Maryland from ensuring that funds for building construction to religious affiliated colleges did not foster religion.¹⁰³ On the other hand, use of public funds to repair existing non-public schools was ruled as an unconstitutional advancement of religion.¹⁰⁴

Most, but not all, of the decisions regarding impermissible reimbursement or tax deductions to parents for parochial school attendance are consistent. Reimbursement for tuition costs,¹⁰⁵ for supplies,¹⁰⁶ and a provision for tax deductions for costs of attending parochial schools¹⁰⁷ were all denied because they violate the Establishment Clause. However, when the Court holds that offering wholesome competition to public schools and the right of private choices by parents are more relevant than the Establishment Clause, then these same practices are permitted.¹⁰⁸

Decisions regarding special services fare no better. Testing, counseling, and health services to parochial schools are generally considered constitutionally valid.¹⁰⁹ While parochial school employees were permitted to deliver these services, as in the above cases, this mode of service delivery was the very reason why special education services were disallowed in *Grand Rapids*.¹¹⁰ Similarly, while special education for parochial school students in *Aguilar v. Felton*¹¹¹ violated the

¹⁰¹ See *Hunt v. McNair*, 413 U.S. 734 (1973).

¹⁰² See *Tilton v. Richardson*, 403 U.S. 672 (1971).

¹⁰³ See *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736 (1976).

¹⁰⁴ See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

¹⁰⁵ See *Essex v. Wolman*, 409 U.S. 808 (1972).

¹⁰⁶ See *Marburger v. Public Funds for Pub. Sch.*, 417 U.S. 961 (1974).

¹⁰⁷ See *Byrne v. Pub. Funds for Public Schs.*, 442 U.S. 907 (1979); *Nyquist*, 413 U.S. at 789.

¹⁰⁸ See *Mueller*, 463 U.S. at 395.

¹⁰⁹ See *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Liberty v. Regan*, 444 U.S. 646 (1980); *Wolman v. Walter*, 433 U.S. 229 (1977).

¹¹⁰ 473 U.S. at 395.

¹¹¹ 473 U.S. 402 (1985), *overruled by Agostini*, 521 U.S. at 236.

Establishment Clause,¹¹² sign language assistance in parochial schools was ruled constitutionally permissible,¹¹³ as were services for the blind even when the student was studying in a Bible college to become a minister.¹¹⁴ Both of these latter decisions supposedly would advance religion quite against current Establishment Clause interpretations, yet they were allowed.

A uniform standard for interpreting the Establishment Clause has escaped the Supreme Court. Sometimes, for instance, parochial institutions and/or attendées are denied monies or resources because they foster religious orientation. At other times, similar resources are allowed for parochial institutions because to instill safeguards to keep the resources pointed in a secular direction constitutes excessive entanglement with religion that is equally unconstitutional.

Justice Rehnquist summarized the Court's First Amendment inconsistencies this way:

For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them non-reusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.¹¹⁵

¹¹² See *id.*

¹¹³ See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

¹¹⁴ See *Witters*, 474 U.S. at 482.

¹¹⁵ See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

Writer Daniel Moynihan gives an even shorter summary of the problem. "Backward reels the mind. Books are constitutional. Maps are unconstitutional. Atlases, which are books of maps, are unconstitutional. Or are they? We must await the next case."¹¹⁶

III. HISTORICAL PRECEDENT

Over the last fifty years, the "high and impregnable" wall between church and state has fluctuated in height and become pregnable. Justice Black's dictum in *Everson v. Board of Education*¹¹⁷ that laws cannot aid religion and the three *Lemon v. Kurtzman*¹¹⁸ requirements of secularity, neutrality, and non-entanglement have been upheld for some but clearly not all of the cases. The key to bringing consistency to the First Amendment most logically exists by examining the circumstances of its creation.

Seemingly consistent with Justice Black's dictum against government involvement in religion, the principal author of the Constitution, James Madison, said, even before the First Amendment was written, that "[t]here is not a shadow of right in the general [federal] government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation."¹¹⁹ Continuing the same confirmatory theme, Jefferson's now-famous statement was the basis for Justice Black's pivotal declaration in *Everson*—namely, Jefferson declared that ratification of the First Amendment resulted in "building a wall of separation between church and State."¹²⁰

As compatible as Madison and Jefferson's statements seem to be with the Justice Black's precedent-setting guidelines, their actions suggest a different meaning than has been supposed. For instance, while a member of the United States House of Representatives, Madison was on the committee that instituted the use of federal funds to promote religion via the United States Congressional Chaplain program.¹²¹ In fact, the same Congress that passed the Chaplain system also passed, again

¹¹⁶ See Daniel P. Moynihan, *Government and the Ruin of Private Education*, HARPERS, Apr. 1978, at 36.

¹¹⁷ 330 U.S. 1 (1947).

¹¹⁸ 403 U.S. 602 (1971).

¹¹⁹ ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 8 (1988).

¹²⁰ Letter from Thomas Jefferson to Nehemiah Dodge et al., *supra* note 23, at 510.

¹²¹ See 1 *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES* 233 (J. Gales ed., 1834) [hereinafter *THE DEBATES*]. Chief Justice Burger claims in *Marsh v. Chambers*, 463 U.S. 783, 788 (1983), that committee member James Madison voted for the bill that authorized payment to chaplains.

with Madison's approval,¹²² the Bill of Rights, the first provision of which would, by contemporary interpretations, argue against the very same Congressional Chaplain system. Furthermore, this same House of Representatives overwhelmingly passed a resolution in favor of a day of nationwide prayer and thanksgiving to God just one day after it passed the First Amendment.¹²³ During his presidency, Madison proclaimed on four different occasions "a day of public humiliation and fasting and prayer to Almighty God."¹²⁴ Further, as President, Madison authorized payment of federal funds for missionaries to the American Indians¹²⁵ and to aid a Bible society for printing and distributing the Holy Bible.¹²⁶

Jefferson's record as President is conceptually similar to Madison's and seemingly at odds with even his own "wall of separation" guideline. While President, Jefferson authorized the use of federal money to support a Catholic priest and to build a church for the Kaskaskia Indians,¹²⁷ and on three occasions he supported a law that allowed for "propagating the Gospel among the Heathen."¹²⁸ Furthermore, he approved an act appointing federally salaried Chaplains to United States military brigades and like his predecessors, Washington and Adams, continued the Congressional Chaplain system.¹²⁹ In fact, religiously favorable actions such as these often originated under Washington's Presidency and continued through a number of presidencies after his.¹³⁰ Even President Jefferson's refusal to proclaim any national days of prayer and thanksgiving¹³¹ was conceptually consistent with these other proclamations, as this article will prove.

At this point, it would seem that, contrary to Madison and Jefferson's prohibitive interpretations about intermeddling, the federal government regularly "intermeddled" with religion both before and after

¹²² See ROBERT S. ALLEY, JAMES MADISON ON RELIGIOUS LIBERTY 31 (1985).

¹²³ See M. STANTON EVANS, THE THEME IS FREEDOM 285 (1994); DREISBACH, *supra* note 33, at 66.

¹²⁴ CORD, *supra* note 119, at 260. As Madison explained in his July 10, 1822, letter to Edward Livingston, "I was always careful to make proclamations absolutely indiscriminate, and merely recommendatory; or rather mere designations of a day, on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith & forms." ALLEY, *supra* note 122, at 82.

¹²⁵ See DREISBACH, *supra* note 33, at 151.

¹²⁶ See DAVID BARTON, ORIGINAL INTENT 208 (1996).

¹²⁷ See DREISBACH, *supra* note 33, at 127; CORD, *supra* note 119, at 47.

¹²⁸ See 1 THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 491 (Richard Peters ed., 1846); CORD, *supra* note 119, at 45.

¹²⁹ See DREISBACH, *supra* note 33, at 130.

¹³⁰ See *id.*; CORD, *supra* note 119, at 40-45.

¹³¹ See CORD, *supra* note 119, at 40.

passage of the First Amendment. The next section demonstrates, however, that the Framers' self-professed prohibitions about intermeddling referred only to a limited class of actions regarding religion. This left open actions that would protect and even promote religions. Thus, there is no contradiction between the Founders' words and their actions.

A. Framers' Intent

In searching for intent, the historical record indicates that the founding legislators held various opinions about whether an amendment regarding religion was even necessary or why it was necessary. For instance, Congressman Sherman objected in principle to the Amendment because "Congress had no authority whatsoever delegated to them by the Constitution to make religion establishments."¹³² Others, like Madison, thought the Amendment necessary to insure that no national religion would somehow be established by law even when such power was denied to the federal government.¹³³ Still others, like Congressman Huntington, wanted to guarantee the free exercise of religious rights.¹³⁴ Some legislators were concerned about the relative jurisdiction of state and federal powers.¹³⁵ While somewhat diverse, all such concerns uniformly shared the common underlying desire to protect freedom of religious conscience from national compulsion, something they so cherished but rarely experienced in Europe.¹³⁶

When James Madison originally proposed the Amendment,¹³⁷ the religion portion read as follows: "[t]he Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed."¹³⁸ The Amendment resulted from Madison's congressional campaign promise to draft a Bill of Rights for the Constitution in return for Virginia's ratification of the

¹³² 5 THE ROOTS OF THE BILL OF RIGHTS 1088 (Bernard Schwartz ed., 1980).

¹³³ See DREISBACH, *supra* note 33, at 60.

¹³⁴ See 5 THE ROOTS OF THE BILL OF RIGHTS, *supra* note 132, at 1089.

¹³⁵ See DREISBACH, *supra* note 33, at 61.

¹³⁶ See AMERICA'S GOD AND COUNTRY: ENCYCLOPEDIA OF QUOTATIONS 168 (William J. Federer ed., 1996) [hereinafter AMERICA'S GOD AND COUNTRY].

¹³⁷ Madison did not offer his amendments as separate addendums to the Constitution; they were to be individually inserted into the Constitution at appropriate places. This particular amendment was to be placed "in article 1, section 9, between clauses 2 and 4," all of which dealt with Congressional limitations. See A SECOND FEDERALIST 265 (Charles Hyneman & George W. Carey eds., 1967).

¹³⁸ MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 4 (1978).

Constitution.¹³⁹ Virginia was among several states that were reluctant to ratify the Federal Constitution without a bill of rights.¹⁴⁰ Madison later admitted that the Amendment

had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion.¹⁴¹

This admission of intent regarding the First Amendment came when, in the course of congressional deliberations, Madison was asked to comment on a modified version of his original amendment. Apparently in agreement with the modification, he interpreted it to mean “that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”¹⁴²

It would seem that Madison was actually speaking to two interrelated yet different dimensions of the proposed First Amendment restriction on Congress. One dimension addressed the nationalization of religion. In this regard, he straightforwardly prohibited the establishment of religion. By this prohibition, the federal government could not override religious prerogatives at the state level. Reflective of this concern, Maryland, where the Church of England had official state status, proposed “that there be no national religion by law.”¹⁴³ Similarly, New Hampshire, where Congregationalism prevailed as the state religion, proposed at its ratifying convention that “Congress shall make no laws touching religion or to infringe the rights of conscience.”¹⁴⁴ Likewise, a national religion was prohibited even in the absence of state religious establishments. In New York, for instance, where no state-sponsored religion existed, their Constitutional Convention accordingly proposed “that no religious sect ought to be favored or established by law in preference to others.”¹⁴⁵ By implication, even if a national religion squared with the general will and conscience of the citizenry of the United States, it was still prohibited.

¹³⁹ See DREISBACH, *supra* note 33, at 57; THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 4 (Eugene W. Hickok, Jr. ed., 1991).

¹⁴⁰ See 5 THE ROOTS OF THE BILL OF RIGHTS, *supra* note 132, at 611, 1007.

¹⁴¹ CORD, *supra* note 119, at 10; DREISBACH, *supra* note 33, at 60.

¹⁴² CORD, *supra* note 119, at 10; DREISBACH, *supra* note 33, at 60.

¹⁴³ CORD, *supra* note 119, at 6.

¹⁴⁴ MALBIN, *supra* note 138, at 4.

¹⁴⁵ CORD, *supra* note 119, at 7.

The second dimension that Madison addressed involved religious conscience, particularly in the negative. Madison's restriction against countering men's consciences indicates that negative impact on religious conscience was the determining factor regarding federal involvement in religion, with or without a national religion. Simply said, federal mandates that countered a citizen's personal religious beliefs were prohibited. This was unequivocally affirmed by the Constitutional Conventions and early First Amendment proposals.

In all the advisements from the Founders about preferred First Amendment wording,¹⁴⁶ nothing indicates that Congress was to be prohibited from making laws to protect or to promote religious freedom.

¹⁴⁶ The First Amendment went through at least the following chronologically arranged revisions:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." Rep. James Madison, Speech Before the U.S. House of Representatives (June 8, 1789), in 5 *THE ROOTS OF THE BILL OF RIGHTS*, *supra* note 132, at 1026.

"No religion shall be established by law, nor shall the equal rights of conscience be infringed." Amendments Reported by a House of Representatives Committee (July 28, 1789), in *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* 321 (George Anastaplo ed., 1995).

"Congress shall make no laws touching religion or infringing the rights of conscience." Samuel Livermore, Debate in the U.S. House of Representatives (Aug. 15, 1789), in 5 *THE ROOTS OF THE BILL OF RIGHTS*, *supra* note 132, at 1089.

"Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." Rep. Fisher Ames, Proposal to the U.S. House of Representatives (Aug. 20, 1789), in 5 *THE ROOTS OF THE BILL OF RIGHTS*, *supra* note 132, at 1026.

"Congress shall make no law establishing one religious sect or society in preference to others or to infringe the rights of conscience." Unrecorded Senator, Moving to Amend Before the U.S. Senate (Sept. 3, 1789), available in American Memory from the Library of Congress, *Journal of the Senate of the United States of America, 1789-1873: Thursday, September 3, 1789* (visited Sept. 30, 2000) <[http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(sj001129\)\)](http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(sj001129)))>.

"Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." Unrecorded Senator, Moving to Amend Before the U.S. Senate (Sept. 3, 1789), in *A DOCUMENTARY HISTORY: CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION* 66 (John J. Patrick & Gerald P. Long eds., 1999).

"Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." Unrecorded Senator, Moving to Amend Before the U.S. Senate (Sept. 9, 1789), in *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY*, *supra*, at 325.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Report of House and Senate Committee of Conference Before the U.S. House of Representatives (Sept. 24, 1789), in 5 *THE ROOTS OF THE BILL OF RIGHTS*, *supra* note 132, at 1162.

In fact, the two-pronged prohibition against a national church and against compelling worship did just that—it protected and promoted religious freedom. The prime reason for even prohibiting a law that would establish a national religion arguably was to prevent the more inclusive action of bringing religion under federal compulsion and enforcement. As demonstrated above, a national religion is only one of several ways to bring legal compulsion. Overall, religion was to be fostered through prohibiting the federal government from having control over it. From this perspective, the two Clauses are not in mutual tension nor do they “tend to clash with [each] other” as Justice Burger claimed in *Walz v. Tax Commission*.¹⁴⁷ The Establishment Clause is actually subsumed under Free Exercise Clause considerations.¹⁴⁸

B. Original Meaning

Much of the problem in interpreting the First Amendment lies in the original meaning of its words and phrases. For instance, the phrase “an establishment of religion” is currently thought to mean the promotion of any kind of religion or religious activity.¹⁴⁹ Those who apply a separationist or broad interpretative reading accordingly say that no law should be made with the purpose to advance or inhibit religion,¹⁵⁰ or more narrowly, to foster religion¹⁵¹ because any such law would be a violation of this interpretation as a law respecting religion. On the other hand, the accommodationists or strict interpreters claim that the Establishment Clause means only that a highly preferential treatment resulting in a national denomination or church cannot be legislated.¹⁵² From a logical perspective, the Clause’s wording favors the latter interpretation. That is, if the Establishment Clause is interpreted broadly to prohibit laws inhibiting, as well as advancing, religion, then the second clause, known as the Free Exercise Clause, is entirely redundant because not to inhibit is to allow free exercise. It also stands to reason that the framers, in their profound literacy, were not guilty here of contradictory writing just as is assumed by canons of legal

¹⁴⁷ 397 U.S. 664, 669 (1970).

¹⁴⁸ See DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH-STATE RELATIONS 119 (1991).

¹⁴⁹ See Robert P. George, *The Supreme Court 1997*, FIRST THINGS, Oct. 1997, at 20, 27.

¹⁵⁰ See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

¹⁵¹ See *Everson*, 330 U.S. at 15.

¹⁵² See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

construction such as the presumption against inconsistency.¹⁶³ Parsimony of expression is, after all, uniformly practiced throughout the Bill of Rights.

A broad interpretation runs directly counter to many federal legal enactments such as the Congressional Chaplain system.¹⁶⁴ It also leaves the federal government powerless to regulate aberrant religious practices for the protection of society, just as the Court has acknowledged.¹⁶⁵ Even interpreting it less broadly, to state that the Establishment Clause prohibits any law that favors religion still places it in direct conflict with official practices such as the Congressional Chaplain system.¹⁶⁶ Perhaps the most convincing of the strict interpretation positions is that the Court had earlier maintained interpretative consistency with the original meaning by permitting the use of federal funds to support a Roman Catholic hospital.¹⁶⁷ The Court allowed a funding law for the religious hospital establishment because, as it succinctly noted, “to make ‘a law respecting a religious establishment,’ [is] a phrase which is not synonymous with that used in the Constitution, which prohibits the passage of a law ‘respecting an establishment of religion.’”¹⁶⁸

The difference in meaning between the commonplace phrase “a religious establishment” and the Amendment’s phrase “an establishment of religion” makes all the difference in interpreting the Amendment. However, this difference in meaning is lost in contemporary society. Currently, religious establishment refers to any religious institution or body much like any other public or private institution. The problem is that the term “religious establishment” is thought to be synonymous in meaning with the First Amendment term “an establishment of religion.” Both are given the commonplace meaning as opposed to the original meaning. Significantly, in the Constitutional era an establishment of

¹⁶³ See HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 42, at 118 (2d ed. 1911) (“Presumption Against Inconsistency: The mind of the legislature is presumed to be consistent [C]onstruction should be adopted as will make all the provisions of the statute consistent with each other”). It stands to reason that the Framers were capable of legal authorship so as not to create inconsistency of meaning between the Establishment and Free Exercise Clauses to render either clause open to rejection or misinterpretation.

¹⁶⁴ See 2 U.S.C. §§ 84-2, 610 (1988) (addressing compensation for House and Senate chaplains, respectively); An Act for Allowing Compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of both Houses, ch. 17, 1 Stat. 70 (1789) [hereinafter Compensation Act].

¹⁶⁵ See *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

¹⁶⁶ See Compensation Act, ch. 17, 1 Stat. at 70.

¹⁶⁷ See *Bradfield v. Roberts*, 175 U.S. 291 (1899).

¹⁶⁸ *Id.* at 297.

religion referred specifically to either the state church or the church-state rather than broadly to any religious institution.¹⁵⁹

Establishment implies the existence of some definite and distinctive relation between the state and a religious society other than that which is shared by other societies of the same general character. "It denotes any special connexion with the state . . . possessed by one religious society to the exclusion of others; in a word, *establishment is of the nature of a monopoly.*"¹⁶⁰

The *Oxford English Dictionary* indicates that the word "establish" comes from the sixteenth-century practice "[t]o place (a church or a religious body) in the position of a national or state church" and is used in reference "to the recognized national church or its religion."¹⁶¹ Similarly, use of the word "establishment" during the Founding Era referred to "the 'establishing' by law" a church, religion, or form of worship and "the conferring on a particular religious body the position of a state church."¹⁶² According to the *Oxford English Dictionary*, these definitions applied up into the early 1900s just as revealed in *Bradfield v. Roberts*.¹⁶³ Thus, in context, establishing a religion means far more than the helping of religion, which is not unconstitutional, current interpretations notwithstanding.¹⁶⁴ It means instead the creation of a national or state church, which is unconstitutional. A member of the Senate Judiciary Committee, Mr. Badger, confirmed these definitional understandings of "an establishment of religion" in 1853:

The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country . . . endowment to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions—such law would be a "law respecting an establishment of religion . . ."¹⁶⁵

C. Establishment Clause

The validity of construing the term "an establishment of religion" as a governmentally sponsored church or religion is evidenced in the words of those indigenous to the time and its studious observers. Notably,

¹⁵⁹ See WILLIAM MORRIS & MARY MORRIS, MORRIS DICTIONARY OF WORD AND PHRASE ORIGINS 206 (1977).

¹⁶⁰ 9 THE ENCYCLOPAEDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES, LITERATURE, AND GENERAL INFORMATION 787 (11th ed. 1910).

¹⁶¹ 3 THE OXFORD ENGLISH DICTIONARY 298 (1933).

¹⁶² *Id.*

¹⁶³ *Id.* (citing *Bradfield v. Roberts*, 175 U.S. 291 (1899)).

¹⁶⁴ George, *supra* note 149, at 20-37.

¹⁶⁵ AMERICA'S GOD AND COUNTRY, *supra* note 136, at 168.

Madison changed the wording about prohibiting an established “national religion” to the synonymous phrase “an establishment of religion” as a political concession to the anti-Federalists during the deliberations about the wording of his amendment.¹⁶⁶ In his earlier Memorial and Remonstrance, written in 1785, Madison used the term establishment to similarly denote a government endorsed religion: “that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.”¹⁶⁷ As President, Madison vetoed an attempt to incorporate a church in Washington, D.C., because, in giving civil government certain powers over the church, the proposed incorporation would have been an “establishment of religion.”¹⁶⁸ Madison reasoned that since incorporation would have “establishe[d] by law sundry rules and proceedings relative purely to the organization and policy of the church incorporated, and comprehending even the election and removal of the minister of the same . . . [t]his particular church, therefore, would so far be a religious establishment by law”¹⁶⁹ and hence unconstitutional since it was controlled by the government.

Madison’s reference to a singular church in Washington, D.C., as opposed to a national church, expands the purview of the Establishment Clause beyond a national religion to matters relating to state and local establishments as well. This suggests that the Establishment Clause prohibits the federal government from establishing religion at any governmental level. In confirmation, the word “respecting” in “Congress shall make no law respecting an establishment of religion”¹⁷⁰ means “regarding,” “concerning,” or “with reference to.”¹⁷¹ Thus, Congress is not just prohibited from making laws that would establish religion at the national level. Congress is equally prohibited from making laws that would establish religion at the state or local level. This type of establishment includes both the initiation of a church/religion or the superseding of one already established.

Jefferson used the term “establishment” in the same manner as his contemporaries to mean exclusive governmental sponsorship. In fact, while President, his practice of refusing to promote national days of

¹⁶⁶ DREISBACH, *supra* note 33, at 61.

¹⁶⁷ ALLEY, *supra* note 122, at 57.

¹⁶⁸ ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 545 (1964).

¹⁶⁹ *Id.*

¹⁷⁰ U.S. CONST. amend. I.

¹⁷¹ DAVID LOWENTHAL, *NO LIBERTY FOR LICENSE* 193 (1997).

prayer and fasting, mentioned earlier, was for the express reason that for him they had the effect of being “a law of conduct” as would emanate from a national religion which was constitutionally forbidden.¹⁷² Again, Jefferson was not operating from a belief in the total separation of church and state as his many pro-religion actions affirm. Rather, he conservatively guarded against appearing to promote a law of required religious conduct. In his 1808 letter to a Presbyterian clergyman, Jefferson spoke against “the establishment . . . of religion” at the federal level,¹⁷³ declaring that “no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government.”¹⁷⁴ Also, in his Query XVII, Jefferson acknowledged and spoke against the existence of state establishments of religion.¹⁷⁵

A student of the Founders’ legislative history, Justice Joseph Story, interpreted the meaning of the Establishment Clause by the way that the Founders opposed a nationalized religion. The remedy, he said, for “ecclesiastical ascendancy, if the natural government were left free to create a religious establishment,” was “in extirpating the power.”¹⁷⁶ Justice Cooley in 1871 interpreted the Founders’ use of “establishment” the same way: “a sect . . . favored by the state and given an advantage by law over other sects.”¹⁷⁷ Neither of these commentators interprets the Amendment to prohibit aiding religion, only to prevent the creation of a monopolistic establishment.

The evidence herein confirms that the Establishment Clause was written to prohibit the federal control of religion and that it resided within the larger framework of protecting freedom of religious conscience. In the final analysis, however, it is a restriction on the

¹⁷² CORD, *supra* note 119, at 40.

¹⁷³ DREISBACH, *supra* note 33, at 170. Jefferson and Madison, at least during the period they occupied state offices, held different views of the interaction of religion and government at the state and federal levels. For instance, they authored five bills in the mid-1780s in which the state government enforced certain religious predilections: (1) Bill Number 82, entitled “[a] Bill for Establishing Religious Freedom,” accompanied by (2) Bill Number 83, entitled “[a] Bill for Saving the Property of the Church Heretofore by Law Established”; (3) Bill Number 84, “[a] Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers”; (4) Bill Number 85, entitled “[a] Bill for Appointing Days of Public Fasting and Thanksgiving”; and (5) Bill Number 86, entitled “[a] Bill Annuling Marriages Prohibited by the Levitical Law.” See DREISBACH, *supra* note 33, at 118-24. Obviously religious freedom (Bill Number 82) did not prohibit the state from protecting and even promoting civic peace and order by enforcing values and standards based on the Bible.

¹⁷⁴ CORD, *supra* note 119, at 40.

¹⁷⁵ See THOMAS JEFFERSON, *Query XVII*, in THOMAS JEFFERSON: WRITINGS, *supra* note 23, at 286.

¹⁷⁶ 3 EDWIN S. CORWIN, CORWIN ON THE CONSTITUTION 143 (Richard Loss ed., 1988).

¹⁷⁷ *Id.*

federal government and not an absolute guarantee of the rights of religious conscience. The exclusively prohibitory function of the First Amendment vis-a-vis the federal government is, after all, diminished not one whit by whether the population has a uniform, a multiplicitous, or no religious conscience at all. If religious conscience were, in fact, the proximal focus of the Amendment, then the parameters of acceptable religious content would have to be clearly specified to avoid licensing any and all religious views. But, obviously and for good reason, no such parameters or content are specified in the final Amendment or even its earlier versions.¹⁷⁸

The thesis herein that Congress is prohibited by the Establishment Clause of the First Amendment from nationalizing or controlling a religion leaves open many other interactions between government and religion just as *Bradfield* admitted.¹⁷⁹ As presented earlier, this is not the extant interpretation. For instance, Chief Justice Warren in *McGowan v. Maryland*¹⁸⁰ claimed that “the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*,”¹⁸¹ by which he meant that laws favoring religion were prohibited. Broad interpretations such as that by Warren typically reference Jefferson’s “wall of separation of church and State” phrase to justify prohibiting all laws directed at religion.¹⁸²

Here we have a logical dilemma. Current interpretations of Jefferson’s “wall of separation” are not compatible with the “establishment of religion” definition that undoubtedly prevailed in and beyond the 1700s. Current interpretations hold that Jefferson’s “wall” is to be a “high and impregnable” barrier between government and religion.¹⁸³ Yet Jefferson’s actions, demonstrably in fealty with church-state interpretations of his day, confirm that his “wall” could not have meant what it is currently interpreted to mean, just as the canons of legal interpretation confirm.¹⁸⁴ In fact, the majority of the Virginia Senate

¹⁷⁸ See 1 THE DEBATES, *supra* note 121, at 118.

¹⁷⁹ See 175 U.S. at 295-300.

¹⁸⁰ 366 U.S. 420 (1961).

¹⁸¹ *Id.* at 441-42.

¹⁸² DREISBACH, *supra* note 33, at 170.

¹⁸³ *Everson*, 330 U.S. at 18.

¹⁸⁴ According to Henry Campbell Black, the meaning of words must be according to the meaning given to them by persons conversant with the particular science or art, and who use its terminology with exactness and propriety . . . courts are not at liberty to apply subtle and forced interpretations to the words of a law, and read them in a recondite or

blocked ratification of the First Amendment for a full two years over concerns regarding the substantial ways that it allowed federal government involvement in religion. Originally received from Congress as the Third Amendment in the Bill of Rights, the Senate noted on December 12, 1789, that

it does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time render it as powerful and dangerous as if it was established as the national religion of the country.¹⁸⁵

On December 15, 1791, Virginia did pass the amendment as the tenth and deciding state apparently to preserve the safeguards of the Bill of Rights.¹⁸⁶ Given the major role that Jefferson's "wall" metaphor has had in First Amendment court decisions, resolution of this dilemma is very important.

D. Wall of Separation?

Jefferson's "wall of separation" phrase is located apparently only in his 1802 letter to the Danbury Baptist Association of Connecticut.¹⁸⁷ That letter was written in response to the Baptists who wrote to congratulate Jefferson for his first-term election to the Presidency.¹⁸⁸ In that letter they also described how their religious freedoms were deprived because they were not part of the established church of Connecticut.¹⁸⁹ In existence since 1790, the Baptist Association was an alliance of twenty-

unfamiliar sense, unless compelled by the obscurity of the act, but must take them in their primary and natural sense.

BLACK, *supra* note 152, § 52, at 141. Obviously courts have inappropriately taken the liberty to redefine "establishment of religion" counter to the meaning given by those of the Constitutional era.

¹⁸⁵ See JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 62 (Richmond 1828) (statement of Sen. White).

¹⁸⁶ See Kenneth R. Bowling, *Overshadowed by States' Rights: Ratification of the Federal Bill of Rights*, in THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED 77, 101 (Ronald Hoffman & Peter J. Albert eds., 1997).

¹⁸⁷ See Letter from Thomas Jefferson to Nehemiah Dodge et al., *supra* note 23, at 510.

¹⁸⁸ See Letter from Nehemiah Dodge et al. to Thomas Jefferson (Oct. 7, 1801). The original letter can be found in Box 45 of the *Thomas Jefferson Papers* collection in the Library of Congress, Washington, D.C.

¹⁸⁹ See *id.*

six churches in a state where Congregationalism was the official establishment until the state constitution was revised in 1818.¹⁹⁰ Prior to 1818, the governing principle in Connecticut, as with most if not all of New England, was that which was carried over from England, wherein the state governed the affairs of the church and full citizenship privileges were allowed only to members of the official state church.¹⁹¹ The full text of their letter, in original form, follows.

The address of the Danbury Baptist Association, in the State of Connecticut; assembled October 7th, AD, 1801. To *Thomas Jefferson* ESQ. President of the united States of America.

Sir,

Among the many millions in America and Europe who rejoice in your Election to office; we embrace the first opportunity which we have enjoy,d in our collective capacity, since your Inauguration, to express our great satisfaction, in your appointment to the chief Magistracy in the United States: And though our mode of expression may be less courtly and pompious than what many others dothe their addresses with, we beg you, Sir to believe, that none are more sincere. Our Sentiments are uniformly on the side of Religious Liberty, That Religion is at all times and places a Matter between God and Individuals—That no man ought to suffer in Name, person or effects on account of his religious Opinions—That the legitimate Power of civil Government extends no further than to punish the man *who works ill to his neighbour*: But Sir, our constitution of government is not specific. Our antient charter, together with the Laws made coincident therewith, were adopted as the Basis of our government, At the time of our revolution; and such has been our Laws and usages, and such still are; that Religion is consider,d as the first object of Legislation; & therefore what religious privileges we enjoy (as a minor part of the State): we enjoy as favors granted, and not as inalienable rights: and these favors we receive at the expense of such degrading acknowledgments as are inconsistant with the rights of freman. It is not to be wondered at therefore; if those, who seek after *power & gain* under the pretance of *government & Religion* should reproach their fellow men—should reproach their chief Magistrate, as an enemy of religion Law & good order because he will not, dares not asoume the prerogative of Jehovah and make Laws to govern the Kingdom of Christ.

Sir, we are sensible that the President of the united States, is not the national Legislator, & also sensible that the national government

¹⁹⁰ See Daniel L. Dreisbach, *Sowing Useful Truths and Principles: The Danbury Baptist, Thomas Jefferson, and the Wall of Separation*, 39 J. CHURCH & ST. 455, 501 (1997).

¹⁹¹ See M. LOUISE GREENE, *THE DEVELOPMENT OF RELIGIOUS LIBERTY IN CONNECTICUT* 1-3 (photo reprint 1970) (1905).

cannot destroy the Laws of each State; but our hopes are strong that the sentiments of our beloved President, which have had such genial Effect already, like the radiant beams of the Sun, will shine & prevail through all these States and all the world till Hierarchy and Tyranny be destroyed from the Earth. Sir, when we reflect on your past services, and see a glow of philanthropy and good will shining forth in a course of more than thirty years we have reason to believe that America's God has raised you up to fill the chair of State out of that good will which he bears to the Millions which you preside over. May God strengthen you for the arduous task which providence & the voice of the people have cal,d you to sustain and support you in your Administration against all the predetermin,d opposition of those who wish to rise to wealth & importance on the poverty and subjection of the people---

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

Neh,h Dodge

Eph,m Robbins,

Stephen S. Nelson¹⁹²

The Committee [signature]

In their letter, the Baptists open with an expression of approval ("our great satisfaction"¹⁹³) for Jefferson's "appointment" to the Presidency thereby establishing common agreement with him. Their mutual compatibility is further reinforced by the way they paraphrase Jefferson's words in his Notes on the State of Virginia regarding both the characterization of religion ("between God and Individuals" only) and the corresponding legitimate but restricted role ("extends no further") of civil government.¹⁹⁴ Even beyond that, the Baptists note that they and he share in the same kind of religious persecution—the Baptists by their state government ("such degrading acknowledgments") and Jefferson ("reproach their chief magistrate") by those who want to combine government and religion through legal control of religion.¹⁹⁵

¹⁹² Letter from Nehemiah Dodge et al. to Thomas Jefferson, *supra* note 188.

¹⁹³ *Id.*

¹⁹⁴ In his Query XVII, Jefferson wrote regarding the rights of conscience: "[w]e are answerable for them to our God." JEFFERSON, *supra* note 175, at 285. The Baptists seem to paraphrase Jefferson's statement to mean "[t]hat [r]eligion is at all times and places a [m]atter between God and [i]ndividuals." Letter from Nehemiah Dodge et al. to Thomas Jefferson, *supra* note 188. Similarly, Jefferson wrote, "The legitimate powers of government extend to such acts only as are injurious to others." JEFFERSON, *supra* note 175, at 285. The Baptists wrote "that the legitimate [p]ower of civil [g]overnment extends no further than to punish the man *who works ill to his neighbour*." Letter from Nehemiah Dodge et al. to Thomas Jefferson, *supra* note 188.

¹⁹⁵ Letter from Nehemiah Dodge et al. to Thomas Jefferson, *supra* note 188.

After clearly documenting the mutuality of the Baptists' sentiment with Jefferson's long-held philosophy of religious freedom, they make it clear that they know neither he nor the national government can legitimately change (i.e., "destroy") the tyrannical laws of the individual states even if the laws violate the right of religious conscience. This point about the President not being enabled to rescue violated consciences is pivotal, as will be shown. Even so, the Baptists express great hope that throughout all the states his sentiments will prevail over the tyranny against religious freedom that results when civil government assumes a hierarchical control over religion.

Jefferson wrote in reply to the Baptists' letter:

Gentlemen,

The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

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

I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem.¹⁹⁶

Jefferson is saying that the American people have selectively constrained actions of the federal government in the area of religion. As much as Jefferson would characteristically like to free the Connecticut Baptists from religiously-based degradations "in behalf of the rights of conscience" and "to restore to man all his natural rights," he seems to be indicating that the federal government, by virtue of the First Amendment, is powerless to help rectify these kinds of actions.¹⁹⁷ The "wall" obviously

¹⁹⁶ Letter from Thomas Jefferson to Nehemiah Dodge et al., *supra* note 23, at 510.

¹⁹⁷ *Id.*

constrained the federal government and not state governments, current interpretations notwithstanding.

Jefferson's position regarding the separation of church and state is clearly stated in his Second Inaugural Address (1805):

In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of state or church authorities acknowledged by the several religious societies.¹⁹⁸

Jefferson summarily admits to the First Amendment guarantee of independence of religion from federal interference while allowing for control at the state level. His statements and his actions acknowledged that the First Amendment forbade the federal government from interfering with state violations of religious conscience, as was happening with the Danbury Baptists. This was no trivial or easy admission on his part given how supremely desirous he was (as with Madison) of freeing from civil-government legislation those expressions of religious conscience that are not socially injurious.¹⁹⁹ His lack of intervention for the Baptists' offended religious consciences has to be taken as a weighty and principled response given his life-long motto—"I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man."²⁰⁰

The apparent conflict between the original definition of "establishment of religion" and the meaning of the phrase "a wall of separation between church and State" is resolved; there is no real conflict. The problem is in the way that "establishment" and the "wall of separation" have both been reinterpreted away from their original meanings.

Jefferson's wall-of-separation statement speaks to federal control over more than just a universal, national religion. Even in the decided and ongoing absence of a prohibited national religion, Jefferson was still not a "National Legislator" and the Federal Government could not "destroy the Laws of each State" to counter Connecticut's injustices against the Baptists.²⁰¹ In fact, the letter was not, as is commonly

¹⁹⁸ THOMAS JEFFERSON, *Second Inaugural Address*, in THOMAS JEFFERSON: WRITINGS, *supra* note 23, at 518, 519-20.

¹⁹⁹ *See id.* In his letter to the Baptists, Jefferson qualified the exercise of a person's natural rights such that they not be "in opposition to his social duties." Letter from Thomas Jefferson to Nehemiah Dodge et al., *supra* note 23, at 510.

²⁰⁰ Letter from Thomas Jefferson to Dr. Benjamin Rush (Sept. 23, 1800), in THOMAS JEFFERSON: WRITINGS, *supra* note 23, at 1082.

²⁰¹ Letter from Nehemiah Dodge et al. to Thomas Jefferson, *supra* note 188.

assumed, a response to the request that he designate a day of fasting for the entire nation.²⁰² As Jefferson said regarding this, “[T]he address to be sure does not point at this.”²⁰³ He in fact deleted from an early draft of his reply to the Baptists a disdainful comment about such proclamations.²⁰⁴ The Establishment Clause prohibition against making a law regarding or respecting an establishment of religion arguably includes establishments at both the state and federal level—the Clause excludes neither. (In context, however, the Clause is rooted in concerns about a national religion.) Thus, Jefferson had no legal basis to override Connecticut’s religious establishment even for the cause of religious freedom. The Baptists thus placed their hopes for religious liberty on Jefferson’s sentiments, already fruitful, and not on his legal powers as President.²⁰⁵

The early historical evidence uniformly interprets “an establishment of religion” as a governmentally authorized and even mandated religion. Accordingly, Congress is forbidden by the Establishment Clause from creating such a monopoly. Beyond this, Congress is not prohibited by the Establishment Clause from passing laws about religion, unless such laws interfere with state establishments as Jefferson’s letter clarified.

IV. STATE VERSUS FEDERAL JURISDICTION

What is most relevant to understanding the First Amendment is the recognition that states and not the federal government were seen as having jurisdictional prerogatives over religion. As the late dean of American constitutional lawyers, Edwin S. Corwin, summarized: “[i]n short, the principal importance of the amendment lay in the separation which it effected between the respective jurisdictions of state and nation regarding religion, rather than in its bearing on the question of the

²⁰² See DREISBACH, *supra* note 33, at 125; BARTON, *supra* note 126, at 221.

²⁰³ IN GOD WE TRUST: THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 134 (Norman Cousins ed., 1958) [hereinafter IN GOD WE TRUST].

²⁰⁴ Jefferson deleted his comments for fear they “might give uneasiness to some of our republican friends in the eastern states where the proclamation of thanksgivings etc. by their Executive is an antient habit & is respected.” James Hutson, *A Wall of Separation: FBI Helps Restore Jefferson’s Obliterated Draft*, 57 LIBRARY OF CONGRESS INFORMATION BULLETIN, at 136-39, 163 (1998).

²⁰⁵ James Hutson, Chief of the Library of Congress Manuscript Division, suggests that at the time of his correspondence with the Danbury Baptists, Jefferson likely shared similar views with them regarding church-state relation—namely, civil government could not legally establish religion, but it could provide “friendly aids” to churches. *Id.* at 163. For instance, just two days after responding to the Danbury Baptists, Jefferson attended a sermon given by a Baptist preacher from Connecticut in the House of Representatives government building and regularly attended these services thereafter. *See id.*

separation of church and state.²⁰⁶ In his review of the matter, Richard E. Morgan concludes, "It seems undeniable that the First Amendment operated, and was intended to operate to protect from congressional interference the varying state policies of church establishment."²⁰⁷

The fact that Madison's initial First Amendment proposition was to be inserted into Section 9 of Article I, which deals with limits on Congress, rather than into Section 10, which deals with restrictions on the States, further substantiates the contention that the Amendment was not intended to apply against the States. Jefferson's 1805 Second Inaugural Address, which has already been discussed, totally obviated by contemporary interpretations, said it plainly.²⁰⁸ Jefferson echoed this in 1808: "[c]ertainly no power over religious discipline has been delegated to the general government. It must rest with the states as far as it can be in any human authority."²⁰⁹ In the final analysis, the Amendment retains the preeminence of state over both federal religious jurisdiction and individual citizens' religious rights. The content of the letter from the Danbury Baptists clinches this position of state preeminence. Significantly, the United States Supreme Court confirmed, approximately a half-century later, in *Permoli v. First Municipality of New Orleans*²¹⁰ that "[t]he constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."²¹¹ Restated, citizens of the states are afforded no explicit religious-conscience protection, and the state governments are not constrained in their religious prerogatives by the First Amendment's prohibiting

²⁰⁶ 3 CORWIN, *supra* note 176, at 142.

²⁰⁷ RICHARD E. MORGAN, *THE SUPREME COURT AND RELIGION* 30 (1972) (quoting WILBUR G. KATE, *RELIGION AND THE AMERICAN CONSTITUTION* 9 (1964)).

²⁰⁸ See JEFFERSON, *Second Inaugural Address*, *supra* note 198, at 519-20.

²⁰⁹ Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), in *IN GOD WE TRUST*, *supra* note 203, at 137. In his letter to Samuel Miller, Jefferson elaborated as follows:

Every religious society has a right to determine for itself the times for these [religious] exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it But I have ever believed, that the example of State executives led to the assumption of that authority by the General Government, without due examination, which would have discovered that what might be a right in a State government, was a violation of that right when assumed by another.

Id.

²¹⁰ 44 O.S. (3 How.) 589 (1845).

²¹¹ *Id.* at 609.

directives to Congress. Yet in 1940 the Court departed from *Permoli* when it stated, for the first time, that the religion clauses of the First Amendment applied to the states via the Incorporation Doctrine of the Fourteenth Amendment.²¹²

Thus, the First Amendment religion clauses are not proximally about individual conscience, but rather about respecting state jurisdiction and limiting federal jurisdiction in religion. By virtue of the First Amendment, Congress was prohibited from establishing a national or state church or religion, thus superseding the religious status quo of states with or without established churches. The First Amendment further prohibited the federal government from adversely interfering with the exercise of religion—a state matter—even without the imposition of a national religion.

V. INCORPORATION

The evidence presented herein invalidates not just the prevailing interpretation of the Establishment Clause, but that of the Incorporation Doctrine as well.²¹³ Proponents of Incorporation say that whatever liberties are protected from federal encroachment by the First Amendment are equally protected from state encroachment by way of the Fourteenth Amendment's Due Process Clause. Assuming the validity of the Incorporation Doctrine for the purpose of discussion, appropriateness of the Doctrine's application is examined under the presently proposed interpretation of the First Amendment.

Recall that the foundational premise of the First Amendment as voiced by Madison was that the states feared the Constitution may be interpreted to provide power for Congress to establish a national religion which “*might* infringe the rights of conscience.”²¹⁴ But a national religion would not infringe on everyone's right of conscience since there would have to be at least enough in agreement to institute such an establishment. Since the debate was not concerned with the type (for example, Baptist, Congregationalist), or the magnitude of infringement (for example, number or percentage of consciences offended) but rather with the potential to interfere with a *right* of conscience, it is not protection of the content of an individual's religious conscience per se, but rather protection from a federal hierarchy, that is the Amendment's main jurisdictional theme. In fact, the provision against Congress prohibiting the free exercise of state or regional religious establishments

²¹² See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

²¹³ See DREISBACH, *supra* note 33, at 89-96.

²¹⁴ CORD, *supra* note 119, at 10 (emphasis added).

or religion in general actually perpetuates infringements on the rights of conscience of those state citizens whose religious beliefs differ from such existing establishments. In their letter to Jefferson ten years after the Bill of Rights was amended to the Constitution, the Danbury Baptists explicitly admitted "that [in Connecticut,] Religion is considered as the first object of legislation . . . [but] the national government cannot destroy the Laws of each State."²¹⁵ Thus, the focus of the religious provisions of the First Amendment is *not* primarily on the so-called granting of individual rights of any type, including those of conscience (the rights-of-conscience concept is not even mentioned in the Amendment), but instead on proscribing Congressional and hence federal powers. Since the First Amendment neither grants nor mentions rights, there is no basis for the Fourteenth Amendment, with its *raison d'être* on rights, for Incorporation. Jefferson's statement in his reply to the Danbury Baptists that man "has no natural right in opposition to his social duties"²¹⁶ implies that freedom for all types of religious conscience was not the primary intent. Otherwise, the debate about which religious practices were socially permissible would have been as labored as current First Amendment interpretations.

As noted above, the First Amendment religion clauses do not explicitly protect individual rights. They actually prohibit the federal government from interfering even where established state religions may in fact violate the consciences of those of other religious beliefs. (Again, the Danbury Baptist situation affirms this principle.) Thus, to say that the Fourteenth Amendment's protection of an individual's liberty incorporates the First Amendment is a contradiction—the First Amendment could actually work against rather than for such liberty.²¹⁷ To impose the First Amendment on the states would in effect work against rather than for the intent of the Fourteenth Amendment. So much for Incorporation!

VI. CONCLUSION

The wall of separation properly serves to reinforce the constitutional limitation in place before the Amendment was written, that the federal government could not "intermeddle with religion."²¹⁸ The wall keeps Congress from establishing a national or state religion and from hindering church or state religious establishments and exercises, but it

²¹⁵ Letter from Nehemiah Dodge et al. to Thomas Jefferson, *supra* note 188.

²¹⁶ Letter from Thomas Jefferson to Nehemiah Dodge et al., *supra* note 23, at 510.

²¹⁷ See BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 208-13 (1977).

²¹⁸ CORD, *supra* note 119, at 8.

is not a wall against laws that promote religion. It is, in fact, silent on the latter point. A totally impregnable wall would never allow, for example, the federally funded Congressional Chaplain system and a resolution in favor of a day of nationwide prayer and thanksgiving to God passed by the very same Congress that passed the Bill of Rights.

The practical impact of resurrecting the original meaning of the First Amendment is so cleanly unadorned as to be splendidly simple. There is no need for any add-on criterion such as the *Lemon Test* to aid interpretation of the Establishment Clause. The cause of religion can be aided as happened under Presidents Madison, Jefferson, and others, as long as religion or church matters are not controlled by the federal government. The contemporary orientation of accommodationism that allows governmental support short of establishing a church or religion is thus constitutionally appropriate. The vast amount of provisions for educational services, instructional materials, facilities support, textbook loans and purchases, tuition reimbursements, and even school prayer are permissible as long as systematic exclusion or exclusivism does not prevail. Of course, other considerations such as tendencies toward religious favoritism will arise, but most will likely be inconsequential as long as opportunities for ecclesiastical equity and free choice of the citizens prevail. Surely Madison, Jefferson, and their compatriots would rejoice to see religion set free from governmental intermeddling consistent with the original meaning of the First Amendment.

Unless authored by the federal government, any and all religious practices *authored by other than the federal government* do not violate the Establishment Clause. This Clause keeps *control* of religion away only from the federal government. The wall separates religion so absolutely from federal control that, beyond not being able to make laws to establish a religion, the federal government can neither inhibit the free exercise of religion or remediate injustices that occur through religious free exercise, just as Jefferson communicated to the Baptists. Leaving the control of religion in the hands of the state or religious societies, just as the Constitution originally held, was a profound solution. State establishments of religion, such as hierarchy and tyranny, have disappeared just as the Danbury Baptists hoped.