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A Wall Between a Secular Government and a Religious People

John A. Ragosta*

INTRODUCTION

The “wall of separation” between church and state, a phrase popularized by Thomas Jefferson and unanimously embraced by the Supreme Court in its first religious freedom case, is a useful metaphor to describe how, under the Constitution’s proscription of religious establishments and protection of the free exercise of religion, government must not interfere with the church and the church (institutionally) must not interfere with government.¹

* Historian at the Robert H. Smith International Center for Jefferson Studies at Monticello. The author would like to thank Carl Bogus and the entire staff of Roger Williams University School of Law and the *Roger Williams University Law Review* for their excellent work on the conference (especially under the trying circumstances of conducting it virtually) and in preparing this important issue of the Law Review. I would also like to thank the Freedom from Religion Foundation and Andrew Seidel for their support of this conference. The views expressed herein are the author’s own and do not reflect the views of the Thomas Jefferson Foundation nor Virginia Humanities. Of course, any errors are the author’s own.

1. See *Reynolds v. United States*, 98 U.S. 145, 165 (1878). Others used the metaphor of a wall of separation before Jefferson. For example, James Burgh, in “Political Disquisitions,” writes of the danger of the church as an engine of state and in “Crito” urges the building of an “impenetrable wall of separation between things sacred and civil The less the church and the state had to do with one another, it would be better for both.” STEVEN K. GREEN, *INVENTING A CHRISTIAN AMERICA: THE MYTH OF THE RELIGIOUS FOUNDING* 54 (2015) (quoting BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 35 (1968)). Roger Williams said much the same, for example referring to the “hedge or wall of Separation between the Garden of the Church and the Wilderness of the world.” 1 ROGER WILLIAMS, *Mr. Cotton’s Letter Examined and Answered*, in *THE COMPLETE WRITINGS OF ROGER*

“Jefferson’s metaphor in describing the relation between Church and State speaks of a ‘wall of separation,’ not of a fine line easily overstepped.”² Admittedly, James Madison on occasion spoke of a “line of separation,” but he meant the same thing.³

Most Americans agree that the metaphor properly describes the appropriate constitutional relationship—sixty-three percent of Americans want “churches to stay out of politics.”⁴ While the wall metaphor does not, itself, resolve all of the relevant conflicts and its application to particular cases may be complex, Justice Jackson’s backhanded reference to the “serpentine walls” at Jefferson’s

WILLIAMS 315, 392 (Perry Miller ed., 1963). (It is worth noting that the Founders, lacking the ability to “Google” in robust databases, do not appear to have relied on Williams’ writings in their early debates on religious freedom and adoption of the First Amendment). Jefferson’s use of the phrase in his January 1, 1802, letter to the Danbury Baptists declaring that the First Amendment had erected a “wall of separation between Church [and] State,” Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), <https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006> [perma.cc/8K3A-FPXB] (last visited Feb. 17, 2021) [hereinafter *Letter to the Danbury Baptists*], undoubtedly popularized the image, and the phrase is commonly associated with Jefferson, *see, e.g.*, JOHN RAGOSTA, RELIGIOUS FREEDOM: JEFFERSON’S LEGACY, AMERICA’S CREED 140–41, 256 n.12 (2013).

2. *McCullum v. Bd. of Ed.*, 333 U.S. 203, 231 (1948).

3. *See* Letter from James Madison to Jasper Adams (Sept. 1833), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/99-02-02-2830> [perma.cc/7KYX-P863] (last visited Feb. 17, 2021). A few academics have tried to make a substantive point out of Jefferson’s use of the “wall” metaphor while Madison referred to a “line,” arguing that Madison was less committed to a strict separation. *See, e.g.*, Daniel L. Dreisbach, *Introduction to JASPER ADAMS, RELIGION AND POLITICS IN THE EARLY REPUBLIC: JASPER ADAMS AND THE CHURCH STATE DEBATE* 1, 21 (Daniel L. Dreisbach, ed., 1996); Sydney E. Mead, *Neither Church nor State: Reflections on James Madison’s ‘Line of Separation,’* 10 J. OF CHURCH AND STATE 349, 350 (1968). This is to grasp at straws and is inconsistent with Madison’s views on church-state relations. That Madison, the consummate wordsmith and draftsman, used the two-dimensional analogy of a line while Jefferson, an architect and gardener, used the three-dimensional analogy of a wall, is simply not substantively significant.

4. *Americans have Positive Views about Religion’s Role in Society, but Want It Out of Politics*, PEW RESEARCH CTR. (Nov. 15, 2019), <https://www.pewforum.org/2019/11/15/americans-have-positive-views-about-religions-role-in-society-but-want-it-out-of-politics/> [perma.cc/AS9G-XAW6]. Of course, there are those who reject the metaphor, noting accurately that the phrase was not itself included in the Constitution, while inaccurately dismissing the influence of Jefferson and the idea of separation. *See, e.g.*, DAVID BARTON, *THE JEFFERSON LIES* (2012); *see also* *Wallace v. Jaffree*, 472 U.S. 38, 91–99 (1985) (Rehnquist, J., dissenting) (criticizing adherence to Jefferson’s “wall” metaphor).

University of Virginia is unkind and tends to unfairly minimize the significance of the metaphor.⁵ The simile is pedagogically powerful, and this type of broadly-embraced and easily-understood public metaphor helps to embed the principle in the minds of the people. In a similar vein, Madison recognized that an important function of a bill of rights is that “political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”⁶ The powerful ability of a clever simile to explain and to be embraced by the people has certainly been the history of the “wall of separation.”

The prominence of Jefferson’s turn of a phrase, though, begs the question: Why do we care so much what Jefferson and Madison thought about religious freedom? In fact, a group of historians and judges, most notably with the encouragement of Justice Rehnquist in *Wallace v. Jaffree*, have sought to minimize the importance of their views.⁷ After all, critics ask, should we not be equally interested in the view of other Founders or those who ratified the Constitution, the First Amendment, and the Fourteenth Amendment?⁸ Alexander Hamilton has suddenly become popular, for example, and he sponsored a “Christian Constitution Society.”⁹ Make no mistake, these attacks on the Jeffersonian influence herald an attempt to breach that wall of separation.

I have addressed this topic in detail elsewhere.¹⁰ Suffice it to say that not only did Jefferson and Madison provide the intellectual and political foundation for the adoption of the Virginia Statute for Establishing Religious Freedom, but that statute became central to

5. See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 237–38 (1948) (Jackson, J., concurring).

6. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-14-02-0018> [<https://perma.cc/LT5Z-4HTL>] (last visited Feb. 17, 2021).

7. See *Wallace*, 472 U.S. at 98–99 (Rehnquist, J., dissenting).

8. See, e.g., Patrick F. Brown, *Wallace v. Jaffree and the Need to Reform Establishment Clause Analysis*, 35 CATH. U. L. REV. 573, 586 (1986).

9. Letter from Alexander Hamilton to James A. Bayard (Apr. [16-21] 1802), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-25-02-0321> [<https://perma.cc/9XX8-MMQ3>] (last visited Feb. 17, 2021).

10. See generally RAGOSTA, *supra* note 1, at 209–22.

the development of the First Amendment (with Madison again playing the key role in drafting and adoption).¹¹ Their efforts were warmly embraced and supported politically by eighteenth-century evangelicals who also demanded a strict separation of church and state.¹² After the First Amendment was adopted, as state after state moved to eliminate vestiges of religious establishments and ensure religious freedom, they did so based on the Jeffersonian/Madisonian vision, often quoting them in the process.¹³ As Americans grappled with the meaning of religious freedom and church-state relations at the end of the eighteenth and through the nineteenth and twentieth centuries, they turned again and again to Jefferson and Madison; their views and statements repeated so often as to be the equivalent of “viral.”¹⁴ No other politician, commentator, academic, or judge came close. As textbooks were written they gave Jefferson and Madison credit for the development of the critical elements of American religious freedom. Pamphlets encouraging emigration proclaimed the strength of religious freedom in America by quoting Jefferson’s Virginia Statute.¹⁵ It was no surprise, nor an anomaly, then, that when the Supreme Court first turned to the question of the meaning of religious freedom, it unanimously found that Jefferson’s and Madison’s views, in particular the Virginia Statute, the letter to the Danbury Baptists, and Madison’s *Memorial and Remonstrance Against Religious Assessments*, “defined” American

11. See generally *The Virginia Statute for Religious Freedom: The Road to the First Amendment*, BILL OF RIGHTS IN ACTION, Fall 2010, at 1, https://www.crf-usa.org/images/pdf/bria26_1_virginia.pdf [<https://perma.cc/D7KZ-ZF5Q>].

12. JOHN A. RAGOSTA, WELLSPRING OF LIBERTY 125–36 (2010); John Ragosta, *Christian or Satanist displays? Keep them off gov’t land*, DETROIT FREE PRESS (Dec. 18, 2014), <https://www.freep.com/story/opinion/contributors/2014/12/17/satanic-display-capitol-lansing/20563581/> [<https://perma.cc/M8L6-V4TA>] (last visited Feb. 17, 2021).

13. RAGOSTA, *supra* note 1, at 134–37. Christine Leigh Heyrman, *The Separation of Church and State from the American Revolution to the Early Republic*, NAT’L HUMANITIES CTR., <http://nationalhumanitiescenter.org/tserve/eighteen/ekeyinfo/sepchust.htm> [perma.cc/Z72J-MDP3] (last visited Feb. 17, 2021).

14. See John Ragosta, *Thomas Jefferson and Religious Freedom*, THOMAS JEFFERSON FOUND. (Apr. 16, 2018), <https://www.monticello.org/site/research-and-collections/thomas-jefferson-and-religious-freedom> [perma.cc/AP4Y-SLB3].

15. RAGOSTA, *supra* note 1, at 142.

religious freedom and the meaning of the First Amendment.¹⁶ While many states only slowly implemented a Jeffersonian separation, as Steven Green shows, the Jeffersonian principle was broadly supported and criticized.¹⁷

As many historians and lawyers have noted, to ask what the “Founders thought” about this or most issues, as if the Founders had one perspective or point of view, may often be relatively fruitless.¹⁸ It is, however, often very relevant to ask whether there are particular Founders whose views on a particular issue were (and are) broadly embraced and especially important to understand historical developments. This is such a case.

Still, Jefferson’s call for a “wall of separation” is only the turn of a phrase, and there are a host of questions that the metaphor does not immediately answer: While there may well be an institutional separation, what happens on both sides of the wall vis-à-vis religion? Or, in more picturesque terms, if you were sitting on the wall looking from side-to-side for religion, what would you see? Is one side of the wall devoid of actors who are motivated by religion? Or, worse, bereft of morality (a rather ridiculous but politically potent claim made by some opponents of a Jeffersonian separation)?¹⁹ And, even on the private side of the wall, has the public square somehow been purged of religious actors or activities (another ridiculous canard of which Jefferson was accused)?²⁰

16. See *Reynolds v. United States*, 98 U.S. 145, 162–64 (1878).

17. See generally STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* (2010). Kent Greenawalt earlier suggested that evidence that people read the First Amendment in a Jeffersonian/Madisonian voice at the time of its adoption, or by the time that the Fourteenth Amendment was adopted (making the provisions applicable to the states) would be persuasive, but he was unaware of such evidence. See Kent Greenawalt, *Some Reflections on Fundamental Questions about the Original Understanding of the Establishment Clause*, in *NO ESTABLISHMENT OF RELIGION: AMERICA’S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY* 341, 345–47 (T. Jeremy Gunn & John Witte, Jr., eds., 2012).

18. See, e.g., Derek H. Davis, *Thomas Jefferson and the “Wall of Separation Metaphor,”* 45 *J. OF CHURCH AND STATE* 5, 7–8, 14 (2003); *Is this a Christian Nation?*, <https://www.au.org/resources/publications/is-america-a-christian-nation> [<https://perma.cc/JTJ9-3F3U>] (last visited Feb. 17, 2021).

19. E.g., Noah Feldman, *A Church-State Solution*, *N.Y. TIMES* (July 3, 2005), <https://www.nytimes.com/2005/07/03/magazine/a-churchstate-solution.html> [<https://perma.cc/MS6D-9DCR>].

20. Davis, *supra* note 18, at 6, 8.

I began thinking about this essay as I was working with new guides at Monticello who will be faced with visitors' questions concerning Jefferson and religion and religious freedom. I am told that these questions are the most asked at Monticello. (This is true in part because the issue of slavery, including Sally Hemings, is addressed proactively.) One of the reasons for this is undoubtedly a growing unease in a large segment of the population that somehow something has gone "wrong" with religion or religious freedom in America and much of that unease seems to be vaguely related to Jefferson's wall of separation.

The cause of this unease apparently starts with shifts in demographics. Others have noted the important demographic aspect of the "Christian nation" debate.²¹ What is a "Christian nation"? Is this merely a demographic descriptor about the population, or does the moniker come with certain legal or policy restrictions? For that matter, if this is a "Christian nation," should that include certain obligations on the part of the nation?²² And if, at least initially, a demographic descriptor, what is the impact of change in America's religious demographic?

These are not new questions. In the 1840s, William Swan Plumer, a well-known Presbyterian minister, addressed the question of whether the United States was a "Christian Commonwealth." His response continues to speak powerfully today:

21. *Is this a Christian Nation?*, *supra* note 18, at 1.

22. Many of those urging that the United States is a "Christian nation" avoid the issue of whether that moniker comes with certain obligations, for example to the poor, the sick, immigrants, etc. In George Washington's *Farewell Address*, when he urged support for virtue, morality, and religion (discussed further below), he adds: "[i]t 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." George Washington, *Farewell Address* 22 (Sept. 19, 1796), U.S. Gov't Printing Office, <https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf> (last visited Feb. 19, 2021) [<https://perma.cc/VA6Y-UVL2>] [hereinafter *Washington's Farewell Address*]. Jefferson suggested a similar moral component to U.S. immigration policy. Letter from Thomas Jefferson to Albert Gallatin (Jan. 24, 1807), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/99-01-02-4939> [<https://perma.cc/VX5H-9TS6>] (last visited Feb. 17, 2021); *see also* JOHN LELAND, *THE VIRGINIA CHRONICLE* (1790), *reprinted in* THE WRITINGS OF THE LATE ELDER JOHN LELAND 92, 118 (L.F. Greene ed., 1845) ("If Christian nations, were nations of Christians these things would not be so.").

If by these terms be meant, that the great majority of our people, who profess any religion, profess the [C]hristian religion, . . . then I do not object to such language. But if it be intended to create a belief that [C]hristians are or ought to be by our laws entitled to any civil, political[,] or religious privileges except in common with Jews, Deists and Atheists, if there be any amongst us, then I utterly reject it.²³

Plumer's comments imply several important aspects of the demographic debate: First, the question becomes increasingly complicated as the panoply of religions embraced by Americans expands both within and beyond Christianity, something that has certainly happened and that was, by more visionary early Americans, anticipated. For example, in 1821, Thomas Jefferson famously insisted that religious freedom was intended to cover "within the mantle of it's [sic] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo [sic], and infidel of every denomination."²⁴ Of course, there were not a lot of Hindus or Muslims in eighteenth-century Virginia (setting aside the enslaved community, many of whom embraced Islam, but it was not to them that Jefferson was likely referring).²⁵ Yet Jefferson recognized that these people would be Americans and share in American religious freedom. Today, their presence, and the presence of citizens from literally dozens of different religions, certainly complicates even the most basic assertion that the United States is a "Christian Nation."²⁶

23. WILLIAM S. PLUMER, THE SUBSTANCE OF AN ARGUMENT AGAINST THE INDISCRIMINATE INCORPORATION OF CHURCHES AND RELIGIOUS SOCIETIES 11–12 (1847).

24. Thomas Jefferson, Autobiography, 6 Jan.–29 July 1821 (Jan. 6, 1821), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-1756> [<https://perma.cc/3T88-C2RC>] (last visited Feb. 17, 2021).

25. See generally Khaled A. Beydoun, *Antebellum Islam*, 58 HOWARD L.J. 141 (2014).

26. Jefferson's comments were echoed by nineteenth century Virginia jurists in discussing the import of his Statute for Establishing Religious Freedom:

Declaring to the Christian and the Mahometan, the Jew and the Gentile, the Epicurean and the Platonists (if any such there be amongst us,) that so long as they keep within [the law's] pale, all are equally objects of its protection; securing safety to the people, safety to the

The issue becomes even further muddled if and when a majority of Americans cease to affiliate themselves with Christianity. The current trend is moving strongly in that direction. By the mid-2010s, for the first time as a nation, white Christians constituted less than half of the U.S. population, while as recently as 1976, that figure was over eighty percent.²⁷ In twenty states, no single religious group accounts for a higher share of the population than the religiously unaffiliated.²⁸

These demographic shifts—both the presence of so many religions that appear to the majority to be “different,” “new,” and “foreign” and the decline in Christianity as a share of the population—seem to instill doubt, fear in some people, about the direction of the nation, the role of religion in the nation, and, perhaps, their own religion. With those fears and doubts, many cling with increased fervor to the hope of identifying a mythical “Christian nation” and then, unfortunately, imposing it upon others.

The unease that so many seem to feel in this regard, and the necessity of expressing that unease at Monticello and in the context of Jefferson’s “wall of separation,” relates to a pervasive, if simplistic and misguided, belief that a wall of separation is somehow “anti-religion” and that Jefferson so intended. This view has been promoted for political reasons for literally centuries.

government, safety to religion; and (leaving reason free to combat error) securing purity of faith and practice far more effectively than by clothing ministers of religion with exclusive temporal privileges; and exposing them to the corrupting influence of wealth and power.

Perry v. Commonwealth, 3 Va. (3 Gratt.) 602, 612 (Va. 1846). Both those who supported and opposed a separation of church and state recognized this fact. For example, Alexander McLeod, a nineteenth century Reformed Presbyterian minister, preaching against a separation of church and state bemoaned that “[t]he US government gave as much support to ‘the Mahometan and the atheist’ as it did to the religion of Jesus.” JOSEPH S. MOORE, *FOUNDING SINS: HOW A GROUP OF ANTISLAVERY RADICALS FOUGHT TO PUT CHRIST INTO THE CONSTITUTION* 66 (2016) (quoting ALEXANDER MCLEOD, *MESSIAH, GOVERNOR OF THE NATIONS OF THE EARTH: A DISCOURSE* 44–45 (1804)); *see also* RAGOSTA, *supra* note 1, at 155–67 (discussing viewpoints on non-preference of the Christian religion in America from the founding era to the late nineteenth century).

27. ROBERT P. JONES & DANIEL COX, *AMERICA’S CHANGING RELIGIOUS IDENTITY: FINDINGS FROM THE 2016 AMERICAN VALUES ATLAS 7* (2017), <https://www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf> [<https://perma.cc/W9FK-7KFB>].

28. *Id.* at 7–8.

During the explosive election of 1800, Jefferson's opponents listed a host of dangers to religion were Jefferson elected: Bibles would be seized, churches degraded, women attacked, etc.²⁹ One opponent asked if there could be any doubt that if Jefferson was elected the "morals which protect our lives from the knife of the assassin—which guard the chastity of our wives and daughters from seduction and violence—defend our property from plunder and devastation, and shield our religion from contempt and profanation, will not be trampled upon and exploded."³⁰ Jefferson's supporters sought to counter the canard, arguing that politics had "converted the elegant reasoning of Jefferson against religious establishments, into a blasphemous argument against religion itself."³¹ In the midst of the election of 1804, another supporter explained that the claim by Jefferson's political opponents that "religion is in danger" is made "because Mr. Jefferson, in his political capacity lets it alone, lets it have its own free course, is not inclined to interpose with his power in favor of any sect, but is a friend to free, complete and perfect toleration."³² But these efforts to explain Jefferson's position never quite stamped out the easily-made and politically-convenient attacks.³³

The fear—or at least the political usefulness of the canard—persists. It is as if the lies told about Jefferson's religion in the election of 1800—his alleged atheism, his intent to seize and burn Bibles, to sell the daughters of America into prostitution, to destroy any morality or ethics in government, etc.—still live. The impression seems to be that Jefferson's wall of separation is an attack on public religion, that religion should be shorn from the

29. John A. Ragosta, *Jefferson, Madison, and Adams: Conversations on Religious Liberty*, in RIVAL VISIONS: HOW JEFFERSON AND HIS CONTEMPORARIES DEFINED THE EARLY AMERICAN REPUBLIC 163, 170–71 (Dustin Gish & Andrew Bibby eds., 2021); see Charles O. Lerche, Jr., *Jefferson and the Election of 1800: A Case Study in the Political Smear*, 5 WM. & MARY Q. 467, 472–75 (1948).

30. NOBLE E. CUNNINGHAM, JR., THE UNITED STATES IN 1800: HENRY ADAMS REVISITED 48 (1988) (quoting A SHORT ADDRESS TO THE VOTERS OF DELAWARE (Sept. 21, 1800)).

31. RAGOSTA, *supra* note 1, at 34 (quoting A Voter, MD. GAZETTE, Aug. 28, 1800).

32. *Id.* at 34, 241 n.58 (quoting PORTLAND E. ARGUS, Nov. 16, 1804).

33. Lerche, *supra* note 29, at 472; see Ragosta, *supra* note 29, at 169–74. These are just a few of the many attacks on Jefferson. See generally RAGOSTA, *supra* note 1, at 19–39.

public square (in this context meaning both private and government activity in public). The fact that separation is only a policy against government religion or churches' (institutional) interference in government is ignored.³⁴

Certainly, Jefferson never believed or advocated that religion should be shorn from the public square, so long as the religion was entirely voluntary and private—neither embraced, compelled, nor encouraged or discouraged by government.³⁵ In fact, he fought the impression even in his own time. When the state funding for his beloved University of Virginia was threatened because of his (and the institution's) alleged infidelity and opposition to “a public establishment of any religious instruction,” he bemoaned to Thomas Cooper that “[i]n our University you know there is no professorship of divinity. [A] handle has been made of this to disseminate an idea that this is an institution, not merely of no religion, but against all religion.”³⁶ Later he would tell a political ally that the claim that he sought a “government without religion” was a “slander[].”³⁷ Admittedly, Jefferson believed that in a rational American republic, the successful religion in the public square would be Unitarianism, but he believed that this would be the result of citizens' choices in a free market of religion.³⁸ He never sought to ban public religion.

34. “Government religion” seems to be an oxymoron, but the Supreme Court's recent embrace of corporate religion might give pause in that regard. See generally Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. WOMEN'S L.J. 35 (2015).

35. HARRY Y. GAMBLE, *GOD ON THE GROUNDS* 3 (2020).

36. Letter from Thomas Jefferson to Thomas Cooper (Nov. 2, 1822), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-3137> [<https://perma.cc/6PNC-2E9Y>] (last visited Feb. 17, 2021).

37. Letter from Thomas Jefferson to DeWitt Clinton (May 24, 1807), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/99-01-02-5622> [<https://perma.cc/6YFW-ZYUR>] (last visited Feb. 17, 2021).

38. Letter from Thomas Jefferson to Benjamin Waterhouse (June 26, 1822), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-2905> [<https://perma.cc/D7A4-UBPL>] (last visited Feb. 17, 2021) (Jefferson predicted in 1822 that “there is not a young man now living in the US who will not die an Unitarian”). A few months later, “[c]oding reason as masculine,” and demonstrating deep misgivings about evangelical enthusiasm, Jefferson wrote to William Short that were a Unitarian minister to come to Virginia, he “would gather in to their fold every man under the age of 40. female fanaticism might hold out awhile longer.” ALAN TAYLOR, *THOMAS JEFFERSON'S EDUCATION* 224 (2019) (quoting Letter from Thomas Jefferson to William Short (Oct. 19,

Perhaps most telling in this regard is the fact that Jefferson's views on religion and separation of church and state did not prove to be a death knell for religion in the early republic as his political and religious opponents predicted. In fact, quite the contrary. Freed from government interference, enjoying a free market for religion, religion and religious organizations experienced a separation-induced explosion in a period referred to as the Second Great Awakening. It was in this period that many new American sects arose: Disciples of Christ, Church of Jesus Christ of Latter-Day Saints, African Methodist Episcopal Church, Oneidians, Seventh-Day Adventists, etc.³⁹ Alexis de Tocqueville saw the broad influence of religion in America as the direct result of separation.⁴⁰ Theodore Dwight Woolsey, the President of Yale and of the Evangelical Alliance, would explain in 1873 that "all unite in believing" that separation at the Founding "was a blessing to religion."⁴¹ In fact, some of those who had previously opposed Jefferson based on his efforts to separate church and state conceded (some reluctantly) that the process of freeing religion from government and embracing the "voluntary principle"—religious choice had to be entirely voluntary, uninfluenced by government inducement or discouragement—had greatly benefited religion. Lyman Beecher, a leading nineteenth century evangelical and no friend of Jefferson's, conceded that the end of the establishment and adoption of the voluntary principle was "*the best thing that ever happened to the State of Connecticut*. It cut the churches loose from dependence on state support. It threw them wholly on their own resources and on God."⁴² As Andrew Seidel concludes, "[a] secular

1822), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-3103> [perma.cc/J6TD-3W6K] (last visited Feb. 17, 2021)).

39. See generally Curtis D. Johnson, "Sectarian Nation": *Religious Diversity in Antebellum America*, 22 OAH MAG. OF HIST. 14 (2008).

40. See James T. Schleifler, *Tocqueville, Religion, and "Democracy in America": Some Essential Questions*, 3 AM. POL. THOUGHT 254, 258–60 (2014).

41. T. Jeremy Gunn, *The Separation of Church and State versus Religion in the Public Square*, in NO ESTABLISHMENT OF RELIGION, *supra* note 17, at 15, 33 (quoting THEODORE DWIGHT WOOLSEY, THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES IN REGARD TO RELIGION 4 (1873)).

42. 1 LYMAN BEECHER, THE AUTOBIOGRAPHY OF LYMAN BEECHER 152–53 (Barbara M. Cross ed., 1961) (emphasis original).

state fostered a religious people; a seeming paradox that has been borne out.”⁴³

These thoughts led me to consider several questions that engaged Jefferson, and continue to engage us, relating to the religiosity of the American people in the face of a high wall of separation between church and state: First, if the government cannot be “religious” does that interfere with the government encouraging virtue and morality, characteristics that early Americans almost universally saw as essential in a republic? Second, how, if at all, are government officials to express their own religiosity? Third, to the extent that the First Amendment is intended to prevent government “coercion” in the area of religion, does Jefferson (and history) speak persuasively to the meaning of coercion? Can the government “endorse” religion or speak in a religious voice, without running afoul of the Establishment Clause? Finally, I have several brief historic observations on the question of how the free exercise of religion is to continue on the private side of the wall in the face of laws that interfere with some people’s religious practices?

In analyzing those issues, I will focus particularly on Jefferson’s thought (and James Madison’s, with Jefferson’s trusty lieutenant never more in agreement with Jefferson than on the issue of church-state relations). Not only has the Jeffersonian vision of a wall of separation played a central role in the development and understanding of American religious freedom, but my current position gives me an opportunity to reflect regularly on that vision and to discuss it with the public. I do not expect to cover

43. Andrew L. Seidel, *Bad History, Bad Opinions: How “Law Office History” Is Leading the Courts Astray on School Board Prayer and the First Amendment*, 12 N.E. U. L.R. 248, 318 (2020). Even today, with the separation of church and state, the United States is one of the most religious of the developed nations. IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 3 (2014). The two are clearly related and were understood to be so during the founding era: “Madison, for example, contrasted the erosion of religion in establishment states with the flourishing of religion in nonestablishment states of his day.” John Witte, Jr., *Introduction to NO ESTABLISHMENT OF RELIGION*, *supra* note 17, at 3, 8. Today, I remind guides at Monticello that an establishment persists (in various forms) in Italy, Germany, and the United Kingdom, for example, but their churches are empty compared to churches in the United States. See *Being Christian in Western Europe*, PEW RES. CTR. (May 29, 2018), <https://www.pewforum.org/2018/05/29/being-christian-in-western-europe/> [https://perma.cc/YQ9G-FLD2].

any of these issues exhaustively, but, perhaps, to look at some of these important issues in a somewhat new way.

I. WHY A WALL?

It is useful to begin with at least some notion of why Jefferson sought broad religious freedom and a strict wall of separation. His views in this regard arose from three (interrelated and overlapping) motivations. Commentators generally attribute Jefferson's insistence on separation to political and philosophical motivations, and these were certainly important. I believe, however, that Jefferson likely shared with eighteenth-century evangelicals' theological reasons to insist upon a wall of separation.

A. *Political Motivations*

The political motivations for a separation of church and state are, perhaps, most obvious. At the time of the American Revolution, Virginia still had an established church—the Church of England—and religious dissenters (especially evangelical Presbyterians and Baptists) had faced serious discrimination and then persecution in colonial Virginia.⁴⁴ With the onset of the Revolution, Virginia's dissenters insisted upon religious freedom, including a separation of church and state, in return for their whole-hearted support for the military fight against Britain.⁴⁵ With dissenters representing from one-fifth to perhaps more than one-third of the population, and especially dominant among the rifle-toting Presbyterian settlers in the Shenandoah Valley, their aid was desperately needed, and the establishment substantially yielded.⁴⁶ Certainly, the evangelical dissenters, having suffered serious discrimination and persecution at the hands of the state because of their religious beliefs, had a strong political reason to demand separation.⁴⁷

These concerns also motivated Jefferson and Madison. The latter was apparently brought to his views on church-state relations

44. RAGOSTA, *supra* note 12, at 3–13. Other colonies also had varying levels of official establishments, but Virginia's took on an outsized role both in the Revolution generally and particularly on the issue of church-state relations. *See generally id.*

45. *Id.* at 6–7.

46. *Id.* at 3–4.

47. *Id.* at 6.

in part because of the attacks on dissenters immediately before the Revolution. Writing to a good friend from his Princeton days, Madison let his anger and exasperation boil over:

That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business. This vexes me the most of any thing whatever. There are at this {time?} in the adjacent County not less than 5 or 6 well meaning men in close Goal for publishing their religious Sentiments which in the main are very orthodox. I have neither patience to hear talk or think of any thing relative to this matter, for I have squabbled and scolded abused and ridiculed so long about it, [to so lit]tle purpose that I am without common patience.⁴⁸

Jefferson, returning to Virginia in late 1776 from the Continental Congress (after drafting the Declaration of Independence), joined the new Virginia House of Delegates and helped to lead the legislative battles to dismantle the establishment.⁴⁹ Late in life, he would refer to these legislative battles as the “severest contest in which I have ever been engaged,” an extraordinary statement from someone with as full a history of legislative battles as Jefferson.⁵⁰

Informed by a long history of political discord fed by church-state relations, and committed to the civil equality of all citizens, Jefferson saw a political necessity in a wall of separation. He believed that history had a clear lesson: political tyrants used religious leaders, and religious leaders used political tyrants, to prop each other up at the expense of the people.⁵¹ Jefferson bemoaned the alliance of “kings, nobles and priests,” telling his mentor George Wythe that this alliance had “loaded with misery”

48. Letter from James Madison to William Bradford (Jan. 24, 1774), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-01-02-0029> [perma.cc/493H-PWH4] (last visited Feb. 17, 2021).

49. Thomas Jefferson, *Autobiography*, 6 Jan.–29 July 1821 (Jan. 6, 1821), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-1756> [https://perma.cc/GKQ5-TA9T] (last visited Feb. 17, 2021).

50. *Id.*

51. Letter from Thomas Jefferson to Benjamin Rush (Sep. 23, 1800), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-32-02-0102> [https://perma.cc/K2F5-6CUT] (last visited Feb. 17, 2021).

the people of France.⁵² Twenty-eight years later he was still adamant about the danger that such an alliance posed for the body politic: “[I]n every country and in every age, the priest has been hostile to liberty. [H]e is always in alliance with the Despot.”⁵³ “[M]isgovernment” was the product of “the selfish interests of kings, nobles and priests,” he informed a favorite granddaughter.⁵⁴ He told his dear friend John Adams that separation of church and state “put down the aristocracy of the clergy, and restored to the citizen the freedom of the mind.”⁵⁵

The danger was that an alliance between aristocrats and clergy would seek to usurp the proper role of free citizens. Governments in Europe, owing “their organisation [sic] [to] kings, hereditary nobles, and priests,” were unresponsive to the people.⁵⁶ Writing to a Jewish leader, Jefferson used the third person to report that:

[I]t excites in him the gratifying reflection that his own country has been the first to prove to the world two truths, the most salutary to human society, that man can govern himself, and that religious freedom is the most effectual anodyne against religious dissension: the maxim of civil government being reversed in that of religion, where it’s [sic] true form is “divided we stand, united we fall.”⁵⁷

52. Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-10-02-0162> [perma.cc/3A5J-MR8Z] (last visited Feb. 17, 2021).

53. Letter from Thomas Jefferson to Horatio G. Spafford (Mar. 17, 1814), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-07-02-0167> [perma.cc/9C2E-WXDK] (last visited Feb. 17, 2021).

54. Letter from Thomas Jefferson to Ellen Wayles Randolph Coolidge (Aug. 27, 1825), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-5493> [https://perma.cc/K9Y4-2CM7] (last visited Feb. 17, 2021).

55. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-06-02-0446> [https://perma.cc/RL7B-CCDY] (last visited Feb. 17, 2021).

56. Letter from Thomas Jefferson to William Johnson (Jun. 12, 1823), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-3562> [https://perma.cc/2GHZ-LZJZ] (last visited Feb. 17, 2021).

57. Letter from Thomas Jefferson to Jacob De La Motta (Sept. 1, 1820), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-1488> [perma.cc/JLM7-2LNU] (last visited Feb. 17, 2021).

Given the history of religious strife in Europe in which “oceans of human blood” had flowed because of wars over religious dogma, religious freedom and separation in America would be especially essential because that republic would include people from a broad mix of regions, ethnicities, and religions.⁵⁸ Similarly, modern court cases rely on the central role that maintaining religious peace and discouraging religious discord played in the crafting of the First Amendment.⁵⁹

B. *Enlightenment (Philosophical) Motivations*

Not surprisingly, Jefferson’s Enlightenment philosophy also supported a separation of church and state for similar reasons. The progress of the human mind is at the center of the hopes of the Enlightenment, but Jefferson believed that the full progress of which the mind is capable would be impossible if religious leaders, using the power and authority of the state, could impose or coerce (or even use state authority to encourage) religious beliefs.⁶⁰ This interfered with the “freedom of the mind” which Jefferson referred to in his October 1813 letter to Adams.⁶¹ It was in this context of religious freedom that Jefferson famously wrote that “I have sworn upon the altar of god eternal hostility against every form of tyranny over the mind of man.”⁶² Jefferson clearly understood this insistence on free inquiry as being good for, rather than harmful to, religion. “Reason and free enquiry, . . . [g]ive a loose to them, they will support the true religion, by bringing every false one to their tribunal, to the test of their investigation.”⁶³

In fact, Jefferson believed that no true or honest belief could be imposed upon the mind by government coercion, but that the effort

58. Letter from Thomas Jefferson to James Fishback (Draft) (Sept. 27, 1809), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-01-02-0437-0002> [<https://perma.cc/7KTN-5HTA>] (last visited Feb. 17, 2021).

59. See, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214 (1963).

60. A Bill for Establishing Religious Freedom, H.D. 82, 1779 Gen. Assemb. (Va. 1786), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082> [<https://perma.cc/53ZT-XSLE>] (last visited Feb. 17, 2021) [hereinafter *Bill for Establishing Religious Freedom*].

61. Letter from Thomas Jefferson to John Adams, *supra* note 55.

62. Letter from Thomas Jefferson to Benjamin Rush, *supra* note 51.

63. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., Univ. of N.C. Press 1982) (1785).

to do so would thwart the necessary growth of intellectual freedom and thought. It was for this reason that Jefferson objected to “putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently matured for religious enquiries.”⁶⁴ Alan Taylor explains that “[b]y precluding rational and critical inquiry, Jefferson alleged, premature exposure to theology prepared children to submit to arbitrary authority as adults. If kept free from religion in the early classroom, however, children would have time to cultivate a moral sense, which he deemed natural to every person.”⁶⁵ This is why he urged his nephew Peter Carr of the necessity of thinking for oneself, especially in the context of religion.⁶⁶

Believing that a church-state alliance encouraged ignorance—blind following of an “official” worldview rather than rational inquiry—Jefferson reasoned:

[O]rganisation [sic] of kings, hereditary nobles, and priests . . . to constrain the brute force of the people, . . . deem it necessary to keep them down by hard labor, poverty and ignorance, and to take from them, as from bees, so much of their earnings as that unremitting labour shall be necessary to obtain a sufficient surplus barely to sustain a scanty and miserable life.⁶⁷

Eliminating any government control or influence in the realm of religion would prevent this danger. Explaining Jefferson’s view, historian Johann Neem makes the same point: “[B]ecause God had created ‘the mind free,’ each person had to make his or her own determinations about faith. . . . Since God had granted us the ability to think, to deny us that right was sinful as well as tyrannical.”⁶⁸

64. *Id.* at 147.

65. TAYLOR, *supra* note 38, at 164.

66. Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-12-02-0021> [perma.cc/A78Y-NU4W] (last visited Feb. 17, 2021).

67. Letter from Thomas Jefferson to William Johnson, *supra* note 56.

68. Johann N. Neem, *A Republican Reformation: Thomas Jefferson’s Civil Religion and the Separation of Church from State*, in *A COMPANION TO THOMAS JEFFERSON* 91, 95 (Francis D. Cogliano ed., 2011).

Madison believed the same. He had a clear “conviction that the most harmful effect of ‘established religion’ (that is, compelled and formalized religion) was its suppression of the vital, useful energies that flowed from the unrestrained practice of religion in the public sphere—and eventually to the practice of citizenship in a self-governing society,” Ralph Ketcham argues.⁶⁹ Free thought was essential to an enlightened republic, but one could not have political freedom or freedom of the mind in the face of the cooperation of church and state. For Jefferson and Madison, Jack Rakove explains, “[t]he attack on establishment flowed logically, perhaps even necessarily, from the commitment to freedom of conscience.”⁷⁰ As Jefferson himself put it, “[f]or the use of . . . reason . . . every one [sic] is responsible to the god who has placed it in his breast, as a light for his guidance, and that, by which alone, he will be judged.”⁷¹

Both the political and philosophical justifications for separation were particularly focused on protecting religious minorities as they faced the risk of political prosecution and their thought was more likely to be impaired by government decrees touching religion.

C. *Theological Motivations*

Jefferson spent a great deal of time studying religion (including comparative religions) and thinking about his own beliefs.⁷² These were not matters to which he had given only

69. Ralph Ketcham, *James Madison, Thomas Jefferson, and the Meaning of “Establishment of Religion” in Eighteenth-Century Virginia*, in *NO ESTABLISHMENT OF RELIGION*, *supra* note 17, at 158, 160.

70. Jack N. Rakove, *Beyond Locke, Beyond Belief: The Nexus of Free Exercise and Separation of Church and State*, in *RELIGION, STATE, AND SOCIETY: JEFFERSON’S WALL OF SEPARATION IN COMPARATIVE PERSPECTIVE* 37, 47 (Robert Fatton, Jr. & R. K. Ramazani eds., 2009).

71. Letter from Thomas Jefferson to William Carver (Dec. 4, 1823), *NAT’L ARCHIVES*, <https://founders.archives.gov/documents/Jefferson/98-01-02-3903> [<https://perma.cc/2U37-BR4S>] (last visited Feb. 17, 2021).

72. Jefferson’s study of comparative religion explains his purchase of a 1734 edition of George Sales’ translation of the Koran in October 1765 while Jefferson was studying law in Williamsburg. Claims that Jefferson purchased the book merely as a means to “know your enemy” during the conflict with Barbary pirates are false and revisionist. See Wm. Scott Harrop, *Jefferson Unafraid of the Koran* (Jan. 17, 2007),

passing consideration. Jefferson, a deep theist, believed in a “benevolent creator” God who deserved to be praised.⁷³ He believed, at least early in life, but likely later as well, in an afterlife with rewards and punishment.⁷⁴ He believed that people would (and should) be judged on their actions, part of his firm renunciation of Calvinism and the idea of salvation by grace alone.⁷⁵ He rejected many of the central tenets of Christianity: Jesus’ divinity, the resurrection, the atonement, original sin, Biblical miracles, the Trinity. Critically, having studied many religions, from classical Greece through his own era, Jefferson concluded that all religions agreed on the fundamental rules of morality and virtue. Their disagreements tended to be overly technical and what he saw as less important issues of dogma, issues for which rivers of blood had been spilled in Europe.⁷⁶

His views on religion contributed importantly to his views on religious freedom, including separation of church and state and arguably paralleled the theological reasons why many eighteenth-century evangelicals supported a strict separation.

A central element of religion for eighteenth-century evangelicals was an insistence on a personal relationship with God, i.e., one not mediated through priests, bishops, or the government.⁷⁷ Theologically, evangelicals reasoned that since all God wanted from humans was a personal commitment, that commitment had to be entirely voluntary, a free will commitment. A commitment to God resulting from government intervention was of no interest or value to God.⁷⁸ Presbyterian clergy in Virginia

<http://www.payvand.com/news/07/jan/1194.html> [<https://perma.cc/3JS9-N8A7>].

73. Letter from Thomas Jefferson to Isaac Story (Dec. 5, 1801), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-36-02-0025> [<https://perma.cc/Q73W-XA6M>] (last visited Feb. 17, 2021).

74. Letter from Thomas Jefferson to John Page (Jul. 15, 1763), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-01-02-0004> [<https://perma.cc/DP2L-H7ER>] (last visited Feb. 17, 2021).

75. Letter from Thomas Jefferson to Thomas Cooper, *supra* note 36.

76. See, e.g., RAGOSTA, *supra* note 1, at 8, 16–17, 26.

77. See RAGOSTA, *supra* note 1, at 22–23.

78. See James H. Smylie, *Jefferson’s Statute for Religious Freedom: The Hanover Presbytery Memorials, 1776–1786*, 63 AM. PRESBYTERIANS J. 355, 371 (1985) (quoting Petition from the Inhabitants of Augusta County to the General Assembly of the Commonwealth of Virginia (Aug. 13, 1785)).

explained that “[r]eligion is altogether personal . . . it is not, cannot, and ought not to be, resigned to the will of the society at large; & much less to the Legislature.”⁷⁹ Rejecting a proposed tax that would have paid clergy a salary, these Presbyterians added:

It is urged, indeed, by the Abettors of this Bill, that it would be the means of cherishing Religion and Morality among the Citizens. But, it appears from fact, that these can be promoted only by the internal Conviction of the Mind, & its voluntary choice which such Establishments cannot affect.⁸⁰

Additional petitions further underscore this religious relationship: “For the discharge of the duties of Religion every man is to account for himself as an individual in a future state . . . not to be under the direction or *Influence* of any Human being.”⁸¹ “But that the *duty which we owe our Creator and the manner of discharging it can only be directed by reason and conviction*; and is no where [sic] cognizable but at the Tribunal of the Universal Judge.”⁸²

Other ministers echoed similar theological reasons to keep the government out of religion. Baptists fighting the proposed tax assessment to support religion insisted that the legislature “leave them entirely free in matters of Religion.”⁸³ During the hotly-contested election of 1800, a Democratic-Republican minister

79. *Id.* (quoting Petition from Augusta County, *supra* note 78)

80. *Id.* (quoting Petition from Augusta County, *supra* note 78); This and other cited petitions are also available from a collection maintained by the Library of Virginia. See Legislative Petitions Digital Collection, LIBRARY OF VA., <http://www.virginiamemory.com/collections/petitions>. In the past, the Library conveniently maintained a separate collection of petitions related to religion, but they are now part of a combined collection.

81. Petition from the Inhabitants of Rockbridge County to the General Assembly of the Commonwealth of Virginia (November 2, 1785) (emphasis added); see also RAGOSTA, *supra* note 12, at 152 (“It is the duty of every man for himself to take care of his immortal interests in a future state, where we are to account for our conduct as individuals; and it is by no means the business of a Legislature to attend to this.” (quoting Petition from Presbyterian Clergy to the General Assembly of the Commonwealth of Virginia (November 12, 1784))).

82. Smylie, *supra* note 78, at 362 (quoting Petition from the Hanover Presbytery to the General Assembly of the Commonwealth of Virginia (July-Sept., 1776)).

83. See Petition from the Inhabitants of Amelia County to the General Assembly of the Commonwealth of Virginia (Nov. 18, 1785). This was a version of the “Spirit of the Gospel” petition copied by numerous Baptist congregations.

explained that “[r]eligion is a concern between the soul of a man and his maker.”⁸⁴ As such, Stanley Griswold explained, “[w]herever religion has been leagued with temporal policy . . . it has uniformly been corrupted.”⁸⁵ John Leland, a leading Baptist minister in Virginia at the time, was adamant:

Every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in a way that he can best reconcile to his conscience. If government can answer for individuals at the day of judgment, let men be controlled by it in religious matters; otherwise, let men be free.⁸⁶

Any interference in religion was counter-productive: “[c]ompulsion in matters of Religion would be so far from engaging men to be what it proposes, that it would rather prejudice them against it.”⁸⁷ The point was made by Isaac Backus, a Massachusetts Baptist minister, in the context of a draft bill of rights for Massachusetts: “[a]s . . . nothing can be true religion but a voluntary obedience unto [God’s] revealed will, . . . every person has an unalienable right to act in religious affairs according to the full persuasion of his own mind, where others are not injured thereby.”⁸⁸

Jefferson made important statements concerning religion that have often been interpreted as simply reflecting his well-known interest in privacy, but they seem to echo these theological concerns. Jefferson would often respond to inquiries concerning his own religion that “religion is a matter which lies solely between

84. STANLEY GRISWOLD, TRUTH ITS OWN TEST AND GOD ITS ONLY JUDGE (1800), *reprinted in* ALAN M. DERSHOWITZ, FINDING JEFFERSON app. B, at 199, 201 (2008) (emphasis removed).

85. Robert J. Imholt, *Timothy Dwight, Federalist Pope of Connecticut*, 73 NEW ENG. Q. 386, 396 (2000) (quoting GRISWOLD, *supra* note 84, at 17–18).

86. JOHN LELAND, THE RIGHTS OF CONSCIENCE INALIENABLE (1791), *reprinted in* THE WRITINGS OF THE LATE ELDER JOHN LELAND, *supra* note 22, at 177, 181.

87. See Petition from the Baptist Association of Powhatan County to the General Assembly of the Commonwealth of Virginia (Nov. 3, 1785).

88. Marci A. Hamilton & Rachel Steamer, The Religious Origins of Disestablishment Principles, 81 NOTRE DAME L. REV. 1755, 1775 (2006) (quoting William G. McLoughlin, *Introduction to ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY*, *reprinted in* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 304 (William G. McLoughlin ed., 1968)).

Man & his God.”⁸⁹ Religion is “a matter between every man and his maker, in which no other, & far less the public, ha[s] a right to intermeddle.”⁹⁰ He warned another correspondent, “say nothing of my religion. it is known to god and myself alone.”⁹¹ This was not a mere matter of convenience or political expediency, but a matter of theological principle for Jefferson:

I cannot give up my guidance to the magistrate; because he knows no more of the way to heaven than I do & is less concerned to direct me right than I am to go right. . . . [co]mpulsion in religion is distinguished peculiarly from compulsion in every other thing. I may grow rich by art I am compelled to follow, I may recover health by medicines I am compelled to take ag[ains]t. my own judgm[en]t, but I cannot be saved by a *worship* I disbelieve & abhor.⁹²

Laws could not provide for a defect in personal belief and action: “[L]aws provide against injury from others; but not from ourselves. God himself will not save men against their wills.”⁹³

Madison made a similar profession in his famous *Memorial & Remonstrance Against Religious Assessments*: “[i]t is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.”⁹⁴

89. See *Letter to the Danbury Baptists*, *supra* note 1. It is notable that Jefferson, while often insisting that he would not speak of his religion, seemed to be constantly speaking and writing about it. By comparison, historians have relatively little on James Madison’s religious beliefs and serious study on the topic is overdue.

90. Letter from Thomas Jefferson to Richard Rush (May 31, 1813), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-06-02-0155> [perma.cc/9WZL-F7GF] (last visited Feb. 19, 2021).

91. Letter from Thomas Jefferson to Joseph Delaplaine (Dec. 25, 1816), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-10-02-0475> [https://perma.cc/6Z4A-HZ4J] (last visited Feb. 19, 2021).

92. See Thomas Jefferson, Notes on Locke and Shaftesbury (Oct. 11–Dec. 9, 1776), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-01-02-0222-0007> [https://perma.cc/LZ4K-NN33] (last visited Feb. 19, 2021) [hereinafter *Notes on Locke and Shaftesbury*].

93. *Id.*

94. James Madison, *A Memorial and Remonstrance Against Religious Assessments* (ca. June 20] 1785), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0163> [perma.cc/V58Y-5JF7] (last visited Feb. 19, 2021).

Jefferson urged family members that they needed to come to their own religious beliefs through private inquiry. He famously wrote to his nephew Peter Carr urging him to:

[S]hake off all the fears and servile prejudices under which weak minds are servilely crouched. Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of god; because if there be one, he must more approve the homage of reason, than that of blindfolded fear.⁹⁵

Referring to the coalition of evangelicals and political rationalists who played such a critical role in the development of American religious freedom, “strange bedfellows” indeed, Alan Taylor explains that “[e]vangelicals and rationalists found common ground by emphasizing individual, free choice as the basis of society—within limits set by race and gender.”⁹⁶

Jefferson’s theological concerns with separation are also evident in his later-in-life devotion to the philosophy (but not the divinity) of Jesus and a rather snarky comment that his crucifixion was the first fruit of the cooperation of church and state.⁹⁷

95. Letter from Thomas Jefferson to Peter Carr, *supra* note 66. Trenchard and Gordon, in their well-known “Cato’s Letters,” explained: “Every Man’s Religion is his own; nor can the Religion of any Man . . . be the Religion of another Man, unless he also chooses it; which Action utterly excludes all Force, Power or Government” independent of all “human Directions.” See GREEN, *supra* note 1, at 53 (quoting John Trenchard, *Cato’s Letters*, No. 60 (Jan. 6, 1721), reprinted in NEIL H. COGAN, CONTEXTS OF THE CONSTITUTION: A DOCUMENTARY COLLECTION 141 (1999)).

96. TAYLOR, *supra* note 38, at 58. Michael McConnell noted that “[i]t is, indeed, a remarkable feature of the debates over establishment and disestablishment at the founding that the advocates of the establishment tended to offer secular justifications grounded in the social utility of religion, whereas the most prominent voices for disestablishment often focused more on the theological objections.” Michael W. McConnell, *Establishment at the Founding*, in NO ESTABLISHMENT OF RELIGION, *supra* note 17, at 45, 64.

97. See RAGOSTA, *supra* note 1, at 18. Jefferson remarked that, utilizing the power of church and state, the clergy had “crucified their own Savior who preached that their kingdom was not of this world, and all who practice on that precept must expect the extreme of their wrath.” *Id.* (quoting Letter from Thomas Jefferson to Levi Lincoln (Aug. 26, 1801), in 35 PAPERS OF THOMAS JEFFERSON 147 (Barbara B. Oberg ed., 2008)).

II. THE WALL OF SEPARATION

It is useful to start with the fundamental question: What does the wall separate? On the one side, obviously, is the state, which is to say the government. Simplistically, one might conclude that this side of the wall is, or should be, entirely areligious. Indeed, it is the fear of such areligion or amorality that, in part, seems to energize much of the opposition to a wall of separation between church and state. The complexity here is that while the government itself is to be areligious, the “government” includes the individuals who make up the government, from military personnel who might wish to have chaplains to any government official who, as an official, does not abandon his or her religion. Nor were they expected to. It is a truism that a person’s religion will, and should, affect his or her moral decisions, whether or not he or she is a government official. Jefferson never expected nor wished that government officials would behave in an amoral manner or in a manner that ignored morality. As Stephen Green quite rightly observes, “a majority of Framers expected that Christian principles would continue to play a role in fostering civic virtue and providing a moral context for public and private activity.”⁹⁸

On the other side of the wall is the church, but more fully the private sector. To be clear, the private side of the wall does not mean “non-public” in the sense that activity cannot occur in the public square; it means non-governmental. A simple example suffices: a Christmas crèche scene displayed in a government building raises questions on the government-side of the wall. The same crèche, displayed publicly at a private corporation’s headquarters, is a matter for the private side of the wall.⁹⁹ Separation “did not refer to a cultural separation of religion from society, as many today assume,” Derek Davis explains, “but rather

98. GREEN, *supra* note 1, at 180.

99. For example, after Allegheny County’s government Christmas crèche display was declared unconstitutional in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 578–79 (1989), it was displayed at the U.S. Steel building in downtown Pittsburgh, see *Pittsburgh Crèche Endowment Fund, THE PITTSBURGH FOUND.*, <https://pittsburghfoundation.org/creche> [<https://perma.cc/5MXT-AAJW>] (last visited Mar. 12, 2021).

an institutional separation of governmental and ecclesiastical power.”¹⁰⁰

In thinking about issues on the two sides of the wall, it is useful (and calming) to remember that many of the fundamental church-state issues have been resolved and are still not under serious challenge, even with the increased pressure of some from within and without government to breach the wall. Direct support for an individual religion or sect is undoubtedly unconstitutional. Similarly, financial support for all religion—similar to Virginia’s proposed general assessment bill—in exclusion to other non-religious activities, would quickly be held to be unconstitutional.¹⁰¹ Nor can the government engage in mandating (or prohibiting) religious activities (other than through neutral legislation not targeted at religion or religious activities, discussed below).¹⁰² Similarly, there is a broad consensus that government cannot openly embrace a particular religion or sect¹⁰³ (although the views of several Justices on the necessity of coercion in the form of a fine or punishment for a government violation of the Establishment Clause, discussed further below, would, if adopted by a majority of the Court, effectively reverse that long-standing prohibition).¹⁰⁴

Looking at the issues that are still hotly contested, and, in particular, questions that elicit interest of the public either directly or implicitly, this Article will address four more complex problems with a particular focus on Jefferson’s thoughts. First, if virtue and

100. Compare Derek H. Davis, *The Continental Congress and Emerging Ideas of Church–State Separation*, in NO ESTABLISHMENT OF RELIGION, *supra* note 17, at 180, 200–03 (examining the developing understanding of the separation of church and state during the founding era that understood the separation not to foreclose all contact between religion and public life), with DANIEL DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 51–52 (2002) (wrongly equating “*separation* between church and state” with “religious influences separated from public life and policy.” (emphasis original))

101. Although many of the private school voucher and tax programs challenge this principle by effectively allocating a large predominance of their funds to religious schools. See, e.g., *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2259 (2020); *Zelman v. Simmons-Harris*, 536 U.S. 639, 663 (2002). This is an issue that the Court should try to address.

102. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526, 546–47, 534 (1993).

103. *Id.* at 532.

104. *Lee v. Weisman*, 505 U.S. 577, 604 (1992).

morality are necessary for a sound republic, and religion encourages both, as almost all of the Founders certainly believed, can government encourage religion generally while avoiding sectarianism? Is separation inconsistent with morality in government? Second, how can public officials act on their own religiosity? Third, if government does sometimes seek to speak on religion, or in a religious voice, for example ceremonial deism or even declaration of a day of thanksgiving, what level of coercion to belief is necessary to prohibit such activity? Fourth, can “religious freedom” justify an exception to an otherwise valid law?

A. *Virtue, Morality, and Religion*

The Founders generally believed that to be successful a republic required moral and virtuous citizens. John Adams made the point using his nom de plume Novanglus: “[l]iberty can no more exist without virtue and independence, than the body can live and move without a soul.”¹⁰⁵ Classic republican doctrine, recognizing the fragility of a republic, advocated for virtuous leaders. “Talk of virtue was not so much pious cant,” Derek Davis explains; “it was a serious proposal to arrest the otherwise inevitable mortality of political society. The success of the body politic would, the [Continental] Congress held, be dependent on the character of the people it comprised.”¹⁰⁶

Similarly, most of the Founders would have agreed that religion promoted such morality and virtue. Perhaps the most commonly referenced statement of this idea is George Washington’s Farewell Address given when he stepped-down from the presidency:

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 labour to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens. . . . And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the

105. Letter To the Inhabitants of the Colony of Massachusetts Bay (Feb. 6, 1775), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-02-02-0072-0004> [<https://perma.cc/FVF5-K4DW>] (last visited Feb. 19, 2021).

106. Davis, *supra* note 100, at 194–95.

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.¹⁰⁷

Those seeking to breach the wall of separation have reasoned that the republic needs virtue, religion encourages virtue, so government should encourage religion, and they claim the endorsement of the Founding generation.¹⁰⁸ Washington's address is offered as a "proof-text" for the need for government support of religion.¹⁰⁹

Many of the Founders, certainly Jefferson and Madison (and Washington), would disagree. Jefferson and Madison "sought the total rejection of the time-honored precept that the good of both church and state required direct, statutory, and even financial support of some or all religious creeds or institutions, or required the diminishment or disadvantage of any other creed or institution[.]" Ralph Ketcham explains.¹¹⁰

As a preliminary matter, to some extent the argument misreads Washington's address. Alexander Hamilton prepared a draft of the Address for Washington in which he suggested that the president expressly embrace government support for religion as a

107. *Washington's Farewell Address*, *supra* note 22.

108. See LUPU & TUTTLE, *supra* note 43, at 76 (citing JAMES H. HUTSON, CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 54–57 (2008)). As Lupu and Tuttle explain:

Earlier justifications for state funding of religion focused on the theological benefits of government care for the spiritual welfare of its subjects. For a variety of reasons, defenders of state aid for religion in the early eighteenth century shifted their argument to a political footing. They claimed that support for an established faith was necessary to promote morality and good order.

Id.

109. Gunn, *supra* note 41, at 25.

110. Ketcham, *supra* note 69, at 171. Ketcham goes on to recognize that, in spite of support for separation, especially for Madison, "religion had a useful and important role to play generally in the realm of the political." *Id.* at 172. Ketcham concludes that there was an unstated "friendly neutrality toward and even encouragement of religions . . . [that] might be a worthy civic objective," if not a government one. *Id.*

means to promote virtue.¹¹¹ Hamilton would have had Washington proclaim: “Does [national morality] not require the aid of a generally received and divinely authoritative [r]eligion?”¹¹² Washington rejected such an approach and deleted this portion of the address.¹¹³ While the Farewell Address urges the importance of religion to society, it does not support the idea of government supporting religion. Ultimately, what Washington recommended in that section of the address was support for public education—“[p]romote, then, as an object of primary importance, institutions for the general diffusion of knowledge[]”—a means to support virtue and morality without involving the government in religion.¹¹⁴ Jefferson made the same point about education and promotion of morality, telling John Adams that his bill for the General Diffusion of Knowledge (proposing a three-tiered system of public education) “would have raised the mass of the people to the high ground of moral respectability necessary to their own safety, & to orderly government.”¹¹⁵

In this regard, Washington’s Farewell Address was not unlike similar provisions in the Northwest Ordinance. That law, adopted by the Confederation Congress and readopted by the first Congress under the Constitution, declared that “[r]eligion, morality, and knowledge, [are] necessary to good government and the happiness of mankind,” but the Ordinance’s only call to government action in that context was that “schools and the means of education shall forever be encouraged.”¹¹⁶ Not unlike Washington’s removal of Hamilton’s suggestion of government support for religion, a provision specifically dedicating a parcel of government land in each district to the promotion of religion had been removed from

111. Draft of Washington’s Farewell Address (July 30, 1796), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-20-02-0181-0002> [<https://perma.cc/38LB-A66K>] (last visited Feb. 19, 2021).

112. *Id.*

113. *Compare id.* (including language supporting the connection of public morality with religious institutions), *with Washington’s Farewell Address, supra* note 22 (omitting language implying direct connection with established religion and morality); *see also* RAGOSTA, *supra* note 1, at 159–60 (drawing same comparison).

114. *Washington’s Farewell Address, supra* note 22.

115. Letter from Thomas Jefferson to John Adams, *supra* note 55.

116. NORTHWEST ORDINANCE art. 3 (1787), https://avalon.law.yale.edu/18th_century/nworder.asp [<https://perma.cc/PQX7-RX5U>].

the original draft of the Northwest Ordinance; government was to support education, but not religion.¹¹⁷ Madison was thrilled that the provision had been removed, writing to James Monroe incredulously: “How a regulation, so unjust in itself, so foreign to the Authority of Cong[re]s[s] so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Comm[itee] is truly matter of astonishment.”¹¹⁸

In the *Cincinnati Bible* case, the Ohio Supreme Court addressed this provision of the Northwest Ordinance specifically:

[T]rue ‘religion’ and ‘morality’ are aided and promoted by the increase and diffusion of ‘knowledge,’ . . . and that all three—religion, morality, and knowledge—are essential to good government. . . . The truth is that these are matters left to legislative discretion, subject to the limitations on legislative power, regarding religious freedom, contained in the bill of rights.¹¹⁹

As Andrew Seidel concludes, “[t]he Ordinance and farewell address mention religion as a societal necessity, not a government power.”¹²⁰

Setting aside Washington’s address, others in the Founding era argued more expressly that government support of religion was essential to protect morality and virtue. For example, after the end of the Revolution, many leaders in Virginia advocated a general tax assessment to support Christian ministers and, as they defined it, the religion that was requisite to support morality and virtue.¹²¹ Richard Henry Lee wrote to Madison that “the experience of all times shows Religion to be the guardian of morals—and he must be

117. Letter From James Madison to James Monroe (May 29, 1785), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0156> [perma.cc/T3CQ-2M98] (last visited Feb. 19, 2021).

118. *Id.* In a rather lame citation of historic precedent, Justice Alito’s opinion in *American Legion v. American Humanist Association* cites both Washington’s Farewell Address and the Northwest Ordinance, apparently as examples of support of legislative prayer, and ignores the fact that in both cases the proposal for any government support of religion was excised. 139 S.Ct. 2067, 2087 (2019) (plurality opinion).

119. *Bd. of Educ. v. Minor*, 23 Ohio St. 211, 244 (1872).

120. Seidel, *supra* note 43, at 319.

121. See LUPU & TUTTLE, *supra* note 43, at 77.

a very inattentive observer in our Country, who does not see that avarice is accomplishing the destruction of religion, for want of a legal obligation to contribute something to its support.”¹²²

A number of Virginia’s citizens joined in the fight for the general religious assessment making similar arguments. Petitioners from Warwick County insisted that “it is essentially necessary for the good Government of all free states, that some legislative attention should be paid to religious Duties.”¹²³ Religion is the “great safeguard against the corruption or usurpation of those who govern on the one hand; and the most powerful security for the subordination & obedience of those who are governed on the other,” urged supporters from Surry County, on December 1, 1784.¹²⁴ A year later, petitioners from the same county argued that throughout the Christian world, “the political as well as religious effects of the Gospel have been thought worthy of Legislative attention.”¹²⁵ Outside the context of the General Assessment, James Maury, one of Jefferson’s teachers, “explained that church and government had ‘such a close & mutual Dependence & connection with each other, & reciprocally give & receive such Stability & Support to & from each other, that they must necessarily stand or fall together.’”¹²⁶

Some Founders would have agreed. Oliver Ellsworth, a delegate to the Philadelphia Convention, chaired a committee of the Connecticut legislature in 1802 concluding that as “peace, order and prosperity of society” are a government’s main object, “institutions for the promotion of good morals” are an appropriate object of legislative support, and “religious institutions are

122. Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0079> [perma.cc/JP23-XYMW] (last visited Feb. 19, 2021). In that letter Lee goes on to explain that “true freedom embraces the Mahomitan and the Gentoo as well as the Christian religion.” *Id.*

123. Petition from the Inhabitants of Warwick County to the House of Delegates of the Commonwealth of Virginia (May 15, 1784).

124. Petition from the Inhabitants of Surry County to the House of Delegates of the Commonwealth of Virginia (Dec. 1, 1784).

125. Petition from the Inhabitants of Surry County to the House of Delegates of the Commonwealth of Virginia (Nov. 14, 1785).

126. TAYLOR, *supra* note 38, at 19 (quoting JAMES MAURY, TO CHRISTIANS OF EVERY DENOMINATION AMONG US 31–32 (1771)).

eminently useful and important” in that regard.¹²⁷ It is worth noting that Ellsworth’s support for such a program would have involved the most mild form of establishment—a general support for religion only—but an establishment nonetheless.¹²⁸

Michael McConnell notes generally that to the Founding generation’s “minds, republicanism both presupposed and demanded a degree of public virtue exceeding that required in monarchical regimes.”¹²⁹ McConnell explores most specifically the Massachusetts Constitution of 1780 and its statement that government depends “upon piety, religion, and morality” and that these “cannot be generally diffused” without public support of worship and religious instruction; therefore, Massachusetts imposed a religious establishment¹³⁰ (the last express religious establishment to be eliminated in the United States when it was overwhelmingly rejected by the people of Massachusetts in 1833¹³¹). While one might be hesitant to use this failed and vilified model as a precedent, McConnell notes that the arguments of Massachusetts Chief Justice Theophilus Parsons in *Barnes v. First Parish*¹³² give the most thorough explanation for the alleged need for church-state cooperation to promote virtue.¹³³

Parson’s recognized that the state needs people to obey moral duties beyond “the control of human legislation” (e.g., to promote charity, benevolence, relations between husbands, wives, and children).¹³⁴ “The next step in Parsons’s argument was that the best way for the government to inculcate the civic virtue needed for community happiness is to support religion,” McConnell

127. William R. Castro, *Oliver Ellsworth’s Calvinist Vision of Church and State in the Early Republic*, in *THE FORGOTTEN FOUNDERS ON RELIGION AND PUBLIC LIFE* 65, 74 (Daniel L. Dreisbach, et al. eds., 2009). See also GREEN, *supra* note 1, at 140–41.

128. Castro, *supra* note 127, at 74.

129. McConnell, *supra* note 96, at 58.

130. *Id.* at 59 (quoting MASS. CONST. art. III (1780), reprinted in MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 33–34 (2d ed. 2002)).

131. See Nathan S. Rives, “*Is Not This a Paradox?*”: *Public Morality and the Unitarian Defense of State-Supported Religion in Massachusetts*, 86 *NEW ENG. Q.* 232, 232–33 (2013).

132. *Barnes v. Inhabitants of First Parish in Falmouth*, 6 Mass. 401 (1810).

133. McConnell, *supra* note 96, at 60.

134. *Id.* at 61 (quoting *Barnes*, 6 Mass. at 405).

concludes.¹³⁵ “That is a far more troubling claim from our modern disestablishmentarian point of view. But throughout most of history, religious teaching has been one of the most powerful means of inculcation of ideas of morality.”¹³⁶ McConnell poses the question: “Who was right? Jefferson or Parsons?”¹³⁷ Of course, even if one concludes that Parsons (who was supporting the policy that was overwhelmingly defeated by the people of Massachusetts in 1833) was more correct than Jefferson and Madison at the time, that begs the question of whether support for religion is still necessary to protect morality.

Among the problems with Parson’s approach from a Jeffersonian perspective, however, is whether government support for religion is the best means to promote religion (and, thus, the best means to promote virtue, even if one otherwise accepts the argument’s logic). Many others during the Founding era grappled directly with the issue of morality and virtue in government and rejected even the mildest form of establishment or any government support for religion. Indeed, the effort to impose a general assessment for these purposes in Virginia, an example used by those advocating government support for religion, was overwhelmed by opposition from evangelicals and allies of Jefferson and Madison, and the evangelicals not only rejected the tax but

135. *Id.*

136. *Id.* at 61–62. While this is undoubtedly true as a historic matter, it does not rise to the level of necessity. For example, modern law and education have found ways to encourage charities and sound familial relations without resorting to a government-sanctioned religion.

137. *Id.* at 61. McConnell concedes, somewhat apologetically, that Parsons’ arguments are expressly restricted to Christianity, but insists that this is merely a recognition that it was long-standing, “had long been promulgated,” and was “well known” to Parsons. *Id.* at 62. McConnell urges that the point for Parsons was not that government would endorse the view that Christianity “was actually true [T]ruth was not a necessary element in his justification for the establishment.” *Id.* This is too kind. Massachusetts specifically restricted its establishment to Christianity, and Parsons insisted that its “divine authority [is] admitted” and it has been “found to rest on the basis of immortal truth” *Id.* (quoting *Barnes*, 6 Mass. at 406). As others have pointed out, virtually all politicians who encourage government support for religious “truth” argue that it is *their* religion that carries such truth. See, e.g., *Bill for Establishing Religious Freedom*, *supra* note 60 (“[T]he impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others . . .”).

repeatedly addressed the broader issue and concluded that government could promote morality and virtue without intervening in religion. In fact, government intervention “in support” of religion would do more harm than good for religion. During the legislative debates over the general assessment, Madison framed the question thus: “[The t]rue question [is] not—Is Rel[igion]: neces[sar]y? [But] are Relig[iou]s Estab[lishmen]ts. necess[ar]y for Religion?”¹³⁸

Perhaps the most telling analysis in this regard came from the Hanover Presbytery, representing the Presbyterians of Virginia. In 1784, the year that the general assessment was proposed, the Presbyterian clergy wrote a petition somewhat grudgingly supporting a non-discriminatory assessment to fund ministers in what the author of that petition (Samuel Stanhope Smith, a future president of New Jersey College) argued was the mildest manner.¹³⁹ Referring to religion, the petition explained:

Neither is it necessary to their existence that they should be publicly supported by a legal provision for the purpose, as tried experience hath often shown; although it is absolutely necessary to the existence & welfare of every political combination of men in society, to have the support of Religion and its solemn institutions as affecting the conduct of rational beings more than human laws can possibly do. On this Account it is wise policy in Legislation to seek its alliance & solicit it's [sic] aid in a civil view because of it's [sic] happy influence upon the morality of the citizens, and its tendency to preserve the veneration of an oath or an appeal to heaven, which is the cement of the social Union. It is upon this principle alone in our opinion, that a Legislative body has a right to interfere in Religion at all, & of consequence we suppose that this interference ought only to extend to the preserving of the public worship of the Deity, and the supporting of Institutions for

138. Madison's Notes for Debates on the General Assessment Bill (Dec. 1784), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0104-0003> [<https://perma.cc/U4V4-5ZMF>] (last visited Feb. 19, 2021).

139. See Smylie, *supra* note 78, at 360, 369.

inculcating the great fundamental principles of all Religion without which Society could not easily exist.¹⁴⁰

Even with these caveats, the Presbytery insisted that the assessment had to be made on the “most liberal” plan possible, including non-discrimination.¹⁴¹ This Presbyterian petition, while insisting that religion does not need government aid, provides support for the type of generic encouragement of religion advocated by Parsons, McConnell, and others, albeit insisting on non-discrimination.

The debate, though, did not stop there. After this petition was released, Presbyterians across the state were enraged with even that lukewarm endorsement of government intervention in matters of religion, even in the name of virtue and morality. Instead, they rejected any government support of religion and did so most emphatically, forcing the clergy who had supported the original petition to recede.¹⁴² One year after the above-quoted petition, the Presbytery went on record: “We oppose the Bill, Because it is a Departure from the proper line of Legislation; Because it is unnecessary, & inadequate to its professed end—impolitic.”¹⁴³ The Presbytery agreed that there is a “happy influence of Christianity” on the nation, but insisted that it was never so effectual in encouraging morality and virtue as when left alone, free from all government interference.¹⁴⁴ Echoing the theological arguments in favor of a strict separation, the Presbytery explained that involvement of the civil power in religion was “destructive of genuine morality.”¹⁴⁵

Petitions from around Virginia made the same point, focusing directly on the argument in favor of morality and virtue and

140. Petition from the Hanover Presbytery to the General Assembly of the Commonwealth of Virginia (November 12, 1784).

141. *Id.*

142. See Smylie, *supra* note 78, at 359; RAGOSTA, *supra* note 12, at 121–27.

143. Petition from Presbyterian Ministers to the General Assembly of the Commonwealth of Virginia (Nov. 2, 1785); see also Smylie, *supra* note 78, at 370.

144. Petition from Presbyterian Ministers, *supra* note 143.

145. *Id.* McConnell cross-references the 1784 Hanover Presbytery’s support of a general assessment in his argument in support of some government support of religion, see McConnell, *supra* note 96, at 59, the same petition that was overwhelming rejected in 1785, see RAGOSTA, *supra* note 1, at 86–87.

insisting that the government could support morality and virtue without supporting religion, even in a very general manner:

- Botetourt County, November 29, 1785:
Civil Government and Religion are, and ought to be, independent of each other. The one has for its object a proper Regulation of the external conduct of men toward each other, . . . the other has for its object our internal or spiritual welfare & is beyond the reach of human laws [Prior] to the revelation of the Christian Religion . . . Roman and Grecian governments [were] founded upon the principles of Justice and equality [and] produced in the citizens the encouraged virtues.¹⁴⁶
- Powhatan County, Baptist Associations, November 3, 1785:
[We] are of opinion that the Church as a Spiritual body, has a polity of its own intirely [sic] distinct from and independent of all combinations of Men for Civil purposes And as they think [the] Legislature will have sufficiently done its part in favour of Christianity when adequate provision is made for supporting those Laws of Morality, which are necessary for private and public happiness and of which it seems more properly the Guardian than of the peculiarities of the Christian Church.¹⁴⁷
- Chesterfield County, November 14, 1785: “[B]ut it’s said to be Necessary to unite the Church and State to keep men moral and for to have confidence in an Oath we Humbly

146. Petition from the Inhabitants of Botetourt County to the General Assembly of the Commonwealth of Virginia (Nov. 29, 1785), <http://www.virginiamemory.com/collections/petitions> [<https://perma.cc/U2PM-BAAX>] [Editors Note: all petitions are available through the virginia memory website search engine but we are unable to provide url permalinks to the specific petitions being cited in footnotes 146–51.].

147. Petition from the Inhabitants of Powhatan County Baptist Associations to the General Assembly of the Commonwealth of Virginia (Nov. 3, 1785), <http://www.virginiamemory.com/collections/petitions> [<https://perma.cc/U2PM-BAAX>].

conceive the civil magistrate has a right to punish Immorality so far as society is injured there by.”¹⁴⁸

- Brunswick County, November 9, 1785: “Let laws punish the vices and immoralities of the time Let ministers manifest to the world that they are Inwardly moved by the Holy Ghost.”¹⁴⁹
- Montgomery County, November 15, 1785: “Good morals are essential to civil society, but no indication that civil laws are not adequate to that purpose. Right and wrong can be derived from positive law, without seeking higher [religious] authority.”¹⁵⁰
- Mecklenburg County, December 24, 1784: “We think every man ought to be left free from all compulsion in this matter, except that of their own Reason & Conscience; This we apprehend will be Best both for Church, & State.”¹⁵¹

In his *Memorial & Remonstrance against Religious Assessments*, Madison agreed, explaining that religion (and its social utility) did not need any government support:

148. Petition from the Inhabitants of Chesterfield County to the General Assembly of the Commonwealth of Virginia (Nov. 14, 1785), <http://www.virginiamemory.com/collections/petitions> [https://perma.cc/U2PM-BAAX]. The Chesterfield petitioners went on to insist that civil laws should “let Jews, Mehometans [sic], and Christians of every Denomination enjoy [sic] religious liberty, [F]ind their advantage in living under your laws [because] religion is of god to man [as] the Civil law is of you to your people[,] [A]nd let the Church of Christ and religion alone.” *Id.*

149. Petition from the Inhabitants of Brunswick County to the General Assembly of the Commonwealth of Virginia (Nov. 9, 1785), <http://www.virginiamemory.com/collections/petitions> [https://perma.cc/U2PM-BAAX]. A number of similar “Spirit of the Gospel” petitions were filed.

150. Petition from the Inhabitants of Montgomery County to the General Assembly of the Commonwealth of Virginia (Nov. 15, 1785), <http://www.virginiamemory.com/collections/petitions> [https://perma.cc/U2PM-BAAX].

151. Petition from the Inhabitants of Mecklenburg County to the General Assembly of the Commonwealth of Virginia (Dec. 24, 1785), <http://www.virginiamemory.com/collections/petitions> [https://perma.cc/U2PM-BAAX]. See also Petition from the Inhabitants of Amelia County to the General Assembly of the Commonwealth of Virginia (Nov. 9, 1785); Petition from the Inhabitants of Caroline County to the General Assembly of the Commonwealth of Virginia (Oct. 27, 1785), <http://www.virginiamemory.com/collections/petitions> [https://perma.cc/U2PM-BAAX].

Because 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.¹⁵²

Madison warned explicitly of the dangers posed to religion from government support:

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.¹⁵³

Years later Madison explained again why government support of religion was not necessary for support of morality and virtue:

The settled opinion here is that . . . there are causes in the human breast, which ensure the perpetuity of religion without the aid of the law; that rival sects, with equal rights, exercise mutual censorships in favor of good morals; that if new sects arise with absurd opinions or overheated imaginations, the proper remedies lie in time, forbearance and example.¹⁵⁴

On the force of these arguments, and thousands of signatures of Jeffersonians and evangelicals, the General Assessment was

152. Madison, *supra* note 94.

153. *Id.*

154. Letter from James Madison to Edward Everett (Mar. 19, 1823), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/04-03-02-0015> [<https://perma.cc/4JEA-W57C>] (last visited Feb. 19, 2021).

defeated.¹⁵⁵ At the time, most viewed the proposed assessment as precisely the type of general support of religion that is now advocated by many of those opposed to a wall of separation.¹⁵⁶ Of course, one might argue that while such a tax is inappropriate, a general support of religion by government endorsement is still required to encourage morality and virtue; the arguments referenced above are wholly applicable to even such a limited scheme.

One of the reasons why government support of religion was seen as unnecessary by Jefferson and Madison was their view that all religions and philosophies tend to support similar ethical regimes, i.e., similar concepts of morality and virtue. The universality of such doctrines draws into question the need for government support for religion. In Jefferson's view:

Every religion consists of moral precepts & of dogmas. [I]n the first they all agree [A]nd these are the articles necessary for preservation of order, justice, & happiness in society. [I]n their particular dogmas [they] all differ[] & [these are] unimportant to the legitimate objects of society.¹⁵⁷

He reflected that, on the religious side of a disestablishment society:

Religion is well supported; of various kinds, indeed, but all good enough; all sufficient to preserve peace and order: or if a sect arises, whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the state to be troubled with it.¹⁵⁸

And, on the secular side:

Man was destined for society. His morality therefore was to be formed to this object. He was endowed with a sense

155. See Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 *GEO. J.L. & PUB. POL'Y*, 51, 86 (2009); RAGOSTA, *supra* note 1, 89–90.

156. See Susan Jacoby, *The White House is Tearing Down the Wall Between Church and State*, *N.Y. TIMES* (July 5, 2018), <https://www.nytimes.com/2018/07/05/opinion/sunday/church-state-supreme-court-religion.html> [perma.cc/WZ9Y-SFBQ].

157. Letter from Thomas Jefferson to James Fishback (Draft), *supra* note 58.

158. See JEFFERSON, *supra* note 63, at 161.

of right and wrong merely relative to this. This sense is as much a part of his nature as the sense of hearing, seeing, feeling; it is the true foundation of morality, and not the truth . . . as fanciful writers have imagined. The moral sense, or conscience, is as much a part of man as his leg or arm.

. . . If [your inquiry] ends in a belief that there is no god, you will find incitements to virtue in the comfort and pleasantness you feel in it's [sic] exercise, and the love of others which it will procure you.¹⁵⁹

Thomas Paine said the same: “[a]ll religions are in their nature mild and benign, and united with principles of morality.”¹⁶⁰ While Jefferson agreed that virtue was necessary in a republic, he concluded that, given the universality of moral principles, government need not intervene to promote religion.¹⁶¹

Indeed, government support would be counterproductive; mixing church and state, as many of the evangelicals had noted, would corrupt both. Madison told one correspondent that “[t]he settled opinion here is that religion is essentially distinct from Civil Gov[ernment] and exempt from its cognizance; that a connexion [sic] between them is injurious to both.”¹⁶² Madison explained this point at length:

159. See Letter from Thomas Jefferson to Peter Carr, *supra* note 66.

160. THOMAS PAINE, RIGHTS OF MAN 80 (1791).

161. See generally Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/99-01-02-7257> [perma.cc/5XW6-TCBR] (last visited Feb. 19, 2021). Madison, during the debates over ratification of the Constitution, underscored this point:

I go on this great principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.

James Madison, Judicial Powers of the National Government (June 20, 1788), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-11-02-0101> [https://perma.cc/4XUA-65M9] (last visited Feb. 19, 2021). John Adams also recognized that the Constitution was made for a moral/virtuous people, but as Derek Davis notes, “not to *produce* them. The responsibility for virtuous character must rest with the people.” Davis, *supra* note 100, at 196 (emphasis in original).

162. Letter from James Madison to Edward Everett, *supra* note 154.

Notwithstanding the general progress made within the two last Centuries in favor of this branch of liberty [religious freedom], and the full establishment of it, in some parts of our Country, there remains in others, a strong bias towards the old error, that without some sort of alliance or coalition between Government & Religion, neither can be duly supported. Such indeed is the tendency to such a Coalition, and such its corrupting influence on both the parties, that the danger can not be too carefully guarded against Religion & Gov[ernmen]t will both exist in greater purity, the less they are mixed together. It was the belief of all Sects at one time that the establishment of Religion by law was right & necessary; that the true Religion ought to be established in exclusion of all others; and that the only question to be decided was, which was the true Religion I can not speak particularly of any of the cases excepting that of Virginia, where it is impossible to deny that Religion prevails with more zeal, and a more exemplary priesthood, than it ever did when established and patronized by Public authority. We are teaching the World the great truth, that Governments do better without Kings & Nobles than with them. The merit will be doubled by the other lesson, that Religion flourishes in greater purity, without than with the aid of Government.¹⁶³

Jefferson had said the same in the preamble to the Statute for Establishing Religious Freedom: government support for religion “tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it.”¹⁶⁴

When Jefferson was attacked for his alleged atheism by political opponents, Jeffersonians made the same point. During the presidential campaign of 1800, Tunis Wortman, a New York Democratic-Republican, explained in *A Solemn Address to Christians and Patriots*:

163. Letter from James Madison to Edward Livingston (July 10, 1822), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/04-02-02-0471> [perma.cc/44H4-CCX9] (last visited Feb. 19, 2021).

164. *Bill for Establishing Religious Freedom*, *supra* note 60.

Religion and government are equally necessary, but their interests should be kept separate and distinct. No legitimate connection can ever subsist between them. Upon no plan, no system, can they become united, without endangering the purity and usefulness of both—the church will corrupt the state, and the state pollute the church.¹⁶⁵

One of the key means of corruption, if government sought to support religion, would be the use of religion by politicians to promote their own political interests at the expense of the people (a concern with particular resonance today as “Court Evangelicals” surround former President Trump in a mutual quest for power (rather than grace)¹⁶⁶). Madison identified such corruption of religion as another problem with the proposed General Assessment. Government support:

[I]mply either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.

....

... What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny: in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries. A just Government instituted to secure & perpetuate it needs them not. Such a Government will be best supported by protecting every Citizen in the

165. TUNIS WORTMAN, A SOLEMN ADDRESS TO CHRISTIANS AND PATRIOTS (1800), *reprinted in* 2 POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805, 1479, 1488 (Ellis Sandoz ed., 2d ed. 1998).

166. See, e.g., John Fea, *Courtiers and Kings, Evangelicals, Prophets and Trump*, RELIGION NEWS SERV. (Jan. 8, 2020), <https://religionnews.com/2020/01/08/courtiers-and-kings-evangelicals-prophets-and-trump/> [perma.cc/3PQ3-4ZAL].

enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.¹⁶⁷

In the preamble to the Statute, Jefferson explained:

[Allowing a] civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy [sic], which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.¹⁶⁸

Religious leaders had made the same point. Reverend Elisha Williams, in *The Essential Rights and Liberties of Protestants*, noted wryly that “a religious establishment made by the civil authority which they think is agre[e]able to the scriptures is certainly agre[e]able to them.”¹⁶⁹ More generally, as Ira Lupu and Robert Tuttle of George Washington University School of Law note, “nonestablishment also reduces religious groups’ incentive to compete for political supremacy. If the machinery of government may not be used to support or promote any faith, religious groups will find control of government significantly less valuable.”¹⁷⁰ Michael McConnell made a similar point: “Establishment was not really about religion; it was about government control over the formation of public opinion. And disestablishment was not an attempt to curtail the influence or prominence of religion in public life. It was to make religious practice free and independent, and therefore strong.”¹⁷¹ While McConnell argues that this can be

167. Madison, *supra* note 94.

168. *Bill for Establishing Religious Freedom*, *supra* note 60.

169. ELISHA WILLIAMS, *THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS* (1744), *reprinted in* 1 *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805*, 53, 75 (Ellis Sandoz ed., 2d ed. 1998).

170. LUPU & TUTTLE, *supra* note 43, at 23.

171. McConnell, *supra* note 96, at 65.

accomplished while still permitting generic government support for religion, Jefferson and Madison disagreed.¹⁷²

Jefferson and Madison were quite clear that government involvement would not promote religion, rather it would undermine it.¹⁷³ In a free market of religion, in contrast, religion, truth, and virtue would all benefit, and, as noted above, building a wall of separation in fact led to an explosion in American religion in the Second Great Awakening.¹⁷⁴ John Witte concludes that the realization that religion (and, thus, its impact on virtue and morality) would be strongest without any government assistance is the most original American insight.¹⁷⁵

Some would argue that the use of legislative chaplains is a subset of this effort to have government encourage virtue and morality. I will not here engage fully the question of the constitutionality of chaplains, although the cases regarding chaplains have certainly been full of bad history. Others have explored the issue extensively.¹⁷⁶ Several observations are in order in this context, however: First, the hiring of legislative chaplains had been justified largely as a historic exception since *Marsh*,¹⁷⁷ based on some very weak history.¹⁷⁸ For example, the Court

172. See *supra* notes 162–68 and accompanying text. A distinction needs to be made between government support of religion qua religion and support of religion indirectly and in a neutral manner. Thus, Jefferson and Madison (and the Supreme Court) would see an enormous difference in a government tax system that promoted contributions to charities, including religious institutions, and a tax system that promoted contributions to religious institutions but not to other charities. Cf. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (“We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.” (citations omitted)).

173. See *supra* notes 162–68 and accompanying text.

174. See *supra* notes 39–43 and accompanying text.

175. Witte, *supra* note 43, at 12.

176. See generally George R. Kennedy, *God(s) in Congress*, 98 IOWA L. REV. 1731 (2013); Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NW. UNI. L. REV., 145 (2008); Richard D. Rosen, *Katcoff v. Marsh at Twenty-Two: The Military Chaplaincy and the Separation of Church and State*, 38 UNI. TOL. L. REV. 1137 (2007); Seidel, *supra* note 43, *passim*.

177. *Marsh v. Chambers*, 463 U.S. 783 (1983).

178. See Seidel, *supra* note 43, *passim*. I hate the term “law office history”: good lawyers do not use bad history. The *Marsh* Court upheld legislative chaplains “almost exclusively on the precedent of First Congress.” GREEN, *supra* note 1, at 13. For example, in *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4

ignored Madison's statements that legislative chaplains were unconstitutional and that such deviant precedent should not be relied upon.¹⁷⁹

Now, in *American Legion*, the Court plurality has eschewed the common view that *Marsh* was based on a historic exception¹⁸⁰ in favor of an analysis of the First Amendment based on "a history and tradition test."¹⁸¹ This is a far more expansive and flexible doctrine and, divorced from principle, makes little sense and poses considerable danger. For example, will the Sedition Act now be a precedent for free speech? In the Jim Crow era, where will we look for "history and tradition" concerning the Equal Protection, Due Process, and Privileges and Immunities Clauses? This approach also seems to ignore change over time: Given that the states were not bound by the First Amendment initially, how they adapted their systems to religious freedom is probably more informative of how

(1987), while discussing *Marsh*, the Court explained that: "The Court based its conclusion in that case on the historical acceptance of the practice. Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *But see* LUPU & TUTTLE, *supra* note 43, at 144 (while *Marsh* could be read as a narrow, historic ruling, *Lynch v. Donnelly*, 465 U.S. 668 (1984), only a year later, upends that limitation by granting leniency to government actions without any founding era analogy). Some indication of the Court's somewhat hollow attempt to treat *Marsh* as a historic anomaly was evident in *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014), where the Court stated that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation" despite expanding legislative prayer beyond even its dubious historical moorings.

179. *See Marsh*, 463 U.S. at 807 (Brennan, J., dissenting). "Rather than let this step beyond the landmarks of power have the effect of a legitimate precedent, it will be better to apply to it the aphorism *de minimis non curat lex*: or to class it 'cum maculis quas aut incuria fudit, aut humana parum cavit natura.'" James Madison, Detached Memoranda (Jan. 31, 1820), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/04-01-02-0549> [perma.cc/M4EL-PA9T] (last visited Feb. 19, 2021) [hereinafter *Detached Memoranda*]. "I shall also take notice of one thing which appears to me unconstitutional, . . . [by that] I mean the thing of paying the chaplains of the civil and military departments out of the public treasury. . . . If legislatures choose to have a chaplain, for Heaven's sake let them pay him by contributions, and not out of the public chest." LELAND, *supra* note 22, at 119.

180. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion).

181. *See id.* at 2092 (Kavanaugh, J., concurring). *But see id.* at 2091 (Breyer, J., concurring) (rejecting a "history and tradition test").

they perceived the First Amendment (and the growth of a unique American religious freedom) than their practice at its adoption—"history and tradition."¹⁸²

Second, much of the work on chaplains ignores the fact that the hiring of a legislative chaplain was initially about preaching to legislators.¹⁸³ Inward looking preaching to government members (who choose to attend) is very different from outward proselytizing at public meetings that citizens attend for a multiplicity of reasons.¹⁸⁴ This distinction has broader implications, and were it enforced as a requirement—for example, requiring that any such prayers before governmental meetings be addressed to members, possibly having such prayers privately preceding public meetings, etc.—it would resolve much of the controversy concerning government chaplains.¹⁸⁵

Third, with respect to military chaplains, they were obviously intended to preach to military members, not to proselytize publicly. Madison recognized that in preaching to service members, military chaplains may be different from other government chaplains: When people are removed from normal access to ministers, their rights of free exercise might otherwise be implicated.¹⁸⁶ But, this means that one must distinguish preaching to troops at wholly voluntary services or counseling with troops (again, voluntary) and public appearances by military chaplains. At a minimum, such use of

182. Certainly, state developments in the area of religious freedom are highly relevant vis-à-vis the adoption of the Fourteenth Amendment. *Cf.* RAGOSTA, *supra* note 1, at 132–68 (discussing state constitutional developments through the Supreme Court's decision concerning the meaning of the First Amendment in *Reynolds v. United States*, 98 U.S. 145, 165 (1878)).

183. *See Galloway*, 572 U.S. at 575 (framing legislative prayer as a neutral acknowledgement of religion and reminder for legislators to work toward the common good).

184. *Cf. id.* at 576–78 (noting import of voluntary participation).

185. *See id.* One also suspects that officials would be far less interested in these prayers if they did not occur in public, thereby giving them the ability to enlist profanely the imprimatur of religion for their own political purposes.

186. *See Detached Memoranda*, *supra* note 179 (expressing sympathy for chaplains in a military context but concern that their use would be a justification for government chaplains in other contexts); *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 296 (1963) (Douglas, J., concurring) (noting that some objectionable government practices might be permissible in the penumbra between the Establishment and Free Exercise Clauses including, "[p]rovisions for churches and chaplains at military establishments").

chaplains should be subject to all of the relevant restrictions: a neutral choice of ministers, no proselytizing, and a clear indication that religion is not “endorsed.”¹⁸⁷

Finally, it is worth noting a growing problem with the theory that the Founders would have accepted government support for religion generally while eschewing support for any particular religion, a problem resulting from the growing religious diversity of the nation. Can government encourage religion generally, while avoiding sectarianism? Proposals for “generic” support for religion would have difficulty addressing growing nontraditional religions, from Buddhism, to Taoism, to Hinduism, to Sikhism, much less Rastafarianism, Druidism, Wicca, the Jedi Religion, Pastafarians, etc.

Some conservative justices have sought to avoid this problem by creating a new theory that would allow the government to promote some, but not all, religions, what has historically been seen as a complete anathema to the First Amendment:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.¹⁸⁸

Nonetheless, Justice Scalia, joined by Justices Rehnquist and Thomas, openly advocated the idea that only monotheist religions, specifically Christianity, Judaism, and Islam, are fully protected by the First Amendment, enjoying a special privilege of government endorsement.¹⁸⁹ Based on a rather distorted view of history, Scalia reasoned that supporting these religions, all of which endorse the Ten Commandments and accept (at least in part) the Bible as true

187. See, e.g., *Town of Greece*, 572 U.S. 565. It is difficult for the government not to “endorse” religion when the person praying is in uniform—as army regulations, discussed below, recognize. See *infra* notes 228–30 and accompanying text.

188. *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968) (citing a long list of precedent).

189. See *McCreary County v. ACLU*, 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting).

revelation, was consistent with the Founders' expectations.¹⁹⁰ It is worth noting that even Scalia would agree that the Establishment Clause still prevents the government from directly funding these religions.¹⁹¹

As a preliminary matter, this is an odd position for a textualist to take; there is certainly no support in the text of the Constitution for singling out particular religions for special treatment, and, as I have shown elsewhere, many in the Founding generation were aware of non-monotheistic religions that shared the protections of religious freedom.¹⁹² Nor is there any basis in early American history for combining Christianity, Judaism, and Islam for preferred treatment.¹⁹³ This focus on monotheism is part of a history of revisionism by those seeking to encourage church-state cooperation and breach Jefferson's wall. What was originally "Christian preferentialism"—government could support Christianity generally but not any individual sect—morphed into "Judeo-Christian preferentialism" after the atrocities of World War II made it simply politically unacceptable to exclude Jews; the term "Judeo-Christian" was not one that eighteenth-century Founders would have recognized.¹⁹⁴ Thus, if one wants to rely on the Founders' views, broadly defined, on "acceptable" religions to

190. *See id.* at 909.

191. As others have pointed out, there is little reason for Scalia's conclusion that neutrality vis-à-vis different religions and religions versus irreligion applies to Free Exercise and affirmative funding of religion but does not apply to endorsement—other than the fact that this achieves the result sought by conservatives by in each instance effectively promoting the religion of the majority. *See, e.g.,* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1117 (2006). In concluding that almost all Americans endorse the Ten Commandments, Scalia ignores not only the significant differences in different religion's versions of the Ten Commandments, but the tens of millions of Americans who do not fall within his preferred list of religions. *Id.* at 1119.

192. *See id.* at 1131.

193. *See, e.g.,* James Loeffler, *The Problem With the 'Judeo-Christian Tradition,'* ATLANTIC (Aug. 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/the-judeo-christian-tradition-is-over/614812/> [<https://perma.cc/2UFJ-BHYX>].

194. *See* RAGOSTA, *supra* note 1, at 151–53 (discussing how members of the Court have used deeply misleading partial quotations and citations to morph the Christian preferentialism advocated by some in the early nineteenth century into Judeo-Christian preferentialism).

promote, inclusion of Judaism would be problematic. Scalia and his cohort have now sought to morph the concept again into monotheists in a “politically correct” effort to include Muslims.¹⁹⁵

Setting aside the historic problems with the proposal, it would enflame sectarian controversies—something that separation of church and state was intended to alleviate—and tend to protect the majority at the expense of the minority—another position that flies in the face of the purposes of the First Amendment.¹⁹⁶ Others have discussed this proposal at length,¹⁹⁷ the point here is that it is another effort to avoid the problems that would be created were the

195. See Colby, *supra* note 191, at 1118. If one wanted to limit protections to the common “religion” at the time of the founding, that would exclude Judaism, Islam, and arguably Catholicism (and then courts would face the question of what to do with “new” Christian sects that were arguably outside the understanding at the Founding, e.g., Mormons, Seventh Day Adventists, etc. Compare Audrey Barrick, *Devout Mormon Declares: I’m Not a Christian*, CHRISTIAN POST (June 14, 2012), <https://www.christianpost.com/news/devout-mormon-declares-im-not-a-christian-76694/> [perma.cc/XB9M-U2Y9] (distinguishing Mormons from “mainline” Christian sects), with *New Poll on Religion and the Election 2012: Romney’s Mormon Faith Likely a Factor in Primaries, Not in a General Election*, PEW RESEARCH CTR. (Nov. 23, 2011), <https://www.pewforum.org/2011/11/23/new-poll-on-religion-and-the-election-2012/> [https://perma.cc/9D93-KRL3] (noting that many White evangelical voters do not consider Mormonism a Christian faith). Leaving these decisions up to courts poses another set of problems. The problem is even evident in the Ten Commandment cases since various denominations and religions use significantly different versions of the Ten Commandments. Justice Scalia, in arguing that the government can erect Ten Commandment monuments, at the same time argues that the government cannot engage in the argument about which version is the most “authentic” or to be preferred—but the erection of a monument, by choosing a particular version, effectively does just that. See Colby, *supra* note 191, at 1108 n.35. Colby explains further that for Scalia, government invocation of “God” is not an establishment, but invocation of Vishnu, Zeus, or polytheism is. *Id.* at 1110–11.

196. See *id.* at 1119.

197. See, e.g., Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1587–90 (2010) (official acknowledgement of majoritarian Judeo-Christian religion creates an atmosphere that alienates minority groups); William P. Marshall, “We Know It When We See It”: *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 514–15 (1986) (noting that promoting majoritarian religious practices as “secularized” due to their long history in American society disadvantages religions that have more recently developed or arrived); Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514, 515–16 (1994) (critiquing Establishment Clause theories that would advantage certain religions).

government to be allowed to promote religion generally—an increasingly complex and ill-defined group—in an effort to encourage virtue and morality.

None of this, though, changes the fact that the Founders, while wishing to end state support for religion, certainly expected that officials would be virtuous and moral officials. That, though, raises the question of how such officials should exercise their religion.

B. *Public Officials/Religious People*

Whatever the restrictions imposed on the government in terms of promotion of religion, there was a broad anticipation at the founding that the American people, including those who would hold government office, would be a religious people. The same is true today (although less so than in the past for the reasons noted at the outset). It is notable, for example, that even while the share of Americans who profess to be Christian or religious is declining substantially, the share of elected officials identifying as Christian is overwhelming. The Pew Research Center, for example, notes that over 88% of the U.S. Congress identifies as Christian, compared to a national average of 71% of U.S. adults being Christian.¹⁹⁸ High-ranking Trump administration officials were likely even more heavily weighted to Christianity.¹⁹⁹ While the Civil Service may have a religious demographic that more closely parallels the national average, this still begs a question: What can a person who happens to be religious and happens to be an official do about their religiosity on the “government side of the wall”?

Once again, Jefferson grappled with this issue, particularly in the context of national prayer proclamations. Both of Jefferson’s predecessors as president had issued prayer proclamations, as had Jefferson as governor when directed to do so by the legislature.²⁰⁰ During the run-up to the Revolution, Jefferson had joined with other members of the Virginia House of Burgesses to urge a day of fasting and prayer in support of Boston after that port was closed

198. *Faith on the Hill, The religious composition of the 116th Congress*, PEW RESEARCH CTR. (Jan. 3, 2019), <https://www.pewforum.org/2019/01/03/faith-on-the-hill-116/> [perma.cc/TSB8-8AN6].

199. This is not surprising; a majority will tend to dominate elections. It is, though, another example of why it is so important that civil liberties protect minorities; majorities tend to be protected through the legislative process.

200. RAGOSTA, *supra* note 1, at 189, 266 n.43.

by Britain as part of the Intolerable Acts.²⁰¹ Notably, though, Jefferson would later report that he and a group of political radicals had “cooked up” that declaration for its political effect, the type of use of religion by politicians that he came to rail against.²⁰² Of course, there was no First Amendment at that time and Virginia had not yet adopted the Statute for Establishing Religious Freedom.²⁰³

As president, though, Jefferson understood that he was subject to the prohibitions of the First Amendment Establishment Clause.²⁰⁴ With that in mind, even when the country was faced with the crisis of hundreds of sailors being impressed by the British navy, and with the prospect of what would prove to be a devastating embargo hanging over the nation, Jefferson insisted that it would violate the Constitution for the president to call officially for a

201. *Id.* at 189.

202. *Id.* at 193. In spite of the “cooked up” comment, some commentators continue to insist that Jefferson’s authorship of the prayer proclamation is evidence of his sincere religious commitment, but Jefferson told Daniel Webster that he and his colleagues had to get someone else to introduce the resolution because “[i]t would hardly have been in character for *us* to present them ourselves.” DANIEL WEBSTER, Notes of Mr. Jefferson’s Conversation, 1824 at Monticello, in 1 THE PAPERS OF DANIEL WEBSTER, CORRESPONDENCE, 1798–1824, at 370, 374 (Charles M. Wiltse & Harold D. Moser eds., Univ. of Va. Press Digital ed. 2018) (1974).

203. RAGOSTA, *supra* note 1, at 193.

204. *See id.* at 189–90. In *American Legion*, Justice Thomas suggested that because the First Amendment begins “Congress shall make no law,” only the legislature is bound by its provisions. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2094–95 (2019) (Thomas, J., concurring). This is a startling and outrageous claim. In Thomas’ view, then, neither the executive nor the judiciary are bound by the First Amendment’s protections against establishments and for free speech, press, assembly, and free exercise. Under such a theory, absent legislation, the president could insist that all executive branch hiring be Presbyterians or prohibit all federal employees, if they want to keep their jobs, from publicly (on social media or otherwise) saying anything derogatory about the president. The executive could openly agree only to prosecute certain crimes when committed by political opponents (such as perjury). The president could announce that Islam is the official religion of the United States and will be treated as such by the Executive Branch. Of course, the courts have consistently rejected this argument, *see* RAGOSTA, *supra* note 1, at 263 n.2, but Thomas’ willingness to even float the argument is breathtaking. (Does this suggest that he believes the Trump administration—with his wife being a key lobbyist on such issues—could ignore the anti-establishment clause?).

national day of prayer.²⁰⁵ His views in this regard are worth quoting at length:

I consider the government of the US. as interdicted by the constitution from intermeddling [sic] with religious institutions, their doctrines, discipline, or exercises. [T]his results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the US. [C]ertainly[,] no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. [I]t must then rest with the states, as far as it can be in any human authority. [B]ut it is only proposed that I should *recommend*, not prescribe a day of fasting [and] prayer. [T]hat is that I should *indirectly* assume to the US. an authority over religious exercises which the [C]onstitution has directly precluded them from. [I]t must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it: not indeed of fine & imprisonment but of some degree of proscription perhaps in public opinion. [A]nd does the change in the nature of the penalty make the recommendation the less a *law* of conduct for those to whom it is directed? I do not believe it is for the interest of religion to invite the civil magistrate to direct it's [sic] exercises, its discipline or its doctrines: nor of the religious societies that the General government should be invested with the power of effecting any uniformity of time or matter among them. [F]asting [and] prayer are religious exercises. [T]he enjoining [of] them an act of discipline, every religious society has a right to determine for itself the times for these exercises [and] the objects proper for them according to their own particular tenets. [A]nd this right can never be safer than in their own hands, where the [C]onstitution has deposited it.²⁰⁶

James Madison, under pressure from Congress during the national crisis that culminated in the War of 1812, did issue a

205. Letter from Thomas Jefferson to Samuel Miller, *supra* note 161.

206. *Id.*

national prayer proclamation, but he later concluded that this was an error, a violation of the Constitution.²⁰⁷ Even when issuing the proclamation, Madison sought to minimize its impact:

[F]reed from all coercive edicts, from that unhallowed connexion [sic] with the powers of this world, which corrupts religion into an instrument or an usurper of the policy of the state, and, making no appeal but to reason, to the heart and to the conscience, can spread its benign influence everywhere, and can attract to the Divine Altar those free-will offerings of humble supplication, thanksgiving and praise, which alone can be acceptable to Him whom no hypocrisy can deceive, and no forced sacrifices propitiate.²⁰⁸

Yet, while Jefferson was emphatic that if the president made an official prayer proclamation it violated the Constitution, in both of his inaugural addresses, Jefferson prayed. In the second inaugural address, he supplicated:

I shall need too the favour of that being in whose hands we are: who led our fathers, as Israel of old, from their native land; and planted them in a country flowing with all the necessaries & comforts of life; who has covered our infancy with his providence, & our riper years with his wisdom & power: & to whose goodness I ask you to join in supplications with me, that he will so enlighten the minds of your servants, guide their councils, & prosper their measures, that whatsoever they do shall result in your good, & shall secure to you the peace, friendship, & approbation of all nations.²⁰⁹

In his first, he also prayed publicly: “And may that infinite power, which rules the destinies of the universe, lead our councils to what is best, and give them a favorable issue for your peace and

207. RAGOSTA, *supra* note 1, at 190–91.

208. James Madison, Presidential Proclamation (July 23, 1813), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/03-06-02-0434> [<https://perma.cc/MS8M-XJ82>] (last visited Feb. 19, 2021).

209. Thomas Jefferson, Second Inaugural Address (March 4, 1805), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/99-01-02-1302> [<https://perma.cc/8L9K-JZXY>] (last visited Feb. 19, 2021) (early access).

prosperity.”²¹⁰ Some critics have concluded that Jefferson was simply being inconsistent. Daniel Dreisbach, for example, says that these two situations were “virtually indistinguishable.”²¹¹ Jefferson obviously did not see it as such.²¹²

There is a simple but powerful point that Jefferson was showing in his actions: under the First Amendment, an official can pray, even publicly, but he or she cannot pray officially. Justice Stevens made the point in his *Van Orden* dissent: “when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity.”²¹³

Imagine a president leaving the White House on a Sunday morning and telling a scrum of reporters stationed there that he is on his way to church. This is very different from the president approaching the cameras and microphones, surrounded by cabinet officials, and saying it is time for all Americans to get up and go to church accompanied by a proclamation on official letterhead to the same effect. While undoubtedly there will be instances where it might be difficult to discern on what side of that line an official’s actions land, the concept was very clear to Jefferson.

The same issues were at work when Jefferson, as president, attended church services held in the House of Representatives. Those services, when the House was not otherwise in use, were not based on a joint resolution of Congress nor official in any manner as some have argued.²¹⁴ In fact, with very few finished buildings

210. Thomas Jefferson, First Inaugural Address (March 4, 1801), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004> [perma.cc/6VH8-WY3P] (last visited Feb. 19, 2021).

211. DREISBACH, *supra* note 100, at 57.

212. See RAGOSTA, *supra* note 1, at 191–92.

213. *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevdreens, J., dissenting) (emphasis original).

214. See, e.g., 1 CHRIS RODDA, LIARS FOR JESUS: THE RELIGIOUS RIGHT’S ALTERNATE VERSION OF AMERICAN HISTORY 443–47 (2006). The situation was not unlike the use of schools for church services on Sunday morning when not otherwise in use. For an interesting take on this practice, see *Bronx Household of Faith v. Board of Education of New York*, 750 F.3d 184, 189 (2d Cir. 2014) (accepting public buildings can be restricted in use for worship but not by religious groups generally). See also RAGOSTA, *supra* note 1, at 193–98 (Jefferson effectively prevented worship on the grounds at the University of Virginia

in the young Washington D.C., the House was often used for various, religious and non-religious, functions.²¹⁵

Jefferson had made a similar point as a young man, noting that a church receives no special privileges simply because an official is a member:

[E]ach church being free, no one can have jurisdiction over another; no not even when the civil magistrate joins it. [I]t neither acquires the right of the sword by the magistrate's coming to it, nor does it lose the rights of instruction or excommunication by his going from it. [I]t cannot by the accession of any new member acquire jurisdiction over those who do not accede. [H]e brings only himself, having no power to bring others.²¹⁶

In his *Detached Memoranda*, written after he left the White House, Madison took on the same problem. He explained that “[i]n their individual capacities, as distinct from their official station, [officials] might unite in recommendations of any sort whatever; in the same manner as any other individuals might do. But then their recommendations ought to express the true character from which they emanate.”²¹⁷

Jeffersonians in the early republic recognized the distinction. St. George Tucker, in his *View of the Constitution*, explained the position of officials, thus: “They cannot, *as public men*, give [religion] any other assistance [than example]. All, besides, that

during his lifetime but accepted impartially drawn access for religious activities in public facilities as a workable compromise).

215. RAGOSTA, *supra* note 1, at 196–97. After his retirement from the presidency, Jefferson would often attend church services in the Charlottesville Courthouse where, lacking downtown churches, ministers from different denominations rotated who would lead the Sunday service (Baptist, Episcopal, Methodist, Presbyterian). See *Charlottesville and Albemarle County Courthouse Historic District*, NAT'L PARK SERV., <https://www.nps.gov/nr/travel/journey/cha.htm> [perma.cc/T4VN-2MVU] (last visited Feb. 19, 2021). When the effort to build a nonsectarian church failed and several of the ministers decided that they needed their own churches, Jefferson agreed to contribute (although family ties and tradition still weighed on the former president: He gave \$200 to build an Episcopal Church, \$60 for a Presbyterian, and \$20 for a Baptist). THOMAS JEFFERSON, 2 JEFFERSON'S MEMORANDUM BOOKS: ACCOUNTS, WITH LEGAL RECORDS AND MISCELLANY, 1767–1826, 1403 (James A. Bear, Jr., & Lucia C. Stanton eds., 2d ser., 2017).

216. *Notes on Locke and Shaftesbury*, *supra* note 92.

217. See *Detached Memoranda*, *supra* note 179.

has been called a public leading in religion, has done it an essential injury, and produced some of the worst consequences.”²¹⁸ Newspaper commentators took up the same refrain, writing that Jefferson was “disclaiming a right to intermeddle with religion *in his capacity as chief magistrate*.”²¹⁹ Another was even more clear, distinguishing between a “*civil ruler, clothed with temporal power*” from action by the same official “in his *private capacity, as a man*.”²²⁰ “Mr. Jefferson, in his political capacity, *lets [religion] alone . . . is not inclined to intervene with his power,*” but privately “attends public worship.”²²¹ Modern commentators have noted the difference between public performance and public official performance, as have political scientists.²²² It is worth noting that Washington’s Farewell Address also joined this question, with Washington emphasizing that it was not an “official” declaration, rather, the “disinterested warnings of a parting friend.”²²³

Once again, undoubtedly there will be cases in which it may be difficult to draw this line, but that does not mean that the point is invalid. If anything, it means that additional care should be taken by officials to ensure that they are not using their official position to promote religion.

Importantly, the principle is not limited to religious exercise; this same principle was and is at work in the government in other ways, strengthening the argument for applying it in this context. For example, Jefferson was also concerned with the question of whether government officials could, as officials, engage in political activity. Jefferson’s Secretary of Treasury, Albert Gallatin, proposed a circular letter to customs officers (the most numerous

218. ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES: WITH SELECTED WRITINGS* 373 (Liberty Fund 1999) (1803) (quoting RICHARD PRICE, *OBSERVATIONS ON THE AMERICAN REVOLUTION* 35–36 (1785) (emphasis original)).

219. See RAGOSTA, *supra* note 1, at 192 (quoting BRIDGEPORT REPUBLICAN FARMER (Conn.), Oct. 2, 1805).

220. John A. Ragosta, *A Religious Republican and a Republican Religion*, in *JEFFERSONIANS IN POWER: IDEAS IN PRACTICE* 59, 62 (Joanne B. Freeman & Johann M. Neem eds., 2019) (quoting THE WITNESS (Litchfield, Conn.), Oct. 2, 1805).

221. *Id.*

222. See, e.g., Martin Marty, *Getting Beyond “The Myth of Christian America,”* in *NO ESTABLISHMENT OF RELIGION*, *supra* note 17, at 364–65.

223. *Washington’s Farewell Address*, *supra* note 22.

public officials at the time) clarifying this issue and shared a draft with Jefferson.²²⁴ Gallatin wrote:

[W]hilst freedom of opinion, & freedom of suffrage at public elections are considered by the President, as imprescriptible [sic] rights, which, possessing as citizens, you cannot have lost by becoming public officers; he will regard any exercise of official influence to restrain or controul [sic] the same rights in others as injurious to that part of the public administration which is confided to your care, and practically destructive of the fundamental principles of a republican Constitution.²²⁵

Jefferson agreed: “I approve . . . entirely of the two paragraphs on the participation of office, [and] electioneering activity.”²²⁶ This distinction is still observed in key respects today. With respect to political activity, the Hatch Act prohibits political activity by federal officials when acting in an official capacity.²²⁷

A close parallel exists in regard to the right of service men and women to engage in political activity. As with Gallatin’s customs letter, regulations recognize that members of the military can participate in political activity, but they must not use their military position to do so.²²⁸ Thus, they are prohibited from wearing military uniforms when participating in a political activity, e.g., attending a political rally.²²⁹ The same constraint should be

224. See Albert Gallatin, Enclosure: Circular to Customs Collectors (July 20, 1801), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-34-02-0486-0002> [perma.cc/2NKH-FRFF] (last visited Feb 19, 2021).

225. *Id.*

226. Letter from Thomas Jefferson to Albert Gallatin (July 26, 1801), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-34-02-0495> [https://perma.cc/5NEZ-EJAT] (last visited Feb. 19, 2021).

227. See generally The Hatch Act, 5 U.S.C. § 7321–7328. Unfortunately, this law was wantonly ignored by the Trump Administration and should have been enforced. See, e.g., Zach Montague, *What is the Hatch Act? Is Trump Violating It at the R.N.C.?*, N. Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/us/politics/hatch-act-trump-rnc.html> [https://perma.cc/88V8-ESXV].

228. See generally DEP’T OF DEFENSE, DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES (2008), <https://www.fvap.gov/uploads/FVAP/Policies/doddirective134410.pdf> [https://perma.cc/RJ7S-57RL] [hereinafter *DOD Directive*].

229. See *id.* § 4.1.4. Similar restrictions apply in commercial settings to prevent a “military endorsement” of a product. See *id.* Unfortunately, there is a

imposed on service chaplains when not directly officiating voluntary religious services.

In the end, government officials may (or may not) be religious, and their official positions in no way require that they cease being religious or hide their religiosity (or, certainly, that they behave in an areligious manner). Given that fact, it is a canard to argue that separation means that officials cannot or will not behave in a moral manner based upon their personal religious views. Nor is it accurate to argue that a strict separation will undermine the morality of the nation. Jefferson certainly understood this and expected his officials to behave in a virtuous and moral manner. In another relevant context, for example (as noted above), he wrote to Gallatin specifically of government obligations to morality: “The laws of humanity make it a duty for nations, as well as individuals, to succor those who accident and distress have thrown upon them.”²³⁰ For officials, in terms of their personal beliefs and actions, as Seidel explains, “[r]eligiosity is irrelevant; religious people fulfill government roles and offices all the time without abusing those offices to promote or impose their personal religion.”²³¹ At the turn of the twentieth century, a North Carolina court made the point like this:

The beautiful and divine precepts of the Nazarene do influence the conduct of our people and individuals, and are felt in legislation and in every department of activity. They profoundly impress and shape our civilization. But it is by this influence that it acts, and not because it is a part of the organic law, which expressly denies religion any place in the supervision or control of secular affairs.²³²

Thus, one can distinguish the National Prayer Breakfast, a private but public event that political officials often attend, from

similar tendency in the Trump Administration to ignore these restrictions, and on occasion, by Democrats as well. *See* Montague, *supra* note 227. These regulations should be enforced. The services should also prohibit service members from wearing uniforms at church services (unless doing so on base or when necessity requires).

230. Letter from Thomas Jefferson to Albert Gallatin (January 24, 1807), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/99-01-02-4939> [perma.cc/9WHM-9NEG] (last visited Feb. 19, 2021).

231. Seidel, *supra* note 43, at 267.

232. *See, e.g.,* Rodman v. Robinson, 47 S.E. 19, 21 (N.C. 1904).

the National Day of Prayer, an inappropriate proclamation from Congress.

The significance of this point goes beyond the fact that officials should feel no constraints in exercising their personal religion. Rather, it goes to the angst that seems to motivate many of those who are concerned with a separation of church and state. As Jefferson explained to one friend, the claim that he desired “government without religion” was a “slander.”²³³

C. *Government and the Problem of Coercion*

Since government officials do not abandon their religiosity when they join the government, and since the government can engage in ceremonial deism²³⁴ and can accommodate individuals’ religious interests in the “joints” between the Establishment and Free Exercise clauses, it begs the question of whether government action, to violate the Establishment Clause, must be coercive of an individual’s beliefs. Or, perhaps, the question is better put: how coercive must government action be to violate the proscription?

The Supreme Court has spoken in very broad terms about the limitations placed on government action by the First Amendment. The “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”²³⁵ “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”²³⁶ Courts “further agree that the state should neither be able to select a preferred religion (or religions) nor provide financial or political aid to some religions while excluding others.”²³⁷ Sometimes the language used can add unnecessary angst: that the Constitution protects “nonreligion,” Arlin Adams and Charles Emmerich

233. Letter from Thomas Jefferson to DeWitt Clinton, *supra* note 37.

234. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989).

235. *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

236. *Eversen v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

237. *Gunn*, *supra* note 41, at 18–19.

explain, can “more properly [be] understood as connoting the right of an individual to believe or not to believe in religious matters.”²³⁸

Within these broad parameters, the question of coercion has become increasingly a topic of argument among commentators and before the courts.²³⁹ Of course, the most immediate question is what is meant by coercion in this context. Justices Scalia, Thomas, and Gorsuch have argued that what is required for an establishment clause violation is an active government penalty (financial or corporal) or benefit given to religion.²⁴⁰

The breadth of the Scalia/Thomas/Gorsuch argument is breathtaking. If an actual fine or penalty is required, Congress could declare the United States a Christian nation (or Muslim or Jewish or Buddhist), as could states or localities. A large cross (or Jewish star or Muslim star and crescent) could be erected on the top of the White House, Congress, and other government buildings—a result that, thankfully, the majority of the Court

238. ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGIOUS CLAUSES* 70 (1990).

239. See, e.g., Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 936–41 (1986); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131–81 (2003).

240. See, e.g., *Am. Legion v. Am. Humanist Ass’n* 139 S. Ct. 2067, 2096 (2019) (Thomas, J., concurring) (“At the founding, ‘[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.’” (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis removed))); see also *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2263–64 (2020) (Thomas, J., concurring) (same). Thomas and Gorsuch also question the application of the anti-establishment clause to the states based upon a too narrow view of incorporation. See RAGOSTA, *supra* note 1, at 170–80. Their broad attack on the principle of separation of church and state in *Espinoza* is based in large part on the argument that many people who supported separation did so based upon anti-Catholic animus in the mid-nineteenth century. See *Espinoza*, 140 S. Ct. at 2266. While it is true that there was anti-Catholic animus at work in church-state issues in the nineteenth and twentieth centuries, Thomas (and now Gorsuch) continue to ignore the fact that the American principle of separation long predated the circumstances they cite and was not based upon such animus. See RAGOSTA, *supra* note 1, at 165–67. Eighteenth-century evangelical Baptists and Presbyterians, for example, demanded a strict separation of church and state, as did Thomas Jefferson and James Madison and their supporters, based upon philosophical, political, and theological reasons having nothing to do with anti-Catholic animus. See *supra* Part II.

continues expressly to eschew.²⁴¹ The president could issue formal executive orders and declarations urging everyone to attend a particular church, to make a particular prayer, or to support one particular religion. It would not even be clear that government financing of religion would be actionable under this view, as it is not clear that the taxpayer-plaintiff would have faced, in their narrow interpretation, “coercion.”

Of course, it is true, as these justices point out, that such positive coercion would have been considered an establishment in the early American nation. And, as Lupu and Tuttle explained, “[t]he founding generation was highly aware of the horrendous history of religious coercion, so it’s hardly a surprise that the Founders were primarily concerned with eliminating that coercion.”²⁴² But the fact that financial and penal coercion in the context of religion is impermissible does not excuse other actions. Such active, explicit coercion is a sufficient, but not a necessary condition. The early understanding of establishment was not so limited.

The most telling Jeffersonian discussion on this point is the 1808 letter from Jefferson to the Reverend Samuel Miller quoted at length above.²⁴³ Jefferson expressly rejects the idea that for a government edict to violate the Establishment Clause the government must impose “some penalty on those who disregard it . . . of fine [and] imprisonment.”²⁴⁴ Rather, Jefferson recognizes that the First Amendment is intended to prevent the government from “taking sides” in matters of religion.²⁴⁵ Thus, a proclamation

241. *Am. Legion*, 139 S. Ct. at 2106 n.3 (Ginsburg, J., dissenting) (“[I]f Justice GORSUCH is right, three Members of the Court were out of line when they recognized that ‘[t]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.’” (citing *Salazar v. Buono*, 559 U.S. 700, 715 (2010)). See generally *County of Allegheny v. ACLU*, 492 U.S. 573, 606–07 (1989).

242. LUPU & TUTTLE, *supra* note 43, at 142. Lupu and Tuttle also provide an excellent discussion of the apparent contradictions in the four-justice dissent in *County of Allegheny* that rejected the relevance of the fact that government action made some citizens feel like outsiders while agreeing that a county could not erect a large cross on the top of a government building. See *id.* at 150–51.

243. Letter from Thomas Jefferson to Samuel Miller, *supra* note 161; see *supra* notes 205–06 and accompanying text.

244. Letter from Thomas Jefferson to Samuel Miller, *supra* note 161.

245. *Id.*

favoring religion wholly lacking in material penalty could still violate the Constitution by imposing “some degree of proscription perhaps in public opinion.”²⁴⁶ Jefferson concludes that such stigmatization resulting from a government edict does not “make the recommendation the less a *law* of conduct for those to whom it is directed.”²⁴⁷ In other words, if the government action divides the people by effectively taking a position that those who support some religion, or prayer, or religious observance, or religion generally, are superior, more patriotic, better citizens, it has violated the Constitution’s proscription. In essence, Jefferson was saying that any “coercion” need be only psychological; it exists when the

246. *Id.*

247. *See id.* This concern with encouraging division among the American people along religious lines has long been a part of First Amendment jurisprudence. Justices across the spectrum of the Court made this point in *American Legion*. Gorsuch and Thomas referred to “religiously based divisiveness that the Establishment Clause seeks to avoid.” *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2103 (2019) (Thomas, J., concurring) (quoting *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring)). Justices Ginsburg and Sotomayor discussed the point at length:

When the government places its “power, prestige [or] financial support . . . behind a particular religious belief,’ the government’s imprimatur ‘mak[es] adherence to [that] religion relevant . . . to a person’s standing in the political community’ [T]he indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Am. Legion, 139 S. Ct. at 2105 (Ginsburg, J., dissenting) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989)). The Establishment Clause is meant to ensure that “however . . . individuals worship, they will count as full and equal American citizens.” *Id.* at 2113 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 615 (2014) (Kagan, J., dissenting)). Justice O’Connor referred to the danger when government acts on religion so that a minority is made to feel like “outsiders, not full members of the political community.” *County of Allegheny*, 492 U.S. at 625 (1989) (O’Connor, J., concurring in part). As Justice O’Connor explained:

At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

McCreary County v. ACLU, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring); *see also* LUPU & TUTTLE, *supra* note 43, at 246.

government backs a particular religion or religion generally (or irreligion).²⁴⁸

In Madison's *Detached Memoranda*, in rejecting prayer proclamations in spite of the claim that they were materially non-coercive, he emphasized that "An **advisory** Gov[ernmen]t is a contradiction in terms."²⁴⁹ Later, in seeking to explain his own proclamations made under pressure, Madison used language that seemed more equivocal on this point. In writing to Edward Livingston in 1822, the former president began by again denouncing legislative chaplains and national prayer proclamations, but qualified the latter with "so far at least as they have spoken the language of *injunction*, or have lost sight of the equality of *all* Religious Sects in the eye of the Constitution."²⁵⁰ Madison continued:

Whilst I was honored with the Executive Trust, I found it necessary on more than one occasion to follow the example of predecessors. But I was always careful to make the 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. In this sense, I presume, you reserve to the Government a right to *appoint* particular days for religious worship throughout the State; without any particular sanction *enforcing* the worship.²⁵¹

Several years earlier, however, while noting that proclamations were "recommendations only," he still insisted that they were beyond the authority of the government:

Religious proclamations by the Executive recommending thanksgivings [and] fasts are shoots from the same root with the legislative acts [chaplains] reviewed.

248. Letter from Thomas Jefferson to Samuel Miller, *supra* note 161.

249. See *Detached Memoranda*, *supra* note 179 (emphasis original).

250. Letter from James Madison to Edward Livingston, *supra* note 163 (emphasis original).

251. *Id.* (emphasis original).

Altho[ugh] recommendations only, they imply a religious agency, making no part of the trust delegated to political rulers.

The objections to them are . . . that Gov[ernmen]ts ought not to interpose *in relation to those subject to their authority* but in cases where they can do it with effect. An advisory Gov[ernmen]t is a contradiction in terms The members of a Gov[ernmen]t as such can in no sense, be regarded as possessing an advisory trust from their Constituents in their religious capacities They see{m} {to} imply and certainly nourish the erroneous [sic] idea of a **national** religion. Th{is} idea just *as* it related to the Jewish nation under a theocracy, *having been* improperly a{d}opted by so many nations which have embraced [Christia]nity, is too apt to lurk {in?} the bosoms even of Americans, who in general are aware of the disti{nction} between religious & political societies [T]he last & not the least Objection is the liability of the practice, to subserviency to political views; to the scandal of religion, as well as the increase of party animosities.²⁵²

Overall, Madison's view seems to parallel closely Jefferson's conclusion that any requisite coercion need only be implicit, the impact of government "choosing" a religion or religion generally.²⁵³

Significantly, the eighteenth-century evangelicals who played a critical role in the adoption of a Jeffersonian separation also recognized that even a government endorsement was unfairly coercive of the personal free will belief that God desired. John Leland, the great Baptist preacher, explained that receiving government "indulgence, preferment, or even protection" was a form of idolatry by acknowledging a power not of the church.²⁵⁴ Using language not unlike Jefferson's later admonition, Leland made clear that government lacked the power to discourage a person based on religious belief. "[N]or do the legitimate powers of civil government extend so far as to disable, incapacitate, proscribe, or in any way distress in person, property, liberty or life, any man

252. See *Detached Memoranda*, *supra* note 179 (emphasis original).

253. See Letter from James Madison to Edward Livingston, *supra* note 163.

254. LELAND, *supra* note 22, at 106 n*.

who cannot believe and practice in the common road.”²⁵⁵ Baptists from Buckingham County opposed even legislative incorporation of churches, insisting that government needed simply to leave religion alone as “the only way to convince the gazing world, that Disciples do not follow Christ for Loaves, and that Preachers do not preach for Benefices.”²⁵⁶ Government endorsement was neither sought nor appropriate, a broad group of religionists from Amherst County wrote in 1779, noting that they were “Fully Persuaded That the Religion of [Jesus Christ] may and ought to be Committed to the Protection Guidance and Blessing of its Divine Author and needs not the Interposition of any Human Power for its Establishment [and] Support.”²⁵⁷

When the government uses its authority to suggest that good and patriotic Americans should endorse a particular religious view or event, from a Jeffersonian perspective, and with a goal of minimizing religious conflict, this is enough coercion to doom the action constitutionally. This is not unlike the prohibition on members of the military wearing uniforms to political rallies, giving the erroneous, but implicitly coercive, impression that the military has endorsed a particular political candidate.

Other scholars have made similar observations noting the implicit penalty of not conforming to a government “choice” in this area. For example, discussing the Continental Congress’ uses of days of fasting and prayer during the Revolution, Derek Davis notes “[t]hose who failed to observe the fasts were frowned upon by the faithful and often suspected of disloyalty to American interests.”²⁵⁸ While it was argued in *American Humanist* that there was no evidence that over the 100 years the Bladensburg Cross was standing that minorities had been discouraged from objecting because of the apparent government endorsement,²⁵⁹ this tends to

255. *Id.* at 108.

256. H. J. ECKENRODE, *SEPARATION OF CHURCH AND STATE IN VIRGINIA* 119 (1910) (quoting Petition from the Inhabitants of Buckingham County to the General Assembly of the Commonwealth of Virginia (Nov. 1, 1786)).

257. Petition from the Inhabitants of Amherst County to the House of Delegates of the Commonwealth of Virginia (Nov. 1, 1779), <http://www.virginiamemory.com/collections/petitions> [perma.cc/7SKZ-M29V].

258. Davis, *supra* note 100, at 186.

259. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2091 (2019) (Breyer, J., concurring) (noting that “nothing in the record suggests that the

ignore the nature of such implicit coercion. It is also likely to encourage future litigants to look for such evidence and present it in the form of a “Brandeis brief,” further entangling the courts in unnecessary and disruptive factual inquiries concerning religion and implicit coercion.²⁶⁰

More recently, the Court gave important guidance on the issue of religious coercion in the context of exempting religious organizations from employment regulation. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court noted that the First Amendment protects the right of religious organizations to decide matters of faith and that “[s]tate interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.”²⁶¹ In this Free Exercise context, the Court rejected any government attempt “even to influence” such matters.²⁶² This is an excellent statement of the Jeffersonian principle and certainly any effort by the government to endorse religion would be an attempt “to influence” such matters and should properly be understood as inconsistent with the First Amendment. A financial or physical penalty is not required in spite of Justices Thomas, Scalia, and Gorsuch’s efforts to breach the wall of separation.

Significantly, the Court has been particularly solicitous of any coercive force imposed on children, particularly in the context of schools. For example, in *Lee v. Weisman*, Justice Kennedy

lack of public outcry ‘was due to a climate of intimidation.’” (quoting *Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring in judgment))).

260. See John Ragosta, Paul Finkelman & Steven K. Green, *Town prayers: What does the Supreme Court mean by ‘coercion?’* WASH. POST (May 6, 2014), https://www.washingtonpost.com/national/religion/commentary-town-prayers-what-does-the-supreme-court-mean-by-coercion/2014/05/06/0ec41aba-d55c-11e3-8f7d-7786660fff7c_story.html [<https://perma.cc/H6TH-RGED>].

261. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); compare *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., dissenting) (“plac[ing] the government’s weight behind an obvious effort to proselytize on behalf of a particular religion” violates the Establishment Clause), with *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2256 (2020) (“The Free Exercise Clause protects against even ‘indirect coercion,’ and a State ‘punishe[s] the free exercise of religion’ by disqualifying the religious from government aid as Montana did here.” (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (alteration original))).

262. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.

recognized the problem: “The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform.”²⁶³ While it is appropriate for the Court to be particularly concerned with coercion of minors—as was Jefferson, for example in his argument that Bibles should not be used in the schooling of young children²⁶⁴—the same concerns, at least in principle, apply to all citizens. If the “material coercion” test was adopted, it would seriously undermine the argument for a more solicitous protection of children in the Court’s jurisprudence.

It is worth discussing an alternative approach to the First Amendment religion clauses that, to some extent, avoids questions of coercion. In *Secular Government, Religious People*, Lupu and Tuttle suggest that the focus should be on government rather than individuals who might (or might not) be coerced; after all, the First Amendment is fundamentally a restriction on government power.²⁶⁵ This was certainly a point made in the early debates over separation. John Leland explained that “[g]overnment has no more to do with the religious opinions of men, than it has with the

263. *Lee v. Weisman*, 505 U.S. 577, 599 (1992). The Court has distinguished government sponsored prayer for adults (although the Court’s flippant conclusion that adults are “not readily susceptible . . . to peer pressure” is highly suspect):

This case can be distinguished from the conclusions and holding of *Lee v. Weisman* There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. . . . Neither choice represents an unconstitutional imposition as to mature adults who “presumably” are “not readily susceptible to religious indoctrination, or peer pressure.”

Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (citations omitted) (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)); *cf. Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 264–65, 276 (3d Cir. 2011) (Students at school board meetings for presentations “bear several markings of ‘involuntariness’ and the implied coercion that the Court has acknowledged elsewhere.”).

264. See JEFFERSON, *supra* note 63, at 147 (“Instead therefore of putting the Bible and Testament into the hands of the children, at an age when their judgments are not sufficiently matured for religious enquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history.”).

265. LUPU & TUTTLE, *supra* note 43, at 5.

principles of mathematics.”²⁶⁶ Jefferson was equally clear that one should not give government “an authority over religious exercises which the constitution has directly precluded them from.”²⁶⁷

Lupu and Tuttle give *Engel v. Vitale* as an example of the application of their method, arguing that while the lower New York court had found no coercion in the prayer, the Supreme Court instead focused on the government being engaged in the impermissible function of writing a prayer.²⁶⁸ The Court stated emphatically that “it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”²⁶⁹ Yet, the Court went on to explain the problem generated by that type of government activity:

The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, *support or influence* the kinds of prayer the American people can say— that the people’s religions must not be subjected to the pressures of government for change each time a new political administration is elected to office

. . . .

. . . The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.²⁷⁰

266. LELAND, *supra* note 86, at 184.

267. Letter from Thomas Jefferson to Samuel Miller, *supra* note 161.

268. LUPU & TUTTLE, *supra* note 43, at 119–20.

269. *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

270. *Id.* at 429–31 (emphasis added). The mere posting of Ten Commandments in schools would not meet the coercion test (as argued by Justices Scalia, Thomas, and Gorsuch), but be violative under jurisdiction test. See LUPU & TUTTLE, *supra* note 43, at 126.

Two thoughts: First, one of the reasons why government was precluded from acting or talking on these topics is that government speech is almost always inherently coercive; even if our legal analysis should focus more on government action rather than the impact on individuals, certainly it is true that we do not want (and the First Amendment should be seen to prohibit) government coercion in the area of religion.

Second, some might distinguish in this context government action that solicits a response from that which does not. So, for example, it could be argued that a government proclamation of a national day of prayer might be seen as inherently coercive whereas maintenance of a religious symbol previously placed on public ground might not. This is a potentially useful distinction, but one significant problem in the cases dealing with public religious monuments is failure to consider adequately the active expenditure of funds to maintain the monuments.²⁷¹

D. *Religious Exemptions*

Since the founding of the United States, people have sought to have their otherwise illegal activities excused based upon an alleged religious justification. Since adoption of the poorly named Religious Freedom Restoration Act (RFRA) in 1993,²⁷² people are increasingly claiming that their religious freedom gives them a right to ignore laws with which they do not agree. The idea seeming to be that on the “private side” of the wall of separation, religion is a license. Such claims range, for example, from a commercial bakery’s refusal to bake a wedding cake for a gay couple,²⁷³ to

271. This issue has been much discussed in the context of Confederate monuments. See, e.g., Brian Palmer & Seth Freed Wessler, *The Costs of the Confederacy*, *SMITHSONIAN MAGAZINE* (Dec. 2018), <https://www.smithsonianmag.com/history/costs-confederacy-special-report-180970731/> [perma.cc/9Z5U-TMVR]; Steven I. Weiss, *You Won’t Believe What the Government Spends on Confederate Graves*, *ATLANTIC* (July 19, 2013), <https://www.theatlantic.com/politics/archive/2013/07/government-spending-confederate-graves/277931/> [https://perma.cc/27CK-3266] (funding, per se, might not be found to make a monument an illegal establishment if “neutral” funding is applied to existing monuments, but it does increase the problem with the maintenance of religious iconography).

272. 42 U.S.C. § 2000bb (1994).

273. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018).

refusal to rent a wedding space to an inter-racial couple,²⁷⁴ to refusal to provide contraceptive coverage in employee health insurance,²⁷⁵ to refusal to abide by sexual-orientation non-discrimination in foster care.²⁷⁶

Cases of this type are myriad and excessively complicated because of RFRA. I will not seek to survey the ground on religious exemptions here but, rather, will seek to make several historic observations. Jefferson expressly rejected such exemptions from “impartial” laws:

[W]hatsoever is lawful in the Commonwealth, or permitted to the subject in the ordinary way, cannot be forbidden to him for religious uses; [and] whatsoever is prejudicial to the commonwealth in their ordinary uses & therefore prohibited by the laws, ought not to be permitted to churches in their sacred rites. [F]or instance it is unlawful in the ordinary course of things or in a private house to murder a child. [I]t should not be permitted any sect then to sacrifice children: it is ordinarily lawful (or temporally lawful) to kill calves or lambs. [T]hey may therefore be religiously sacrificed, but if the good of the state required a temporary suspension of killing lambs (as during a siege) sacrifices of them may then be rightfully suspended also. [T]his is the true extent of *toleration*.²⁷⁷

Jefferson made this point again in the preamble to the Statute for Establishing Religious Freedom: While “the opinions of men are not the object of civil government, nor under its jurisdiction,” government can intervene when religious “principles break out into overt acts against peace and good order.”²⁷⁸ He repeated the point in discussions with Madison about a possible Bill of Rights: “[t]he

274. Allyson Chiu, *A Mississippi wedding venue rejected an interracial couple, citing ‘Christian belief.’ Facing a backlash, the owner apologized.*, WASH. POST (Sept. 3, 2019, 7:04 AM), <https://www.washingtonpost.com/nation/2019/09/03/mississippi-wedding-venue-rejects-interracial-couple-christian-belief-apologized/> [<https://perma.cc/XTE2-DLFJ>].

275. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

276. *Fulton v. City of Philadelphia*, 922 F. 3d 140, 147 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (Feb. 24, 2020) (19-123).

277. *Notes on Locke and Shaftesbury*, *supra* note 92.

278. *Bill for Establishing Religious Freedom*, *supra* note 60.

declaration that religious faith shall be unpunished, does not give impunity to criminal acts dictated by religious error.”²⁷⁹

Madison joined in the argument. Madison wrote to Edward Livingston that he approved of “the immunity of Religion from Civil Jurisdiction, in every case where it does not trespass on private rights or the public peace.”²⁸⁰ Thomas Cooley, the nineteenth century constitutional scholar, agreed: Religious practice is exempt from government intrusion “so long as the public order is not disturbed.”²⁸¹ Eighteenth-century evangelicals agreed: “Should a man refuse to pay his tribute for the support of government, or any wise disturb the peace and good order of the civil police, he should be punished according to his crime, let his religion be what it will; but when a man is a peaceable subject of state, he should be protected in worshipping the Deity according to the dictates of his own conscience.”²⁸² Of course, laws always addressed circumstances (such as commercial discrimination) when actions tread on “the public peace.”

The Supreme Court’s first religious freedom case also emphatically rejected the doctrine of a religious exemption: “To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”²⁸³ Modern cases, after some hesitation, agreed.²⁸⁴

The scope of this Jeffersonian approach is not so broad as some suggest nor is it an attack on religion. First, legislation determines

279. Letter from Thomas Jefferson to James Madison (July 31, 1788), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-13-02-0335> [perma.cc/77FS-WGFN] (last visited Feb. 19, 2021).

280. Letter from James Madison to Edward Livingston, *supra* note 163.

281. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 467 (2d ed. 1871).

282. JOHN LELAND, *A YANKEE SPY* (1794), *reprinted in* THE WRITINGS OF ELDER JOHN LELAND, *supra* note 22, at 213, 228.

283. *Reynolds v. United States*, 98 U.S. 145, 167 (1878). When confronted with the question of religious-based polygamy, the Court recognized that “[h]owever free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.” *Davis v. Beason*, 133 U.S. 333, 342–43 (1890).

284. *See Emp’t Div. v. Smith*, 494 U.S. 872, 878–82 (1990) (rejecting religious exemptions for “neutral, generally applicable regulatory laws”).

what is a violation of the public order (“peace and good order” to use Jefferson’s term).²⁸⁵ Business owners can discriminate on the basis of race, sexual orientation, religion, gender, or any other criteria until the duly-elected legislature prohibits such discrimination. The law itself must fall within the legitimate authority of government and must not, itself, violate constitutional proscriptions. To use a term that Jefferson used, it must be “impartial regulation” (or what the Court today would say is “neutral”).²⁸⁶ Picking up on Jefferson’s example: If the government, in time of war, prohibits the slaughtering of lambs so as to encourage meat production of sheep, this is a legitimate government regulation, and one cannot claim a religious

285. See *Bill for Establishing Religious Freedom*, *supra* note 60.

286. Jefferson authored the Rockfish Gap Commissioners’ Report that, when adopted by the Virginia House of Delegates, created the University of Virginia. See Ellen Hickman, *Avoiding “The appearance of dictating to the Assembly”: Thomas Jefferson and the Establishment of the University of Virginia, 1818-1819*, in *THE FOUNDING OF THOMAS JEFFERSON’S UNIVERSITY* 95, 95–101 (John A. Ragosta, et al. eds., 2019). Jefferson’s initial draft not only excluded a professor of divinity, even though such a professorship was the practice at other colleges, but it also did not provide for religious services on campus. See Thomas Jefferson, *Draft of the Rockfish Gap Report of the University of Virginia Commissioners*, in 13 *THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES* 189, 189–202 (J. Jefferson Looney, et al. eds., 2018). At the meeting of the Rockfish Gap commissioners, presumably having been encouraged by other commissioners, Jefferson added a clause that a room would be provided for “religious worship, under such impartial regulations as the Visitors shall prescribe, for public examinations, for a library.” See *id.* at 203 n.22. Jefferson and the UVA Board of Visitors later reaffirmed their commitment to impartiality. Meeting Minutes of Univ. of Va. Board of Visitors (October 2, 1820), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-1551> [perma.cc/RYP3-ENTD] (last visited Feb. 19, 2021). Jefferson later returned to the need for impartial regulation in an 1825 letter to the University’s proctor, Arthur Brockenbrough. Letter from Thomas Jefferson to Arthur S. Brockenbrough (April 21, 1825), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-5152> [perma.cc/3TLS-NM6Z] (last visited Feb. 19, 2021). While Jefferson ultimately refused to permit religious services on UVA’s campus during his life, see RAGOSTA *supra* note 1, at 193–98, the standard that he proposed is much like the modern Court’s use of “neutrality” between religion and non-religion, *cf.* *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2280 (2020) (“The Free Exercise Clause . . . ‘protects religious observers against unequal treatment’ and against ‘laws that impose special disabilities on the basis of religious status.’” (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (internal quotation marks and alterations omitted))).

exemption.²⁸⁷ At the same time, the government could not ban Jewish people from slaughtering lambs or ban the slaughtering of lambs for religious purposes as those would not be “impartial regulations.”²⁸⁸ One must be vigilant that laws are neutral before any question of religious exemption arises. The question in the first instance is not whether such laws are a good idea or should survive, but who should be responsible for crafting such laws and limitations.²⁸⁹

Second, the legislature can create an exception or exemption to its own laws that impose requirements that might impinge on individual’s religious exercises. For example, a ban on the use of alcohol might exempt sacramental wine, as the law did during Prohibition. Similarly, a law criminalizing the use of peyote might readily include an exemption for Native American religious practices. Such exceptions can accommodate, but not endorse, religion. The Court has said that such accommodation evidences “play in the joints” between the Establishment and Free Exercise Clauses.²⁹⁰ As Lupu and Tuttle explain:

Whenever the government responds to religious needs as part of a broader class of concerns, the government does not make those religious needs a matter of its own ends or identity. Instead, it recognizes that many of its people will make those concerns a central part of their own life projects.²⁹¹

As with the legislative proscriptions at issue, such exemptions should come from the legislature.²⁹²

287. See *Notes on Locke and Shaftesbury*, *supra* note 92; *supra* note 277 and accompanying text.

288. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993).

289. Justice Scalia, who authored the opinion in *Smith*, was in part making this point. See *Smith*, 494 U.S. 872. Compare Justice Kavanaugh’s plaintive plea in *American Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2092–94 (2019).

290. *Trinity Lutheran*, 137 S. Ct. at 2019.

291. LUPU & TUTTLE, *supra* note 43, at 215.

292. The Supreme Court’s most recent cases, however, draw into question this “play in the joints” between the Establishment Clause and the Free Exercise clause, seeming to require states to always treat religious institutions the same as secular institutions. Cf. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2282 (2020) (Breyer, J., dissenting) (noting that the Court had previously “held that there ‘are some state actions permitted by the Establishment

Most of the modern cases, however, raise questions under a blanket exception or qualification, as in RFRA. Such laws raise broad concerns, in particular unintended consequences. Keep in mind that a court cannot question an individual's claim of religious need, for example, the insistence that a baker's religion prohibits her or him from baking a cake is tenuous and would be strongly challenged by many theologians, but it is not a court's responsibility to do so.²⁹³

Thus, any individual can object to application of any law based upon their own personal religious beliefs and force the government, if it wishes to enforce the law, to show that the law either does not substantially burden that person's religion (as they define it) or serves a compelling government interest and is crafted as narrowly as possible to not infringe on a person's religious exercise. As Jefferson recognized, the broad and undefined application of these exemptions is a prescription for disaster.²⁹⁴ In a "liberal" example, people providing relief to undocumented immigrants have successfully relied upon RFRA.²⁹⁵ Those supporting polygamy can be expected to make similar arguments. One labor lawyer has confided to me his intention to use RFRA to argue that restrictions on labor organizing violate his Marxist religion.

Under RFRA, not only will many practices have to be permitted when justified based upon an alleged religious reason, potentially creating a patchwork of legal enforcement and limiting the solicitous effects of good laws, but an immense amount of court time

Clause but not required by the Free Exercise Clause." (quoting *Locke v. Davey*, 540 U.S. 712, 719 (2004)). While the Court's decision in *Espinoza* benefitted religious education, the same rationale might be used to claim that any legislative religious exemption is, de facto, an establishment.

293. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 714–15 (1981) ("[I]t is not for [courts] to say that the line dr[awn] on a religious belief is 'an unreasonable one.'" (citation omitted)); see also LUPU & TUTTLE, *supra* note 43, at 200 ("[T]he long-standing constraint on judicial evaluation of 'the place of a particular belief in a religion' has remained fully intact." (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989))). Cf. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2365, 2390–91 (2020) (Alito, J., concurring) (although RFRA requires an "honest conviction," "it is not for [courts] to say that their religious beliefs are mistaken or insubstantial" (citations omitted)).

294. See *Bill for Establishing Religious Freedom*, *supra* note 60.

295. See Elana Schor, *Religious freedom law plays key role in migrant-aid case*, ASSOCIATED PRESS (Nov. 29, 2019), <https://apnews.com/article/1c894dedcb744e4f82ad925dbbc8042f> [<https://perma.cc/W4WM-JZ5E>].

will be taken up by issues more properly resolved by a legislature or administrative agency. This type of blanket exception turns decisions that should be made by legislatures over to courts.²⁹⁶

Moreover, with the plethora of cases justifying violations of anti-discrimination laws based on religion, the courts will certainly face renewed arguments that racial and religious discrimination is required by some bigoted plaintiffs' religion.²⁹⁷ While we can anticipate that the courts will find ending racial discrimination a compelling state interest, we can expect a host of litigation on whether legislation intended to end racial discrimination is adequately narrowly tailored. Similar arguments will arise in cases involving discrimination against Jews, Mormons, Muslims, and other religious minorities. Discrimination based on gender, gender-orientation, age, national origin, etc., will likely face similar tests.

CONCLUSION

A fundamental point, worth repeating, is that a strict separation of church and state, in a Jeffersonian voice, is not inconsistent with a vibrant private religion on the "other" side of the wall. Indeed, history demonstrates that it encourages it.

Nor does a separation undermine the morality and virtue of government or its citizens. Nor do government officials have to "check" their religiosity at the door of government service, although they are precluded from using their government position to promote religion.

A renewed commitment to a Jeffersonian separation of church and state would result in citizens, courts, and legislatures recognizing that government efforts to influence religion, even to

296. See John Ragosta, *We can celebrate religious freedom by keeping religion separate from government*, DALL. MORNING NEWS, (Jan. 16, 2020, 2:00 AM), <https://www.dallasnews.com/opinion/commentary/2020/01/16/we-can-celebrate-religious-freedom-by-keeping-religion-separate-from-government/> [<https://perma.cc/5F7X-CN7V>]. In addition, judicial activism on Free Exercise is a strange position to be championed by conservatives who claim to favor judicial restraint.

297. For example, a new, "whites only" church has opened in Minnesota, the Asatru Folk Assembly. John Reinan, *Minnesota town votes to allow white supremacist church*, STAR TRIBUNE (Dec. 10, 2020), <https://www.startribune.com/tiny-minnesota-town-to-vote-today-on-allowing-white-supremacist-church/573344361/> [<https://perma.cc/Q3AE-V6RD>]. Claims of a religious basis for racial discrimination will almost certainly proliferate under the Religious Freedom Restoration Act due to the recent trends in Supreme Court cases.

encourage it generally, serve only to tarnish it, corrupt government, and recklessly divide the American people.