August 7, 2011

The Myth Of Church-State Separation

David E. Steinberg, *Thomas Jefferson School of Law*
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by David E. Steinberg*

Introduction

In the Establishment Clause of the First Amendment,¹ the framers supposedly intended to mandate a separation of church and state. The Supreme Court has treated this statement as a truism.² Given how the Establishment Clause is equated with church-state separation, one finds surprisingly little evidence that the framers intended anything like church-state separation.

This article asserts that the church-state separation interpretation of Establishment Clause history is simply wrong. The framers were focused on the first five words of the amendment, which read: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” The Establishment Clause guaranteed that the federal government would not interfere in state regulation of religion – whatever form that state regulation took. Rather than enacting the Establishment Clause to mandate a separation of church and state, the framers adopted the clause to protect divergent state practices – including state establishment of religion, which continued in several states after the Establishment Clause was enacted. As Thomas Jefferson himself later acknowledged, the Establishment Clause had much in common with the Tenth Amendment, which also protected states’ rights from federal interference.

*Professor, Thomas Jefferson School of Law. B.A., Northwestern University; J.D., Stanford Law School. My thanks to the Thomas Jefferson School of Law, for generous research funding.

¹U.S. Const. amend I.

²See, e.g., Wolman v. Walter, 433 U.S. 229, 236 (1977) (citing ”the wall of separation that must be maintained between church and state” as a basis for striking down some forms of state aid to private religious schools); Engel v. Vitale, 370 U.S. 421, 425 (1962.) (prayer in the public schools “breaches the constitutional wall of separation between Church and State.”).
Part I of this article reviews federal laws and practices at the time when the Establishment Clause was enacted. Part I notes that the prevalence of aid to religion in early America is inconsistent with contentions that the Establishment Clause mandated a separation of church and state.

Part II reviews some of the congressional discussions that resulted in the enactment of the Establishment Clause. Part II concludes that nothing in the legislative history relating to the Establishment Clause suggests that the framers intended to endorse a separation of church and state. To the contrary, this history indicates that by adopting the Establishment Clause, the framers agreed that the federal government would not interfere in state religious regulation.

Part III concludes that with respect to the Establishment Clause, the framers were committed to the principal of federalism. Of the framers, Jefferson has been closely connected with arguments for church-state separation, given his mention in a letter of a “wall of separation between Church & State.”

Although Jefferson wrote about the Establishment Clause on a number of other occasions, none of these writings advocated a policy of church-state separation. Instead, Jefferson wrote that the power to regulate religion must “rest with the States, as far as it can be in any human authority.” In other words, Jefferson viewed the Establishment Clause as endorsing the non-interference principle described in Part II.

After discussing Jefferson’s writings, Part III reviews other statements about the Establishment Clause penned during the framing period. Jefferson’s federalist views of the

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4Letter to the Reverend Samuel Miler (Jan. 23, 1808), in 11 The Writings of Thomas Jefferson 428-30 (Andrew A. Lipscomb ed. 1905),
Establishment Clause were not an aberration. Like Jefferson, other framing era sources largely omit any discussion of church-state separation. Also like Jefferson, framing era sources repeatedly emphasize that the Establishment Clause was adopted to preclude federal interference in state regulation of religion.

Part IV reviews the origins of modern Establishment Clause activism in Everson v. Board of Education. In the Everson majority opinion, Justice Hugo Black concluded that the framers enacted the Establishment Clause to mandate a separation of church and state. Part IV discusses the surprisingly sloppy and inaccurate statement of Establishment Clause history in Everson.

Part V discusses the bitter irony in the modern Supreme Court’s Establishment Clause activism. The framers enacted the Establishment Clause as a shield, to protect state religious regulation from federal interference. However, the Supreme Court has transformed the Establishment Clause into a sword, which gives federal judges the power to meddle in areas traditionally reserved to the states. Through bad history and questionable public policy, the Supreme Court has created an Establishment Clause that is the exact opposite of what the framers intended.

5 330 U.S. 1, 16 (1947).

Early federal laws and practices are entirely inconsistent with the argument that the Establishment Clause mandated the separation of church and state. Just three days after Congress enacted the Establishment Clause, the same Congress approved a salary for a chaplain to lead Congress in prayer. Presidents Washington, Adams, and Madison each established a national holiday for prayer. In addition, a number of early statesmen – including President Washington – spoke of the importance of an active role for religion in public life. In short, the practices and statements of the early federal government were contrary to a separation of church and state.

A. Early Federal Laws and Practices

Thanksgiving Proclamations. The first Congress urged President Washington to proclaim “a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God.”\(^6\) President Washington selected November 26, 1789 as a day of thanksgiving to “offer our prayers and supplications to the Great Lord and Ruler of Nations.”\(^7\) Although Jefferson broke from this practice when he served as


\(^7\)J. Richardson, A Compilation of the Messages and Papers of the Presidents 1789-1897, 64 (1899).
President, both John Adams and James Madison designated special days for Thanksgiving and prayer.\textsuperscript{8}

\textbf{Legislative prayer and military chaplains.} As Christopher Lund has demonstrated,\textsuperscript{9} legislative prayer was a widely recognized practice in early America. The first federal legislative prayer dates from the 1774 meeting of the Continental Congress in Philadelphia.\textsuperscript{10} In the following years, both the house and senate began their sessions with a prayer. By 1789, the practice was so well-established that both houses of Congress appointed chaplains. On September 22, 1789, Congress enacted a statute, setting the chaplains salaries at $500 a year.\textsuperscript{11} This act was passed just three days before Congress reached agreement on the bill of rights – including the Establishment Clause.\textsuperscript{12}

Like legislative prayer, federal support for military chaplains was in place long before Congress adopted the Establishment Clause, and continued after the clause was enacted. In

\textsuperscript{8}John Adams, Proclamation for a National Fast (Mar. 6, 1799) (quoting Proverbs 14:34), reprinted in 9 \textit{The Works of John Adams, Second President of the United States} 172, 173 (1850) (recommending that that Thursday, the twenty-fifth day of April next, be observed, throughout the United States of America, as a day of solemn humiliation, fasting, and prayer); James Madison, A Proclamation, in 1 \textit{A Compilation of the Messages and Papers of the Presidents 1789-1897}, at 513 (James D. Richardson ed. 1899) (noting James Madison's July 9, 1812 Proclamation calling for a day Thanksgiving and prayer).


\textsuperscript{10}Id. at 1177.

\textsuperscript{11}Sept. 22, 1789, ch. 17, 1 Stat. 70-71.

\textsuperscript{12}Marsh v. Chambers, 463 U.S. 783, 786-88 (1983). \textit{See also} Lund, \textit{supra} note /\_\_\_\_/, at 1184.
1775, the Continental Congress approved the first army chaplain. In addition to authorizing legislative prayer, the first Congress enacted a statute that provided for chaplains for the army. The practice of appointing and paying army chaplains has continued up to the present day.

The practice of appointing and compensating chaplains involved the direct financial support of religion by the federal government. If the Establishment Clause required a separation of church and state, such direct federal financing of religion would have been inconsistent with the clause. Nonetheless, the first Congress approved such financial support, without any suggestion that the aid violated the Establishment Clause. This congressional action raises considerable doubt about whether the framers read the Establishment Clause as requiring a separation of church and state.

The Kaskaskia Indian Treaty. In 1803, President Thomas Jefferson proposed a treaty with Kaskaskia Indian Tribe. Jefferson’s proposal would appropriate federal funds to build a Catholic church on the tribe’s lands, and would provide a salary to support a Catholic priest who would tend to the tribe’s spiritual needs. The treaty ultimately ratified by Congress provided: “And whereas the greater part of said tribe have been baptized and received into the Catholic Church, to which they are much attached, the United States will give annually, for seven years, one hundred dollars towards the support of a priest of that religion, who will engage to perform


141 Stat. 222 (1789).

for such tribe the duties of his office, and also to instruct as many of their children as possible, in
the rudiments of literature, and the United States will further give the sum of three hundred
dollars, to assist the said tribe in the erection of a church.”

Notably, this treaty was proposed by President Jefferson. Courts and scholars have long
associated Jefferson as the foremost proponent of the separation of church and state. Yet it was
Jefferson who convinced Congress to fund both the construction of a Catholic Church, and the
funding of a Catholic priest.

References to Religion in the Northwest Territory Ordinance, the Declaration of
Independence and State Constitutions. Outside of the First Amendment, and the Article IV
provision prohibiting religious tests as a qualification for office, the United States Constitution
makes no reference to religion or God. But during the framing period, it was common for
constitutions and official documents to include such references. As Professor Daniel L.
Dreisbach observes: “The Declaration of Independence (1776), the Articles of Confederation


17 See, e.g., Everson v. Board of Education, 330 U.S. 1, 16 (1947) (noting the wall of separation
metaphor, which appeared in a letter written by Jefferson to the Danbury Baptist church). See
also text accompanying notes /____/ infra (Jefferson believed that the Establishment Clause
prohibited regulation of religion by the federal government, rather than mandating a separation
of church and state).

18 Article VI, clause 3 of the Constitution provides in part: “No religious Test shall ever be
required as a Qualification to any Office or public Trust under the United States.” U.S. Const.
art. IV, Clause 3.
(1781), virtually all state constitutions, and other official documents are replete with claims of Christian devotion and supplication to the Supreme Being.”

The Declaration of Independence begins by noting that all persons “are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” During the framing period, state constitutions also commonly referred to god or religion. For example, the Massachusetts Constitution of 1776 declared: “It is the right as well as the duty of all men ... to worship the Supreme Being, the Great Creator and Preserver of the Universe.” The Virginia Constitution of 1776 described religion as “the duty which we owe to our Creator.”

In an enactment much closer in time to the adoption of the First Amendment, the first Congress enacted a charter to govern the Northwest Territory in 1787. Article III of the Northwest Territory Ordinance provided: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”

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20 The Declaration of Independence para. 2.


22 Va. Const. of 1776, Declaration of Rights, art. XVI, reprinted in 7 The Federal and State Constitutions 3814 (Francis N. Thorpe ed., 1909)

23 Northwest Territory Ordinance of 1787, 1 Stat. 50.
government.” One should ask whether these same men, when they adopted the Establishment Clause just a few short years later, now suddenly believed in the separation of church and state.

Conscientious Objector Provision. In 1775, the Continental Congress exempted religious conscientious objectors from service in the Revolutionary War. The conscientious objector provision read: “As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.” During the early years of the Civil War, conscription initially was left to the individual states. However, after the federal government took control of the conscription process, the 1864 draft act exempted members of pacifist religious denominations from military service. That same year, the Confederacy also exempted religious conscientious objectors from conscription.

Many years later, Justice John Harlan, Jr. stated that the conscientious objector provisions violated the Establishment Clause, because these provisions were inconsistent with “the neutrality principle.” Justice Harlan was correct in his observation that the conscientious


26Id.

27Welsh v. United States, 398 U.S. 333, 357 (1970) (Harlan, J., concurring). The Welsh Court attempted to overcome the issue of religious favoritism by extending the conscientious objector statute to any person who “deeply and sincerely holds beliefs that are purely ethical or moral in
objector provisions accorded special treatment to objectors with a religious opposition to war, as opposed to individuals who did not want to fight for other reasons. But contrary to Justice Harlan’s conclusion, no evidence suggests that the framers believed that such a preference for religious motivations violated the Establishment Clause.


An important strand of early American thought asserted that religion was an essential component of what George Washington referred to as “national morality.”28 Those who agreed with Washington on the connection between religious belief and good government have become known as “civic republicans.” John Witte, Jr writes that “consistent with Puritan views, civic republicans sought to imbue the public square with a common religious ethic and ethos -- albeit one less denominationally specific and rigorous than that countenanced by the Puritans.”29 As Witte correctly observes, this civic republican approach was one of many competing views on church-state relationships.30 Nonetheless, the proponents of an active role for religion in government included some of early America’s most prominent statesmen -- Benjamin Franklin, source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time.” Id. at 340.


30See id at 378-88.
George Washington, and John Adams. Given the stature of these civic republicans, their views on the importance of religion to political life cannot be dismissed lightly.

George Washington noted in his farewell address: “Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens.”\(^{31}\) Washington continued: “And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”\(^{32}\)

John Adams made a similar point in his correspondence, writing that the United States Constitution “was made only for a moral and religious people. It is wholly inadequate to the government of any other.”\(^{33}\) Adams continued that government was not “capable of contending with human passions unbridled by morality and religion.”\(^{34}\) Connecticut Senator Oliver Ellsworth described religious institutions as “eminently useful and important” to the new


\(^{32}\)Id.

\(^{33}\)Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (1798), in 9 Life and Works of John Adams 229 (1854).

\(^{34}\)Id.
And Supreme Court Justice Joseph Story observed that “it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects.”

The Civic Republican perspective also was reflected in the Northwest Territory ordinance. As noted above, Article III of the Northwest Territory Ordinance provided that “[r]eligion, morality, and knowledge” were “necessary to good government and the happiness of mankind.”

A separation of church and state would be contrary to the philosophy expressed by these civic republicans. Rather than desiring a separation of church and state, civic republicans viewed religion and morality as essential components of the state. For this reason, assistance and support of religion was a critical state function.

Summary. In the early years of the United States, the actions of the federal government are not consistent with a desire to separate church and state. To the contrary, the federal government endorsed legislative prayer, hired chaplains, built a church and hired a priest for the Kaskaskia Indian Tribe, and spoke of the importance of religion in the Northwest Territory Ordinance. The ordinance was consistent with a broader philosophy of the Civic Republicans,


36 Joseph Story, Commentaries on the Constitution of the United States 723 (1833).

37 Northwest Territory Ordinance of 1787, 1 Stat. 50.
who saw religion as necessary for good government. In short, nothing in the early history of the federal government suggested an intent to separate church and state.

II. The Drafting of the Establishment Clause

A number of other authors have written a detailed, point-by-point description of each event that eventually resulted in the enactment of the Establishment Clause. This section is not intended to duplicate their work. Instead, this section focuses on particularly events in the enactment of the Establishment Clause. These events illustrate that a church-state separation principle was precisely contrary to what the framers intended. Instead, the framers sought to insure that the federal government would not interfere with state regulation of religion.

A. The Anti-Federalists

Congress enacted the Establishment Clause and the other provisions of the bill of rights in response to concerns raised by the anti-federalists. The anti-federalists sought to prevent the formation of a federal government, arguing that states should not ratify the new Constitution. The anti-federalists consistently stressed hat the federal government would exercise tyrannical power, usurping state authority. For example, an anti-federalist who wrote under the pen name “Federal Farmer” wrote “Instead of seeing powers cautiously lodged in the hands of numerous

\[38\text{See, e.g., Thomas J. Curry: The First Freedoms: Church and State in America to the Passage of the First Amendment 198-222 (1986).}\]
legislators, and many magistrates, we see all important power collecting in one centre, where a few men will possess them almost at discretion.”

In their opposition to the Constitution, the anti-federalists emphasized that the federal government would attempt to preempt state regulation of religion. Kurt Lash observes that among the anti-federalists, “the most common objection in regard to congressional power and the subject of religion was that Congress might attempt to regulate that subject as one of its express or implied responsibilities.” As noted by Lash, the criticisms leveled by an anti-federalist writing under the pen name “An Old Whig” were typical: “[I]f a majority of the continental legislature should at any time think fit to establish a form of religion, for the good people of this continent, with all the pains and penalties which in other countries are annexed to the establishment of a national church, what is there in the proposed constitution to hinder their doing so? Nothing; for we have no bill of rights, and every thing therefore is in their power and at their discretion.” Similarly, at the New York ratifying convention, antifederalist Thomas Tredwell wished “that sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing over our consciences by a religious establishment.”


42See, e.g., 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 399 (2d ed. 1836).
Those who sought ratification of the Constitution emphatically emphasized that the document did not give the federal government any authority to regulate religion. For example, when he spoke to the Virginia ratifying convention in 1788, Madison said: “There is not a shadow of right in the general government to intermeddle with religion. Its least interference would be a most flagrant usurpation.”\textsuperscript{43} As noted below, framers such as James Iredell in North Carolina and Edmund Randolph in Virginia repeated Madison’s assertion that the federal government had no power over religion.\textsuperscript{44}

To obtain ratification of the Constitution, the federalists promised to amend the Constitution after the states had ratified the document. Professor Robert Natelson writes that a central purpose of these amendments was to reassure moderates “that the states would retain wide jurisdiction exclusive of the central government.”\textsuperscript{45} Even with this promise, Professor Natelson reports that in several states, that the decision to ratify the Constitution passed by an extremely narrow margin.\textsuperscript{46}

To understand the Establishment Clause, one must understand the context in which the clause was adopted. The Establishment Clause and other provisions of the bill of rights was

\textsuperscript{43} J. Madison, Remarks Before the Virginia Ratifying Convention (June 12, 1788), \textit{reprinted in 5 The Founders Constitution} 88 (P. Kurland & R. Lerner eds. 1987).

\textsuperscript{44} See text accompanying notes /___ / infra.


\textsuperscript{46} For example, Virginia ratified the Constitution by a vote of 89-79. In New York, the votes was 30-27. In New Hampshire, the Constitution was ratified by a vote of 57-47. Robert G. Natelson, \textit{The Original Meaning of the Establishment Clause}, 14 \textit{Wm. & Mary Bill Rights J.} 73, 83 n.52 (2005). See also 13 \textit{The Documentary History of the Ratification of the Constitution} xli - xlili (Merrill Jensen et al. eds., 1976).
adopted to limit federal power, not to extend that power into areas traditionally regulated by the states.

B. The Drafting of the Establishment Clause.

In drafting the bill of rights, Congress sought to reassure uneasy constituents that the federal government would not interfere with state regulation of religion. The original text of what became the Establishment Clause was consistent with this purpose. James Madison’s original version of the First Amendment religion clauses provided: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretense infringed.”

Madison’s draft was changed into the modern religion clauses largely as a result of Representative Fisher Ames, who successfully proposed the following revision to Madison’s language: “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” Much more clearly than Madison’s proposal, Ames’ language focuses on limiting the power of Congress and not the states.

Fisher Ames was a representative of the State of Massachusetts. Ames’ home state continued to enforce laws supporting the dominant Congregational Church for years after Congress enacted the Establishment Clause. To take just one example, the States of

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47 1 Annals of Cong. 434 (Joseph Gales ed. 1834) (emphasis added).

48 Id at 796 (proposal of Fisher Ames, Aug. 20, 1789).
Massachusetts collected “religious assessments” – tax revenues paid directly to the Congregational Church.\textsuperscript{49} This practice continued until 1833.\textsuperscript{50}

To read the Establishment Clause as mandating a separation of church and state would require the assertion that Fisher Ames wanted to require a separation of church and state, even though the state that Ames represented did not practice such a separation. Why would Fisher Ames promote such a constitutional amendment? The more plausible explanation is that Ames – and everyone else in Congress – regarded the Establishment Clause as limiting only the federal government, and not the states. Far from mandating a separation of church and state, the framers enacted the Establishment Clause to preserve diverse state methods of religious regulation – \textit{including state establishments of religion}.

Another exchange during the framers’ discussion of the First Amendment indicates that the amendment was designed to protect state religious establishments, rather than to mandate a separation of church and state. During discussion of the Establishment Clause in the House of Representatives, Madison was questioned about whether the Establishment Clause might prohibit state establishments of particular religions. In response, Madison stated “that the purpose of his amendment was to recognize restrictions on congressional power. He meant to

\textsuperscript{49} Steven K. Green, \textit{Federalism and the Establishment Clause: A Reassessment}, 38 \textit{Creighton L. Rev.} 761, 767 (2005) (“The standing order in Massachusetts, New Hampshire and Connecticut, however, were not convinced and viewed their systems of religious assessments as respecting rights of conscience. More important, they did not associate their systems with ‘religious establishments.’”).

\textsuperscript{50} Philip Hamburger, \textit{Separation of Church and State} 213 (2002).
assure [Congressman] Sylvester and [Congressman] Huntington that the amendment would not abolish state establishments, which seems to have been their fear.”

Throughout the discussions of the Establishment Clause in the First Congress, one searches in vain for any statement that the Establishment Clause was designed to mandate a “wall of separation” between church and state. Instead, the amendment was enacted to insure that the federal government would not interfere with state regulation of religion – regardless of the form of state regulation. The Establishment Clause was cited as a means of protecting diverse state regulations of religion – including state establishments – rather than a proposal for mandating a universal separation of church and state.

III. Establishment Clause Federalism.

Over the past 20 years, federalism has emerged as the central theme in attempts to understand the original understanding of the Establishment Clause. Justice Clarence Thomas has endorsed this federalist interpretation of the original understanding. In a concurring opinion filed in Elk Grove Unified School District v. Newdow, Justice Thomas wrote: “[T]he Establishment Clause is best understood as a federalism provision -- it protects state establishments from federal interference but does not protect any individual right.”

Similarly, Professor Steven D. Smith has asserted that the religion clauses adopted by the first Congress were “purely

53 Id. at 49-50.
jurisdictional in nature.”\(^{54}\) In other words, the framers of the First Amendment adopted the clauses “merely to assign jurisdiction over matters of religion to the states.”\(^{55}\) The framers did not adopt the Establishment Clause to endorse a particular approach to church-state relationships. A number of other commentators have advanced similar readings of the Establishment Clause.\(^{56}\)

These federalist interpretations find strong support in the historical record. A review of the statements and writings by framing era scholars demonstrate that the Establishment Clause was adopted to prevent the federal government from interfering with state religious regulation. The Establishment Clause was agnostic on what method of religious regulation the states should choose.


\(^{55}\)Id at 26.

A. What Separation Of Church And State Meant to Jefferson

The term “separation of church and state” appeared rarely, if at all, in discussions about the Establishment Clause in the First Congress, and in the state ratifying conventions. Yet in his now famous 1802 letter to the Danbury Baptists, Thomas Jefferson wrote: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.”\(^{57}\) Jefferson was a deliberate writer, who chose his words carefully. When Jefferson chose the words “wall of separation between church and state,” what did he mean?

In his book on Jefferson’s metaphor, Daniel L. Dreisbach concludes that Jefferson’s wall was intended to separate the federal government from regulation of religion, which was left to the states. As Dreisbach observes: “There is little evidence to indicate that Jefferson thought the [wall of separation] metaphor encapsulated a universal principle of religious liberty or of the prudential relationships between religion and all civil government (local, state, and federal).”\(^{58}\) Instead, the metaphor “affirmed the policy of federalism.”\(^{59}\)

Throughout his lifetime, Jefferson repeatedly stated his federalist views of the Establishment Clause. In response to the Alien and Sedition Acts of 1798, Jefferson drafted the

\(^{57}\)Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802) in 16 \textit{The Writings of Thomas Jefferson} 281, 281-82 (A. Lipscomb ed., 1904).

\(^{58}\)Daniel L. Dreisbach, \textit{Thomas Jefferson and the Wall of Separation Between Church and State} 70 (2002).

\(^{59}\)Id at 69.
Kentucky Resolutions. Jefferson’s draft states his view of the First Amendment and the Establishment Clause as a federalist provision. The Alien and Sedition Acts were flawed because they regulated speech – a power that the Constitution had reserved for the states. But beyond the acts themselves, Jefferson’s Kentucky Resolutions contained a remarkably clear statement of the Establishment Clause as a federalist provision. Jefferson wrote that the federal government had “no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution . . . . All lawful powers respecting the same did of right remain, and were to the states, or to the people.”

In 1805, Jefferson returned to this federalist theme in his second inaugural address. In the address, Jefferson asserted: “In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general [i.e. federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies.” Once again, the passage provides a clear statement of Jefferson’s federalist interpretation of religions regulation. Religious exercise was “independent of the powers of the federal government,” and could be regulated only by “State or Church authorities.”


61Thomas Jefferson, Second Inaugural Address (Mar. 4 1805), in 3 The Writings of Thomas Jefferson 320, 323 (Andrew A. Lipscomb ed. 1905),
In a January 23, 1808 letter to Rev. Samuel Miller, Jefferson again stated this federalism theme clearly. Jefferson wrote: “I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, disciplines, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion [the First Amendment], but from that also which reserves to the States the powers not delegated to the United States [the Tenth Amendment] . . . . It must then rest with the States, as far as it can be in any human authority.”62 Like the prior statements, this passage treats the First Amendment as a jurisdictional provision that prevents the federal government from “intermeddling with religious institutions.” Any power to legislate with respect to religion must “rest with the states.”

Dreisbach concludes: “Jefferson’s ‘wall,’ like the First Amendment affirmed the policy of federalism. This policy emphasized that all government authority over religious matters was allocated to the states . . . . Insofar as Jefferson’s ‘wall,’ like the First Amendment, was primarily jurisdictional [or structural] in nature, it offered little in the way of a substantive right or universal principle or religious liberty.”63

Under Jefferson’s view, states could regulate religion as they saw fit. A state could demand a complete separation of church and state. Or a state could require that citizens pay assessments to one church, two churches, or the church of their choice. States could mandate

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63Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State 69 (2002).
prayer in public school classrooms, permit prayer in classes, or prohibit prayer altogether. States could fund private religious schools, or withhold such funding.

It was all up to the states. And whatever path a state chose, the federal government was powerless to interfere.

B. Other Federalist Interpretations of the Establishment Clause.

The preceding section focuses on Jefferson’s federalist view of the Establishment Clause, because Jefferson authored the “separation of church and state” metaphor that has proven so influential. However, Jefferson’s federalist views were not unique or idiosyncratic. To the contrary, during the founding period everyone understood that the Establishment Clause was a federalist provision. In other words, the Establishment Clause was enacted in order to prevent federal interference with state regulation of religion, whatever form that regulation took.

After Jefferson, Madison is the framing era figure who receives the most attention in Everson. Justice Rutledge actually attached Madison’s Memorial and Remonstrance Against Religious Assessments as an appendix to his Everson dissent.

Like Jefferson, Madison did not endorse a separationist interpretation of the Establishment Clause. Instead, Madison endorsed the same non-interference principle described by Jefferson. For example, at the Virginia ratifying convention in 1788, Madison said that under
the Constitution, “[t]here is not a shadow of right in the general government to intermeddle with religion.”

When Jefferson published the Kentucky Resolution in 1798, Madison published the Virginia Resolution. Like the Kentucky Resolution, Madison’s resolution relied on the principle of federalism to protest the federal Alien and Sedition Acts. Notably, the Virginia Resolution asserted that the federal government had no power to regulate “the liberty of conscience, and of the press,” because such powers had not been “delegated by the Constitution, and consequently withheld from the [federal] government.” In arguing that the federal government lacked the power to regulate the press, the Virginia Resolution relied on the premise that the federal government lacked any power to interfere with the regulation of religion in the individual states. Madison wrote: “Any construction or argument, then, which would turn the amendment into a grant or acknowledgment of power, with respect to the press, might be equally applied to the freedom of religion.”

According to the Virginia Resolution, the federal government clearly lacked such power to regulate religion.

Like Jefferson and Madison, other framers endorsed the non-interference principle. In their view, the individual states had plenary power to determine church-state relationships. The First Amendment guaranteed that the federal government would not interfere in whatever arrangements the states made. For example, consider James Iredell’s statement before the North Carolina ratifying convention: “Had Congress undertaken to guarantee religious freedom, or any

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64 J. Madison, Remarks Before the Virginia Ratifying Convention (June 12, 1788), reprinted in 5 The Founders' Constitution 88 (P. Kurland & R. Lerner eds. 1987).

65 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 577 (Jonathan Elliot ed., 2d ed. 1836)
particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. *Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.*”66 During Virginia’s ratification convention, Governor Edmund Randolph stated that under the Constitution, “no power is given expressly to Congress over religion.”67

In his treatise on the Constitution, Joseph Story noted the framers’ views that all power to regulate religion remained exclusively with the states. Story wrote: “[T]he whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.”68 Similarly, William Rawle wrote in 1829: “The first amendment prohibits congress from passing any law respecting an establishment of religion; or preventing the free exercise of it. It would be difficult to conceive on what possible construction of the Constitution such a power could ever be claimed by congress.”69

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66 Debate in North Carolina Ratifying Convention (July 30, 1788) [hereinafter Debate in North Carolina], reprinted in 5 The Founders’ Constitution 90 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

67 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 204 (Jonathan Elliot ed., 2d ed. 1836).


C. Was Federal Support For Religion Consistent With Federalism?

With the enactment of the Establishment Clause, the framers seemed to agree with James Madison’s 1788 statement before the Virginia ratifying convention, where Madison asserted: “There is not a shadow of right in the general government to intermeddle with religion. Its least interference would be a most flagrant usurption.” But at the same time, the federal government designated holidays for prayer, authorized legislative prayer, appointed and compensated chaplains, and engaged in other acts designed to endorse and support religion. If the federal government lacked the power to “intermeddle with religion,” how did the government have the authority to enact these measures that supported religion?

At one point, Thomas Jefferson suggested that the federal government lacked such authority. Unlike Presidents Washington and Adams before him and President Madison after him, Jefferson refused to issue Thanksgiving proclamations. In his 1808 letter to Reverend Samuel Miller, Jefferson explained that he refused to issue these proclamations because the Constitution prohibited the federal government “from intermeddling with religious institutions, their doctrines, disciplines, or exercises.” Whether Jefferson in fact consistently viewed the Constitution as completely prohibiting any federal action in support of religion is debatable. As noted above, in 1803 Jefferson had endorsed a treaty with Kaskaskia Indian Tribe that authorized the use of federal funds to finance the construction of a church on the tribe’s land, and to

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70 J. Madison, Remarks Before the Virginia Ratifying Convention (June 12, 1788), reprinted in 5 The Founders Constitution 888 (P. Kurland & R. Lerner eds. 1987).

compensate a Catholic priest for the tribe.\textsuperscript{72} This treaty suggests that in Jefferson’s view, the federal government could support religion without running afoul of the Establishment Clause.

Even if Jefferson in fact read the Establishment Clause as mandating a complete prohibition on federal support for religion, the other framers seemed to agree on a less restrictive reading of the clause. Consistent with the many statements quoted above, the Establishment Clause prohibited the federal government from interfering with any state’s regulation of religion.\textsuperscript{73} However, this did not mean that the federal government was categorically prohibited from legislating with respect to religion. The federal government could aid religion, \textit{as long as this aid did not interfere with state religious regulation}.

Reviewing the federal support of religion described in Part I, none of these federal actions conflicted with state religious regulation.\textsuperscript{74} Authorizing prayers before meetings of the federal Congress, and appointing chaplains for the federal army would not conflict with state religious regulation. Similarly, funding a church and priest for the Kaskaskia Indian Tribe would not conflict with state religious regulation, because the tribe was outside the states’ jurisdiction.

Of the early federal initiatives relating to religion, the days of prayer proclaimed by early presidents were the only federal enactments that might possibly infringe on state authority. But because all of the American states continued to endorse religion and prayer as a positive force, it is hard to see how a day of prayer would interfere with state religious regulation. At least this

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seems to have been the judgments of Presidents Washington Adams, and Madison – who all issued Thanksgiving resolutions.

The federal government thus could aid religion, even though the Constitution left religious regulation exclusively to the states. Federal aid to religion was acceptable, as long as any such aid did not interfere with religious regulation enacted by state legislatures.

IV. Everson v. Board of Education: The Origins of Establishment Clause Distortion

In Everson v. Board of Education, the Supreme Court laid the foundation of modern Establishment Clause doctrine – including the emphasis on a “separation of church and state.” As discussed above, the framers intended that the Establishment Clause would operate as a shield, insulating state regulation of religion from the federal government. Beginning with Everson, modern doctrine has effectively stood the Establishment Clause on its head. Everson and other modern Establishment Clause cases effectively have turned the Establishment Clause into sword, authorizing the federal government to interfere in areas traditionally left to the states. Everson dealt with a New Jersey statute, which required local school boards to reimburse private school students for the cost of bus transportation to school. Justice Black’s majority opinion claimed to review the history of the Establishment Clause. However, most of Justice Black’s historical review did not examine the Establishment Clause itself. Instead, Justice Black

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76Id at 3 n.1.
focused on the successful battle to end religious assessments in the State of Virginia. This was a serious error.

According to the *Everson* majority, the dispute about the proper relationship between church and state “reached its dramatic climax in Virginia in 1785-86, when the legislative body was about to renew Virginia’s tax levy for the support of the established church.” The Court noted that Thomas Jefferson and James Madison “led the fight against this tax.” The *Everson* majority further noted Madison’s *Memorial and Remonstrance Against Religious Assessments*, where Madison purportedly argued “that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.”

The Court continued that the Virginia legislature not only declined to renew the tax levy, but also enacted Jefferson’s Bill for Religious Liberty. The *Everson* Court then quoted Jefferson’s bill: “That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief.”

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77 *Id.* at 11-12.
78 *Id.* at 12.
79 *Id.*
80 *Id.*
81 *Id.* at 12–13.
The Court’s myopic focus on Virginia was odd. In *Everson*, the Justices were interpreting the federal Establishment Clause, not the Virginia Bill for Religious Liberty. This perplexing focus on the events in Virginia led the Court to make a serious error, which would distort the development of Establishment Clause law to the present day. Writing for the majority, Justice Black now asserted: “This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”

The goals of Jefferson and Madison in advocating the Virginia Bill for Religion Liberty, and their goals in advocating the First Amendment were entirely different. In the Virginia Bill for Religious Liberty, Jefferson and Madison were advocating an approach for the single State of Virginia to a single problem – assessments collected by the state, and paid to the dominant Anglican church. In the First Amendment, the framers were attempting to define the proper relationship between the federal government and the states. This First Amendment was a complicated project, because the 13 states had developed several different approaches to the relationship between church and state. To say that Madison and Jefferson had “the same objective” in drafting the Virginia Bill for Religious Freedom and the First Amendment was simply wrong.

While Jefferson and Madison clearly played a privotal role in the enactment of the United States Constitution and the First Amendment, Justice Black’s myopic *Everson* focus on Jefferson and Madison renders his historical account incomplete and inaccurate. For example, Justice

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82*Id*, at 13.
Black completely ignores George Washington’s Farewell Address, where Washington advocated the importance of religion in public life. While Madison and Jefferson were important framers, they were not the only framers.

Even with respect to the views of Madison and Jefferson, Justice Black’s account is seriously misleading. Robert Cord writes that after reading the Everson decision, “one might come to the conclusion that Madison and Jefferson fought the battle for religious freedom in Virginia, wrote a few letters on the subject, and then retired.” Justice Black’s majority opinion fails to mention any of the federalist writings by Jefferson and Madison. The Everson opinion completely omits any discussion of the Kentucky and Virginia resolutions, even though scholars always have treated these resolutions as some of the most important political documents in the early United States. Either Justice Black was unaware of the resolutions or – worse yet – deliberately declined to discuss the resolutions, because such a discussion would undermine Justice Black’s church-state separation principle.

While the Everson majority opinion spent considerable time discussing the Virginia dispute on religious assessments, Justice Black entirely ignores the development and adoption of the federal Establishment Clause, even though this is the provision at issue in Everson. As Robert Cord writes: “The Everson opinion is devoid of any attempt to explore the actions and debates of the First Congress which proposed to the States what became the First Amendment.” Obviously, this was a serious omission. For example, the Everson Court entirely ignores the


84 Id at 121.
house discussion of the First Amendment, where Madison assured Representative Sylvester and Representative Huntington that the Establishment Clause “would not abolish state establishments.”\textsuperscript{85} This discussion is yet another piece of critical evidence that is not mentioned by the \textit{Everson} Court.

Given these wholesale omissions, it is not surprising that Justice Black’s discussion of Establishment Clause history is inaccurate, and even misleading. Consider Justice Black’s concluding statement about the history of the Establishment Clause: “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”\textsuperscript{86} Justice Black continued: “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”\textsuperscript{87}

Much of this statement is demonstrably wrong. Consider Justice Black’s statement that “neither a State nor the Federal Government” could pass laws that “aid all religions.” This article has presented a list of examples where the federal government \textit{did} aid religion – including Thanksgiving proclamations, legislative prayer, the conscientious objector provision, and land grants to churches.

\textsuperscript{85} \textit{Annals of Cong.}, 757-79 (Joseph Gales ed. 1834).

\textsuperscript{86} \textit{Everson v. Board of Education}, 330 U.S. 1, 15-16 (1947).

\textsuperscript{87} \textit{Id.} at 16.
Also, when the Establishment Clause was adopted, several states maintained established churches. If the Establishment Clause really did provide that a state could not aid religion, then the representatives from those states never would have voted for an amendment that outlawed their state’s practices. To the contrary, one of the key proponents of the First Amendment was Fisher Ames, whose home state of Massachusetts collected tax assessments to support the dominant Congregational Church. Justice Black’s account of history also ignores Madison’s own statement during the house debates, that the Establishment Clause “would not abolish state establishments.” This statement directly contradicts Justice Black’s claim that under the Establishment Clause, states could not aid religion.

As a historical account, Justice Black’s Everson majority opinion is an abject failure. But given the multitude of errors, one suspect’s that this opinion never really was about a faithful rendition of the original understanding of the Establishment Clause. Instead, the opinion was about reshaping history for another purpose.

The Everson opinion was all about power. Justice Black and his colleagues saw the Establishment Clause as a means for the federal courts to exercise dominion over areas where the Court previously had lacked jurisdiction or authority. Indeed, decisions since Everson have used

88 Connecticut did not eliminate its established church until 1818, New Hampshire eliminated its established church in 1819, and Massachusetts in 1833. Cord, supra note /___/, at 4.

89 1 Annals of Cong. 757-79 (Joseph Gales ed. 1834).

90 Ultimately, the Everson Court upheld the New Jersey bus reimbursement statute. Everson v. Board of Education, 330 U.S. 1, 17 (1947) To decide this case, the Court need only have issued a brief opinion concluding that the New Jersey statute was constitutional. In the final analysis, Justice Black’s extended discourse about the Establishment Clause was nothing more than dicta.
the Establishment Clause as means for federal courts to intrude into a variety of areas previously reserved for the states. Federal courts have cited the Establishment Clause as a means of regulating private school funding, public school curriculum and events, religious symbols, and miscellaneous issues that have arisen out of state religious regulation.

The Court’s intervention in state affairs reached a particularly low point in *Epperson v. Arkansas*. In *Epperson*, the Court invalidated an Arkansas law that prohibited public school instructors from teaching the evolutionary account of man's origins. The law intended to promote teaching creationism, or the biblical account of man’s origins.

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92 *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (a prayer at a graduation ceremony violated the Establishment Clause); Epperson v. Arkansas, 393 U.S. 97 (1968) (a law mandating that public schools cannot teach evolution violated the Establishment Clause).

93 *Compare* McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) (a ten commandments display in a courthouse violated the Establishment Clause) *with* Van Orden v. Perry, 545 U.S. 677 (2005) (a ten commandments display at the Texas state capital did not violate the Establishment Clause).

94 *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985) (a state law that gave employees the right to refuse work on their sabbath violated the Establishment Clause); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (creating a public school district that coincided with the neighborhood boundaries of a religious sect violated the Establishment Clause).

95 393 U.S. 97 (1968).
The Epperson Court wrote that the anti-evolution law violated the Establishment Clause, because the law wasn’t “neutral.” The Justices wrote that Government “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.”

Of course, the anti-evolution law wasn’t “neutral.” But any regulation specifying school curriculum won’t be neutral. For example, laws requiring that students learn basic science and scientific methods aren’t “neutral.” Religious believers may view such courses as improperly elevating empirical testing as the basis for wisdom, as opposed to the importance of belief based on faith. Similarly, one might object to a curriculum that required (or prohibited) Ernest Hemingway’s classic short novel The Old Man and the Sea, given the explicit religious symbolism used throughout the book. But given the popularity of both Hemingway and this book, no court has held that Old Man and The Sea amounts to an establishment of religion.

Epperson involved the specter of federal intervention in its most heavy-handed and distasteful form. While the Justices cited the Establishment Clause as authority for their

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96 See id at 104.

97 Id.

98 Hemingway’s short novel remains a popular work of literature, commonly assigned in high school courses. See Ernest Hemingway, The Old Man and the Sea (1952) Hemingway’s novel is about an old and unsuccessful fisherman who catches a huge marlin, only to have the fish devoured by sharks as he sails home. Religious symbolism is prominent throughout the book. The fisherman is named “Santiago” – Spanish for saint. When he returns home exhausted, Santiago struggles to carry his ship’s mast to his shack – much as Christ carried the cross to his crucifixion. And when Santiago sees the sharks coming for the malin, Hemingway’s book reads: "‘Ay,’ he said aloud. There is no translation for this word and perhaps it is just a noise such as a man might make, involuntarily, feeling the nail go through his hands and into the wood.” Id at 107.
objections to teaching creationism over evolution, this was clearly a pretext for federal judges who simply didn’t accept the plausibility of a creationist account of man’s origins. In *Epperson*, the Justices seemed to be dictating to the Arkansas legislature how to run the state’s schools.

The Establishment Clause activism in cases like *Everson* and *Epperson* represents a bitter irony. The Establishment Clause was enacted to insulate state religious regulation from the federal government. Yet in *Epperson*, the United States Court used the Establishment Clause – a provisions designed to protect state decisions from federal interference – as a basis for overturning a state legislative decision regarding school curriculum.

Modern Establishment Clause cases have literally turned the clause on its head. The Establishment Clause was meant as a shield, to protect state religious regulation. But the Supreme Court has transformed the Establishment Clause into a sword, precisely for the purpose of overturning these state decisions.

**Conclusion**

A review of early American history demonstrates that the framers did not intend a separation of church and state. The federal government appointed and compensated chaplains and priests, authorized legislative prayers, issued Thanksgiving proclamations, and endorsed many other measures intended to support religions.

When the framers enacted the First Amendment clause prohibiting an “establishment of religion,” what did they mean? Madison’s first draft of the First Amendment is instructive. This draft provided: “The civil rights of none shall be abridged on account of religious belief or
worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."\(^99\) As indicated by the subsequent remarks of Jefferson, Madison, and others, the Establishment Clause that eventually found its way into the First Amendment adopted this federalism principle. The federal government had no power to intrude on state regulation of religions institutions, whatever form the state regulations might take. Regardless of whether states enacted a no-aid policy, or provided generous preferential aid to a single state-established church, the federal government was powerless to interfere.

During the framing period, no one believed that the Establishment Clause imposed a “wall of separation” between church and state. The Establishment Clause was not designed to isolate state governments from religion. Rather, Jefferson’s metaphorical wall was designed to protect state regulation of religion from interference by the federal government. In other words, the Establishment Clause was a shield, designed to protect the states from the federal government. Paradoxically, the Supreme Court has used the Establishment Clause as a sword, to strike down state laws regulating religion. In these decisions, the Court has turned the Establishment Clause on its head.

The concept of “separation of church and state” is an entirely artificial construct, having no basis in the language or history of the Establishment Clause. Nonetheless, the so-called “church state separation principle” has served a purpose for the Supreme Court. The Court has

used this metaphor as a basis for regulating state aid to private schools, religion in the public schools, religious symbols, and other controversies.

Perhaps the Court can justify such decision by invoking public policy – although the wisdom of such second-guessing of discretionary legislative decisions is highly problematic. However, it is not possible to justify the Court’s intervention based on a historical church-state separation principle. No such historical principle exists.

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