Public Education and the Public Good

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I. INTRODUCTION

The year 1995 has brought a new leadership to the United States House of Representatives that appears poised to initiate actions calculated to amend the Religion Clauses of the First Amendment and to offer legislation authorizing some form of vouchers for parents to send children to private schools.¹ That agenda, announced by Speaker Newt Gingrich, threatens the fundamental principles of religious non-establishment and freedom espoused by our eighteenth-century Founders, promotes a degradation of the nation’s public schools, and bodes ill for any sense of national identity that transcends narrow sectarian divisions.

The new power in Washington espouses a general contempt for government and for career politicians. This contempt contrasts sharply with the views of the Founders whom Mr. Gingrich is so fond of quoting and recommending for winter reading. James Madison was a consummate practitioner of the art of politics. Government was a genuine craft for the architect of the Bill of Rights. As we listen to those current residents of the District of Columbia who sneer at the government, a democracy that has been our guiding star for more than 200 years, one might well ponder words from one of Virginia’s political leaders, Edmund Pendleton, who in a letter to Madison urging the latter’s election to the 1788 Virginia Ratification Convention wrote:

[I]t is exceedingly difficult, indeed impossible, to make the good people at large well Acquainted with the different forms & combinations of Power necessary to constitute Government for the protection of liberty and property: and hence they are exposed to impositions from designing men, and particularly Of those in Opposition to Government, who have the popular side, and by decrying powers as dangerous to

¹ The Sayings of Speaker Gingrich; The House Leader on Teen Pregnancy, Bad Schools, Volunteerism and Saving the City, WASH. POST, Feb. 5, 1995, at C4.
liberty, will include indiscriminately, such as are unavoidable to good Government, with those that are really hurtful. . . .

Mindful of the new mood in Congress, this Article will: (1) examine the historical roots of the First Amendment; (2) explore some highlights of the fifty-five years of judicial decisions since Cantwell v. Connecticut concerning the Religion Clauses; (3) expose the myths that have been fabricated by persons wishing to undermine both eighteenth-century history and Supreme Court precedent regarding establishment of religion and free exercise thereof; and (4) in the name of the public good engage the current advocates of vouchers and organized public school prayer with a reasoned argument against their positions.

II. ARCHITECT OF THE RELIGION CLAUSES: JAMES MADISON

Little in the early history of British colonial settlement of North America seemed a harbinger for religious freedom in the “new world.” Even as James I persecuted English citizens for their departure from Anglican orthodoxy in 1607, the settlers of Jamestown established the Church of England in the colony of Virginia. So thoroughly did that establishment become ingrained in Virginia that a century and a half later Presbyterians found themselves objects of restrictive colonial action. The New England colonies of the 1620s brought variations of religious establishment, more lenient in Plymouth (Separatists), more restrictive in Massachusetts Bay (Puritans). Another form of establishment emerged in Maryland, broader in conception, but still Christian. The liberal spirit of New Jersey and Pennsylvania maintained toleration as an operating principle; it was limited, however, as suggested by William Penn’s Frame of Government, to providing full rights only to all citizens “who profess to believe in Jesus Christ.”

Penn’s ideas were consistent with principles espoused by John Locke in his Letters of Toleration. Locke supported a national church, comprehen-

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3 310 U.S. 296 (1940) (holding that states could regulate the time, place, and manner of religious solicitations only if such regulations were general and non-discriminatory).
5 ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 7 (1964).
7 STOKES & PFEFFER, supra note 5, at 5.
8 Id. at 7.
9 Id. at 18.
10 Alexander Campbell Fraser, John Locke, in THE ENCYCLOPAEDIA BRITANNICA
sive in creed. As Locke scholar A.C. Fraser observed:

He had no objection to a national establishment of religion, provided that it was comprehensive enough, and was really the nation organized to promote goodness; not to protect the metaphysical subtleties of sectarian theologians. The recall of the national religion to the simplicity of the gospels would, he hoped, make toleration of nonconformists unnecessary, as few would then remain.11

Locke refused any idea of toleration for atheists because “the taking away of God dissolves all.”12

Locke’s views should not be confused, though they almost invariably are, with “free exercise of religion,” a concept espoused in seventeenth-century America almost exclusively in Rhode Island under the leadership of Roger Williams and John Clarke. The latter wrote in 1662 that Rhode Island wished “to be permitted to hold forth in a lively experiment that a flourishing civil state may stand, yea, and best be maintained, and that among English spirits, with a full liberty of religious concernments.”13

Williams based his endorsement of religious freedom on his Christian theology. He believed that coercion in matters of belief was offensive to God and that such conversions were neither efficacious nor in the spirit of Christ.14 He insisted that there was a proper distinction between sacred and secular.15 Further, he believed that coercion by the state should only be in the arena of the secular.16 After Williams died in 1681, Rhode Island reverted to a form of Protestant establishment similar to its neighbors.17

In 1689, England came to terms with its Protestant religious diversity via William and Mary and the Act of Toleration.18 England resolved its most dangerous conflicts with a mild establishment of Anglicanism and broad tolerance of all other Protestants. But because the confrontations in England involved a sole central government to which all religious believers were presumed loyal, the resolution of 1689 resulted from a century and a half of struggle, persecution, war, and negotiation focused upon a single so-

848 (11th ed. 1911).

11 Id.
12 Id.
13 John Clark, in 1 APPLETON’S CYCLOPEDIA OF AMERICAN BIOGRAPHY 634 (James G. Wilson & John Fiske eds., 1888); see also STOKES & PFEEFFER, supra note 5, at 18.
14 STOKES & PFEEFFER, supra note 5, at 13-18.
15 Id.
16 Id.
17 Id.
18 Id. at 3.
olution: a tolerant Protestant establishment. In contrast, each of the colonies became an administrative entity with, in every instance, an established religion of some kind. Whether narrowly Anglican or Puritan, or more broadly tolerant in the Separatist or Quaker mold, the same type of struggle that took place in a united England emerged thirteen times over in the colonies with quite different results. Thus the Parliament’s “Act of Toleration” meant a completely different thing in New Jersey than it did in eighteenth-century Virginia. There was never “an” establishment common to all colonies.

By the second decade of the eighteenth century, religious fervor among Presbyterians created what has come to be known as the Great Awakening. Beginning in the middle colonies, it spread first north to New England where it fell on hard soil, and then to the South, a far more receptive area. The Awakening would create a unique American religious tradition of the Protestant persuasion, ultimately extremely loyal to the cause of revolution. The movement was a significant influence in the spread of toleration among the colonies, at least the tolerance of various Protestant alternatives. Nevertheless, as the Revolution approached, the colonies remained committed to religious establishment along the lines defined by Locke. As commerce and communication among the colonies became more and more the rule, the bonds among the white, English Protestants of whatever theology became stronger than any that persisted in relation to the mother country.

One of the first evidences of theology in service to the emerging independent governments of the colonies came in the French and Indian War. Haranguing his parishioners with anti-papal sentiments and Protestant pride, the Reverend Mr. Samuel Davies became one of the best recruiting officers for the militia in Virginia. A Presbyterian, Davies lived in his adopted colony for twelve years from 1747 to 1759. In that period he became a prime illustration of changing attitudes. Davies respected the established Anglican Church, but he insisted that Virginia law be made consistent with the Parliament’s Act of Toleration. He objected to colonial officials arbitrarily denying him and his colleagues licenses to preach. His success and the growing variety of Protestants in all the colonies made his struggle a foregone success. By the time he left Virginia in 1759, begrudging Protestant toleration had begun in one of the most rigid of the thirteen colonies.

20 Id. at 36-37.
21 Id. at 265-80.
22 Id. at 314-30.
23 Id. at 263.
24 Alley, supra note 6, at 132-34.
25 Id.
26 Id. at 107.
By the early 1760s Baptists moved in ever larger numbers into Virginia. One segment of that sect rejected the authority of the state to issue preaching licenses, thereby creating a bitter conflict with colonial officials. A goodly number of Baptist clergy were imprisoned in that decade and the next for their refusal to obtain licenses before preaching. There existed no body of political thought capable of cutting through this conflict with advanced principles that would extend beyond toleration.

It was at this point in history that James Madison entered the picture. As public servant, legislator, and confidant of other giants of the early days of the Republic, Mr. Madison was the consummate American citizen. None has shone more brightly before or since. An examination of the already extensive new edition of James Madison's Papers reveals that the range of his interests was remarkable and his concentration on the art of government was stunning. A very small portion of the Madison material relates to freedom of religion, but it was the subject that first excited him to political action and to which he returned in his last years with a ringing endorsement of the American experiment in religious freedom. He, like Jefferson, considered his efforts in that area of primary importance.

Ralph Ketcham correctly notes that "when Madison went to the middle colonies and to the Presbyterian stronghold at Princeton [then The College of New Jersey], he placed himself at the center of the English dissenting tradition in North America." Madison, however, did not gain from that exposure explicit rejection of all forms of establishment. It was his genius that moved him from those early influences supporting a liberal form of toleration to a grander concept, religious liberty.

In 1772, when Madison returned from Princeton to his home at Montpelier, he entered into correspondence with his close friend, William Bradford of Philadelphia. A year later, he offered serious advice to his friend about choosing a profession. On December 1, 1773, Madison learned that Bradford had chosen the law. At this point we come upon Madison's first ref-

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28 It is interesting that President Clinton took the Sunday before his inauguration to meet with the congregation of the Culpeper Baptist Church, located in the town where several preachers were imprisoned. Leonard Hughes, History Comes to Culpeper: Clinton Visit Sets Quiet Town in Motion, WASH. POST, Jan. 21, 1993, at VI.
29 SEMPLE, supra note 27, at 30.
33 Letter from James Madison to William Bradford (Dec. 1, 1773), in 1 THE PAPERS
ference to a serious political interest. He asked Bradford for a draft of the Pennsylvania Constitution, "particularly the extent of your religious Toleration."34 One can feel Madison come alive as he asks: "Is an Ecclesiastical Establishment absolutely necessary to support civil society in a supreme Government? & how far is it hurtful to a dependant State?"35 Something was at work on the young man. On January 24, 1774, he wrote again to Bradford: "Ecclesiastical Establishments tend to great ignorance and Corruption all of which facilitate the Execution of mischievous Projects."36 He referred to the problems of pride, ignorance, and vice before asserting:

This is bad enough But It is not the worst I have to tell you. 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. So I [leave you] to pity me and pray for Liberty of Conscience [to revive among us.]37

By April of 1774, Madison was writing about the "rights of Conscience."38 Madison's vexation appears to have raised him from his lethargy. He had a cause that ignited him. In two consecutive letters we find him moving from tentative commitment to a theory of toleration to his basic life-long espousal of the principle of liberty of conscience. There is little doubt that

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34 Id. at 101.
35 Id.
37 Id. at 106 (footnotes omitted). The brackets indicate words illegible in the original. They were taken from William Bradford's copybook version. It is not made clear in this correspondence exactly what was taking place in Madison's own county of Orange, but later references make it clear that he was occupied with the cause of freedom in Orange. The editors confirm Madison's motivation. They note, "[a]pparently it was religious issues, more than tax and trade regulation disputes with England, which were rapidly luring JM away from his beloved studies and arousing his interest in contemporary politics." Id. at 107 n.9.
38 Letter from James Madison to William Bradford (Apr. 1, 1774), in 1 THE PAPERS OF JAMES MADISON, supra note 32, at 111, 112.
Madison, in the few months that transpired between the two letters to his friend, had answered his own question about establishment and moved to a new level beyond toleration.

The word toleration has a sweet ring in modern America. It denotes a sense of justice and respect for differing views. We urge our children to retain that natural spirit of tolerance in mind and action which characterizes youth. But for a state to be tolerant is quite another matter. In eighteenth-century America, the implication was that the state had the right to enforce tyranny, and exercised tolerance out of its largesse. Madison rejected the concept of toleration as early as 1776 when in the Declaration of Rights he replaced the term “toleration” with “free exercise of religion.” In 1785, he put his concerns in classic form: “Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?” As he expressed it in an autobiographical note around 1832, Madison contended for freedom of conscience as a natural and absolute right. Toleration presumed a state prerogative that for Madison, did not exist. The right to tolerate religion presumes the right to persecute it. Madison had no hesitation in describing the ideal relationship between church and state: separation. Sometime following his retirement Madison made the following comment on Thomas Jefferson’s Bill for Religious Freedom:

Here the separation between the authority of human laws, and the natural rights of Man excepted from the grant on which all political authority is founded, is traced as distinctly as words can admit, and the limits to this authority established with as much solemnity as the forms of legislation can express.

Returning to the 1770s, it is fair to surmise that the young Madison first felt his intense, life-long commitment to freedom focusing on political ac-

39 Virginia Declaration of Rights, Article 16, in 1 THE PAPERS OF JAMES MADISON, supra note 32, at 174-75.

40 James Madison, Memorial and Remonstrance against Religious Assessments, in 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al. eds., 1973) [hereinafter Madison, Memorial].


43 James Madison, Detached Memoranda, reprinted in 3 WM. & MARY Q., 534, 554 (1946). Madison expanded on several concerns having to do with religion and state including chaplains and presidential proclamations. These writings likely began a few years after Madison left the presidency, and were completed by 1832.
tion as he observed the persecution by his own government of Baptist ministers. Whatever influences sent him to the Virginia Convention two years later, the emotional reaction to the abuse of the dissenters in 1774 was a critically significant factor.

In May of 1776, Madison was elected to the Revolutionary Convention in Virginia. He was selected to serve on a committee to compose a declaration of rights for the new government. George Mason, leader in the cause of individual rights and respected Virginia statesman, proposed an article about religion that read, "all Men shou'd enjoy the fullest Toleration in the Exercise of Religion." Consistent with his earlier observations, Madison suggested replacing the word toleration. He appeared to view the term as an "invidious concept" and proposed to substitute "all men are equally entitled to the free exercise of religion."

The all-consuming character of the war with Britain left little time to make extensive changes in the laws of Virginia. While Jefferson was in the legislature, he was unable to achieve passage of his Revised Code of Virginia, 126 bills offered in 1779 that included his Bill to Establish Religious Freedom.

With the conclusion of the war, Madison took his place in the governing body of Virginia. Almost immediately he was confronted with two threats to the freedom he so clearly articulated in 1776. First, there was the renewed effort to establish the Episcopal Church in the state as the natural successor to the Anglican establishment. Second, there was a General As-

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44 1 THE PAPERS OF JAMES MADISON, supra note 32, at 165 (editorial note).
45 Id. at 170 (editorial note).
46 Id. at 170-75.
47 Id. at 175 (editorial note).
49 KETCHAM, supra note 31, at 154.
50 In October, 1776, the Laws of Virginia were amended to read:
   That all and every act of parliament, by whatever title known or distinguished,
   which renders criminal the maintaining any opinions in matters of religion, forbear-
   ing to repair to church, or the exercising any mode of worship whatsoever, or
   which prescribes punishments for the same, shall henceforth be of no validity or
   force within this commonwealth.
WILLIAM W. HENING, 9 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE
LAWS OF VIRGINIA 164 (1821). Further, it was agreed:
   That all dissenters, of whatever denomination, from the said church, shall, from
and after the passing of this act, be totally free and exempt from all levies, taxes,
and impositions whatever, towards supporting and maintaining the said church, as
it now is or hereafter may be established, and its ministers.
Id. The result was an establishment with no funding or power of enforcement. This same act anticipated the debates of 1784 with another provision:
   And whereas great variety of opinions hath arisen, touching the propriety of a
general assessment, or whether every religious society should be left to voluntary
assessment Bill that would assign tax monies to support teachers of religion in
Protestant churches, a project frequently justified by its supporters as a
means of curtailing the sin and immorality of the young people.\textsuperscript{51} The
Bill’s rationale sounded the sentiments set forth by Locke in the previous
century. In the Fall of 1784, Madison knew that he could not deflect both of
these pieces of legislation. Politicians were not likely to cast two votes
“against God” in the same session.

Madison was opposed to the established Church of England. However,
the dilemma for him in 1784 was quickly resolved in his mind. He voted for
Episcopalian establishment, and it passed.\textsuperscript{52} Concurrently, he convinced his
colleagues to postpone a vote on Assessment until the next session in
1785.\textsuperscript{53} Madison believed that the Assessment Bill was a far more insidious
form of establishment. He was convinced that it would result in a plural es-
stablishment of Protestantism in eighteenth-century Virginia. Combining, as it
might, the interests of most all Protestant religious factions, the consequence
could well be a permanent condition. Writing to his father on January 6,
1785, Madison explained his decision:

The inclosed Act for incorporating the Episcopal Church is
the result of much altercation on the subject. In its original
form it was wholly inadmissible. In its present form into
which it has been trimmed, I assented to it with reluctance at
the time, and with dissatisfaction on review of it. . . . I con-
sider the passage of this Act however as having been so far
useful as to have parried for the present the Genl. Assesst.
which would otherwise have certainly been saddled upon us:
& If it be unpopular among the laity it will be soon repealed,
and will be a standing lesson to them of the danger of refer-
ing religious matters to the legislature.\textsuperscript{54}

contributions for the support and maintenance of the several ministers and teach-
ers of the gospel who are of different persuasions and denominations, and this
difference of sentiments cannot now be well accommodated, so that it is thought
most prudent to defer this matter to the discussion and final determination of a
future assembly, when the opinions of the country in general may be better
known: To the end, therefore, that so important a subject may in no sort be pre-
judged, \textit{Be it enacted, by the authority aforesaid}, That nothing in this act con-
tained shall be construed to affect or influence the said question of a general as-
essment, or voluntary contribution, in any respect whatever.
\textit{Id.} at 165. The Assembly went on to suspend state payment of salaries for establish-
ment ministers. \textit{Id.} at 165-66.
\textsuperscript{51} H.J. ECKENRODE, SEPARATION OF CHURCH AND STATE 75-77 (1910).
\textsuperscript{52} \textit{8 THE PAPERS OF JAMES MADISON, supra} note 40, at 196.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} Letter from James Madison, Jr. to James Madison, Sr. (Jan. 6, 1785), \textit{in} 8 THE
The reason for Madison’s choice in the Fall of 1784 is clear enough, confirming as it did his consistent view that the state had most to fear from the tyranny of the majority. He was certain that Presbyterians, Methodists, and Baptists would not long tolerate the pre-eminent position of the Episcopal Church. He was correct. By the close of the century the Church had been stripped not only of its established status, but also of its land holdings obtained in pre-revolutionary times. For Madison the great danger was an establishment of a coalition of Protestant groups that would be impervious to arguments against it. He foresaw a classic case of majority tyranny relegating minority religious views to a “tolerated” status.

Madison faced two tasks. He had to enlist public opposition to the Assessment Bill and he had to deal with the oratory of his chief adversary, Patrick Henry. Commenting upon Henry, Jefferson wrote his friend Madison in December, 1784:

What we have to do I think is devo[u]tly to pray for his death, in the meantime to keep alive the idea that the present is but an ordinance and to prepare the minds of the young men. I am glad the Episcopalians have again shewn their teeth & fangs. The dissenters had almost forgotten them.

Rather than take Jefferson’s religious position concerning Henry, Madison helped elect Henry as governor for another term, thereby silencing his silver tongue in the House of Delegates. In the Spring, after the Assembly adjourned, having authorized distribution of copies of the Assessment Bill to the voters, Madison was persuaded by friends to write a document attacking it. The result was a severe critique in the form of a petition to the General Assembly distributed broadside by Madison to the citizenry. The Memorial and Remonstrance against Religious Assessments became the classic statement for religious freedom in North America.

Newly elected delegates, his Memorial, and a massive petition drive by dissenters in the state gave Madison his victory over the Assessment Bill

PAPERS OF JAMES MADISON, supra note 40, at 216, 217.


56 ECKENRODE, supra note 51, at 147.

57 Letter from Thomas Jefferson to James Madison (Dec. 8, 1784), in 8 THE PAPERS OF JAMES MADISON, supra note 40, at 178.

58 Id.

59 Madison, Memorial, supra note 40, at 298-306.
without ever having to argue against it in the Assembly. He chose that season to champion Jefferson's Bill to Establish Religious Freedom in Virginia and, with some significant alterations of the original wording in the prologue, it became law on January 19, 1786. As predicted by Madison, Episcopal establishment was repealed shortly thereafter. Meanwhile Madison was off to Philadelphia to help fashion the new Constitution.

Little information is forthcoming from examination of Madison's notes on the Constitutional Convention on the two occasions when religion became an issue before that 1787 assemblage. According to the record, on June 28th Dr. Benjamin Franklin addressed his colleagues:

The preamble was sent up again from the H. of D. with one or two verbal alterations. As an amendment to these the Senate sent down a few others; which as they did not affect the substance though they somewhat defaced the composition, it was thought better to agree to than to run further risks, especially as it was getting late in the Session and the House growing thin. The enacting clauses past without a single alteration, and I flatter myself have in this Country extinguished for ever the ambitious hope of making laws for the human mind.

Letter from James Madison to Thomas Jefferson (Jan. 2, 1786), in 8 THE PAPERS OF JAMES MADISON, supra note 40, at 472, 474.

These changes were not without significance. Jefferson had originally included the following phrases in Section I: (a) "well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds;" (b) "manifested his supreme will that free it (the mind) shall remain by making it altogether insusceptible of restraint; (c) "but to extend it (religion) by its influence on reason alone;" (d) "and abhors," (e) "that the opinions of men are not the object of civil government, nor under its jurisdiction." Draft of Bill for Establishing Religious Freedom, in VIRGINIA HISTORY IN DOCUMENTS 1621-1788 (William H. Gaines ed., 1974) (Document #8). Each omission clearly marks out a division between the deistic, rationalist Jeffersonian principles and the more crabbed view of traditional churchmen in Virginia. Madison realized that only with the deletions could the Bill be approved, and he hoped Jefferson would understand. Writing to his friend on January 22, 1786 he noted:

Letter from James Madison to Thomas Jefferson (Feb. 15, 1787), in 9 THE PAPERS OF JAMES MADISON 267, 268 (William T. Hutchinson & William M.E. Rachal eds., 1962). In 1799, the General Assembly, under pressure from Presbyterians and Baptists, passed a law confiscating the glebe lands. The matter was taken to court and was upheld by a majority of judges on the bench in 1802. ECKENRODE, supra note 51, at 147-51. See generally id. at 130-51.
The small progress we have made after 4 or five weeks... is methinks a melancholy proof of the imperfection of the Human Understanding... how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings?64

Franklin credited God for victory over England and asked whether "we imagine that we no longer need his assistance?"65 He continued:

I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God Governs in the affairs of men....

I therefore beg leave to move—that henceforth prayers imploving the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that Service.66

Madison made no indication that he himself entered the debate, noting only that "MR. HAMILTON & several others expressed their apprehensions that however proper such a resolution might have been at the beginning of the convention" it could now lead "the public to believe that the embarrassments and dissensions within the Convention, had suggested this measure."67 Of course, it was precisely that thought which had prompted Franklin's motion. Mr. Hugh Williamson of North Carolina suggested the omission was due to a lack of funds.68 Madison concluded: "After several unsuccessful attempts for silently postponing the matter by adjourn'g the adjournment was at length carried, without any vote on the motion."69

64 JAMES MADISON, 1 DEBATES IN THE FEDERAL CONVENTION OF 1787, at 181 (Gaillard Hunt & James B. Scott eds., 1987) [hereinafter MADISON, DEBATES]. In the latter part of the twentieth century, as the Congress has become involved in responding to school prayer decisions of the Supreme Court, many a witness has quoted Franklin in order to prove how dependent on prayer the nation had been at its inception. Only one of them recited the conclusion of the discussion on the subject in Philadelphia. That individual, Senator A. Willis Robertson (D-Va.), created a myth out of thin air, asserting that thereafter the Convention opened every session with prayer. See infra note 224 and accompanying text.

65 MADISON, DEBATES, supra note 64, at 181.

66 Id. at 181-82.

67 Id. at 182.

68 Id.

69 Id. (footnote omitted).
Seemingly an embarrassing interlude followed when the delegates, anxious not to offend the elder statesman, fumbled about until they just dispersed. With regard to their assembly on the morning of June 29, no mention of the Franklin motion is to be found, and the idea for public prayer never resurfaced.\footnote{Id.}

This is a revealing episode. Franklin was seemingly convinced that public prayer would secure success in their deliberations. His point was never addressed. Those who spoke all dealt with public opinion, suggesting that for most of the men public prayer was a form without substantial benefit other than good feelings and appearances. Under the circumstances, Hamilton construed the Franklin suggestion, which at the beginning of the Convention might have had excellent public relations value, perhaps conveying a positive message to the electorate, as a serious mistake.\footnote{Id.} The efficacy of prayer was not at issue for the leaders in Philadelphia. The debate was focused on public relations. These were men, many devout Christians, satisfied that their creator had endowed them with minds with which to think. For others, religious sentiments were expressed in an enlightened humanism that respected the image of the deity they felt resided in the human mind and spirit.\footnote{See discussion infra part III (regarding myths about the ratification of the Constitution).}

Evidence is abundant that the architects of the Constitution gathered with the same spirit Madison expressed in remarks to a Virginia convention seeking to create a new constitution for the state. Madison said:

\begin{quote}
In framing a Constitution, great difficulties are necessarily to be overcome; and nothing can ever overcome them, but a spirit of compromise. . . . I cannot but flatter myself, that without a miracle, we shall be able to arrange all difficulties. I never have despaired, notwithstanding all the threatening appearances we have passed through. I have now more than a hope—a consoling confidence, that we shall at last find, that our labours have not been in vain.\footnote{James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), in 9 THE WRITINGS OF JAMES MADISON 364 (Gaillard Hunt, ed., 1910).}
\end{quote}

According to Madison's notes on the Constitutional Convention, the only other mention of religion had to do with Article VI, which prohibited religious testing of candidates for public office.\footnote{MADISON, DEBATES, supra note 64, at 428.} Madison's notes provide no clue as to the reasoning behind the religious test provision. Charles
Pinckney of South Carolina submitted a set of propositions on August 20.\textsuperscript{75} Among them was: "No religious test or qualification shall ever be annexed to any oath of office under the authority of the U. S."\textsuperscript{76} This was referred to the Committee of Detail without debate or consideration.\textsuperscript{77} On August 30, Mr. Pinckney moved to add to what was to become Article VI: "[B]ut no religious test shall ever be required as a qualification to any office or public trust under the authority of the U. States."\textsuperscript{78} Roger Sherman of Connecticut "thought it unnecessary, the prevailing liberality being a sufficient security against such tests."\textsuperscript{79} Gouverneur Morris of Pennsylvania joined in support of the amendment, and the motion was then agreed to.\textsuperscript{80}

In a letter to Jefferson in 1788, Madison noted reservations among some about that provision. "One of the objections in New England was that the Constitution by prohibiting religious tests opened a door for Jews Turks & infidels."\textsuperscript{81} This is a revealing commentary because it puts to rest the frequent assertion by David Barton that the Founders intended that only Christians hold public office.\textsuperscript{82} That matter had been debated and resolved.\textsuperscript{83}

When the Constitutional Convention concluded in Philadelphia, James Madison, as a member of Congress under the Articles of Confederation, returned to New York where he assisted in the passage of the necessary resolutions that would send the newly written document to the states for ratification. The task was not altogether easy. Madison argued successfully against efforts to have the Congress amend the Constitution. Some members of Congress "urged the expediency of sending out the plan with amendments, & proposed a number of them corresponding with the objections of Col. Mason."\textsuperscript{84}

In a lengthy letter to Jefferson, Madison expressed serious misgivings about the likely success of the new Constitution. He was troubled because the federal government lacked the power to veto state laws. He feared the "virus of tyranny" which he felt was most rampant at the state level.\textsuperscript{85} He wrote: "Such a check on the States appears to me necessary 1. to prevent

\textsuperscript{75} Id. at 428-29.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 495.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), supra note 55, at 295, 297.
\textsuperscript{83} See supra note 80 and accompanying text.
\textsuperscript{84} Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON 205, 217 (Robert A. Rutland et al. eds., 1977).
\textsuperscript{85} Id. at 205 (editor's note).
encroachments on the General authority. 2. to prevent instability and injustice in the legislation of the States."\(^86\) Elaborating on this theme, Madison offered an extended commentary on the threat to religion from state laws:

The inefficacy of this restraint on individuals is well known. The conduct of every popular Assembly, acting on oath, the strongest of religious ties, shews that individuals join without remorse in acts agst. which their consciences would revolt, if proposed to them separately in their closets. When Indeed Religion is kindled into enthusiasm, its force like that of other passions is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of Religion, and whilst it lasts will hardly be seen with pleasure at the helm. Even in its coolest state, it has been much oftener a motive to oppression than a restraint from it. If then there must be different interests and parties in Society; and a majority when united by a common interest or passion can not be restrained from oppressing the minority, what remedy can be found in a republican Government, where the majority must ultimately decide, but that of giving such an extent to its sphere, that no common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit. In a large Society, the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole. The same security seems requisite for the civil as for the religious rights of individuals. If the same sect form a majority and have the power, other sects will be sure to be depressed. Divide et impera, the reprobated axiom of tyranny, is under certain qualifications, the only policy, by which a republic can be administered on just principles. . . . The General Government would hold a pretty even balance between the parties of particular States, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests.\(^87\)

It was this concern that led Congressman Madison in 1789 to try, unsuccessfully, to place in the Bill of Rights a provision that the secured rights applied to state law as well as to laws made by Congress.\(^88\)

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\(^{86}\) Id. at 209.

\(^{87}\) Id. at 213-14.

\(^{88}\) See Amendments to the Constitution (Aug. 17, 1789), in 12 THE PAPERS OF JAMES MADISON 344 (Charles F. Hobson et al. eds., 1979).
Having been one of the fifty-five men to prepare the Constitution in Philadelphia, having argued for its passage through the Congress, and having written extensively in defense of the Constitution in his remarkable contributions to the *Federalist Papers*, Madison was dubious about being selected a delegate to the Richmond Convention set to consider ratification in June of 1788. However, prior to the first ratification by Delaware on December 2, 1787, Madison had declared reluctantly his intention to stand for election to the Virginia Convention. In a November 8, 1787 letter to his brother, Ambrose, Madison wrote:

In answer to the second point, I am to observe that it was not my wish to have followed the Act of the General Convention into the Convention of the State; supposing that it would be as well that the final decision thereon should proceed from men who had no hand in preparing and proposing it. As I find however that in all the States the members of the Genl. Convention are becoming members of the State Conventions, as I have been applied to on the subject by sundry very respectable friends, as I have reason to believe that many objections in Virginia proceed from a misconception of the plan, or of the causes which produced the objectionable parts of it; and as my attendance at Philadelphia, may enable me to contribute some explanations and informations which may be of use, I shall not decline the representation of the County if I should be honoured with its appointment. You may let this be known in such way as my father & yourself may judge best. I shall be glad to hear from [you] on the subject, and to know what competition there will probably be and by whom.

At least one letter survives that demonstrates the early concern by his Virginia friends that Madison seek to attend the Richmond Convention set for June 1, 1788. On November 2, 1787, Archibald Stuart wrote: "It is generally considered necessary that you should be of the convention, not only that the Constitution may be adopted but with as much unanimity as possible. For gods sake do not disappoint the Anxious expectations of yr friends &

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90 Letter from James Madison to Ambrose Madison (Nov. 8, 1787), *in 10 THE PAPERS OF JAMES MADISON*, supra note 84, at 244.
91 See Letter from Archibald Stuart to James Madison (Nov. 2, 1787), *in 10 THE PAPERS OF JAMES MADISON*, supra note 84, at 234.
let me add of yr Country." Two months later Edmund Pendleton expressed similar feelings in a letter dated January 29, 1788, urging Madison to be a delegate to the ratification convention. He stated: "But too much of my self: it is much more important that you should be there, and wish for that reason that you could be in your County some time before the day, lest some designing men may endeavour to avail themselves of yr. Absence."

On November 22, Madison's famous Federalist No. 10 appeared in the New York The Daily Advertiser. On January 11, 1788, Madison took up his pen again with No. 37 and over the next six weeks wrote some twenty-two essays. Toward the end of that period he wrote a letter to George Washington detailing his plans:

I have given notice to my friends in Orange that the County may command my services in the Convention if it pleases. I can say with great truth however that in this overture I sacrifice every private inclination to considerations not of a selfish nature. I foresee that the undertaking will involve me in very laborious and irksome discussions; that public opposition to several very respectable characters whose esteem and friendship I greatly prize may unintentionally endanger the subsisting connection; and that disagreeable misconstructions, of which samples have been already given, may be the fruit of those exertions which fidelity will impose. But I have made up my determination on the subject; and if I am informed that my presence at the election in the County be indispensable, shall submit to that condition also; though it is my particular wish to decline it, as well to avoid apparent solicitude on the occasion; as a journey of such length at a very unpleasant season.

On the same day he made it clear in a letter to Jefferson that he had already determined to travel to Virginia. "By letters just received from Virginia I find that I shall be under the necessity of setting out in 8 or 10 days for Virginia." This sentence likely refers to a letter of February 17 from James Gordon stating "it is incumbent on you with out delay, to repair to

92 Id.
93 Letter from Edmund Pendleton to James Madison (Jan. 29, 1788), supra note 2, at 527.
94 THE FEDERALIST No. 10 (Madison).
95 THE FEDERALIST No. 37 (Madison).
96 Letter from James Madison to George Washington (Feb. 20, 1788), supra note 89, at 526-27.
97 Id. at 526.
By mid-February, six states, including Pennsylvania, New Jersey, and Massachusetts, had ratified the Constitution. Before Virginia ratified it on June 25, the requisite nine states had approved the document. Nevertheless, Hamilton and Madison were undoubtedly aware that without New York and Virginia, the new union would be hopelessly flawed.

Madison departed New York on his critically important mission on the 3rd or 4th of March. He stopped at Mount Vernon on the 18th and 19th of March and departed on the morning of March 20th, arriving in Fredericksburg some time on the 21st. While there he was probably given a letter from Joseph Spencer that had been addressed to Madison in the care of Mr. F. Maury. The identity of Spencer is not known and there is no written evidence that the letter was actually delivered on the 21st. All that is known for certain is that Madison eventually received the letter and recorded it as being dated February 26, 1788.

Spencer’s letter was alarmist, a sentiment that does not seem extreme in light of Madison’s letter to Eliza House Trist on March 25th. Spencer said the Constitution had enemies in Orange County. He noted that Madison’s opponent in the upcoming March 24 election, James Barbour had as friends “in a General way the Baptus’s, the Prechers of that Society are much alarm’d fearing Relegious liberty is not Sufficiently secur’d they pretend to other objections but that I think is the principle objection.” Spencer identified John Leland, a Baptist preacher in Orange, as one of the most significant leaders of this faction. Spencer urged Madison “as Mr. Leeland Lyes in your Way home from Fredricksburg to Orange would advise you’ll call on him & Spend a few Howers in his Company” in order to persuade Leland to support the Constitution.

It is not clear when Madison left Fredericksburg—possibly late in the
day on the 21st. Records reveal that Madison was expected for dinner at the home of his friend Major Moore. Madison failed to arrive before other guests departed. A March 23rd diary entry by one of Moore’s guests, Francis Taylor reads: “Heard that Col. Madison got to Majr. Moores last night and proceeded today to his fathers.”

In Madison’s letter to Eliza Trist, he informed her that “[t]he badness of the roads & some other delays retarded the completion of my journey till the day before yesterday.” Madison was home in Montpelier the day before the election. The letter to Trist is the best account of the events on election day, March 24th.

I had the satisfaction to find all my friends well on my arrival; and the chagrin to find the County filled with the most absurd and groundless prejudices against the federal Constitution. I was therefore obliged at the election which succeeded the day of my arrival to mount for the first time in my life, the rostrum before a large body of the people, and to launch into a harangue of some length in the open air and on a very windy day. What the effect might be I cannot say, but either from that experiment or the exertion of the federalists or perhaps both, the misconceptions of the Government were so far corrected that two federalists one of them myself were electd by a majority of nearly 4 to one. It is very probable that a very different event would have taken place as to myself if the efforts of my friends had not been seconded by my presence.

There is no evidence from Madison or anyone during his lifetime to prove that he met with John Leland. The first reference to such an encounter was made by John Barbour in a eulogy for Mr. Madison delivered on July 18, 1836—48 years after the election of 1788. Barbour orated: “[Madison’s] soft and assuasive and lucid elocution changed two ministers of the Gospel of the Baptist Church on the day preceding the election and that conversation carried him to the Convention. The celebrated John Leland was one of them.” Probably based upon the Barbour allusion, the editors of the Madison papers noted in a footnote: “Although accounts of JM’s famous meeting with Leland are fanciful, the tradition is strong that such a meeting

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11 Letter from James Madison to Eliza House Trist (Mar. 25, 1788), supra note 105, at 5. Madison completed his journey on March 23, the day before the election. See id.
12 Id. at 5-6 & n.2.
13 Semple, supra note 27, at 111.
did in fact occur, probably on 22 Mar."\textsuperscript{114}

Clearly, the record supports the fact that Baptist endorsements of the Constitution were significant for its ratification in Virginia. It was one of many factors. It does no honor to a denomination devoted to religious freedom to exaggerate and mythologize events; it merely deflects from a serious consideration of what Baptists did indeed contribute.

The Leland legend presumes that either Leland convinced Madison to support a Bill of Rights or that Madison allayed Leland's fears by guaranteeing he would support such additions to the Constitution. As was made clear by a resolution of the Virginia Baptist General Committee on March 7, 1788, the Constitution's omission of "sufficient provision for the secure enjoyment of religious liberty"\textsuperscript{115} was the singular concern of Leland and his colleagues.\textsuperscript{116} Madison's first full commitment to placing amendments before the first Congress came in a letter to Alexander Hamilton on June 22, 1788,\textsuperscript{117} three months after his election to the Ratification Convention. Finally, on the basis of the letter to Eliza Trist there is reason to reject as improbable any meeting at all with Leland prior to the March 24th election.\textsuperscript{118} This in no way diminishes Leland's important support for Madison's election. Leland remained a life-long admirer of both Madison and Jefferson, in large part because of their support for religious freedom.\textsuperscript{119} Leland was a distinguished champion of freedom.

The most important lesson from the Baptist story is the sub-text of the Patrick Henry effort to derail the Constitution by playing every prejudice to create a coalition able to scuttle the document in June of 1788. Henry sought to use the Baptists, along with many other groups and individuals, to advance his own anti-federalist interests.\textsuperscript{120} The fact that he failed is a tribute to the persuasiveness of Madison both in Orange on March 24, 1788, and in Richmond three months later.

In Virginia, as elsewhere, much of the opposition to ratification of the Constitution centered directly upon the issue of a Bill of Rights. Often, opponents of greater federal power used the Bill of Rights issue as a means to undermine the new government document. Certainly this was the case with

\begin{thebibliography}{12}
\bibitem{114} 10 THE PAPERS OF JAMES MADISON, \textit{supra} note 84, at 542 n.4.
\bibitem{115} SEMPLE, \textit{supra} note 27, at 77.
\bibitem{116} \textit{Id.} at 76-78.
\bibitem{117} Letter from James Madison to Alexander Hamilton (June 22, 1788), \textit{in} 11 THE PAPERS OF JAMES MADISON, \textit{supra} note 55, at 166.
\bibitem{118} Letter from James Madison to Eliza House Trist (Mar. 25, 1788), \textit{supra} note 105, at 5.
\bibitem{120} Letter from James Madison, Sr. to James Madison (Jan. 30, 1788), \textit{in} 10 THE PAPERS OF JAMES MADISON, \textit{supra} note 84, at 446.
\end{thebibliography}
Patrick Henry, and it seems as well to have been at work in the mind of Madison's long time friend George Mason. Indeed, Mason, the honored architect of the Virginia Declaration of Rights in 1776, voted to reject the Constitution at the Richmond Convention.

The issue in 1788 came down to whether there would be a promise of subsequent amendments after ratification, or amendments adopted state by state prior to ratification. The question before the states was the language adopted for the Constitution by Congress. Alteration of the document would likely have had no standing in law and would have required, at least, that every ratifying state adopt identical language in any amendments—a highly unlikely occurrence. In fact, eight states had already ratified without amendments before the matter was addressed by Virginia.

Speaking to his colleagues on June 25, 1788, concerning a bill of rights, Mr. Madison noted: "If there be any suspicions that, if the ratification be made, the friends of the system will withdraw their concurrence, . . . it shall never be with my approbation." He was convinced there was "no doubt [other states] will agree to the same amendments after adoption. If we propose the conditional amendments, I entreat gentlemen to consider the distance to which they throw the ultimate settlement, and the extreme risk of perpetual disunion." Shortly thereafter the Convention voted eighty ayes, and eighty-eight noes on the question of prior or conditional amendments. On the main question of ratification the vote was eighty-nine ayes, seventy-nine noes.

In June, Madison had exerted all his efforts to salvage the Union. John Marshall is quoted as having observed that if eloquence included the unadorned power of reasoned persuasion, "Mr. Madison was the most eloquent man [he] ever heard." As he worked toward a slim majority, Madison's words had to have the ring of integrity in order to hold a coalition of moderate and radical federalists. At the end a switch of four votes on the first ballot would have created an impasse. In retrospect, the most important

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122 Letter from James Madison to Thomas Jefferson (July 24, 1788), in 11 THE PAPERS OF JAMES MADISON, supra note 55, at 196-97.
124 Id. at 1064-67. Those states were Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, and South Carolina. See id.
125 James Madison, Statement to the Virginia Ratification Convention (June 25, 1788), in BERNARD SCHWARTZ, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 830 (Leon Friedman et al. eds., 1971).
126 Id.
127 Letter from James Madison to George Washington (June 25, 1788), in 11 THE PAPERS OF JAMES MADISON, supra note 55, at 178.
128 Id.
130 See Letter from James Madison to George Washington (June 25, 1788), supra...
convincing by Madison took place in the weeks before June 1 as he gently nudged Governor Randolph toward open support of the Constitution.\textsuperscript{131}

Madison had been concerned over the Bill of Rights issue since the Philadelphia Convention. On October 24, 1787, he wrote Jefferson informing him of the content of the new Constitution and suggesting the likely outcome of a vote for ratification.\textsuperscript{132} Naturally, he sought to explain why only three Virginians signed the document. He noted: "Col. Mason left Philada. in an exceeding ill humour indeed. . . . He returned to Virginia with a fixed disposition to prevent the adoption of the plan if possible. He considers the want of a Bill of Rights as a fatal objection."\textsuperscript{133} Madison then enumerated other objections closing with "and most of all probably to the power of regulating trade, by a majority only of each House."\textsuperscript{134}

Circumstances conspired to make the Bill of Rights the most obvious handle to be used by anyone opposed to the Constitution. It had the emotional tug that quickly set the population to wondering about the intentions of the new government. Responding to Madison’s letter, Jefferson wrote on December 20:

\begin{quote}
I will now add what I do not like. First the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press. . . . Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse or rest on inference.\textsuperscript{135}
\end{quote}

On February 6, 1788, Jefferson wrote again:

\begin{quote}
I am glad to hear that the new constitution is received with favor. I sincerely wish that the 9 first conventions may receive, & the 4. last reject it. The former will secure it finally; while the latter will oblige them to offer a declaration of rights in order to complete the union.\textsuperscript{136}
\end{quote}

\textsuperscript{131} See Letter from James Madison to Edmund Randolph (Apr. 10, 1788), in 11 THE PAPERS OF JAMES MADISON, supra note 55, at 18-19.
\textsuperscript{132} See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), supra note 84, at 205-20.
\textsuperscript{133} Id. at 215.
\textsuperscript{134} Id.
\textsuperscript{135} Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 10 THE PAPERS OF JAMES MADISON, supra note 84, at 336-37.
\textsuperscript{136} Letter from Thomas Jefferson to James Madison (Feb. 6, 1788), in 10 THE PAPERS OF JAMES MADISON, supra note 84, at 474.
As noted previously, Madison was elected to the Virginia Ratification Convention on March 24. On April 22, he wrote to Jefferson about the Virginia situation. He was optimistic that passage was to occur, nevertheless he noted serious opposition:

The adversaries take very different grounds of opposition. Some are opposed to the substance of the plan; others to particular modifications only. Mr. H[enr]y is supposed to aim at disunion. Col. M[aso]n is growing every day more bitter, and outrageous in his efforts to carry his point; and will probably in the end be thrown by the violence of his passions into the politics of Mr. H[enr]y. The preliminary question will be whether previous alterations shall be insisted on or not?

Madison was certain that conditional amendments would doom the new document and possibly the union itself. Interestingly, Madison made no specific comment on a bill of rights. On July 24, he wrote to Jefferson, finally acknowledging his friend’s letters of Dec. 20 and Feb. 6, which had not been received until Madison’s return to Virginia. Again, there was no reference to the bill of rights issue, only a brief account of the ratification. Jefferson wrote again on July 31, returning to his theme.

I sincerely rejoice at the acceptance of our new constitution by nine states. [He had not heard about the Virginia decision.] It is a good canvas, on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from North to South, which calls for a bill of rights. It seems pretty generally understood that this should go to Juries, Habeas corpus, Standing armies, Printing, Religion & Monopolies.

Jefferson felt that if there were no modifications to please the habits of individual states, it would be better to have unrestrained rights affirmed “in all

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137 11 THE PAPERS OF JAMES MADISON, supra note 55, at 6 n.2.
139 Id. at 28.
140 See Letter from James Madison to Thomas Jefferson (July 24, 1788), supra note 122, at 196-98.
141 See id.
142 Letter from Thomas Jefferson to James Madison (July 31, 1788), in 11 THE PAPERS OF JAMES MADISON, supra note 55, at 212.
cases, than not to do it in any."

Illustrating his point he continued:

A declaration that the federal government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed. The declaration that religious faith shall be unpunished, does not give impunity to criminal acts dictated by religious error. . . . I hope therefore a bill of rights will be formed to guard the people against the federal government, as they are already guarded against their state governments in most instances.

Madison continued to focus on the efforts of constitutional opponents to instigate a second convention to alter the document. "The great danger in the present crisis is that if another Convention should be soon assembled, it would terminate in discord, or in alterations of the federal system which would throw back essential powers into the State Legislatures." Two weeks later Madison again wrote about the same subject, noting, "fresh hopes and exertions to those who opposed the Constitution" in the ratification debate in North Carolina. Again, on September 21, Madison feared the impact of a circular letter from New York that "ha[d] rekindled an ardor among the opponents of the federal Constitution for an immediate revision of it by another General Convention." He trusted that such a move would be opposed by "not only . . . those who wish for no alterations, but by others who would prefer the other mode provided in the Constitution, as most expedient at present for introducing those supplemental safeguards to liberty agst. which no objections can be raised."

Madison ultimately became an advocate of amendments, but only through the process outlined in the Constitution itself, not through a second convention. On October 17, he wrote to Jefferson noting that a "constitutional declaration of the most essential rights" probably "will be added." For the first time he affirmed:

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143 Id.
144 Id. at 213.
145 Letter from James Madison to Thomas Jefferson (Sept. 21, 1788), in 11 THE PAPERS OF JAMES MADISON, supra note 55, at 226 (footnote omitted).
146 Letter from James Madison to Thomas Jefferson (Aug. 23, 1788), in 11 THE PAPERS OF JAMES MADISON, supra note 55, at 238.
147 Letter from James Madison to Thomas Jefferson (Sept. 21, 1788), supra note 145, at 257 (footnote omitted).
148 Id. at 258.
149 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), supra note 55, at 297.
My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others.\textsuperscript{150}

He went on to suggest the reasons why amendments might still be a mistake. He noted: "A positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power."\textsuperscript{151} He was quite fearful of the tyranny of the majority that could make such guarantees meaningless. He wrote: "[E]xperience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State."\textsuperscript{152}

Writing in November, Jefferson agreed with Madison, stating: "I should deprecate with you indeed the meeting of a new convention. I hope they will adopt the mode of amendment by Congress & the Assemblies..."\textsuperscript{153}

On March 15, 1789, Jefferson wrote a highly significant response to Madison’s letter of the previous October:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, & kept strictly to their own department merits great confidence for their learning & integrity.\textsuperscript{154}

This argument was quite convincing to Madison and was used in his presentation to the first Congress.\textsuperscript{155}

Anticipating the meeting of the new Congress, to which he hoped to be

\textsuperscript{150} Id. (footnote omitted).
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Letter from Thomas Jefferson to James Madison (Nov. 18, 1788), \textit{in} 11 THE PAPERS OF JAMES MADISON, supra note 55, at 353.
\textsuperscript{154} Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), \textit{in} 12 THE PAPERS OF JAMES MADISON, supra note 88, at 13.
\textsuperscript{155} Judiciary Bill (Aug. 29, 1789), \textit{in} 12 THE PAPERS OF JAMES MADISON, supra note 88, at 367.
elected, Madison had written to Jefferson on December 8, 1788, commenting on his hopes concerning amendments to the Constitution. He envisioned that the majority of representatives in that Congress would "wish the revisal to be carried no farther than to supply additional guards for liberty ... and [would be] fixed in opposition to the risk of another Convention." He informed his friend that Mr. Henry had seen to the association of Orange County with areas "most likely to be swayed by the prejudices excite against me" in creating congressional districts. Friends urged Madison to come home to secure a place in the new Congress.

Madison undertook a campaign for election that included an important message to George Eve, minister of the Blue Run Baptist Church in Orange County, a short distance from Montpelier. Seeking Eve's support, he wrote:

I freely own that I have never seen in the Constitution as it now stands those serious dangers which have alarmed many respectable Citizens. Accordingly whilst it remained unratified, and it was necessary to unite the States in some one plan, I opposed all previous alterations as calculated to throw the States into dangerous contentions, and to furnish the secret enemies of the Union with an opportunity of promoting its dissolution. Circumstances are now changed: The Constitution is established on the ratification of eleven States and a very great majority of the people of America; and amendments, if pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favor of liberty. Under this change of circumstances, it is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c.

As later correspondence indicates, the sentiments espoused in the Eve letter became the campaign slogan he adopted. "[I]t is my wish, particularly, to see specific provision made on the subject of the Rights of Conscience, the

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156 Letter from James Madison to Thomas Jefferson (Dec. 8, 1788), in 11 THE PAPERS OF JAMES MADISON, supra note 55, at 382.
157 Id. at 384.
158 Letter from James Madison to George Eve (Jan. 2, 1789), in 11 THE PAPERS OF JAMES MADISON, supra note 55, at 404-05.
Freedom of the Press, Trials by Jury, Exemption from General Warrants. . . "159 On February 2, 1789, Madison was elected by a comfortable margin over his opponent, James Monroe. Ralph Ketcham notes that the election was "a remarkable personal tribute to Madison in a district 'rigged' against him."160

In a moving ceremony at Montpelier, Madison's home, on Constitution Day in 1990, James MacGregor Burns, after speaking of the sage of Orange County as the true "Father of the Bill of Rights," argued that the remarkable thing about the political climate two centuries ago was trust.161 He rightly noted that enough delegates to the 1788 Virginia Convention, as did those to similar gatherings in the other states, set aside their reservations about the Philadelphia document and voted for it just because they trusted the promises of those who gave assurances that the first order of business for the new nation should be inclusion of amendments.162

When Madison took leave of his friends in Virginia to journey to New York for the meeting of the first Congress in 1789, he bore a heavy responsibility, perhaps more than he realized. On July 21, 1789, Congressman Madison addressed his colleagues, pleading for consideration of amendments. He "begged the House to indulge him in the further consideration of amendments to the constitution."163 Encountering stiff opposition, Madison returned to the issue on August 13:

[I] would remind gentlemen that there were many who conceived amendments of some kind necessary and proper in themselves; while others who are not so well satisfied of the necessity and propriety, may think they are rendered expedient from some other consideration. Is it desirable to keep up a division among the people of the United States on a point in which they consider their most essential rights are concerned? If this is an object worthy the attention of such a numerous part of our constituents, why should we decline taking it into our consideration, and thereby promote that spirit of urbanity and unanimity which the Government itself stands in need of for its more full support?

Already has the subject been delayed much longer than could have been wished. If after having fixed a day for taking it into consideration, we should put it off again, a spirit

159 Letter from James Madison to a Resident of Spotsylvania County (Jan. 27, 1789), in 11 THE PAPERS OF JAMES MADISON, supra note 55, at 428.
160 KETCHAM, supra note 31, at 277.
161 James MacGregor Burns, Address at Montpelier, Orange County (Sept. 16, 1990).
162 Id.
163 SCHWARTZ, supra note 125, at 1057.
of jealousy may be excited, and not allayed without great inconvenience.\textsuperscript{164}

Madison encountered dissent from those members who felt more important matters required attention. Mr. Lawrence, a representative from New York stated that "certainly the people in general are more anxious to see the Government in operation, than speculative amendments upon an untried constitution."\textsuperscript{165} Madison then appealed to the honor of the body:

I admit, with the worthy gentleman who preceded me, that a great number of the community are solicitous to see the Government carried into operation; but I believe that there is a considerable part also anxious to secure those rights which they are apprehensive are endangered by the present constitution. Now, considering the full confidence they reposed at the time of its adoption in their future representatives, I think we ought to pursue the subject to effect. I confess it has already appeared to me, in point of candor and good faith, as well as policy, to be incumbent on the first Legislature of the United States, at their first session, to make such alterations in the constitution as will give satisfaction, without injuring or destroying any of its vital principles.\textsuperscript{166}

The difficulty Madison encountered in convincing his colleagues to consider amendments having to do with specific individual rights suggests that Professor Burns' observations about "trust" may not be universally applicable to all the Founders.

The debates over the amendments are detailed and have been analyzed by numerous scholars.\textsuperscript{167} In all these examinations it is clear that Madison's congressional leadership was the primary impetus for what came to be the Bill of Rights.\textsuperscript{168} Prodded by Madison, aware of citizen concerns, the lawmakers ultimately turned to the task of keeping the promise they made in their campaigns.

In the initial stages the amendments were to be incorporated into the text at appropriate points.\textsuperscript{169} Representative Roger Sherman vigorously opposed

\textsuperscript{164} Id. at 1062-63 (quoting Madison).
\textsuperscript{165} Id. at 1064.
\textsuperscript{166} Id. at 1065.
\textsuperscript{167} See, e.g., LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 83-93 (2d ed. 1994); SCHWARTZ, supra note 125, 12 THE PAPERS OF JAMES MADISON, supra note 88, at 196.
\textsuperscript{168} See SCHWARTZ, supra note 125, at 1066.
\textsuperscript{169} See id.
this procedure from the outset, but it was not until August 19 that Sherman prevailed in his motion to separate the amendments from the original Constitution. Madison had considered that question one more of form than substance. It is arguable that the form became a part of the substance when the amendments became not mere insertions in a complex document, but became the “Bill of Rights.”

What we know as the First Amendment was the third of twelve offered to the states for ratification. Rejection of the first and the second proposed amendments resulted in the prohibition of “establishment” of religion by the federal government, and the right to “free exercise” of religion as our first liberty. Frequently the two Religion Clauses are considered in isolation from the remaining parts of the First Amendment. While viewing the Amendment in that manner has advantages, it may appear on occasion that priority is being assigned on the basis of position. Such assumptions are incorrect and miss the value of viewing the Amendment as a whole. This caveat having been stated, it is desirable for purposes of this study to extract as much as possible from the debates in Congress relative to religion/state matters.

The first sixteen words of the third amendment submitted to the states read: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The impetus for the inclusion of these two clauses was commitment to freedom of conscience as a principle. But while that conviction was without reservation on the part of men like Jefferson and Madison, it was not a universal sentiment for those who gathered in New York in 1789. Some of the states, notably Massachusetts, still had restrictive language in their laws that provided toleration at best, and that only to Protestants. Several states had established religions. So for many the ultimate stand for national protection of a free conscience was, in fact, a means of self-protection. If there could be no national religion consistent with a particular state tradition, then clearly it was in the interest of the states to assure federal protection of all state established religious traditions.

On August 15, Madison engaged his colleagues in an extended discussion of the wording of the religion amendment. That discussion has recently been the subject of Justice Rehnquist’s unique interpretation.

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170 Id.
171 Id. at 1121.
172 Id. at 1066.
173 See id. at 1163-65.
174 Id. at 1164.
175 See LEVY, supra note 167, at 31.
176 See id. at 27-78.
177 See, e.g., SCHWARTZ, supra note 125, at 1087-107.
sponding to concerns by Mr. Huntington of Rhode Island over the draft as it
then read, "no religion shall be established by law," Madison suggested add-
ing national before the word religion. A problem lies in the fact that
there is no clarity as to the objections by Mr. Huntington that prompted
Madison's response. Rehnquist has assumed that by using "national"
Madison intended to allow nonpreferential treatment of all religions.
According to Rehnquist, this proves that Madison did not "conform to the
'wall of separation' between church and State idea which latter-day com-
mentators have ascribed to him." Two things need to be noted. First, the
word national was not defined by Madison at the time, and was in any event
almost immediately dropped by him after a single objection. Second,
Madison employed an expansive, non-sectarian definition when he used the
term "national" in other contexts: "Religious proclamations by the Executive
recommending thanksgivings & fasts. . . . seem to imply and certainly nour-
ish the erroneous idea of a national religion." And, as noted earlier,
Madison's opposition to the Assessment Bill in 1784-85 clearly positioned
him against plural establishments of any kind.

On August 24, the House sent seventeen amendments to the Senate. The third read: "Congress shall make no law establishing religion, or pro-

179 SCHWARTZ, supra note 125, at 1089.
180 See id. at 1088-89 (paraphrasing Huntington's comments).
181 Wallace, 472 U.S. at 96-99 (Rehnquist, J., dissenting).
182 Id. at 98 (Rehnquist, J., dissenting).
183 SCHWARTZ, supra note 125, at 1089.
184 Madison, supra note 43, at 560.
185 See supra notes 49-51 and accompanying text. Leonard Levy makes the following
summary in reference to this question of plural establishments:
The history of the drafting of the establishment clause does not provide us
with an understanding of what was meant by "an establishment of religion." To
argue, however, as proponents of a narrow interpretation do, that the amendment
permits congressional aid and support to religion in general or to all denominations
without discrimination leads to the impossible conclusion that the First
Amendment added to Congress's power. Nothing supports such a conclusion. Ev-
ery bit of evidence goes to prove that the First Amendment, like the others, was
intended to restrict Congress to its enumerated powers. Because Congress pos-
sessed no power under the Constitution to legislate on matters concerning religion,
Congress has no such power even in the absence of the First Amendment. It is
therefore unreasonable, even fatuous, to believe that an express prohibition of
power—"Congress shall make no law respecting an establishment of
religion"—vests or creates the power, previously nonexistent, of supporting reli-
gion by aid to all religious groups. The Bill of Rights, as Madison said, was not
framed "to imply powers not meant to be included in the enumeration."
LEVY, supra note 167, at 105-06 (quoting letter from James Madison to Thomas Jeffer-
sion).
186 SCHWARTZ, supra note 125, at 1122.
fringed." A motion was made in the Senate on September 2, 1779, to strike "religion, or prohibiting the free exercise thereof" and substitute "one religious sect or society in preference to others." That was eighteenth century nonpreferentialism. It was, as Madison knew, the most insidious form of establishment. The motion was defeated by the Senate. Another amendment was proposed that Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society. It was defeated. A final effort to insert "Congress shall make no law establishing any particular denomination of religion in preference to another" was rejected. As finally reported, the Senate accepted the House wording but struck the final phrase, "nor shall the rights of conscience be infringed."

In a Senate/House conference committee there was a lingering effort to have reference to establishing a single sect. The Committee rejected that approach. Finally, on September 24, the House sent a message to the Senate indicating it would agree with other Senate amendments provided the amendment on religion read: "Congress shall make no law respecting an establishment of religion, or prohibiting a free exercise thereof..." The Senate agreed on September 25th.

The states in turn rejected the first two amendments—regulation of number of representatives in Congress and regulation of congressional pay. The result was that what had been Amendment III became the First Amendment. Appropriately, it was Virginia, on December 15, 1791, that became the final state required to bring about ratification of the ten amendments.

Madison had prevailed in spite of the fact that probably the majority of the members of Congress saw no problem with establishment of religion in principle. And there were many who would have blanched at the thought of granting freedom of conscience to non-Christians. Madison had so noted in his October 17, 1788 letter to Jefferson: "I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." Sup-

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187 Id.
188 Id. at 1148.
189 Id.
190 Id.
191 Id.
192 LEVY, supra note 167, at 82.
193 Id.
194 Id.
195 Id.
196 SCHWARTZ, supra note 125, at 1162.
197 Id. at 1166.
198 Id. at 1171.
199 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 PAPERS OF
porting this view was the fate of an additional article proposed by Madison which read: "No State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right to trial by jury in criminal cases." Addressing his peers in the House, Madison said he considered the proposed amendment "to be the most valuable amendment on the whole list." The Senate demurred. Victory on that front would wait until 1868 and the Fourteenth Amendment.

III. HISTORY, HOAX, AND HOKUM

Since the late 1940s, beginning with *Everson v. Board of Education*, many of the issues concerning the Establishment of Religion Clause of the First Amendment have been aired in public debate. In the beginning those exchanges focused upon how much latitude the government had under that Amendment to provide aid to parochial schools and to endorse or support religious exercises in public schools. The record of the Founders and their thoughts were taken seriously, if differently interpreted. Sadly, a new dimension of public debate has emerged since *Engel v. Vitale* in 1962. Outraged citizens have resorted to numerous distortions of history to counter Court decisions. In the process a collection of myths have arisen and continue to float, usually unchallenged, in the public arena. But while the story of Paul Bunyan and his big blue ox is a fine tale, and the imaginations of Dr. Seuss and Richard Scary have enhanced the pleasure of children and parents alike, neither is imposed as a guideline for constitutional interpretation. The myth of George Washington hurling a coin across the Rappahannock River is harmless unless it is employed to prove that the first President was conveying to future generations that the use of currency should be abandoned for a return to the barter system.

Examples of this new mythology surrounding the Founders are growing in number. They become highly mischievous when used to formulate current policy respecting the First Amendment. Prior to examining the Supreme Court actions relative to the Religion Clauses, three such myths illustrating the problem are considered.

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JAMES MADISON, *supra* note 55, at 297.

200 12 PAPERS OF JAMES MADISON, *supra* note 88, at 344.

201 *Id.*

202 330 U.S. 1 (1946), *reh'g denied*, 330 U.S. 855 (1947) (holding that state funding of parochial school busing was unconstitutional).

203 370 U.S. 421 (1962) (holding that a state could not constitutionally compose an official state prayer and require that it be recited in the public schools).
A. *The Danbury Baptists*

On the 22nd of January, 1995, Pat Robertson remarked that the separation of church and state "was never in the Constitution. However much the liberals laugh at me for saying it, they know good and well it was never in the Constitution. Such language only appeared in the constitution of the Communist Soviet Union."204 Some thirteen years earlier Mr. Robertson, in a 1982 appearance before the Senate Committee on the Judiciary, testified on behalf of the Reagan school prayer amendment.205 On that occasion he asserted that separation of church and state was more compatible with the constitution of the Soviet Union than that of the United States.206 In order to support that claim, Robertson sought to discredit the 1802 Jefferson letter to the Danbury Baptist Association, in which President Jefferson described the First Amendment as "building a wall of separation between church and state."207 Robertson, without a single shred of evidence, said the letter resulted from the Danbury Baptists having "aroused [Jefferson's] ire by criticism of one of his policies.1208 In his oral testimony Robertson spoke of Jefferson having "some pique, because of criticism."209 The conclusion to be drawn was that the separation metaphor resulted from anger, and was thus to be dismissed. Implicit in Robertson's harangue was the notion that Jefferson was merely telling the Baptists to leave him alone since the First Amendment separated him from the need to listen to their criticism. Robertson's whole premise is patently false and demonstrates a contempt for history, the Constitution, and the founders.

Anyone who has read the letter from the Danbury Baptist Association can categorically state that there is not a single shred of criticism of Mr. Jefferson in the entire letter.210 It begins by expressing "our great satisfac-

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204 *The 700 Club* (The Family Channel television broadcast, Jan. 22, 1995) (statement of Pat Robertson).
206 Id.
208 *Hearings on S.J. Res. 199*, supra note 205, at 274.
209 Id. at 265.
210 I am indebted to the editors of *The Papers of Thomas Jefferson* for supplying me with a photocopy of the letter which I transcribed here:

Sir,

Among the many millions in America and Europe who rejoice in your Election to office; we embrace the first opportunity which we have enjoyed in our collective capacity, since your Inauguration, to express our great satisfaction, in your appointment to the chief Majestacy in the United States: And though our mode of expression may be less courtly and pompious than what many others clothe their addresses with, we beg you, Sir to believe, that none are more sincere.

Our Sentiments are uniformly on the side of Religious Liberty—that Religion is at all times and places a matter between God and individuals—that no man ought to suffer in name, person, or effects on account of his religious Opinions—that the legitimate Power of civil government extends no further than to punish the man who works ill to his neighbors: But Sir our constitution of government is not specific. Our antient charter together with the Laws made coincident therewith, were adopted as the Basis of our government, at the time of our revolution; and such had been our Laws & usages, and such still are; that Religion is considered as the first object of Legislation; and therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted, and not as inalienable rights: and these favors we receive at the expense of such degrading acknowledgements, as are inconsistent with the rights of freemen. It is not to be wondered at therefore; if those, who seek after power & gain under the pretense of government & Religion should reproach their fellow men—should reproach their chief Magistrate, as an enemy of religion Law & good order because he will not, dare not assume the prerogatives of Jehovah and make Laws to govern the Kingdom of Christ.

Sir, we are sensible that the President of the [U]nited States, is not the national legislator, and also sensible that the national government cannot destroy the Laws of each State; but our hopes are strong that the sentiments of our beloved President, which have had such genial affect already, like the radiant beams of the Sun, will shine and prevail through all these States and all the world till Hierarchy and Tyranny be destroyed from the Earth. Sir, when we reflect on your past services, and see a glow of philanthropy and good will shining forth in a course of more than thirty years we have reason to believe that America's God has raised you up to fill the chair of State out of that good will which he bears to the Millions which you preside over. May God strengthen you for the arduous task which providence & the voice of the people have cald you to sustain and support you in your Administration against all the predetermined opposition of those who wish to rise to wealth & importance on the poverty and subjection of the people. And may the Lord preserve you safe from every evil and bring you at last to his Heavenly Kingdom through Jesus Christ our Glorious Mediator.

Signed in behalf of the Association.

Nehh Dodge
Ephram Robbins The Committee
Stephen S. Nelson

Letter from Nehh Dodge, Ephram Robbins & Stephen S. Nelson, Committee Members of the Danbury Association, to Thomas Jefferson, President of the United States (Oct. 7, 1801) (copy on file with the author) [hereinafter Letter from the Danbury Association]. A note Jefferson had written on the side of second page reads: “Address Baptist Association of Danbury Conn. recd Dec. 30, 1801.” Id. For a transcription of the Letter,
tion in your appointment to the chief Majestracy in the United States.”

Quickly the writers move to assert: “Our Sentiments are uniformly on the side of Religious Liberty—That Religion is at all times and places a matter between God and individuals—That the legitimate Power of civil government extends no further than to punish the man who works ill to his neighbor. . . .”

Turning from that ideal, the letter calls attention to Connecticut laws made at the time of the Revolution and asserts: “Religion is considered as the first object of Legislation; and therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted, and not as inalienable rights. . . .”

Respecting the state legislators, the Baptists note:

It is not to be wondered at therefore; if those, who seek after power & gain under the pretense of government & Religion should reproach their fellow men—should reproach their chief Magistrate, [President Jefferson,] as an enemy of religion Law & good order because he will not, dare not assume the prerogatives of Jehovah and make Laws to govern the Kingdom of Christ.

The writers conclude: “[O]ur hopes are strong that the sentiments of our beloved President, which have had such genial affect already, like the radiant beams of the Sun, will shine and prevail through all these States and all the world till Hierarchy and Tyranny be destroyed from the Earth.”

The writers expound on their hopes by asserting: “May God strengthen you for the arduous task which providence & the voice of the people have cald you to sustain and support you in your Administration against all the predetermined opposition of those who wish to rise to wealth & importance on the poverty and subjection of the people.”

This message to the new president reflected the sentiments of most Baptists in Connecticut where the “Standing Order,” the established Congrega-

*see Charles C. Haynes, Religion in American History, in ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT 44-45 (1990). Haynes’ transcription of the Danbury Letter is confused by his misreading of the word “antient” as national, id. at 44, while his reproduction of Jefferson’s reply suffers from misquoting the letter and the First Amendment, replacing, as he does, the word “respecting” with “regarding.” Id. at 48.*

211 See Letter from the Danbury Association, supra note 210.
212 Id.
213 Id.
214 Id.
215 Id.
216 Id.
tional ministers, dominated the political scene in the state. The established clergy of Connecticut were firmly opposed to Jefferson's election in 1800. That establishment survived until 1818, when these words were included in the State constitution: "That the exercise and enjoyment of religious profession and worship without discrimination, shall forever be free to all persons in this State. . . ."

It is no wonder that President Jefferson, who received the letter on December 30, 1801, replied on January 1, 1802: "The affectionate sentiments of esteem and approbation you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction." Then Jefferson turned to the Association's concerns, stating:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.

Modern critics of "separation" frequently insist that Jefferson dashed this letter off in haste, and Justice Rehnquist wrote in Wallace v. Jaffree that it "was a short note of courtesy." The evidence is totally to the contrary. Jefferson received the Danbury Letter on December 30, 1801. On January 1, 1802, he sent the letter, a draft of his response, and a request to Attorney General Levi Lincoln. Jefferson wrote:

The Baptist address, now enclosed, admits of a condemnation of the alliance between Church and State, under the authority of the Constitution. It furnishes an occasion, too, which I have long wished to find, of saying why I do not proclaim fastings and thanksgivings, as my predecessor did.

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217 STOKES & PFEFFER, supra note 5, at 74.
218 Id.
219 Id.
220 Id. at 75.
221 Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), supra note 207, at 510.
222 Id.
224 Id. at 92 (Rehnquist, J., dissenting).
The address, to be sure, does not point at this, and its introduction is awkward. But I foresee no opportunity of doing it more pertinently. I know it will give great offense to the New England clergy; but the advocate of religious freedom is to expect neither peace nor forgiveness from them. Will you be so good as to examine the answer and suggest any alterations which might prevent an ill effect, or promote a good one, among the people?225

Mr. Lincoln replied on the same day with the suggestion that Jefferson alter his comments on proclamations because, with the exception of Rhode Island, the other New England states were used to "proclamations from their respective executives."226 He went on: "This custom is venerable, being handed down from our ancestors . . . [and] they regreted very much the late conduct of the legislature of Rhode Island on this subject."227 Based on Lincoln's advice, Jefferson excised "Congress thus inhibited from acts respecting religion and the Executive authorized only to execute their acts, I have refrained from prescribing even those occasional performances of devotion."228 Explaining his decision, Jefferson wrote in the margin of the original draft that "[t]his paragraph was omitted on the suggestion that it might give uneasiness to some of our republican friends in the eastern states where the proclamation of thanksgivings etc. by their Executive is an antient habit and is respected."229

What a remarkable story this is. In 1801, Baptists in Connecticut were still persecuted under a "mild" establishment. Jefferson, as President, could do nothing about the state laws except to anticipate seeing "the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties."230 In their

227 Id.
228 Letter from Thomas Jefferson to Committee of Danbury Baptists (Jan. 1, 1802), supra note 207, at 510.
229 Id. The note, in Jefferson's hand, does not alter Jefferson's consistent refusal to make such proclamations. It merely reflects his awareness that the "antient" traditions of the New England states, except for Rhode Island, would require time before they were altered. At the national level religious exercises were subject "only to the voluntary regulations and discipline of each respective sect." See id. These words were in the paragraph Jefferson omitted.
230 Id.
hearts the Baptists knew that and so stated when they wrote: "[W]e are sensible that the President of the united States, is not the national legislator, and also sensible that the national government cannot destroy the Laws of each State; but our hopes are strong that the sentiments of our beloved President . . . will shine and prevail through all these States and all the world till Hierarchy and Tyranny be destroyed from the Earth." 231

These letters and events together reflect how seriously Mr. Jefferson approached the plight of fellow citizens, and, when understood in that context, make the separation metaphor profoundly significant. 232 It was born out of human suffering, not rational abstraction. How Mr. Robertson, with such disdain for facts, could callously violate the dedication and commitment of those Connecticut Baptist citizens is difficult to fathom.

One other remark about the Danbury Letter is in order here. David Barton in America's Godly Heritage 233 comments upon the Danbury Letter with outrageous disregard for the facts. After totally missing the point of the Danbury Letter, Barton incorrectly asserts that in his reply Jefferson explained that the First Amendment was to prohibit the establishment of a na-

231 Letter from the Danbury Association, supra note 210. We are reminded that James Madison anticipated just the problem the Danbury Baptists experienced, knowing, as he did, that it was at the state level that violations of rights were most likely to occur. Thus did he attempt, unsuccessfully, to pass a bill applying the Religion Clauses to state laws. Id.; see supra notes 198-200 and accompanying text.

232 When Thomas Jefferson responded to the Baptists in Danbury, Connecticut, they were being severely persecuted because they were not a part of the Congregationalist establishment in that state. Jefferson sought to use his reply to enunciate his own principles on the subject of religious freedom and non-establishment. On December 30, 1801, he wrote his first draft of a letter that was to be sent two days later. Letter from Thomas Jefferson to Committee of the Danbury Baptist Association, supra note 207, at 510. In the original, Jefferson included a single word which he deleted with pen strokes prior to writing the final draft. As first devised by Jefferson, the wording was "thus building a wall of eternal separation between church and State." Id. Careful reading of the original manuscript in the Library of Congress leaves no doubt as to that word. Whatever prompted the President to strike that word, it is clear that as he first phrased his assessment of the First Amendment, the word "eternal" came to mind. This strongly suggests that separation of church and state was never simply a political solution for Jefferson, but a fundamental principle to which he was dedicated. While it certainly can be argued that Jefferson struck the word because he decided he did not mean it, a more plausible explanation is that he saw the word as an intrusive adjective that deflected from the effect of the crisp phrase "wall of separation." All we can say with certainty is that when he first devised the phrase, the word "eternal" flowed naturally in the context for him. To my knowledge no one has previously deciphered the word "eternal."

Jefferson did, in fact, use the word in one of his most remembered phrases swearing "eternal hostility against every form of tyranny over the mind of man." Letter from Thomas Jefferson to Benjamin Rush (Sept. 23, 1800), in A JEFFERSON PROFILE, supra note 55, at 120.

233 Barton, supra note 82, at E3069.
tional denomination only. He also fabricates a long list of things Jefferson supposedly used to explain the First Amendment. He quotes Jefferson as saying that "such a wall would protect the church from the government, that there would be open and free religious expression of all orthodox religious practices (whether public prayer, the use of the Bible, etc.)." It is appalling that the Jefferson Letter, readily accessible to the public, should be so abused. Barton's claims have no relationship to truth but can be floated easily to support political agendas concerning school prayer. Under pressure from critics, it is reported that Barton has now withdrawn some of his lies about the letter to the Danbury Baptists.

B. Prayer and the Constitutional Convention of 1787

A second example of historical fraud has been around for a considerable length of time. In various forms it has been reported that after a motion by Benjamin Franklin, offered on June 28, 1787, at the Constitutional Convention, to have daily prayer thereafter, the Convention voted for the motion, "took a day off for fasting and prayer," and at every session thereafter "opened with prayer." David Barton claims: "They indeed did stop and pray. They adjourned, and for almost three days they prayed, attended church, and listened to preachers challenge and inspire them." The assertion that the Convention members took a day off from fasting and prayer is the most distressing because it comes from the Speaker of the House, Newt Gingrich, who operates under the banner of a Ph.D. in history, and is currently engaged in "teaching" a course on cable television. He simply lied to the Congress and the American people. In the conclusion to his speech he grandly quoted Benjamin Franklin's comments to the Constitutional Convention of 1787. Afterwards, Gingrich told his colleagues, the Convention members "took a day off for fasting and prayer" before returning to their task. Facts hold no charm for the Republican leader.

As noted earlier, Franklin did make a motion "that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations,

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234 Id. at E3071.
235 Id.
236 Id.
239 Prayer in Public Schools and Other Matters: Hearings Before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 68 (1962) (testimony of Senator A. Willis Robertson).
241 Id.
be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that Service." The Convention members briefly debated the issue and "after several unsuccessful attempts for silently postponing the matter by adjourning the adjournment was at length carried, without any vote on the motion." The Convention convened the following morning, June 29th, for a full day of business.

In spite of "historian" Gingrich, the delegates did not stop either a day or an hour for fasting and prayer at that time or thereafter. It is shameful to distort history intentionally to achieve some pious rub-off effect from a non-event. The efficacy of prayer was not at issue for the leaders in Philadelphia. They were men satisfied that they were endowed with minds with which to think. Some were devout Christians, but those patriots in Philadelphia were not about the business of creating some form of a pious image of themselves. Of course there is no reason to suggest that because Madison has no record of the Convention stopping for prayer during the entire summer, prayer was rejected as a concept by individual members.

C. The Ten Commandments Hoax

In July, 1994, the organization Fairness & Accuracy in Reporting (FAIR) pointed out that Rush Limbaugh had incorrectly attributed to James Madison a quotation concerning the centrality of the Ten Commandments to "American civilization." Quickly rising to Limbaugh's defense were several California residents who wrote letters to the Los Angeles Times. One writer prefaced the alleged quotation with the following: "Here (as quoted in The Myth of Separation by David Barton) is precisely what Madison said." The bogus quote followed: "We have staked the whole future of American civilization, not upon the power of government, far from it. We have staked the future of all of our political institutions upon the capacity of mankind for self government; upon the capacity of each and all of us to govern ourselves, to control ourselves, to sustain ourselves according to the Ten Commandments of God." What the writer, Rick Crowell, did not tell us was that Barton cited as his only sources for those words two twentieth century writers, Harold K. Lane in Liberty! Cry Liberty!, and Fred-

\[\text{\small 242 Madison, Debates, supra note 64, at 182.} \]
\[\text{\small 243 Id.} \]
\[\text{\small 244 Id.} \]
\[\text{\small 245 Howard Rosenberg, Limbaugh Devotees Rush to his Defense, L.A. Times, July 11, 1994, at F1.} \]
\[\text{\small 246 Id. at F1.} \]
\[\text{\small 247 Id.} \]
\[\text{\small 248 David Barton, The Myth of Separation 308 (1992) (citing Harold K.} \]

Responding to the public hubbub, editors of *The Papers of James Madison,* John Stagg and David Mattern, referred all inquirers to a letter dated November 23, 1993, in which Mr. Mattern wrote concerning the alleged quotation: “We did not find anything in our files remotely like the sentiment expressed in the extract you sent us. In addition, the idea is inconsistent with everything we know about Madison’s views on religion and government, views which he expressed time and time again in public and in private.” This expert response has not dampened the ardor of those who would have Madison affirm their own distorted version of American history. Crowell accused Mr. Mattern of “revisionism at its worst.”

I offer here a reconstruction of the convoluted trek of the words in question. In citing David Barton’s *The Myth of Separation* as the source, Mr. Crowell apparently missed the fact that Barton did not include the words, “of all of our political institutions upon the capacity of mankind for self-government.” In a video tape Barton inserts “of all our political institutions” but still omits the “capacity of mankind.” This video version was read into the Congressional Record by Representative Dannemeyer on October 7, 1992.

Barton’s sources are two, or three, depending upon how you sort out his confusion. Apart from citing the Lane volume of 1939, he offers as his other source Frederick Nyneyer’s *First Principles in Morality and Economics: Neighborly Love and Ricardo’s Law of Association.* In fact, his source appears to be an article entitled *Neighborly Love and Ricardo’s Law of Association.* Far from appearing in a source by Nyneyer, the alleged quote is found in the latter article and drawn “[f]rom the 1958 calendar of *Spiritual Mobilization.*” Barton’s attempted documentation becomes exponentially more curious. He seems to have no clue as to his sources. When approached about his mythical additions to Jefferson’s letter to the Danbury

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*Lane, Liberty! Cry Liberty* 32-33 (1939)).


250 Letter from David Mattern to Gene Garman, Nov. 23, 1993. A copy of this letter was supplied to the author by Mr. Mattern, current editor of *The Papers of James Madison.*


253 Barton, *supra* note 82, at E3072.

254 *Id.* at E3071.

255 BARTON, *supra* note 248, at 308.

256 4 PROGRESSIVE CALVINISM 31 (1959).

257 *Id.*
Baptists, he deleted the references in a later edition of his tape.\textsuperscript{258}

The connection between the Ten Commandments and James Madison has been variously advanced by numerous commentators from the political right over the past several decades. In 1964, Clarence Manion wrote:

As Madison stated in the \textit{[T]he Federalist}, our entire political experiment swings upon our capacity to govern ourselves according to the moral law. . . . The only people who can afford the great luxury of a civil government strictly limited by law are those people who recognize and are willing to live by their natural, God-imposed obligations and responsibilities under the Ten Commandments.\textsuperscript{259}

There is nothing in \textit{The Federalist Papers} remotely resembling what is argued by Manion. Madison never mentioned the Ten Commandments in any of \textit{The Federalist} essays. There are, however, two points to be made. First, Manion, while claiming to cite \textit{The Federalist Papers}, does not have the temerity to quote Madison. Second, while Manion espouses generally the same sentiment about the Ten Commandments as does the Barton material, the references to the Decalogue are utterly different from the Barton version.

Proving that a quotation does not exist is a daunting task. If you cannot find it in any extant manuscripts or collections of Madison's works, just how does one prove it will not turn up in someone's attic tomorrow? Of course you cannot. That is why the Madison editors were careful in how they phrased their response. But, after all, it is incumbent solely upon the perpetrators of this myth to prove it by at least one citation. This they cannot do. Their style is not revisionism, it is anti-historical.

We likely have not heard the last of this nonsense, but it is important to press the new media frauds to document what they claim. Because they cannot do so in most instances, time may ultimately discredit the lot of them.

\textbf{IV. The Supreme Court on Church and State: 1940-1960}

Madison's death in 1836 marked the end of the era of the Founders. He was the last living member of the 1787 Constitutional Convention. As evidenced by correspondence late in Madison's life, the popular perception of the nation was, by the 1830s, frequently phrased in terms of a Protestant hegemony.\textsuperscript{260} In fact, if not in law, the huge Protestant majority enforced a

\begin{footnotes}
\footnote{See supra text accompanying notes 233-36.}
\footnote{CLARENCE MANION, THE CONSERVATIVE AMERICAN 197 (1964). Manion attributes these sentiments to Madison in \textit{Federalist No. 39}.}
\footnote{Letter from James Madison to Reverend Jasper Adams (circa 1834), in 9 \textsc{The Writings of James Madison}, supra note 73, at 484-88 (internal references of this let-}
\end{footnotes}
generalized Christian mantle over the political and social institutions of the Nation.\textsuperscript{261} In the first census, taken in 1790, the total white population of the United States was a little over 3 million.\textsuperscript{262} In 1840, it was a little more than 14 million.\textsuperscript{263} The slave population had risen from 700,000 to over 2 million.\textsuperscript{264} The vast majority of those persons were Protestant.\textsuperscript{265} In 1820, there was a total of 8,000 Baptist, Methodist, Congregational, and Presbyterian churches.\textsuperscript{266} In contrast, there were only 124 Roman Catholic churches.\textsuperscript{267} By 1860, the Catholic figure had grown sharply to 2550 churches.\textsuperscript{268} However, Methodists alone had nearly 20,000 churches.\textsuperscript{269}

Restricted by the words "Congress shall make no law . . . "\textsuperscript{270} the Supreme Court was unable to respond to establishment and free exercise questions at the state and local level. Chief Justice John Marshall hinted at the application of the Bill of Rights to the states in an 1810 opinion: "[T]he constitution of the United States contains what may be deemed a bill of rights for the people of each state."\textsuperscript{271} He, however, closed that door securely in an 1833 opinion when he wrote: "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."\textsuperscript{272} As noted earlier, Madison was deeply concerned over this issue as evidenced by his effort to have the Bill of Rights apply to state laws. He told the Congress in 1789 that he conceived this to be the most valuable amendment on the whole list; if there was any reason to restrain the government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the state governments; he thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.\textsuperscript{273}

\begin{thebibliography}{9}
\bibitem{261} See generally E. DIGBY BALTZELL, THE PROTESTANT ESTABLISHMENT (1964).
\bibitem{262} J.D.B. DEBOW, STATISTICAL VIEW OF THE UNITED STATES 45 (1854).
\bibitem{263} Id.
\bibitem{264} Id. at 82.
\bibitem{265} Id. at 136-37.
\bibitem{266} EDWIN GAUSTAD, HISTORICAL ATLAS OF RELIGION IN AMERICA 43 (rev. ed. 1976).
\bibitem{267} Id.
\bibitem{268} Id.
\bibitem{269} Id.
\bibitem{270} U.S. CONST. amend I.
\bibitem{271} Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137 (1810).
\bibitem{272} Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).
\bibitem{273} 12 THE PAPERS OF JAMES MADISON, supra note 88, at 344 (citation omitted).
\end{thebibliography}
In light of Madison’s failure to secure passage of that provision, Justice Marshall was on solid ground in his ruling.

With the adoption of the Fourteenth Amendment in 1868, the door was opened for a new reading of the first ten amendments. Slowly, beginning in 1897, the Court explored the Bill of Rights for guidelines in state cases. As Laurence Tribe notes, “many of the rights guaranteed by the first eight Amendments have been ‘selectively’ absorbed into the fourteenth.” Following Cantwell v. Connecticut in 1940 and Everson v. Board of Education of 1947, the Court has rendered over sixty-five significant decisions in this area.

Because my focus in this examination is primary and secondary public and private education, I turn now to the events in the Supreme Court that set the stage for the critical opinion of the Court in Everson. The first important pre-forties case came in 1925 when the Court in Pierce v. Society of Sisters ruled that an Oregon law requiring attendance at public schools could not prohibit a private alternative. The case was decided on Fourteenth Amendment grounds and became what has been termed the Magna Carta of parochial schools. Five years later in Cochran v. Louisiana State Board of Education, the Court upheld a Louisiana law providing textbooks to parochial school children, rejecting appellants’ claim that the statute violated the Fourteenth Amendment by diverting public property to

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274 The Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.


276 Laurence H. Tribe, American Constitutional Law §11-2, at 772 (2d ed. 1988). Tribe lists the years of cases regarding the incorporation of the following rights: just compensation (1897), free speech (1927), free press (1931), free assembly (1937), petition (1939), free exercise of religion (Cantwell v. Connecticut, 310 U.S. 296 (1940)), non-establishment of religion (Everson v. Board of Education, 330 U.S. 1 (1947)). Id.

277 310 U.S. 296 (1940).

278 330 U.S. 1 (1947).


280 268 U.S. 510 (1925).

281 Id. at 536.

282 Miller & Flowers, supra note 279, at 453.

283 281 U.S. 370 (1930).
private individuals. The Court endorsed the lower court's ruling that the school children, as opposed to the state, were the beneficiaries of the legislation.

The Supreme Court created instant historical precedent in 1947, when it found in favor of the State of New Jersey in *Everson*. In spite of the narrow margin, all of the justices seemed in full agreement with the principles enunciated in Justice Black's majority opinion. He wrote:

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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. 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."

What divided the justices was a quite narrow interpretation of the child benefit theory. Justice Black and his colleagues separated the child's interest in this case from the First Amendment issues and upheld the State's right to fund transportation to parochial schools. While some advocates of broader aid to church schools took heart at the majority opinion, it soon became clear that the decision did not rest on the child's right to an education but, rather, the child's right to safety. Thus, in 1947, all nine justices drew their interpretation of the Religion Clauses from the Madison/Jefferson tradition, generating a strong precedent for a firm separationist view.

There was some grumbling from citizen groups that agreed with the minority, but by and large the decision raised little uproar. A year later a shift

284 *Id.* at 375.
285 *Id.*
286 *Everson*, 330 U.S. at 15 (citation omitted).
287 *Id.* at 17.
288 *Id.*
in public response to this new area of judicial review was detectable. It had
to do with the Court's decision rendered on March 8, 1948, in Illinois ex
rel. McCollum v. Board of Education. The Court held that public
schools in Champaign, Illinois had engaged in violation of the Establishment
Clause by permitting religious groups to use classrooms during school hours
for the teaching of religion.

While Illinois officials sought to comply with the Court's action, church
groups in other states defied the ruling. The Virginia Council of Churches
continued to press its own teaching of religion in public schools in the face
of State Attorney General J. Lindsay Almond's observations: "I have grave
doubts as to the constitutionality of any plan" which would hold school au-
thorities "responsible . . . for the discipline of the child."

Almost immediately an alternative plan was attempted in several locali-
ties. In Champaign, religion classes held after school hours appeared to meet
with success. In fact, the chief instructor for the city's Council for Reli-
gious Education said the new idea had met with sufficient support to "warr-
rant starting others next year in the adjoining city of Urbana." In 1952,
in Zorach v. Clauson, the justices by a six to three majority found the
"released time" formula constitutional.

The national discussion of these church/state decisions was, for the most
part, quite civilized. Shortly after McCollum, Dwight Eisenhower was inau-
gurated as President and presided over a nation in the throes of a movement
focused on "The Man Upstairs." Struggling with the realities of post-
war conflict with the Soviet Union, the United States was plunged into a
massive red scare that affected everything from the academy of learning to
the Academy of Motion Picture Arts and Sciences. Coupled with the
political climate was the rise of the guru of godly mayhem, Billy Graham.
Early in the fifties, Graham began to thrust the deity into the fray on the
side of democracy against communism.

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290 Id. at 212.
291 Virginia Churches Face Changes in Weekday Religious Education, RELIGIOUS
HERALD, July 22, 1948, at 3.
293 Id.
295 Id. at 315. Justice Douglas wrote: "Here . . . the public schools do no more than
accommodate their schedules to a program of outside religious instruction." Id.
296 This was a popular song of the fifties concerning deity. One line of the lyrics
reads: "Have you talked to the Man Upstairs?"
297 See JOHN COGLEY, REPORT ON BLACKLISTING: I-MOVIES 1-23 (1956) (discussing
the 1947 hearings).
298 For discussion of the military aspects of church and state relationships during the
early 1950s, see Merlin Gustafson, Church, State, and the Cold War, 1945-1952, J.
In the election of Dwight Eisenhower, Americans turned to a man who seemed to incarnate their corporate notion of deity. Religion was everywhere in the fifties. Will Herberg commented:

But it is a curious kind of religion. The very same people who are so unanimous in identifying themselves religiously, who are joining churches at an accelerated rate, and who take it for granted that religion is a "very important" thing, do not hesitate to acknowledge that religion is quite peripheral to their everyday lives: more than half of them quite frankly admit that their religious beliefs have no influence whatever on their ideas in economics and politics, and a good proportion of the remainder are obviously uncertain.299

It was a time when laymen had the courage to scold the clergy for involving itself in matters other than spiritual, i.e., politics and social justice.

Shortly after his election Eisenhower said: "Our government makes no sense unless it is founded in a deeply felt religious faith, and I don’t care what it is."300 He expressed a similar attitude in 1948: "I am the most intensely religious man I know. . . . Nobody goes through six years of war without faith. That does not mean that I adhere to any sect. A democracy cannot exist without a religious base. I believe in democracy."301 Working from that concept, Eisenhower wanted to rally all faiths to endorse the American system as God’s system.302 Sociologist Digby Baltzell was quite correct in remarking that "President Eisenhower calmly reigned as representative of a generation still dominated by the Protestant establishment."303 Ike and the people seemed to identify America with some nebulous deity. On the Sunday following his inauguration Eisenhower joined a sect, the Presbyterian Church.304

The high priests of popular religion in the fifties were Norman Vincent Peale and Graham.305 Eisenhower was comfortable with both men. In addi-

299 Will Herberg, Religion and Culture in Present-Day America, in 2 The Record of American History 448, 448 (Irwin Unger et al. eds., 1971).
301 Id. at 83.
302 Id.
303 Baltzell, supra note 261, at 296.
304 Alley, supra note 300, at 84; see also William Lee Miller, Piety Along the Potomac: Notes on Politics and Morals in the Fifties (1964).
305 Alley, supra note 300, at 85.
tion, Ike inaugurated the White House prayer breakfast and tried to establish a national day of prayer.\textsuperscript{306} Eisenhower opened Cabinet meetings with prayer.\textsuperscript{307} He became, for millions of citizens, the center of piety for America. The President made the nation feel good. He was roundly praised for supporting the addition of "under God" to the Pledge of Allegiance.\textsuperscript{308} Definition of this amorphous deity was seen as unnecessary, perhaps because it would have been near impossible.

Eisenhower's popularity did not come from intellect or commitment to a cause. Unlike FDR, Ike did not move the country to reflect his personality. Rather, Eisenhower reflected back to the people their own popular image of one nation under God. He possessed a generalized piety that made millions feel good. He brought piety to the Potomac.\textsuperscript{309} Will Herberg was on the mark in noting that Eisenhower represented the secular religionist "being serious about religion but not taking religion seriously."\textsuperscript{310} That could equally be said of Graham and Peale.

During that time, the nation may have moved closer than ever to establishing a kind of civil religion. Had it happened, it would have been of a modified Puritan variety, spouting many legalisms but divested of ethical or theological content. It was a decade of simplistic faith in which Hollywood peddled Peter Marshall and audiences responded with tears and "faith."\textsuperscript{311} It was a nostalgic look back at the old time religion.

The Eisenhower piety was not new. Many Presidents have used "godtalk" to communicate to the electorate.\textsuperscript{312} However, even within the Protestant enclave, there has been remarkable dissonance in the religious messages conveyed. The gods addressed by chief executives have come in many manifestations. If there is a god of America, who is it? Is she the elective god of judgment affirmed by President Wilson?\textsuperscript{313} Is he the god of business rewarding the practice of diligence as defined by Herbert Hoover?\textsuperscript{314} Is she the god of the universe whose benevolent plan may inspire all men and women as it did Franklin Roosevelt?\textsuperscript{315} Is he the friendly sov-

\textsuperscript{306} Id.
\textsuperscript{307} Id.
\textsuperscript{308} See AHLSTROM, \textit{supra} note 19, at 954; GEORGE C. BEDELL ET AL., RELIGION IN AMERICA 15 (1982); MARTIN MARTY, RIGHTEOUS EMPIRE 250 (1970).
\textsuperscript{309} See generally MILLER, \textit{supra} note 304.
\textsuperscript{310} Herberg, \textit{supra} note 299, at 454.
\textsuperscript{311} A \textit{MAN CALLED PETER} (20th Century Fox 1955) (film account of Peter Marshall who became a U.S. Senate chaplain).
\textsuperscript{312} Consider, for instance, Woodrow Wilson, Harry Truman, and Franklin Roosevelt. \textit{See Truman Calls Sermon on the Mount Our Guide}, CHRISTIAN CENTURY, Sept. 21, 1949, at 1091 (Truman's statement made to a group of visiting Anglican bishops).
\textsuperscript{313} See ALLEY, \textit{supra} note 300, at 32-42.
\textsuperscript{314} See \textit{id.} at 50-57.
\textsuperscript{315} See \textit{id.} at 58-69.
ereign who has chosen America, blessed her, and given her a special mission as suggested by Truman, Eisenhower, Ronald Reagan, and George Bush? None of these questions extend beyond the community of Christianity. So just how is America to find its way through the theological thickets of her ever more complex and variegated religious heritages? Politicians seldom bother themselves about such questions. The Supreme Court could not avoid them as it undertook the adjudication of establishment and free exercise disputes. In its role as interpreter of the nation’s political “scripture,” the Constitution, the Court would inevitably create tension with citizens and their representatives when it handed down “final” resolutions that seemed at odds with some reigning popular religion.

The calm of domestic tranquility, so consistently portrayed on television by *Leave It To Beaver* and *Father Knows Best*, was in marked contrast to the violent world emerging around us. The fifties not only produced the irrational behavior of McCarthyism, but also were often consumed with public fear over the bomb exemplified by late night talk show conversations about bomb shelters. The Sputnik event of 1957 shattered illusions about superiority in space. And hovering over the domestic landscape was the anger engendered by the Supreme Court decision of 1954 in *Brown v. Board of Education*.

In spite of President Truman’s religious doctrine which claimed that American policy was determined by the Sermon on the Mount, Southern white leaders and citizens, a majority identifying themselves as Christians, ignored that presidential nostrum in the wake of *Brown*. An entire generation of young Americans, black and white, were sentenced before their birth to racial animosity and suspicion. The unholy roll call of the fifties and early sixties includes Gov. George Wallace, Sen. Harry Byrd, Gov. Orvil Faubus, Sen. Strom Thurmond, and Gov. Ross Barnette, ably abetted by J. Edgar Hoover. That tight southern political alliance against the Court resulted in lost opportunities and lost children. The decade of the fifties may rank as the time of the greatest irresponsibility in our history. In spite of all the good will manifest in the character of Martin Luther King, Jr., so movingly expressed in his letter from the Birmingham jail, a deaf ear was turned by white politicians who, a decade later, would be in a lather over public school prayer. Nothing in our recent past so clearly identifies the shal-

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316 *See id. at 69-91.*
320 Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), in GOD’S NEW ISRAEL 347-60 (Conrad Cherry ed., 1971).
lowness of the public religious sentiments of the era than does the fundamentally unjust treatment of black citizens and the attempted dismantling of public education. And the nation would listen in vain for years to hear a mumbling word on the subject from Billy Graham. Perhaps, in light of these circumstances, it was fortunate for advocates of genuine adherence to the Religion Clauses of the First Amendment that no controversial cases related to public education and religion appeared in the fifties.

V. ESTABLISHMENT, SCHOOL PRAYER, PROTESTS, HEARINGS: 1962-1992

On January 23, 1992, the United States Senate by a vote of thirty-eight to fifty-five defeated a school prayer amendment offered by Senator Helms which he had attached to an education bill.\(^\text{322}\) The vote came a little less than five months shy of the 30th anniversary of the decision by the Supreme Court in *Engel v. Vitale*\(^\text{323}\) declaring prescribed public school prayers unconstitutional.\(^\text{324}\) In those three decades there was an unending stream of legislative maneuverings aimed at undermining that landmark decision.\(^\text{325}\) Of all the Court rulings of this century, none has sparked more consistent and long lasting action in Congress than *Engel*. The testimony on the subject fills volumes of committee hearings.\(^\text{326}\)


\(^{323}\) 370 U.S. 421 (1962).

\(^{324}\) Id. at 436.


\(^{326}\) *See, e.g.*, S. REP. NO. 357, 98th Cong., 2nd Sess. (1984), *reprinted in* 1984
When the *Engel* decision came down on June 25, 1962, it unleashed a fire-storm of protest across the nation. Addressing a session of the National Catholic Laymen's Retreat Conference in Portland, Senator Eugene McCarthy told the delegates: "It was the only thing [the Court] could do, in my opinion. . . ." He went on to comment on the heated response of some of his congressional colleagues: "Some genuinely believed it was an incorrect decision . . . others were critical to bolster their attack on the Court for its desegregation decisions . . . others were just 'demagoguing.'" Certainly the second reason was quite significant among Southern conservatives who were still engaged in delaying tactics related to the *Brown* decision. Those same elected officials represented a constituency that was heavily weighted with conservative Protestant religious traditions. While protesting desegregation often proved difficult to defend in a nation whose conscience had been affected by the protests and the ringing words of Martin Luther King, Jr., this new issue might well place those politicians on a presumed high moral ground against a perceived secularistic trend in the Court.

The public outrage stirred by the *Engel* decision spawned decades of House and Senate hearings on proposed constitutional amendments that would have altered the First Amendment Religion Clauses. This has persisted through eight Presidents. Only a month after *Engel*, the Senate Committee on the Judiciary held hearings for two days, interviewing only proponents of constitutional amendments. The Committee took no action.

In the Fall of 1962, the House of Representatives voted unanimously to replace some of the stars on the wall above the Speaker's desk with the motto "In God We Trust." In a speech before the House, Representative Randall of Missouri opined that one of the "byproducts of our act today is that we have given perhaps not too directly, but in not too subtle a way, our answer to the recent decision of the U.S. Supreme Court banning the Regents' Prayer from the New York public schools." Speaker John McCormack said: "The words 'In God We Trust' symbolize the path that our country has always taken since its origin and, pray God, will always take."


329 For a discussion of racial practices of various Protestant traditions, see WATSON, supra note 319, at 527-29.
330 See supra note 325.
333 Id.
334 Id.
In the midst of this public uproar the Court agreed to hear the appeals of
two cases involving prayer and Bible reading in public schools in the states
of Pennsylvania and Maryland. The decisions on those two cases, Abington
School District v. Schempp and Murray v. Catlett, were rendered in a single
opinion on June 17, 1963. Extending its logic in Engel, the Court de-
clared unconstitutional Bible reading and recitation of the Lord’s prayer and
other prayers in public schools.

In marked contrast with many of their parishioners, most leaders of
main-line Protestant churches applauded the 1963 decision. Contrary opinion
was offered by Billy Graham who said he was “shocked” and that the Court
was “wrong. . . . At a time when moral decadence is evident on every hand,
when race tension is mounting, when the threat of communism is growing,
when terrifying new weapons of destruction are being created, we need
more religion, not less.” He called the decision a penalty for the eighty
percent of Americans who “want Bible reading and prayer in the
schools.”

Cardinal Spellman deplored the decision: “I think it will do
great harm to our country and there is nothing we can do but bear it. But,
nevertheless, no one who believes in God . . . can approve such a deci-
sion.” In the South, Governor George Wallace said Alabama would defy
the Court’s stand: “I don’t care what they say in Washington . . . . We are
going to keep right on praying and reading the Bible in the public schools
of Alabama.” No doubt such practices had provided Mr. Wallace with
his high sense of morality respecting race relations.

One criticism of the Court in late August 1963 was noteworthy. The
Vatican publication Osservatore Romano referred to the Court decision, sug-
gesting that the principle of Church-State separation in the United States
was “tending to become, also legally, agnosticism.” Actually, this cri-
tique is most perceptive. It can be argued that the Court did indeed confirm
that the state is agnostic and should be neutral, taking no position on the
accuracy of religious claims of whatever character or nature. However,
agnosticism does not imply atheism nor antagonism to religion.

In 1964, Representative Emanuel Celler, Chairman of the House Judicia-
ry Committee, opened hearings on Bible reading and prayer in public
schools. As the debate progressed in the Committee, most of the argu-

336 Id. at 226.
338 Id.
339 Id.
342 The House conducted 18 days of hearings between April 28 and June 3, 1964.
See School Prayers: Hearings Before the House Committee on the Judiciary, 88th
Cong., 2d Sess. (1964) [hereinafter 1964 Hearings].
ments that would be repeated for decades to come emerged. Frequent reference was made to the term 'voluntary,' with few specific definitions given.\textsuperscript{343} Usually the word applied to a school's right to choose and the pupils' right to respond to the school mandate.\textsuperscript{344} Reflecting the 1952 decision in \textit{Zorach v. Clausen},\textsuperscript{345} some advocated a principle of released time for school prayer. Notable among the opponents of a school prayer amendment was theologian Reinhold Niebuhr who wrote:

\begin{quote}
I do not think it would be wise to enshrine a detailed method of preserving religious rites in the public schools. We are the most pluralistic society in the world. The separation of church and state, ordained in the Constitution is the only general method of doing justice to all aspects of this pluralism. I should hope that various cities and States would experiment with religious practices which do not violate the Constitution. But it would be a mistake to enshrine any of these ad hoc adjustments to our religious heterogeneity into the Constitution.\textsuperscript{346}
\end{quote}

In his testimony before the House Committee, Edwin H. Tuller, General Secretary of the American Baptist Convention, spoke on behalf of the National Council of Churches.\textsuperscript{347} He made several significant points: (1) It is not right for the majority to impose religious beliefs or practices on the minority in public institutions; (2) public schools are particularly inappropriate places for religious exercises; (3) children are almost always not given a genuinely free choice by glib use of the word "voluntary participation," when the whole atmosphere of the classroom is one of compliance and conformity to group activities; (4) it is unclear who is to compose the prayers and to select the Scriptures to be read; (5) what a nonsectarian theistic majority can require today in the way of a Regents' prayer or Bible reading "without comment," a sectarian majority can require tomorrow in the way of an Augsburg Confession, a Hail Mary or a theistic tract; and (6) religious practices that are nonsectarian are too vague and generalized to have much meaning or effect for character development or moral motivation, whereas practices which are specific or demanding enough to effect character or motivation are unacceptable to some and therefore sectarian.\textsuperscript{348}

\textsuperscript{343} See id.
\textsuperscript{344} See id.
\textsuperscript{345} 343 U.S. 306 (1952).
\textsuperscript{346} See 1964 Hearings, supra note 342, at 257 (letter from Dr. Reinhold Niebuhr to Chairman Celler).
\textsuperscript{347} Id. at 654.
\textsuperscript{348} Id. at 656-58. In an extended commentary Tuller offered this particularly cogent
In 1964, there was almost no voice in the political arena for millions of fundamentalists. There was the National Association of Evangelicals (NAE) which claimed two million members, but that organization represented existing denominations, not huge individual churches with thousands of members that are typical of present fundamentalist congregations.\textsuperscript{349} The organization did see itself as “servicing” some ten million more through various affiliates.\textsuperscript{350} Indeed, the NAE did testify in favor of a constitutional amendment.\textsuperscript{351} But the rhetoric was muted, civil, and brief. In the sixties extreme Fundamentalism was at most apolitical, and did not employ television as a tool to any great effect. To be sure, Jerry Falwell and Rex Humbard had syndicated weekly shows by then, but they were seldom viewed by anyone other than the converted. Pat Robertson did not go on the air until 1965.\textsuperscript{352}

The concerted effort of the mainstream churches and the failure of persons like Graham and Peale to claim the congressional stage on behalf of constitutional amendments, combined to sink early hopes for enactment. In 1966, Senator Birch Bayh convened the Senate Subcommittee on Constitutional Amendments to begin six days of hearings on Senator Everett Dirksen’s Senate Joint Resolution 148.\textsuperscript{353} As the hearings began Senator

\begin{quote}
I fear state religion. My heritage is definitely rooted in this particular background. I feel that if the people of the United States wish to undergird their personal lives and their social life by the power of prayer and Bible reading they have through the free exercise clause not only the right but the responsibility so to do.

The place for this, sir, in my opinion, is in the homes of our country and in the churches and religious institutions. It is not in the public schools. This is the contention that I am placing strongly before you. If the public schools are to be used as an agency for evangelism or religious education, sir, I think they would tend to weaken rather than strengthen the strong religious witness we have in these United States.

I believe strongly that the strength of our religious heritage among the common people of the United States is posited upon the voluntary nature of such religious conviction; that it would be seriously damaged through any effort of the State to bolster, or strengthen it through these procedures.

\textit{Id.} at 665.
\textsuperscript{349} \textit{Id.} at 972.
\textsuperscript{350} \textit{Id.}
\textsuperscript{351} \textit{Id.}
\textsuperscript{353} S.J. Res. 148, 89th Cong., 2d Sess. (1966). The Resolution read as follows: Section 1. Nothing contained in this Constitution shall prohibit the authority administering any school, school system, educational institution or other public building supported in whole or in part through the expenditure of public funds from providing for or permitting the voluntary participation by students or others
Dirksen engaged Father Robert Drinan, Dean of Boston College Law School, in a brief exchange. Drinan commented: "Children do not get together and pray voluntarily. If they do that, it is arranged or provided for by a church, some religious organization, or by the school." He felt the legislation under consideration suggested that school systems "are now forbidding voluntary participation by students in prayer, and I think that that is an illusion." When the debate moved to the Senate floor, the opposition to Resolution 148 was led by Senators Bayh and Sam Ervin. It lasted three days and resulted in a vote of forty-nine for the amendment, thirty-seven against. Since the Constitution requires two-thirds majority of each House to pass an amendment to the Constitution, Dirksen's amendment failed.

Five years later in 1971, pressure mounted in the House of Representatives for yet another try at an amendment to the Constitution. The first suggestion was to create an amendment that would allow non-sectarian or non-denominational prayer. As the debate unfolded it was suggested that "voluntary" replace the word nondenominational in the original motion. Representative Gallagher of New Jersey saw a problem. He stated that "[t]he real problem with 'voluntary' is that it requires a positive act of abstention by the child, while providing a moment of silent prayer or meditation at the start of each school day makes the decision solely internal." He wanted to change the wording to a "moment of silent prayer." The amendment was refused by the sponsors. When the vote came there were only 240 votes in favor of the amendment, forty-eight short of the two-thirds required.

President Ronald Reagan was elected in 1980 partly because he promised to submit a constitutional prayer amendment. True to his word, in 1982 he proposed Senate Joint Resolution 199, which read: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the Unit-
ed States or by any State to participate in prayer."

Hearings were held on the issue, but no action was taken. Resolution 73, introduced on March 24, 1983, by Senators Thurmond and Hatch to replace Senate Joint Resolution 199, was later amended by adding: "Neither the United States nor any State shall compose the words of any prayer to be said in public schools."

New hearings resulted. In the debate Professor Dellinger of Duke University pointed to a major problem—the perception by school officials that they might be prosecuted for constitutional violations. Dellinger testified:

Senator, one problem is this: the Supreme Court's decisions have only invalidated teacher-led, school-initiated, government-sponsored prayer. Now, this committee has heard accurate statements from around the country that there are school principals who say, 'We cannot allow the Fellowship of Christian Athletes to have a meeting at our school, even though we permit the key club and the rodeo club to meet.'

There are school principals around the country who think that. Do you know why they think that? They think that, in part, because the President of the United States and many distinguished Members of Congress have for many years been misleading the American people by constantly stating that the U.S. Supreme Court has forbidden all prayer in the public schools.

That is just not true. . . .

As the hours passed the evidence mounted that experts on both sides of the divide on the efficacy of school prayer were concluding, as did Professor Burke Marshall of Yale, that "[t]he core objection to the resolution is that it inescapably leaves the matter of the choice of the prayer or prayers to be offered as part of a school program up to the agents of the state."

Nevertheless, the Moral Majority remained convinced that prescribed prayer presented no problems because "local school districts have rarely ever

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367 Id. at 202 (statement of Prof. Burke Marshall).
sought to stifle diversity or to offend those who hold minority religious views.\textsuperscript{368} 

The valiant Republican effort to guide the President’s amendment through the Congress continued into 1985. This time, on June 4, fifteen days before the hearings began, the Supreme Court handed down its decision in \textit{Wallace v. Jaffree}.\textsuperscript{369} By a six to three margin the justices, in an opinion written by Justice Stevens, overturned an Alabama law establishing a moment of silence in public schools of the State.\textsuperscript{370} On its face, the ruling appeared to have given impetus to proponents of the Reagan amendment. But upon examination of the arguments it became clear that the Court holding focused on the purpose of the Alabama law. The Court found a legislative intent “to return prayer to the public schools.”\textsuperscript{371} Further, in a concurring opinion in \textit{Jaffree}, Justice O’Connor left open the possibility that a more carefully worded moment-of-silence law might well pass muster.\textsuperscript{372} Justice Powell agreed with her on that point.\textsuperscript{373} With O’Connor and Stevens plus the three dissenters, there was a majority of the Court in \textit{Jaffree} prepared to accept in state legislation some form of silent moment in public classrooms.

As the 1985 hearings commenced, Dean Kelley, speaking for the National Council of Churches properly observed that “the proposed amendments are unnecessary, since any person can pray to God at any time or place, and the Supreme Court cannot prevent it, nor can the Congress enable it.”\textsuperscript{374} His words were a clear signal that the religious fundamentalists would find the new version of the amendment almost useless to their cause—government support for deity.

Senator Thurmond could read the political winds, and although he preferred allowing “voluntary vocal prayer,” he was prepared to support the new wording “if we do not have support for voluntary prayer.”\textsuperscript{375} More clearly than before, the record revealed testimony that what proponents meant by voluntary prayer was in fact organized prayer from which one could exempt oneself. President Reagan’s amendment simply evaporated with the election of 1986, however, which placed the Senate in Democratic control.\textsuperscript{376}

\textsuperscript{368} Id. at 212 (statement of Richard Dirgman, legislative director of the Moral Majority).
\textsuperscript{369} 472 U.S. 38 (1985).
\textsuperscript{370} Id. at 61.
\textsuperscript{371} Id.
\textsuperscript{372} Id. at 84 (O’Connor, J., concurring).
\textsuperscript{373} Id. at 66 (Powell, J., concurring).
\textsuperscript{374} Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 190 (1983).
\textsuperscript{375} Id.
VI. INTERPRETATIONS TO FIT THE GOALS OF PRAYER ADVOCATES: NONPREFERENTIALISM

In 1962, emotion and nostalgia for a lost Protestant establishment were the chief weapons employed by school prayer advocates. As time passed the arguments became more sophisticated. The movement, which soon began to be identified as nonpreferentialism, predicated its arguments on an alternate reading of constitutional origins and the Founders’ intentions. It became a type of historical revisionism. In stark contrast to the Supreme Court tradition begun in *Cantwell v. Connecticut* and *Everson v. Board of Education*, nonpreferentialism argues that the First Amendment not only allows, but also promotes, some form of plural religious establishment. Leonard Levy has defined nonpreferentialism as

a plausible but fundamentally defective interpretation of the establishment clause to prove that its framers had no intention of prohibiting government aid to all denominations or to religion on a nonpreferential basis. The nonpreferentialists are innocent of history but quick to rely on a few historical facts which, when yanked out of context, seem to provide a patristic lineage to their views.

As a scholar sympathetic to nonpreferentialist thought, Michael Malbin believes that the legislative history of the Establishment Clause shows that the framers accepted nondiscriminatory aid to religion. In fact, the states that retained religious establishments after 1789 were regularly discriminatory.

In 1985, nonpreferentialists found a vital and critically important ally in then Justice William Rehnquist. In his vigorous dissent in *Wallace v.

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378 310 U.S. 296 (1940).
380 See Levy, supra note 167.
381 Id. at 91.
383 See supra part III.A. (discussing Jefferson’s correspondence of 1801-02 with the Danbury Baptists). In a letter to Jefferson from Attorney General Levi Lincoln it is noted that the New England states were, in fact, discriminating among Christians under establishments. See supra notes 226-27 and accompanying text.
Jaffree, Rehnquist dismissed the Jeffersonian phrase "a wall of separation between church and state" as inapplicable to the First Amendment. We have previously discussed the origin of that metaphor, found in a letter to the Danbury Baptist Association. Rehnquist contended:

[T]he greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. . . . The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

Justice Rehnquist appears not to be troubled by the fact that Jefferson is a far more reliable source of the "actual intentions" for the First Amendment than is a Supreme Court justice some 180 years later. Jefferson was in constant discussion with Madison, via voluminous correspondence, during the entire period from 1784 through 1789. One may differ with Jefferson's insights, but it is the height of arrogance to assert that his observations, based upon intimate knowledge of the subject and the events, has provided modern judges with a "mischievous diversion," as Rehnquist claimed in Wallace. Rehnquist's easy dismissal of Jefferson's thoughts is an instant clue to the Justice's own lack of historical judgment. For Rehnquist, the "wall" idea is an impediment to a goal he espouses, and is therefore in need of expurgation. In his quest he ignores the numerous times when Madison employed variations on the separation theme. For example, in 1833, Madison wrote about "the line of separation between the rights of religion and the Civil authority."

Unfortunately, the decision of Jefferson to use non-constitutional language to define the Religion Clauses has become a nonpreferentialist means to divert the argument. Jefferson's central role in the struggle provided him credibility, but his absence from the debates in Virginia, Pennsylvania, and New York allows his critics to discredit him. From 1879 to the present, the Court has always found a reasonable correlation between the wall idea and

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385 Id. at 91-92 (Rehnquist, J., dissenting).
386 See supra note 196 and accompanying text.
387 Wallace, 472 U.S. at 107 (Rehnquist, J., dissenting).
389 Letter from James Madison to Reverend Jasper Adams (circa 1834), supra note 260, at 487. Internal evidence would place the date of this letter at 1834 or later. See id.
the First Amendment, however. Justice Waite wrote for the Court in *Reynolds v. United States* that the Danbury letter, “[c]oming as [it] does from an acknowledged leader of the advocates of the measure, . . . may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured.”

Justice Waite’s use of the word “almost” is important because none of the cases from that time on have been based upon the Jefferson metaphor alone. The Court decisions stem from clear and precise language of James Madison spanning a period from 1774 to 1834.

Madison frequently addressed the notion of plural establishments. He did so first with the 1784 Assessment Bill. He did so for the last time around 1834 in a letter to Jasper Adams, a Charleston, South Carolina minister. Apparently, Adams wanted Madison to endorse the idea of a national religion: Christianity. Adams asserted that “the people of the United States have retained the Christian religion as the foundation of their civil, legal, and political institutions.” Justice Story had already expressed similar views in *Terrett v. Taylor*.

> [T]he free exercise of religion cannot be justly deemed to be restrained, by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulchre of the dead.

Madison took up the Adams challenge, writing:

> [T]he simple question to be decided is whether a support of the best & purest religion, the Xn religion itself ought not so far at least as pecuniary means are involved, to be provided for by the Govt. rather than be left to the voluntary provisions of those who profess it. And on this question experi-

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390 98 U.S. 145 (1878).
391 *Id.* at 164.
392 *See, e.g.,* VA. DECLARATION OF RIGHTS (1766); Madison, *Memorial, supra* note 40, at 298.
393 *See supra* note 57 and accompanying text.
395 This is adduced from Madison’s response to Adams. *See id.*
396 *See JAMES MADISON ON RELIGIOUS LIBERTY* 87 (Robert S. Alley ed., 1985).
397 13 U.S. (9 Cranch) 43 (1815).
398 *Id.* at 49.
ence will be an admitted Umpire, the more adequate as the connection between Govts. & Religion have existed in such various degrees & forms, and now can be compared with examples where connection has been entirely dissolved.399

Madison here rejected a plural establishment of the “Xn religion” as he rejected all establishments. He noted: “[T]he prevailing opinion in Europe, England not excepted, has been that Religion could not be preserved without the support of Govt.”400 But he continued:

It remained for North America to bring the great & interesting subject to a fair, and finally to a decisive test.

In the Colonial State of the Country, there were four examples, R.I., N.J., Penna. and Delaware, & the greater part of N.Y. where there were no religious Establishments; the support of Religion being left to the voluntary associations & contributions of individuals; and certainly the religious condition of those Colonies, will well bear a comparison with that where establishment existed.

As it may be suggested that experiments made in Colonies more or less under the Controul of a foreign Government, had not the full scope necessary to display their tendency, it is fortunate that the appeal can now be made to their effects under a compleat exemption from any such controul.401

Employing the separation idea for the last time, Madison concluded:

The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinence of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others.402

The point here is not to insist that Madison must be the only voice considered for interpreting the First Amendment. Clearly, Justice Story had a

399 Letter from James Madison to Reverend Jasper Adams (circa 1834), supra note 260, at 485.
400 Id.
401 Id. at 485-86.
402 Id. at 487.
contrary opinion. Rather, it is to suggest that historical integrity demands fairness to the celebrated author of our constitutional right to free exercise and prohibition of establishment. We should rest on his arguments, not his stature as a Founder. It is not original intent at issue here, but experience with principles of freedom.

Nonpreferentialism is certainly not new as an alternative reading of tradition. But this movement seems oblivious to the fact that the wall metaphor is not necessary to support the Courts’ findings since 1940. Separation has become a straw person by which nonpreferentialism seeks to discredit the Court precedents.

Nonpreferentialism has a correlative thesis. As Justice Rehnquist put it: “The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion.”403 In so interpreting the non-establishment provision, Rehnquist reverses history, returning to a concept of toleration. The Chief Justice missed entirely the thrust of the Madisonian distinction between toleration and free exercise. In this regard, a petition by Jewish citizens to the French National Assembly in 1790 put it well:

America, to which politics will owe so many useful lessons, has rejected the word toleration from its code, as a term tending to compromise individual liberty and to sacrifice certain classes of men to other classes. To tolerate is, in fact, to suffer that which you could, if you wish, prevent and prohibit.

Further, Rehnquist makes no allowance for a citizen’s conscience to lead her to irreligion.

In implementing this modern nonpreferentialism, Chief Justice Rehnquist would undoubtedly insist upon a much more inclusive net than the Protestant model so popular in the previous century. However, given the population of Virginia in 1784 and its religious proclivities, the Assessment Bill net was broad for its time. Few non-Protestants populated Virginia in 1784.405 It is not clear how large a net the Chief Justice would employ, but he clearly omits what he terms irreligion from inclusion when he speaks of “legitimate secular ends” pursued through sectarian means.406 But no mat-

403 Wallace, 472 U.S. at 106 (Rehnquist, J., dissenting).
405 In the U.S. census of 1850 there were 2300 Protestant churches, 17 Roman Catholic churches, and one Jewish synagogue. See J.D.B. DeBow, supra note 262, at 134.
406 Wallace, 472 U.S. at 113 (Rehnquist, J., dissenting).
ter how large the net, the concept of such a net inevitably leads to a restriction of freedom. To continue the net analogy, nets not only exclude, they ultimately imprison the included. Free exercise resulted in a rejection of any notion that the government possessed the right to tolerate in matters of conscience. The conscience is inviolate, beyond the power of the state to control. Jefferson phrased it well in his Bill for Establishing Religious Freedom: "[T]he rights hereby asserted are of the natural rights of mankind, and . . . if any act shall be hereafter passed to repeal the present, or to narrow its operation such act will be an infringement of natural right." Working from the principle of a natural right, the Establishment Clause must not be allowed to create a resident power for the government to select among creeds, endorsing some but merely tolerating others. Here nonpreferentialism arguments are threats to the rights of religious minorities even as they threaten to create the tyranny of the majority.

Nothing is more central to Christians than prayer; prayer in the name of Jesus. For liberal Christians that does not preclude other rituals of other faiths being of equal value. On the other hand, the major premise of nonpreferentialism inevitably results in requiring the federal government to "define" religion. One can hardly go about the task of creating a plural establishment without coming to a decision about inclusion and exclusion. Such decision-making requires definitions. This problem is solved in the First Amendment by assigning to each citizen the responsibility of defining religion according to individual conscience. Hence, the government should accept, without debate, all conscience claims by citizens as having equal worth. To be sure, practical implementation of some beliefs, such as polygamy, have been restricted in the name of "compelling state interest." But the Court, at the same time, has been prepared to affirm that the beliefs that inspired such actions were unquestionably protected by the First Amendment.

Further, any effort to provide a "generalized endorsement of prayer" as Rehnquist says the Establishment Clause allows, necessitates a definition of prayer. But prayer, as many prominent religious leaders have noted, is not generalizable. In particular, Jerry Falwell and Baily Smith have publicly denied that prayer, other than in the name of Jesus, is prayer at all.

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409 See, e.g., Reynolds, 98 U.S. at 162.
410 Wallace, 472 U.S. at 113-14 (Rehnquist, J., dissenting).
411 While President of the Southern Baptist Convention, Baily Smith stated: "God Almighty does not hear the prayer of a Jew." Marjorie Hyer, Baptist Leaders Statement on
What is the state's position to be on this matter? Did the Regents' Prayer of New York qualify as prayer? It did not for millions of Christians in this nation who had no intention of praying to a non-sectarian God they felt did not exist. Is the State of New York to tell them otherwise by endorsing a particular religious perspective, no matter how innocuous?

When the state takes sides with religion over against irreligion it poses a fundamental dilemma: Who will define these terms? Is the Rehnquist strategy merely a means of establishing "traditional" religions or is that a meaningless concept? If no definition of religion is forthcoming, then the argument is moot. If any definition is employed, no matter how broad, some will be excluded.

In a scholarly treatment of similar subjects Daniel Dreisbach, a nonpreferentialist, has written that "the modern Court should not limit its interpretation of the first amendment to the presumed ambitions of Madison. Rather, judicial interpretations of the first amendment should reflect the views of the majority of the First Congress which apparently diluted Madison's 'sweeping' intentions."412 Two comments are required. First, Dreisbach appears to differ with Rehnquist and others when he asserts, I think correctly, that Madison had sweeping intentions, as reflected in Court opinions since 1940.413 Second, why should the Court "limit its interpretation of the first amendment" to the "views of the majority" in the 1789 Congress? Let's examine that proposition. Many of the states still retained religious restrictions in 1790.414 Were we to be guided by their proclivities we would have little of content left. Indeed, senators defeated Madison's proposal that the First Amendment apply to the states because they were protecting their home environments. The miracle of religious freedom as incorporated in the Bill of Rights is that it came in spite of a narrow, unenlightened sentiment that pervaded many of the new states. Most members of the 1789 Congress likely had as much sympathy for thoroughgoing separation as they did for women's suffrage and emancipation.

Another advocate of nonpreferentialism, Richard John Neuhaus, insists that "the entire purpose of the religion clause of the First Amendment" is

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Jews Stirs Dispute, WASH. POST, Sept. 26, 1980, at F10. Likewise, Falwell stated: "I believe God . . . does not hear the prayers of unredeemed Gentiles and Jews." Marjorie Hyer, Evangelist Reverses Position on God's Hearing Jews, WASH. POST, Oct. 11, 1980, at A2. Falwell added that he did not agree with Baily Smith. After a week of unrelenting criticism, including comments by President Reagan, Falwell said he was grieved for having been quoted, and offered a mild retraction. Id.


413Id.

414For example Massachusetts, Connecticut, New Hampshire, Delaware, and Maryland. See STOKES & PFEFFER, supra note 5, at 81.
religious freedom. "[A]ny use of 'no establishment' that restricts 'free exercise' is a misuse of 'no establishment.'" Neuhaus hopes by this ploy to cure what he abhors: the "secular state in a secular society"; "the naked public square"; "secular humanism"; and suppression of religion in the classroom.

Justice Scalia's dissent in *Texas Monthly, Inc. v. Bullock,* opposing the taxing of religious book sellers, is remarkably close to the language of Neuhaus:

> It is not always easy to determine when accommodation slides over into promotion, and neutrality into favoritism, but withholding of a tax upon the dissemination of religious materials is not even a close case. . . . If there is any close question, it is not whether the exemption is permitted, but whether it is constitutionally compelled in order to avoid "interference with the dissemination of religious ideas." 

In sharp contrast, Justice Blackmun, voting with the majority, noted: "Justice Scalia's opinion, conversely, would subordinate the Establishment Clause value. This position, it seems to me, runs afoul of the previously settled notion that government may not favor religious belief over disbelief."

The argument being advanced by Justice Scalia is that free exercise mandates a tax exemption, no matter how such practice might violate establishment. He believes, with Neuhaus, that the "no establishment" provision was intended only to support free exercise. Both argue that the Founders had no intention of protecting the state from the church, a badly reasoned point clearly disputed by Madison's notes on the Virginia Declaration of Rights, his letter to Jasper Adams and in his *Memorial and Remon-

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416 *Id.* at 189-91.
417 *Id.* at 193.
419 *Id.* at 40-41 (Scalia, J., dissenting) (quoting Gilette v. United States, 401 U.S. 437, 462 (1971)).
420 *Id.* at 27 (Blackmun, J., concurring) (citations omitted).
421 See supra note 39 and accompanying text.
422 In his letter to Jasper Adams, Madison pointedly stated that, "it will scarcely be contended that Government has suffered by the exemption of Religion from its cognizance, or its pecuniary aid." Letter from James Madison to Reverend Jasper Adams, *supra* note 260, at 486.
strange Against Religious Assessments. Only by accepting the superiority of religion over irreligion can Scalia’s position be seriously considered. But even given that assumption, the fact is that single or plural establishment, as illustrated in the proposed Assessment Bill in 1784, impinges necessarily upon other citizens whose religious views differ from those receiving government approval. It would tilt the state toward one or more confessions and against others. In his argument in Texas Monthly that the state may be mandated to extend tax exemption “to avoid ‘interference with the dissemination of religious ideas,’” Scalia attempted to create for the state the responsibility of defining religion. Justice White recognized this problem in a 1989 case in which he pointed out that the state cannot impose a definition on religion, nor require one to be a member of any sect as a standard for being protected under the Religion Clauses. Justice Stevens addressed the problem directly in 1982:

[There exists an] overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

Motives are hard to establish and frequently miss the mark, but in this instance the rhetoric of nonpreferentialism seems clearly aimed at creating a moral tone for the nation along specifically religious lines. It appears to be a effort to “return” the country to a specific set of seventeenth and eighteenth-century values its proponents find most satisfying, values that were inevitable reflections of the overwhelming Christian majority. Free exercise, then, would become a special largesse administered by the congressionally established religions. The inevitable result would be the creation of second class believers, not to mention the irreligious, who would be, at best, tolerated, outside the realm of state established truth.

The genius of ideas cannot be captured in their historical context. The ideas concerning democracy and freedom espoused by Jefferson in the Declaration of Independence and Madison in his constitution-making were larger.

423 See supra note 40 and accompanying text.
424 See supra note 53.
425 Texas Monthly, 489 U.S. at 41 (Scalia, J., dissenting) (quoting Gilette, 401 U.S. at 462).
428 J.D.B. DeBow, supra note 262, at 132-33.
than the minds that gave them voice. Slavery, gender discrimination, and outrageous treatment of Native Americans marred that great beginning. The genius of the foundation principles inherent in the Constitution has consistently resulted in expanding rights while guarding against retrenchment and restriction. That concept of an ever more inclusive interpretation has most often answered Madison's fear that a Bill of Rights might, in future generations, become restrictive because an enumeration of such rights could omit others that later generations would require. Nonpreferentialism, with its crabbed view of history, remains a threat to the notion of expanding rights.

Those who are committed to that expanding interpretation of rights and to Madisonian principles of religious liberty and church/state separation have a series of rational arguments that are hoisted on command. Believing in reason as the ultimate arbiter, Jefferson was convinced that truth "will prevail if left to herself, that she is the proper and sufficient antagonist to error." Separationists often fail to educate, much less to inspire, fellow citizens with regard to the principles of religious freedom. Further, we frequently seem convinced that free argument and debate should occur without passion or emotion. We do well to remember the words of John Milton, concerned over censorship, in the opening paragraph of the Areopagitica: "[T]he very attempt of this address . . . hath got the power within me to a passion . . . ."

Supreme Court precedents are critical for an orderly democracy. As new precedents have emerged in our history, the Court has traditionally expanded the rights of citizens. In 1954, Brown v. Board of Education overturned an 1896 precedent, Plessy v. Ferguson. Today Plessy is an antique, a reminder of a nation's blind past. Meanwhile, Griswold v. Connecticut and Roe v. Wade have provided access to the Ninth Amendment.

In the arena of public school prayer, the 1992 decision in Lee v. Weisman appeared to shift the focus from classroom prayer or moment of silence to graduation ceremonies. Even the Solicitor General of the Bush Administration asserted that not only was school or teacher sponsored classroom prayer unconstitutional under Engel v. Vitale and School District

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430 JOHN MILTON, AREOPAGITICA (1644), reprinted in 3 THE HARVARD CLASSICS 199 (1909).
432 163 U.S. 537 (1896).
433 381 U.S. 479 (1965).
435 The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.
of Abington Township v. Schempp, it was patently coercive in nature. When, by a five to four decision, the Court banned school sponsored prayers at graduation, prayer advocates like the Christian Coalition and the ACLJ quickly moved to promote some form of student initiated prayer that might pass muster. The fundamental argument appears to be by transferring the responsibility for coercion to students, it might be constitutional for them to tyrannize a minority of their fellow students. That issue is now moving through the Federal courts. But even as proponents speak glibly of values and the student's right to pray in some organized fashion, there is a growing awareness that the diversity and factionalism, which Madison recognized as a protection of rights at the national level, have blossomed in vast numbers of communities across the land. That fact alone helps define the First Amendment in terms Madison would have approved in 1789. Any religious establishment, no matter how mild or bland, is patently unfair to existing minorities and politically destructive for the current majority. One recalls Madison's warning in Memorial and Remonstrance: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"

Establishment in any form is a threat to the very democratic tradition we cherish. For these reasons it is particularly disturbing to observe in 1995 the resurrection of the old prayer amendments of the eighties. Negotiations among leaders of the religious and political right now appear aimed at yet another attack on non-establishment. School vouchers are an integral part of this strategy. Speaker Gingrich has promised a vote on school prayer this year. As new proposals float and old rhetoric is refurbished, the simple reality is that school prayer, in any form that extends beyond the protection of the individual student right to pray, is laced with direct and implied violation of the Establishment Clause of the First Amendment.

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440 Lee, 112 S. Ct. at 2649.
442 Compare Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) (upholding student initiated graduation prayer) with Harris v. Joint Sch. Dist., 41 F.3d 447 (9th Cir. 1994) (ruling such student initiated prayer is unconstitutional).
443 Madison, Memorial, supra note 40, at 30.
VII. PRAYER AS A POLITICAL WEAPON AGAINST PUBLIC EDUCATION

Having examined in considerable detail the origins of the First Amendment Religion Clauses, explored the fanciful mythology about the Founders that debases history, engaged proponents of nonpreferentialism with counterarguments, and elaborated on the work of the Court and Congress in the implementation of those Clauses, the task that remains is to focus upon public education and private rights with an eye toward their stake in whatever resolution of differences may be forthcoming. As already noted, the current rash of political conversations that have focused on public school prayer are not of the same flavor as the Congressional debates directed at judicial decisions from *Engel v. Vitale* to *Lee v. Weisman*. There are marked changes in the goals of prayer proponents. In the early years after *Engel*, the public schools were seldom a target of attack. Following careful consideration of the Court actions, mainline Protestant and Jewish leadership, along with some notable Catholic thinkers, defended a series of Court decisions on the subject of prayer. Through all this the Catholic Church has almost never suggested the public schools were inferior, valueless, or in need of abolition.

Eighteen years after *Engel*, a vigorous religious fundamentalism, organized politically, adopted the school prayer issue as a cornerstone of its agenda. The fledgling Moral Majority under Jerry Falwell urged Ronald Reagan to embrace a school prayer amendment as a plank in his party platform. In spite of this powerful alliance, all attempts to force a prayer amendment failed in the Congress. As frustration mounted, opponents of the Court decisions concocted a new strategy. The Religious Right, in the early eighties, undertook a war against the public schools that involved a massive creation of their own religious schools. The rationale for this conflict consisted of a litany of accusations against public schools as being morally corrupt institutions with anti-religious agendas. Soon the public schools, without prayer, were accused of causing declining SAT scores and

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447 *See 1964 Hearings, supra note 342.*
449 *See ALLEY, supra note 300, at 107-219.*
450 *Id.*
451 BARTON, *supra* note 239, at ix, x.
This unmerciful barrage against the schools, which educate over ninety percent of American youth, soon included an affirmation by religious leaders of the Religious Right such as James Kennedy, Jerry Falwell, and Pat Robertson that public schools were damned and should be abandoned. Pat Robertson wants “to get the state out of the business of educating kids at the primary and secondary levels.”

Even as the prayer debate heats up once again, the Religious Right leadership must know full well that in a school system becoming more diverse by the day, any serious and meaningful organized prayer that would satisfy their religious goals is not possible. The mass of mean-spirited attacks on the public schools highlights what is perceived to be a lack of morality. The Religious Right understands this and consistently argues that public schools cannot offer the religious emphasis parents feel appropriate. Then, in the name of free exercise, they demand public funds for their own schools, concluding that the lack of prayer proves their charge of immorality in public education. School prayer is being used to sow distrust of public education in order to justify vouchers to finance religious schools.

Thus public education itself is even more in jeopardy, a target of a vicious attack upon thousands of school teachers in classrooms across the land. Robertson, Falwell, and the Christian Coalition argue that public schools without prayer become value-free, relativistic bastions of immorali-

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452 Id.

453 One citation from James Kennedy, one from Falwell, and several from Robertson will prove enlightening. Each citation refers to a broadcast in Washington, D.C. Tapes of all of these broadcasts are available at the Offices of the People for the American Way, Washington, D.C. All 700 Club quotes are from Robertson, while the Old Time Gospel Hour quotes are from Falwell: “Textbooks in public schools promote anti-Christian attitudes.” The Old Time Gospel Hour, Dec. 11, 1983 (syndicated broadcast); “It is absolutely impossible to have genuine education without the holy scriptures.” 700 Club, Sept. 23, 1982 (CBN broadcast); “The schools in the United States are as secularized as those in the Soviet Union . . . [T]he public schools today are as exclusively teaching the materialistic view as the schools in Russia.” 700 Club, July 2, 1982 (CBN broadcast); “The breakdown of the morality in schools is the result of a Supreme Court decision.” Public school teachers “don’t care if [children] can read or not. They just want to take them away from traditional, Christian morality . . . They’re more concerned with indoctrination of the students against their parents . . . so they have embraced this failed look-see method of reading which is absolutely an abomination.” 700 Club, Sept. 9, 1985 (CBN broadcast); “I trust the day is soon coming when there will be someone . . . to throw this godless, atheistic, evolutionary, amoral, collectivist, socialist, communist religion right out of the public system of our nation.” James Kennedy, Oct. 14, 1984; “[T]he public education movement has also been an anti-Christian movement.” 700 Club, Apr. 23, 1991 (CBN broadcast).

Robertson constantly attacks public education as “a gigantic, inefficient, state-run monopoly controlled by a greedy, left-wing union.” He sees the nation facing a “moral crisis,” warning that “[w]e have turned away from the God of our Fathers.” This scurrilous and dishonest attack is aimed at teachers, underpaid and overworked, who dedicate themselves daily to the welfare of the nation’s children. These maligned public servants, our neighbors and our friends who value the welfare and education of our children, deserve better. In a recent discussion in which I participated, sponsored by the National Humanities Center, twenty-five public high school teachers, all but one active in a church or synagogue, identified values upon which they focus in their classrooms. Their list included: honesty, integrity, fairness, responsibility, dependability, generosity, compassion, independence, tolerance, cooperation, and kindness. Further, they noted, their respect and love for the children will not allow them to impose their own singular definitions of faith upon their students. That very regard for fragile and precious relationships in class is now being attacked by dogma driven citizens bent upon destroying public education. In the process, what messages are transmitted to students who regularly hear from self-styled moralists that their classrooms are devoid of values and that their teachers preside over a moral cesspool?

As Newt Gingrich dramatically injects the prayer issue into the public discourse on education we might ponder the argument by Regent University Education Professor Wally Cox that since public schools teach beliefs contrary to his Christian views, like evolution, either public schools should cease receiving tax dollars or religious schools should be funded by taxes. He writes: “This issue of discriminatory tax money distribution may be a far more central pursuit than the school prayer amendment.” Robertson agrees, having stated in 1994 that the solution to disputes over religion and education “is to have vouchers where parents pay their money to the school of their choice.”

Vouchers have so far been rejected by voters in the states where the idea has been placed on the ballot. They are a frontal attack on the First

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455 See supra note 453 and accompanying text.
457 Id.
458 The National Humanities Center Faculty Development Seminar, examining contemporary American culture, met in the Fall of 1994 at the University of Richmond. Consulting scholars were Professor Cliff Edwards and Robert Alley.
461 Most recently this was observed in the California vote of 1993 rejecting vouchers
Amendment and non-establishment. The ploy of the Religious Right is to so smear public education that the claim can be made that what is being taught violates free exercise. By this logic free exercise inevitably trumps establishment, a point quite congenial with the insupportable position that the founders meant to subordinate establishment to free exercise. Nothing in the record supports such a reading.

In this game driven by the goal of funding private religious schools and home schools, the vast majority of students in elementary and secondary schools are eagerly sacrificed. Robertson and Falwell know that vouchers will be of no help to most present public school students. They know their plan will further balkanize public education. Yet, by using the prayer game, they also encourage untold numbers of students to tyrannize the minority by voting for graduation prayer—something its advocates have admitted would be unconstitutional for adults to do. Their message is: “Let the children break the law. What court will prosecute? So ignore the Constitution and the Bill of Rights. And while you are at it ignore the rights of minorities—Jews, Muslims, atheists, agnostics, Buddhists, Hindu.” If every school in the nation suddenly had prayers, the true agenda of the Religious Right would not be affected in the least. Their complaints about public schools go to philosophy, textbooks, science, and sex education that in no way would be erased by student initiated prayers. The Religious Right may be pleased if it can exercise some control of public education as a by product of its angling for funding, but its heart is in its own religious enclaves.

In 1990, I participated in the ceremonies celebrating the 200th anniversary of President Washington’s letter to Touro Synagogue in Newport, Rhode Island. Jewish people, drawn to that colony in the seventeenth century by the promise of freedom offered by Roger Williams, were told by the President: “[H]appily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support.” My thoughts on that day took the form of a subjective, personal litany of what religious freedom means and of what it reminds one concerning the past:

1. Religious freedom is HISTORY. History’s dark side is a most effective teacher. It is the history of persecutions, of self-styled men of god, of


463 Id. (footnote omitted).
inquisitions, of religious wars, of doctrinal arrogance and certitude. It is Michael Servetus in Protestant Geneva. It is John Hus in Catholic Bohemia. It is Thomas Helwys in Anglican England. It is John Wyclif and Sir Thomas More. It is Jewish communities in every self-proclaimed “Christian” nation for nearly two millennia. It is the primary stage upon which we come to understand the truly sublime nature of religious freedom.

2. Religious freedom is MEMORY. Memory is history in the making, closer for being our own experiences. It is frequently frightening. It is sexism and racism, narrow orthodoxy and religious fanatics. It is Martin Luther King, Jr. in a Birmingham jail responding with passion and conviction to advice offered by fellow clergy. It is a Henrico School Board meeting in 1955 where two hundred citizens screamed “keep the niggers out, to protect the white race.”

3. Religious freedom is EDUCATION. It is the ability to distinguish between a Puritan “city on a hill” and Roger Williams’ “grand experiment.” It is discerning the difference between toleration and free exercise. It is knowledge of the Bill of Rights, of Thomas Jefferson, and of James Madison who wrote to Mordecai Noah regarding “the freedom of religious opinions & worship as equally belonging to every sect.” It is reading a good newspaper with a rational editorial policy.

4. Religious freedom is DEMOCRACY. It is a decent respect for persons with contrary opinions. It is commitment to justice and freedom. It is protection of minorities against the tyranny of the majority. It is about equality and humaneness.

5. Religious freedom is HUMANISM. It is respect for the right and thought of every person. It is the recognition that our own claims, no matter how sound and reasonable, give us no right to impose upon others our own definitions. It is pride in and support for our secular republic as the realm of true human community.

6. Religious freedom is ACTION. It is concern for Supreme Court appointments. It is support of public schools for all citizens. It is political activism, local and national. It is the task of educating our citizenry to the high calling of public service and the dignity of politics as an art and craft.

7. Finally, religious freedom is VIGILANCE. It is an alert citizenship, responsive to trends and threats to freedom before erosion of fundamental liberties and the right to privacy becomes unstoppable. It is taking “alarm at the first experiment on our liberties.”

In Madison’s words, religious freedom is “the equal right of every citi-

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464 Allan Jones, *Henrico’s Dr. Smart Asks Study to Keep Segregation*, RICHMOND TIMES DISPATCH, July 29, 1955, at 1. The author was present for the entire meeting.

465 Letter from James Madison to Mordicai Noah (May 15, 1818), in JAMES MADISON ON RELIGIOUS LIBERTY, supra note 396, at 80.

466 Madison, *Memorial*, supra note 40, at 300.
zen to the free exercise of his Religion according to the dictates of conscience” [and] “is held by the same tenure with all other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us.” It is the “basis and foundation of Government. It is the freedom “to profess, and by argument to maintain, . . . opinions in matters of religion” without in any way “diminishing, enlarging or affecting their civil capacities.”

Advocates of public education believe with Jefferson: “Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of a day.” Our schools, both public and private, will suffer irreparable damage if pitted against each other in a struggle for survival. The fact that the Religious Right uses prayer as a weapon in its war against public schools needs to be exposed and combatted by those who respect both prayer and education too highly to allow either to be so callously demeaned.

467 Id. at 304.
468 Id.
469 8 THE PAPERS OF JAMES MADISON, supra note 40, at 400.
470 Letter from Thomas Jefferson to Dupont de Nemours (Apr. 24, 1816), in A JEFFERSON PROFILE, supra note 55, at 274.