

Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration

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INTRODUCTION

In order to strengthen the United States Supreme Court's jurisprudence in Establishment Clause cases, this Article proposes a new, useful, and realistic model of adjudication. More specifically, the introductory section of the Fourteenth Amendment (the "citizenship declaration") is depicted as a bridge between the Establishment Clause and the three prohibitions in Section One of the Fourteenth Amendment. The citizenship declaration prohibits the federal and state governments from subverting a citizen's status in the political community because of his or her creed or lack of religious commitment. For example, some government endorsements of religion make nonbelievers feel like outsiders and second-class citizens. This is not permitted by the citizenship declaration. Using the principle of equal citizenship in Establishment Clause cases, there is no longer a need for judges to distort the meaning and significance of documents written by James Madison and Thomas Jefferson.

America's legal history is an ongoing dialogue between the past, present, and future. This complicated history can be organized and understood as an intelligible text. An important part of this text is the Fourteenth Amendment's citizenship declaration, which is a key provision subjecting state action to the prohibitions of the Establishment Clause.

Almost nothing in politics leads to more incongruous coalitions,¹ produces as many heated arguments, and excites deeper feelings than church-state issues. Pitted against secularists, reform Jews, liberal Catholics, and progressive Protestants on church-state issues are nearly all Christian fundamentalists, most conservative Catholics and many Orthodox Jews. Battles over the role of religion in public life and arguments over the allocation of government resources for religious purposes are

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1. On separation of church and state issues, there are more overlapping agreements and disagreements among secular and sectarian groups than many pundits realize. See ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 181 (1991).

important in their own right and are linked closely to contests over family values, privacy rights, woman's rights, gay rights, multi-culturalism, funding for the arts, the content of public school textbooks, and similar contests too numerous to mention here.² The stakes are high because there are irreconcilable differences of opinion about the content of the common good, the existence and nature of truth, and the moral equivalency of life-style choices.

Many relentless secularists who condemn alliances between religious institutions and government³ treat "religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere."⁴ On the other hand, many cultural conservatives who believe that morality is reinforced by religion call the secularists misguided, elitist, paranoid, and intolerant. Bitterness between the warring camps causes politically destabilizing (even potentially violent) divisiveness along sectarian lines,⁵ and the antagonists are not tranquilized by seemingly endless litigation. United States Supreme Court decisions often provoke new waves of impassioned rhetoric by those who care, and millions of Americans do care fervently about church-state issues.⁶

Many judges who decide church-state issues try to apply neutral principles of law. However, what one litigating side sees as neutrality, another sees as callous indifference or hostility.⁷ Moreover, what one

2. See JAMES D. HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* xi-xii, 52-64 (1991).

3. See, e.g., Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 213-14 (1992).

4. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992). Justice Black improperly referred to Catholics who favored textbook loans to religious schools as "powerful sectarian religious propagandists" whose "preferences and prejudices" impel them to look forward to "complete domination and supremacy of their particular brand of religion." *Id.* at 121 (quoting Board of Educ. v. Allen, 392 U.S. 236, 251 (1968)(Black, J., dissenting)).

5. After intimating in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that political divisiveness was not ordinarily an independent ground for nullifying government support for religion, the United States Supreme Court changed its mind in *Aguilar v. Felton*, 473 U.S. 402 (1985). Showing its concern again in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), the Court stated that "[t]he potential for divisiveness [along religious lines] is of particular relevance here." *Id.* at 2656. Justice Blackmun also observed that "[r]eligion has not lost its power to engender divisiveness." *Id.* at 2666 n.10 (Blackmun, J., concurring). Scholars share the Court's concerns about a *kulturkampf* (i.e., a culture war). See, e.g., LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* ix (1986).

6. "Of all the issues the ACLU takes on — reproductive rights, discrimination . . . police brutality, to name a few — by far the most volatile issue is that of school prayer. Michele A. Parish, *Graduation Prayer Violates the Bill of Rights*, 4 UTAH B.J. 19 (June/July 1991), cited in *Lee v. Weisman*, 112 S. Ct. 2649, 2666 n.10 (1992) (Blackmun, J., concurring).

7. The Court sometimes claims that governmental "neutrality" toward religion is

side views as benevolent, nonpreferential aid to mediating religious institutions, the other views as impermissible and threatening official sponsorship.

On church-state issues, reasonable moderates on both sides think the neutrality ideal is chimerical. For example, moderate accommodationists cannot understand how government aid to charitable nonreligious institutions is neutral if aid is not given to charitable religious institutions, and moderate secularists do not understand why the display of a religious symbol on government property is a legitimate accommodation, rather than an impermissible endorsement, of religion. Whatever the issue, and despite the judiciary's efforts to depoliticize religion and diminish disunity,⁸ anger flares anew each time the United States Supreme Court interprets the Establishment Clause.⁹

In constitutional law cases, the meaning of the Constitution "is always partly determined . . . by the historical situation of the interpreter . . ." who understands the text in ways different from its authors.¹⁰ Jurists, therefore, should concede that the Constitution's meaning is influenced by their cultural preconceptions and predispositions (avoidable and unavoidable). Judges should be self-consciously critical of their habits of thought.¹¹

The Court's habitual repetition of its flawed reconstruction of the original meaning of the First Amendment's religion phrases is partly responsible for the deplorable condition of its Establishment Clause jurisprudence.¹² A former United States Solicitor General rates the doc-

the preeminent goal of the First Amendment. See, e.g., *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985); *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 747 (1976) (plurality opinion); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973). However, the Court's concept of neutrality as applied does not always appear neutral to those excluded from programs because of their religious affiliations. For example, the principle that parochial schools may not obtain aid for secular programs identical to programs in public schools is arguably not neutral if an institution would be entitled to aid *but for* its religious affiliation.

8. In the view of James Madison, the more factions there were, the less likely were the chances of a coalition powerful enough to endanger religious liberty. WILLIAM L. MILLER, *THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING* 13 (1992).

9. U.S. CONST. amend. I. The First Amendment to the United States Constitution, in part, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise [of religion] . . ." *Id.*

10. HANS GEORG-GADAMER, *TRUTH AND METHOD* 263 (Continuum 1975) (2nd ed. 1965).

11. See JOEL C. WEINSHEIMER, *GADAMER'S HERMENEUTICS, A READING OF TRUTH AND METHOD* 175 (1985).

12. There is discontent along the entire liberal-conservative spectrum of political thought. See Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989). The Court's Establishment Clause

trinal coherence of the Supreme Court's Establishment Clause cases on a scale of one to ten as between "zero" and "less than zero."¹³ Because of a barrage of criticism directed against hyperactive judges (and other causes beyond the scope of this Article),¹⁴ the public thinks we have a government of persons, not of laws. Before the general public became so aware of the Supreme Court's fallibility and lack of judicial restraint, the Justices could more easily convince the American people that the text of the Constitution, as illuminated by the intentions of the Founding Fathers, dictated their Establishment Clause decisions.

In *Everson v. Board of Education*,¹⁵ the Court announced that the Establishment Clause (supplemented by the Fourteenth Amendment) means at least this: "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."¹⁶ To support this statement, Justice Black equated the prohibitions of the Establishment Clause with the provisions of Thomas Jefferson's "Virginia Bill for Establishing Religious Freedom."¹⁷ Justice Rutledge also relied on history, especially Virginia's history. In dissent, he would have prohibited payment of bus fares for children who went to parochial schools even though the legislature authorized payment for all children transported to school.¹⁸ According to Justice Rutledge, "[n]o provision of the Constitution is more closely tied to or given [more authentic] content by its generating history than the religious clause of the First Amendment."¹⁹ A year later, in *Illinois ex rel. McCollum v. Board of Education*,²⁰ eight Justices endorsed without qualification the accuracy and sufficiency of Justice Rutledge's historical research.

Justice Rutledge considered the views expressed by James Madison during the Virginia disestablishment process as authoritative,²¹ and wrote,

tests consist of "contradictory principles, vaguely defined tests, and eccentric distinctions." Phillip T. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 817 (1984).

13. Rex Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 338.

14. Other causes of public mistrust include, for example, the media's reportage, which has exposed the political agendas of the Court's left and right wings.

15. 330 U.S. 1 (1947).

16. *Id.* at 15.

17. *Id.* at 13. One version of Jefferson's Bill, dated June 12, 1779, is reprinted in 5 THE FOUNDERS' CONSTITUTION 77 (Phillip B. Kurland & Ralph Lerner eds., 1987).

18. 330 U.S. at 52-53 (Rutledge, J., dissenting).

19. *Id.* at 33 (Rutledge, J., dissenting). The opinions in *Everson* "invoked the names of Madison and Jefferson, singly or jointly, some three and half dozen times (excluding footnotes)." Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws Of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159, 175 n.83 (1990).

20. 333 U.S. 203 (1948).

21. As an antidote, see RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION

“[w]ith Jefferson, Madison believed that to tolerate any fragment of establishment would be [unacceptable]. Hence, [Madison] sought to tear out the institution not partially but root and branch and to bar its return forever.”²² Justice Rutledge’s hero-worshipping narrative attaches undue importance to Virginia’s “Bill for Religious Freedom,” which does not in its enacting clauses expressly prohibit establishment of religion and to Madison’s Memorial and Remonstrance against religious assessments (a petition more well known now than two centuries ago). Both documents have been cited and relied upon by courts in scores of cases,²³ although it is at best dubious to assume that the ratifiers of the First Amendment intended to impose upon the entire United States the same disestablishment policy that the Commonwealth of Virginia adopted.²⁴

I. DEMYTHOLOGIZING JEFFERSON AND MADISON

A Justice who relies on Thomas Jefferson must be very cautious. “Jefferson was not wholly consistent when it came to an establishment of religion.”²⁵ His “views [on religion] were sufficiently unorthodox for him to take care that they [did] not become generally known.”²⁶ Although ordinarily he was among the strictest of American disestablishment proponents, he did not object to some treaties and legislation that provided federal funds to meet the religious needs of Native Americans, and which “propagate[d] the Gospel among the Heathen.”²⁷ He also used religion manipulatively to rally the colonists against Great Britain.²⁸

Jefferson’s contributions advancing the cause of disestablishment, although undeniably important, are often exaggerated by jurists. Indeed, the momentous social transformation called disestablishment cannot be reduced to anecdotes about Jefferson’s efforts in Virginia during the 1780s. The disestablishment of religion has been a complex, variable

125-32 (1987) (discussing why Justice Rutledge’s position is weakly supported by the historical record).

22. *Everson*, 330 U.S. at 40.

23. Dreisbach, *supra* note 19, at 173-74 n.78.

24. See Mark D. Howe, *Religion and the Free Society: The Constitutional Question*, in *SELECTED ESSAYS ON CONSTITUTIONAL LAW 1938-1962*, 780, 781 (Association of American Law Schools ed., 1963).

25. LEVY, *supra* note 5, at 183. Jefferson, acting as Rector of the University of Virginia, did not entirely exclude religious education from the University, a point discussed at some length by Justice Reed. See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 245-47 (1948) (Reed, J., dissenting). Madison approved of Jefferson’s decision as rector. *Id.* at 248.

26. GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 354 (1990).

27. See LEVY, *supra* note 5, at 183.

28. WILLS, *supra* note 26, at 359-60.

process occurring throughout the Western world over a long period of time.

Unlike the French immediately after the French Revolution, "the Americans did not regard their revolution as a repudiation of the Christian past."²⁹ Moreover, for believing Americans, the new nation under the new Constitution was "not perceived to be inimical to the Christian church or Christian beliefs."³⁰ Before 1800, in some respects, the disestablishment process in France,³¹ Austria, and the Kingdom of Tuscany advanced faster than in Massachusetts.

The Court's doctrine which is shaped by its excessive reliance on Virginia's disestablishment of the Anglican Church is vulnerable to devastating criticism.³² As Professor Howe wrote, "[b]y superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer."³³ Fortunately, the Court today seems aware that the versions of history presented by Justices Rutledge and Black are incomplete. Nevertheless, judicial opinions still invoke the names of James Madison and Thomas Jefferson as if recurrence to their guiding principles were a simple hermeneutical task. Not so; our world view as we approach the 21st century is not the same as the founding generation's. There are continuities of course, but there are many discontinuities as well. Contrary to now-discredited hermeneutic theories, the past cannot be studied as if it is fixed or static.

The founding generation, on religious and other questions, was not of one mind but rather was split into politically partisan factions. The United States Supreme Court mistakenly emphasizes only one side of the debate that divided the young American republic's founding generation. It hears the voices of Jefferson and Madison but not Alexander Hamilton, Benjamin Rush, John Jay or political leaders in New England, like Noah Webster, who relied on government supported religion to inculcate civic virtue.

29. *Id.* at 115.

30. MILLER, *supra* note 8, at 114.

31. The ultimate disestablishment, although temporary, occurred in France in 1795 when formal separation of Church and State was decreed and when Pope Pius VI became a French prisoner.

See PAUL JOHNSON, A HISTORY OF CHRISTIANITY 360 (1976).

32. See MARK D. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965). Justice Brennan warned against a "too literal quest for the advice of the Founding Fathers upon the issues of [religious establishment]." *Abington School Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

33. HOWE, *supra* note 32, at 4.

The Establishment Clause contains traces of meaningful information that are usually deleted in judicial opinions. The Court minimizes the importance of the earliest applications of the Establishment Clause by Congress, the courts, and by officials in the executive branch as if these telling state and federal precedents are *de minimis* or were inexplicable mistakes, e.g., laws against blasphemy, official resolutions for days of fasting and Thanksgiving, presidential inaugural addresses, and the appointment of Chaplains to the Congress. Indeed, the First Congress supported "sectarian education on Indian reservations, provid[ed] for religious objects on public property, and permitt[ed] public property to be used for religious purposes."³⁴ Apparently, the Court wants to have it both ways; it wants to rely on the history that supports its theory of the Constitution's religion provision and it wants to ignore the history that does not. For example, the Court has never addressed the apparent "conflict between Jefferson's law punishing 'Sabbath Breakers' and the strict separationist position attributed to Jefferson by the *Everson* Court."³⁵

Writing "law office" history is not the Court's only failing. The Justices often approach their interpretive duties with too much of a clause-bound approach. The meaning of the Establishment Clause (and the known intentions of those who supported its inclusion in the Constitution) must not be interpreted only sentence by sentence; the provisions of the entire document must be read holistically and integrated with each other. For example, the Establishment Clause cannot be completely understood until it is juxtaposed, if not reconciled with, the Constitution's Preamble,³⁶ its Clause guaranteeing a republican government,³⁷ the Tenth Amendment,³⁸ the Free Exercise Clause,³⁹ and the declaration of citizenship in the Fourteenth Amendment, which secures the citizenship status of all persons born in the United States, regardless of their creed.⁴⁰

In this Article, I criticize the arguments used by judges to justify their historically flawed Establishment Clause decisions. I suggest that judges who attempt to understand the lineage of the language of the Constitution in the context of history must recognize that the writings of Madison and Jefferson and the records of the Virginia disestablishment

34. Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 255 (1991). See also *supra* note 27 and accompanying text.

35. Dreisbach, *supra* note 19, at 204.

36. U.S. CONST. pmbl.

37. U.S. CONST. art. IV, § 4.

38. U.S. CONST. amend. X.

39. U.S. CONST. amend. I.

40. The Fourteenth Amendment reads in part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

process are merely small pieces in a large puzzle.⁴¹ The Virginians' views were opposed in other regions of the country. Few of the Founders thought that the Establishment Clause of the First Amendment limits state power or preempts state constitutions advancing religion.⁴² Even Jefferson understood that the United States Constitution did "not stop the States from assuming authority in the matters of religion."⁴³

Madison and Jefferson were not one-dimensional thinkers. Their respective world views contained contradictions, some of which were irreconcilable. Their views on established religion were integrated with their views about science, religious enthusiasm, the moral sense, republicanism, separation of powers, federalism, and myriad other issues.

41. Thomas Jefferson was not actually in the Country during the relevant time period. He sailed to Paris in 1784 as a United States Ambassador to France. See DUMAS MALONE, *JEFFERSON THE VIRGINIAN* 422 (1948). Jefferson sailed back home to America late in October of 1789. See Adrienne Koch & William Peden, *Introduction to THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* at xxvi (Adrienne Koch & William Peden eds., 1944). See also, ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 85-86 (1982).

42. Justice Stewart grasped this point writing that:
 the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments. Each state was left free to go its own way and pursue its own policy with respect to religion.
Abington Sch. Dist. v. Schempp, 374 U.S. 203, 309-10 (1963) (Stewart, J., dissenting). Justice Stewart noted that "it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." *Id.* at 310.

Levy also writes: "As at the Constitutional Convention, a widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion." LEVY, *supra* note 5, at 74. See also CORD, *supra* note 41, at 40; WILBUR G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 8-10 (1964); MARTIN E. MARTY, *PILGRIMS IN THEIR OWN LAND* 163 (1984); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1157-58 (1991); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 *Nw. U. L. REV.* 1113, 1132-35 (1988); Edward S. Corwin, *The Supreme Court as National School Board*, 14 *LAW & CONTEMP. PROBS.* 3, 14 (1949); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 *MICH. L. REV.* 477, 481-82 (1991); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 *WASHBURN L.J.* 65, 66 (1962); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 *DEPAUL L. REV.* 1191, 1201-02 (1990); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 *NOTRE DAME L. REV.* 311, 317 (1986); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 *WASH. U. L.Q.* 371-73, 406-07; William Van Alstyne, *What Is "An Establishment of Religion,"* 65 *N.C. L. REV.* 909, 910 (1987); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 *HARV. L. REV.* 1700, 1700 (1992).

43. CORD, *supra* note 41, at 40.

Madison and Jefferson, who did not always agree with each other, were both willing to negotiate with their political opponents. Indeed, Madison was a successful politician not because he was doctrinaire but because he was willing to compromise,⁴⁴ even on some matters of principle.⁴⁵

Madison's vision of disestablishment for Virginia was more comprehensive than most of his contemporaries who voted to ratify the First Amendment in order to prevent Congress from meddling with state establishments.⁴⁶ This policy of nonintervention was, in effect, a multilateral nonaggression pact. The ratifying conventions in each state after the summer of 1787 and the verbal exchanges in the First Congress during the summer of 1789 strongly suggest that the polemics of both Madison and Jefferson (regarding the nature and pace of disestablishment in Virginia) diverged from the ideas of most Americans.⁴⁷ Both Virginians were ahead of their time, and their advocacy was not always indicative of public opinion.

Madison's Remonstrance (circa June 1785), the now famous petition listing objections to Patrick Henry's bill providing tax funds to teachers of the Christian religion, was a broadside that has gained in stature and influence⁴⁸ since it was written anonymously and considered at the

44. Madison was not a rigid ideologue "nor a man of doctrinaire temperament, nor marked by any nostalgia for the absolute." MILLER, *supra* note 8, at 285. He was among other things a "tactician, the compromiser, the 'skillful organizer who could keep various factions and pressure groups together'." *Id.* at 12. When his proposals for a bill of rights were opposed, he skillfully set about bringing his opponents into the fold. *Id.* at 268.

45. For an unusually informative article proving that Madison and Jefferson were willing to compromise their principles during the Virginia disestablishment process, see generally, Dreisbach, *supra* note 19, at 159. Jefferson apparently authored *A Bill for Appointing Days of Public Fasting and Thanksgiving*, *id.* at 193, and *A Bill Annuling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage*. *Id.* at 199. Dreisbach writes, "Jefferson [at least in the 1780s] may have held a more accommodating view of church-state relations than the strict separationist version of legal history would suggest." *Id.* at 203. "While Madison's 'Memoranda' and Jefferson's 'wall [of separation]' metaphor are frequently invoked by the judiciary, their 'Bill for Appointing Days of Public Fasting and Thanksgiving' is largely forgotten." *Id.* at 195. For another discussion of Jefferson's *Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers*, see Robert L. Cord, *Interpreting the Establishment Clause of the First Amendment: A "Non-Absolute Separationist" Approach*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 731, 735-36 (1990).

46. The Court, contrary to the founding generation, treats the establishment-of-religion issue by local officials as legally impermissible.

47. Madison and Jefferson both knew that for many Americans religious loyalties were more obligatory than loyalty to the nation. BELLAH ET AL., *supra* note 1, at 181.

48. See THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 143 (1986).

time "a mite excessive."⁴⁹ For example, Madison went into rhetorical overdrive when he suggested that Patrick Henry's proposed tax was, in principle, as objectionable as the Inquisition.⁵⁰ In his Remonstrance, Madison's entire list of argumentative objections to the proposed tax assessment did not express the national will⁵¹ respecting disestablishment because by 1791, national disestablishment issues were discussed in the context of a debate over states' rights. Judges, advocates, and academics on opposite sides of contemporary church-state issues, however, cite passages from Madison's memorabilia as if Madison himself anticipated the Fourteenth Amendment issues that are now being brought to the Court.

The fact that we delude ourselves about our history when we think we are not deluding ourselves is a puzzling irony developed by contemporary hermeneutists.⁵² "Constitutional history almost always suffers from what T.S. Eliot described as the cruelty of mixing memory with desire."⁵³

Contrary to legends popularized by the Court, Madison's views changed over time and the views he expressed in public changed depending on his various roles as advocate, candidate for office, member of the Virginia General Assembly, member of the United States House of Representatives, President, private letter writer, and writer of memoranda⁵⁴ published posthumously. For example, all the arguments in Madison's Remonstrance against a bill attempting "to enforce by legal sanctions, acts obnoxious [to most Virginians]"⁵⁵ were not entirely germane when he served in the United States House of Representatives and proposed amendments to the Constitution. Obviously, Madison's role in the House was different from his role as a ghost writer for a Presbyterian faction. His role was also different when he served in the Virginia General Assembly. For example, in 1785, he introduced a bill (probably drafted

49. WILLIAM L. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 137 (1985).

50. *Id.*

51. When published in 1785, the Remonstrance was not the most widely supported published petition protesting Patrick Henry's Assessment Bill. *See Id.* at 39.

52. *See generally* GEORG-GADAMER, *supra* note 10.

53. Philip B. Kurland, *The Origins Of The Religion Clauses Of The Constitution*, 27 WM. & MARY L. REV. 839, 860 (1986) (invoking T.S. Eliot, *The Waste Land*, in *COLLECTED POEMS 1909-1962*, at 53 (1963)).

54. Madison's views in the so-called Detached Memoranda written during his declining years, although often cited by judges, do not necessarily coincide with his views in 1789 when he proposed amendments to the Constitution including the precursor of the Establishment Clause.

55. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 17, at 84.

by Jefferson) providing for punishment of “sabbath breakers.”⁵⁶ One of his biographers describes how Madison adeptly shifted his roles from “the statesman of artful accommodations” to “single-principled absolutist.”⁵⁷

Madison’s arguments why Christian teachers should not be paid by the government’s treasury in 1785 were cited by the Court in *Lee v. Weisman*⁵⁸ to justify its condemnation of graduation prayers in public schools, but Madison’s own arguments against chaplains to Congress were not heeded by the House of Representatives and Senate whose resolutions authorized the national Treasury to appoint and pay their official chaplains in 1789 and 1790.⁵⁹ Congressional action appointing chaplains and endorsing prayer might show that Congress deviated from the Constitution’s principles as Justice Souter recently argued,⁶⁰ but it also tends to prove that Congress did not agree with Madison’s privately published interpretations of the Establishment Clause.

By 1789, Madison had become the nation’s most important advocate for a bill of rights.⁶¹ Nevertheless many facets of the Virginian’s views were not known,⁶² understood, debated, or approved by most ratifiers of the Establishment Clause. Furthermore, “[t]here were important changes in . . . language as these proposed amendments passed from James Madison’s hand, on June 8, 1789, through the complicated process in the House, the Senate, the conference committee, and the ratifications

56. Dreisbach, *supra* note 19, at 190. The religious nature of the bill punishing sabbath breakers is undeniable; it was *not* introduced primarily for secular purposes. *See id.* at 191.

57. MILLER, *supra* note 49, at 137.

58. 112 S. Ct. 2649, 2657 (1991).

59. The House and Senate, even after proposing the Establishment Clause for ratification, appointed paid Chaplains to both houses of Congress. *See* 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791 251, 254, 623-25 (Linda Grant De Pauw ed., 1977). *See also* Letter from James Madison to Edward Livingston (*July 10, 1822*) reprinted in 5 THE FOUNDERS’ CONSTITUTION, *supra* note 17, at 105 (containing Madison’s explanation of his position at the time). This letter was cited by Justice Souter in *Weisman*, 112 S. Ct. at 2675 n.6 (Souter, J., concurring). Justice Souter understands, however, that “the Framers simply did not share a common understanding of the Establishment Clause.” *Id.*

60. *Weisman*, 112 S. Ct. at 2675.

61. MILLER, *supra* note 8, at 6. Madison screened the proposed amendments to the Constitution and decided which ones were not likely to be seriously controversial. *Id.* at 253. He did some editing, and engaged in considerable prodding. *Id.* at 252. The list of rights that were eventually ratified through his leadership were similar to those selected by Madison, although the proposed amendment he thought most important, dealing with limitations on state power to regulate religion, did not survive in the Senate. *Id.* at 252-259.

62. Madison in the 1780s was reluctant to admit that he wrote the Remonstrance. MILLER, *supra* note 49, at 98.

by the state legislatures, into the Constitution of the United States on December 15, 1791.”⁶³

Seemingly oblivious to problems caused by excessive reliance on selected snippets from Madison’s writings, Justice Blackmun in *Weisman* relies on Madison’s Remonstrance as if it memorializes the founders’ understanding of the First Amendment’s unchanging meaning.⁶⁴ This type of propaganda is needlessly primitive. Justice Souter, concurring in *Weisman*, cites Madison’s “Detached Memoranda”⁶⁵ which are not a reliable record of the national will that prevailed when the First Amendment was ratified. Written in Madison’s declining years between 1817 and 1832, the Memoranda contain personal opinions that contradict some of Madison’s other writings and actions concerning disestablishment.⁶⁶

Let me now clarify what I am not arguing. I am not denying that Madison and Jefferson were remarkably influential leaders of public opinion, and I concede that late eighteenth century history is pertinent in Establishment Clause cases brought under the Fourteenth Amendment. I am arguing, however, in support of a diachronic rather than a synchronic view of history. Instead of isolating a slice of time— for example, the period between 1785 and 1791—the Court should consider the sweep of history that indicates the long term dialogical and doctrinal continuities and discontinuities that are relevant in a particular case.

Instead of a diachronic approach, the Court isolated brief fragments of recorded history when, citing the words of Jefferson, Justice Black attempted to “erect ‘a wall of separation between Church and State.’ ”⁶⁷ The Court did not give any weight to the opinions of leaders who disagreed with Jefferson and his allies. The Court in 1947 did not consider the anti-slavery origins of the Fourteenth Amendment’s citizenship declaration, which arguably prohibits noncoercive state aid to religion only if it subverts a person’s citizenship status. Clearly, the Court in *Everson* was attempting to transform the American people’s understanding of their past in order to influence their future.⁶⁸ *Everson’s*

63. MILLER, *supra* note 8, at 259.

64. *Weisman* 112 S. Ct. at 2666 (Blackmun, J., concurring).

65. *Id.* at 2673, 2675, 2675 n.6 (Souter, J., concurring).

66. CORD, *supra* note 41, at 30-31. I should point out that Justice Souter does not rely on Madison as much as on Justices Rutledge, Black, or Blackmun; his point is that the critics of the Court’s rendition of history have not presented arguments that are cogent enough to overturn prior precedent. See *Weisman*, 112 S. Ct. at 2673-76 (Souter, J., concurring).

67. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

68. In *Weisman*, Justice Blackmun cited Justice Black’s dicta, calling it “the touchstone of Establishment Clause jurisprudence.” 112 S. Ct. at 2662 (Blackmun, J.,

dicta led to the school prayer cases in the 1960s⁶⁹ and scores of other decisions condemning relationships between local governments and religious institutions.

Because of *Everson*, the federalism shield limiting the reach of the Establishment Clause has ironically been transformed into a sword for attacking state laws respecting religion.⁷⁰ The judge-made doctrine incorporating the Establishment Clause as a negation of the States' power to aid religion noncoercively and nonpreferentially seems entrenched for the foreseeable future.⁷¹ The Court's muddled theory of selective incorporation can be improved without a dramatic invalidation of precedent if the Court uses the Fourteenth Amendment's declaration of citizenship, which protects the immunities of individuals in addition to their liberties.⁷²

According to the model described in this Article, if the government endorses religion and if the endorsement detracts from a person's citizenship status, then the citizenship declaration, which augments the Establishment Clause, is violated. Consider, for example, the situation of Jews in the United States.⁷³ In the words of Professor Alan Dershowitz, "[t]he separation of church and state in America is the foundation on which the first-class legal status of American Jews rests."⁷⁴ He is partially correct; his emphasis on separation, however, does not fully guarantee the status of Jews; the Fourteenth Amendment's declaration of citizenship does (explained below in Section IV).

Dershowitz writes, "The goal of the Christian right is to convert Jews, or at the very least, to relegate them to second class status in their Christian America."⁷⁵ Although Dershowitz's assertion is overin-

concurring). Justice Souter referred favorably to dicta in *Everson* prohibiting any and all aid to religion even if State programs "aid all religions." *Id.* at 2667 (Souter, J., concurring) (quoting *Everson*, 330 U.S. at 15). Justice Stevens and Justice O'Connor joined the concurring opinions of Justices Blackmun and Souter. *Id.* at 2661, 2667.

69. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (holding the practice of daily Bible reading and recitation of Lord's Prayer in elementary and secondary public schools unconstitutional); *Engle v. Vitale*, 370 U.S. 421 (1962) (holding the practice of reciting a nondenominational prayer written by state officials unconstitutional).

70. CURRY, *supra* note 48, at 208. Levy concedes that "religion as a subject of legislation was reserved exclusively to the states." LEVY, *supra* note 5, at 74. He adds, however, that "[t]o expect the Supreme Court to turn back the clock by scrapping the entire incorporation doctrine is so unrealistic as not to warrant consideration." *Id.* at 166.

71. See *Weisman*, 112 S. Ct. at 2673 n.4 (Souter, J., concurring).

72. See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 52 (1989).

73. The status and standing of Jews in the United States is vastly different from countries where, throughout history, they have been unwelcome, vilified, and savagely persecuted.

74. ALAN M. DERSHOWITZ, *CHUTZPAH* 313 (1991).

75. *Id.* at 336.

clusive, courts must protect all citizens vigorously when government endorsements of religion subvert any person's citizenship status and immunities. Recently, however, the Court has observed that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."⁷⁶ Accordingly, the government does not establish religion when it is necessary to "lift a discernible burden on the free exercise of religion."⁷⁷ This position leads to the accommodationists' interpretation of the Establishment Clause.⁷⁸ Yet, how far down that road will the Court travel? Moderates on the Court have signified most recently in *Lee v. Weisman* that there is a line beyond which the government may not accommodate religion.⁷⁹

Weisman was not an easy case because the record barely supports Justice Kennedy's inference that petitioner Deborah Weisman was psychologically coerced to participate in the religious exercise she challenged as unconstitutional,⁸⁰ especially in view of her counsel's stipulation that her attendance at graduation was "voluntary." Deborah was not coerced by state law, as Justice Scalia asserts with some rancor.⁸¹ Justice Kennedy explained, however, that official school policy forced Deborah to choose

76. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987)).

77. *Lee v. Weisman*, 112 S. Ct. 2649, 2677 (1992).

78. Accommodationist Richard John Neuhaus, author of the influential *The Naked Public Square*, thinks "it is past time" for the Court to recognize candidly that "[i]n a society that is strongly and pervasively religious, it is not possible to have a government that is both democratic and, at the same time, indifferent or hostile to religion." Richard J. Neuhaus, *The Naked Public Square: A Metaphor Reconsidered*, in *FIRST THINGS* 78, 80 (The Inst. on Religion and Public Life ed., May 1992).

79. In *Weisman* a trio of Justices having varying degrees of enthusiasm for accommodation (Justices O'Connor, Souter, and Kennedy) joined with two Justices with stricter separationist views (Justices Blackmun and Stevens) and voted together as the Court condemned a nonsectarian prayer delivered by a rabbi at graduation exercises at a public school. Justice Souter decided that "the graduation prayers at issue . . . crossed the line from permissible accommodation to unconstitutional establishment." *Weisman*, 112 S. Ct. at 2677 (Souter, J., concurring).

80. The Court's finding of coercion was predicated on the following facts not disputed by the litigants: In 1989, a public school principal decided to include as part of a graduation ceremony an invocation and benediction. Over the objections of Deborah Weisman and her father, the principal selected a clergyman, in this case a rabbi, to lead the audience of children and adults assembled in prayer. The rabbi was advised to deliver a non-sectarian prayer, and the school principal provided him with guidelines distinguishing between appropriate and inappropriate prayers. *Weisman*, 112 S. Ct. at 2652-53. The rabbi chose a prayer that was based in part on the Book of the Prophet Micah, Ch. 6, v. 8 from the Hebrew Scriptures. *Id.* at 2664 n.5 (Blackmun, J., concurring).

81. *Id.* at 2683-84. (Scalia, J., dissenting).

between “social isolation”⁸² and “prayers [that] were offensive.”⁸³ Arguably for many teenagers in Deborah’s situation, the only realistic alternative is to submit to a religious exercise that is offensive—since a graduation ceremony to most adolescents “is one of life’s most significant occasions.”⁸⁴ Given this scenario, described with an empathy not present in the dissenting opinion (which implies that Deborah is a little too thin-skinned for her own and society’s good), the Court held that “[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.”⁸⁵

An accommodationist whose citizenship status is not threatened by the anti-Semitic currents in public opinion might wonder why Deborah cannot take the bitter with the sweet? Is the “bitter” (i.e., the subtle, psychological coercion of peer pressure) really the functional equivalent of “legal coercion”?⁸⁶ The answer is yes, according to Justice Kennedy, although his concept of psychological coercion has the potential—as pointed out by Justice Scalia—of being “a boundless and boundlessly manipulable test,” one that varies in accordance with the “philosophical predilections of the Justices.”⁸⁷ Despite this dangerous potential, the general principle “that the government may no more use social pressure to enforce orthodoxy than it may use more direct means”⁸⁸ is, in theory, judicially manageable. Moreover, the controversial principle protects the citizenship status of persons who are stigmatized as outsiders if they do not submit to social pressures exerted by government officials.

Court watchers had expected Justice Kennedy to adhere to the principles he expressed in *County of Allegheny v. ACLU*,⁸⁹ in which he attacked the Court’s “unjustified hostility toward religion.”⁹⁰ Although Justice Kennedy’s *Weisman* opinion modifies his previously stated position that “the Establishment Clause must be construed in light of the [g]overnment policies of accommodation, acknowledgment, and support

82. *Id.*

83. *Id.* at 2659.

84. *Id.*

85. *Id.* at 2660.

86. *Id.* at 2683 (Scalia, J., dissenting).

87. *Id.* at 2679 (Scalia, J., dissenting). The dissenters concede that government-sponsored endorsement of [sectarian] religion is out of order but not “the officially sponsored non-denominational invocation and benediction read by Rabbi Gutterman.” *Id.* at 2684 (Scalia, J., dissenting).

88. *Id.* at 2659. As Professor McConnell wrote prophetically before *Weisman*, there is an element of coercion when a student, in order to attend her graduation, is forced to become a member of a captive audience which is subjected to a prayer, the content of which is influenced by the government. McConnell, *supra* note 4, at 158.

89. 492 U.S. 573 (1989).

90. *Id.* at 655 (Kennedy, J., concurring in the judgment and dissenting in part).

for religion [that] are an accepted part of our political and cultural heritage,"⁹¹ nothing in *Weisman* departs his general view that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself be inconsistent with the Constitution."⁹²

Significantly, Justice Kennedy did not rely on the guidelines of *Lemon v. Kurtzman*,⁹³ which have failed to produce a coherent body of law.⁹⁴ The so-called *Lemon* "guidelines,"⁹⁵ although more accommodating than strict separationism, have confused lawyers and judges and have caused persistent divisions among the Justices of the Supreme Court. The Court in *Weisman*, however, declined invitations to abandon *Lemon*.⁹⁶ Instead, it relied on a rule inferable from previous precedent: *viz.*, no public school below the college level "can persuade or compel a student to

91. *Weisman*, 112 S. Ct. at 2678 (Scalia, J., dissenting) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment and dissenting in part)).

92. *Id.* at 2661.

93. 403 U.S. 602 (1971). To satisfy the Establishment Clause under the three *Lemon* guidelines, "a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." *Weisman*, 112 S. Ct. at 2654. The first two guidelines are derived from *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); the third is taken from *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

94. Chief Justice Burger, the author of *Lemon*, admitted "[c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of law." *Lemon v. Kurtzman*, 403 U.S. at 612. Justice White claims that the *Lemon* test "sacrifices clarity and predictability for flexibility." *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980). Justice Scalia calls the Supreme Court's establishment clause jurisprudence "embarrassing." *Edwards v. Aguillar*, 482 U.S. 578, 639 n.7 (1987) (Scalia, J., dissenting), and describes the *Lemon*-guided decisions as variations on a "theme of chaos." *Id.* at 640. Chief Justice Rehnquist, referring to *Lemon*, called it a theory that "has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results." *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, C.J., dissenting). Justice O'Connor has expressed doubts about the test. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting). An inviting pre-*Weisman* opinion written by Justice Kennedy indicates that a "[s]ubstantial revision of our Establishment Clause doctrine may be in order." *County of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in the judgment and dissenting in part).

95. It was Chief Justice Burger himself who explained that the three factors function as a guideline, not a test. *See Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). "Since 1971, the Court has decided 31 Establishment Clause cases" and prior to *Weisman*, it had rested all of those decisions, save one, "on the basic principles described in *Lemon*." *Weisman*, 112 S. Ct. at 2663 n.4 (Blackmun, J., concurring). The exceptional case was *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding prayer opening a session of the state legislature).

96. *Weisman*, 112 S. Ct. at 2655. The lower courts had relied on *Lemon*, as the Court noted. *Id.* at 2654-55.

participate in a religious exercise.”⁹⁷ The Court’s expanded conception of impermissible coercion in *Weisman* allowed it to postpone the difficult business of clarifying or replacing the *Lemon* framework of analysis.

What is needed is a new and enduring model of adjudication that is based on guidelines that can be plausibly derived from the Constitution. Saying what is needed is obviously easier than providing an exemplar that fulfills the need. Section IV of this Article constructs a new framework of analysis that is faithful to the Constitution’s text read holistically. However, the state constitutions in effect at the time the Establishment Clause was ratified must be taken into consideration. They created a diminished citizenship status for non-Christians. Indeed, the endorsements of religion in many late-eighteenth century state constitutions demonstrate why the Court’s version of American history is flawed, incomplete, and misleading.

II. THE DIMINISHING BUT LINGERING INFLUENCE OF CHRISTIANITY IN STATE CONSTITUTIONS

In 1740, a combination of religious beliefs and social attitudes known as Puritanism was still the strongest cultural force in the New England colonies destined to become independent States.⁹⁸ By 1776, the year of the Declaration of Independence,⁹⁹ such habits of mind had been unsettled by influences stemming from “the Enlightenment, and several variants of traditional Christianity.”¹⁰⁰ Nevertheless, the heady wines of spirit-filled revivalism and the Enlightenment were imbibed with moderation in North America, where traditional modes of Christianity remained an inhibiting reality.

97. *Id.* at 2661.

98. A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 6 (1985).

99. The self-evident truths of the Declaration drew upon English legal theory, the Whig political tradition, and Enlightenment themes that melded with Puritan covenant theology. During the 18th century Enlightenment, new thinking in theology demystified medieval and post-Reformation dogmatics. The Founding Generation was influenced by John Locke’s political theories and his great work, *The Reasonableness of Christianity* (1695), which exalted human reason without denying the Gospel. Lest we forget, however, the Declaration’s first paragraph contains two references to the Deity: “Nature’s God” and “Creator.” In the final paragraph, there are two more references: “Supreme Judge of the world” and “Divine Providence.” See THE DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776). “[T]he signers generally agreed that a transcendent Creator had conferred certain inalienable rights that were beyond the dominion of human government.” ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 8 (1990). For a general discussion of the Declaration’s religious references, see ASAN P. STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 561-66 (Greenwood Press rev. ed. 1975) (1964).

100. REICHLEY, *supra* note 98, at 6.

In the new Federal Constitution, no provision was made for a state supported church, and persons were not required to take any sort of religious oath or test in order to hold a public office of the United States.¹⁰¹ It is a mistake, however, to think that secularists desiring separation of church and state achieved their goals. The ties between the several states and religious institutions were left undisturbed by the Constitution. As William Lee Miller writes, “[a]lthough the Christian religion in Europe was often, and often seen to be, the great opponent of the modern age—of liberalism, of republicanism—in the United States it was no opponent but a friend.”¹⁰² With the advent of the new Constitution, there was only one United States, not two, as there were two Frances, two Italys and two Spains. The United States had “not divide[d] politically or systematically along a religious faultline.”¹⁰³

Most disestablishmentarians in the United States were not zealously anti-religious like the revolutionaries in France. Disestablishment did not mean that Christianity would be confined to a ghetto totally isolated from the public square. The founding generation,

explicitly disentangled themselves from . . . hierarchy, and implicitly repudiated priesthood, and set in place a new nation with liberty and equality at the center, without casting the Christian religion as an opponent.

The United States managed to come into being as a modern democratic state with the connection to the Christian past unbroken.¹⁰⁴

Although the influence of Christianity persisted, “every colony-turned-state altered the Church-State arrangements it had inherited from colonial times.”¹⁰⁵

At the time the Bill of Rights was ratified, “[t]he pattern of establishment was bewilderingly diverse. . . . Some [jurisdictions] maintained dual establishments, others multiple establishments [of several denominations and sects] with free exercise for dissenters.”¹⁰⁶ According to Leonard W. Levy, six of the original thirteen states had multiple

101. The Constitution provides, “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI, § 3.

102. MILLER, *supra* note 8, at 114.

103. MILLER, *supra* note 8, at 115.

104. MILLER, *supra* note 8, at 116.

105. CURRY, *supra* note 48, at 134.

106. LEONARD W. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 196 (1972).

establishments;¹⁰⁷ namely, Connecticut, New Hampshire, Massachusetts, Maryland, Georgia, and South Carolina.¹⁰⁸ Professor Levy does not consider the laws in force at the time in Rhode Island, Delaware, Pennsylvania, or New Jersey to be establishments.¹⁰⁹ His conclusion is questionable; laws in those states disfavored non-Christians and in some instances Roman Catholics. The following summary of *all* the state constitutions discloses that there were elements of established religion remaining in each state at the time the First Amendment was ratified.

In Rhode Island, perhaps the most tolerant state, Catholics were ineligible for public office and Jews, although free to practice their religion, were considered "second class citizens."¹¹⁰ Delaware's Constitution also discriminated in favor of Christians. It provided that "all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state."¹¹¹ Pennsylvania, as late as 1790, excluded from public office atheists and those who did not believe in "a future state of rewards and punishments."¹¹² Pennsylvania's discrimination was not considered invidious by disestablishmentarians in the late eighteenth century only because "the values, customs, and forms of Protestant Christianity thoroughly permeated civil and political life."¹¹³ The same values underpinned New Jersey's constitution of 1776, which provided that "no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles."¹¹⁴

Maryland's constitution of 1776 granted equal religious liberty only to "persons professing the Christian religion";¹¹⁵ it also authorized "a general and equal tax, for the support of the Christian religion."¹¹⁶ Moreover, there was a religious test for office holders who were required to declare a belief in the Christian religion.¹¹⁷ A tax supporting religion

107. A multiple establishment, according to Levy, exists when the state provides impartial tax support of religious institutions. *Id.* at 202.

108. *Id.* at 197-99.

109. *Id.* at 192.

110. CURRY, *supra* note 48, at 91. Curry describes the situation in Rhode Island helpfully and succinctly. *Id.* at 90-91.

111. DEL. DECLARATION OF RIGHTS of 1776, § 3, *reprinted in* ADAMS & EMMERICH, *supra* note 99, at 116.

112. CURRY, *supra* note 48, at 161 (quoting PA. CONST. of 1790).

113. CURRY, *supra* note 48, at 219.

114. N.J. CONST. of 1776, art. XIX (1776) *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 71.

115. MD. CONST. of 1776, *Declaration of Rights*, no. 33, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 70.

116. MD. CONST. of 1776, *Declaration of Rights*, no. 33, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 70.

117. MD. CONST. of 1776, *Declaration of Rights*, no. 33, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 70.

was not repealed until 1810, but even then "Maryland continued . . . to proclaim itself a Christian state and to exclude non-Christians from office."¹¹⁸ "[N]on-Christians would achieve political and civil rights [in Maryland] only after a bitter struggle in the early nineteenth century."¹¹⁹

South Carolina's constitution of 1778 provided *inter alia* that "[t]he Christian Protestant religion shall be deemed . . . the established religion."¹²⁰ Moreover, it stated that "God is publicly to be worshipped," "[t]hat the Christian religion is the true religion" and "[t]hat the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice."¹²¹ Although individuals were not obligated to support any "religious worship,"¹²² the Constitution excluded non-Protestants from "equal religious and civil privileges."¹²³ The establishment of religion by South Carolina's Constitution could not be more explicit.¹²⁴ Georgia's Constitution, drawn in 1777, "limited officeholding to Protestants," and "made possible a general assessment type of support of religion."¹²⁵ A statute enacted in 1785 contained language designating Christianity as the established religion.¹²⁶

Similarly, according to North Carolina's constitution of 1776, persons who denied the truth of the Protestant religion were "[in]capable of holding any office or place of trust or profit in the [state's] civil department."¹²⁷ Eligibility for public office was not extended to *all* Christians until 1835.¹²⁸ The disabilities of Jews in North Carolina were not removed until 1868 when the state "constitution was changed to

118. CURRY, *supra* note 48, at 157.

119. CURRY, *supra* note 48, at 158. Maryland's religious test stayed in force until invalidated by the Supreme Court in *Torcaso v. Watkins*, 367 U.S. 488 (1961).

120. S.C. CONST. of 1778, art. XXXVIII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 76. "The Episcopal was made the State Church in South Carolina by its first constitution, 1776." 1 FRANCIS N. THORPE, A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 1760-1850 53 (1898).

121. S.C. CONST. of 1778, 5 THE FOUNDERS' CONSTITUTION *supra* note 17, at 76. *See also* ADAMS & EMMERICH, *supra* note 99, at 118.

122. *See supra* note 121.

123. *See supra* note 121.

124. As Stokes and Pfeffer correctly conclude, South Carolina continued to maintain its religious establishments. *See* STOKES & PFEFFER, *supra* note 99, at 81.

125. CURRY, *supra* note 48, at 153.

126. The statute provided in part "that as the Christian religion redounded to the benefit of society, its regular establishment and support is among the most important objects of legislative determination." *Id.*

127. N.C. CONST. of 1776, art. XXXII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 71. The Constitution excluded ministers from the legislature and limited officeholding to Protestants.

128. STOKES & PFEFFER, *supra* note 99, at 72.

disqualify from public office only persons 'who [shall] deny the being of Almighty God'.¹²⁹

During the disestablishment process in Virginia, many opponents of the established religion wanted to eliminate laws burdening religious liberty, and some wanted to go further and keep the Gospel pure from the contaminating influence of government.¹³⁰ They suffered a setback in December 1784 when Virginia passed an act incorporating the Episcopal Church.¹³¹ Almost immediately thereafter, however, the Old Dominion's disestablishmentarians were encouraged¹³² when Patrick Henry's General Assessment Bill¹³³ died in committee.¹³⁴ In its place, the governor signed Virginia's Act for Establishing Religious Freedom¹³⁵ in January, 1786

129. STOKES & PFEFFER, *supra* note 99, at 72 (quoting 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 38 (Francis N. Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]).

130. "The most intense religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities." Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1438 (1990). James Madison championed their cause well. Jefferson also argued at times that true religion was corrupted by government. He wanted "to protect religion, not dishonor it, by disestablishment." WILLS, *supra* note 26, at 372. Jefferson also supported disestablishment because he objected to irrational religion's power over the electorate but he did not often make this argument in public. WILLS, *supra* note 26, at 363-72.

131. MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 23 (1978). Presbyterians worried that Virginia's act incorporating the Episcopal Church would replace the Anglican church as the Commonwealth's established church. *See id.* at 24.

132. The disestablishment process began in 1776 when Virginia adopted a new constitution. Section 16 of its Declaration of Rights provided in part "[t]hat religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction . . . and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other." VA. DECLARATION OF RIGHTS § 16 (1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 70. *See also* VA. CONST. art. I, § 16.

As I argued in the foregoing section, "[i]t would be a mistake . . . to interpret the establishment clause wholly in terms of what Madison and Jefferson thought." Paul G. Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 318-19 (1973). It is also a mistake to suggest that the First Amendment's meaning is discernible from arguments made during Virginia's disestablishment process since such arguments were neither presented nor considered by the framers and ratifiers of the Establishment Clause. *See* John T. Valauri, *Constitutional Hermeneutics*, in *THE INTERPRETIVE TURN: PHILOSOPHY, SCIENCE, CULTURE* 245 (David R. Hiley et al., eds., 1991).

133. A general assessment normally is distributed equally to all Christian religions. *See* WINTHROP S. HUDSON, *RELIGION IN AMERICA*, 103 (3rd Ed. 1981).

134. MALBIN, *supra* note 131, at 24.

135. The reverential preamble of the Act acknowledged "Almighty God," the "Al-

(authored by Jefferson in somewhat different form in 1779).¹³⁶ In 1786, the State also repealed the act incorporating the Episcopal Church.¹³⁷ All legally significant vestiges of the established Episcopal (formerly Anglican) church were removed in 1802, when the Virginia General Assembly ordered the sale of its glebe lands. Officials were required to use the receipts from the land sale to pay parish debts, support the poor, and provide funds "for any other nonreligious purpose which a majority of the voters might decide."¹³⁸ The rhetoric inspiring Virginia's movement toward total disestablishment was adopted by the United States Supreme Court in 1947, but the Court ignored the eighteenth century state constitutions that continued to treat non-Protestants as second class citizens.

The New York Constitution of 1777 guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference."¹³⁹ However, legal restrictions aimed at and adversely affecting Roman Catholics remained on the statute books until 1806.¹⁴⁰ The 1777 Constitution also discriminated against those with no religious beliefs to the extent that it decreed laws "as may be construed to establish or maintain *any particular denomination* of Christians or their ministers . . . are, abrogated and rejected."¹⁴¹ Indeed, a state statute enacted in 1784 "took note of the duty of governments to 'countenance and encourage virtue and religion'."¹⁴² Professor Curry explains, "New York inherited the common colonial ethos that America was a Protestant

mighty power" and the "plan of the Holy author of our religion, who [is] Lord both of body and mind." *Act For Establishing Religious Freedom* (Virginia), in 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 84.

136. The wording of Jefferson's *Bill For Establishing Religious Freedom* began with the phrase, "[w]ell aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds, that Almighty God hath created the mind free," *Id.* at 77. As enacted, the *Act For Establishing Religious Freedom* deleted this phrase; instead, the Act began with the phrase, "[W]hereas Almighty God hath created the mind free." *Id.* at 84. Thanks to Madison's skilful political leadership, the Act became law in January of 1786, upon the governor's approval. *An Act for Establishing Religious Freedom*, ch. 83, 12 VA. STATUTES AT LARGE 84 (William W. Hening ed., 1785).

137. MALBIN, *supra* note 131, at 25.

138. STOKES & PFEFFER, *supra* note 99, at 71.

139. N.Y. CONST. of 1777, art. XXXVIII, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 75.

140. STOKES & PFEFFER, *supra* note 99, at 73.

141. FEDERAL AND STATE CONSTITUTIONS, *supra* note 128, at 2636 (emphasis added). Accordingly, no longer could the counties of metropolitan New York support the Anglican church with taxes. See McConnell, *supra* note 130, at 1436.

142. CURRY, *supra* note 48, at 162 (quoting *New York Session Laws* 21 (New York, 1784)).

country and simply assumed that Protestantism should be encouraged."¹⁴³

Connecticut made no excuses for its tax supported establishment of religion.¹⁴⁴ Its "preferential" establishment of Congregationalism,¹⁴⁵ with tax exemptions provided for Quakers and Baptists, endured until 1818.¹⁴⁶

New Hampshire adhered to its religious establishment long after it ratified the first Amendment.¹⁴⁷ Its Constitution of 1784 encouraged "the public worship of the DEITY, and of public instruction in morality and religion."¹⁴⁸ It empowered,

the legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this state, to make adequate provision at their own expense, for the support and maintenance of public protestant teachers of piety, religion and morality:

Provided notwithstanding, That the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own [Protestant religious] teachers, and . . . no person of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect, or denomination.¹⁴⁹

New Hampshire's ecclesiastical system was not toppled until 1819.¹⁵⁰ The state's provisions preventing non-Protestants from serving in the state legislature were not removed until 1852.¹⁵¹ Despite New Hampshire's laws respecting an establishment of religion, it promptly ratified the Establishment Clause.

Like New Hampshire's Constitution, Article III of the Constitution of Massachusetts of 1780¹⁵² empowered the legislature to authorize towns

143. CURRY, *supra* note 48, at 162.

144. CURRY, *supra* note 48, at 183. Connecticut's *Act for securing Rights of Conscience in Matters of Religion, to Christians of every Denomination (1784)* allowed persons who were not members of the established Congregationalists church to pay their taxes to their own church if they regularly attended its religious services. CURRY, *supra* note 48, at 180-81.

145. See LEVY, *supra* note 5, at 41.

146. See LEVY, *supra* note 106, at 198.

147. See STOKES & PFEFFER, *supra* note 99, at 81.

148. N.H. CONST. of 1784, pt. 1., art. 6, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 81.

149. N.H. CONST. of 1784, pt. 1., art. 6, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 81.

150. See CURRY, *supra* note 48, at 187-88.

151. See STOKES & PFEFFER, *supra* note 99, at 78.

152. John Adams was the principal author of this Massachusetts Constitution. See Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J. L. & HUMAN. 311, 325 (1992).

and parishes "to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily."¹⁵³ Although a Massachusetts taxpayer could in theory be forced to support only teachers of his own religious sect or denomination,¹⁵⁴ the tax system was discriminatory in practice.¹⁵⁵ In fact, unless the taxpayer actually received instruction from a teacher of his own sect,¹⁵⁶ the funds collected from his taxes were paid to religious teachers elected in each town or parish (virtually always Congregationalists).¹⁵⁷ Massachusetts did not completely terminate its system of tax supported religion until 1833.¹⁵⁸

Vermont's Constitution of 1777, stated in part:

Section XLI. [A]ll religious societies . . . that have or may be hereafter united and incorporated, for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they, in justice, ought to enjoy, under such regulations, as the General Assembly of this State shall direct.¹⁵⁹

The belief in Vermont and elsewhere that the use of tax funds in support of religion is not necessarily an impermissible establishment of religion¹⁶⁰

153. MASS. CONST. of 1780, pt. 1, art. III, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 77-78.

154. *See* LEVY, *supra* note 106, at 197.

155. "[T]he Congregationalists were the chief beneficiaries of the establishment primarily because they were by far the most numerous and because they resorted to various tricks to fleece non-Congregationalists out of their share of religious taxes." Leonard W. Levy, *The Original Meaning of the Establishment Clause of the First Amendment*, in RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 43, 72 (James E. Wood, Jr. ed., 1985).

156. *See id.*

157. The "Congregationalist dominance of local elections was foreseen and intended." Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 912 (1986).

158. Levy, *supra* note 155, at 73.

159. VT. CONST. of 1777, ch. 1, § 3; ch. 2, § 41, *excerpted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 75.

160. Any claim that Vermont, New Hampshire, and Massachusetts did not have an established church makes sense only if it is compared to the Anglican establishment model in England where the Anglican bishops, although subordinate to the British monarchy, "exercise[d] spiritual and temporal powers — powers made the more fearful because no proper distinction between them was made." Edwin S. Gausted, *A Disestablished Society: Origins of the First Amendment*, 11 J. CHURCH & ST. 409, 414 (1969). For this reason, "[T]he Framers [of the Federal Constitution and the Bill of Rights] appeared united in the belief that a national church, patterned after the English model, posed the greatest threat to [religious] liberty." ADAMS & EMMERICH, *supra* note 99, at 45.

indicates that the meaning of the term “establishment” in late eighteenth century varied from state to state, from town to town, and to a great extent from person to person. The sometimes strong, sometimes weak support for religion in all state constitutions suggests that an establishment of religion was then, as now, a question of degree.¹⁶¹

Obviously, nothing similar to the line drawn by the modern Court between permissible and impermissible state establishments was prevalent when the Establishment Clause was ratified since “[t]he First Amendment originally functioned as a restraint [solely] on the federal government rather than on the States.”¹⁶² States with an established religion, like New Hampshire, would not have ratified the Establishment Clause if it had invalidated their constitutions. The ratifiers “intended to prevent the federal government from interfering with state religious establishments.”¹⁶³ Once again, it is relevant to reiterate that Justice Black’s dicta in *Everson v. Board of Education* went beyond the historical evidence¹⁶⁴ when he asserted that the Establishment Clause “means at least this: Neither a state nor the Federal Government . . . can pass laws which aid . . . all religions.”¹⁶⁵ Indeed, when the Establishment Clause was ratified, many persons were viewed within their states as second class citizens because of their lack of religious commitment to established denominations.

161. See Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF., 259, 263 (1989) (recognizing that establishment of religion is a matter of degree).

162. EDWARD M. GAFFNEY, JR. & PHILIP C. SORENSON, *ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS* 48 (Howard R. Griffin ed., 1984). The founding generation “generally believed that civil authority in religious matters, to the extent it could be exercised, was a state function.” ADAMS & EMMERICH, *supra* note 99, at 45.

163. Kruse, *supra* note 42, at 84. The records of the State Ratifying Conventions collected by Elliot “clearly show that the federal government’s potential religious activity was the object of fear.” Kruse, *supra* note 42, at 76 (referring to *THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (Jonathan Elliot ed., 2d ed., 1836)). The framers and ratifiers wanted to make sure that Congress could not “molest state religious programs.” Kruse, *supra* note 42, at 85.

164. When Justice Black relied on Virginia’s experience in his *Everson v. Board of Education* opinion, he “neglected to mention . . . that church-state arrangements in the original thirteen states were as diverse as the views of the Founders, with Virginia representing but one model on a spectrum that ranged from disestablishment through official state establishment, with various cooperative arrangements in between.” Glendon & Yanes, *supra* note 42, at 483. Under Black’s model, Congress may not give nondiscriminatory aid to religion, and “whatever Congress could not do, the states could not do either.” MALBIN, *supra* note 131, at 2. Justice Black did not cite the legislative history of the Establishment Clause as it underwent scrutiny by the First Congress.

165. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

In the following section, I describe the relevant responses by members of the First Congress after Madison proposed a Bill of Rights. Admittedly, the hermeneutical problems presented by the recorded debates range from the "paradoxical to [the] impenetrable,"¹⁶⁶ but one generalization can be made safely: The framers of the First Amendment (namely the First Congress) and the ratifiers (the state legislatures responding favorably to the First Congress' recommendation) did not intend to subvert any of the existing state constitutions which established religion.

III. THE FIRST CONGRESS RESTRICTS ITSELF BUT NOT THE STATES

A. *The State Ratifying Conventions Express Their Concerns About Centralized Control over Religion*

The United States Constitution would not have been ratified if it had endorsed a religion or a religious doctrine. This situation was well understood by delegates attending the Philadelphia Convention during the Summer of 1787. Accordingly, in none of the Constitution's substantive provisions are there professions of faith, sentiments of thanksgiving to a deity, or religious commitments. "The United States was not to be a 'confessing' state."¹⁶⁷ Of course, the Constitution does not repudiate the nation's Christian heritage.¹⁶⁸ The new nation and its new Constitution "were not perceived to be inimical to the Christian Church or Christian beliefs."¹⁶⁹

Religion was still considered by many of the Founders to be "the strongest promoter of virtue, the most important ally of a well-constituted republic."¹⁷⁰ Unfortunately, many religious Americans were openly hostile

166. CURRY, *supra* note 48, at 193.

167. MILLER, *supra* note 8, at 107.

168. "The vast majority of Americans assumed that theirs was a Christian, i.e. Protestant, country and they automatically expected that the government would uphold the commonly agreed on Protestant ethos and morality." CURRY, *supra* note 48, at 219. It was hard in the 1780s and 1790s "to define where Protestantism ended and secular life began." CURRY, *supra* note 48, at 218.

169. MILLER, *supra* note 8, at 115. In a New York case decided in 1811, Chancellor James Kent upheld a conviction for blasphemy on the ground that "we are a Christian people, and the morality of this country is deeply ingrafted upon Christianity." *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. Sup. Ct. 1811). Joseph Story's *Commentaries* note that, when the First Amendment was adopted, "the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the Freedom of religious worship." 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1868 (1833).

170. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 427 (1969).

to non-Protestant faiths.¹⁷¹ Protestant sects continued to be selectively privileged in many state constitutions.¹⁷² Professor Laycock summarizes the situation as follows:

State aid [to religion] was both preferential and coercive. The states continued practices that no one would defend today. All but two states had religious qualifications for holding public office, and at least five states denied full civil rights to Catholics. Blasphemy was commonly a crime; in Vermont blasphemy against the Trinity was a capital offense, although it presumably was not enforced as such. Observance of the Christian Sabbath was widely enforced [as such] with little in the way of fictitious [secular] explanations about a neutrally selected day for families to be together.¹⁷³

Accordingly, the Framers understood that a national establishment or disestablishment of religion(s) would be undesirable, unpopular, and unachievable. Even so, outspoken opponents of ratification feared that the federal branches of government would “alter, abrogate, or infringe . . . part[s] of the constitution of the several states which provide for the preservation of liberty in matters of religion.”¹⁷⁴ There was also fear that the new consolidated, central government could not be sensitive to local establishments of religion.¹⁷⁵ Anti-federalists¹⁷⁶ along with other groups and individuals¹⁷⁷ who lacked “confidence in the federal legis-

171. See Laycock, *supra* note 157, at 918.

172. “[A]lmost no one thought that government support of Protestantism was inconsistent with religious liberty because. . . [p]rotestantism ran so deep among such overwhelming numbers of people.” Laycock, *supra* note 157, at 918.

173. Laycock, *supra* note 157, at 916-17.

174. THE CASE AGAINST THE CONSTITUTION: FROM ANTIFEDERALISTS TO THE PRESENT 76 (John F. Manley & Kenneth M. Dolbeare eds., 1987).

175. See Conkle, *supra* note 42, 1135.

176. Antifederalists generally deplored the Constitution’s potential to subvert their state laws and customs. See HERBERT J. STORING, WHAT THE ANTI-FEDERALIST WERE FOR 7 (Murray Dry ed., 1981). They wanted the states to be the primary units of government. They opposed strengthening the federal or general authority in ways that would undermine the states and endanger if not destroy local habits and attachments. See *id.* at 9-10. Many Federalists were also protective of their state constitutions establishing religion. For example, John Adams, a Federalist, drafted most of the Massachusetts Constitution of 1780. Berman, *supra* note 152, at 326. He would have opposed any attempt by the central government to abrogate its provisions establishing a religion. The arch-Federalist Joseph Story also made it clear that he was in favor of state autonomy with respect to religious establishments. STORY, *supra* note 169 § 1873.

177. For a description of the odd coalition opposing the Constitution’s ratification, see JACKSON T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788 259-62 (1961). The ratification debates split many religious sects. For example, some Baptists supported ratification; others did not. *Id.* at 260-61.

lature's ability to truly represent the people"¹⁷⁸ made their views known in state ratifying conventions.

Ratifying conventions in several states recommended more than 200 proposed changes to the Constitution.¹⁷⁹ Five states—their delegates worried about the federal government's potential jurisdiction over religious establishments—formally requested amendments limiting the national government's power to enact laws endangering rights of conscience and religious liberties.¹⁸⁰ New Hampshire, for example, proposed an amendment which read as follows: "Congress shall make no laws touching religion, or to infringe the rights of conscience."¹⁸¹ This wording, considered in light of relevant local concerns, indicates that New Hampshire's ratifying convention did not want Congress to establish any religion other than the Protestant denominations endorsed by its state constitution. Although the wording of the Establishment Clause was not the same as the language proposed by New Hampshire's ratifying convention, its state legislature was satisfied that its system of financial support for elected Protestant teachers of piety, religion and morality was secure and for that reason it ratified the First Amendment.¹⁸²

During the North Carolina Ratification Convention, Richard Spaight said, "[a]s to the subject of religion. . . . [a]ny act of Congress . . . would be a usurpation."¹⁸³ Mindful that North Carolina restricted the holding of state office to Protestants,¹⁸⁴ James Iredell insisted that the United States Congress lacks "authority to interfere in the establishment of any religion whatsoever"; it has no "power . . . in matters of

178. Amar, *supra* note 42, at 1140.

179. MILLER, *supra* note 8, at 252.

180. See DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 226 (1990). See also *McGowan v. Maryland*, 366 U.S. 420, 486 (1960) (Frankfurter, J., concurring). The five states were North Carolina, Virginia, New York, New Hampshire, and Rhode Island. States ratifying the Constitution without formal requests for an amendment prohibiting establishments of religion were Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Maryland, South Carolina, and Massachusetts. See JOINT COMM. ON PRINTING, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1009-24, H. DOC. NO. 398, 69th Cong., 1st Sess. (1927). Ten of the original 13 states sent in timely returns ratifying the First Amendment. *Id.* at 1065 n.2.

181. THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 163, at 326. This language, urged upon the House of Representatives by Mr. Livermore, was eventually rejected in favor of the language that is now the Establishment Clause. See *infra* notes 233-39 and accompanying text.

182. See CURRY, *supra* note 48, at 220.

183. 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 92.

184. N.C. CONST. of 1776, art. XXXII, reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 71.

religion.”¹⁸⁵ Speeches made during ratifying conventions in other states demonstrate the delegates’ desires to have the subject of religion remain one “within the exclusive cognizance of the respective states.”¹⁸⁶

B. The First Congress and the Relevant Legislative History of the Establishment Clause

Turning now to the surviving legislative history made by the First Congress, Madison—elected to the House of Representatives after he promised the Virginia Convention that he personally would work for the adoption of amendments—proposed changes to the Constitution in early May of 1789.¹⁸⁷ Madison sifted through more than 200 amendments¹⁸⁸ that had been proposed by seven of the state ratifying conventions.¹⁸⁹ He condensed the list to a set of nine major proposals¹⁹⁰ which were debated in June, mainly because of his persistence.

Madison shrewdly managed to satisfy the diverging interests of the religious factions—the disestablishmentarians and the antifederalists. Justice Rutledge stated, however, that the debates of the First Congress considered together with Madison’s efforts to disestablish religion in Virginia show that the Establishment Clause “forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises.”¹⁹¹ However, the debates of the First Congress disclose that “[t]he only thing we really *know* about the original meaning of the ‘no establishment’ clause is that it forbade Congress to disestablish as well as to establish religion.”¹⁹²

185. 5 THE FOUNDERS’ CONSTITUTION, *supra* note 17, at 90. Madison, during the Virginia Ratifying Convention, makes a similar point: “There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.” 5 THE FOUNDERS’ CONSTITUTION, *supra* note 17, at 88.

186. Snee, *supra* note 42, at 373-78.

187. On May 4, 1789, Madison moved to debate his list of proposed amendments to the Constitution, 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791 3 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) and announced that he would bring up the amendments on May 25. MILLER, *supra* note 8, at 251.

188. See CURRY, *supra* note 48, at 204 (citing Senator Pierce Butler of South Carolina). See also Theodore Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1406-07 (1966).

189. MILLER, *supra* note 8, at 252.

190. See 1 ANNALS OF CONG. 433-36 (Joseph Gales ed., 1789). See also ROBERT A. RUTLAND, JAMES MADISON: THE FOUNDING FATHER 62 (1987).

191. *Everson v. Board of Educ.*, 330 U.S. 1, 41 (1947) (Rutledge J., dissenting). One wonders why Vermont and New Hampshire ratified the amendment that, according to Justice Rutledge, invalidated their system of appropriating money from public funds to aid religious ministries. See *infra* notes 233-38 and accompanying text.

192. KATZ, *supra* note 42, at 11.

For the better part of the day on June 8, 1789,¹⁹³ Madison spoke in favor of the nine proposals that he presented to the House. Some of the proposals were in the nature of a "bill of rights,"¹⁹⁴ others were introduced as changes to the body of the Constitution. More specifically, Madison favored amendments to Articles I, III, and VI of the Constitution. He also wanted to add a new Article between Articles VI and VII.¹⁹⁵ His proposed amendment prohibiting Congress from establishing any national religion was intended by him to be placed—and this is significant—in Article I, Section Nine.¹⁹⁶ His proposed amendment protecting "equal rights of conscience" against state action (the "Lost Amendment") was intended to be placed in Article I, Section Ten.¹⁹⁷ The limited reach of the original version of the Establishment Clause is indicated by its proposed placement in Article I, Section Nine (which limits federal power) rather than in Article I, Section Ten (which limits the states' powers).¹⁹⁸

Madison's "Lost Amendment" stated: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."¹⁹⁹ Unsuccessfully, Madison argued that "State Governments are as liable to attack these invaluable privileges as the General Government."²⁰⁰ He described his Lost Amendment as "the most valuable amendment in the whole list."²⁰¹ Subsequently reworded, the Lost Amendment became Article XIV in a list of proposed amendments sent to the Senate,²⁰² where it was killed on September 7, 1789.²⁰³ To Madison's dismay, the Lost Amendment could not be resurrected in the conference committee composed of Senate and House members. Although other proposals favored by Madison were not adopted by

193. RUTLAND, *supra* note 190, at 63.

194. 1 ANNALS OF CONG. 436 (Joseph Gales ed., 1789).

195. *Id.* at 435-36.

196. *Id.* at 434.

197. *Id.* at 435.

198. All the substantive provisions in Section Ten of Article I limit state power. See U.S. CONST. art. I, § 10. On or about August 21, 1789, perhaps even earlier, the idea of incorporating the proposed establishment clause into the body of the original Constitution was dropped after the House Committee of the Whole abided by the Report of the House Select Committee that recommended seventeen articles of amendment in the nature of a bill of rights. See 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 59, at 158-62; RUTLAND, *supra* note 190, at 68.

199. 1 ANNALS OF CONG., *supra* note 190, at 435; see also 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 11.

200. 1 ANNALS OF CONG., *supra* note 190, at 441.

201. 1 ANNALS OF CONG., *supra* note 190, at 755.

202. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, 138 (Linda Grant DePauw ed., 1972). The Senate rejected Article XIV. See *id.* at 158.

203. See MILLER, *supra* note 8, at 255.

Congress,²⁰⁴ the defeat of the Lost Amendment “was the change he felt most keenly.”²⁰⁵ Evidently, Madison’s unacceptable “Lost Amendment” was considered an unwanted invasion of the states’ powers, whereas the proposal (which became the Establishment Clause) *protected* the states’ authority and traditional prerogatives.

Madison’s first draft of the proposal, which eventually became the Establishment Clause, states: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner . . . infringed.”²⁰⁶ Madison’s original proposal leaves state establishments of religion intact. The proposal was sent to a Select Committee of the House (sometimes called the Committee of Eleven),²⁰⁷ whose report was issued on July 28.²⁰⁸ Without explanation, Madison’s draft was changed to read: “No religion shall be established by law, nor shall the equal rights of conscience be infringed.”²⁰⁹

A revealing discussion in the House on August 15, provides persuasive evidence that the Establishment Clause was never intended to prohibit state action. The first speaker, Peter Sylvester from New York, voiced his concern about the House Select Committee’s revision of Madison’s

204. Madison also failed to persuade the Congress to adopt his submission of the proposal that became the Second Amendment. His submission read: “The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; *but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.*” 1 ANNALS OF CONGRESS, *supra* note 190, at 434 (emphasis added). The italicized portion of this proposal was deleted by the Senate. MILLER, *supra* note 8, at 254-56. The Senate’s deletion is consistent with the idea of powers reserved to the states and the people.

205. MILLER, *supra* note 8, at 255. Madison was ahead of his time. “The protection of liberties against the states (and all subordinate units) by the federal bill of rights had to wait until after the Civil War.” *Id.*

206. 1 ANNALS OF CONG., *supra* note 190, at 434; 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 10. This wording provides ammunition to accommodationists who argue that this formulation containing the words “national religion” indicates that Madison was willing to settle for an arrangement that would not ban noncoercive, nonpreferential, impartial aids to religion. Even if this is incorrect, the point that should be considered is not what Madison wanted, but whether the Court can make good on its claim that its interpretation of the Establishment Clause is supported by history.

207. *See, e.g.,* STOKES & PFEFFER, *supra* note 99, at 94. The Committee was appointed on July 21. Its members included Madison and one member from the other ten states (in addition to Virginia) that were represented in the House. *Id.*

208. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 4.

209. 1 ANNALS OF CONG., *supra* note 190, at 729. Madison did not always get his way, although the Court’s mythmaking efforts do not emphasize this point.

first draft.²¹⁰ He argued that the new language had a tendency "to abolish religion altogether."²¹¹ Sylvester's objection made sense to his constituents who would have been appalled if any constitutional amendment nullified New York's state Constitution discriminating against non-believers and Roman Catholics²¹² or invalidated its statute "[taking] note of the duty of governments to 'countenance and encourage virtue and religion'."²¹³

Elbridge Gerry suggested that the proposed Establishment Clause "would read better if it was [reworded to state] that no religious doctrine shall be established by law."²¹⁴ Gerry's proposed language allays Sylvester's concern and safeguards his own state's religious establishment. Roger Sherman, a strong supporter of the United States Constitution, originally resisted the demands for a Bill of Rights because the powers granted to Congress by the Constitution "extend only to matters respecting the common interests of the Union, and are specially defined, so that particular states retain their sovereignty in all other matters."²¹⁵ On August 15, 1789, Sherman reiterated his previously stated view that state constitutions were not in danger of being abrogated under the original Constitution *sans* amendments. Representative Daniel Carroll of Maryland, however, wanted to make sure that the proposed amendment dealing with establishments of religion allayed the fears voiced by established sects in several states who believe they "are not well secured under the present Constitution."²¹⁶ Carroll was mindful that Maryland's Constitution at the time secured the rights of Christian sects and only

210. According to Justice Souter, the House rejected its Select Committee's revision of Madison's first draft, which "arguably ensured only that 'no religion' enjoyed an official preference over others." *Lee v. Weisman*, 112 S. Ct. 2649, 2669 (1992) (Souter J., concurring). He draws the inference that the House's rejection of the Select Committee's revision indicates the Framers' intention to ban all "nonpreferential aid to religion." *Id.* Justice Souter's analysis of the textual development of the Establishment Clause's revisions turns out to be a predicate for his adoption of the so-called "powerful argument supporting the Court's jurisprudence following *Everson*." *Id.* at 2668.

211. 1 ANNALS OF CONG., *supra* note 190, at 729.

212. See *supra* text accompanying note 139.

213. CURRY, *supra* note 48, at 162 (quoting *Hanover Presbytery Petition 1777*, in JAMES, DOCUMENTARY HISTORY 226 (1971)).

214. 1 ANNALS OF CONG., *supra* note 190, at 730.

215. See *Letter from the Hon. Roger Sherman and the Hon. Oliver Ellsworth, Esquires, Delegates From the State of Connecticut, in the Late Federal Convention to His Excellency, the Governor of the Same State*, in 1 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 163, at 491, 492.

216. Carroll said, in part, that "many sects have concurred in opinion that they are not well secured under the present Constitution." 1 ANNALS OF CONG., *supra* note 190, at 730.

Christian sects. Moreover, Maryland's state Constitution authorized a general tax for the support of Christian sects.²¹⁷

Madison attempted to pacify Carroll. Madison also addressed the fears and concerns of Gerry, Sherman and Sylvester—all hailing from states with partial religious establishments. He explained that the language of the House Select Committee limits only the necessary and proper clause powers of Congress in accordance with the recommendations of several state ratifying conventions.²¹⁸ Moreover, in Madison's reassuring words, "Congress should not establish *a* religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."²¹⁹

The foregoing explanation by Madison of the Establishment Clause's function does not suggest that he was trying to impose on the nation Virginia's policy of disestablishment. Indeed, if Madison had chosen to impose Virginia's resolution of the general assessment tax issue upon other states, then he would have confirmed the fears of all those state ratifying convention delegates who were afraid of the central government's augmented powers.²²⁰ Yet in *Lee v. Weisman*, Justice Souter remains wedded to Justice Black's tall stories. Dismissing in a footnote²²¹ Chief Justice Rehnquist's challenge (in *Wallace v. Jaffree*²²²) to the renditions of history by Justices Black and Rutledge, Justice Souter follows *Everson* and argues that nonpreferential state aid is prohibited *inter alia* on the basis of the debates in the First Congress, Madison's Remonstrance, his Detached Memoranda, and The Virginia Statute for Religious Freedom.²²³

But Madison did not cite his Remonstrance or the famous Virginia Statute when he replied to Congressman Huntington from Connecticut,

217. See *supra* note 115.

218. 1 ANNALS OF CONG., *supra* note 190, at 730.

219. 1 ANNALS OF CONG., *supra* note 190, at 730 (emphasis added). Cord argues that Madison's reply indicates that the Establishment Clause is "addressed to the possible imposition of a *single church or religion* by the Federal Congress." CORD, *supra* note 41, at 10. This arguably is too much of a stretch. Yet, Justice Souter concedes that the placement of an indefinite article before the word "religion" is evidence that the Framers intended only to ban preferential establishments. See *Lee v. Weisman*, 112 S. Ct. 2649, 2669-70 n.2 (1992) (Souter J., concurring).

220. Indeed, Richard Spaight of North Carolina felt the important question was: "If the judiciary acts as a check on the legislature, then who was to act as a check upon the judiciary?" RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 8 (1971).

221. *Weisman*, 112 S. Ct. at 2670 n.3 (Souter, J., concurring).

222. 472 U.S. 38 (1985) (Rehnquist, C.J., dissenting).

223. *Weisman*, 112 S. Ct. at 2668-71 (Souter, J., concurring). It is foolishness if anyone thinks that Madison, who was playing the role of a dealmaker in August of 1789, planned diabolically to incorporate norms advocated in his Remonstrance into the First Amendment. If he had such intentions, they were frustrated when the Senate killed his "Lost Amendment." See *supra* text accompanying notes 199-205.

a state whose constitution provided for the financial support of Congregationalist clergy.²²⁴ Huntington “wanted to keep the federal government from any pronouncement that might tend to affect Connecticut’s Church-State system.”²²⁵ Huntington found the House Select Committee’s wording defended by Madison “objectionable because it might be interpreted not merely to outlaw a congressional establishment of religion—a worthy and legitimate aim—but also to disable a federal court from enforcing a minister’s claim against his parish.”²²⁶ Huntington did not want the enforcement of a Congregationalist’s minister’s claim “construed into a religious establishment.”²²⁷ He agreed with Sylvester from New York who feared for religion’s survival²²⁸ and he “hoped the amendment would . . . not . . . patronize those who professed no religion at all.”²²⁹ Madison’s reassuring response to Huntington suggested that the proposed amendment merely responded to those delegates of state ratifying conventions who “feared” that religious factions who obtain control of the national government could “compel others to conform” to a national religion.²³⁰ To prevent a nationalized religion, he suggested, once again, the insertion of the word “national” before the word “religion”²³¹ so that the proposed amendment would read: “No national religion shall be established by law, nor shall the equal rights of conscience be infringed.” Madison’s response to Huntington, in effect, assures him that Connecticut’s establishment of religion is not jeopardized by the proposed amendment.

224. See *supra* text accompanying notes 144-46.

225. CURRY, *supra* note 48, at 203.

226. HOWE, *supra* note 32, at 20-21. Like many others in the First Congress, “Huntington was anxious . . . to preserve the freedom of the states to enforce such principles relating to religion as they saw fit.” *Id.* at 22. Huntington “was calling attention to the fact that the states, in many varying ways, did support and aid religious enterprise,” and that it would be unfortunate if the federal courts were deprived “of power to respect state law when it happened to sustain a religious enterprise.” *Id.* at 23.

227. 1 ANNALS OF CONG., *supra* note 190, at 730.

228. See Laycock, *supra* note 157, at 889. It should be noted that Justice Rutledge in *Everson* suggests incorrectly that religion was not supported financially by taxes. See *Everson v. Board of Educ.*, 330 U.S. 1, 42-43 n.34. Towns in Connecticut, contrary to Justice Rutledge, were taxed for the support of their ministers. See CURRY, *supra* note 48, at 203. Moreover, Massachusetts, like the other states, had other laws respecting an establishment. For example, laws “for Making More Effectual Provision for the Due Observation of the Lord’s Day.” *McGowan v. Maryland*, 366 U.S. 420, 546 (appendix to opinion of Frankfurter, J., concurring). Because Massachusetts ratified the Establishment Clause, its approval suggests a meaning far different from the meaning attributed to it by the Supreme Court.

229. 1 ANNALS OF CONG., *supra* note 190, at 730-31.

230. 1 ANNALS OF CONG., *supra* note 190, at 731.

231. 1 ANNALS OF CONG., *supra* note 190, at 731.

Samuel Livermore was a Federalist from New Hampshire, a state whose laws supported religious ministries.²³² His motion to change the proposed Establishment Clause reads as follows: "Congress shall make no laws touching religion, or infringing the rights of conscience."²³³ Livermore's language was briefly adopted by the House.²³⁴ His choice of wording (the same as that proposed by New Hampshire's ratifying convention)²³⁵ prevents Congress from disestablishing as well as establishing a religion. Livermore would have voted against (and New Hampshire would have rejected) any amendment nullifying a parish's tax for the support of elected Protestant teachers.²³⁶ Although Justice Souter tells us that he does not know what the eventual congressional rejection of Livermore's language means,²³⁷ New Hampshire's ratification of the Establishment Clause suggests that its state legislature was assured that its established religion was still protected from the central government.

Livermore's language was altered on August 21, to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe upon the rights of conscience."²³⁸ Arguably, this proposal did not differ in substance from Livermore's, and Madison decided the alteration was acceptable.²³⁹ The House's proposal was not favorably received by the Senate.

After a secret Senate debate²⁴⁰ on September 9, the Senate's draft read: "Congress shall make no law establishing articles of faith or a

232. See *supra* text accompanying note 149.

233. 1 ANNALS OF CONG., *supra* note 190, at 731. The language proposed by Livermore is similar to the amendment proposed by New Hampshire's ratifying convention. See *supra* note 181.

234. 1 ANNALS OF CONG., *supra* note 190, at 731.

235. Livermore was "wedded" to the language adopted by the New Hampshire ratifying convention. See CURRY, *supra* note 48, at 203.

236. One commentator notes that "freedom of religion to Livermore, as to so many other Federalists, seemed to be limited to Protestants, and only to particular kinds of Protestants." Morton Borden, *Federalists, Antifederalists, and Religious Freedom*, 21 J. CHURCH & ST. 469, 478 (1979).

237. *Lee v. Weisman*, 112 S. Ct. 2649, 2669 (1992) (Souter, J., concurring).

238. 1 ANNALS OF CONG., *supra* note 190, at 766-67, 773; see also 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 28 n.9; 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 59, at 159.

239. See CURRY, *supra* note 48, at 214.

240. On September 3, three motions changing the wording in the proposed religion amendments were defeated: First, "[Congress shall make no law establishing] [o]ne Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed." *Weisman*, 112 S. Ct. at 2669 (Souter, J., concurring) (quoting 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 202, at 151 (emphasis added)). Second, "Congress shall not make any law infringing the rights of conscience or establishing

mode of worship, or prohibiting the free exercise of religion”²⁴¹ This provision, having a potential for congressional action terminating state religious establishments, was unacceptable to the House. A joint conference committee quickly ironed out the differences between the House and Senate versions of the Amendment, and their wording is now the First Amendment.²⁴²

Commenting on the joint conference committee’s work following the Senate’s action, Justice Souter in *Lee v. Weisman* generalizes much too broadly as follows: “The Framers . . . extended their prohibition to state support for religion in general” and rejected narrower language prohibiting only preferential establishments.²⁴³ Notwithstanding Justice Souter’s generalization, *state* establishments of religion were *not* prohibited by the Framers.

Nearly every scholar agrees that whatever the First Amendment means, originally it did not reach the states.²⁴⁴ For example, Professor Kurland agrees that “the evidence of the nonapplicability of the [F]irst [A]mendment to the states is clear and convincing as far as the intent of the authors and ratifiers of the [F]irst [A]mendment is concerned.”²⁴⁵ The First Congress was wise and prudent enough to realize that state officials were better informed and more politically accountable than

any Religious Sect or Society.” Third, “Congress shall make no law establishing any *particular* denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.” 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 202, at 151 (emphasis added).

241. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 202, at 166.

242. There is no documentation of the conference committee’s discussions. After it reached an agreement, its report was published on the 24th of September. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, *supra* note 187, at 47-48. The language reported by the conference committee is the same as the religion provision of the First Amendment. *Id.*

243. *Lee v. Weisman*, 112 S. Ct. 2649, 2669-70 (Souter, J., concurring).

244. CORD, *supra* note 41, at 14; CURRY, *supra* note 48, at 215; EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 104, 104 n.5 (1957); LEVY, *supra* note 5, at 122; MALBIN, *supra* note 131, at 16 (The Establishment “[C]ause prohibited Congress from tampering with state religious establishments.”); STORY, *supra* note 169, at 730-31; Amar, *supra* note 42, at 1157-60; Kruse, *supra* note 42, at 84-85, 127-30; Lietzau, *supra* note 42, at 1191; Paulsen, *supra* note 42, at 321-23; Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569, 619 (1984). See also Snee, *supra* note 42, at 388.

245. Kurland, *supra* note 53, at 844. In a similar vein, Wilbur Katz writes, “It seems undeniable that the First Amendment operated, and was intended to operate, to protect from Congressional interference the varying state policies of church establishment. The Amendment thus embodied a principle of federalism.” KATZ, *supra* note 42, at 9.

federal officials. Moreover, Americans in 1789 largely believed that church-state issues should be settled in accordance with the preferences of local communities — preferences that varied dramatically in different areas of the nation. Nevertheless, liberal and moderate United States Supreme Court Justices continue to rely excessively on James Madison and the debates of the First Congress to reinforce the Court's view that each state should be subjected to the same limitations as Congress.

The United States Supreme Court distorts what Madison really accomplished in the First Congress. Madison was the moving force behind the Bill of Rights, a facilitator, a prodder, an editor, a diligent deal maker. He selected the amendments to be debated (and omitted the ones he did not want debated). His influence in pushing through the Bill of Rights cannot be gainsaid, even though there were some important alterations to his first draft which eventually became *the* Establishment Clause. However, neither his first draft nor the subsequent revisions by the First Congress threatened the antidisestablishmentarians in the several states (unlike the views expressed in Madison's Remonstrance, his Detached Memoranda, and Jefferson's views about walls of separation which did threaten the antidisestablishmentarians). Indeed, the Establishment Clause is part of our Constitution now only because Madison managed to satisfy the reservations of antidisestablishmentarians without impeding the disestablishment process ongoing in several states. Therefore, contrary to misleading impressions created by the Court since 1947, Madison's views, which he expressed during Virginia's disestablishment battles, are of limited relevance when the meaning of the Establishment Clause is debated. The Fourteenth Amendment is at least as relevant as the Establishment Clause. Nonetheless, the Court still leans on Madison's collected papers as a crutch to support its position that federal courts may enjoin non-stigmatizing state aid to religion.

To sum up the foregoing, the Founders in Philadelphia during the summer of 1787 agreed that the federal government lacked power to disestablish religions established by state law. Public opinion did not change when the First Amendment was framed in 1789 and ratified in 1791.²⁴⁶ The Establishment Clause, as it was originally projected in 1791, did not encroach upon any of the unspecified residual powers reserved to the states.²⁴⁷ Perhaps I have been belaboring the obvious. On its face

246. Since no records were kept of the debates in the state legislatures that ratified the Bill of Rights, we do not know what the legislators of the various ratifying and nonratifying States said about the scope and reach of the Establishment Clause. Neither the relevant correspondence of public figures nor newspaper comments have "uncovered anything particularly revealing. . . ." LEVY, *supra* note 5, at 189.

247. Even Jefferson "understood the states' rights aspect of the original establishment

the Establishment Clause prevents congressional interference with laws in the states regulating religion and the language chosen by the First Congress performed that function until the 1940s.²⁴⁸ The Court's incorporation doctrine has, however, transformed the Establishment Clause from a guarantee of state autonomy²⁴⁹ to a provision limiting state powers.

IV. THE NEGLECTED CITIZENSHIP DECLARATION: A BRIDGE FROM THE ESTABLISHMENT CLAUSE TO THE FOURTEENTH AMENDMENT'S PROHIBITIONS AGAINST STATE ACTION

A. *Identifying the Missing Link in the Court's Establishment Clause Chain of Reasoning*

The Supreme Court's Establishment Clause jurisprudence is most vulnerable to criticism when state support of religion is enjoined at the behest of a litigant whose freedom is not violated. Nevertheless, the Court repeatedly reaffirms without reservations or qualifications the decision in *Everson v. Board of Education*,²⁵⁰ which "ensconced separationism as an end in itself."²⁵¹ Unfortunately, the Court has never found a cogent way to connect the Establishment Clause to the three prohibitions in Section One of the Fourteenth Amendment.²⁵² This missing link²⁵³ weakens the Court's Establishment Clause jurisprudence. In this

clause." See Amar, *supra* note 42, at 1159. Moreover, when Jefferson was the Governor of Virginia, he endorsed theistic beliefs when it suited him. Indeed, "he was so enamored of the motto ['Rebellion to tyrants is obedience to God'] that he included it on the seal of Virginia and stamped it on the wax with which he sealed his own letters." RICHARD B. MORRIS, *SEVEN WHO SHAPED OUR DESTINY: THE FOUNDING FATHERS AS REVOLUTIONARIES* 137 (1973).

248. Glendon & Yanes, *supra* note 42, at 481-82 ("the historical record is clear that when the religious language was first adopted it was designed to restrain the federal government from interfering with the variety of state-church arrangements then in place").

249. See Amar, *supra* note 42, at 1136.

250. 330 U.S. 1 (1947). Perhaps the most controversial line in *Everson* is the one stating that "[n]either a state nor the Federal government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15.

251. Glendon & Yanes, *supra* note 42, at 535.

252. The three prohibitions read:

No State shall make or enforce any law which shall abridge the privileges and 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.

253. The missing link referred to in the text is the introductory sentence of the Fourteenth Amendment which reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

section I will focus on the cases dealing with symbolic state support for religion, that is, support which does *not* violate anyone's religious liberty but which might subvert an individual's citizenship status.

In *County of Allegheny v. ACLU*,²⁵⁴ the Court permanently enjoined a county from placing on the beautiful "Grand Staircase" of its courthouse a privately donated creche depicting the Christian nativity scene during the Christmas holiday season. *County of Allegheny* has a rationale that makes sense given the doctrine of paramount national citizenship embodied in the Fourteenth Amendment. Indeed, the Court's emphasis on the states' duty to protect persons who are stigmatized as outsiders by government endorsements of religion enables us to see the missing link connecting the Establishment Clause with the commands of the Fourteenth Amendment. However, this missing link was not noticed in *Everson*. I describe below the endorsement rationale ventilated in *County of Allegheny*, but let us first re-examine the incorporation doctrine "slipped" into the *Everson* opinion.

Everson explains that the Establishment Clause is incorporated by the Fourteenth Amendment because the Court had already incorporated the Free Exercise Clause into the Establishment Clause and because the Establishment Clause complements and is interrelated with the Free Exercise Clause.²⁵⁵ But this justification of the Court's incorporation of the Establishment Clause does not explain why state laws not burdening free exercise, are invalid when challenged by a plaintiff who is offended by nonpreferential government aid to *all* charitable institutions, including religious ones.

Shortly after Justice Black's remarkably brief and unconvincing justification for incorporating the Establishment Clause in *Everson*, he wrote an extraordinary dissenting opinion attempting to justify incorporation of the first eight amendments *in toto*.²⁵⁶ Justice Black's total incorporation theory has never attracted a majority of the Justices because his reconstruction of legislative history has been correctly deemed unconvincing. This is not to say that the framers of the Fourteenth Amendment did not want to incorporate *some* of the first eight amendments; they did. But any explanation that the Establishment Clause is incorporated because the Fourteenth Amendment's framers expressed collectively their objections to state aid to religion cannot be documented by substantial evidence. The Thirty-ninth Congress and the ratifying states did not, *pace* Justice Black, consciously constitutionalize a doctrine totally

254. 492 U.S. 573 (1989).

255. *Everson v. Board of Educ.*, 330 U.S. 1, 15.

256. See *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting) (involving the Fifth Amendment's guarantee against self-incrimination).

separating church and state in every town, hamlet, prison, public school, and state-subsidized orphanage.²⁵⁷

It is extremely awkward to incorporate the Establishment Clause²⁵⁸ into the Fourteenth Amendment for reasons well expressed by Justice Black when he argued that the Ninth Amendment was not incorporated by the Fourteenth. As Justice Black pointed out, it is illogical to convert an amendment "enacted to protect state powers against federal invasion" into "a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs."²⁵⁹ The same reasoning applies to the Establishment Clause. Furthermore, incorporating a "policy of states' rights for application against the states [is] utter nonsense" because "[i]t would be the incorporation of an empty set of values, akin to the incorporation of the [T]enth [A]mendment for application against the states."²⁶⁰

Although the Court has never embraced Justice Black's total incorporation theory, it selectively incorporates individual rights which are protected against state action by the Due Process Clause of the Fourteenth Amendment.²⁶¹ The process of selective incorporation involves a search for the principles of ordered liberty and justice that give content to the provisions of the Fourteenth Amendment.²⁶² One source for the content of such principles is "the traditions and conscience of our people."²⁶³

Some aspects of the Court's doctrine of separation of church and state are deeply rooted in the ideals and aspirations of our people, whereas other aspects of separationism are traditionally resisted by a large segment of the population. Separationism as an end in itself is incompatible with many traditional American values especially when the

257. As Paulsen writes, "the Supreme Court forced a square historical peg into a round doctrinal hole by filing off a few of the more inconvenient sharp edges of history." Paulsen, *supra* note 42, at 317-18. There is less than a scintilla of evidence indicating that the Thirty-Ninth Congress intended to limit the state government's power to establish religion. Hardly sounding like a disestablishmentarian, Lyman Trumbull informed the Senate during the Thirty-ninth Congress' deliberations over the pending Civil Rights Bill: "Now, our laws are to be enacted with a view to educate, improve, enlighten, and Christianize the negro." CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (emphasis added).

For some recent histories of the Fourteenth Amendment, see generally EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

258. See Amar, *supra* note 42, at 1158.

259. *Griswold v. Connecticut*, 381 U.S. 479, 520 (Black, J., dissenting).

260. Conkle, *supra* note 42, at 1141.

261. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

262. See *id.* at 174-80 (Harlan, J., dissenting).

263. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Court spells out the most extreme implications of a doctrine erecting a high and impregnable “wall of separation.”²⁶⁴

Americans, however, traditionally boast that our land is a place of refuge for persons who feel they are dishonored in other countries because of their religion. Therefore, it violates enduring American traditions of justice if state supported religion “sends a message to nonadherents [of the aided religion(s)] that they are outsiders, not full members of the political community’.”²⁶⁵ Under such circumstances, the Court labels the impermissible state action an “endorsement.”

The endorsement rationale, which was adopted by the Court in *County of Allegheny*, recognizes that under some circumstances state aid to religion, even if it is not coercive or deliberately preferential, “mak[es] religion relevant, in reality or public perception, to *status* in the political community’.”²⁶⁶ Such “endorsements” violate the Establishment Clause regardless of whether they also violate the Equal Protection Clause²⁶⁷ or the Free Exercise Clause.²⁶⁸

The Court’s endorsement doctrine was foreshadowed in 1785 when Madison warned Virginians that an establishment of religion that departs

264. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States* 98 U.S. 145, 164 (1898)).

265. *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

266. *Id.* at 626 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)) (emphasis added).

267. In *Larsen v. Valente*, 456 U.S. 228, 254 (1982), the Court explained: “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Id.* at 244. Justices Rehnquist and White point out, however, that the premise for the Court’s holding in *Larsen* “is that the challenged provision [in the law] is a deliberate and explicit legislative preference for some religious denominations over others.” *Id.* at 260 (White, J., dissenting). The *Larsen* Court’s Equal Protection Clause test is not nearly as broad as the Court’s Establishment Clause doctrine. Neither is Paulsen’s. Paulsen advances an Equal Protection Clause test that triggers heightened judicial scrutiny only when “government policy has coercive or discriminatory effects on an individual’s religious exercise.” Paulsen, *supra* note 42, at 336. Certainly, the Equal Protection Clause’s principles are pertinent in Establishment Clause cases, but they are bolstered and given more content by the citizenship declaration.

268. Even Justice Scalia concedes that legal coercion is not required when the government endorsement of religion is sectarian. *See Lee v. Weisman*, 112 S. Ct. 2649, 2683-84 (1992) (Scalia, J., dissenting). “To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy.” *County of Allegheny*, 492 U.S. at 628 (O’Connor, J., concurring). In *Engel v. Vitale*, 370 U.S. 421, 430 (1962), the Court’s plurality opinion states: “The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion.” *See also Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963).

from the policy of offering asylum to the persecuted of every religion "degrades from the *equal rank of Citizens*" ²⁶⁹ There was, however, no well-developed conception of paramount national citizenship in 1785 and Madison's "Lost Amendment," which limited state power in order to protect rights of conscience, was killed in the Senate in 1789. ²⁷⁰ Given the Fourteenth Amendment's very first sentence, which replaced the older dual citizenship doctrine, paramount national citizenship is *the* mid-nineteenth century doctrine that makes, once again, Madison's concern about degraded citizenship relevant outside of Virginia.

Under the older, superceded doctrine of national citizenship, one could not be considered a citizen of the United States if he lacked "the full rights of a citizen in the State of his residence." ²⁷¹ Under this view, United States citizenship is derived from state citizenship. ²⁷² During this early period of our history, Madison's concern about degraded citizenship was inapplicable on a national level. During the 1830's, however, and increasingly thereafter, the abolitionists articulated a conception of paramount national citizenship ²⁷³ which was incompatible with state laws adversely affecting persons marginalized as if they were alien to the political community. The abolitionists, among others, were outraged when *Dred Scott v. Sandford* ²⁷⁴ upheld a doctrine of diminished citizenship reinforcing "deep and enduring marks of inferiority and degradation" on free blacks born in the United States. ²⁷⁵

The doctrine of national citizenship was not yet the law in 1862 when the Attorney General of the United States was unable to clearly answer the question: Who is a citizen? ²⁷⁶ By 1866, however, the abolitionists' conception of paramount national citizenship was widely shared

269. *Remonstrance*, par. 9, in 5 THE FOUNDERS' CONSTITUTION, *supra* note 17, at 83.

270. *See supra* text accompanying note 203.

271. 1 Op. Att'y Gen. 506-9 (1821).

272. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 94 (1873) (Field, J., dissenting) (citing John C. Calhoun's 1833 speech in the Senate on the Force Bill).

273. *See generally* JACOBUS TENBROEK, *Equal Under Law* (Collier Books ed. 1965) (1951).

274. 60 U.S. (19 How.) 393 (1856).

275. *Id.* at 416.

276. Excerpts from an 1862 opinion of the Attorney General of the United States follows:

Who is a citizen? What constitutes a citizen of the United States? I have often been pained by the fruitless search in our law books for a clear and satisfactory definition of the phrase *citizen of the United States* Eighty years of practical enjoyment of citizenship under the Constitution have not sufficed to teach us either the exact meaning of the words, or the constituent elements of the thing we prize so highly

10 Op. Att'y Gen. 383 (1862).

by the Republican dominated Congress and it became embodied in the introductory clause of the Fourteenth Amendment (hereinafter the citizenship declaration) which states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."²⁷⁷ This language, deliberately chosen because of its breadth, secures the immunities, privileges, and liberties of the people as a body politic.²⁷⁸ The citizenship declaration embodies a conception of citizenship broader than the widely shared concerns about the recurrence of badges and incidents of slavery. Indeed, it eliminates the stigma of second class citizenship.

Since social stigmatization because of creed is incompatible with an individual's equal citizenship status, the citizenship declaration can serve plausibly as a bridge historically,²⁷⁹ functionally,²⁸⁰ and hermeneutically²⁸¹ linking the Establishment Clause with all three overlapping prohibitions of state action in the Fourteenth Amendment. Realization of its potential was delayed when "in the *Slaughter-House Cases*,²⁸² the Court narrowly rejected the notion that there was independent substantive content in the amendment's citizenship provisions."²⁸³ It was necessary and appropriate, however, for the Court to belatedly recognize "that the Fourteenth Amendment was designed to, and does, protect every citizen of this

277. U.S. CONST. amend. XIV, § 1.

278. The most prominent writers on constitutional law during the post-Civil War period noticed that the Fourteenth Amendment's broad scope extended far beyond the need to protect persons of color. See, e.g., HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937* 96 (1991).

279. The framers and ratifiers of the Fourteenth Amendment gave very little thought, if any, to separation of church and state issues but the yearnings and aspirations embodied in the citizenship declaration enable the sensitive interpreter of the Constitution to "honor[] original intent and, yet, adapt[] it to contemporary issues." Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept Of A "Living Constitution,"* 139 U. PA. L. REV. 1319, 1330 (1991).

280. The framers of the Fourteenth Amendment "saw themselves as adopting a principle of equal citizenship, and that the principle was 'capable of growth.'" Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 17 (1977) (quoting Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63 (1955)).

281. Charles Black has argued that much of the case law ascribed to the framers of the Fourteenth Amendment could be accomplished based solely on the citizenship declaration. CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 51-66 (1969). In other words, even without the Privileges and Immunities Clause, even without the Equal Protection Clause, and even without the Establishment Clause, the citizenship declaration has an independent potency. The citizenship declaration, however, also acts synergistically with the prohibitions of the Fourteenth Amendment.

282. 83 U.S. (16 Wall.) 36 (1873).

283. Karst, *supra* note 280, at 18.

Nation against a forcible destruction [by Congress] of his citizenship, whatever his creed. . . ."²⁸⁴

In sum, the citizenship declaration of the Fourteenth Amendment describes the eligibility requirements for United States citizenship and recognizes a legal status with concomitant privileges and immunities for all citizens.²⁸⁵ The citizenship declaration constitutionalizes the abolitionists' doctrine of paramount national citizenship, and this Article is intended to demonstrate how it augments the reach and scope of the Establishment Clause.²⁸⁶

B. *The Function of the Citizenship Declaration*

In our nation, citizenship is a "fundamental right";²⁸⁷ it is a legal status but one not like "a license that expires upon misbehavior."²⁸⁸ Citizenship status in America, in theory, is without gradations; there is no intermediate class of persons between citizens and aliens.²⁸⁹ There are not any second class citizens—again, at least not in theory. There are no separate estates of the realm as in Great Britain—Lords, clergy and people. "The essence of equal citizenship is the dignity of full membership in the society,"²⁹⁰ a principle that "guards against degradation or the imposition of stigma."²⁹¹ The status of being a citizen of the United States differentiates a person legally from aliens,²⁹² foreigners, corporations, and other non-citizens.²⁹³

284. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

285. Justice Bradley wrote prophetically, "[i]t was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens . . . [t]heir very citizenship conferred these privileges, if they not possess them before." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 119 (1873) (Bradley, J., dissenting).

286. See *Afroyim*, 387 U.S. at 284 n.42 (Harlan, J., dissenting).

287. *Trop v. Dulles*, 356 U.S. 86, 93 (1958). Dissenting in *Perez v. Brownell*, Chief Justice Warren called United States citizenship the American people's "most basic right." 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

288. *Trop*, 356 U.S. at 92.

289. The Constitution's identification of persons who are citizens necessarily gives them "full partnership in political society." MALTZ, *supra* note 257, at 4 (1990). According to Representative Bingham, addressing the House in 1866, citizenship makes every person born in the United States "a partner in the government of the country." CONG. GLOBE, *supra* note 257, at 1291 (speech in support of the Civil Rights Act of 1866).

290. Karst, *supra* note 280, at 5.

291. Karst, *supra* note 280, at 6.

292. The Justice Department insists that the First Amendment rights enjoyed by citizens are more extensive than those guaranteed to resident aliens. See *Trial May Turn on Issue of Aliens' Rights*, WALL ST. J., Aug. 14, 1992, at B8. The alien, however, has never had legal parity with the citizen. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (upholding deportation of alien who in 1939 had been a member of the Communist Party in Greece). An alien cannot stand for election to many public offices.

The problem of limits is inescapable when theorists identify a concept of equal citizenship as a source of basic rights.²⁹⁴ There are limits to my conception of the citizenship declaration, which is not radical or transformative. In Establishment Clause cases, the citizenship declaration merely supplies a missing link in the Supreme Court's Establishment Clause jurisprudence; it is not the foundation for an entirely new edifice of privileges, immunities, and rights, although it does add content to the Equal Protection Clause and adds strength to existing immunities.²⁹⁵ With a proper view of the citizenship declaration, however, it is no longer necessary to rely primarily on the Court's frequently criticized theory of selective incorporation in Establishment Clause cases when a litigant's citizenship status is wrongfully degraded on the basis of his or her faith or lack of religious beliefs.²⁹⁶

Respect for beliefs is the common denominator of the endorsement of religion cases like *County of Allegheny* and the "citizenship" cases providing a citizen with an immunity against Congress when laws alter citizenship status on the basis of creed.²⁹⁷ Only the overbreadth of the Court's Establishment Clause jurisprudence is eliminated by recognizing the function of the citizenship declaration. The immunity associated with citizen status does *not* need to come into play when nonpreferential, noncoercive state aid to religion advances legitimate secular objectives and does not stigmatize members of religious outgroups. It needs to come into play if, and only if, noncoercive state aid to religion marginalizes citizens who do not share the creed of the aided religion.

For example, Art. 1, § 2, cl. 2, & § 3, cl. 3 of the Constitution, respectively, require that candidates for election to the House of Representatives and Senate be citizens. The Court still refuses to "obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship." *Foley v. Connelie*, 435 U.S. 291, 295 (1978) (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting)).

293. Birthright citizenship was not extended to American Indians born on reservations until 1924 by an Act of Congress. Act of June 2, 1924, ch. 233, 68 Stat. 253 (1924).

294. A theory of judicial review without limits encourages excessive judicial activism.

295. An immunity disempowers the government from acting to deprive a person of his or her privileges, entitlements, right, liberties, or status as a citizen. *Cf.* JUDITH JARVIS THOMPSON, *THE REALM OF RIGHTS*, 59, 283 (1990). For example, Congress lacks power to divest persons of their citizenship absent their voluntary renunciation. *See Afroyim v. Rusk*, 387 U.S. 253 (1967). There is an obvious difference however between divestment of citizenship on the one hand and a stigma that makes one seem like a second class citizen. In the latter situation, there is a qualified immunity that can be overcome if the government shoulders a heavy burden of persuasion by presenting evidence and arguments justifying its stigmatizing action aiding religion. *See infra* text accompanying notes 312-15.

296. The Court protects citizenship status from alteration on the basis of "creed, color, or race." *Afroyim*, 387 U.S. at 268.

297. *Id.* at 268.

The supporters of the citizenship declaration “wanted to put citizenship beyond the power of any governmental unit to destroy.”²⁹⁸ United States citizenship “means something;”²⁹⁹ it means that a person’s status is protected as well as her liberty. Chief Justice Warren labelled citizenship “man’s basic right for it is nothing less than the right to have rights.”³⁰⁰ Although countless governmental classifications treat dissimilarly situated citizens differently on the basis of traits relevant to legitimate governmental objectives, persons³⁰¹ (whose religious commitments are not endorsed by the majority or consensus view) may no longer be stigmatized as inferior by the government’s aid to religion. The foregoing proposition is captured, as stated above, by the Court’s endorsement rationale in *County of Allegheny*, but I have not yet answered one important question: Why was it necessary for the citizenship declaration to link the Establishment Clause with the three prohibitions on state action in the Fourteenth Amendment?

The answer to the foregoing question is this: The citizenship declaration became necessary because the states did not fulfill one of their original obligations. More specifically, national unity was one of the Founders’ ideals that transcended religious differences and states were expected to respect the national citizenship of the individuals comprising the sovereign people of the United States. The states failed to advance the national goal of unity when they failed to adequately protect the citizenship status of many people who were marginalized because of their race or creed. Therefore, more protection by the national government was needed. It was provided via the citizenship declaration. Hence, the citizenship declaration is the bridge connecting the Establishment Clause with the three prohibitions on state action in the Fourteenth Amendment. In short, the citizenship declaration is both remedial and reconfiguring. It is reconfiguring because the nineteenth-century notion that the United States is a Christian nation is no longer an accurate description of our polity.

The citizenship declaration is especially pertinent when state aid to religion belittles non-Christians whose very identities are sustained by

298. *Id.* at 263. The government may not “‘abridge,’ ‘affect,’ ‘restrict the effect of,’[or] ‘take . . . away’ citizenship.” *Id.* at 267 (quoting U.S. CONST. amend XIV).

299. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 114 (1873).

300. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). Justice Douglas, dissenting in *Perez*, stated, “Citizenship, like freedom of . . . religion, occupies a preferred position in our written Constitution, because it is a grant absolute in terms.” *Id.* at 84 (Douglas, J., dissenting).

301. Aliens would usually be protected against state action because of the Court’s Equal Protection Clause cases protecting aliens and because state action is preempted by Congress’ power to prescribe the conditions for an alien’s lawful residence in the United States.

the knowledge that they can stand tall—even in a nation that has a strong Christian heritage. A communitarian approach, instead of a one dimensional focus on individual rights, supports the ideal of equal citizenship in an illuminating way.³⁰² “From the communitarian perspective, citizenship is seen as an organic relationship between the citizen and the state.”³⁰³ A citizen of course is a member of a community³⁰⁴ and is constituted in part by his embeddedness in that community. To subvert that membership is to undermine not merely rights, but human dignity. One’s conception of self includes one’s sense of being an American citizen. This sense of being an American, according to Professor Dershowitz, is threatened when the government aids Christian denominations.³⁰⁵

The connection between a creche displayed at Christmas and the threat to Jews that Dershowitz describes is not immediately evident to everyone. For example, Justice Scalia has indicated that he lacks empathy with any person, Jew or Gentile, who is traumatized when government officials facilitate public prayer.³⁰⁶ Minority groups are in trouble when judges lose their ability to place themselves in the shoes of those who depend upon their sensitivity as well as their good legal judgment. We know from reliable testimony that persons who object to religious rituals sponsored by the government “bec[o]me the objects of ridicule and anger” when others learn of their beliefs.³⁰⁷ Under such circumstances, the government’s aid to religion has the impermissible effect of “mak[ing] religion relevant, in reality or public perception, to status in the political community.”³⁰⁸

Admittedly, it is difficult for many mainstream Americans, especially mainstream Christians, to empathize with persons with nonconforming

302. See T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1494-98 (1986).

303. *Id.* at 1494.

304. The Court has recognized that “citizenship is . . . a relevant ground for determining membership in the political community.” *Cabell v. Chavez-Salido*, 454 U.S. 432, 438 (1982).

305. DERSHOWITZ, *supra* note 74, at 336. See also *supra* note 105 and accompanying text.

306. *Lee v. Weisman*, 112 S. Ct. 2649, 2681-83, 2686 (1992).

307. Judy Gordon Lessin, who many years ago sued unsuccessfully in Richmond to ban an invocation and benediction at her high school graduation, remembers and writes: “[W]e believed in our cause enough to defend ourselves” by filing a lawsuit but “[w]hen our case made the front page of the TIMES-DISPATCH, we became the objects of ridicule and anger from some students and faculty.” Judy G. Lessin, *Letter to the Editor*, RICH. TIMES-DISPATCH, July 11, 1992, at A9. In short, Ms. Lessin was made to feel like a second-class citizen.

308. *County of Allegheny v. ACLU*, 492 U.S. 573, 626 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring)).

religious beliefs. They ask why members of nonconforming religions or sects cannot "go along to get along" without filing lawsuits. However, for some members of minority religions, the psychological peer pressure generated by government-sponsored religious rituals is traumatic. Peer acceptance and self-image, for some insecure, as well as some out-directed, persons are closely related. When peer pressure is aided or supported by the government's endorsement of a religious ceremony, symbol or belief, a *reasonable dissenter*³⁰⁹ might, under the circumstances, consider herself viewed as less than a full member of the national community.³¹⁰ Non-degradable, equal citizenship status, however, is that victim-dissenter's birthright under the Fourteenth Amendment's citizenship declaration.

When a state subverts the status of patriotic Americans whose citizenship status is an inseparable part of their identity and self-esteem, the invasive state action tears away an invaluable component of one's very being.³¹¹ If this is how a typical (as opposed to hyper-sensitive) member of a minority religion responds to a city-sponsored religious symbol (for example, a nativity scene), the injury is not merely a subjective chill.³¹² At the very least, a normal reaction of this sort is an Article III injury³¹³ deserving of standing to sue. Moreover, under *County of Allegheny*, a cause of action is stated and the government should have the burden of persuasion to show why compelling secular interests justify its sponsorship of religion.

309. What matters is that given all the facts and circumstances of a case, the party who complains about the stigmatizing effects of state aid to religion is perceived as "a reasonable dissenter." See *Weisman*, 112 S. Ct. at 2658. Certainly not "every state action implicating religion is invalid if one or a few citizens find it offensive." *Id.* at 2661.

310. Some offensive government action is tolerable because "offense alone does not in every case show a violation" of the Constitution. *Id.*

311. See Aleinikoff, *supra* note 302, at 1495.

312. See *Laird v. Tatum*, 408 U.S. 1 (1972) (denying standing to sue because plaintiffs' injuries were labelled a "subjective chill"). The reasonable observer test is arguably adequate in most endorsement cases brought under the Establishment Clause. On the other hand, experience might show that the reasonable observer standard may not be sufficiently sensitive, if the plaintiffs are members of minority religions and the fact finder is not empathetic. Just as in racial harassment and sexual harassment cases, where some courts are applying a "reasonable black person" and a "reasonable women" test, so too in cases involving deeply offended religious persons, a reasonable dissenter's test might be needed. See, e.g., *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1513, *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991) (amendment only of injunction and order) (using, in racial harassment case, a reasonable black person standard); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (using reasonable woman standard in sexual harassment case); *Andrews v. Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (using, in sexual harassment case, standard of reasonable person of the same sex in that position).

313. U.S. CONST. art. III, § 2.

I can, however, think of five compelling governmental interests that might, if substantially furthered, justify noncoercive, nonpreferential aid to religion. Such aid could be justified if it: (1) facilitates the free exercise of religion without hardship to others, (2) increases options for a parent subject to a compulsory education law in a school district where the public education provided does not meet the religious beliefs of a reasonable parent,³¹⁴ (3) is an essential part of a program of equal access to government property,³¹⁵ (4) is an accommodation deemed necessary to accord religious persons or entities the same treatment as others similarly situated,³¹⁶ or (5) is a precaution necessary to avoid the appearance of hostility or callous indifference toward religion(s).³¹⁷ In such situations, under the model of adjudication proposed in this Article, the government can often carry its exceedingly heavy burden of persuasion.

When courts realize that there is a framework of analysis that will neither dramatically overturn precedent nor detract from the Court's legitimacy, judges might turn away from the spurious history and rely instead on the bridging function of the citizenship declaration.

V. CONCLUSION

The Fourteenth Amendment's provisions have an "overlapping and duplicatory nature."³¹⁸ The Fourteenth Amendment does not, however, give judges a blank check to use the rhetoric of "establishment" as an excuse to eliminate all religious symbolism in the public square. Ironically, the Court de-emphasizes Madison's concern about the connection between religious autonomy and citizenship status.³¹⁹ Although Madison lost his battle to obtain an amendment limiting the states' power to degrade a person's equal citizenship status, the general idea of national citizenship has survived, and it delimits the powers of both the state and federal government. For example, no religious person can be singled out and given privileges or disabilities because of his or her religious faith or

314. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

315. *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226, 248-53 (1990) (upholding Equal Access statute enacted by Congress making it unlawful for a public secondary school to deny equal access to students wishing to hold religious meetings).

316. *Widmar v. Vincent*, 454 U.S. 263 (1981) (invalidating university regulation denying religious groups equal access to university facilities used as a public form).

317. *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1991) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.").

318. See TENBROEK, *supra* note 273, at 123. The Establishment Clause protects states rights; quite different is the protection of individual rights provided by the Fourteenth Amendment. Unfortunately, the Court often neither sees nor appreciates this basic difference.

319. See *supra* text accompanying note 269.

loyalties. Indeed religious faith and loyalties are irrelevant to the rights and duties of citizens.³²⁰

This Article does not reconstruct the mindsets of Madison or those who influenced the framing of the Fourteenth Amendment, but I have tried to tease out the hitherto unnoticed dormant meaning of the Amendment's citizenship declaration. One aspect of that meaning must be made clear: the concept of *national* citizenship increases the rights of individuals at the expense of state sovereignty.

Our generation, and future ones, have the responsibility to develop and clarify a doctrine of citizenship status that gives citizens of the United States the dignity, honor, and protection they are due. Part of what is due in establishment of religion cases is a legal environment that is caring and respectful of persons regardless of their creed or lack of religious commitment. To give each citizen the protection and dignity that is his or her entitlement, without denigrating the importance of the spiritual dimension in the lives of many Americans, the meaning of the Establishment Clause should not be contaminated by a radical secularism that poses dangers akin to those posed by any other ideology taken relentlessly to an extreme. Accordingly, the Court's Establishment Clause doctrine must respect the equal citizenship status of individuals who need the presence of religious symbolism in the public square without debasing the equal citizenship status of individuals who feel, quite often reasonably, threatened by such symbolism. To perform this delicate task with adequate sensitivity, the Court must decide the cases one at a time without dogmatic prejudgments that indiscriminately view all kinds of aid to religion as if all aid is, without exception, forbidden fruit.

320. The term "citizenship" has had a variety of meanings in American history; it is a dynamic concept that cannot be discussed in a vacuum. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 3, 8 (1991). One danger of any theory privileging citizenship, of course, is that it marginalizes aliens, including permanent residents, but this danger was with us when the Bill of Rights was drafted since the Founders tended not to regard aliens as parties to the social contract, i.e., citizens. See Gerald L. Neuman, *Whose Constitution?* 100 *YALE L.J.* 909, 927-38 (1991). Nothing, in this Article, however, provides a basis for reducing the Court's level of careful scrutiny (in equal protection cases) of state classifications based on alienage. Therefore, aliens who are made to appear as outsiders because of their religious beliefs are not unprotected, but their protection depends on a representation-reinforcing rationale that is beyond the scope of this Article. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 148-49, 160-62 (1980).