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The Supreme Court, the establishment clause, and the First Amendment.

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THE SUPREME COURT, THE ESTABLISHMENT CLAUSE, AND THE FIRST AMENDMENT

By

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DEDICATION

This thesis is dedicated to my wife and daughter

Emy Lorigan

and

Wrigley Grace Lorigan

for their patience and selflessness during this educational opportunity.

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ABSTRACT

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William Lorigan

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This study examined the faiths of select Founding Fathers, the religious context of their time, and six Supreme Court decisions concerning religion, to highlight the inconsistencies found within the Supreme Court's jurisprudence covering cases concerning religion. Through an examination of the religious practices of the Founding Fathers, it became evident that their views on religion, and how religion should be observed, were as diverse as they were. An examination of the Supreme Court's jurisprudence concerning religion reflects a very confusing and inconsistent application of the First Amendment, including the Court's inability to formulate a test that can be consistently applied to cases concerning religion. Through the examination of the Founding Fathers and the Supreme Court's decisions concerning religion, it became apparent that the Supreme Court needs to find a way to examine religious cases that is consistent with the Court's jurisprudence and the principles of the First Amendment.

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CHAPTER I

THE ESTABLISHMENT CLAUSE: HISTORY AND HISTORIOGRAPHY

Today the United States is not the country that the Founding Fathers envisioned. From the principles expounded through the signing of the Declaration of Independence and the drafting and subsequent ratification of the 1787 Constitution, to the Supreme Court's ruling on *United States v. Windsor*, 570 U.S. (2013), America has undergone numerous cultural, social, and economic shifts and changes. Countless ideas, philosophies and practices have fallen by the wayside as the United States has grown in population, expanded in size and population diversity, and the federal government has increased its influence in political, economic, and social issues, both foreign and domestic. Male and female suffrage has expanded through the efforts of Andrew Jackson and the Nineteenth Amendment. The nation abolished slavery through the ratification of the Thirteenth Amendment, and a rising rights consciousness expanded through the passage of many acts of Congress, including the 1866 and 1964 Civil Rights Acts. Although Congress intended the ratification of the original Bill of Rights to prohibit and limit the powers of the federal government on the states only, through the ratification of the Fourteenth Amendment in 1868, these rights became imposed upon the states through the decisions of the United States Supreme Court through the incorporation process. The application of the Bill of Rights upon the states has had both a far-reaching and significant effect on many political and cultural spheres previously acknowledged as the jurisdiction of the states.

One of the most controversial and compelling issues of legal precedence handed down by the Supreme Court to federal, state and local governments through the application of the Fourteenth Amendment has been in the area of religion. The First Amendment to the Constitution restricts Congress from making "no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] At face value, the interpretation and application of this language might seem both straightforward and simple, particularly at the time of its drafting. However, many social, religious and political changes have taken place that have clouded and confused not only the meaning but the application of this decree. With the ever changing and evolving pattern of American life influencing numerous areas, including suffrage rights and slavery from the original intentions of the Founding Fathers, it is reasonable to assume that religious rights and freedoms would also be altered by the changing patterns of society and culture. However, the question that has thwarted both time and judicial jurisprudence is how to apply the principles of the First Amendment while remaining as faithful as possible to the intentions of the Founding Fathers? This thesis asserts that an oversimplified historical understanding of the religious views of the Founding Fathers, and inconsistent religious jurisprudence concerning the First Amendment's religion clauses, have made it necessary for the Supreme Court to institute a way of examining religious cases that are consistent with its own jurisprudence and the principles of the First Amendment.

Arguments concerning the interpretation and application of the First Amendment have been summarized as the "Establishment Clause" and the "Free Exercise Clause."

[1] U.S. Constitution, amend. 1; John Grafton, *The Declaration of Independence and Other Great Documents of American History 1775-1865* (Mineola: Dover Publications Inc., 2000), 15.

These two terms define the text of the First Amendment which states in part, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." But what do each of these two terms mean and, more importantly, how should they be applied? Most advocates who seek to add scholarly or legal weight to these questions fall within one of two groups. According to ex-Attorney General Edwin Meese, the first group, known as accommodationists, are advocates of a position that believe Congress designed the Establishment Clause to prevent an establishment of a "national church," and from "designating a particular faith or sect . . . above the rest."[2] In 1985, Chief Justice William H. Rehnquist reinforced this position in an opinion he delivered in which he claimed the Establishment Clause merely "forbade the establishment of a national religion and forbade preference among religious sects or denominations."[3] Opponents of this view, known as Separationists, adhere to a strict interpretation of the proverbial saying of "separation of church and state," taken from the words of Thomas Jefferson, which seek to keep the church and the state separate in every sphere of civic and political life.

The historical precedence and influence of religion on America's founding and its history is significant. Christianity constituted one of the three most important and influential streams of thought flowing through the colonies from their founding. Historian Jeffry H. Morrison described the ideas of "classical republicanism, British liberalism, and Protestant Christianity," as the most common concepts and ideas discussed, and then incorporated into the writings and beliefs of most people living

[2] Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (Chapel Hill: The University of North Carolina Press, 1994), xvii.
[3] Ibid., xvii.

through the unsettling and rebellious era of the 1760s and 1770s.[4] Both the social elite and many of the common folk shared similar writings and beliefs during this time. This enabled their usage to be widely promulgated and understood, whether they were in book, pamphlet, newspaper or other printed form.[5] However, it was the colony of Virginia where religious influence was strongest between the end of the French and Indian War in 1763, and the start of the American Revolution in 1775.[6]

Historiography

It was within these tumultuous decades that much of the history concerning the role and influence of religion within American culture and its applicability for today begins. Surveying the religious atmosphere of the colonies at the time, many colonies had established state sponsored religions like Virginia with the Anglican Church, and Massachusetts with the Congregational Church, while other colonies supported or endorsed religion through their individual charters and eventually their constitutions. These colonies had also promoted statutes that prohibited persons from holding public office or voting unless they supported the Christian religion, among other religious regulations.

In his book, *The First Freedoms: Church and State in America to the Passage of the First Amendment*, historian Thomas J. Curry examined the relationship between the church and the state from the founding of the colonies all the way through to the passage

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[4] Jeffry H. Morrison, *The Political Philosophy of George Washington* (Baltimore: The Johns Hopkins University Press Baltimore, 2009), 4.
[5] Jeffry H. Morrison, "John Witherspoon's Revolutionary Religions," in *The Founders on God and Government*, ed. Daniel L. Dreisbach, Mark D. Hall, and Jeffry H. Morrison (Lanham: Rowman & Littlefield Publishers, Inc., 2004), 123.
[6] Ibid., 3.

of the First Amendment. Curry believed that by the eighteenth century toleration of religious freedom had become a matter of principle within the colonies. Colonial writers assumed that the legal systems of the time would uphold and maintain a Protestant Christian state, and as a natural right be in favor of "absolute liberty of conscience, and entire freedom in all religious matters."[7] Curry contends that widespread religious diversity had occurred as a result of the Great Awakening, and as a consequence of this event the term "establishment of religion" acquired different meanings depending on the colony.[8] For many colonies, establishment meant following a set of guidelines, while in other colonies tax payer funded religion was common. Colonists became comfortable with the religious establishment, as long it was organized and administered by themselves. Colonists saw external "establishment" imposed by England as an encroachment on their religious liberties.[9]

Led by Virginia, the free exercise of religion, as opposed to the toleration of religion, became the benchmark for religious freedom in many southern states. State leaders such as James Madison believed that if the state could force a person to contribute to "any one establishment," then it could compel them to conform to "any other establishment," which would contradict the principle of free exercise.[10] New Englanders rallied against laws and language that placed one sect or religion above or before another while the middle colonies remained unmoved by religious establishment definitions but maintained a strong Christian influence. For many Americans, state religion became

[7] Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press Inc., 1986), 78.
[8] Ibid., 104.
[9] Ibid., 133.
[10] Ibid., 78.

defined as either the preference of a single religion or the tyrannical intrusion of the government into religious affairs.[11] By 1789, Americans believed that church and state issues had been resolved by individual states, principally because the federal government had no power in such matters. Yet, some groups and individuals still wanted the principle stated specifically.[12]

In, *Church, State, and Original Intent,* political scientist Donald L. Drakeman believed that as a result of the widespread diversity of understanding concerning church and state issues, the "original intent" of the First Amendment should refer to the "intentions" of the sovereign parties ratifying the Bill of Rights at the time.[13] Drakeman believed that the First Amendment religion clauses never stood for the personal convictions of the framers or of anyone else; [14] consequently "the early nineteenth-century Supreme Court spent little time consulting any potential sources of original intent or meaning."[15] Drakeman adds that it was not until the framers and ratifiers died out that their views started to become more important as the need for the Supreme Court's "arsenal of interpretive approaches began to expand."[16] He believed that arguing what was and what was not going on during the drafting and ratifying of the First Amendment has led to eighteenth century conversations that did not take place. This is because the views held by the Founding Fathers were as diverse and as varied as the founders themselves.

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[11] Ibid., 191.
[12] Ibid., 194.
[13] Donald L. Drakeman, *Church, State, and Original Intent* (New York: Cambridge University Press, 2010), 6.
[14] Ibid.
[15] Ibid., 7.
[16] Ibid.

The question of legal jurisprudence remaining faithful to the Founding Fathers is itself subject to debate. In, *God and the Founders*, political scientist Vincent Phillip Muñoz argues that not every founder of the country viewed religion in the same light, contrary to popular belief. The views of George Washington were inconsistent with those of John Adams. The principles of Roger Sherman were different than those of Benjamin Franklin, and as Muñoz emphasizes, even the religious views of James Madison and Thomas Jefferson, often linked as kindred spirits, were divergent on subjects such as religion and religious liberty.[17] Outside of Christianity being the dominant faith of those who professed belief in God, denominational practices, regional experiences, and personal convictions left every Founding Father with their own personal view on religion and how it should be practiced in general. With no consistent and consensus view on religion existing outside of a general agreement on the freedom to practice religion, it is impossible for the Supreme Court to formulate an exact standard or doctrine for religious legal jurisprudence. Many historians and conservative social commentators, have looked back on the writings, practices and precedents set by the Founders as examples of why and how religion should be given free and almost unabridged access to all areas of life, both public and private. Other historians, along with more liberal or progressive social commentators, have reached for other writings, often by many of the same Founding Fathers, as examples as to why the influence of religion should be diminished and in many cases extinguished when religious practices and the governmental are involved.

[17] Vincent Phillip Muñoz, *God and the Founders: Madison, Washington, and Jefferson* (New York: Cambridge University Press, 2009), 119.

The reason for such a disparity of views is because the Founding Fathers constituted a unique and diverse group of individuals. Following the promulgation of the 1776 Declaration of Independence, some Founders were killed during the events surrounding the American Revolution, while others faded from national prominence. Additional Founders rose up in their place when it came time to draft a new Constitution. Following the completion of the Constitution in 1787, some Founders excused themselves from a prominent place in American history by refusing to sign the final draft or leaving federal positions when state governance appeared to be a higher calling. While many Founders have faded from the minds of the present, unknown by all except those who care for American history or maintain more than a passing interest in historical events, other Founding personalities live on almost larger than life. To this day some Founding Fathers cast a long shadow over the cultural and legal direction of the country, and in particular the decisions of the Supreme Court.

Two of the most widely known and well published figures cited by the Supreme Court are James Madison, often touted as the "Father of the Constitution," and Thomas Jefferson, the drafter of the Declaration of Independence. Muñoz noted that to date James Madison has been cited in more than two hundred Supreme Court opinions,[18] while the single most controversial ruling concerning religion by the Supreme Court cites the writings of Thomas Jefferson as the cornerstone of its argument. In *Everson v. Board of Education*, 330 U.S. 1 (1947), the justices of the United States Supreme Court split their decision five to four. However, all nine justices agreed that the meaning of the Establishment Clause was to be found in the writings of Jefferson and Madison

[18] Ibid., 12.

concerning the establishment of religious freedom in Virginia.[19] Two questions bear asking when considering this conclusion by the Supreme Court justices concerning their zealous appeal to the writings of Madison and Jefferson in search of religious thought and precedence. First, why have the writings of Madison and Jefferson been given such an elevated status concerning church and state issues? Thirteen colonies existed that were all uniquely established, uniquely governed, and uniquely individual in their cultures concerning religion prior to and after the ratification of the Constitution in 1787. Yet the thoughts of Madison and Jefferson, who only represented the opinions of Virginia, are applied to all thirteen states. Secondly, Jefferson's position concerning the relationship between the state and the church was outlined in the *Virginia Statute for Religious Freedom*, first drafted in 1777. However, the strength of the Supreme Court's argument concerning the Establishment Clause was settled on a letter penned by Jefferson in 1802. In this letter the weight of the argument concerning separation and the Establishment Clause hangs on the phrase, "a wall of separation between church and state;"[20] a saying that only ever appears once in the writings of Jefferson and never in the *Virginia Statute for Religious Freedom*.[21] The Supreme Court needs to reconsider establishing a precedent based on a letter written twenty-five after the Constitutional Convention by a man who was not present for either the drafting or ratification of the Constitution and the Bill of Rights.

[19] Ibid., 13.
[20] Ibid., 71.
[21] Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State* (New York: New York University Press, 2002), 54.

In *The Establishment Clause*, historian Leonard W. Levy suggested that possibly the reason the justices have placed so much weight on the words of Jefferson and Madison is that Virginia, the home state of both politicians, was the only state from which some evidence survives that speaks to the ratification of the First Amendment.[22] Levy believed that the evidence suggested that those debating the First Amendment advocated for a wider or Separationists interpretation of the establishment clause.[23] Even if this position was true, any evidence only represents the thoughts of Virginia, a state which was debating ratification under the shadow of their recent divorce from established religion in the form of the Anglican Church. The Anglican Church stood for everything many Virginians rejected; a church supported by state funds, a church that oppressed other denominations, and a church that as the official state church in England, symbolically stood for everything Virginian patriots were fighting against in the Revolutionary war. Any silence by the remaining states, whether through inaction or a lack of historical records, does not simply give way to the thoughts and ideas of Virginia.

Historical evidence exists to support the position of other colonists within the other states at the outbreak of the Revolution and the decades following the cessation of hostilities. The leader of the Baptist denomination in Massachusetts, Reverend Isaac Backus believed that religious taxes imposed by the state's legislature were illegal.[24] Backus' position supports Levy's argument that the Revolution triggered the disestablishment of religion within the states.[25] Levy argues that Separationists believed

[22] Levy, *The Establishment Clause*, 111.
[23] Ibid.
[24] Ibid., 2.
[25] Ibid., 27.

the establishment of religion by law hurt both the church and the state.[26] Supporting this position Levy contended that southern states, particularly South Carolina, looked to disestablish state churches. In his *Memorial and Remonstrance against Religious Assessments* (1785), Madison argued that religion was a private and voluntary affair not subject to the state in any way,[27] while an unrelated petition to the Virginia state legislature also in 1785, advocated for the principle of voluntary support toward the church.[28] The rationale from both Madison and the Virginia petition was that Christianity was most effective when left alone under God "free from the intrusive hand of the civil magistrate."[29] These personal opinions, among others, confirm Jefferson and the Supreme Court's wall of separation theory; however, Jefferson himself refutes these claims as universally true.

Historian Daniel L. Dreisbach in his book, *Thomas Jefferson and the Wall of Separation between Church and State*, argued that it was uncertain whether the wall of separation which Jefferson spoke of was located between the state's right to govern and its jurisdiction on religion, or the state's right to adjudicate between religious opinion and religious practices.[30] Additionally, Dreisbach suggested that as a matter of federalism, Jefferson's views applied at the federal level and not the state level.[31] In keeping with his federalist approach it was conceivable that Jefferson had intended that each state would erect its own wall principle.[32] The First Amendment was about jurisdiction, not religious

[26] Ibid., 50.
[27] Ibid., 63.
[28] Ibid., 64.
[29] Ibid., 65.
[30] Dreisbach, *Thomas Jefferson*, 53.
[31] Ibid., 54.
[32] Ibid., 68.

liberty. Drakeman also supported this position contending that Jefferson's second inaugural speech left religion as a state issue.[33] It was also probable that Jefferson lifted the phrase "separation of church and state" from western political and theological literature. Based on the library of books Jefferson kept, he was familiar with at least one or two uses of the phrase and the context in which it was used did not distinguish between church and state affairs.[34]

The issue of church and state relations seldom came up during the years after the ratifying of the 1787 Constitution and the 1791 Bill of Rights. Regardless of a person's interpretation of the First Amendment, Levy argued that it was agreed upon by the delegates of the Constitutional Convention that "the new central government would have no power whatever to legislate on the subject of religion," and that "religion as a subject of legislation was reserved exclusively to the states."[35] Occasionally the issue of religious liberty did broach public dialogue early in the republic's history; however, that dialogue rarely dealt with the encroachment of religion into the sphere of state or government sponsored events. Early national Americans embraced religion within the context of both federal and state governmental proceedings. Possibly the only judicial overlap concerning church and state relations came via the Supreme Court case *Barron v. Baltimore*, 32 U.S. 243 (1833). In a decision written by Chief Justice John Marshall, the Supreme Court noted that the federal Constitution "was ordained and established by the people of the United States for themselves, for their own government, and not for the

[33] Drakeman, *Church, State, and Original Intent*, 75.
[34] Dreisbach, *Thomas Jefferson*, 82.
[35] Levy, *The Establishment Clause*, 93.

government of the individual states."[36] Succinctly stated, Chief Justice Marshall's rationale was that when "the people of the United States" had ratified the Constitution it was to apply to only the government that the Constitution had created - the federal government - and "not for the government of the individual states."[37]

Following the 1788 ratification of the Constitution and the 1791 Bill of Rights, historian James W. Ely Jr. in, *The Guardian of Every Other Freedom: A Constitutional History of Property Rights*, discussed how the United States began to embark on a course that lead to widespread economic prosperity and expansion. Later conceptualized as Manifest Destiny, during this era of prosperity and expansion, property rights consumed the majority of the legal proceedings that filled the Supreme Court's dockets rather than religious cases. Ely explained how legal scholar James Kent's *Commentaries on American Law* (1826-1830), defined and interpreted American law through this period.[38] Kent observed that "the right to acquire and enjoy property" was among the "absolute rights of individuals."[39] Using this rational, Ely contended many judges, including Supreme Court Chief Justices Marshall and Roger B. Taney, used property rights "as the basis for both ordered liberty and economic development."[40] The Supreme Court used the Constitution to emphasize property ownership and corporate enterprise over government authority concerning property. Simply stated, Supreme Court justices

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[36] Melvin I. Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941 – 1953* (Columbia: University of South Carolina Press, 1997), 6.
[37] *Barron v. Baltimore*, 32 U.S. 243 (1833).
[38] James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 3rd ed. (New York: Oxford University Press, Inc., 2008), 81.
[39] Ibid.
[40] Ibid.

recognized that respect for property rights constituted the basis of ordered liberty and economic development.[41]

The free-market economy facilitated the growth of both industrialization and urbanization, which also aided the growth of big businesses and corporations. During this time Ely contended that the understanding of property rights had never been fixed. Instead property rights evolved over time in response to geographical and economical change, urbanization, and industrialization.[42] While many people saw property rights as a safeguard to economic liberty, political independence, and private enterprise, many others began to see economic liberty as a barrier to reforms, income redistribution, and a threat to the welfare state.[43] The constant flow of new immigrants and laborers to the work force in the mid to late 1800s, facilitated industrial economic growth which resulted in the concentration of enormous economic power into the hands of a rich few. This concentration of power exacerbated disparities in wealth, and increased the pool of middle and lower income workers. Ely explained that by the beginning of the 1900s, and encouraged by the writings and advocacy groups of the progressive movement, lawmakers began to shift their focus from the promotion of economic growth to economic regulation.[44] This new focus led legislators to "redress the unbalanced social and economic situation by, in essence, mandating a redistribution of property in favor of those viewed as disadvantaged."[45] Legislating social change aroused the ire and hostility

[41] Ibid.
[42] Ibid., 8.
[43] Ibid., 5.
[44] Ibid., 8.
[45] Ibid.

of conservative judges, "resulting in a bitter and prolonged controversy over the constitutional position of property rights."[46]

For historical precedence conservative judges continued the long-standing Federalists position of using the Constitution as a safeguard for property.[47] Ely explained that their justification for supporting this position was the fact that the Constitution did not grant Congress the right to tax, and it also placed limits on federal governance over property and trade. The Founding Fathers used the Constitution as a mechanism against the regulation of property and wealth redistribution, a position up until that point the judiciary branch was willing to support.[48] Although its potential was not realized at the time, it was the ratification of the 1868 Fourteenth Amendment that opened the possibility for federal supervision of state legislation, and encroachment upon some areas of property rights. However, the Supreme Court still struck down redistribution and class legislation; thus, reinforcing the Framers thoughts concerning property and economics.

During the Progressive Era reforms inside and outside the legal system nudged the Supreme Court into an era of transition. Ely suggested that many American saw these reforms as the foundations of the civil liberties era to come, though at the time they were largely symbolic because they produced little tangible results. Within the Supreme Court, Associate Justice Oliver Wendell Holmes Jr. proposed the philosophy of judicial restraint; that is the Court should defer to "the right of a majority to embody their

[46] Ibid.
[47] Ibid., 57.
[48] Ibid., 58.

opinions in law."[49] Underpinning this philosophy was Holmes' skepticism towards "absolute legal values," instead preferring the practice of exercising a wide latitude for political resolutions.[50] Outside of the Court, Progressives sought to "weaken the aura of sanctity surrounding the United States Constitution and Supreme Court."[51] Progressive leaders latched onto Holmes' concept of judicial restraint while also maintaining that the Supreme Court should no longer "review the reasonableness of economic and social legislation."[52] Additionally, Progressives floated the suggestion of amending the Constitution to allow for the popular election of judges and judicial recall; but, the idea proved unsuccessful.

In *Division and Discord: The Supreme Court under Stone and Vinson,* historian Melvin I. Urofsky identified the first official shift towards civil rights and civil liberties in the legal jurisprudence of the 1920s when the Supreme Court began dealing with cases involving individual liberties.[53] Initially the Court reaffirmed through, *Prudential Insurance Company v. Cheek,* 259 U.S. 530 (1922), the *Barron* decision of 1833, that individual liberties applied only to the federal government.[54] However, a mere three years later Associate Justice Edward T. Sanford noted in the opinion of the Court for *Gitlow v. New York,* 268 U.S. 652 (1925), that the First Amendment right to freedom of speech applied to the states as well as the federal government.[55] The Supreme Court reaffirmed this opinion six years later when the freedom of the press clause was also

[49] Ibid., 108.
[50] Ibid.
[51] Ibid., 122.
[52] Ibid., 123.
[53] Urofsky, *Division,* 6.
[54] Ibid.
[55] Ibid., 85.

applied in *Near v. Minnesota*, 283 U.S. 697 (1931).[56] Urofsky stated that these two cases provided the basis for the legal doctrine known as "incorporation," by which the Fourteenth Amendment "incorporated" the liberties protected in the Bill of Rights through due process, and applied them to the states.[57] The application of the freedom of speech and press clauses to the states raised an important question; did the Fourteenth Amendment guarantee the incorporation of every right found within the Bill of Rights and apply them to the states? Urofsky suggested that this question was answered in 1937, when Associate Justice Benjamin Nathan Cardozo delivered the majority opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937).[58] The *Palko* decision affirmed that all the protections of the First Amendment did in fact apply to the states; however, the Second through Eighth Amendments should only be applied by the Court when "the very essence of a scheme of ordered liberty" was "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[59] One explanation proposed to define whether something threatened ordered liberty was if it was "so acute and so shocking that our polity will not bear it."[60] This approach became known as "selective incorporation," and also implied for the first time that cases would be tried away from "absolute legal values."

While no ambiguity existed within the Supreme Court's determination that all of the protections of the First Amendment did apply to the states, the doctrine of selective incorporation provided a lot of freedom of choice to the justices when deciding which

[56] Ibid.
[57] Ibid., 7.
[58] Ibid., 85.
[59] Ibid., 6.
[60] Ibid., 86.

amendments or portions of the Second through Eighth Amendments applied against the states. Consequently, Urofsky suggested that the doctrine of selective incorporation provided "enormous power and discretion" to the courts and the justices.[61] He defended this position by pointing out that nothing exists in the Constitution that provides any guidance or direction about how to apply these rights.[62] Instead, judges had to "modernize" the Bill of Rights and decide how each of these rights were to be applied based on history and precedence.[63] Such opinions opened the Supreme Court up to ruling on issues that Justice Holmes had described as "the right of the majority."[64] Even more critical than Urofsky, Drakeman contended that the incorporation doctrine improperly imposed the Establishment Clause on the states via a "judicial revolution."[65] Drakeman supported this position by arguing that incorporation reverses the positions not only of Congress, but of "forty-three judges of the Supreme Court [who] had passed on the scope of the Fourteenth Amendment in a period of seventy years.[66]

The Constitutional Revolution of 1937

The jump from absolute legal values to the right of the majority to embody their opinions in law was not nearly as neat as applying the Bill of Rights to the states by way of the Fourteenth Amendment. Ultimately, a shift in the role of shaping judicial rule and reform by the Supreme Court can be traced to many contributing factors, including the apprenticeships for lawyers and progressivism throughout the early twentieth century,

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[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ely, *The Guardian*, 108.
[65] Drakeman, *Church, State, and Original Intent*, 160.
[66] Ibid., 60, 161.

and most obviously the Great Depression.[67] The onset of the Great Depression magnified the argument that the unregulated and uncontrolled free market was not functioning well in an industrial society. If the Great Depression exemplified anything it was the downward plight of the middle class and poor, often at the hands of big businesses, and the distinct lack of protection afforded to them through the legislative and legal process. In order to remedy the problems of the Great Depression, President Franklin D. Roosevelt and Congress enacted a series of legislative initiatives known as The New Deal.

Unfortunately for Roosevelt, in 1935 and 1936, while finding "no basis for the claim made by some members of the Court that something in the Constitution [had] compelled them regretfully to thwart the will of the people,"[68] the Supreme Court struck down much of his legislative agenda. During Roosevelt's first term as President he was not afforded the opportunity to appoint any justices to the Supreme Court sympathetic to his legislative agenda. Consequently, following re-election in 1936, Roosevelt proposed a bill that attempted to enlarge the size of the Supreme Court. This bill became known as Roosevelt's infamous court packing plan.[69] Roosevelt attempted to "pack the court" in order to accommodate for what he considered as the Court not acting as a judicial body. Instead, Roosevelt saw the Supreme Court as a "policy-making body that had improperly set itself up as a third House of Congress – a super-legislature . . . reading into the

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[67] Jeffrey D. Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham: Rowman & Littlefield Publishers, Inc., 1996), 59.
[68] Ibid., 1.
[69] Ely, *The Guardian*, 133.

Constitution words and implications which are not there, and which were never intended to be there."[70]

Despite his electoral success many people, including supporters of Roosevelt, felt that he had over-reached with his court packing plan. While having to abandon the plan, Roosevelt's threat to pack the court did have some unforeseen and welcome side-effects, which collectively would become known as the "Constitutional Revolution of 1937."[71] Under mounting political pressure and following Roosevelt's court packing threat some justices shifted their positions concerning the New Deal's economic and social agenda.[72]

Another effect on the Supreme Court surrounding the Constitutional Revolution of 1937, was the changing application of the words conservative and liberal. Prior to the Court revolution, "conservative judges imposed their views of property on the law in order to thwart economic reform, while liberals advocated judicial restraint."[73] However, from this period up until the Warren Court, conservative judges exercised judicial restraint "to avoid clashing with the legislature and executive over issues affecting individual liberties," while liberals advocated judicial activism to oppose the political branches in order to "protect civil rights and civil liberties."[74]

In 1937, the court abandoned its historic role as protector of property rights, leaving them to the federal and state governments to administer. The following year the Supreme Court redirected its focus by separating property rights from personal freedoms through the majority opinion by Chief Justice Harlan F. Stone in Footnote Number Four

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[70] Hockett, *New Deal Justice*, 1.
[71] Ely, *The Guardian*, 134.
[72] Ibid., 126.
[73] Urofsky, *Division*, 7.
[74] Ibid.

of *United States v. Carolene Products Company*, 304 U.S. 144 (1938). Urofsky described this footnote as the lynchpin in the way the Supreme Court took and ruled on cases as it looked forward to the future.[75] He observed that "economic legislation would henceforth receive a minimal level of scrutiny . . . so long as the legislature had the power and a reasonable justification for its use, courts would not question the wisdom of that legislature."[76] However, when statutes began to encroach upon a person's individual rights, "there would be a much higher standard of review."[77] Additionally, the Court's efforts to flesh out exactly how Stone's footnote would apply brought forth the opportunity to reexamine the rationale behind church and state constitutional challenges, a void that would be filled by Associate Justice Hugo Black through the words of Thomas Jefferson.

The central argument behind the *Carolene Products* case concerned itself with a federal law which prohibited the interstate transportation of "filled milk." Urofsky points out that the legislation in question was easily upheld; however, Stone's majority opinion crafted what has since become the most famous footnote in Supreme Court history. Through his footnote, Stone established the foundation for "separate criteria in which to evaluate legislation embodying economic policy and laws that affected civil liberties."[78] Laws that affected civil liberties would be described by Stone as being "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[79] Additionally, Stone emphasized

[75] Ibid., 12.
[76] Ibid., 11.
[77] Ibid.
[78] Ibid.
[79] Ibid.

statutes that dealt with religious, national, or racial minorities, and that prejudice against "discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry."[80]

Associate Justices Hugo Black and Felix Frankfurter

President Roosevelt's unparalleled tenure as President of the United States afforded him the opportunity to appoint more justices to the Supreme Court than any other president outside of President Washington, who established the first Supreme Court. It was two of Roosevelt's first three appointments that historian Jeffery D. Hockett in *New Deal Justice*, argued had the greatest bearing on debate surrounding incorporation and the precedence that would be set. Hockett describes the appointments of Hugo L. Black (1937), and Felix Frankfurter (1939), by President Roosevelt as Associate Justices of the Supreme Court as his "most conspicuous appointees."[81] Urofsky affirms Hockett's assessment noting that the personalities of Justices Black and Frankfurter "delineated the jurisprudence debates, laid out the key arguments regarding incorporation, the proper role of the courts, the limits of the constitutional protection, and the meaning of due process and equal rights."[82]

Though the nominees themselves did not agree with all of President Roosevelt's legislative methods, they did provide varying degrees of support towards the intentions of the president's goals.[83] However, an unforeseen byproduct of Roosevelt's selection process for choosing candidates to fill the vacancies on the Supreme Court, was the

[80] Ibid.
[81] Hockett, *New Deal Justice*, 3.
[82] Urofsky, *Division*, 8.
[83] Hockett, *New Deal Justice*, 86.

relative lack of harmony concerning legal jurisprudence.[84] As a result of this lack of harmony and the need to "modernize" the Bill of Rights, constitutional interpretation, which in the past had been the relatively easy job of interpreting legal language and following precedence proceeding from absolute legal values, became subject to the will of those making the judicial decisions.[85] Hockett describes this shift away from traditional legal jurisprudence by noting that the "traditional view of judicial decision making did not survive the assaults that the Progressive jurists initiated and the legal realists of the 1930s expanded."[86]

It was while considering the arguments of *Chambers v. Florida*, 309 U.S. 227 (1940), that Black determined that the Fourteenth Amendment did in fact incorporate the Amendments One through Eight to the Bill of Rights, and applied them to the states.[87] Black's detailed reading of history led him to believe that the framers of the Fourteenth Amendment had intended to apply all of the Bill of Rights to the states.[88] This conclusion contradicted Black's previous position concerning the earlier *Palko* decision, and put him directly at odds with Frankfurter concerning selective incorporation. Through his own analysis and historical research, Justice Frankfurter had determined that the framers of the Fourteenth Amendment had not intended to "subsume all of the Bill of Rights."[89]

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[84] Ibid., 60.
[85] Ibid.
[86] Ibid.
[87] Ibid., 112.
[88] Urofsky, *Division*, 11.
[89] Ibid., 217.

By 1941, the criteria for which individual rights applied to the states had not been articulated,[90] and many rights cases that had come up had taken a back seat due to war issues.[91] Despite the *Carolene Products* footnote the Supreme Court was slow to press forward with civil rights and civil liberties, in large part due to World War Two. First *Hirabayashi v. United States*, 320 U.S. 81 (1943), and then *Korematsu v. United States*, 323 U.S. 214 (1944), seemed primed as opportunities to showcase the Supreme Court's recent change in direction towards civil rights and liberties. Unfortunately, to the disappointment of Gordon Hirabayashi, Mitsuye Endo, and the American Civil Liberties Union, this proved untrue. Although the circumstances surrounding both cases were debated in chambers, the Supreme Court found in favor of the defendant both times, citing the military's actions as both a necessary and legal means to achieve an end. Given the circumstances surrounding the attack on Pearl Harbor in 1941, the declaration of war, and then the huge national undertaking involved in fighting a global war on two fronts, the Court felt that the federal government and by extension the United States military were justified in their actions.

While historian Alpheus Mason commends Chief Justice Stone for not sacrificing more individual liberties because of military necessities during World War Two,[92] historian John Frank was less forthcoming with praise, citing "the dominant lesson of our history in the relation of the judiciary to repression is that the courts love liberty most when it is under pressure least."[93] Urofsky also conceded that many of the justices who

[90] Ibid., 7.
[91] Ibid., 213.
[92] Ibid., 83.
[93] Ibid.

later developed strong reputations as staunch defenders of individual liberties, were more than willing to "look the other way" when the government invoked military necessity when making such decisions.[94]

Wartime consensus on decisions did not mean peaceful interactions on the Supreme Court behind closed doors. By the spring of 1946, Justice Frankfurter would end up defining the sharp personality clashes and general Court dysfunction through three observations. According to Frankfurter, never before in the history of the Supreme Court had so many of its members reached "decisions by considerations extraneous to the legal issues that supposedly control decisions."[95] Additionally, Frankfurter believed that never before had so many members of the Court "acted contrary to their convictions," and had "so large a proportion of the opinions fallen short of requisite professional standards."[96] It would be a Court decision that many felt fell short of "requisite professional standards" that gained the Supreme Court notoriety the next year.

As a part of his concurrence with the majority decision in *Adamson v. California*, 332 U.S. 46 (1947), Frankfurter observed that it was not the Supreme Court's responsibility to impose all of the rights found in the Bill of Rights. Instead, the Court should ask the question, have "the criminal proceedings which resulted in conviction deprived the accused of the due process of law?"[97] Frankfurter believed that the "standards of justice are not authoritatively formulated anywhere," but "neither does the application of the Due Process Clauses imply that judges are wholly at large."[98]

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[94] Ibid., 84.
[95] Ibid., 137.
[96] Ibid.
[97] Ibid., 217.
[98] Ibid.

Frankfurter summarized his position of selective incorporation by explaining that "the judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and not to be based upon the idiosyncrasies of a merely personal judgment."[99] Frankfurter saw judging as a moving target rather than a stationary or fixed position from which to rule from. Urofsky described Frankfurter's philosophy behind this rational as allowing judges to "yield the right answer – not an objective, eternally fixed answer, but the right answer for the time."[100] Frankfurter did not see his position as moral relativism but providing judges the opportunity to "reflect the advances that society has made, so that the Due Process Clause does not mean fairness in terms of 1868 but fairness today."[101]

On the other hand, Black saw danger in leaving the law and the Constitution at the educated whim of the justices on the Supreme Court. For Black, at least total incorporation no longer left the definition of what rights met the "canons of decency and fairness" to the subjectivity of judges.[102] Black even went one step further, determining that not only had the Fourteenth Amendment intended to apply the Bill of Rights to all the states, but declared that Chief Justice John Marshall had "been wrong in ruling that [the Bill of Rights] did not" apply to the states.[103] Black's greatest contention was that if Supreme Court judges could strike down random state laws that they believed failed to meet "civilized standards," then constitutional law became the Court's view of

[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid., 218.
[103] Ibid., 87.

"civilization" at any given moment.[104] Black felt so strongly about "total incorporation" that he described his dissent in *Adamson* as the most important opinion of his career.[105]

Neither Black's nor Frankfurter's approach were without flaws. While Frankfurter's approach forced legal jurisprudence to become vulnerable to subjective evaluation, Black's approach did not do away with subjectivity either, because Black's "rigid adherence to the text led to a cramped view of individual liberty."[106] Black and Frankfurter's sharp disagreements concerning the application of the Bill of Rights made one conclusion obvious. When two justices can view the same historical evidence, hear the same arguments, draw opposing conclusions, and even disagree with the legal jurisprudence, the weight of personal preference and personal opinion decided rulings. Black's concern for the ever increasing amount of personal opinion and preference, as well as the need to modernize the Bill of Rights led to his landmark majority opinion in *Everson v. Board of Education*, 330 U.S. 1 (1947).

Everson v. Board of Education

Historian Sarah Barringer Gordon in her book, *The Spirit of the Law: Religious Voices and the Constitution in Modern America*, observed that the first time the Supreme Court applied the Establishment Clause was the *Everson* decision.[107] The *Palko* decision had already established that all the protections of the First Amendment, including the Establishment and Separation Clauses, applied to the states. The Court established this application even though it was the intent of the Framers, and then later upheld by Chief

[104] Ibid., 214.
[105] Ibid., 215.
[106] Ibid., 219.
[107] Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (Cambridge: Harvard University Press, 2010), 60.

Justice Marshall and the Supreme Court through the *Barron* decision, that the restraints of the Bill of Rights applied only to the federal government.

Everson was a bare majority ruling in favor of the minority plaintiffs, and it fell to Justice Black to draft the majority opinion. This opinion became the basis for widespread ridicule, an opinion that Gordon describes as an "object of criticism, even derision."[108] The most controversial aspect of this decision was not the ruling itself but the way in which Justice Black framed the opinion. In justifying his opinion, Black invoked Thomas Jefferson as a source for understanding constitutional text.[109] Drawing on Jefferson's legacy as a Virginia state legislator, his foundational role in the disestablishment of religion in that state, and a prominent supporter behind the movement for the adoption of the Bill of Rights, Black used Jefferson to tie the Founding Fathers to his opinion in *Everson*. Black felt that the function of the judicial branch should be the same as that of the legislative branch, "to protect society's weakest members from political and economic exploitation."[110] Through his opinion in the *Everson* ruling Black fell in line with his jurisprudence, but his history did not.

Two main issues exist that make *Everson* so controversial. The first is the rationale behind Black's opinion. As Urofsky stated, "Black went on to write a brilliant exposition of the historical forces that had led to the adoption of the First Amendment, and his opinion leads the reader to expect him to uphold the New Jersey statute constitutional," and then he upholds the opposing position.[111] In his opinion, while

[108] Ibid., 64.
[109] Ibid., 65.
[110] Hockett, *New Deal Justice*, 95.
[111] Urofsky, *Division*, 232.

writing his definition of the Establishment Clause, Black explained that, "the establishment of religion clause of the First Amendment . . . in the words of Jefferson . . . was intended to erect 'a wall of separation between church and state.'"[112] In concluding his opinion Black reaffirmed his previous position stating that, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[113] For the duration of his opinion Black proved everything that he was trying not to say. Urofsky described it as, "Black, after marshaling every argument in favor of a total separation of church from state, weakly allowed that no breach of the wall had occurred."[114]

The second issue was Black's appeal to Thomas Jefferson as his link back to the Founding Fathers. In doing so, through the eyes of conservative and religious activists, Black made two fundamental mistakes. The first was that Jefferson is not a great source for understanding the "constitutional text." In previous rulings, Black had pointed to the intent of the framers as support for his decisions and chastised fellow justices for "engaging in constitutional revision."[115] The irony being that despite being an advocate for the intentions of the Framers, Black's watershed opinion was made via the words of a Founding Father who was not a framer of the Constitution or the Bill of Rights. Secondly, the justification for his definition of the Establishment Clause is not a reference to any state legislation, but a subjective personal letter between Jefferson and the

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[112] Paul J. Weber, ed., *Equal Separation: Understanding the Religion Clauses of the First Amendment* (Westport: Greenwood Press, 1990), 127.
[113] Ibid.
[114] Melvin I. Urofsky, *Religious Freedom: Rights and Liberties under the Law* (Santa Barbara: ABC-CLIO, Inc., 2002), 60.
[115] Hockett, *New Deal Justice*, 127.

Danbury Baptist Church. Drakeman contends that Black, "simply used mandates from historical records or sought out and used facts that justified [a] case he had already pre-decided,"[116] describing Black as the "Supreme Court's chief practitioner of law office history."[117]

Both the context of the letter to the Danbury Baptists and the meaning of the wall separating church and state have come under more and more scrutiny over time. Both religious and secular proponents alike have been jostling for leverage and relief concerning the exact meaning and definition of this statement. At face value what Justice Black and the Supreme Court's intentions were concerning these words, as well as the intentions of the Founding Fathers, remains unclear. The exact meaning of the wall became clearer when Justice Black expounded that this separation must be "kept high and impregnable. We could not approve the slightest breach." Yet the *Everson* opinion from the outset created more confusion, accusations, and misunderstandings concerning what the Supreme Court meant and how its ruling should be enforced when considering issues of religion.

In *Religious Freedom and the Constitution,* Provost of Princeton University Christopher L. Eisgruber and law professor Lawrence G. Sager explained that the high, impregnable, and un-breachable wall was failing to serve the Court as needed. Eisgruber and Sager believed that the metaphor "can never provide a sensible conceptual apparatus for the analysis of religious liberty,"[118] since in practical reality the wall should be "raised

[116] Drakeman, *Church, State, and Original Intent*, 148.
[117] Ibid., 79.
[118] Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007), 23.

in some places and lowered in others. Or that it should have holes in it."[119] Ultimately though, they came to the conclusion that the Supreme Court's definition needed to be restated.

Like many others, Eisgruber and Sager believed the fundamental problem with constitutional rulings concerning religious issues was that they are somewhat arbitrary, occasionally inconsistent, but they do not follow a clear or distinguishable line of reason or principle. According to Eisgruber and Sager, the idea or possibility of true separation needed to be removed from people's understanding of religion and government. Instead, they believed that true separation is a misleading perception and expectation in light of how much the state and religion are entwined. Levy further emphasizes this idea pointing out that "the Establishment Clause, like any other controversial clause of the Constitution, is sufficiently ambiguous in language and history to allow few sure generalizations."[120] Levy further adds that "no scholar or judge of intellectual rectitude should answer establishment-clause questions as if the historical evidence permits complete certainty."[121]

Eisgruber and Sager believed that the idea of "Equal Liberty" provided the best possible alternative to evaluate church and state relations easily, without having to take into account perceived biases either for or against religious petitions. Equal liberty meant replacing the concept of separation when dealing with church and state issues from the public lexicon, and replacing it with the use of the term equal liberty. Equal liberty sought to offer "fair terms" which guaranteed that a person's religious needs would be

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[119] Ibid., 22.
[120] Levy, *The Establishment Clause*, xxi.
[121] Ibid., xix.

accommodated on the same terms as comparably nonreligious needs. While equal liberty may have seemed prudent and even practical, the phrase fell short of its intended goal because it ultimately did not resolve the root issue of the problem, the unique position the Constitution affords religion over other liberties. Replacing the arbitrary wall of separation with equal liberty may provide a sharper, distinct and more pragmatic understanding of church and state issues, while also helping to solve some problems; yet, it may in turn, also created new ones.

According to the First Amendment of the Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Equal liberty would have also moved against the tide of current First Amendment jurisprudence which has sought to protect the rights, and in many cases the practices of religious groups. Unfortunately for Eisgruber and Sager, the Constitution does not protect the establishment and free exercise of nonreligious convictions, unlike religious convictions which are protected.

Religious organizations and people rely on the state for both opportunities and protection. To try and separate them is both foolish and impossible. The whole point of having religious freedoms and rights protected by the Constitution is because the Founding Fathers, regardless of their opinions on religion, knew that the needs of religion are unique and separate from those of other institutions and individuals. Another problem Urofsky points out is that by protecting the rights of those who do not believe in the use of religion in civic events, are not the courts "treading on the right of those who continue to believe that religion plays a necessary and legitimate role in civic society?"[122]

[122] Urofsky, *Division*, 8.

Religion is far more intertwined in American culture than Black's *Everson* ruling suggests. The Founding Fathers and American presidents have petitioned to God throughout American history. It is to God as "the Supreme Judge of the world" that Thomas Jefferson appealed the just intentions of the "Representatives of the United States of America" in the Declaration of Independence.[123] Jefferson also appealed to God when he declared that all men are created equal, "endowed by their Creator with certain unalienable Rights" of which are "Life, Liberty and the pursuit of Happiness."[124] Finally, it is to God again that Jefferson looked for support of the Declaration, and to "divine Providence" that Jefferson and his contemporaries would mutually pledge to each other "our Lives, our Fortunes and our sacred Honor."[125] It would be four score and seven years later, after the horrendous bloodbath at the Battle of Gettysburg, that President Abraham Lincoln would give his famous Gettysburg Address. In this address on November 19, 1863, Lincoln, while invoking the previous work of the Founding Fathers, would pledge to those around and future generations that America "under God" would provide "a new birth of freedom and that government of the people, by the people, for the people, shall not perish from the earth."[126] Finally, it was President Roosevelt who in 1944, a mere three years before the *Everson* ruling, would call "the Nation into a single day of special prayer" to "Almighty God."[127] On June 6, 1944, a day of national trepidation brought on by the invasion of Normandy, France, during World War Two,

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[123] *The Declaration of Independence*.
[124] Ibid.
[125] Ibid.
[126] Abraham Lincoln, *Gettysburg Address*, November 19, 1863.
[127] Franklin D. Roosevelt, *D–Day Radio Prayer*. June 6, 1944. Congressional Record, Volume 153, Part 11, June 6, 2007 to June 15, 2007, (Washington D.C.: Government Printing Office, 2007).

Roosevelt would ask "Almighty God . . . to preserve . . . our religion," asking the people of the United States to "let words of prayer be on our lips, invoking Thy help to our efforts."[128] Roosevelt would also ask "Lord, give us Faith. Give us Faith in Thee," and concluded with the solemn request, "Thy will be done, Almighty God. Amen."[129]

Religion has played a far more prominent role in America's history, and influenced American society than the arbitrary delineation that a "high and impregnable" wall of separation between church and state suggests. From the father of "separation" Thomas Jefferson, to Abraham Lincoln to Franklin Delano Roosevelt, prominent men of historical importance as well as common citizens, have all called on God and invoked the weight of God's name and stature to support their opinions. The historical influence of religion cannot be denied; however, its universal appeal certainly cannot be agreed upon either.

In 1953, Justice Frankfurter when asking the other Supreme Court justices to consider the civil rights cases before them, requested that they address, among others, the following question: What was the "congressional intent in the drafting of the Civil War amendments?"[130] When discussing cases concerning religion, the Court should also consider the congressional intent of the drafters of the First Amendment. In asking this question two conclusions are likely to be reached. First, it will become obvious that no single solution or universal answer to what the Founding Fathers meant existed when they crafted the First Amendment. As Levy points out, "the framers and the people of the United States, whose state legislatures ratified the clause, probably did not share a single

[128] Ibid.
[129] Ibid.
[130] Urofsky, *Division*, 261.

understanding" concerning the exact meaning of the First Amendment.[131] Secondly, it will be equally obvious that a "wall of separation between church and state" was not the congressional intent of the Founding Fathers either. Again Levy weighed the argument concluding that "scholars and judges who present an interpretation as the one and only historical truth, the whole historical truth, and nothing but the historical truth delude themselves and their readers."[132] As Dreisbach contended, the Supreme Court's elevation of the saying "separation of church and state" to a virtual rule of constitutional law neglected the historical context of the saying.[133] He further speculates that the debate surrounding church and state may not be any different if the wall had not been introduced, but it might have "created a more honest debate; instead 'wall' ceased any critical analysis and reevaluations."[134]

After the work of the Founding Fathers establishing the country, property rights became the single biggest legislative and legal issue for a century. Through the Industrial Revolution and then the Great Depression, the legal stage was set concerning the shift from property rights, to individual liberties, and in particular those concerning minority groups. The *Palko* opinion laid the foundation for incorporation while the *Carolene Products* footnote signaled the Court's shift in focus. For the Stone Court, the onset of World War Two would result in a brief hiatus as both the United States military and the federal government sought to strengthen America's fighting position from the inside and out. At the conclusion of the war the postwar agenda became dominated by the views

[131] Levy, *The Establishment Clause*, xix.
[132] Ibid.
[133] Dreisbach, *Thomas Jefferson*, 127.
[134] Ibid., 217.

and opinions of both Justices Black and Frankfurter. Such views would be based on personal subjectivity as much as legal jurisprudence. It would be Black who would leave the longest lasting legacy concerning the state and religion with his *Everson* opinion. Mocked and derided from the outset, *Everson* has since become one of the most quoted and misunderstood opinions in Supreme Court history. Inconsistent religious jurisprudence and an oversimplified historical understanding of the religious views of the Founding Fathers, have become a product of judicial subjectivity and the "benefactor" of the *Everson* legacy.

CHAPTER II

RELIGION AND THE FOUNDING FATHERS

Unlike any other clause within the Constitution since its ratification, the First Amendment clause concerning the establishment and free exercise of religion has garnered more debate, disagreement, controversy, and division than any other piece of literature left by the Founding Fathers. Historians, including both Leonard Levy and Daniel Dreisbach, agree that attaching a single understanding to the Establishment and Free Exercise clauses of the Constitution, like the *Everson v. Board of Education,* 330 U.S. 1 (1947), decision did, is both neglectful and delusional.[1] Even more astonishing is that the United States Supreme Court itself has stated through the words of Associate Justice John Rutledge that "no provision of the Constitution is more closely tied to or given context by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history."[2] Given that both historians and Supreme Court justices alike agree that the historical context is both important and fundamental to understanding the meaning of the Establishment and Separation Clauses, it is wise to examine both the historical context surrounding the

[1] Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (Chapel Hill: The University of North Carolina Press, 1994), xix; Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State* (New York: New York University Press, 2002), 127.
[2] Mark A. Noll, *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), xvi.

revolutionary era, the early years of federal governance, as well as any personal opinions that can be gleaned through the writings and correspondence of the Founding Fathers themselves. In doing so it may be possible to gain a more holistic understanding of what the intentions and limitations of the religious clauses of the First Amendment were for that generation.

The historical legacy of religion in American history is long and complicated. These historical complications are due to the diversity of denominations established throughout the different colonies as well as the varying degrees of political influence they welded over time. Additionally, individual colonists, including the Founding Fathers, each professed and practiced their religious beliefs in a multitude of different ways. Consequently, it has been impossible for historians to illustrate the religious climate throughout the colonies, and the individual states, in one sweeping characterization. Unlike historians, the United States Supreme Court defined the religious atmosphere and opinions of the late eighteenth century. Through the *Everson* decision the Supreme Court provided a template by which it could decide subsequent decisions concerning religion. The *Everson* template defined the First Amendment religion clauses by establishing the separation of church and state through a "high, impregnable, and un-breachable wall."[3] Despite the *Everson* decision, however, the Court has been unable to decide religion cases by applying a simple rubric. Such an application has been impossible because of the girth of historical evidence, including the writings and religious convictions of the Founding Fathers, historical documentation, and the diverse opinions of the colonists

[3] *Everson v. Board of Education*, 330 U.S. 1 (1947).

themselves, all of which have compounded the Court's inability to provide clear, consistent, and accurate decisions.

Religion within the American colonies of the mid to late eighteenth century was a tapestry of traditional religious practices established since the founding of the colonies, infused with the constant influx of new religions and denominations as more immigrants arrived from Europe. By the seventeenth century the marriage between church and state had been established with many colonies requiring taxpayers to pay taxes in support of the local church.[4] Although the practice was the same, the churches or denominations receiving support varied from region to region. In Virginia colonists supported an established church, the Church of England, while in New England colonists provided support to the Congregationalist Church. In addition to state sponsorship, various appointments to public office required at minimum an affirmation of faith while other colonies required the passing of a religious test. The first real challenge to these centuries old European practices was the religious explosion that came to be known as the First Great Awakening during the 1730s and 1740s.

The First Great Awakening destroyed any preconceived ideas of establishment understood throughout all the colonies by the early settlers. This religious awakening effected many colonists disassociated with or discouraged by the many preexisting large denominations, in particular the Church of England. As a consequence, many of these new religious converts sought validation for both their experiences and their beliefs. When old churches could not or would not cater to the needs of these new believers,

[4] Joseph Bondy, *How Religious Liberty was written into the American Constitution: A History* (Syracuse: Oberlander Press, 1927), 10.

colonists formed new churches.[5] Many new and marginal Christian denominations began to form such as the Baptist and Methodists, and then saw their ranks swell with numbers. Accordingly, by the middle of the eighteenth century, the term "establishment of religion" meant little more than public financial support and civic preference for one denomination.[6]

The Great Awakening itself was short-lived, being over by the late 1740s, with the notable exception of Virginia. Within Virginia the Awakening persisted into the 1760s and 1770s, where it exerted significant influence surrounding both the politics and the rhetoric leading up to the American Revolution.[7] In order to cater to and take advantage of this religious persistence much of the political literature of the 1760s and 1770s was either written by clergy or emphasized religious themes.[8] Following the outbreak of the American Revolution, stark differences between traditions, religious toleration, and religious liberty, began to emerge throughout the various colonies.[9]

One of the first battles to be fought was the ideological difference between religious tolerance and religious liberty in Virginia.[10] During the drafting of the 1776, *Virginia Declaration of Rights*, a young James Madison persuaded George Mason to amend the wording of the document. Madison argued that the wording should be

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[5] John F. Wilson, *Church and State in American History* (Boston: D. C. Heath and Company, 1965), 33.
[6] Ibid.
[7] Frank Lambert, *The Founding Fathers and the Place of Religion in America* (Princeton: Princeton University Press), 157.
[8] Gary Scott Smith, "Samuel Adams: America's Puritan Revolutionary," *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), 50.
[9] Thomas J. Curry, *Farewell to Christendom: The Future of Church and State in America* (New York: Oxford University Press, 2001), 28.
[10] Bondy, *How Religious Liberty*, 8.

changed from, "all men should enjoy the fullest toleration in the exercise of religion,"[11] to the more liberty and rights minded wording of, "all men are equally entitled to the free exercise of religion."[12] This single word "free" or freedom moved religion from the category of "legislative grace,"[13] to an inalienable right through which everyone has "an absolute right to believe and worship a Supreme Being in his own way regardless of how the other man believes; or he may not believe at all."[14] This action by Madison set a precedent for his work towards religious liberty which, in time included the 1785 penning of *Memorial and Remonstrance against Religious Assessments*.[15]

While Virginia worked through its own legislative understanding of religious freedom, revolutionaries in New England worked with equal fervent, but reached different results. In Massachusetts the notion of freedom of religion came to mean "no more than toleration and the absence of government coercion."[16] Massachusetts defined religious freedom in negative terms meaning that the "government could promote religious belief as long as it did not force anyone to accept it."[17] This distinct difference from the Virginian understanding of religious freedom became evident when taking into

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[11] Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* (New York: Random House, Inc., 2006), 69.
[12] Ibid.
[13] A right allowed or granted permission to an individual or group that is not legally required to be given; and can subsequently be revoked if necessary.
[14] Bondy, *How Religious Liberty*, 9.
[15] Thomas E. Buckley, "Patrick Henry, Religious Liberty, and the Search for Civic Virtue," *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), 130.
[16] Curry, *Farewell to Christendom*, 34.
[17] Ibid., 32.

account Massachusetts' state sponsorship of the Congregational Church well into the 1800s.[18]

The legal infrastructures concerning religious freedom were done through the collaborative efforts of a variety of men, many of whom are referred to as the Founding Fathers. However, over time scholars have placed a greater emphasis on certain founders' thoughts, words, and deeds, while ignoring a large company of forgotten men and women who made "salient, consequential contributions to the construction of the American republic and its institutions."[19] While it is both impossible and impractical to try and ascertain the religious perspective of every Founding Father, it is necessary to try and understand the religious opinions of some of the more influential but lesser known founders. As a result of their geographical diversity and their personal convictions, it is possible to gain a greater understanding of the religious complexities during the revolutionary era.

In many ways George Washington personified the religious climate of the late 1700s. Washington attended the Anglican Church; however, he refused to take communion.[20] He often referred to God in his correspondence, using the term "divine providence," as well as lesser known terms like "The Grand Architect," "Superintending Power," "Governor of the Universe," and "Great Ruler of Events."[21] Washington employed such terms when he referred to the passage that the United States had travelled

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[18] Ibid.
[19] Noll, *The Forgotten Founders*, xiii.
[20] For reasons unknown.
[21] Edwin Gaustad and Leigh Schmidt, *The Religious History of America: The Heart of the American Story from Colonial Times to Today* (New York: HarperCollins Publishers, 2004), 132.

through the Revolution, or when addressing the country as president.[22] Washington also supported religion as a means of fostering both patriotism and morality, warning in his farewell address, "that one who labors to subvert a public role for religion and morality cannot call himself a patriot."[23]

While some historians have claimed to have found no trace of Biblical references in Washington's writings, "even a cursory review of Washington's papers reveals scores of quotations from and unmistakable allusions to the Bible."[24] Despite the many uses of and references to God and the name of God, no clear evidence exists to suggest that Washington was an orthodox Christian. Despite calling for a national day of prayer while in office, Washington is never once recorded referring to Jesus as God. Rather, Washington condoned the blending together of church and state as long as it came from personal conviction and served the greater good.

Washington's first Secretary of the Treasury, Alexander Hamilton, had a long and remarkable record as a Founding Father. He had a distinguished Revolutionary War military career in his own right before serving as Chief of Staff for General Washington. After the war Hamilton served as a delegate to the Constitutional Convention, signed the Constitution, became one of three authors of the *Federalist Papers*, and served as the nation's first Secretary of the Treasury.

Throughout his life Hamilton never affiliated himself with any particular church or religious denomination. His religious beliefs do not fit into either of the two accepted

[22] Ibid.
[23] Noll, *The Forgotten Founders*, xiii, xiv.
[24] Ibid., xiv.

categories for the period: Deism and Christianity.[25] Instead, evidence supports the likelihood that Hamilton was most likely a "theistic rationalist,"[26] who opposed "particularist religion and supported toleration – even equality – of religions."[27] Hamilton viewed religion as a whole as one of the "venerable pillars that support the edifice of civilized society."[28]

Like many of his peers, Hamilton saw the merits of organized religion often tying religion to causes which he supported. Hamilton attempted to use religion as a tool to prevent Jefferson from being elected president in 1800. In his 1796, *Phocion* essays, Hamilton linked Jefferson with the atheism of the French Revolution.[29] Additionally, he tied religion to America's patriotic cause, exclaiming that, "in vain does that man claim the praise of patriotism who labours to subvert or undermine these great pillars of human happiness [religion and morality]."[30] Despite his personal indifference to organized religion, Hamilton still recommended "a day of fasting, humiliation and prayer" by the national government. Hamilton believed that such actions were "politically useful," "very expedient," and "proper," further suggesting that the government would be "very unwise, if it does not make the most of the religious prepossessions of our people."[31]

Patrick Henry also had a distinguished career as a patriot and a politician throughout the late 1700s. Unfortunately, he was one of the many Founding Fathers who

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[25] Gregg L. Frazer, "Alexander Hamilton, Theistic Rationalist," *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), 101.
[26] Ibid.
[27] Ibid., 114.
[28] Ibid., 114.
[29] Ibid., 109.
[30] Ibid., 110.
[31] Ibid.

did not "save his mail," thereby limiting the evidence concerning his views on both church and state. From the various forms of correspondence he did leave it is known that Patrick Henry was "a traditional Anglican and apparently became even more devout in his later years."[32] His final will and testament concluded, "This is all the inheritance I can give to my dear family. The religion of Christ can give them one which will make them rich indeed."[33]

Despite his own personal beliefs, Henry saw religion as an institution that could be used for the greater good of society. In the 1790s, Henry wrote a letter to Archibald Blair in which he shared his belief that only "virtue, morality, and religion" would protect America.[34] Henry saw immense value in organized religion, believing the church to be an "essential prop for civic virtue in the new republic."[35] Possibly the most insightful view of Henry concerning religion and government was his stance against the ratification of the Constitution. Henry would not support the proposed 1787 Constitution because it did not state that the new federal government could not interfere with religious thought and activities.[36] While it is probable that Henry believed religion could be used or supported by the government to promote national virtue and morality, it is clear that Henry did not believe that the government should have any influence over religious beliefs or its practices.

[32] Buckley, "Patrick Henry," 140.
[33] Ibid., 139.
[34] Ibid., 140.
[35] Ibid.
[36] Bondy, *How Religious Liberty,* 53.

George Mason also left a scant paper trail concerning issues surrounding church and state. Mason supported freedom of religious conscience.[37] He served as the principal draftsman of the 1775 *Virginia Declaration of Rights*,[38] and "was a pivotal figure in the struggle to craft a distinctively American doctrine of religious liberty and church-state relations for both the commonwealth and the nation."[39] As a result of these experiences George Mason, in good conscience, could not support the ratification of the Constitution because it did not guarantee that religion would be free from state control or influence.[40]

Few Founding Fathers possessed a more overt and genuine faith than Samuel Adams. Unfortunately, like many other Founding Fathers, his opposition to the ratification of the Constitution, and consequent labelling as an Anti-Federalist, left him on the wrong side of history. As a consequence, historians have overlooked Adams' political views in addition to his religious convictions. Despite this historical oversight, Adams was still one of the most energetic patriots before, during, and after the Revolution.

Adams saw the hand of God within the actions of the Revolution and he sought to display the same guidance in his personal and political life after the war ended. Unlike many Founders, "Adams' Christian convictions are especially evident in his views of church-state relations."[41] For Adams these views meant not only living by his Christian

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[37] Ibid., 28.
[38] Daniel L. Dreisbach, "George Mason's Pursuit of Religious Liberty in Revolutionary Virginia," *The Founders on God and Government*, ed. Daniel L Dreisbach, Mark D. Hall and Jeffry H. Morrison (Lanham: Rowman & Littlefield Publishers, 2004), 210.
[39] Ibid., 207.
[40] Bondy, *How Religious Liberty*, 53.
[41] Smith, "Samuel Adams," 47.

convictions, but displaying these convictions while in office. Consequently, Adams sought to use his elected office to promote his personal religious convictions, often signing many of his essays "a religious politician."[42] As an individual of faith, Adams' declared his reliance "on the merits of Jesus Christ for the pardon of all my sins,"[43] and who's goal, by his own admission, was "to promote the spiritual kingdom of Jesus Christ."[44] Like many other Christians immersed in the struggle of Revolution, Adams expected that God would "erect a mighty empire in America" characterized by "biblical morality, manners and zealous efforts to spread liberty and Christianity to the world."[45]

Throughout the Revolution, Adams marshalled religious arguments to "justify American independence and trumpeting God's providential assistance of the patriot's cause."[46] Adams called for national days of fasting and prayer to "seek the Lord," and in doing so, helped give the American Revolution the character of a moral and religious crusade.[47] Once the war was over, he sought opportunity to serve God and His divine aims as a political leader all the while becoming even more "conservative, devout, and dedicated to Puritan principles as he aged."[48] While holding office as governor of Massachusetts "he repeatedly urged individuals to repent of their disobedience to God's laws," and accept His "gracious and free pardon" through Jesus Christ, while actively working to spread Christianity and build God's kingdom throughout the world.[49] Adams

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[42] Ibid., 46.
[43] Ibid.
[44] Ibid.
[45] Ibid., 50.
[46] Ibid., 54.
[47] John C. Miller, *Sam Adams: Pioneer in Propaganda* (Stanford: Stanford University Press, 1936), 84.
[48] Smith, "Samuel Adams," 46.
[49] Ibid., 57.

was not alone in his religious zeal, many other colonists supported an established church while defending "the free exercise of the rights of conscience."[50] At the Massachusetts Constitutional Convention in 1780, Adams proclaimed that every citizen had a "duty" to worship "the Supreme Being," and advocated for the "preserving of the Congregational Church as the state's established religion."[51]

Somewhat ironically, however, Adams opposed the organized church becoming involved in secular affairs.[52] Adams decried the joining of religious and civil power, protesting that such unions had "been fatal to the Liberties of mankind."[53] Additionally, Adams applied his religious liberties selectively. In *The Rights of the Colonists as Christians* (1772), Adams insisted that "all Christians except Papists" should be permitted to have their own worship services.[54] Like many other colonists at the time, Adams believed that Catholics, because of their allegiance to the Pope and their belief in "Doctrines subversive of the Civil Government," should not be granted religious freedom.[55] Samuel Adams served as both an advocate for Christianity and faithful politician to the American cause. For Adams, no sharp line existed between church and state. The absolute determination that he had was that the state should have no grounds or opportunity to interfere with the work of the church.

Unlike the Christian beliefs attributed to by his cousin Samuel, John Adams was not an orthodox believer of the tenants of the Christian faith. Instead, John Adams shared

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[50] Ibid., 47.
[51] David L. Holmes, *The Faiths of the Founding Fathers* (New York: Oxford University Press, 2006), 148.
[52] Smith, "Samuel Adams," 47.
[53] Ibid.
[54] Ibid., 48.
[55] Ibid.

similar doubts about traditional Christianity and Christian doctrine to those of Thomas Jefferson.[56] Religion fascinated Adams; he described God as "the Power that moves, the Wisdom that directs, and the Benevolence that sanctifies this grand and mysterious universe."[57] However, religion for Adams served more as a form of a moral compass than that of a saving grace, guiding light, or eternal promise. For Adams, Christianity was good as an ally to morality.[58] Writing during the Revolutionary War Adams described religion as an institution which could establish morality and "the principles upon which freedom can securely stand."[59]

Benjamin Franklin has become one of the most well-known and celebrated founders. By the time of the Revolutionary War and the subsequent drafting of the 1787 Constitution, Franklin had endeared himself to international dignitaries, his peers, and his fellow Americans. Franklin subscribed to Deism, a religious perspective more conducive to his intellectual abilities spawned during the Enlightenment.[60] Although Franklin did not maintain an orthodox perspective on religion, he "seemed to endorse stronger views of Providence and the efficacy of prayer than one might expect of a deist."[61] An example of this was when he proposed that the Constitutional Convention open with prayer before beginning its daily business.[62] Although Franklin held a skeptical view of religion, he

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[56] Gaustad, *The Religious History,* 133.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Lambert, *The Founding Fathers,* 159.
[61] Ibid., 160.
[62] John Witte Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder: Westview Press, 2000), 62.

had no objection with combining at least the perfunctory functions of state with the fundamental practices of religion.

Over time the political contributions of John Jay have become less conspicuous. Like many less prominent Founding Fathers, Jay possessed an active and successful political life and he held strong religious convictions. Jay never expressed his political or religious thoughts in essays and decrees; instead, most of what is known about Jay's views on church and state has been gleaned through "his polemical writings" where he argued for the benefit of a specific policy or political decision.[63]

At first glance, Jay's views on religion and politics often appear confusing or conflicted. However, upon further investigation his actions fall in line with his own convictions and are consistent with the thoughts of most Americans of his era. Jay was a committed Protestant with his words and deeds suggesting a strong preference for orthodox Christianity.[64] Like many Americans, he viewed both virtue and religion as cornerstones of a good life,[65] while working to limit the effect and impact of the Roman Catholic Church from the political process.[66]

The perceived inconsistency of Jay's personal opinion on faith and politics can be understood in some of his more public decisions. As a member of the First Continental Congress, Jay was unsure of the legitimacy of letting clergy open sessions with prayer,[67] while as governor of New York, Jay took the unprecedented step of issuing an official

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[63] Jonathan Den Hartog, "John Jay and the 'Great Plan of Providence,'" *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), 154.
[64] Ibid., 150.
[65] Ibid., 151.
[66] Ibid., 155.
[67] Ibid.

Thanksgiving Day proclamation.[68] That proclamation obligated "the entire community to give thanks and join in prayers."[69] At face value, the questioning of prayer to open political sessions while issuing a thanksgiving proclamation is contradictory. For Jay, the issue of prayer at the Continental Congress was not a question of separating church and state, it was an effort of conscience to not offend another denomination of the Christian faith.[70] In fact as Chief Justice of the United States Supreme Court and as governor of New York, Jay worked to integrate church and state by earning Christianity a "more robust place" in the public sphere.[71]

Like many Founders, Jay became concerned with the moral direction of the new republic. While the promulgation of Protestant Christianity was always foremost in Jay's mind, he also turned to Christianity as a means of moral guidance for the nation. Jay believed that moral virtue could be asserted through Christianity as the most effective means to ensure successful and peaceful governance. According to Jay, it was impossible to "maintain both order and freedom, both cohesiveness and liberty apart from the moral precepts of the Christian Religion. Should our Republic ever forget this fundamental precept of governance, we will then, be surely doomed."[72] Unfortunately, further examination of Jay's thoughts on church and state has been limited because many of Jay's letters and papers were destroyed at his own request after his death. What can be

[68] Ibid., 163.
[69] Ibid.
[70] Ibid., 155.
[71] Ibid., 146.
[72] Joseph Loconte, *Why Religious Values Support American Values*. The Heritage Foundation, http://www.heritage.org/research/lecture/why-religious-values-support-american-values. [accessed May 12, 2013].

discerned is that Jay's views on religion and politics were not exclusive; instead, one was used to help support the other in the promotion of both the Gospel and good citizenry.

A religious man of devout Christian faith since his childhood, Benjamin Rush committed himself to the establishment of a Christian republic.[73] For Rush, such an understanding moved far beyond evangelism as he sought to use Christianity to help cultivate the "principles, morals, and manners" of American citizens.[74] According to Rush, a Christian nation needed to confront and resolve many of the contentious political issues including abolition, temperance, the elimination of the death penalty, humane treatment of criminals and the insane, as well as educational reforms, including female education. Rush believed that the only method to deal with these issues was with religious thought and judgment, appealing to the convictions of both the average American and civic leaders.[75]

As a consequence of such beliefs, Rush became one of the most avid supporters of the union between church and state. He believed that by placing Christianity at the foundation of a republican education, state officials could defuse both the problem of trying to infuse revolutionary zeal into republican virtue as well as promoting the present religious fervor associated with religion and Christianity into republicanism.[76] Rush believed that "a Christian cannot fail of being a republican,"[77] reinforcing his own belief that the main purpose of education was to train "men, citizens, and Christians" rather than

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[73] Robert H. Azbug, "Benjamin Rush and Revolutionary Christian Reform," *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), 244.
[74] Ibid., 221.
[75] Ibid., 227.
[76] Ibid., 230.
[77] Ibid., 232.

"scholars."[78] For Rush, education constituted a means to an end. Religion was not the subject itself that needed to be promoted. Instead religion provided the vehicle through which republicanism could be promoted and the many social ills of the period could be addressed. Rush never saw the union of church and state through education as a conflict of interest; rather, he saw one as a compliment to the other with the end result being the promotion of republican virtue and morality.

Thomas Paine was a steadfast Deist to the day he died. Paine's deism could not "account for the reality of moral evil," and so he advocated for religious liberty and freedom as a means to providing the "moral bedrock" for a free society.[79] Though raised in both the Church of England and as a Quaker, Paine never embraced the faith of his parents, choosing instead to first dismiss religion, before distaining institutionalized religion altogether.[80] A gifted writer, Paine's first great literary success was the 1776, revolutionary pamphlet known as *Common Sense*. Though unimpressed with religion, Paine was both wise and shrewd enough to understand that, "arguments couched in biblical authority carried greater weight with believers than those based on mere mortal authority," and so he laced *Common Sense* with Biblical references and arguments.[81]

Historians describe Edmund Randolph as a "central actor in Virginia's revolutionary and constitutional politics from the 1770s to the 1790s," attending the Constitutional Convention and upon his retirement in 1795, he wrote *History of*

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[78] Ibid.
[79] David J. Voelker, "Thomas Paine's Civil Religion of Reason," *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), 189.
[80] Thomas P. Slaughter ed., *Common Sense and Related Writings* (New York: Rutgers University, 2001), 4.
[81] Ibid., 34.

Virginia.[82] Like many of his contemporaries, Randolph's spiritual journey evolved over time. Randolph's family had an established tradition of religious heterodoxy. Beginning in his childhood with Unitarianism before moving onto the Church of England, then concluding his spiritual journey at the new Protestant Episcopal Church.[83] Unfortunately Randolph left behind few personal papers, and his official correspondence is "not especially revealing of the influence of religion on his political thought."[84] In *History of Virginia*, however, it is possible to extrapolate some of Randolph's thoughts concerning the relationship between religion and state.

Randolph supported disestablishment but not as a result of the same convictions as deists like Jefferson.[85] Randolph believed that Jefferson's ardent support of religious toleration was because of his strong belief in deism.[86] For Randolph, religious establishment was undesirable because it produced indolent clergy whom he described as men who "delighted rather in the lethargy of fixed salaries than in the trouble of thought, learning, and research."[87] For Randolph, he favored disestablishment because he felt it would better promote commitment to religious devotion in Virginia.[88] In 1786, the Virginia House of Burgesses passed Jefferson's "Bill to Establish Religious Freedom," with the support of Madison and a coalition of minority religious groups, including the

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[82] Kevin R. Hardwick, "Anglican Moderation: Religion and the Political Thought of Edmund Randolph," *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), 196.
[83] Ibid.
[84] Ibid., 203.
[85] Ibid., 211.
[86] Ibid.
[87] Ibid., 211, 212.
[88] Ibid., 212.

Baptists and the Presbyterians.[89] Randolph made clear, however, that the bill was not passed to force a clear separation between church and state, but rather to combat the clear favoritism shown to the Church of England by the state government.[90] For Randolph, the role of religion constituted an important path to the successful development of a growing nation.

Thomas Jefferson's views on religion are the most prominent of all the Founding Fathers. Great fanfare has been made of his strong views as a Deist, and even more people are familiar with his even stronger convictions concerning the separation of church and state. Characterizing Jefferson's religious views within these two parameters, however, limits both the full contribution Jefferson brings to the church and state debate, and excludes other arguments that help to contextualize the religious climate of his day.

Jefferson never felt that the federal government had any authority concerning religious affairs. Writing in his 1785, *Notes on the State of Virginia*, Jefferson argued that the rights of conscience of an individual could not be surrendered to civil authority,[91] a position he further emphasized in his 1803, letter to the Danbury Baptists by declaring that, "the legislative powers of government reach actions only, and not opinions."[92] Furthermore, Jefferson stated that "Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human

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[89] Ibid., 211.
[90] Ibid.
[91] Timothy L. Hall, *Separating Church and State: Roger Williams and Religious Liberty* (Chicago: University of Illinois Press, 1998), 129.
[92] John F. Wilson and Donald L. Drakeman, *Church and State in American History*,3rd ed. (Boulder: Westview Press, 2003), 74.

authority."[93] Needless to say, while this power rested with the states, Jefferson believed it was not the domain of the states to dictate how this power was used or abused, noting that "state support of religion inevitably corrupts religion."[94]

Jefferson believed that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing of him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness."[95] Instead, religious freedom should be safeguarded by the state in order that every person should be able to worship with a free conscience since every person was answerable for themselves before God.[96]

These arguments are not based on any political or theological conviction outside of Jefferson's own opinion and his "little sympathy for religious institutions and their priests."[97] Like many Deists, Jefferson found the orthodox beliefs of Christianity to be untenable and incongruent to his moralistic and reasoned approach to religion. Instead, Jefferson understood Christianity as a set of "conniving priests" who misconstrued and misinterpreted the teaching of Jesus as to leave his true doctrines as a series of "mysticisms, fancies, and falsehoods."[98] Additionally, Jefferson understood organized

[93] Ibid., 76.
[94] Hall, *Separating Church*, 125.
[95] Wilson, *Church and State*, 73.
[96] Hall, *Separating Church*, 129.
[97] Gaustad, *The Religious History*, 134.
[98] Ibid., 136.

religion to be far more concerned with profit and "power-hungry manipulators" than the morality of humanity.[99]

The most underappreciated aspect of Jefferson's religious opinions was his propensity to favor his own personal convictions above those of everyone else. A person can "fairly observe" that Jefferson's views concerning religious liberty were "remarkably hospitable to his own brand or religious experience and far less protective of the religious experiences of others."[100] The most famous example of this occurred at Monticello after his retirement. There Jefferson spent hours compiling the "Life and Morals of Jesus." From a careful examination of the New Testament in Greek, Latin, French, and English, Jefferson extracted verses that emphasized the ethical content of Jesus' teaching, cropping out all signs of the supernatural and miracles. He hoped to make Christianity "appear less the abstruse metaphysical system and more the clear moral code by which people could live."[101] Such beliefs and actions made Jefferson, while certainly a "brilliant mind and influential in establishing and administering the early republic," not even close to being representative of "either the mindset or the lifestyle of the average American."[102] Consequently, Jefferson's "dominance of First Amendment theory is historically untenable. There are persuasive grounds for believing that, if anything, the First Amendment owes more to evangelical passion than to Enlightenment skepticism."[103]

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[99] Ibid., 134.
[100] Hall, *Separating Church*, 131.
[101] Gaustad, *The Religious History*, 133, 134.
[102] Hall, *Separating Church*, 130.
[103] Ibid., 177.

While not as explicitly stated as other founders, Madison's personal views on religion can be pieced together through his personal correspondence. It is probable that Madison was not a Deist, despite his close friendship with Jefferson. Instead, Madison prescribed in some degree to the Christian faith. To William Bradford, Madison exhorted that a "watchful eye must be kept on ourselves lest . . . we neglect to have our names enrolled in the Annals of Heaven."[104] Madison also went to church, however, it is speculative to suggest his level of orthodoxy.[105]

The degree to which Madison believed religion should be immersed into politics is the most important issue. The first and most important observation that needs to be made concerning Madison's view on religion is that he envisioned freedom "*for* religion rather than a Jeffersonian freedom *from* religion."[106] This idea is critical to understanding the meaning behind the First Amendment as it pertains to religion. Unlike Jefferson, Madison recognized that freedom of religion had to embrace more than mere opinion.[107] In his 1785, *Memorial and Remonstrance,* Madison expressed that it was the right of every man, to "exercise" his religion according to the dictate of his conscience, advocating for freedom "to embrace, to profess and to observe" whatever religion an individual believed to be of divine origin.[108]

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[104] James Madison to William Bradford, November 9, 1772, *The Letters and Other Writings of James Madison* (New York: R. Worthington, 1884), 5, 6.
[105] Steven Waldman, *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America* (New York: Random House Inc., 2008), 193.
[106] Hall, *Separating Church,* 135.
[107] James Madison, "A Memorial and Remonstrance," *The Mind of the Founder: Sources of the Political Thought of James Madison,* Marvin Meyers ed. (Hanover: University Press of New England, 1981), 8.
[108] Ibid., 10.

In addition to freedom *for* religion, Madison advocated freedom *of* religion. Madison believed that both the state and federal legislatures could not legislate, govern, or interfere with religious opinion or practices because it was the dictates of a man's conscience and convictions.[109] For Madison, "power over religion was not given to the government but rather reserved to the people themselves," consequently, Madison opposed the drafting of a Bill of Rights.[110] Madison believed it was unnecessary to prohibit the exercising of a power not granted to the federal government. In Madison's estimation the new government possessed not even "the shadow of right" to meddle in religion.[111] As Madison argued, "the same authority which can force a citizen to contribute three pence only of his property for the support of any establishment, may force him to conform to any other establishment in all cases whatsoever."[112] Therefore, just as the state should be unable to compel anyone to contribute money in support of religion, the government should equally have no power to regulate religion. The only caveat to this principle, Madison believed, was if the particular practices of a religion threatened the existence of the state itself.[113]

The wall of separation between church and state that Jefferson was so eager to establish did not materialize the same way, either in principle or in practice, for Madison. On a personal level Madison encouraged public officials to share their Christian beliefs, stating that men, "who occupy the most honorable and gainful departments and [who] are rising in reputation and wealth, publicly to declare their unsatisfactoriness by becoming

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[109] Wilson, *Church and State,* 72.
[110] Curry, *Farewell to Christendom*, 11.
[111] Ibid., 11.
[112] Wilson, *Church and State,* 69.
[113] Hall, *Separating Church*, 135.

fervent advocates in the cause of Christ."[114] This practice and encouragement of personal faith was not limited to public officials. Madison believed that it was the "mutual duty of all to practice Christian forbearance, love, and charity toward each other,"[115] in addition to endorsing public and official religious expressions by issuing several proclamations for national days of prayer, fasting, and thanksgiving.[116]

The history surrounding the wording of the First Amendment also challenges the separation theory. Madison's original proposal for the wording of the First Amendment was, "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established."[117] Such wording supported Madison's opposition to the establishment of a national religion or denomination, not the prohibition of public religious activities. He reemphasized this position throughout the debates surrounding the Bill of Rights and with his actions.[118] If Madison was in favor of a strict separation of church and state it is worth investigating why, in 1789, he served on the Congressional committee which authorized, approved, and selected paid Congressional chaplains,[119] and supported the distribution of Bibles using federal funds.

Madison's primary objective concerning issues of religion focused more on keeping the government out of religion as opposed to the more modern understanding that focuses on keeping religion out of government. Madison conceded, however, that trying to delineate the line of separation between religion and government was fraught

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[114] Madison, *The Letters*, 66.
[115] George Mason, *The Virginia Declaration of Rights, Section 16.*
[116] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (Published by Authority of Congress, 1899), 513.
[117] 1 Annals of Congress 451, (June 8, 1789).
[118] 1 Annals of Congress 729–759, (August 15, 1789).
[119] 1 Annals of Congress 109, (April 9, 1789).

with difficulty. Commenting on the problem, Madison stated that he, "must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points."[120] Madison further stated that the "tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the government from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others."[121] The significance of this last statement cannot be underestimated. Through it, Madison advocated not that religion should be removed from every sphere of political thought and action, but that the government itself should be prohibited from legislating or adjudicating on any religious issues outside of those that threaten public safety and nation security. Unlike Jefferson, Madison was a staunch advocate of freedom *for* religion rather than freedom *from* religion which Jefferson advocated.

While Madison and Jefferson hold the most preeminent positions concerning the modern interpretation of church and state, another Founding Father should be considered more authoritative than either of them. Unlike any other Founding Father, Roger Sherman holds a unique place in the annals of American history. Despite the fame surrounding Washington, Jefferson, Madison, and others, Sherman is the only Founding Father to sign the Declaration and Resolves (1774), the Articles of Association (1774), the Declaration of Independence (1776), the Articles of Confederation (1777, 1778), and

[120] Wilson, *Church and State,* 78.
[121] Ibid.

the Constitution (1787). Additionally, like Jefferson, he authored a significant state law concerning religious liberty; however, unlike Jefferson, he also participated in the debates over the exact wording and meaning of the First Amendment,[122] served as a judge on Connecticut's Superior Court, and was a member of the United States House of Representatives and the United States Senate. During his time in Congress, Sherman debated the Bill of Rights as it was being drafted,[123] and served on the committee with Madison which reconciled the House and Senate versions of the Bill of Rights.[124]

Roger Sherman was an "orthodox Christian" who adhered to the reformed theological tradition. Sherman, too, was both a proponent of religious liberty and thought it appropriate for states and the national government to promote Christianity.[125] Sherman was one of the few founders who made "life-long efforts to base their personal lives on biblical teachings."[126] Consequently, Sherman's faith influenced his political ideas and actions in a variety of ways.[127] While serving in the Continental Congress, Sherman helped to draft a recommendation that states set aside April 26, 1780, as a day of "fasting, humiliation, and prayer,"[128] and was also a strong supporter for a national day of Thanksgiving.[129]

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[122] Mark David Hall, "Roger Sherman: An Old Puritan in a New Nation," *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), 248.
[123] Ibid., 250, 251.
[124] Ibid., 267.
[125] Ibid., 249.
[126] Ibid., 251.
[127] Ibid., 260.
[128] Ibid., 268.
[129] Ibid., 269.

Sherman also believed that the promotion of Christianity was necessary for political prosperity.[130] He believed that the states had the primary responsibility for promoting religion and morality, and protecting religious liberty. As a result of being a member of the Constitution Convention, Sherman understood the limited powers of the federal government. These limited powers included an understanding that Congress could neither create an established church nor restrict religious liberty because it was not granted the power to do so. However, Sherman believed that the national government could encourage religious practices as the Continental Congress had done throughout the Revolutionary War.[131]

Through not only his faith but his actions, Roger Sherman is more representative and more authoritative than Jefferson concerning issues surrounding religion and politics.[132] Unfortunately, comparatively far fewer of Sherman's papers have survived than Jefferson's.[133] Consequently, historians and legal scholars have tended to dismiss Sherman's contributions to America's founding and its founding documents. When United States Supreme Court justices have used history to interpret the First Amendment's religion clauses, they have made 112 distinct references to Jefferson but mentioned Sherman on only three occasions.[134] It is both sad and ironic that a man that had so much influence in drafting and debating the religion clauses would receive so little historical consultation when excavating their meaning, and even less consideration when discerning their application.

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[130] Ibid., 266.
[131] Ibid., 269.
[132] Ibid., 270.
[133] Ibid., 252.
[134] Ibid., 248.

When the historical context of the First Amendment is examined within the light of even just a small sampling of the Founding Fathers' religious convictions, opinions, and objections, it becomes clear that the Supreme Court's idealistic interpretation of the Founders' intentions is not correct. The first session of the Continental Congress opened its daily sessions with prayer. The second session appointed and funded legislative chaplains to offer these prayers as well as chaplains to serve with the military forces.[135] Additionally, on June 12, 1775, the Continental Congress called for the first of four fast days of "publick humiliation, fasting, and prayer; that we may, with united hearts and voices, unfeignedly confess and deplore our many sins," and that we may "be ever under the care and protection of a kind of Providence, and be prospered."[136]

Building upon these earlier actions, on September 11, 1777, the Continental Congress voted to import 20,000 Bibles for distribution in the new states,[137] an action that did not occur because of the lack of funds. That same year on November 1, Congress issued the first of what became the annual Thanksgiving Day celebration, by proclaiming that "it is the indispensable Duty of all men to adore the superintending Providence of Almighty God; to acknowledge with Gratitude their Obligation to him for Benefits received, and to implore such farther Blessings as they stand in need of."[138] Later, during the drafting of the 1787, Northwest Ordinance, one of the Ordinances' fundamental principles stated that, "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments."[139]

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[135] Witte, *Religion and the American,* 58.
[136] Ibid.
[137] Ibid., 59.
[138] Ibid., 58.
[139] Ibid., 60.

Through these actions it is clear that the Founding Fathers did not believe in separating the actions of the federal government from religion. Instead, it is most likely that the founders wanted to prohibit the authority of the government over religion.

During ratification of the Constitution the Federalists had to assure the general public that the proposed Congress had no power over religion because it was not "specifically enumerated in the Constitution."[140] The states themselves were to be left to their own devices on matters of religious liberty, with many adopting their own, variously worded, guarantees of religion into their own constitutions. These guarantees were neither controlled nor enforced by federal authority, with a few states like Massachusetts, continuing to have established churches, enforcing tithes for specific churches, "tithes for religion in general, and laws against certain religions well into the nineteenth century."[141]

Unfortunately, at that time many Americans, including some Founding Fathers, failed to see an omission of religious regulation as a guarantee of religious freedom. Jefferson, who was in France at the time of the drafting and ratification of the Constitution commented in a 1788, letter to a friend that he "expressed disappointment at the absence of an express declaration insuring the freedom of religion, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations."[142] The necessary altercations, as Jefferson put it, came with the drafting and passage of the Bill of Rights.

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[140] Ibid., 63.
[141] Randall P. Bezanson, *How Free Can Religion Be?* (Chicago: University of Illinois Press, 2006), 2, 3.
[142] Ibid., 16, 17.

Madison designed the federal Bill of Rights to safeguard what many Americans understood to be inalienable rights as a part of the promises given to various states during the ratification process. Unfortunately an accurate understanding of the framers intent cannot be determined by studying the debates over the First Amendment clauses from the First Session of Congress in 1789.[143] The minutes concerning these debates, their content and the reasoning behind the amendments in the Bill of Rights are, "exceedingly cryptic and conclusory;"[144] a fact which has not stopped the courts and commentators from using them despite their ample room for speculation and interpolation.[145]

Notwithstanding the cryptic and conclusory nature of the debate minutes what is clear is that the original senators debated over what the words "establish religion" meant.[146] James Madison thought that if the word "national" was inserted before religion, "it would satisfy the minds of honorable gentleman."[147] Madison believed that people feared "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[148] Consequently, Madison thought that if the word national was introduced, it would point the amendment "directly to the object he believed it was intended to prevent."[149] Additional historical evidence suggests that most Americans in 1789, supported Madison's perspective, which defined establishment of religion as a government preference for one religion over another. Along with Madison, John Leland, a Baptist minister and one of the leaders of

[143] Witte, *Religion and the American,* 23.
[144] Ibid., 65.
[145] Ibid.
[146] Curry, *Farewell to Christendom*, 36.
[147] Witte, *Religion and the American,* 67.
[148] Ibid.
[149] Ibid.

the movement for the Bill of Rights, also thought of establishment in terms of preference.[150] It is both unsurprising and unhelpful that there was no clear understanding about what "establish religion" meant, since the drafters of the First Amendment could not agree themselves. Despite this lack of consensus Congress wrote religious liberty into the Constitution as one of the fundamentals of a free people.[151]

Despite the wide variance in religious convictions found among the Founding Fathers and conflicting opinions about the exact meaning of the First Amendment's Establishment Clause, one application for religion and religious principles shines through. All of the Founding Fathers agreed that religion was fundamental for good morality, which was essential to establishing a successful republic. They were united in their belief that a "self-governing people must be a well-informed and virtuous people; thus, they encouraged education and religion, which they believed nurtured these qualities."[152]

Whether the Founding Fathers were orthodox Christian believers or subscribed to some kind of deistic belief in God, they promoted religion as a form of national virtue. Both John Adams and Thomas Jefferson thought morality essential to the "well-being of the country and Christianity – a purified, reasonable Christianity – was the best instrument for instructing and enforcing the moral duties."[153] Jefferson's "edited" Bible sought to "rid it of all corruptions,"[154] including the "supernaturalism that mocked the laws of nature," in the Old Testament, and all accounts of miracles and supernatural tales,

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[150] Curry, *Farewell to Christendom*, 37.
[151] Bondy, *How Religious Liberty*, 34.
[152] Hall, *Separating Church*, 4.
[153] Gaustad, *The Religious History*, 134.
[154] Lambert, *The Founding Fathers*, 174.

in the New Testament, leaving only the moral teachings attributed to Jesus as a way to foster civic virtue.[155] Jefferson reduced religious experience to little more than "a matter of morality,"[156] believing that only when religious principles break out into "overt acts against peace and good order" should the government intervene to prevent such acts.[157] For Jefferson, true Christianity was "the most benevolent and sublime system of morality that ever shone upon the world."[158]

Likewise, George Washington when addressing the General Assembly of Presbyterian Churches, stated his belief that "the pious practice of sound religion was essential to good citizenship."[159] During his Farewell Address Washington admonished that, "of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens,"[160] adding "let us with caution indulge the supposition that morality can be maintained without religion."[161]

Benjamin Franklin used and promoted Jesus Christ as his moral model and guide. While dismissing his claim to divinity, Franklin embraced Jesus' morality, exclaiming "I think the System of Morals and his Religion, as he [Jesus] left them to us, the best the World ever saw or is likely to see."[162] Concluding when Jesus drafted his religious creed,

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[155] Ibid.
[156] Hall, *Separating Church*, 130.
[157] Ibid., 125.
[158] Ibid., 131.
[159] Lambert, *The Founding Fathers*, 259.
[160] Matthew L. Harris and Thomas S. Kidd, *The Founding Fathers and the Debate Over Religion in Revolutionary America* (New York: Oxford University Press, 2012), 121.
[161] Ibid.
[162] Lambert, *The Founding Fathers*, 173.

"he made morality, not theology, the centerpiece of a good life."[163] Meanwhile Hamilton, in a more orthodox context promoted similar ideals, expressing that "morality cannot be separated from religion," and that those who love liberty know that "morality must fall with religion."[164]

Because of his strong religious convictions, Roger Sherman was also a strong proponent of Christianity as a means of promoting morality. According to Sherman, "one of the most critical components with respect to the common good is the freedom to worship God in a society that promotes Christian morality."[165] This Christian morality Sherman believed was useful for "the happiness of a People, and the good Order of Civil Society [and] Piety,"[166] the likes of which were the duty and responsibility of the Civil Authority to "provide for the Support and encouragement thereof."[167] Whether it was in conjunction with personal convictions and evangelism, or merely for the prosperity and wellbeing of the fledgling nation, the Founding Fathers supported and encouraged the promotion of religion as a means of morality and civic virtue. The only caveat to this religious endorsement was that any religious activity must not be "contrary to proper and accepted morals,"[168] which would make the exercise self-defeating.

The religious backgrounds of the Founding Fathers are as varied and diverse as their views are on politics, the Establishment Clause, and the principle known as the separation of church and state. Benjamin Franklin, Thomas Paine, George Washington,

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[163] Ibid.
[164] Frazer, "Alexander Hamilton," 114.
[165] Hall, "Roger Sherman," 262, 263.
[166] Ibid., 265.
[167] Ibid.
[168] Bondy, *How Religious Liberty*, 9.

and John Adams, were all heterodox in their religious beliefs and who, with the exception of Washington and Adams, were ardent critics of the ecclesiastical establishments of their day.[169] Historians cite Madison and Jefferson as ecclesiastical co-laborers, representing the spiritual voice of the founding generation, but they were not always of one mind on the meaning of "establishment" or their understanding of religious freedom.[170] Even more ironic is that both Jefferson's and Madison's views on religion and church-state relations are "among the least representative of the founders."[171]

Unfortunately, historians such as Edwin S. Gaustad's *Faith of Our Fathers: Religion and the New Nation* (1987), Steven Waldman's *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America* (2008), David L. Holmes's *The Faiths of the Founding Fathers* (2006), and, Brooke Allen's *Moral Minority: Our Skeptical Founding Fathers* (2007),[172] among others, all focus on the "elite fraternity" of famous founders, providing a distorted perspective on religion and the role it played during the Revolutionary era. This distortion, however, is of more than just an academic interest because these founders' views have carried "significant weight in contemporary political and legal discourse."[173]

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[169] Noll, *The Forgotten Founders*, xv.
[170] Bezanson, *How Free*, 32.
[171] Noll, *The Forgotten Founders*, xiv, xv.
[172] Edwin S. Gaustad, *Faith of Our Fathers: Religion and the New Nation* (New York: Harpercollins, 1987); Steven Waldman, *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America* (New York: Random House Inc., 2008); David L. Holmes, *The Faiths of the Founding Fathers* (New York: Oxford University Press, 2006); Brooke Allen, *Moral Minority: Our Skeptical Founding Fathers* (Chicago: Ivan R. Dee, 2007).
[173] Noll, *The Forgotten Founders*, xv, xvi.

The religion clauses of state constitutions and of the First Amendment, crafted between 1776 and 1789, express both theological and political sentiments. They were a reflection of both the religious convictions of believers as well as the calculations of their political leaders.[174] The clauses manifested both the "certitude of such eighteenth-century theologians as Isaac Backus and John Witherspoon and the skepticism of such contemporaneous philosophers as Thomas Jefferson and Thomas Paine."[175] To suggest that religion played little or no role in politics following the ratification of the First Amendment lacks evidence; all evidence suggests the large role religion played during this era. Unfortunately, the inconsistent efforts by historians to provide a platform for all the Founding Fathers voices to be heard has helped provide an inconsistent application of the religion clauses of the First Amendment.

[174] Witte, *Religion and the American,* 23.
[175] Ibid.

CHAPTER III

RELIGIOUS FREEDOM BY JUDICIAL TEST

Over the last seven decades the United States Supreme Court has immersed itself more and more into the complex web of litigation concerning religion. Religious litigation corresponds to the religion clauses of the First Amendment: the Establishment Clause and the Free Exercise Clause. Beginning with *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Everson v. Board of Education*, 330 U.S. 1 (1947), the Supreme Court applied the First Amendment religion clauses to the states, reading its guarantees into the general liberty guarantee of the Fourteenth Amendment that "No state shall deprive any person of … liberty … without due process of law."[1] Since *Cantwell*, the Court has ruled on over 150 cases concerning religion, seeking to create a national rule on religious liberty that was "binding on all federal, state, and local officials."[2] Unfortunately, the Court has done more to exacerbate all parties concerning religious legislation, particularly those rulings surrounding the Establishment Clause, thereby leaving the standards of review in such cases as "disorderly and confusing."[3] Through the *Everson* decision, Associate Justice Hugo Black tried to establish a "high, impregnable, and un-breachable wall,"[4] that could easily delineate between issues concerning church and state.

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[1] John Witte Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder: Westview Press, 2000), 1.
[2] Ibid.
[3] Russell L. Weaver, and Donald E. Lively, *Understanding the First Amendment* (New York: Matthew Bender & Company, Inc., 2003), 15.
[4] *Everson v. Board of Education*, 330 U.S. 1 (1947).

According to Provost of Princeton University Christopher L. Eisgruber and law professor Lawrence G. Sager, Black's impregnable wall metaphor failed to provide "a sensible conceptual apparatus for the analysis of religious liberty."[5] Instead, Eisgruber and Sager argued that practical reality suggested rather than a high and impregnable wall, the wall should be "raised in some places and lowered in others. Or that it should have holes in it."[6] Unfortunately, such a possibility is impossible, so Eisgruber and Sager came to the conclusion that the Supreme Court's definition needs to be restated.

To add both clarity and consistency to their decisions, the justices of the Supreme Court devised a number of tests to help guide the judicial process when rendering verdicts on issues of religion. The oldest test is the Establishment Clause Test, devised by Justice Black during his majority opinion on *Everson*. According to Black, the meaning of the "establishment of religion clause" or test stated that:

- Neither a state nor the federal government can set up a church.
- Neither can pass laws which aid one religion, aid all religions nor prefer one religion over another.
- Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.
- No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

[5] Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007), 23.
[6] Eisgruber, *Religious Freedom*, 22.

- No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion.
- Neither a state nor the federal government can openly or secretly participate in the affairs of any religious organizations or groups and vice versa.[7]

While not presented in this forensic fashion, these principles became known as the Establishment Clause Test. Over the last 60 years other tests have been introduced by the Supreme Court to gauge the constitutionality of laws and actions, including some that have replaced the Establishment Clause Test.

The most widely used test was the *Lemon* Test, derived from the Supreme Court case *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This test became the standard of judicial review in cases involving the Establishment Clause of the First Amendment. The *Lemon* Test involved three criteria for judging whether laws or governmental actions were allowable under the Establishment Clause. Those three criteria were: Does the challenged law, or other governmental action, have a bona fide secular (non-religious) or civic purpose? Secondly, does the primary effect of the law or action neither advance nor inhibit religion? In other words, is it neutral? And finally, does the law or action avoid excessive entanglement of government with religion?[8] If the answer to all three is yes, the law passes the *Lemon* Test; however, if a negative answer resulted from any of the three questions then the law or action was unconstitutional.

[7] *Everson v. Board of Education*, 330 U.S. 1 (1947).
[8] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In addition to the *Lemon* Test is the *Marsh* Test. The *Marsh* Test, from *Marsh v. Chambers*, 463 U.S. 783 (1983), is a ruling in which the Court upheld legislative prayers; however, it did not use *Lemon* as a benchmark. Instead, the Court traced history back to the debates on the Constitution and Bill of Rights, concluding that such prayers were permissible since "the same statesman, on the same day they agreed on the language of the First Amendment, authorized Congress to pay a chaplain to open each session with prayer."[9] In essence, the Court viewed the contemporaneous actions taken by those who framed the First Amendment as "weighty evidence" of its intent.[10] If the historical bread crumbs can be followed to the founder's intent, then present judicial jurisprudence maybe be sidestepped.

Another test for religion is the Endorsement Test. In 1984, Associate Justice Sandra Day O'Conner, in a concurring opinion, first proposed the Endorsement Test in *Lynch v. Donnelly*, 465 U.S. 668 (1984). The Endorsement Test seeks to answer the question whether the challenged law or government action has "either the purpose or effect of endorsing religion or disapproving of religion in the eyes of the community members."[11] Justice O'Connor argued, "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community . . .. What is crucial is that the government practices not have the

[9] Gerhard Casper and Kathleen M. Sullivan, ed. "McCreary County v. ACLU of Kentucky (2005)," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 2004 Term Supplement*, Vol. 348 (Bethesda: LexisNexis, 2005), 139.
[10] Ibid.
[11] *Lynch v. Donnelly*, 463 U.S. 783 (1983).

effect of communicating a message of government endorsement or disapproval of religion."[12] The Endorsement Test asks what a reasonable person would perceive from this law or action concerning religion.

Associate Justice Anthony Kennedy proposed a Coercion Test following *Lee v. Weisman*, 505 U.S. 577 (1992). The background for this test originated from the possible psychological coerciveness of clergy-led prayer at high school graduation ceremonies. The Court found that, "the school district's supervision and control of a high school graduation ceremony places subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction."[13] Consequently, the Court ruled in its decision that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[14]

Unfortunately, these judicial tests have not clarified or simplified constitutional issues concerning religion. If anything, they have muddied the constitutional waters, exposing Court inconsistencies across a variety of religious topics. Consequently, it has been easy for many groups to criticize the Supreme Court, especially if their rulings have come down on the opposite side of an individual's principles and values. Many decisions exist where separationists and accommodationists have adjudged themselves to have been slighted or wronged using Court precedents to validate their cases. In light of these circumstances, the examination of the following Supreme Court cases are not meant to cast judgment concerning the validity of the decisions and whether they were historically,

[12] Ibid.
[13] *Lee v. Weisman*, 505 U.S. 577 (1992).
[14] Ibid.

factually, or theoretically correct. Nor is the examination of the following cases meant to vilify the separationists or accommodationists which argued them. Instead, the following cases illustrate the inconsistencies surrounding Supreme Court decisions pertaining to the establishment of religion, and in many instances the free exercise of religion as well. Through the inconsistencies found in these cases, it should become clear that both, the idea of "separation of church and state," and, the fundamental principles surrounding the Supreme Court's jurisdiction and treatment of matters pertaining to religion needs to be reevaluated and reapplied.

The first two decisions to be addressed are *Lynch v. Donnelly*, 463 U.S. 783 (1983), and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Both of these decisions address Christmas "decorations" and whether the use of a Christmas crèche, and in the case of *Allegheny*, a Chanukah menorah, are legitimate holiday decorations or an endorsement of a certain religion, and therefore in violation of the Establishment Clause. The next two cases are *Aguilar v. Felton*, 473 U.S. 402 (1985), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). These two cases focus on the examination of public money being used to help enhance the learning of disadvantaged learners in parochial schools. The final two cases are *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005). Both of these cases dealt with the circumstances surrounding the displaying of the Ten Commandments on state property and within state buildings.

***Lynch v. Donnelly*, 463 U.S. 783 (1983)**

In 1982, Daniel Donnelly and the American Civil Liberties Union's (ACLU), Rhode Island affiliate, filed a lawsuit alleging a violation of the First Amendment.

Donnelly alleged that Dennis Lynch, individually and as mayor of the City of Pawtucket, Rhode Island, had erected a religious crèche as a part of an annual secular holiday display. Donnelly believed that this crèche was a violation of the First Amendment because it could be perceived as an endorsement of one religion over another. Such an endorsement would be a violation of the First Amendment's Establishment Clause which states in part, "Congress [and other government authorities] shall make no law respecting an establishment of religion,"[15] In 1983, the Supreme Court granted a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit, which had affirmed the District Court's ruling that the crèche was indeed in violation of the Establishment Clause of the First Amendment.[16] The fundamental argument surrounding *Lynch v. Donnelly* was that the lower federal courts "held that a municipality is prohibited by the Establishment Clause from including a crèche in a dominantly secular Christmas display maintained on private property during the Christmas season."[17] The Supreme Court granted a writ of certiorari to test the issue of whether "a passive and contextually muted display of a crèche as a part of a dominantly secular municipal Christmas celebration violates the Establishment Clause."[18]

The Supreme Court petitioner Pawtucket Mayor Dennis M. Lynch and associates, based their argument for this case on the history of the display, and the degree to which

[15] U.S. Constitution, amend. 1.
[16] *Lynch v. Donnelly*, 463 U.S. 783 (1983).
[17] Philip B. Kurland and Gerhard Casper, ed. "Lynch v. Donnelly (1984)," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 1983 Term Supplement,* Vol. 151 (Frederick: University Publications of America, 1985), 8.
[18] Ibid., 11.

government contact with religion was permissible.[19] The city owned the crèche in question, having bought it in 1943. Along with the rest of the holiday display, the crèche had been added to regularly over a number of years, was stored on city property year round, with the crèche making up a portion of a conventional and traditional display of holiday symbolism.[20] The petitioner's argued that a government celebration of Christmas was a secular activity. The "American Christmas" was a national folk festival which was derived from the Christian celebration of the nativity and the birth of Christ. Although the nativity theme and the holiday's origins have not disappeared from the contemporary observance, over time the nativity has been overshadowed by the secular components of the national festival.[21]

The petitioners' also believed that the Establishment Clause's principles defined "the degree to which government contact with religion is permissible."[22] They argued that a removal of all religiosity from government activity is neither practical nor desirable because the religious tradition of the American Christmas is too deeply ingrained in the life of the nation. While the government is prohibited from promoting religion, "passive acknowledgement of the religious tradition" is not promotion of religion.[23] Using *McGowan v. Maryland*, 366 U.S. 420 (1960), as precedence, the petitioners' argued that despite the religious origins of the American Christmas, United States culture did not

[19] Ibid., 47, 48.
[20] Ibid., 8, 9.
[21] Ibid., 48.
[22] Ibid., 47, 48.
[23] Ibid., 47.

prohibit public observance of contemporary secular events derived from religious origins.[24]

The petitioners' argument rested on the principle that when the "secular aspects of an activity dominate the religious aspects, a government many engage in such activity without offending the Establishment Clause. The underlying constitutional standard is whether the government is conducting a secular or a religious exercise."[25] They believed that in light of the Court's previous decisions concerning such issues of religion, "the tripartite [*Lemon*] test must be applied to the entire governmental activity and not merely to a single religious element in that activity."[26] The petitioners believed that the fundamental issue in this case was whether the city's celebration of Christmas was predominantly a religious or secular activity.

The respondents to this Supreme Court case, rather than arguing against the history of the Christmas festival, focused their efforts on proving religious intent and the religious nature of the holiday display. To prove intent, the ACLU seized upon the actions of the Mayor Lynch after the filing of the case. The ACLU alleged that after the mayor heard about the filing of the lawsuit, he vowed to fight against the ACLU's attempt to take "Christ out of Christmas,"[27] and then lead children in the singing of Christmas carols.[28] The ACLU also presented expert testimony from a Methodist Church

[24] Ibid., 48.
[25] Ibid.
[26] Ibid.
[27] Ibid., 91.
[28] Ibid.

minister stating that the crèche was in fact a sacred religious symbol, rather than a prop used in the promotion of holiday cheer.[29]

In addition to arguing against the stated intent of the petitioners, the ACLU argued that the city had endorsed and promulgated religious beliefs through the use of the crèche. To prove that the city had endorsed and promulgated religious beliefs the ACLU provided support for their case through the aid of the District Court's ruling which agreed that, "Christmas retains strong significance as a religious holiday and that the Nativity scene is primarily an embodiment of Christian beliefs concerning the birth and nature of Jesus Christ."[30] In conjunction with this support, the respondents presented further evidence from the District Court's ruling that, as a result of this statement, the crèche itself had violated all three aspects of the *Lemon* Test. Consequently, the mayor and the city, through political divisiveness, had failed to establish any "compelling governmental interest in the erection of the Nativity scene."[31] The respondents concluded their argument by highlighting the realization that "relationships which tend to endanger religious-civil peace are forbidden because they are a 'warning signal' that the mandate of the First Amendment has been compromised."[32]

Despite the mayor's overt bias towards Christianity and the clear religious overtones of a Christmas crèche, the Supreme Court reversed the judgments of the lower courts. In doing so, the Court cited three main reasons. First, "whatever benefit there was to one faith or religion or to all religions, it was indirect, remote, and incidental."[33]

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[29] Ibid.
[30] Ibid., 97.
[31] Ibid., 98.
[32] Ibid., 156.
[33] *Lynch v. Donnelly*, 463 U.S. 783 (1983).

Second, the Court held that "the display of the crèche was no more an advancement or endorsement of religion than the congressional and executive recognition of the origins of Christmas itself as "Christ's Mass," or the exhibition of hundreds of religious paintings in governmentally supported museums."[34] Finally, the Court believed that the city "had a secular purpose (the celebration of Christmas) for including the crèche."[35] By a five to four split decision, the Court concluded that the city had not violated the Establishment Clause or the *Lemon* Test by impermissibly advancing religion, and the inclusion of the crèche had not created an excessive entanglement between religion and government.[36]

***County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573 (1989)**

In 1986, the ACLU of Greater Pittsburgh filed a lawsuit against the County of Allegheny alleging that the display of a nativity crèche and a Chanukah menorah on or around government buildings violated the Establishment Clause of the First Amendment. The crèche and menorah in question were part of a Christmas carol program on the steps of the County Courthouse, known as the Grand Staircase. The County erected the crèche on the steps of the Grand Staircase where the choirs performed, while the menorah was located outside the City-County Building.[37] Since the program's inception in 1968, the nativity crèche in conjunction with the choral program, had been part of the holiday festivities.

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[34] *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).
[35] Ibid.
[36] Ibid.
[37] Philip B. Kurland and Gerhard Casper, ed. "County of Allegheny v. ACLU Greater Pittsburgh Chapter (1989)," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 1988 Term Supplement,* Vol. 189 (Frederick: University Publications of America, 1990), 9, 10.

The County of Allegheny started the program as a dedication to world peace and brotherhood, and to the memory of those missing from the Vietnam War, the purpose of which has remained unchanged.[38] Over time, the County decorated the entire area surrounding the Courthouse where the Christmas carol program was held in traditional Christmas fashion. These displays included wreaths, trees and Santa Clauses, as well as the menorah in question.[39] The only change during this time period had been the use of a new crèche, which program supporters replaced in 1981. The nativity scene was not owned by the County, and other than "providing storage space in the basement of the Courthouse for the past two years and a dolly to transport the display to and from its place of storage," the County had no other involvement with the nativity scene.[40]

Allegheny County challenged the judgment of the United States Court of Appeals for the Third Circuit (Pennsylvania). The Court of Appeals had held that displaying the crèche and the Chanukah menorah on government property violated the Establishment Clause. The petitioner's argument centered on *Lynch v. Donnelly,* and the precedents set by that decision. The three central arguments made by the petitioners were that the right for a government entity to display a nativity crèche or religious symbol was in itself not unconstitutional. Secondly, that the physical location of the items themselves was not important, and finally, that the County Christmas display passed both the *Lemon* Test and the Endorsement of Religion Test.

The County of Allegheny argued that the mere public displaying of a religious item or symbol is not unconstitutional. Before a decision can be made concerning

[38] Ibid., 9.
[39] Ibid., 10.
[40] Ibid.

whether a particular governmental activity violates the Establishment Clause, the activity in question must in some way "confer some benefit upon religious activities that advance religious practice or have that effect on those that involve the government directly in religious exercises."[41] The petitioners reasoned that the "intent of the drafters of the Constitution and the historical practice of confirming that intent," affirmed their belief that public manifestations of religion are not inherently unconstitutional. To support this argument they emphasized the words of Chief Justice Warren Burger from *Lynch*, who "set forth a litany of governmental displays that are accepted without thought of a full-blown constitutional analysis."[42] In addition to this ruling, the petitioners cited *Marsh v. Chambers*, 463 U.S. (1983), which supported the Court's recognition of religion throughout the country's history, and as such that the "public manifestation of our religious heritage was not the type of conduct sought to be prevented by the Establishment Clause."[43]

According to the County of Allegheny, the physical location of the religious items in question should be irrelevant. They believed that "no viewer of the City's display would believe that the purpose is an endorsement of that religion,"[44] regardless of the location, whether it was on public or privately owned land. The County of Allegheny argued the Supreme Court and other federal courts are opened with an announcement that concludes "God save the United States and this Honorable Court."[45] If these and other public religious manifestations occur "within" and are "incorporated" in the core

[41] Ibid., 178.
[42] Ibid., 178, 179.
[43] Ibid., 179.
[44] Ibid., 185.
[45] Ibid., 187.

functions of government, then surely those that occur "at" the core function of government must also be permissible?[46]

Finally, the petitioners argued that the religious activities did not violate either the *Lemon* Test or the Endorsement of Religion Test. The Court had previously ruled in *Lemon* that a "challenged governmental practice would pass constitutional muster if it had a secular legislative purpose, if its primary effect neither advanced nor inhibited religion, and if it did not foster an excessive entanglement with religion."[47] The County of Allegheny believed that, just like *Lynch*, the purpose of their nativity scene was "to celebrate the Holiday and to depict the origins of the season,"[48] which were both legitimate secular purposes. Therefore the crèche, though a religious symbol, was constitutional because it did not benefit religion, and fell within the bounds of Court jurisprudence and the religious tests.

The arguments of the Court respondents focused on refuting the claims made by the County of Allegheny. First, they petitioned that the Court of Appeals had ruled correctly when declaring both religious symbols were a violation of the Establishment Clause of the First Amendment. Additionally, they argued that the Court of Appeals location oriented analysis of the case was correct. That other examples of public displays of religion were irrelevant to this case, and that the presence of a Christmas tree does not require or condone a religious display as well.

The respondents believed that the locations of the religious symbols in question were fundamental when trying to determine the constitutionality of the case. They

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[46] Ibid.
[47] Ibid., 121.
[48] Ibid.

believed that "historical examples of religion in our nation's public life do not affect the constitutional analysis in this case."[49] The basis of this argument was that the Establishment Clause only examines the effect of any religious symbols at issue, not their setting. The ACLU argued that "location-sensitive reasoning clearly is one of the hallmarks of Establishment Clause jurisprudence,"[50] and that other decisions and rulings did not set any broad precedents or guidelines that extended beyond the specific circumstances of those cases. Consequently, in this case "historical remarks and unrelated examples of religion in public life are constitutionally irrelevant."[51]

The ACLU concluded its case by emphasizing the point that the presence of one religious symbol did not condone the use of another. The presence of a Christmas tree does not condone a crèche, nor does the presence of a crèche condone the use of a menorah. The "constitutional prohibition against governmental endorsement of one religion cannot be avoided by the government's endorsement of an additional religious faith."[52] The respondents concluded that "true religious equality cannot tolerate a Nativity Scene and a Chanukah Menorah dominating structures of government power."[53]

The Court chose to examine whether the display of the crèche and the menorah, within their respective setting rather than the Christmas display as a whole, were an endorsement of religion. In a five to four split decision the Court ruled, contrary to its 1983, *Lynch* decision, that the petitioners had sent an unmistakable message that it supported and promoted Christianity through the use a crèche and was therefore

[49] Ibid., 195.
[50] Ibid., 203.
[51] Ibid., 195.
[52] Ibid.
[53] Ibid., 210.

unconstitutional. However, despite the religious overtones of a menorah, in a six to three split decision the Court held that the display of the menorah "in its particular setting was a visual symbol for a holiday with a secular dimension."[54] Consequently, the injunction against the display of the menorah was reversed.

Associate Justice Harry Blackmun wrote the majority opinion of the Court. In it, however, he spent the preponderance of his time explaining why *Marsh* and *Lynch* do not apply in this ruling, while also refuting Associate Justice Anthony Kennedy's dissention. In *Marsh*, Justice Blackmun explained, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights. Additionally, the rationale of the majority opinion in *Lynch* stated that the inclusion of the crèche in the display was "no more an advancement or endorsement of religion."[55] However, Blackmun points out, *Lynch* offered no discernible measure for distinguishing between permissible and impermissible endorsements. Second, the Court ruled that any benefit the government's display of the crèche in *Lynch* provided to religion was "no more than indirect, remote, and incidental," but never stated how or why. Changing tact, Blackmun also berated Justice Kennedy for what he viewed as Kennedy's effort to legitimize "all practices with no greater potential for an establishment of religion" than those "accepted traditions dating back to the Founding," regardless of their history.[56] Blackmun called Kennedy's accusations against the Court that it had "latent hostility" and "callous indifference" toward religion, as both offensive and

[54] *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).
[55] *Marsh v. Chambers*, 463 U.S. 783 (1983).
[56] *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

absurd.[57] Blackmun concluded by pointing out that a secular state, because of its indifference to religion, is not the same as an atheistic or antireligious state.

Justice Kennedy in his dissention found that the crèche did not violate the Establishment Clause because the "principal or primary effect" of the display was not to advance religion within the meaning of *Lemon* Test. Kennedy viewed the Court's majority as taking an "unjustified hostility toward religion, a hostility inconsistent with our history and our precedents."[58] While finding the crèche display constitutional within the definitions of the *Lemon* Test, Justice Kennedy also took the unusual opportunity in his dissent to acknowledge his lack of confidence in the *Lemon* Test. Kennedy explained that he "did not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area."[59] To validate his convictions he cited the "persuasive criticism of *Lemon*" that had emerged from his fellow justices in *Edwards v. Aguillard*, 482 U.S. 578 (1987), Associate Justice Antonin Scalia dissenting; *Aguilar v. Felton*, 473 U.S. 402 (1985), Justice O'Connor dissenting; *Wallace v. Jaffree*, 472 U.S. 38 (1985), Chief Justice William Rehnquist dissenting; and, *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736 (1976), Associate Justice Byron White concurring in judgment, as evidence of the inadequacy of the test.[60] Kennedy questioned its usefulness in providing "concrete answers to Establishment Clause questions," instead calling it but a "'helpful signpos[t]'" or "'guidelin[e]'" in deliberations, rather than a comprehensive test.[61] Additionally, he cited *Mueller v. Allen*, 463 U.S. 388 (1983), *Committee for Public*

[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.

Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), and *Lynch v. Donnelly*, 465 U.S. 668 (1984), as examples where the Court had expressed its "unwillingness to be confined to any single test or criterion" when ruling on cases concerning religion. Kennedy concluded his thoughts by expressing the need for a "substantial revision of our Establishment Clause doctrine."[62]

Although expressed in the dissent, Justice Kennedy's points concerning the piecemeal jurisprudence of religious law raised troubling issues. Additionally, the legal inconsistencies of *Lynch* and *Allegheny* are striking. Both crèches dated their history back at least twenty years, with neither set up with the intention to support religion. Both defendants stored their crèches on government property, and both crèches were a part of a greater Christmas display celebrating the American Christmas tradition. What was most concerning was the inconsistent application of the *Lemon* Test when examining both cases. In *Lynch*, the justices examined the crèche within the wider context of the display, while in *Allegheny* the justices examined both the crèche and the menorah on their own merits. As such it is no wonder that Justice Kennedy spent considerable time in his dissent criticizing the *Lemon* Test.

***Aguilar v. Felton*, 473 U.S. 402 (1985)**

In 1978, six federal taxpayers challenged New York City's Title I program and its use of federal funds to pay the salaries of public employees who taught in parochial schools. The federal government distributed these funds under Title I of the Elementary and Secondary Education Act of 1965. New York City used the funds to provide financial assistance to programs that helped meet the education needs of deprived

[62] Ibid.

children from low income families. After conflicting rulings by two United States District Courts and the Court of Appeals, the Supreme Court gained certiorari in February, 1984, with a ruling handed down on July 1, 1985. The appellants before the Court for this case sought a review of the judgment handed down by the Court of Appeals. They held that the program was distinct from the parochial schools and that the church and state maintained their separation under the Establishment Clause.

Previous Court rulings had not established a "*per se* rule absolutely forbidding public employees from providing remedial instruction on the premises of religiously oriented schools,"[63] and no "impressible" degree of entanglement between the church and the state existed.[64] The appellants argued that Title I, which was enacted in 1965, brought "better education to millions of disadvantaged youth who need it most."[65] At the time of the suit the program had grown to become the most significant federal educational program ever undertaken. It served more than five million public school and almost 200,000 private school children, costing in excess of three billion dollars.[66]

Prior to the adoption of its current format, New York City subjected the program to numerous forms of trial and error. Initially, the appellants argued, New York City had experimented with two different methods of providing Title I services to private school children. The City tried providing services after regular school hours, first, at public schools, and then later at private schools. However, for numerous reasons attendance

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[63] Philip B. Kurland and Gerhard Casper, ed. "Aguilar v. Felton (1985)," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 1984 Term Supplement,* Vol. 154 (Frederick: University Publications of America, 1986), 45.
[64] Ibid.
[65] Ibid., 12.
[66] Ibid.

was poor in both programs: "both students and teachers were tired after a full school day, and parents were concerned about the safety of their children traveling home after dark or in inclement weather."[67] Additionally, those programs proved ineffective because, "Title I teachers and regular classroom teachers could not communicate concerning the educational needs of the Title I students."[68] Subsequently, New York City adopted the program in its current form which included on-premises aid.

The appellants believed that such a program did not become as an excessive entanglement of church and state because under the New York City program, eligible students in private schools received five types of Title I remedial services: remedial reading, remedial mathematics, reading skills centers, English as a second language, and clinical and guidance services.[69] None of these services advanced religion; but, instead, the services encouraged the core educational function of public schools. In the past tutoring had been conducted off-premises and upheld by the Court through *Wolman v. Walter*, 433 U.S. (1977). A further safeguard against the advancement of religion through the Title I program was the supervision of teachers by public school authorities. Public school authorities supervised all their teachers to ensure teachers do not subject or impose their personal views on students, including those of a religious nature.[70] As such, the appellants argued that no chance of religious instruction being advanced through the use of tax payer money existed.

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[67] Ibid., 13.
[68] Ibid., 14.
[69] Ibid.
[70] Ibid., 47.

For the ACLU, who represented the respondents in this case, the constitutional question at hand was simple. The ACLU did not argue whether the program was effective or favored minorities, the fundamental question was whether "the government may aid a religious school in performing its core educational function by stationing public school teachers in religious schools to teach reading and mathematics skills."[71] While seeming innocuous, the ACLU argued, such aid to parents and children "inevitably aids the institution they have chosen to attend by freeing resources for use in other aspects of the religious school's program."[72] The respondents distinguished between previous forms of permissible aid to religious institutions such as bus rides and diagnostic testing, as opposed to aiding with the core educational function of religious schools. The ACLU reasoned that if public school teachers could enter parochial schools to teach secular skills, as part of the parochial school curriculum, then under the rubric of "permissible aid to children, no discernible, much less principled, Establishment Clause check will exist on massive aid to parochial schools."[73] Additionally, if government aid is permissible for remedial learning, it must also be valid for enrichment programs as well.[74] According to the ACLU, the logical stopping point of such programs would be the creation of joint educational enterprises, with public school teachers "undertaking to teach broad areas of the secular curriculum and religious educators accepting responsibility for religious instruction."[75] The ACLU concluded that allowing such aid, as necessary or beneficial as it is to parochial schools, was unconstitutional because it,

[71] Ibid., 389.
[72] Ibid., 392.
[73] Ibid., 394.
[74] Ibid., 398.
[75] Ibid., 398, 399.

"(1) constitutes forbidden aid to a religious institution, (2) creates a risk that religious criteria will affect the secular program, and (3) threatens the autonomy of the religious institution," therefore violating the Establishment Clause.[76]

Despite the obvious benefits and success of the Title I program, in another five to four split decision, the Court ruled that this program was unconstitutional. The Court believed that an excessive entanglement of church and state in the administration of benefits provided under Title I existed. Consequently, the Court upheld the Court of Appeals decision against Title I.

***Zobrest v. Catalina Foothills School District,* 509 U.S. 1 (1993)**

In October, 1987, petitioners Larry and Sandra Zobrest requested Catalina Foothills School District provide the service of a certified sign language interpreter for their son, the petitioner James Zobrest, a deaf boy then 14 years old. At the time the petitioner attended classes at a Catholic high school, with the request being made in connection with the Education of the Handicapped Act (EHA). The Supreme Court granted a writ of certiorari to the petitioners to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Court of Appeals upheld the decision of the district court which denied the petitioners request for services. The Court of Appeals ruled that the provision of such a publicly employed interpreter violated the Establishment Clause of the First Amendment.

The basis of the argument from the petitioners before the Court was simple. The petitioners believed that under the EHA the Establishment Clause did not prohibit a local educational agency from providing the service of a certified sign language interpreter to a

[76] Ibid., 424, 425.

deaf child on the premises of the child's religious school.[77] The petitioners argued that Salpointe Catholic High School was approved by the Department of Education, State of Arizona, and is accredited as a College Preparatory School by North Central Association of Colleges and Schools. The curriculum for graduation consisted of English, Social Sciences, Mathematics, Science, Foreign Language, Religion, and five to nine hours per year of electives.[78] Through the services of an interpreter, James would receive an education indistinguishable from a secular viewpoint than that of any other Arizona boy.[79]

The Zobrest's argued that a certified sign language interpreter was an individual certified by the Registry of Interpreters for the Deaf and, as such, was bound by the Registry's Code of Ethics. The interpreter's service would have multiple effects, the primary effect being the advancing of the general education of a citizen, not the advancement of religion. To support their case the petitioners argued that prior decisions of the Court including the *Mueller, Witters* and *Allen* cases sustained the constitutionality of allowing the EHA service. Additionally, the Zobrest's argued that the decisions of the Court in the *Lemon, Meek, Wolman, Grand Rapids* and *Aguilar* cases are not precedents to the contrary.[80] The point of which was that the service would not create an excessive

[77] Philip B. Kurland and Gerhard Casper, ed. "Zobrest v. Catalina Foothills School District (1993)," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 1992 Term Supplement,* Vol. 224 (Bethseda: University Publications of America, 1994), 61.
[78] Ibid., 57.
[79] Ibid., 62, 63.
[80] Ibid., 65.

entanglement of church and state, and neither would it encourage governmental sponsorship of religion.[81]

The petitioners also argued that the decision by the Court of Appeals was flawed because of its focus on the fact that furnishing a sign language interpreter to James had a primary effect of advancing religion. The flaw in the Court of Appeals argument was the misconception of the term "primary."[82] Governmental actions may have multiple effects, however, for the courts to assume that when many benefits existed the "primary" benefit is religious is erroneous. One out of many benefits of a particular governmental action may not be held as "primary" simply because it is religious."[83]

An additional concern raised by the prohibition of such a service was the conflict between the constitutional mandate concerning the non-establishment of religion but the equally protected right to the free exercise thereof. The petitioners addressed this potential conflict by noting that the logical relationship concerning establishment and free exercise was "carefully delineated by this Court almost a half-century ago in *Everson v. Board of Education*, 330 U.S. 1 (1947)."[84] In *Everson*, the Court stated that New Jersey could not "in accordance with the Establishment Clause contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church, however, also pointed out the limiting effect that the Free Exercise Clause places on the absolutist, or secularist, reading of the Establishment Clause."[85] The petitioners argued that the principles of *Everson* applied to their case, since the EHA was a public welfare program

[81] Ibid., 61.
[82] Ibid., 62.
[83] Ibid.
[84] Ibid., 77.
[85] Ibid., 77, 78.

for the support of all handicapped children. They believed that in each case, the public service enabled a child to get both a religious and a secular education. To exclude petitioners in the present case from participation in the benefits of EHA, "because of their faith . . . would undeniably inhibit them in the exercise of their religion."[86]

As a co-respondent, the ACLU outlined the arguments against the petitioner's case. The ACLU's made two arguments; the Establishment Clause prohibited a state-employed sign language interpreter from aiding in a pervasively religious education,[87] and that the refusal to provide the same interpreter neither discriminated against nor was a burden against the free exercise of religion.[88] The respondents grounded their constitutional argument in the precedents found in *Aguilar v. Felton*, 473 U.S. 373 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Through these cases the respondents held that furnishing the requested services violated the Establishment Clause by creating an excessive entanglement of church and state.[89]

Salpointe's stated goal was the educating of students in a religious atmosphere, a practice consistent with the religious mission of the Roman Catholic Church.[90] The ACLU argued that "the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe."[91] The presence of a funded state employee in a parochial classroom, "communicating, assisting and participating in religious discussions and other sectarian activities,"[92] cannot

[86] Ibid., 78.
[87] Ibid., 217.
[88] Ibid., 233.
[89] Ibid., 11.
[90] Ibid., 29.
[91] Ibid.
[92] Ibid., 39.

be reconciled with the constitutional requirement that government not participate in the religious education of parochial students.

The respondents also argued that the school district's failure to provide a sign language interpreter was not a burden on the free exercise of religion for the exact opposite reason the petitioners argued it was. The respondents believed that providing an interpreter in a sectarian classroom would be providing "direct assistance in the teaching and propagation of religious beliefs and ideas."[93] Fundamentally, the respondents claimed that the petitioners needed to provide any necessary special assistance to their child at a sectarian school at their own expense. The use of a sign language interpreter was available at the local public schools. Since the Zobrest's had chosen to send their child to a private religious school, they also chose to incur any liabilities as a consequence of that decision.

After weighing the constitutional arguments and merits of each case, the United States Supreme Court, through another five to four split decision, reversed the judgment of the Court of Appeals. The Court found that the Establishment Clause did not prevent the respondent school district from furnishing the petitioner with a sign language interpreter to facilitate his education at a sectarian school.

The conflicting principles surrounding *Aguilar* and *Zobrest* are striking. In *Aguilar*, the Court ruled that public school teachers providing remedial instruction in a parochial school was an excessive entanglement of church and state. This instruction constituted an excessive entanglement despite the fact that the remedial teachers would only be aiding in the understanding and improved learning of secular subjects by special

[93] Ibid., 235.

education learners. Meanwhile, in *Zobrest*, similar instructional aid was to be provided to help with the understanding and improved learning of an individual special education learner. Ironically, in *Zobrest* the teaching aid was to help the student learn both secular and religious instruction, contrary to the educational bounds found in *Aguilar*. Despite the many hairs that could be split concerning the finer details of the cases, the interest between these two cases does not lay between the cases themselves, but with an ensuing case four years later.

In *Agostini v. Felton*, 521 U.S. 203 (1997), through another 5-4 split decision, the Court overruled their own precedent of *Aguilar v. Felton*. In *Agostini*, the Court decided to distinguish its prior decision evaluating the programs that aided the secular activities of religious institutions into two categories: "those in which it concluded that the aid resulted in an effect that was "indirect, remote, or incidental," and upheld the aid; and those in which it concluded that the aid resulted in "a direct and substantial advancement of the sectarian enterprise," and invalidated the aid.[94] The Court held that cases subsequent to *Aguilar*, including *Zobrest*, had reshaped the approach the Court used to assess indoctrination.[95]

Using *Zobrest* as the exemplar, the Court abandoned the presumption that the placement of public employees on parochial school grounds resulted in "the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[96] Additionally, the Court believed that *Zobrest* had refuted the idea that the use of a public employee would aid in the advancement of

[94] *Agostini v. Felton*, 521 U.S. 203 (1997).
[95] Ibid.
[96] Ibid.

religion. The Court decided that a sign teacher had the same opportunity to inculcate religion in the performance of their duties and no evidence existed to suggest they had done so. Consequently, Justice O'Connor stated in her majority opinion when reversing the principles of *Aguilar v. Felton* through *Agostini v. Felton,* that it was the precedent set through *Zobrest,* and not *Agostini,* that guided the Court and established the rule by decision.[97]

The reversal of *Aguilar* by *Agostini* casts doubts about the Supreme Court and the consistency of its rulings concerning the Establishment Clause. However, it is the words of the Court itself that provide the most fuel to the fire of judicial inconsistencies concerning religion. In summarizing the majority decision on *Agostini* Justice O'Connor stated that the Supreme Court's Establishment Clause law had "significantly changed since we decided *Aguilar*."[98] Such an admission, though common for other topics like race, gender, and property, casts more doubt concerning both the fair and equitable understanding and application of the Establishment Clause by the Supreme Court. For the Supreme Court to "significantly change" its Establishment Clause law over such a short period of time invites questions over both the consistency and the partiality of such decisions. The inconsistent application of the Establishment Clause and the significant changes signaled by the Court have not only frustrated the practitioners of the religious clauses, but the justices themselves. As Supreme Court jurisprudence concerning the religion clauses continues to evolve, the Supreme Court justices see the inconsistencies with their decisions and begin to question the validity of their methods.

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[97] Ibid.
[98] Ibid.

CHAPTER IV

FRUSTRATION IN COURT

When Associate Justice Hugo Black considered the arguments of *Chambers v. Florida*, 309 U.S. 227 (1940), he determined that the Fourteenth Amendment incorporated Amendments One through Eight of the Bill of Rights, and applied them to the states.[1] Since Black's deliberations and subsequent decision, the Supreme Court has had varying degrees of success applying the Bill of Rights to the states. While the Miranda rights warning from *Miranda v. Arizona*, 384 U.S. 436 (1966), is often seen as a positive application of the Bill of Rights to the states, other areas of application have not been met with as much success. The application of the First Amendment religion clauses on the states has encountered stiff resistance and uneven application as the Court struggles to find a reliable methodology to apply the religion clauses in a consistent manner.

Consequently, the Supreme Court has devised numerous methods by which to apply the religion clauses. Through the application of the Establishment Clause Test, the *Lemon* Test, the *Marsh* Test, the Endorsement Test, and the Coercion Test, the Court has tried and failed to apply the religion clauses consistently. More recent Supreme Court cases have led to further contradictions and conflicts, with the justices themselves

[1] Jeffrey D. Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham: Rowman & Littlefield Publishers, Inc., 1996), 112.

expressing their frustrations over the clear lack of consistency. These contradictions and illogicalities came to a head on June 27, 2005, when the justices handed down the decisions in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005). Both of these cases dealt with the circumstances surrounding the displaying of the Ten Commandments on or within state property, with each case resulted in a conflicting opinion. These conflicting opinions set off a firestorm of criticism within the Supreme Court itself, resulting in calls for consistent, long lasting reform, and the questioning of whether the Supreme Court even has jurisdiction over any matters pertaining to religion itself.

***Van Orden v. Perry*, 545 U.S. 677 (2005)**

By 2005, the twenty-two acres surrounding the Texas State Capitol contained seventeen monuments and twenty-one historical markers commemorating the people, ideals, and events that compose Texan identity. One of these monuments was a six feet high by three and a half feet wide granite monument of the Ten Commandments. In 1961, "the people and youth of Texas by the Fraternal Order of Eagles of Texas," presented this monument to Texas who accepted it by a joint resolution of the House and the Senate.[2] The joint resolution also authorized the placement of the monument on the Capitol grounds.[3] In 2003, Thomas Van Orden filed an action to have the monument removed from the surroundings of the State Capitol on the grounds that the monument violated the Establishment Clause of the First Amendment. The United States Court of

[2] Gerhard Casper and Kathleen M. Sullivan, ed. "Van Orden v. Perry (2005)," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 2004 Term Supplement*, Vol. 347 (Bethesda: LexisNexis, 2005), 9.
[3] Ibid.

Appeals for the Fifth District found that the monument did not contravene the Establishment Clause. However, on the same day the Court of Appeals for the Eighth Circuit ruled the opposite conclusion on a case with virtually identical facts. Consequently, the Supreme Court granted a writ of certiorari for the two cases to be heard.

The petitioner Thomas Van Orden made two main points. First, he believed that the Ten Commandments monument was a clear expression of a religious message and it was also a religious symbol.[4] Second, by the state government placing a large monument of the Ten Commandments in a prominent public place, such a placement violated the Establishment Clause because it favored some religions over others.[5] The petitioners established their argument through the use of previous rulings found in the lower courts. At that time seven Circuit Courts had ruled on the question of whether Ten Commandments displays on government property violated the Establishment Clause. While three Circuits, including the Fifth Circuit in this case, had rejected the constitutional challenges and allowed the monuments to remain, four Circuits had come to an opposite conclusion and found the Ten Commandments monuments unconstitutional.[6]

The petitioners also emphasized the similarities of the cases to add weight to their argument. In almost all of these decisions the Fraternal Order of Eagles placed the monuments. Additionally, all the monuments had been on government property for some time, often decades, before the constitutional challenge. Moreover the symbols on all the

[4] Ibid., 76.
[5] Ibid., 84.
[6] Casper, "Van Orden v. Perry," 11.

monuments were religious in nature and conveyed a religious message; a message that could be construed as an endorsement of a particular religion.

While the petitioners focused their argument on two main points, they broke these points down into four separate violations of the Establishment Clause. First, the state government discriminated in favor of some religious denominations and sects over others because of the writing, size of the lettering, and the prefatory words, "I AM the LORD thy GOD," which emphasized a religious message over a secular one.[7] Additionally, different religions had varying versions of the Ten Commandments and the choice of a version prefers some religions over others.[8] Second, the government had no permissible secular purpose when placing the Ten Commandments within the grounds of the State Capitol. The Supreme Court had held repeatedly that government actions violated the Establishment Clause if there was not an actual secular purpose."[9] Third, the Ten Commandments monument had the impermissible effect of symbolically endorsing religion. The petitioners argued that, contrary to common belief, a careful review of American history found little influence of the Ten Commandments in the forming of American law. Subsequently, any message was religious in nature since it had little in common with secular American culture. Finally, the message of the monument is not "minimal religious content," but instead the words "I AM the LORD thy GOD" and the explicitly religious commandments projected a religious message.[10] According to the petitioners, these four factors demonstrated that the monument's location, context, and

[7] Ibid., 89.
[8] Ibid., 79.
[9] Casper, "Van Orden v. Perry," 73, 74.
[10] Ibid., 109.

content constituted an impermissible symbolic endorsement of religion. They believed that the Ten Commandments monument expressed a religious message and that these religious beliefs favored a particular religion over others through the displaying of the Decalogue.

The respondents to this case based their defense on four arguments. First, they believed that the context of the monument was not an endorsement of religion and thus did not violate the Establishment Clause.[11] Secondly, the "history and ubiquity" of the monument, and other monuments across the nation, did not violate the Establishment Clause.[12] Third, the monument survived any test given to it that had been devised in conjunction with the Establishment Clause,[13] and finally, the monument itself presented a far lesser threat to the establishment of religion than practices and displays already condoned by the Court.[14]

The respondents also argued that the context of the monument was not religious in nature through an extrapolation of the history and ubiquity of the display. Dating back to 1888, the people of Texas dedicated the Texas Capitol and its grounds, and three years later the first monument was built on the grounds and dedicated to the Texans who died at the Alamo.[15] By 2005, seventeen monuments and twenty-one historical markers adorned the Capitol Grounds, "together commemorating people, events, and ideals that have contributed to the history, diversity, and culture of Texas."[16] Concerning the

[11] Ibid., 130.
[12] Ibid., 158.
[13] Ibid., 164.
[14] Ibid., 167.
[15] Casper, "Van Orden v. Perry," 122.
[16] Ibid.

monument in question, the display had stood for over four decades before anyone took offense to it. By statute, Texas defined the monument as a "museum" and maintained it by a professional curator, along with the other monuments on the grounds.[17]

The respondents argued that under *Lynch* and *Allegheny*, the overall history, context, and surroundings are critical to determining a display's constitutionality. If, aware of that full background and history, the reasonable observer would not perceive the monument to be a government endorsement of religion, then the monument is constitutional. In a unanimous verdict the Court of Appeals supported the argument concerning the history and background, and ruled that the monument met the constitutional standard.[18]

The Court of Appeals agreed that the context of the monument was a governmental acknowledgement of "the substantial contribution of the Ten Commandments to the development of Western civilization and legal codes."[19] No history or evidence existed that demonstrated an impermissible purpose, but rather the Ten Commandments monument served at least two permissible purposes. First, the state accepted it from the Fraternal Order of Eagles in 1961, for the purpose of commending their work with youth. Second, the state placed the monument on the grounds for the purpose of acknowledging the Ten Commandments' historical impact on American and Texan law and culture.[20]

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[17] Ibid., 129.
[18] Ibid.
[19] Ibid.
[20] Casper, "Van Orden v. Perry," 130.

To further support their argument of history and ubiquity, the respondents drew on the

"countless monuments, medallions, plaques, sculptures, seals, frescoes, and friezes – including, of course, this Court's own courtroom frieze that commemorate the Decalogue."[21] They claimed nothing in the Constitution required these historic artifacts to be "chiseled away or erased."[22] The Framers of the Constitution considered and rejected a rule that would have prohibited any governmental activity "touching religion," and since the monument had neither the purpose nor the effect of endorsing religion, it remained consistent with the Court's precedents, and should be upheld.[23]

Finally, the respondents argued, that by forcing the State Preservation Board to remove only one of the seventeen monuments on the Capitol Grounds because that monument contains a text with religious significance would be tantamount to an act of discrimination and hostility.[24] The Constitution mandates the accommodation, not merely tolerance, of all religions, and forbids hostility toward any. To remove a monument, regardless of its religious message, would contravene the Establishment Clause and invalidate its historical significance.

Upon ruling on the case, the United States Supreme Court held that the *Lemon* Test was not useful in dealing with the sort of passive monument that had been erected on the Capitol grounds. Instead, the Court focused on both the nature of the monument and its history. Consequently, the Court ruled, by a split majority of five to four, that the

[21] Ibid.
[22] Ibid.
[23] Ibid., 170.
[24] Ibid.

placement of the Ten Commandments monument on the State Capitol grounds was "a far more passive use of those texts than the mandatory placement of the text in elementary school classrooms."[25] Citizens had walked by the monument for a number of years before bringing this lawsuit. Additionally, Texas had treated its Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group had a dual significance, partaking of both religion and government. Therefore the monument passed Constitutional examination.

***McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005)**

On November 18, 1999, the American Civil Liberties Union (ACLU) of Kentucky filed a complaint against McCreary and Pulaski Counties. The genesis of this complaint were displays in each county's courthouses of the Ten Commandments, which the ACLU believed violated the Establishment Clause of the First Amendment. Shortly after the lawsuit, the counties changed their displays to include another eight documents, in addition to the Ten Commandments. The counties entitled these new displays, "Foundations of American Law and Government," with the express intention of educating citizens about Kentucky's "precedent legal code."[26] The ACLU continued its request for a preliminary injunction and on May 5, 2000, the District Court ordered the immediate removal of the displays. The defendants then modified the displays a second time in an effort to bring it within constitutional boundaries. This time the displays included eleven equally sized documents placed in equal sized frames, with an

[25] *Van Orden v. Perry*, 545 U.S. 677 (2005).
[26] *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).

explanatory document stating that the "display contains documents that played a significant role in the foundation of our system of law and government."[27]

After the construction of the third display, a second motion was filed for a preliminary injunction, which was granted by the District Court which again ordered the displays to be removed. The defendants filed a motion with the Sixth Circuit Court, which affirmed the lower court's ruling in a split decision. The Circuit Court ruled that the defendants needed to show "historical and an analytical connection" of the Ten Commandments with the other documents.[28] The defendants held that the requirement of a historical and analytical connection conflicted with precedence set by both the Supreme Court and four other Circuit Courts. Subsequently, the Supreme Court granted a writ of certiorari for the case.

The petitioner's arguments before the Supreme Court contained three main points. First, they believed that the display did not violate the Establishment Clause.[29] Secondly, they argued that the *Lemon* Test should be overruled or modified for governmental acknowledgement of religion,[30] and finally, an objective test should be adopted for government acknowledgements of religion.[31] The base argument of the petitioners concerning the displaying of the Ten Commandments was that they "have profoundly influenced the formation of Western legal thought and the formation of our country."[32]

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[27] Gerhard Casper and Kathleen M. Sullivan, ed. "McCreary County v. ACLU of Kentucky (2005)," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 2004 Term Supplement*, Vol. 348 (Bethesda: LexisNexis, 2005), 17.
[28] Ibid., 19.
[29] Ibid., 116.
[30] Ibid., 143.
[31] Ibid., 148.
[32] Ibid., 17.

The influence that they cited as supporting this claim was that they were foundational to the United States through the Declaration of Independence. In the Declaration it declares, "that all men are created equal" and that they are "endowed by their Creator with certain unalienable rights,"[33] this Creator being the same Creator that issued the Ten Commandments. The petitioners also argued that the validity of such a statement is irrelevant. The Court is not required to "determine whether the secular purpose is morally or politically correct – because the government acts neutrally so long as the purpose is one other than advancing religion."[34] Checking the validity of such statements was not necessary despite the fact that, the petitioners contended, many historians and legal scholars agreed that the Ten Commandments influenced American law.[35]

The petitioners also believed that the *Lemon* Test should be overruled "since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence."[36] Their evidence for the *Lemon* Test's unworkability was their belief that the foundations display passed every test developed by the Court. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the secular purpose was "to educate the public about some of the documents that played a significant role in the foundations of our system of law and government."[37] They argued that the mere presence of the Ten Commandments did not transform an otherwise secular display into a religious one.[38] The display is about the law, and like many other legal documents in history, the Decalogue is law and has

[33] Ibid.
[34] Ibid., 119.
[35] Ibid., 120.
[36] Ibid., 93.
[37] Ibid., 114.
[38] Ibid.

influenced American law. The petitioners argued that no reasonable observer would consider the "Foundations Display" an endorsement of religion. Such an observer, would be aware of the historical influence of the Ten Commandments, and would view them in context with the other legal documents. The Commandments are only one of eleven documents on display, and viewed in light of history and ubiquity, no objective observer would conclude the display favors or establishes religion.[39]

The third point of the petitioners' argument was that the Establishment Clause test announced in *Lemon v. Kurtzman*, has caused "hopeless confusion," with many members of the Court having voiced opposition to its continued use.[40] As an example they cited the dissent in *Edwards v. Aguilard*, 482 U.S. 578, 636 (1987), where Justice Scalia, joined by Chief Justice Rehnquist, speaking of the *Lemon* test remarked that,

> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental official can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.[41]

Justice Rehnquist further added that the purpose prong of the *Lemon* test is not "a proper interpretation of the Constitution," and has "no basis in the history" of the First Amendment.[42] Rehnquist concluded by saying that the test "has proven mercurial in

[39] Ibid., 115.
[40] Ibid., 143.
[41] Ibid., 145, 146.
[42] Ibid., 108.

application," and should be abandoned.[43] The petitioners continued, declaring that the Court has acknowledged that no "rigid caliper" or "single test" existed and that *Lemon* was only meant as a guideline; however, this "guideline" had continued to overshadow Establishment Clause jurisprudence.[44] Consequently, the petitioners argued that the *Lemon* Test should be abandoned. It had fractured the Court and caused scholars and litigators to wonder if any hope for consistency existed.[45] The petitioners concluded by observing that many "conflicting decisions on virtually identical fact patterns as there are judges to decide them" exist.[46]

The respondents argument centered on two main points. First, that the Ten Commandments contained and expressed a religious message,[47] and second, that the inclusion of the Ten Commandments in the courthouse displays had the impermissible purpose and effect of endorsing religion.[48] In arguing these points the respondents drew on the original intentions of the Court Houses for displaying the Ten Commandments. The Kentucky ACLU argued that at first the courthouses had displayed only a framed copy of the Ten Commandments."[49] After the initial legal action from the respondents the counties then passed a resolution to post the Ten Commandments with additional documents and a sign that read, "The precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded."[50] However, the

[43] Ibid.
[44] Ibid., 144, 145.
[45] Ibid.
[46] Ibid.
[47] Ibid., 177.
[48] Ibid., 188.
[49] Ibid., 168.
[50] Ibid., 169.

portions of those additional documents selected only included those documents references to God or the Bible.[51] After the continuance of legal action the counties then modified the displays to include several other documents, with the acknowledged understanding that they were doing so "in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit."[52]

To negate previous precedents from the Court concerning religious cases, the respondents presented four arguments. First, governmental Ten Commandment displays were new and far less ubiquitous than the Pledge of Allegiance or the national motto.[53] Second, while the Ten Commandments are not worship or prayer in themselves, they have as their purpose "placing the [reader] in a penitent state of mind, or [are] intended to create a spiritual communion or invoke divine aid, [thus] stray[ing] from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history."[54] Third, the Ten Commandments displays referred to particular religions by emphasizing that document itself, and by choosing text and then emphasizing ideas that reflected deep theological and historical rifts. Finally, each county's displays had far more than "minimal" religious content. The displays contained between fourteen and seventeen Biblical verses (depending on a religions' numbering and organizing systems), and recited core religious beliefs of Christians and Jews. Additionally, they capitalize the word "Lord" in every usage making them more of a religious proclamation to the reasonable observer.[55] In summary, the ACLU argued that the purpose and effect of the

[51] Ibid., 170.
[52] Ibid., 169.
[53] Ibid., 214.
[54] Ibid., 215.
[55] Ibid., 216.

counties' actions throughout the litigation process, including the posting of the second and third displays, was meant to advance religion. Accordingly, the respondents believed that for this reason, the third displays violated the First Amendment's Establishment Clause.[56]

In a five to four split decision, the Supreme Court affirmed the lower court judgments, agreeing with the respondents that all of the displays violated the Establishment Clause because they did not have a secular legislative purpose. Even though the third displays may have been within the bounds of the Establishment Clause, the Court also considered the progression leading up to the third display. Additionally, the Court rejected the counties' request to abandon *Lemon's* purpose test or to truncate the Court's enquiry into purpose.

When taken at face value the most bewildering contrast between these two cases is not that they were similar in circumstance or argument. Nor is it that despite their similarities the decisions handed down were different. The most bewildering aspect of these two cases is that the justices handed down these decisions on the same day. Although a convincing argument might be made about the inconsistency of the decisions based on the merits of each case and the application of the Constitution, it is the remarks in both the majority and dissenting opinions of each case that speak to the inadequacy of the current application of the Establishment Clause.

In the opinion of the Court for *Van Orden*, Chief Justice Rehnquist identified the conflicting views concerning religious cases. On the one side, Rehnquist stated, it was impossible to ignore the "strong role played by religion and religious traditions

[56] Ibid., 217.

throughout our Nation's history;" yet, on the other side, the Court must concern itself with "the principle that governmental intervention in religious matters can itself endanger religious freedom."[57] Rehnquist then reiterated these points stating that the Court should "neither abdicate our responsibility to maintain a division between church and state," while striving to avoid demonstrating "a hostility to religion by disabling the government from in some ways recognizing our religious heritage."[58] In illustrating the inadequacies of this balancing act Rehnquist outlined over the previous twenty-five years the inconsistencies surrounding Establishment Clause rulings.

The inconsistencies that Rehnquist identified included the random application of the *Lemon* Test, such as *Wallace v. Jaffree*, 472 U. S. 38 (1985) which applied the test, as opposed to *Marsh v. Chambers*, 463 U. S. 783 (1983), which did not.[59] To further compound the confusion surrounding the Court's decisions, it was decided just two years after *Lemon*, in *Hunt v. McNair*, 413 U. S. 734, 741 (1973), that the three prongs which make up the test would be "no more than helpful signposts."[60] Subsequently, many of the Court's more recent cases have simply ignored the *Lemon* test, including *Zelman v. Simmons-Harris*, 536 U. S. 639 (2002), and *Good News Club v. Milford Central School*, 533 U. S. 98 (2001).[61] Rehnquist then rounds out this conflicting piece of analysis in the Court's opinion by conceding that sometimes the *Lemon* Test was applied only after concluding "that the challenged practice was invalid under a different Establishment

[57] *Van Orden v. Perry*, 545 U.S. 677 (2005).
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.

Clause test."[62] Rehnquist then, echoing the words of Justice Kennedy from *Lynch v. Donnelly*, concluded this line of thought by stating "whatever may be the fate of the *Lemon* Test in the larger scheme of Establishment Clause jurisprudence," implying through the use of the word "whatever" that the Court's confidence in the test is marginal at best.[63]

Speaking to the *Van Orden* decision, Rehnquist explained that the Supreme Court had always recognized the role that God had played in America's heritage.[64] Consequently, he observed, it would be "incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government."[65] Rehnquist then cited as an example the Court's decision to uphold laws which originated from one of the Ten Commandments; the sale of merchandise on Sunday.

Given the Court's own acknowledgement that Establishment Clause jurisprudence is flawed, it is therefore confusing that the Court, on the same day, would uphold the displaying of one Decalogue as a historical monument, while declaring another unconstitutional. Such a contradiction if further highlighted by the fact that in one case (*Van Orden*) the *Lemon* Test was not applied while in the other case it was. Additionally, the unconstitutional monument bore a title stating "display contains documents that played a significant role in the foundation of our system of law and government."[66] An

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[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Philip B. Kurland and Gerhard Casper, ed. "County of Allegheny v. ACLU Greater Pittsburgh Chapter (1989)," *Landmark Briefs and Arguments of the Supreme Court of the*

acknowledgement the Court made when considering the constitutionality of the *Van Orden* case.

The conflicting decisions of *Van Orden* and *McCreary County* become even more confusing when the Court acknowledged that a frieze of Moses "has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew," in addition to a, "24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, [which] stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives."[67] Adding further confusion to the two decisions was the Court's declaration that Moses was a lawgiver as well as a religious leader, and "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[68]

In concurring, Associate Justice Antonin Scalia added further weight to the confusion surrounding Establishment Clause jurisprudence. Scalia commented that he believed Chief Justice Rehnquist's opinion "accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently apply some of the time."[69] Scalia conceded through this admission that Establishment Clause jurisprudence was far from settled or consistent, and subject to change. Scalia finished this line of thought by lamenting his still elusive goal of adopting "an

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United States: Constitutional Law 1988 Term Supplement, Vol. 189 (Frederick: University Publications of America, 1990), 17.
[67] *Van Orden v. Perry*, 545 U.S. 677 (2005).
[68] Ibid.
[69] Ibid.

Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied."[70]

In a separate concurrence, Associate Justice Clarence Thomas retraced the words of Justice Scalia, longing for a consistent standard for Establishment Clause jurisprudence. Thomas observed that the *Van Orden* case would be easy to rule upon, "if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges."[71] According to Thomas, a consistent standard could only occur when the Court returned "to the original meaning of the Clause."[72] According to Justice Thomas, however, returning to the original meaning of the "Clause's text and history," meant overturning the incorporation of the religion clauses in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Everson v. Board of Education*, 330 U.S. 1 (1947).[73] Thomas believed that if the amendment was not applicable to the states when first adopted, then it should not be forced upon the states now.

Justice Thomas conceded that the likelihood of incorporation being reversed was improbable at best. Therefore, Thomas offered a compromise by instead focusing on "the original meaning of the word "establishment," rather than the various approaches the Court now uses.[74] Thomas believed that the Framers understood establishment to mean coercion of "religious orthodoxy and of financial support by force of law and threat of penalty," such as mandatory observance or mandatory payment of taxes supporting

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[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.

ministers.[75] Ultimately Justice Thomas saw the Court's jurisdiction, application, and decisions concerning cases of religion to be flawed. By returning to the Founders original intent and meaning of the religion clauses, he believed the Court would:

> avoid the pitfalls present in the Court's current approach to such challenges. This Court's precedent elevates the trivial to the proverbial "federal case," by making benign signs and postings subject to challenge. Yet even as it does so, the Court's precedent attempts to avoid declaring all religious symbols and words of longstanding tradition unconstitutional, by counterfactually declaring them of little religious significance. Even when the Court's cases recognize that such symbols have religious meaning, they adopt an unhappy compromise that fails fully to account for either the adherent's or the nonadherent's beliefs, and provides no principled way to choose between them. Even worse, the incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application. All told, this Court's jurisprudence leaves courts, governments, and believers and nonbelievers alike confused—an observation that is hardly new.[76]

Justice Thomas saw the Court's handling of the religion clauses, and in particular the Establishment Clause, as fraught with futility and incapable of consistent application. Thomas then concluded his frustration laced concurrence by pointing to the inconsistency of the decisions the Court reached today in "this case and in *McCreary County v. American Civil Liberties Union of Ky*.," which Thomas believed had only compounded the confusion.[77]

Writing the opinion of the Court in the *McCreary County* decision, Associate Justice David Souter cited the *Lemon* Test as the standard by which the case was decided. Souter noted that one of the three prongs of the *Lemon* Test was to determine the secular purpose of the case in question. Drawing on the previous two earlier efforts to establish the display, the Court found that the Ten Commandments violated the *Lemon* Test, since

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[75] Ibid.
[76] Ibid.
[77] Ibid.

it would have been hard for an "objective observer" to not concede that the initial purpose of the display was the advancement of religion. Given the validity of this statement in light of the *Lemon* Test criteria, it becomes much harder to understand the Court's decision in *Lynch v. Donnelly*, 463 U.S. 783 (1983). Like *McCreary County*, *Lynch* was decided through the use of the *Lemon* Test. After the initiation of the lawsuit, the mayor vowed to fight against the ACLU's attempt to take "Christ out of Christmas."[78] Yet the Court in *Lynch* allowed the displaying of the Christmas crèche, despite the religious actions of the mayor. Souter conceded the inconsistencies of the Court's decision, commenting that in Establishment cases, "trade-offs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had."[79]

In his dissent, Justice Scalia lambasted Souter's "trade-offs" as nothing more than the *Lemon* Test being used to take "seemingly simple mandates" and have them "manipulated to fit whatever result the Court aimed to achieve."[80] Scalia reiterated his desire to see the *Lemon* Test abandoned. In doing so, he cut to the heart of the matter concerning the Supreme Court's jurisdiction and jurisprudence over religious matters. Scalia observed that the Founding Fathers would "surely regard it as a bitter irony that the religious values they designed those Clauses to protect have now become so distasteful to this Court that if they constitute anything more than a subordinate motive

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[78] Philip B. Kurland and Gerhard Casper, ed. "Lynch v. Donnelly (1984)," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 1983 Term Supplement,* Vol. 151 (Frederick: University Publications of America, 1985), 91.
[79] *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).
[80] Ibid.

for government action they will invalidate it."[81] Scalia reiterated the feelings of Justice Thomas in his *Van Orden* concurrence. The Founding Fathers did not leave matters of religion to the federal government, nor did they intend the federal courts to prescribe what can and cannot be practiced as a part of one's religious devotion. By applying, sometimes avoiding, and then ignoring the *Lemon* Test, Scalia observed that the Court's invocation of the *Lemon* Test is "like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, Lemon stalks our establishment clause jurisprudence once again."[82]

Tremendous struggles exist among the Court's members trying to find the right balance concerning religious issues. As historian Timothy L. Hall observed, the "courts and commentators have been incorrigible poachers in the preserve of American history,"[83] erecting claims and precedence for First Amendment jurisprudence based on "shockingly scanty" historical evidence, both for and against religious issues.[84] In a previous ruling Justice O'Connor sought to resolve the issue by adopting an objective religions test. She suggested four preliminary categories: (1) government action targeted at individuals or groups, (2) government (acknowledgment or) speech on religious topics, (3) government decisions involving religious doctrine and religious law, and (4) governmental delegations of power to religious bodies.[85] Unfortunately, the problem with the objective religions test is that it conflicts with the original purpose for the

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[81] Ibid.
[82] *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).
[83] Timothy L. Hall, *Separating Church and State: Roger Williams and Religious Liberty* (Chicago: University of Illinois Press, 1998), 4.
[84] Ibid.
[85] *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

Establishment and Free Exercise Clauses'. By suggesting that the Court's decisions concerning religion should fall into four main categories, one of which includes "government decisions involving religious doctrine and religious law," the Court would be deciding what is and is not "religious doctrine and law." By accepting such a responsibility the Supreme Court would in effect be establishing a state religion and prohibiting the free exercise thereof; the very two purposes the Establishment and Free Exercise clauses were designed to protect.

Law professors Russell L. Weaver and Donald E. Lively in their book, *Understanding the First Amendment*, predict that "given the considerable dissatisfaction with established principles" and the "failure of the Court to unify in support of an alternative," the Establishment Clause standards have an uncertain future.[86] If Supreme Court jurisprudence is going to become consistent, and the religion clauses are going to be consistently enforced, then a far more general and fairer way of deciding cases of religious scope needs to be adopted. The Court has taken the first step by acknowledging that the current jurisprudence concerning religious cases is not adequate. Justice Thomas has taken a much bolder and much more "constitutional" step by questioning the Court's jurisdiction concerning religious matters. If an adequate compromise is to be made, it is probable that the solution will be found somewhere between the jurisprudence and jurisdiction of the Court's religion cases.

[86] Russell L. Weaver, and Donald E. Lively, *Understanding the First Amendment* (New York: Matthew Bender & Company, Inc., 2003), 15.

CHAPTER V

THE SEARCH FOR A CONSISTENT STANDARD

The application of both the Establishment Clause and the Free Exercise Clause to the states following *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Everson v. Board of Education*, 330 U.S. 1 (1947), exposed the Supreme Court to widespread criticism. The Supreme Court's jurisprudence and jurisdiction has become the subject of heavy criticism as it sought to forge a more consistent and more definitive role concerning religion and its relationship with local, state, and the federal government. The justices themselves have acknowledged that current jurisprudence concerning religious cases is not adequate. A far more general and balanced way of deciding cases of a religious nature needs to be developed. Associate Justice Clarence Thomas has facilitated a potential change towards the way the Supreme Court decides cases concerning religion by questioning the Court's jurisdiction over religious matters. Thus, because of the inconsistencies found in the Supreme Court's jurisprudence and because of the Court's reluctance to cede jurisdiction, combined with the institution's treatment of matters pertaining to religion, all have made it clear that both the idea and the principle of "separation of church and state" needs to be reevaluated and reapplied, by the justices, scholars, and the public.

Many Supreme Court rulings exist that highlight the inconsistencies found in the Court's application of the Establishment and Free Exercise Clauses of the First Amendment. It is unfortunate that the consistency and absolutism that the Supreme

Court has sought to establish has been fraught with contradictions and unpredictability, even in cases where the justices thought they had crafted a clear rule. These contradictions in jurisprudence have become apparent when analyzing the Court's rationale behind cases similar in nature but different in their decisions. Some of these decisions include the exhibition of Christmas crèches between *Lynch v. Donnelly*, 463 U.S. 783 (1983), and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). Additionally, analysis of *Aguilar v. Felton*, 473 U.S. 402 (1985), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), concerning the use of public money being used to help enhance the education of disadvantaged learners, and *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005), regarding the displaying of the Ten Commandments on or within state premises, further highlight the Supreme Court's inconsistent, even contradictory, jurisprudence concerning this issue of religious separation.

In *Lynch v. Donnelly* and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, the Court decided on cases that addressed religious Christmas "decorations" in state sponsored public displays, specifically the use of a Christmas crèche, and in *Allegheny* a Chanukah menorah as well. In *Lynch* the Court upheld the use of a crèche while in *Allegheny* the Court viewed the use of a crèche unconstitutional, but not the menorah. The most confusing and concerning aspects of these cases, outside of the contrary conclusions of the Court, was how the justices reached their conclusions. In *Lynch*, the justices examined the crèche within the wider context of the display, while in *Allegheny* the justices examined both the crèche and the menorah on their own merits. Despite the similarities of the circumstances, the inconsistent application of the *Lemon*

Test, a test devised by the Court to consistently determine the constitutionality of a decision concerning religion, resulted in the preservation of one display while the justices condemned the display in the other. It is not surprising that Associate Justice Anthony Kennedy in his dissent of *Allegheny* stated that he "did not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area."[1] Additionally and correctly, Kennedy questioned the *Lemon* Test's usefulness in providing "concrete answers to Establishment Clause questions."[2]

The cases of *Aguilar v. Felton* and *Zobrest v. Catalina Foothills School District*, focused on the use of public money being used to help enhance the learning of disadvantaged learners in parochial schools. Despite the inconsistency of the decisions between *Aguilar* and *Zobrest*, which permitted the use of public funds in one case but not the other, it was a later case concerning the same issue that called into question the consistency and reasonableness of the Supreme Court's jurisprudence. In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court overruled their own precedent of *Aguilar v. Felton*. In *Agostini*, the Court decided to distinguish its prior decision evaluating programs that aided the secular activities of religious institutions into two categories: indirect and direct aid.[3] The greatest threat to religious freedom derived from this decision, however, is not the decision itself, but the Court's admission through Associate Justice Sandra Day O'Connor that the Supreme Court's Establishment Clause law had "significantly changed since we decided *Aguilar*."[4] For the Supreme Court to

[1] *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).
[2] Ibid.
[3] *Agostini v. Felton*, 521 U.S. 203 (1997).
[4] Ibid.

"significantly change" its Establishment Clause law over such a short period of time invites questions over both the consistency and the partiality of such decisions. In effect, O'Connor setup a slippery slope argument: if this change, then what else?

The cases of *McCreary County v. ACLU of Kentucky* and *Van Orden v. Perry*, dealt with similar circumstances surrounding the displaying of the Ten Commandments on state property and within state buildings. The obvious inconsistency of these cases is the conflicting decisions of the Court, despite being given on the same day, concerning the same issues. However, it is the opinions given by the justices on these cases that shed most of the light regarding the Court's frustrations and inconsistency with issues concerning religion. In the opinion of the Court for *Van Orden*, Chief Justice William Rehnquist identified the conflicting views concerning religious cases. Rehnquist observed that it was impossible to ignore the "strong role played by religion and religious traditions throughout our Nation's history;" yet, on the other side, the Court must concern itself with "the principle that governmental intervention in religious matters can itself endanger religious freedom."[5] Rehnquist also illustrated the inadequacies of the Supreme Court's jurisprudence over the previous twenty-five years identifying multiple inconsistencies surrounding Establishment Clause rulings.

In concurring, Associate Justice Antonin Scalia added further weight to the confusion surrounding Establishment Clause jurisprudence. Scalia commented that he believed Chief Justice Rehnquist's opinion "accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently

[5] *Van Orden v. Perry*, 545 U.S. 677 (2005).

apply some of the time."[6] Scalia finished his line of thought by lamenting his still elusive goal of adopting "an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied."[7] In a separate concurrence, Justice Thomas retraced the words of Justice Scalia, longing for a consistent standard for Establishment Clause jurisprudence. Thomas observed that the *Van Orden* case would have been easy to rule upon, "if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges."[8] According to Thomas, a consistent standard could only occur when the Court returned "to the original meaning of the Clause."[9] Ultimately, Justice Thomas saw the Court's handling of the religion clauses, and in particular the Establishment Clause, as fraught with futility and incapable of consistent application.[10]

Despite Justice Thomas' desire to return to the original meaning of the religion clauses, scholars acknowledge that historical precedence concerning the religion clauses cannot be fully extrapolated to satisfactorily accommodate every historian, lawyer, or potential petitioner before the Court. Presently, historical scholarship dealing with the background and enactment of the First Amendment is at an impasse with separationists and accommodationists defending their own position while being convinced about the erroneousness of their opponents. Unfortunately, both groups adhere to their respective positions by ignoring "massive amounts of countervailing evidence and by engaging in

[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.

determined historical selectivity."[11] Consequently, judicial interpretation of the First Amendment's religion clauses are in a state of disarray.[12]

These historical inaccuracies have fostered a lack of understanding and an inaccurate contextualization of religious and political thought during the late 1700s, with "sound bites" of the Founding Fathers used to justify, dismiss, and deny state and federal laws throughout the country. Separationists claim that the Bible and religion did not play a significant role in the political and legal thoughts of the Founding Fathers. However, a statistical study of their political writings from 1760 to 1805, shows that well over half of all their citations were from the Bible, Montesquieu, Blackstone, and Locke, in that order of priority.[13] Consequently, as historian Thomas Curry pointed out, some of the conclusions modern scholars have drawn about the meaning of the First Amendment are logical, plausible and reasonable, but those conclusions are not necessarily historical.[14]

Today a few Founding Fathers hold popular positions in the imagination of contemporary society and have been afforded prominent, but historically inaccurate influence when tracing the meaning and history of the First Amendment. These historical inaccuracies have helped create a distorted history of First Amendment jurisprudence. Of the justices who have written at least one religion clause opinion, "seventy-six percent have appealed to the founders or founding era history to shine light on the meaning of the religion clauses, and every one of the twenty-three justices who have authored more than

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[11] Thomas J. Curry, *Farewell to Christendom: The Future of Church and State in America* (New York: Oxford University Press, 2001), 35.
[12] Ibid., 8.
[13] John Witte Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder: Westview Press, 2000), 27.
[14] Curry, *Farewell to Christendom*, 13, 14.

four religion clause opinions have done so."[15] Despite Madison and Jefferson's unorthodox religious opinions, and their incongruent religious views relative to the majority of Americans in the late eighteenth century, seventy-nine percent of the justices have appealed to their writings, while "only 21 percent of their appeals have been to one of thirty-one other founders."[16] Even the term "Founding Father" is ambiguous because, depending on the context of the user, it can exclude some of the most influential thinkers of the revolutionary era. Scholars of church and state matters have exempted people like Roger Sherman, as well as many others who drafted and ratified the Constitution and First Amendment. However, despite these misgivings an effort must be made to advance the jurisprudence of the religion clauses since all parties involved, including the Supreme Court justices themselves, agree that the *status quo* cannot remain the law of the land and be so inconsistent in its application.

Despite Justice Thomas' suggestion to the contrary,[17] one area the Supreme Court justices are unlikely to concede is their jurisdiction over religious affairs. Beginning with Associate Justice Hugo Black, and then being reaffirmed by subsequent Court rulings concerning religion, many justices have baulked at the idea that religion as a facet of American life and legislation might be beyond their legal jurisdiction. The modern understanding that religion was not written into the Constitution to keep religion out of the government is accurate. However, it is equally accurate that religion was not written into the Constitution to keep government out of religion. The passage of the Bill of

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[15] Mark A. Noll, *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), xvi.
[16] Ibid.
[17] *Van Orden v. Perry*, 545 U.S. 677 (2005).

Rights was not meant to undermined this idea; instead, the states ratified the Bill of Rights to reinforce a long held colonial belief that people are free to worship God however they wanted, or not at all.[18] For this reason the Bill of Rights was not originally applicable to the states because religious issues did not fall within the sphere of the federal government's jurisdiction.

In writing for a unanimous Court in *Barron v. Baltimore,* 32 U.S. 243 (1833), Chief Justice Marshall stated that the "amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them."[19] Marshall further stated of the Bill of Rights that, "No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States."[20] However, the states submitted large portions of legal power to the jurisdiction of the federal government, and by default the Bill of Rights, following the passage of the Fourteenth Amendment. Despite this shift in jurisdiction the historical principles concerning religion should remain true as Associate Justice John Rutledge noted, "no provision of the Constitution is more closely tied to or given context by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history."[21]

Since the passage of the Fourteenth Amendment and the expansion of judicial rights by the federal government over the states, the United States Supreme Court has made decisions concerning religion that historian Mark Noll described as founded on

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[18] Joseph Bondy, *How Religious Liberty was written into the American Constitution: A History* (Syracuse: Oberlander Press, 1927), 9.
[19] *Barron v. Baltimore,* 32 U.S. 243 (1833).
[20] Ibid.
[21] Noll, *The Forgotten Founders*, xvi.

"abstract logical deductions drawn from statements made at the time and on textual analysis of wording carried out apart from their historical context."[22] The inconsistencies surrounding the history of the First Amendment and its subsequent application "was precipitated in 1947, when the Supreme Court set a direction for discussion of the First Amendment,"[23] after Justice Black's majority opinion regarding *Everson*. At odds with the First Amendment's history, and that of religion and politics in American history in general,[24] Black declared that the clause against the establishment of religion by law "was intended to erect a wall of separation between church and State."[25] Instead of viewing the amendment as depriving the government of power, and, in particular, the federal government, Black interpreted the amendment as conferring on government "enormous authority to determine the sphere of religious practice and confine it behind a metaphorical wall of the State's making."[26] As a consequence of Black's opinion, historian John Wilson described the Supreme Court's discussions and debates surrounding the meaning of the First Amendment as carrying them "even farther from its historical source and even deeper into the thickets of confusion."[27] This confusion has spilled over into many conflicting and confusing Court decisions. Despite the good intentions of the Supreme Court justices, judicial interpretation on both the Establishment and Free Exercises Clauses of the Bill of Rights, has resulted in uncertainty and

[22] Curry, *Farewell to Christendom*, 14.
[23] Ibid., 8.
[24] Ibid., 49.
[25] John F. Wilson, *Church and State in American History* (Boston: D. C. Heath and Company, 1965), 74.
[26] Ibid.
[27] Ibid., 8.

inconsistency; an ironic outcome since the Founding Founders designed the clauses in order to avoid such situations.

The consequences of the religion clauses falling under the jurisdiction of the Supreme Court, and subsequently all lower courts because of the Fourteenth Amendment, has set a dangerous precedent. That precedence is the ideological difference between religious tolerance and religious liberty, debated by James Madison with George Mason.[28] During the drafting of the *Virginia Declaration of Rights* in 1776, Madison persuaded Mason to amend the wording of the document from, "all men should enjoy the fullest toleration in the exercise of religion,"[29] to the more liberty and rights minded wording of, "all men are equally entitled to the free exercise of religion."[30]

The difference was the word "free" which moved religion from the category of "legislative grace,"[31] to an inalienable right through which everyone has "an absolute right to believe and worship a Supreme Being in his own way regardless of how the other man believes; or he may not believe at all."[32] By allowing the Supreme Court to establish judicial review of religious actions, to define religious symbols,[33] and to define what is and is not religious in nature, facets of an individual or groups religious practices have become what Madison and other Founding Fathers set out to prevent; toleration of religion rather than the free exercise thereof.

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[28] Bondy, *How Religious Liberty,* 8.
[29] Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* (New York: Random House, Inc., 2006), 69.
[30] Ibid.
[31] A right allowed or granted permission to an individual or group that is not legally required to be given; and can subsequently be revoked if necessary.
[32] Bondy, *How Religious Liberty,* 9.
[33] Curry, *Farewell to Christendom,* 101; *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

Madison's exchange with Mason laid the platform for his work on religious liberty, culminating in his 1785, penning of *Memorial and Remonstrance against Religious Assessments,*[34] which advocated for religious freedom by espousing two fundamental principles. The first and most important observation that Madison made was freedom "*for* religion rather than a Jeffersonian freedom *from* religion."[35] For Madison this idea meant that freedom of religion had to embrace more than mere opinion.[36] In *Memorial and Remonstrance,* Madison stated that it was the right of every man to "exercise" his religion according to the dictate of his conscience.[37] The second principle that Madison observed was the freedom for every individual "to embrace, to profess and to observe" whatever religion an individual believed to be of divine origin.[38]

As a result of the Supreme Court's inconsistency concerning religious issues, religion has become increasingly legislated; a situation that all the Founding Fathers wished to avoid. Some recent examples that have blurred the lines between religious freedom and religious tolerance are the Affordable Care Act (2010), and the repeal of the Section 3 of the Defense of Marriage Act (1996), through the Supreme Court ruling of *United States v. Windsor*, 570 U.S. (2013). The questions concerning the United States health care system, its faults, flaws and inadequacies are not the subject of debate. The

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[34] Thomas E. Buckley, "Patrick Henry, Religious Liberty, and the Search for Civic Virtue," *The Forgotten Founders on Religion and Public Life*, ed. Daniel L Dreisbach, Mark David Hall and Jeffry H. Morrison (Norte Dame: University of Notre Dame Press, 2009), 130.
[35] Timothy L. Hall, *Separating Church and State: Roger Williams and Religious Liberty* (Chicago: University of Illinois Press, 1998), 135.
[36] James Madison, "A Memorial and Remonstrance," *The Mind of the Founder: Sources of the Political Thought of James Madison,* Marvin Meyers ed. (Hanover: University Press of New England, 1981), 8.
[37] Ibid., 10.
[38] Ibid.

principle question is, should the federal government impose upon an individual, and under certain circumstances their businesses,[39] a law that according to their religious convictions is morally objectionable, and if not obeyed is subject to harsh penalties to the point of financial ruin? Likewise, the debate surrounding the allegations of perceived civil rights abuses or the societal moral decline concerning same-sex relationships is not the subject of debate. The principle question is, should the federal government force on individuals' the acceptance and the facilitation of alternative lifestyle convictions if they contravene that individuals religious convictions?[40]

According to Madison the answer to that question would be an unequivocal no. Although Madison's religious convictions may have been at odds with the majority of Americans in the late eighteenth century, as a drafter of the Constitution, the *Federalist Papers*, and the Bill of Rights, his opinion on church and state affairs are relevant. Madison's primary focus concerning religious issues was keeping the government out of religion as opposed to the more modern understanding of keeping religion out of government. Madison believed that both the state and federal legislatures could not legislate, govern, or interfere with religious opinion or practices because it was the dictates of a man's conscience and convictions.[41] The reason Madison opposed the drafting of the Bill of Rights was because he believed that "power over religion was not given to the government but rather reserved to the people themselves."[42] According to

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[39] Ethan Bronner, "A Flood of Suits Fights Coverage of Birth Control," *New York Times*, January 26, 2013.
[40] Rachel Zoll, "Divide over religious exemptions over gay marriage," *Times-Standard*, September 7, 2013; Cheryl K. Chumley, "Christian bakers who refused cake order for gay wedding forced to close shop," *The Washington Times*, September 2, 2013.
[41] Wilson, *Church and State*, 72.
[42] Curry, *Farewell to Christendom*, 11.

Madison, local, state, and federal government did not possess even "the shadow of right" to meddle in religion.[43] Madison argued that, "the same authority which can force a citizen to contribute three pence only of his property for the support of any establishment, may force him to conform to any *other establishment* in all cases whatsoever."[44] The jurisprudence established by the Supreme Court concerning issues of religion has deviated from Madison, and many of the other Founding Fathers, insights and understanding. By the early twenty-first century, although the federal government cannot force a person to financially support religion through taxation, it can force an individual to support an "other establishment" against their religious convictions.

Forcing an individual or an organization to act in a manner contrary to their religious convictions contravenes both the Establishment and Free Exercise clauses of the First Amendment. It could be argued that, in accordance with the precedence set through *Van Orden v. Perry*, people could be exempt from participating in or adhering to such laws if they can show clear historical precedence to support their religious convictions. While this precedence may seem like an amicable compromise, the real constitutional concern is that the federal government is prohibiting a person from what Madison referred to as their "inalienable right." Denying anyone this "inalienable right" the federal government has established what Madison fought against during the drafting of the 1776, *Virginia Declaration of Rights*.[45] By *allowing* an individual to be exempt from national laws and statutes the federal government has moved away from "all men are

[43] Ibid.
[44] Wilson, *Church and State*, 69.
[45] Meacham, *American Gospel*, 69.

equally entitled to the free exercise of religion,"[46] to "toleration in the exercise of religion," thereby moving religious conviction and practices into the category of "legislative grace."

Historians and scholars have offered solutions and compromises to help solve the judicial impasse before the Court. Unfortunately, nothing to date has provided an amicable solution to the thorny problems presented by the Establishment and Free Exercise Clauses. This examination of six Supreme Court cases highlights the current jurisprudential thicket. It is concerning that despite seventy years of jurisprudence the Supreme Court has been unable to formulate a consistent and durable solution to the religion clauses. Even more concerning is the path which Supreme Court jurisprudence has found itself taking where religious freedom has become confused with religious tolerance. Until the justices of the United States Supreme Court decide upon a principle consistent with both the historical and legal jurisprudence of the First Amendment, religious cases will continue to languish in flux between religious freedom and religious toleration, unable to find an equitable place in modern American society.

[46] Ibid.

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