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Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor

I. INTRODUCTION

As President of the United States, Thomas Jefferson refused to declare a national day of fasting, reasoning that the first amendment had created "a wall of separation between church and State." As a Virginia legislator, however, he sponsored a bill giving the Governor the power to declare days of fasting and thanksgiving. Jefferson's "wall" is a well-remembered and oft-quoted metaphor; his "Bill for Appointing Days of Public Fasting and Thanksgiving" is largely forgotten. This apparent inconsistency invites further analysis. Indeed, a knowledge of how Jefferson could consistently believe that a Governor could declare a fast day while a President could not is essential to an understanding of the wall metaphor. A careful study of Jefferson's actions and utterances over the span of his life reveals that the Master of Monticello saw in the religion clauses of the first amendment more than a wall of separation between church and state; to him, they constituted a study in federalism.

Because of the federal nature of the United States, any discussion of church-state relationships is immediately complicated by the fact that there is not just one "state" to be concerned with, but two—the federal "state" and the state "state." Thus, the first amendment religion clauses address two basic issues: First, what is the proper relationship between the federal government and religion? Second, what is the proper relationship between state government and religion? A third, corollary issue arises from the first two: Who shall have jurisdiction over religious questions, the federal government or the state government? Jefferson identified...
these three issues and dealt with all of them in his writings and public activities. This Comment will examine Jefferson's views on these issues in an effort to better understand his use of the wall metaphor. No attempt will be made here to present a broad analysis of the historical justification for judicial review of state action under the first and fourteenth amendments. Rather, this Comment will first examine modern judicial use and interpretation of Jefferson's wall metaphor and then determine the extent to which judicial construction of the phrase comports with Jeffersonian church-state and federal-state philosophies.

II. THE COURTS AND THE WALL METAPHOR

A. The Supreme Court

Jefferson's now-famous phrase "wall of separation between church and State" was resurrected from obscurity by Justice Black in the 1947 decision of *Everson v. Board of Education*. Justice Black cited it as the sole historical justification for his definition of the establishment clause of the first amendment:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

After *Everson* the wall metaphor appeared thirteen times in the next major Supreme Court church-state cases, *McCollum v.*
Board of Education\textsuperscript{6} and Zorach v. Clauson,\textsuperscript{7} both of which involved religious released time programs. The metaphor lay dormant until the early 1960's when it again saw frequent use\textsuperscript{8} before falling into disuse again, possibly due to criticism from legal scholars.\textsuperscript{9} Despite the criticism, Justice Black revived the metaphor in his 1968 dissent to Board of Education v. Allen.\textsuperscript{10} Thus rejuvenated, the wall language soon reappeared in a majority opinion, Epperson v. Arkansas,\textsuperscript{11} where it was used in striking down Arkansas' antievolution statute.

The 1970's opened with three cases whose language boded ill for the metaphor's future utility. In upholding the constitutionality of tax exemptions for churches, Chief Justice Burger stated, "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of [the religion clauses]."\textsuperscript{12} Justice Marshall continued the attack on the wall in Gillette v. United States: "The metaphor of a 'wall' or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis . . ."\textsuperscript{13} A few months later, Chief Justice Burger attempted to deal the troublesome metaphor a death blow: "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."\textsuperscript{14}

Despite the Chief Justice's efforts to do away with the wall, Justice Powell soon succumbed to the seemingly irresistible urge to employ Jefferson's language in first amendment religion cases.

\textsuperscript{6} 333 U.S. 203, 211, 212 (1948); id. at 213, 225, 231 (Frankfurter, J., concurring); id. at 244 n.8, 247 (Reed, J., dissenting).
\textsuperscript{7} 343 U.S. 306, 317 (1952) (Black, J., dissenting); id. at 325 (Jackson, J., dissenting).
\textsuperscript{9} Dallin Oaks' criticism was typical:

The modern popularity of the wall metaphor should not conceal its inappropriateness as an expression of current church-state relationships. Certainly there is something anomalous about a wall that will admit a school bus without the "slightest breach," but is impermeable to a prayer . . . The metaphor is not an aid to thought and it can be a positive barrier to communication.

\textsuperscript{10} 392 U.S. 236, 251 (1968) (Black, J., dissenting).
\textsuperscript{11} 393 U.S. 97, 106 (1968).
\textsuperscript{13} 401 U.S. 437, 450 (1971).
\textsuperscript{14} Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
In striking down a statutory system providing income tax benefits to parents of children attending New York nonpublic schools, Justice Powell admitted that "this Nation’s history has not been one of entirely sanitized separation between Church and State.” He quickly added, however, that “[n]either . . . may it be said that Jefferson’s metaphoric ‘wall of separation’ between Church and State has become ‘as winding as the famous serpentine wall’ he designed for the University of Virginia.” In a historical sketch of the establishment clause, provided by Justice Powell in a footnote, he equated the wall of separation with Thomas Jefferson’s Bill for Establishing Religious Freedom: “In Jefferson’s perspective, so vital was this ‘wall of separation’ to the perpetuation of democratic institutions that it was this Bill . . . that he wished to have inscribed on his tombstone.”

Although Justice Powell left the wall in good repair in 1973, the phrase again lay idle until June 1977 when sharp disagreement over its proper definition surfaced once again in Wolman v. Walter, another case involving state aid to sectarian schools. In writing for the majority, Justice Blackmun incorporated the Chief Justice’s attempted “death blow” into his definition of the wall: “[T]he wall of separation that must be maintained between church and state ‘is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.’” This “indistinct” standard provoked rejoinders from Justice Stevens and Justice Marshall, both of whom expressed dismay that “[w]hat should be a ‘high and impregnable’ wall between church and state, has been reduced to a ‘blurred, indistinct, and variable barrier’” that is “incapable of performing its vital functions of protecting both church and state.” The Wolman decision underscores the extent of the Court’s internal disagreement as to the modern application or relevance of the wall metaphor.

20. Id. at 236.
21. Id. at 266 (Stevens, J., concurring in part, dissenting in part).
22. Id. at 257 (Marshall, J., concurring in part, dissenting in part).
23. This disagreement is aptly illustrated by the extraordinary voting record of the Justices on this case:
B. Lower Federal Courts and State Courts

Supreme Court disagreement over whether the wall in the metaphor is "high and impregnable" or "blurred, indistinct, and variable" has not diminished the frequency of the metaphor's use in state and lower federal court decisions. A review of decisions in eleven states\(^24\) since 1966 reveals nineteen appearances of the wall language.\(^25\) Since 1966, federal circuit courts have employed the metaphor thirteen times in ten different cases.\(^26\) During the same period, the district courts have used the phrase in at least twenty decisions,\(^27\) one of the latest instances occurring in

Blackmun, J., announced the judgment of the Court and delivered an opinion of the Court with respect to Parts I, V, VI, VII, and VIII, in which Stewart and Stevens, J.J., joined; in which as to Part I, Burger, C.J., and Brennan, Marshall, and Powell, J.J., also joined; in which as to Part V, Burger, C.J., and Marshall and Powell, J.J., also joined; in which as to Part VI, Burger, C.J., and Powell, J.J., also joined; in which as to Parts VII and VIII, Brennan and Marshall, J.J., also joined; and an opinion in which as to Parts II, III, and IV, Burger, C.J., and Stewart and Powell, J.J., joined. Burger, C.J., dissented from Parts VII and VIII. Brennan, J., Marshall, J., and Stevens, J., filed opinions concurring in part, concurring in the judgment in part, and dissenting in part. White and Rehnquist, J.J., filed a statement concurring in the judgment in part and dissenting in part.

\(\text{Id. at 231-32. See also McDaniel v. Paty, 98 S. Ct. 1322, 1330, 1333 (1978) (Brennan, J., concurring).}\)

\(24.\) The states included: California, Florida, Illinois, Kansas, Massachusetts, Missouri, New Jersey, New York, Ohio, Pennsylvania, and Texas.


\(27.\) Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316, 1322 (D. Minn. 1978); Rhode Island Chapter, Associated Gen'l Contractors of America, Inc. v. Kreps, 450
Hernandez v. Hanson, a Nebraska case decided shortly before Wolman. A school principal’s power to prohibit the distribution of sectarian literature was questioned, but the district court ruled in the principal’s favor, reasoning that “’after all the States have been told about keeping the “wall between church and state . . . high and impregnable,” . . . it would be rather bitter irony to chastise [the defendants] for having built the wall too tall and too strong.’” One is left to wonder at the irony of that remark in view of the Wolman colloquy.

Despite the abundant use of the wall metaphor in judicial decisions over the past thirty years, and the corresponding scholarly comments on the subject, there has been no apparent attempt to investigate seriously the metaphor in light of Jefferson’s political beliefs. The statement has been accepted as absolute, as if Jefferson had uttered it in a philosophical vacuum, without any attempt to integrate the statement into the whole of Jefferson’s thought on the subject. The context in which he uttered the statement and his later attempts to explain and modify his position have been largely ignored. Jefferson’s beliefs concerning the implications of the first amendment for federalism have for the most part been consigned to historical oblivion by the courts. Furthermore, no attempt has been made to explain Jefferson’s political actions in the light of his theories regarding church-state relationships. A discussion of these factors may help clear away the thorny mass of confusion that has grown up around the wall.


29. Id. (quoting Stein v. Oshinsky, 348 F.2d 999, 1002 (2d Cir. 1965)).
III. THE WALL IN LIGHT OF JEFFERSONIAN POLITICAL PHILOSOPHY

A. Jefferson, Madison, and First Amendment Federalism

Within ten years after the adoption of the Constitution, the passage of the Federal Alien and Sedition Laws aroused a storm of protest that gave Jefferson an opportunity to comment publicly on his interpretation of the first amendment. In attacking these laws, Jefferson teamed with James Madison, his longtime political ally. Madison's famous *Memorial and Remonstrance* had cleared the way for the passage of Jefferson's Bill for Establishing Religious Freedom. They had collaborated on *The Revisal of the Laws 1776-1786 of Virginia*. And perhaps most importantly, Jefferson helped influence Madison to introduce the Bill of Rights as an amendment to the United States Constitution. Madison's comments on the meaning of the first amendment thus provide valuable insights into Jefferson's own thinking on the subject.

Madison's intimate acquaintance with the legislative history of the first amendment served him well in his arguments against the Alien and Sedition Acts. A review of that legislative history is essential to an understanding of Madison's and Jefferson's subsequent thinking on the first amendment. Therefore, before proceeding to Jefferson's and Madison's arguments against the Alien and Sedition Acts, the legislative history of the first amendment will be briefly detailed.

1. Legislative history of the establishment clause

When Madison's proposed amendment concerning religion first came out of congressional committee, it read, "[N]o religion shall be established by law, nor shall the equal rights of con-

31. *Id.*
32. 1 Letters and Other Writings of James Madison 162 (1865).
33. 2 Papers of Jefferson, supra note 2, at 545.
34. *Id.* at 307.
35. Letter from Thomas Jefferson to Dr. Priestly (1802), reprinted in Thomas Jefferson on Democracy 67 (S. Padover ed. 1939):

I was in Europe when the Constitution was planned, and never saw it till after it was established. On receiving it I wrote strongly to Mr. Madison, urging the want of provision for freedom of religion, freedom of the press, trial by jury, habeas corpus, the substitution of militia for a standing army, and an express reservation to the States of all rights not specifically granted to the Union. He accordingly moved in the first session of Congress for these amendments, which were agreed to and ratified by the States as they now stand. This is all the hand I had in what related to the Constitution.
science be infringed." This wording, however, could have been construed as prohibiting state as well as federal establishments of religion. The possibility of such an interpretation provoked proposals for a change in wording since at least seven of the states had officially established religions at the time the Constitution was adopted. Understandably, these states wanted to protect their state establishments from federal interference as well as guarantee that no national religion would be established by law. Consequently, the proposed amendment was rephrased in deference to these state interests.

Samuel Livermore, whose home state of New Hampshire made constitutional provision for the "support and maintenance of public protestant teachers of piety, religion, and morality," proposed that the language read "that Congress shall make no laws touching religion, or infringing the rights of conscience." Such wording explicitly named Congress as the restricted body and would have prevented that body from passing any law, positive or negative, on the subject of religion. Livermore's suggestion apparently influenced the final version of the amendment, as the House version that was sent to the Senate expressly mentioned Congress as the target of the amendment: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof. . . ." This version, however, still did not prohibit Congress from legislating against state establishments of religion. The joint committee which produced the final version incorporated this prohibition by substituting the word "respecting" for "touching." Thus, the phrase "Congress shall make no law respecting an establishment of religion" was intended to serve as a two-edged sword that would prevent federal action favoring or establishing religion while protecting state establishments from federal interference.

36. 1 ANNALS OF CONG. 729 (Gales & Seaton eds. 1789).
38. These state establishments varied in degree but all shared the common vice of preferring one religion over another. Among the states with state establishments were Connecticut (Congregational), Delaware (Christian), Maryland (Christian), Massachusetts (Congregational), New Hampshire (Protestant), New Jersey (Protestant), and South Carolina (Protestant). Id. at 95-106.
39. 1 ANNALS OF CONG. 731 (Gales & Seaton eds. 1789) (emphasis added).
41. Id. at 145, quoted in Snee, supra note 40, at 387.
42. See J. Story, Commentaries on the Constitution § 1879 (1833).
That such was the intention of the Framers is evidenced by remarks made in the ratifying convention of North Carolina, a state that restricted the holding of state office to Protestants.\(^\text{43}\) When questioned as to the power of Congress to interfere with the states’ jurisdiction over religious affairs, Mr. Iredell, a proponent of the Constitution, replied: “They [the federal government] certainly have no authority to interfere in the establishment of any religion whatsoever, and I am astonished that any gentleman should conceive that they have.”\(^\text{44}\) James Madison had made the same point in the Virginia ratifying convention. Replying to the criticisms of Patrick Henry, Madison stated: “There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.”\(^\text{45}\) Madison, then, seems to have understood that the Constitution was intended to prevent federal intervention in state-level church-state relationships. The states, however, were left free to establish or disestablish as they saw fit.


In attacking the Federal Alien and Sedition Laws,\(^\text{46}\) Madison analogized the freedom of the press clause to the establishment clause.

The situation . . . of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others, presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendency, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.

_id. (emphasis added).

44. 4 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 194 (2d ed. 1836).
45. 3 id. at 330.
clause in order to prove that the federal government had no power over freedom of the press. In support of the laws, the Federalists had claimed that Congress had the power to regulate the press as long as freedom of the press was not abridged. Madison’s answer to this argument reveals much concerning his interpretation of the religion clauses:

Both of these rights, the liberty of conscience and of the press, rest equally on the original ground of not being delegated by the Constitution, and consequently withheld from the government. Any construction therefore, that would attack this original security for the one must have the like effect on the other.

If the words and phrases in the amendment, are to be considered as chosen with a studied discrimination, which yields an argument for a power over the press, under the limitation that its freedom be not abridged; the same argument results from the same consideration, for a power over the exercise of religion, under the limitation that its freedom be not prohibited.

For if Congress may regulate the freedom of the press, provided they do not abridge it: because it is said only, “they shall not abridge it;” and is not said, “they shall make no law respecting it;” the analogy of reasoning is conclusive, that Congress may regulate and even abridge the free exercise of religion; provided they do not prohibit it; because it is said only “they shall not prohibit it;” and is not said “they shall make no law respecting or no law abridging it.”

A careful reading of Madison’s statement suggests that he understood the word “respecting” to be synonymous with Livermore’s proposed word “touching,” and that it was inserted in the establishment clause in order to withhold all power from the federal government over the question of an establishment of religion.

Jefferson’s actions and writings tend to indicate that he agreed with Madison’s interpretation of the religion clauses. In The Kentucky-Virginia Resolutions of 1798, Jefferson wrote:

Resolved, that it is true as a general principle, as is also expressly declared by one of the amendments to the Constitution that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people;” and that no power over the freedom of religion, freedom of speech, or freedom of the

47. Id. at 59.
48. Id. at 76-77 (emphasis in original).
press being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States, or to the people; That thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this state by a Law passed on the general demand of its Citizens, had already protected them from all human restraint or interference: And that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution which expressly declares, that "Congress shall make no law respecting an Establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or the press," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals.49

Here, Jefferson coupled the tenth amendment with Madison's first amendment argument to show that all regulatory powers over speech, press, and religion were reserved to the states by the Constitution. He maintained that these amendments limited not only Congress but the Supreme Court and, as will be shown below,50 the President as well. To Jefferson, the federal government had no more power to regulate the religious affairs of the states than it had power to interfere with the states' rights in the areas of speech and press.


Jefferson, then, saw the relationship of the federal government to religion as a problem in federalism, and he was careful throughout his Presidential administration to avoid exercising powers over religion that he felt had been reserved by the states.

49. Id. at 2-3 (emphasis added). Note that here Jefferson used the word "respecting" in the same tense that Madison used it; i.e., "touching upon" or "having to do with."
50. See notes 62-63 and accompanying text infra.
An example of this concern is Jefferson's reply to a request by the Danbury Baptist Association that he as President declare a national day of fasting. His letter to the association contains the famous wall-of-separation metaphor. In a note to Levi Lincoln, his Attorney General, Jefferson said with regard to this matter: "The Baptist address, now enclosed, admits of a condemnation of the alliance between Church and State, under the authority of the Constitution. It furnishes an occasion, too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings, as my predecessors did." The context of this note evidences that Jefferson was concerned about the lack of Presidential authority, under the Federal Constitution, to proclaim such a day. The Danbury letter itself suggests further that Jefferson had reference to the federal government only: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." Jefferson apparently felt that since the legislative power had been so limited, his power as President had been similarly limited. As President, he consistently refused to proclaim fast or thanksgiving days or even to recommend that they be observed.

In marked contrast to Jefferson's strict separationist attitude in the federal arena were his early actions relative to religion in the colonial and state government setting. In 1774 as a member of the Virginia House of Burgesses, Jefferson was personally involved in drafting and enacting a Resolution of the House of Burgesses Designating a Day of Fasting and Prayer.

This House being deeply impressed with Apprehension of the great Dangers . . . from the hostile Invasion of the City of Boston, . . . deem it highly necessary that the said first Day of June be set apart by the Members of this House as a Day of Fasting, Humiliation, and Prayer, devoutly to implore the divine Interposition for averting the heavy Calamity . . . .

51. Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), reprinted in S. Padover, supra note 1, at 518.
52. 9 Works of Jefferson, supra note 1, at 346 (emphasis added).
53. Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), reprinted in S. Padover, supra note 1, at 519 (emphasis added).
54. See notes 62-63 and accompanying text infra.
55. 1 Papers of Jefferson, supra note 2, at 105. Jefferson made no secret of his part in drafting the resolution, as revealed in this frank discussion of the matter from his autobiography:

We were under conviction of the necessity of arousing our people from the
Although it might be argued that Jefferson did this only as a radical wartime measure when his strict separationist scruples were overcome by his revolutionary zeal, the argument will not stand in light of a similar bill that was later included in Jefferson's Revisal of the Laws.\(^6^4\) Entitled "A Bill for Appointing Days of Public Fasting and Thanksgiving" and introduced by James Madison October 31, 1785, this bill stands in direct conflict with most modern interpretations of the Danbury letter:

Be it enacted by the General Assembly, that the power of appointing days of public fasting and humiliation, or thanksgiving, throughout this commonwealth, may in the recess of the General Assembly, be exercised by the Governor, or Chief Magistrate, with the advice of the Council; and such appointment shall be notified to the public, by a proclamation, in which the occasion of the fasting or thanksgiving shall be particularly set forth. Every minister of the gospel shall on each day so to be appointed, attend and perform divine service and preach a sermon, or discourse, suited to the occasion, in his church, on pain of forfeiting fifty pounds for every failure, not having a reasonable excuse.\(^5^7\)

A comparison of this bill with modern judicial doctrines concerning the meaning of the first amendment is a worthwhile exercise. In *Lemon v. Kurtzman*,\(^5^8\) Chief Justice Burger articulated a three-part test for measuring the constitutionality of state legislation concerning religion or aid to religious institutions. First, the statute must have a secular legislative purpose; second, its primary effect must neither advance nor inhibit religion; and third, the statute must not foster excessive government entanglement with religion.\(^5^9\) One federal district judge linked this three-part test with Jefferson's wall: "In recent years the Supreme Court has

\(^{56}\) Id. at 106.

\(^{57}\) Id. at 556 (footnotes omitted).

\(^{58}\) 403 U.S. 602 (1971).

\(^{59}\) Id. at 612-13.
developed three tests to serve as guidelines to be used in determining whether the 'wall of separation between church and state' has been breached. 60

This test might be applied to determine whether or not Thomas Jefferson and James Madison breached the wall of separation between church and state with their fast day bill. First, there was no secular legislative purpose in the bill. Second, a primary effect of the bill was to advance religion by requiring the preaching of religious sermons at divine services. Third, how could a state officer avoid "excessive government entanglement with religion" as he fines a derelict minister fifty pounds or labors to ascertain whether or not the minister had a reasonable excuse for not preaching? The ironic conclusion inevitably follows that under current Supreme Court establishment clause standards, Jefferson's public fast day bill would be struck down as breaching his own wall of separation. It is apparent that Jefferson never thought his wall stood between the state "state" and the church. Again, some might assert that the fast day bills do not represent Jefferson's more mature thinking on the subject, or that Jefferson believed the scope of state power over religious matters was altered by the adoption of the Constitution. Jefferson's pronouncements on the subject after the adoption of the Constitution, however, reinforce the conclusion that the wall referred to in the Danbury letter was erected only against the federal government. In his second inaugural address, possibly replying to criticisms of his refusal to declare national religious holidays, Jefferson stated:

In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of state or church authorities acknowledged by the several religious societies. 61

Near the end of his Presidency, Jefferson had another opportunity to explain his position on the church-state issue under conditions similar to the Danbury circumstances. The Reverend Samuel Miller wrote and requested that Jefferson, as President, declare a national fast day. In his reply denying the request, Jefferson gave a much more thorough explanation of the reasons for his refusal.

61. S. Padover, supra note 1, at 412.
I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. 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 authority. ...

I am aware that the practice of my predecessors may be quoted. But I have ever believed, that the example of State executives led to the assumption of that authority by the General Government, without due examination, which would have discovered that what might be a right in a State government, was a violation of that right when assumed by another.62

Had Jefferson felt moved to employ the wall metaphor in this letter, he might have phrased it in these terms: The Federal Constitution has erected two walls—the first amendment and the tenth amendment. These walls stand as bulwarks against federal usurpation of power over religious institutions or sects. Since these walls cut off federal power over religious matters, these powers must rest with the states, as far as any government can legitimately exercise such powers.

The documents and actions discussed above indicate Jefferson believed that the first and tenth amendments denied all three branches of the federal government any power, positive or negative, over the religious activities of the people of the various states. All legitimate governmental powers over religious affairs in the states were reserved exclusively to the states, and any exercise by the federal government of these powers over religion was an unconstitutional usurpation of state authority. Jefferson’s statement in the Miller letter that the power to prescribe religious exercises and to assume authority in religious discipline rested with the states “as far as it can be in any human authority”63 leads to further investigation of his philosophy concerning the permissible extent of state authority in the area of religion.

63. Id.
IV. JEFFERSON ON CHURCH AND STATE AT THE STATE LEVEL

A. Modern Theories About the Definition of an Establishment

Since the 1940 Cantwell v. Connecticut decision applying the first amendment to the states through the fourteenth amendment, the Supreme Court has used the first amendment to strike down various state practices that the Court felt constituted "establishments of religion." Two major theories concerning the meaning of the phrase "establishment of religion" have been advanced in arguments before the Court. According to the first theory, which never found favor with the Court, the establishment clause bans only preferential treatment by government of one religion over another. This theory, which would allow state aid to or encouragement of religion on a nonpreferential basis, was advanced by various states in defense of what they considered to be nonpreferential aid-to-religion programs. The Supreme Court, taking its cue from Justice Black's famous statement in Everson, emphatically affirmed the second theory of "total separation-no aid" in the controversial Bible reading case, Abington School District v. Schempp.

This Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference

64. 310 U.S. 296 (1940).
67. E.g., the oral argument in the McCollum case quoted in J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 225 (1949):

MR. JUSTICE BLACK. Do I understand you to take the position that if the State of Illinois wanted to contribute five million dollars a year to religion they could do so, so long as they provided the same to every faith?
MR. FRANKLIN. Yes, and the State of Illinois does contribute five million dollars annually to religious faiths, equally, and more than five million dollars, and has during its entire history.
MR. JUSTICE BLACK. How does it do it?
MR. FRANKLIN. By tax exemptions specifically granted to religious organizations.
MR. JUSTICE BLACK. Your position is that they could grant five million dollars a year to religion, if they wanted to, out of the taxpayer's money, so long as they treated all faiths the same?
MR. FRANKLIN. Yes, Your Honor. That is our interpretation of the meaning of the first clause of the First Amendment.

68. See text accompanying note 5 supra.
of one religion over another. Almost 20 years ago in *Everson* . . . the Court said that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." 70

In more recent decisions, however, the Court has retreated somewhat from the extreme total separation-no aid rhetoric. In *Committee for Public Education and Religious Liberty v. Nyquist*, 71 Justice Powell stated, "It has never been thought either possible or desirable to enforce a regime of total separation . . . ." 72 Justice Blackmun reiterated this view in *Roemer v. Board of Public Works*. 73 "The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required." 74 These dicta notwithstanding, the three-tiered *Lemon* test, 75 which the Court continues to apply, 76 is essentially a no-aid-to-religion standard. It allows aid to religious institutions only for secular—not sectarian—purposes.

**B. Jefferson’s Views on Establishment and Religious Freedom in Virginia**

Despite the Court’s apparent backpedaling from the total separation position, Justice Powell in *Nyquist* persisted in the view that Thomas Jefferson advocated the total separation of church and state, even at the state level. "Thomas Jefferson’s Bill for Establishing Religious Freedom . . . contained Virginia’s first acknowledgement of the principle of total separation of Church and State." 77 Dispute between total separationists and advocates of the no-preference theory has often centered around the question of which theory Thomas Jefferson adopted. 78 The question arises because of the seemingly contradictory positions taken by Jefferson during his many years of public service. A close examination of Jefferson’s writings on the subject indicates that he likely held to neither extreme view; his was a compromise solu-

70. *Id.* at 216 (emphasis added).
71. 413 U.S. 756 (1973).
72. *Id.* at 760.
73. 426 U.S. 736 (1976).
74. *Id.* at 745-46 (footnote omitted).
75. See notes 58-59 and accompanying text *supra*.
77. 413 U.S. at 770 n.28.
tion. To Jefferson an establishment of religion meant one religion being officially preferred and privileged over others. He decried such preference and maintained that any state assistance to religion should be equally available to all religions. He also believed that even nonpreferential aid to all religions should be outlawed in specific instances if such aid might curtail religious freedom. It appears from Jefferson’s writings that he attempted to strike a balance between two competing positions, possessing both a conviction that successful free government was not secure unless the people believed in God and thus were led to act with morality, and a belief that state encouragement of religion, if carried too far, could easily impair the right of free exercise of religion. A study of Jefferson’s state-level activities, both prior and subsequent to his terms as President, reveals his lifelong efforts to achieve the proper balance in church-state relationships. The problem for Jefferson, then, was how to encourage religion and morality among the people without infringing upon their religious liberty.

1. Jefferson’s preconstitutional church-state activities

One of Jefferson’s first public acts in Virginia on the subject of church and state relationships came in 1776 when he authored a Resolution for Disestablishing the Church of England and for Repealing Laws Interfering with Freedom of Worship. In part, the resolution stated:

Resolved that it is the [opinion] of this [Committee] that so much of the [said] petitions as prays that the establishment of the Church of England by law in this Commonwealth may be discontinued, and that no pre-eminence may be allowed to any one Religious sect over another, is reasonable; & therefore that the several laws establishing the [said] Church of England, giving peculiar privileges to [the] ministers [thereof], & levying for the support thereof . . . contributions on the people independent of their good will ought to be repealed.

79. See notes 83-86 and accompanying text infra.
80. See notes 93-106 and accompanying text infra.
81. Jefferson wrote: “[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath?” 4 Works of Jefferson, supra note 1, at 83.
82. For Jefferson, the very purpose of government was to protect the rights of men: “That to secure these rights, governments are instituted among men . . . .” Declaration of Independence.
83. 1 Papers of Jefferson, supra note 2, at 530.
84. Id.
From this statement it is clear Jefferson believed that no preference for one religion over another should be shown by state government. Jefferson himself stated that the resolution was written for the purpose of "discontinuing the establishment of the Church of England by law, & [thereby] taking away the privilege & pre-eminence of one religious sect over another, and thereby [establish[ing] . . . equal rights among all]."  

Jefferson's effort in 1776 to disestablish the Church of England as the official state church of Virginia was only partially successful, resulting in a compromise measure whereby the Church of England remained the official state church but dissenters were exempted from levies in support of the church. The exempting bill specifically reserved for later resolution the question of "the Propriety of a general Assessment or whether every religious society should be left to voluntary Contributions for the support and maintenance of the several Ministers and Teachers of the Gospel . . . ." This issue came to a head eight years later when Patrick Henry introduced his "Bill Establishing a Provision for Teachers of the Christian Religion." The measure provided that each taxpayer could designate "to what society of Christians" his money should go. The sums thus collected were to be "appropriated to a provision for a Minister or Teacher of the Gospel . . . or the providing places of divine worship, and to none other use whatsoever . . . ."  

Henry's proposed tax provoked Madison's _Memorial and Remonstrance_ that condemned the proposal as a legal establishment of the Christian religion. Madison's language showed that he, like Jefferson, believed state government should not prefer one religion over others.

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? . . . .

. . . [T]he bill violates that equality which ought to be the basis of every law . . . . As the Bill violates equality by subject-

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85. _Id._ at 531 n.1 (brackets and emphasis in original).
86. _Id._ at 531.
87. _Id._ at 533.
88. This document is reproduced in the supplementary appendix to _Everson v. Board of Educ._, 330 U.S. 1, 72 (Rutledge, J., dissenting).
89. _Id._ at 73.
90. _Id._ at 74.
91. 1 _LETTERS AND OTHER WRITINGS OF JAMES MADISON_ 162 (1865).
ing some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. 92

It seems clear from the above that both Jefferson and Madison felt government should show no preference for one religion over another. What is not clear is whether Jefferson would have approved of governmental aid to all religious on a nonpreferential basis. Jefferson's Bill for Establishing Religious Freedom 93 (enacted shortly after the Remonstrance had laid Henry's bill to rest) is often cited to support the notion that Jefferson not only believed in nonpreferential treatment of religion, but also opposed all governmental aid to religion and advocated total separation of church and state. 94

The operative language of the bill read:

*We the General Assembly of Virginia do enact* that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities. 95

This language outlawed three evils: (1) compelling a man to attend religious services; (2) forcing a man to support any religious "worship, place, or ministry"; and (3) punishing a man on account of his religious beliefs. In addition, the bill affirmatively declared man's natural right 96 to profess and contend for his religious opinions.

The preamble language concerning forced support reveals that his portion of the bill was designed to eliminate two practices: taxes supporting establishment of one preferred state religion, and general tax assessments to pay ministerial salaries and build sectarian edifices for all religions. Preferential establishment was condemned in severe language:

[T]he impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the

92. *Id.* at 163-64.
93. 2 *PAPERS OF JEFFERSON,* supra note 2, at 545.
95. 2 *PAPERS OF JEFFERSON,* supra note 2, at 546 (emphasis in original) (footnotes omitted).
96. *Id.* at 546-47.
only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical . . . .

The language condemning general assessments was much softer, although it broadened the prohibition beyond the scope of Henry's bill (which was in effect the establishment of the Christian religion) to cover an assessment used to support ministers and teachers of every religion, not only Christianity. Jefferson condemned general assessments on the ground that they interfered with religious freedom: "[T]hat even the forcing [a man] 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 . . . ." 98 To conclude, however, that because the bill outlawed tax support of religion it was designed as a "wall of separation between church and state" or that it was intended to effect a "total separation" is to ignore historical realities.

The religious freedom bill was the first of a group of five consecutive bills in Jefferson's "Revisal" dealing with religion. The religious freedom bill itself began with language which might be offensive to some total separationists:

Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments . . . are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone . . . .

The second bill was entitled "A Bill for Saving the Property of the Church Heretofore by Law Established," 100 and was designed to protect the property rights of the recently disestablished Anglican Church. It was, in a sense, a bill which aided "one religion." The third bill of the group was called "A Bill for Pun-

97. Id. at 545.
98. Id.
99. Id.
100. Id. at 553.
ishing Disturbers of Religious Worship and Sabbath Breakers.”

This Act prohibited officers of the law from arresting a clergyman while he was preaching in church, and imposed a fine and imprisonment on anyone who might “maliciously, or contemptuously, disquiet or disturb any congregation assembled in any church, chapel, or meeting-house . . . .”

This part of the bill was clearly directed at benefiting “all religions.” The bill also outlawed working on Sunday, but in keeping with the religious freedom bill, did not require attendance at church in order to avoid the penalties for Sabbath breaking.

The fourth enactment was the Bill for Appointing Days of Public Fasting and Thanksgiving discussed above. This bill stood virtually back to back with the religious freedom bill, yet is irreconcilable with modern conceptions of the Danbury “wall of separation.” The last act of the group, entitled “A Bill Annulling Marriages Prohibited by the Levitical Law,” enacted Biblical law by reference: “Be it enacted by the General Assembly, that marriages prohibited by the Levitical law shall be null; and persons marrying contrary to that prohibition, and cohabitating as man and wife, convicted thereof in the General Court, shall be amerced [fined], from time to time, until they separate.”

These five bills serve to demonstrate that if Jefferson believed in any impregnable wall at the state level, it most likely was not between religion generally and the state, but between religious freedom and the powers of the state. In his view legitimate state interaction with religious institutions was both necessary and permissible. State practices infringing upon religious freedom, including the establishment of an officially preferred religion and general assessments for direct support of all religions, were outlawed by Jefferson in his religious freedom bill. To Jefferson, however, this did not mean the total separation of church and state such that no religion or religious influence was to be permitted in state-sponsored activities and laws. State declaration of days of rest and public fasts were specifically within the proper realm of church-state relations. In his state-level actions and legislation Jefferson emphasized religious freedom and legal equality among the sects, but allowed for what he considered

101. Id. at 555.
102. Id.
103. Id.
104. See notes 56-57 and accompanying text supra.
105. 2 PAPERS OF JEFFERSON, supra note 2, at 556.
106. Id. at 556-57.
legitimate interaction, cooperation, and encouragement between church and state. Whether his attitude changed in the post-Presidential period of his life, after the Danbury letter, will be the next subject of inquiry.

2. Jefferson's post-Presidential thinking on church and state

In 1822, Jefferson wrote a letter to Doctor Thomas Cooper in which he expressed some of his views on religion and religious fanaticism:

The atmosphere of our country is unquestionably charged with a threatening cloud of fanaticism, lighter in some parts, denser in others, but too heavy in all. I had no idea, however, that in Pennsylvania, the cradle of toleration and freedom of religion, it could have arisen to the height you describe. This must be owing to the growth of Presbyterianism. . . . Their ambition and tyranny would tolerate no rival if they had power. Systematical in grasping at an ascendancy over all other sects, they aim, like the Jesuits, at engrossing the education of the country, are hostile to every institution which they do not direct, and jealous at seeing others begin to attend at all to that object.\textsuperscript{107}

Here Jefferson revealed his fear that intolerance and religious fanaticism would lead to a loss of religious freedom and an official, preferential establishment of one sect. This possibility was abhorrent to Jefferson. On another occasion he had stated, "I am for freedom of religion, and against all maneuvers to bring about a legal ascendancy of one sect over another. . . ."\textsuperscript{108} In contrast, Jefferson praised examples of harmony and toleration among the sects:

In Boston, however, and its neighborhood, Unitarianism has advanced to so great strength, as now to humble this haughtiest of all religious sects; insomuch that they condiscend to interchange with them and the other sects, the civilities of preaching freely and frequently in each others’ meeting-houses. . . . In our village of Charlottesville, there is a good degree of religion, with a small spice only of fanaticism. We have four sects, but without either church or meeting-house. The court-house is the common temple, one Sunday in the month to each. Here, Episcopalian and Presbyterian, Methodist and Baptist, meet together, join in

\textsuperscript{107} Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), reprinted in 12 Works of Jefferson, supra note 1, at 270-71.

\textsuperscript{108} Letter from Thomas Jefferson to Elbridge Gerry (1799), reprinted in Thomas Jefferson on Democracy 31 (S. Padover ed. 1939).
hymning their Maker, listen with attention and devotion to each others’ preachers, and all mix in society with perfect harmony.109

The student of Jefferson is led to ask, “Where is the wall of separation between church and state when the courthouse is used as the common temple of all the religious sects of a village?” Jefferson made no objection to this arrangement, probably because it was the very antithesis of intolerance. With such harmony among the sects, an establishment of one in preference to others would have been extremely unlikely, and religious freedom would have remained unthreatened by religious fanaticism. This may be why it seems never to have occurred to Jefferson that using the courthouse as a temple might be seen as a violation of his Bill for Establishing Religious Freedom as compelling a man to support a “religious place.” The ideal for Jefferson at the state level seems not to have been total separation, but religious liberty and religious tolerance. If these ends were fulfilled, the accommodation of religion by allowing impartial use of a state-owned building for religious services seems not to have been repugnant to his church-state scruples.

This attitude is particularly apparent in Jefferson’s activities in public education. He consistently opposed official arrangements that might have led to intolerance or the ascendancy of one sect over others, while he favored ideas that encouraged tolerance and religious peace. In his Bill for Establishing Elementary Schools110 of 1817, Jefferson sought to exclude ministers from serving as “Visitors,” i.e., school board members, of the primary schools. By way of explanation, he stated, “Ministers of the gospel are excluded to avoid jealousy from the other sects, were the public education committed to a particular one . . . .”111 This, however, did not mean that all religion was to be excluded from the schools. Jefferson maintained that there was a core of belief common to all the sects112 and in his view, this common core could be included in public education without offense. He wrote in the same bill: “[N]o religious reading, instruction or exercise, shall be prescribed or practiced inconsistent with the tenets of any religious sect or denomination.”113

109. Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822) reprinted in 12 WORKS OF JEFFERSON, supra note 1, at 270-71.
110. EARLY HISTORY OF THE UNIVERSITY OF VIRGINIA AS CONTAINED IN THE LETTERS OF THOMAS JEFFERSON AND JOSEPH C. CABELL 96-97 (J. Randolph ed. 1856) [hereinafter cited as EARLY HISTORY].
111. Id. at 96 (emphasis added).
112. See note 81 supra.
113. EARLY HISTORY, supra note 110, at 98 (emphasis added). A state law requiring
Jefferson's later actions in public education followed this same pattern. In the Rockfish Gap Report of 1818,\textsuperscript{114} which contained Jefferson's preliminary proposals for the establishment of the University of Virginia, religion was included as an integral part of the plans. His suggestion for providing facilities for religious worship contemplated nonpreferential access to what, under the language of the Bill for Establishing Religious Freedom, could be considered a tax-supported "religious place."\textsuperscript{115} "It is supposed probable that a building of somewhat more size in the middle of the grounds may be called for in time, in which may be rooms for religious worship, under such impartial regulations as the Visitors shall prescribe . . . \textquotedblright\textsuperscript{116} Jefferson apparently felt such a plan would not be a violation of his Bill for Establishing Religious Freedom. This serves to illustrate further that when Jefferson outlawed tax support of a religious place he had in mind Henry's general assessment, which contemplated public support to build sectarian chapels. As Jefferson stated in the religious freedom bill, such an assessment for the support of ministers and sectarian chapels deprived a man of the liberty of choosing to which pastor he would voluntarily contribute. Jefferson apparently felt, however, that any minor curtailment of religious freedom that might result from allowing all of the sects a place to meet and hold religious exercises at a tax-supported university was outweighed by the policy of encouraging religion and morality among the people. As in the case of the courthouse "temple" in Charlottesville, such nonpreferential use of a public place for religious service seems not to have been a contravention of Jefferson's church-state philosophies.

3. "Schools on the Confines"—An example of Jefferson's approach

Jefferson planned to include religious teachings in the University of Virginia's curriculum in a way calculated to encourage morality and a belief in God while at the same time avoiding a preferential establishment of one sect's beliefs over those of another.

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\textsuperscript{114} EARLY HISTORY, supra note 110, at 432.
\textsuperscript{115} See note 95 and accompanying text supra.
\textsuperscript{116} EARLY HISTORY, supra note 110, at 434.
In conformity with the principles of our Constitution, which places all sects of religion on an equal footing, with the jealousies of the different sects in guarding that equality from encroachment and surprise, and with the sentiments of the Legislature in favor of freedom of religion, manifested on former occasions, we have proposed no professor of divinity; and the rather as the proofs of the being of a God, the creator, preserver, and supreme ruler of the universe, the author of all the relations of morality, and of the laws and obligations these infer, will be within the province of the professor of ethics; to which adding the developments of these moral obligations, of those in which all sects agree, with a knowledge of the languages, Hebrew, Greek, and Latin, a basis will be formed common to all sects.117

This balanced solution overcame constitutional problems in Jefferson's view by not allowing any sect to gain preeminence. In Jefferson's mind such a plan did not constitute an establishment of religion, nor did it infringe on religious liberty. In fact, Jefferson later stated his belief that there should be no "public establishment of any religious instruction" at the university.118 The context of this statement indicates he was speaking of sectarian religious instruction, as the plan obviously involved what most would consider religious instruction.

The failure to provide any means by which a student could be educated in the tenets of his own particular religion, however, provoked criticism of the university. In a personal letter, Jefferson wrote:

In our university you know there is no Professorship of Divinity. A handle has been made of this, to disseminate an idea that this is an institution, not merely of no religion, but against all religion. Occasion was taken at the last meeting of the Visitors, to bring forward an idea that might silence this calumny, which weighed on the minds of some honest friends to the institution.119

The "idea" is put forth in Jefferson's "Schools on the Confines" proposal of 1822:

It was not, however, to be understood that instruction in religious opinions and duties was meant to be precluded by the public authorities as indifferent to the interests of society; on the contrary, the relations which exist between man and his

117. Id. at 441 (emphasis added).
118. Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), reprinted in 12 WORKS OF JEFFERSON, supra note 1, at 272.
119. Id.
Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences . . . A remedy, however, has been suggested . . . which . . . excludes the public authorities from the domain of religious freedom . . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give their students ready and convenient access and attendance on the scientific lectures of the University . . . .

This proposal obviously provided educational advantages to future theological students, as their religious schools would now be associated with the university, but Jefferson also envisioned reciprocal benefits accruing to the full-time students at the university.

Such establishments would offer the further and great advantage of enabling students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under impartial regulations, as proposed in the same report of the Commissioners, or in the lecturing room of such professor.

Jefferson specifically gave his approval in this proposal to religious exercises conducted in a state-owned school building by a minister-professor from outside the school. Jefferson's 1824 "Regulations for the University" show the importance he attached to attendance at these religious exercises. He envisioned a program of early morning seminary attendance for all university students:

Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, . . . in time to meet their school in the University at its stated hour.

120. Early History, supra note 110, at 474.
121. Id. at 475.
122. This sounds similar to the in-school released time religious instruction program struck down by the Supreme Court in McCollum. See McCollum v. Board of Educ., 333 U.S. 203 (1948).
123. S. Padover, supra note 1, at 1110.
The plan concluded with an assurance that the regulations of the university "should be so modified and accommodated" so as to give seminary students access to the university library. Jefferson asserted finally that his plans "would fill the chasm now existing on principles [while leaving] inviolate the constitutional freedom of religion, the most unalienable and sacred of all human rights." Jefferson's comments in his letter to Thomas Cooper further revealed his thoughts on the plan:

In our annual report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have the free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other . . . . I think the invitation will be accepted, by some sects from candid intentions, and by others from jealousy and rivalry. And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason and morality.

Jefferson saw the plan as an opportunity to do away with religious intolerance—an enemy of religious freedom—and replace it with an attitude of peace and harmony. This state accommodation and encouragement of religion would thus promote religious freedom, an end Jefferson consistently sought.

Thomas Jefferson apparently had a more complex view of church-state relationships than his metaphorical expression of "a wall of separation," taken in isolation, would indicate. While Jefferson believed control of sectarian religious instruction should remain independent of state power, his standards of church-state relationships at the state level, rather than being a wall of separation, seems to have been one of impartial accommodation.

V. CONCLUSION

A careful analysis of Jefferson's beliefs and actions concerning church-state relationships demonstrates that a strict separationist interpretation of his wall-of-separation metaphor is incon-
sistent with his intent. Jefferson believed the federal government should not interfere with the relationship between state governments and religion. His refusal to declare national fast days was based on his belief that the President and Congress constitutionally lacked such power. The states, on the other hand, were constitutionally left free to regulate church-state relationships. However, even state involvement with religion was not without boundaries in Jefferson's view. The Bill for Religious Freedom was designed to protect religious freedom by outlawing direct subsidies to religion.

Jefferson's model, then, left the free exercise of religion protected from federal as well as state power, with the legitimate regulation of religious matter in the hands of the states, protected from federal interference. As Jefferson saw it, the states were left free, under the Constitution, to develop what they deemed to be the proper relationship with religion. In Virginia, Jefferson developed a standard of impartial accommodation in church-state affairs.

The Supreme Court's present church-state model differs from Jefferson's in that the Court, as a federal authority, has not seen the first and tenth amendments as walls precluding its addressing church-state questions on the state level. Instead, the Court has coupled the first and fourteenth amendments to take jurisdiction over such issues. In further contrast to Jefferson's thinking, the Court has imposed upon church-state relationships a standard of no aid for religious purposes.

Whether or not one agrees with Supreme Court review of state actions concerning religion, the reliance of the Court on Thomas Jefferson to justify the results of that review seems out of harmony with the political philosophy of the famous Virginian. It is suggested that, if the Court invokes the Jefferson metaphor in reaching its church-state conclusions in state-level cases, an approach more consistent with Jeffersonian philosophy might be

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127. While the application of the free exercise clause to the states through the fourteenth amendment may be historically justifiable, incorporation of the establishment clause through the fourteenth amendment presents different problems since, as pointed out above, the original intent of the clause seems to have been to deny federal authority over state-level establishment-of-religion questions. However, no detailed analysis of the issue of incorporation has been attempted here, as that issue has been dealt with adequately elsewhere. See, e.g., Corwin, The Supreme Court as National School Board, 14 LAW & CONTEMP. PROB. 3, 16-20 (1949); Kruse, supra note 37, at 110-141; O'Brien, The Statutes and "No Establishment": Proposed Amendments to the Constitution Since 1798, 4 WASHBURN L.J. 183 (1965); Snee, supra note 40.
to apply his state-level standard of impartial accommodation rather than the federal standard of a "wall of separation."

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