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Book Review

The First Amendment: Saving Us
From Ourselves

*No Liberty for License: The Forgotten Logic
of the First Amendment*

by David Lowenthal

Spence Publishing Company (1997)

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”*¹

I. INTRODUCTION

“The First Amendment is not difficult to interpret.”² However, its interpretation has “taken some wrong and dangerous turns—not by malice, but by superficial thinking.”³ So concludes Dr. David Lowenthal⁴ in *No Liberty for License: The Forgotten Logic of the First Amendment*. The book is a criticism of the Supreme Court’s modern interpretation of the First Amendment; “the Court made individual freedom its god—at the expense of the moral, social, and political needs of ordered society.”⁵

The attack on current First Amendment jurisprudence focuses on (1) its inadequacy in dealing with revolutionary groups, e.g., the Ku Klux Klan or the Black Panthers; (2) its

1. U.S. CONST. amend. I.

2. DAVID LOWENTHAL, *NO LIBERTY FOR LICENSE: THE FORGOTTEN LOGIC OF THE FIRST AMENDMENT* 272 (1997).

3. *Id.* at 271.

4. Dr. Lowenthal is a teacher of Political Science at Boston College. He received undergraduate degrees from both Brooklyn College and New York University. He went on to receive a Ph.D from the New School for Social Research.

5. LOWENTHAL, *supra* note 2, at xiv.

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indulgence in obscenity; and (3) its establishment of a “wall of separation” between church and state.⁶ More specifically, the bulk of this assault is centered on the legacy of Justice Holmes,⁷ a legacy that, according to Dr. Lowenthal, impermissibly broadened First Amendment interpretation to protect revolutionary groups and obscenity. Beyond this, Dr. Lowenthal contends that the “wall of separation” between church and state runs counter to the original intent of the framers.⁸ Each prong of Dr. Lowenthal’s arguments reaches the same conclusion: the Supreme Court has led the country toward a slippery slope of license and anarchy in its interpretation of the First Amendment.

The book claims as its foundation the original intention and meaning of the First Amendment,⁹ raising two questions: First, has Dr. Lowenthal indeed discovered the true intent of the framers? Second, are we bound by that original intention? As to the former question, Dr. Lowenthal’s interpretations are questionable; they go even farther than other originalist arguments; they are often based not on the words of the framers, but on the philosophies of the day. The second question is equally troubling. “Originalism” is a much criticized and hotly debated theory of constitutional law. Yet, while recognizing this contention, Dr. Lowenthal gives the issue only shallow analysis.

Dr. Lowenthal argues that the Supreme Court erred in incorporating the First Amendment into the Fourteenth, asserting incorporation is both illogical and internally inconsistent with the language of the First Amendment. While this may very well be true, Dr. Lowenthal fails to adequately address the Supreme Court’s actual rationale in incorporating the principles of the First Amendment into the Fourteenth.

The author concludes that the Supreme Court has compromised the original social compact of this nation in order to

6. *See id.* at xvii-xxi.

7. Indeed, this otherwise intelligent book is often undermined by Dr. Lowenthal’s *ad hominem* attacks on Justice Holmes. For example, Justice Holmes is denounced as being a confused voice for a “witch’s brew of philosophical notions” that he had to borrow, “not being [a] great thinker [himself].” *Id.* at 53. Such attacks only serve to undermine the book’s reasoning.

8. Throughout the book, Dr. Lowenthal “reserve[s] the term ‘founders’ for those who helped write the Constitution and ‘framers’ for those who helped write the First Amendment.” *Id.* at xxiii. For the sake of consistency, that pattern will be followed throughout this Book Review.

9. *See id.* at xiii.

champion the individual freedoms noted in the Constitution. The Court has forgotten the obligations imposed by the social compact. Without these obligations, there is no counterbalance to personal liberty. Complete liberty, without limitation, degenerates into license.

II. REVOLUTIONARY GROUPS, OBSCENITY, RELIGION AND THE FIRST AMENDMENT

The book is actually a composition of three distinct aspects of First Amendment jurisprudence. Dr. Lowenthal discusses the status of revolutionary groups, obscenity, and separation of church and state under the First Amendment. Each of these sections is tied to the others by the notion that the First Amendment's interpretation has been tainted by a shift in philosophy; the founders and framers generally relied on the philosophy of Locke, with its accompanying social compact, while the Supreme Court has focused on individual rights championed by Mill and even Darwin.¹⁰

A. *Revolutionary Groups*

The democracies in both the Weimar Republic and Czechoslovakia collapsed due to legalized revolutionary parties. Ac-

10. For example, in discussing revolutionary groups, Dr. Lowenthal notes that the philosophical basis for the position taken by Justices Holmes and Brandeis is the works of Mill and Darwin. From Mill, the notion of supreme individual liberty is taken, from Darwin, the idea that truth is "determined not by intrinsic merit but by the marketplace." LOWENTHAL, *supra* note 2, at 44. These philosophies conflict, when applied to revolutionary groups, with Locke's ideas of the rights of man being bound up in a social compact:

Locke's philosophy of the rights of man was sweeping the world toward liberal representative democracy. Soon, Mill feared, the enemies of liberty would be not kings, nobles, or priests but the people themselves, oppressing minorities in both social and political life. The rule of the people seemed inexorably on its way to a secure dominion, but what effect would it have on individual liberty?

Id. at 45-46. In response to this perceived threat, Mill championed individual liberty. He went as far as stating that the actual instigation of tyrannicide may be punished, but a connection must be shown between the killing and the instigation. Thus, no action can be taken against the instigator until a crime has actually occurred as a result of the instigation.

This is clearly impossible in the case of revolutionary groups. The crime that is being committed, i.e., the overthrow of the government, itself insures that it will not be punished. Is it even plausible to say that a successful revolutionary group would reverse course and punish the instigators of the rebellion? However, this is the very result reached in following Holmes's "clear and present danger" test.

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ording to Dr. Lowenthal, America is closer than many realize to a similar situation, due to the Supreme Court's misguided interpretations of the First Amendment.¹¹ The underlying problem is a (seemingly) ever-expanding umbrella of protected speech and press.

Dr. Lowenthal continues by arguing that the First Amendment was never meant to secure every right of speech, writing, or other communication; the very presumption "is a supposition too wild to be indulged by any rational man."¹² The Court's original test for First Amendment protection was the "clear danger" test that left unprotected speech and press which could be dangerous to the Republic.¹³

Emphasizing personal liberty, however, the Court revamped the "clear danger" test, adopting, in its place, the "clear and present danger" test.¹⁴ Justice Holmes first coined this phrase, in the First Amendment context, in his majority opinion in *Schenck v. United States*.¹⁵ Holmes's position is this: absent a clear and present danger "of serious injury to the state,"¹⁶ the speech is protected by the First Amendment. Even speech which, if accepted, would lead to the downfall of the nation is acceptable if there is no present danger of violating the law.¹⁷ Eventually, Justice Holmes's position was accepted as the Warren Court "shifted sharply in favor of individual lib-

11. The goal of the First Amendment was to secure "above all . . . republican government at the national level [T]he First Amendment cannot possibly have been intended to protect political movements dedicated to the overthrow of republican government" LOWENTHAL, *supra* note 2, at 20. It was clear, through the early twentieth century, that both state and federal governments were free to make urging a party to defy the law a crime in itself. In 1917, Judge Learned Hand said, "Words . . . which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state." *Id.* (quoting *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917)). That is to say, such language does not fall under the protective shield of the First Amendment.

12. *Id.* at 29 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1880 (5th ed. 1833)).

13. *See id.* at 26.

14. *See id.*

15. 249 U.S. 47, 52 (1925).

16. *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., dissenting). Dr. Lowenthal considers this phrase disgraceful. "Even likely injury to individuals does not qualify as sufficiently serious. Counseling the murder of an individual . . . is protected by the First Amendment. Inciting a murder *with a likelihood of its occurring* is protected by the First Amendment." LOWENTHAL, *supra* note 2, at 37. The reason is that these individual injuries are not "serious injury to the state." *Whitney*, 274 U.S. at 378 (Brandeis, J., dissenting).

17. *See* LOWENTHAL, *supra* note 2, at 35.

erty.”¹⁸

B. Obscenity

The shift to individual liberty has continued in the Court's more recent obscenity decisions. Although laws against obscenity were long upheld in America, Dr. Lowenthal points to their decline during the period of the sexual revolution.

In 1973, the Court clarified the test for obscenity in *Paris Adult Theatres v. Slaton*.¹⁹ A work that was prurient or patently offensive had to have “serious” social value to muster a First Amendment challenge against regulation.²⁰ Although this clarity was needed, the Court's test of patent offensiveness was, according to Dr. Lowenthal, regrettably coupled with a narrower field of application, limiting obscenity to pornography.²¹ Additionally, in *Miller v. California*,²² the Court further narrowed the definition of obscenity to “hard-core pornography.” The most dangerous result of this decision was that “the production of obscenity of every description short of the Court's narrow ban ha[s] become a flourishing industry.”²³

In short, all forms of obscenity that fall outside of this narrow definition promulgated by the Supreme Court are thriving in America and undermining the American family. “A thirty-year-long judicial effort to expand liberty in the name of intellectual, literary, and artistic progress has resulted not in greater thought, literature, and art but in their obvious degradation and vulgarization.”²⁴

C. The “Wall of Separation” Between Church and State

Finally, the book deals with the Court's “wall of separation” between church and state. Relying on original intent, Dr. Lowenthal argues this wall should never have been built. This is a difficult originalist argument to make in light of contradictory statements made by several of the framers themselves.

Three distinct elements of the modern Court's view of the

18. *Id.* at 5.

19. 413 U.S. 49 (1973).

20. See LOWENTHAL, *supra* note 2, at 136-37.

21. See *id.*

22. 413 U.S. 15, 35 (1973).

23. LOWENTHAL, *supra* note 2, at 147.

24. *Id.*

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religious portion of the First Amendment are challenged: the Establishment Clause, the Free Exercise Clause, and the definition of religion. The Court has incorporated the First Amendment into the Fourteenth Amendment, thereby forbidding any state establishment of religion or inhibition of the free exercise of religion.²⁵ Dr. Lowenthal considers this proposition inconsistent with the language of the First Amendment and, therefore, rejects it. Further, there currently exists a nearly complete blanket of separation between church and either federal or state government. Finally, the Court has broadly defined "religion," including even "a . . . belief that is sincere and meaningful [which] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."²⁶ This interpretation is wholly inconsistent with the intent of the framers of the First Amendment.

Dr. Lowenthal argues original intent did not establish a firm "wall of separation" between church and state. Indeed, non-preferential aid can, consistently with original intent, be given to all religions. Additionally, neither the Establishment Clause nor the Free Exercise Clause is offended by the government's favoring religion over "irreligion."²⁷ However, the modern Court has placed "irreligion" under the First Amendment's umbrella. This must be remedied; "religion" must be defined restrictively, as being "anchored in beings or realities that are permanent, transcending ordinary experience."²⁸

Next, the Supreme Court erroneously incorporated the First Amendment into the Fourteenth Amendment. Dr. Lowenthal believes the language "*Congress* shall make no law respecting an establishment of religion"²⁹ implies that the states were free to establish religion. The framers anticipated that states would indeed establish religions, "respecting" which, Congress could pass no laws. Further, with respect to the Free Exercise Clause, religions should be prohibited from breaking the law. For example, Congress was within its authority to forbid polygamous marriages although it impinged on the free exercise of religion. However, the Court has wavered on this issue, allowing, for instance, Jehovah's Witnesses to refrain from

25. *See id.* at 222-44.

26. *United States v. Seeger*, 380 U.S. 163, 165-66 (1965).

27. *See* LOWENTHAL, *supra* note 2, at 226.

28. *Id.* at 256.

29. U.S. CONST. amend. I (emphasis added).

saluting the flag where required in a school setting.

Once again, Dr. Lowenthal argues that Mill, the champion of individual liberty, is the Court's source for the transition from the framers' original intent. Only the banner of individual liberty allows religions to violate laws and regulations. Only under the banner of personal freedom can one so broadly define "religion" as to encompass even those who do not believe in any power higher than humankind.

III. ORIGINALISM AND ORIGINAL INTENT

A. *Originalism—Are We Bound?*

The first step in following Dr. Lowenthal's argument is to accept the notion that the original intent of the framers governs. Does it? Dr. Lowenthal's reasoning is this: the framers were steeped in the substantive and interpretive doctrine of Blackstone and the philosophy of Locke. In interpreting statutes, Blackstone followed the doctrine of original intent. In creating the First Amendment, the framers incorporated meanings consistent with both Locke and Blackstone. Just as with any statute, the Constitution should be interpreted with the intent of the framers in mind. Thus, we are limited to the philosophers of the day, mainly Locke, and the writings of the framers to interpret the Constitution.

Interestingly, Dr. Lowenthal does not mention at any point that any of the framers stated that they actually had the interpretive mode of Blackstone in mind when they enacted the First Amendment. Rather, he states that they *must* have had it in mind. Perhaps they did, but why is there no first-hand support cited for that conclusion?

Such an argument lends credence to the words of Justice Brennan:

[Originalism] is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.³⁰

30. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *INTERPRETING THE CONSTITUTION* 23, 25 (Jack N. Rakove ed., 1990).

B. What was the Original Intent?

Assuming an examination of original intent is the correct way to interpret the First Amendment, is Dr. Lowenthal's interpretation of that intent correct? Recall the conclusions of another originalist, Robert Bork, about the First Amendment:

*We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave into the judges' keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of these clauses.*³¹

This statement reaches a conclusion that is difficult to reconcile with Dr. Lowenthal's own findings. Although Dr. Lowenthal's analysis may be correct, his conclusions are precipitously balanced upon the proof he offers; a stiff critical breeze could topple them.

Dr. Lowenthal's rationale for his position on revolutionary groups is illustrative of this point. As previously noted, his position is that the First Amendment does not protect the statements of revolutionary groups, as acceptance of these statements would result in the downfall of the very government assigned to uphold the liberties of the First Amendment.³² What is the historical basis of this principle?

One would think that the first place to turn would be the words of the framers themselves. What evidence could be stronger than the express statement of the framers, "Our intent is X"? Instead, Dr. Lowenthal supports his position by relying on Sir William Blackstone and his *Commentaries on the Laws of England*,³³ giving only passing notice to the framers' words—words that undermine the very Blackstonian view he favors.

Blackstone noted that the government is free to "punish . . . any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency," as it "is necessary for the preservation of peace and good order, of government . . ." ³⁴ This view, Dr. Lowenthal ar-

31. ROBERT BORK, *THE TEMPTING OF AMERICA* 168 (1990) (emphasis added).

32. See *supra* notes 11-18 and accompanying text.

33. See LOWENTHAL, *supra* note 2, at 10.

34. IV WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 152-53 (21st ed., London 1847).

gues, was adopted by the First Amendment.³⁵ The federal government, regardless of the language of the First Amendment, is allowed to prohibit seditious libel.

The framers further relied on the philosophy of Locke with its social compact. This limited personal freedom where it contradicted the objectives of society. Even accepting the contention that the framers were steeped in Locke, should we give this philosopher's thoughts more credence in constitutional interpretation than the writings of the framers themselves? Indeed, when we look beyond Locke's philosophy and into the statements of the framers themselves, the notion that the federal government could limit even revolutionary speech quickly becomes unstable.

Dr. Lowenthal cites two notable authorities that seem to contradict his Blackstone/Locke argument of original intent—James Madison and Thomas Jefferson. “Both [of these framers] claimed that the First Amendment from the outset had utterly deprived the national government of control over speech and press. . . .”³⁶ Further, this position was adopted by the majority of the legislature in reaction to the Alien and Sedition Acts in 1798, a mere seven years after the ratification of the First Amendment.³⁷

Madison and Jefferson both vehemently opposed the Alien and Sedition Acts of 1798.³⁸ Their Virginia and Kentucky Resolutions were passed in reaction to these laws. Dr. Lowenthal responds by pointing out that other framers, most notably soon-to-be Chief Justice John Marshall, opposed the Virginia and Kentucky resolutions. However, theirs was the minority view. Madison and Jefferson both felt that the First Amendment forbade the federal government from controlling freedom of speech.³⁹ Although Jefferson felt that states had the authority to control freedom of speech, he too believed that the federal government was completely barred by the First Amendment. In light of the success of Madison's and Jefferson's resolutions,

35. See LOWENTHAL, *supra* note 2, at 10; see also *Dennis v. United States*, 341 U.S. 494, 534 (1897) (Frankfurter, J., concurring) (stating that the Bill of Rights had incorporated the liberties of English law with “no intention of disregarding the exceptions”).

36. LOWENTHAL, *supra* note 2, at 14.

37. See *id.* at 14-15.

38. See *id.* at 15.

39. See *id.* at 17.

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this view seems to have been the majority view.

Madison's insistence that the First Amendment, as adopted, forbade federal interference is clear from his opposition to the Alien and Sedition Acts. Additionally, Madison's own proposal for the First Amendment forbade both state and federal governments from depriving or abridging the people's "right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."⁴⁰ Jefferson was in agreement with Madison that the First Amendment forbade interference by the federal government.⁴¹

Dr. Lowenthal criticizes Madison's view as follows: "Madison's reasoning . . . falls short of showing that the words 'freedom of speech and press' in the First Amendment were expected to have any other meaning than the Blackstonian meaning they demonstrably had in state constitutions."⁴² However, this misses the point; did the framers of the First Amendment of the *federal* Constitution intend for it to have the Blackstonian meaning? Relying on Madison and Jefferson, the answer is no. The only evidence Dr. Lowenthal provides to counter this conclusion is the minority federalist view that was rejected in the legislature's reaction (spearheaded by Madison and Jefferson) to the Alien and Sedition Acts.⁴³

In summary, Dr. Lowenthal's interpretation of original intent is, at least, questionable. He rejects the philosophy of two of the founding fathers of our nation in order to reach his goal. What is more troubling, his support is found in what is, admittedly, the minority view of the federalists. Yet, support through Blackstone is consistent with English law at the time. When interpreting the Constitution, who is the more reliable source

40. *Id.* at 14.

41. In a letter to Abigail Adams, Thomas Jefferson discussed the effect of the First Amendment on slander. He said, "[W]e deny that Congress have a right to control the freedom of the press." *Id.* at 17. Though he went on to say that the states could regulate these rights (bear in mind the Fourteenth Amendment had not yet been passed, much less deemed to have incorporated the principles found in the First Amendment) his prohibition of Congressional interference was absolute.

42. *Id.* at 16.

43. John Marshall (future Chief Justice of the Supreme Court) authored the Minority Report in opposition to Madison's Virginia resolution (rejecting the Alien and Sedition Acts as unconstitutional). *Id.* at 15. Although the report is well-reasoned in its explanation of why Blackstonian philosophy should be accepted in interpreting the First Amendment, the fact that it is the minority view only seven years after the adoption of the First Amendment speaks volumes about the framers' actual intent.

of original intent, Jefferson and Madison, on the one hand, or Blackstone on the other? Indeed, given the federalists' acceptance of the Blackstonian view, can the judiciary be faulted, on originalist grounds, for following the views of Madison and Jefferson, views supported by Congress a mere seven years after the passage of the First Amendment?

Dr. Lowenthal couches his argument against revolutionary groups in the language of seditious libel. Again, however, Bork's conclusion concerning libel is illuminative. "Perhaps the framers did not envision libel actions as a major threat to . . . freedom [of, especially, political expression]." ⁴⁴ It is quite possible that the framers never even considered the issue. It becomes impossible to find original intent where none exists.

IV. INCORPORATION OF THE FIRST AMENDMENT INTO THE FOURTEENTH

According to Dr. Lowenthal, the First Amendment was incorporated into the Fourteenth Amendment in three separate cases. The 1925 case of *Gitlow v. New York*⁴⁵ incorporated the Freedom of Speech and Press Clauses into the Fourteenth Amendment; in 1940, the case of *Cantwell v. Connecticut*⁴⁶ incorporated the Free Exercise Clause; and in 1947, *Everson v. Board of Education*⁴⁷ incorporated the Establishment Clause. Dr. Lowenthal argues that the holdings in these cases were erroneous.

The heart of his argument is that it is not plausible to incorporate the language of the First Amendment because the Amendment specifically reserves that power to the states. This argument is based on Dr. Lowenthal's interpretation of the Establishment Clause. That clause will be the focus of this section.

A. The Reservation of States' Rights

The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion."⁴⁸ Dr. Lowenthal argues that this is "both a guarantee of no Federal religious es-

44. *Id.* at 16.

45. 268 U.S. 652 (1925).

46. 310 U.S. 296 (1940).

47. 330 U.S. 1 (1947).

48. U.S. CONST. amend. I.

establishment and a recognition of the power of the states to establish religions.”⁴⁹ Just as the Tenth Amendment cannot be incorporated because it is an express reservation of states’ power, so the First Amendment cannot be incorporated because it is an implied reservation of states’ power. This view does have historical support. Massachusetts, for example, had a state-established religion early in its history. However, Dr. Lowenthal points out that by 1940, every state constitution contained a clause similar to the Establishment Clause. Thus, even if this power was reserved to the states, the point has been effectively mooted for the present by the states’ desire to avoid establishments of religions. Even if Dr. Lowenthal were correct that the Establishment Clause should not have been incorporated, a change in that rule of law would have no impact on the country.

B. Incorporating Language or Principles?

Dr. Lowenthal argues that the plain language of the First Amendment bars its incorporation into the Fourteenth Amendment. However, only Justice Black favored such literal incorporation of the First Amendment; when the Supreme Court incorporated the First Amendment, it did so not because it was in the Bill of Rights, but because the principle it rests on is a fundamental right. Dr. Lowenthal is arguing against a straw-man made up from concurring opinions of Justice Black, *which were never adopted by the Court*.

The principle behind the Establishment Clause was to disallow a government-sustained religion. In the Bill of Rights, this principle was enunciated with respect to Congress only. On its own, each state has more or less echoed the language of the Establishment Clause in its own Constitution. Again, this furthers the basic principle of separation. It is this principle, which supports the plain language of the First Amendment, that was incorporated by the Court.

The language of *Duncan v. Louisiana*,⁵⁰ a Supreme Court decision regarding the incorporation of the Fifth and Sixth Amendments, is illustrative. The Court looked at whether the rights guaranteed in the Fifth and Sixth Amendments are “fundamental rights.” The question is “whether [the] right is

49. LOWENTHAL, *supra* note 2, at 232.

50. 391 U.S. 145 (1968).

among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'⁵¹ In light of the fact that governmental establishment of religion is barred not only by the Federal Constitution but also every state constitution, it is plausible to state that the principle of non-establishment is a "fundamental right."

Indeed, the Court in *Everson* spoke of the First Amendment as being the expression of the framers' "feeling of abhorrence" towards established religions.⁵² In determining that the Establishment Clause was incorporated into the Fourteenth Amendment, the Court focused on "the light of [the First Amendment's] history and the evils it was designed forever to suppress."⁵³ For these reasons, namely the principles behind it, the First Amendment was incorporated into the Fourteenth Amendment.

However, while this may well defeat Dr. Lowenthal's argument, it does not necessarily defeat his position. How can the right not to have state-established religions "lie at the base of all our civil and political institutions" when Massachusetts and other states actually had state-established religions?

Thus, although Dr. Lowenthal's own reasoning is incapable of supporting his conclusion, there is at least one viable argument that his general position against incorporation is correct. By itself, however, Dr. Lowenthal's argument fails to address the actual basis around which the Supreme Court's rationale of incorporation turned.

V. CONCLUSION

If nothing else, Dr. Lowenthal promulgates a necessary warning. The "clear and present danger" test is inadequate to deal with (especially successful) revolutionary groups and with obscenity, which has had an overwhelmingly negative effect on our society. Indeed, as for the role of religion in America, Jefferson himself pondered,

Can 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 the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my

51. *Id.* at 148 (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

52. 330 U.S. 1, 11 (1947).

53. *Id.* at 14-15.

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country when I reflect that God is just; that his justice cannot forever sleep.⁵⁴

Beyond this, however, unanswered questions undermine this well-reasoned book. How can a firm understanding of original intent be founded solely on the theories of Blackstone and Locke? How can we dismiss comments of the framers in direct contradiction to Dr. Lowenthal's conclusions? It is difficult to accept his solutions, especially where they are based on attenuated arguments of original intent. Thus, although the country may be headed to hell in a hand-basket, it is a stretch to argue that salvation lies in the original framework of the First Amendment.

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54. LOWENTHAL, *supra* note 2, at 190 (quoting *The Complete Jefferson* at 677 (1802) (Query XVIII of the Notes on Virginia, 1782)).