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## The Framers' Establishment Clause: How High the Wall?

*J. Clifford Wallace*\*

### I. INTRODUCTION

Our nation's motto is "In God we trust."<sup>1</sup> The motto, taken from the closing bars of our national anthem, "The Star Spangled Banner,"<sup>2</sup> has appeared on United States coins and currency since 1865<sup>3</sup> and is emblazoned over the entrance to the Senate Chamber in the Capitol.<sup>4</sup> When we pledge allegiance to our flag, we proclaim "one Nation under God."<sup>5</sup> Public officials complete their oaths of office with "the final supplication, 'So help me God.'"<sup>6</sup> Both houses of Congress have paid chaplains,<sup>7</sup> who begin each day's session with prayer.<sup>8</sup> Likewise, the Supreme Court crier, since Chief Justice Marshall's tenure, has invoked God's grace on the Court each time it takes the bench.<sup>9</sup>

Religion has long been a part of our country's fabric.<sup>10</sup> The possibility of restraints on the development of this religious heritage was an early concern of our forefathers.<sup>11</sup> In 1791, the First Amendment

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\* Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit. I have not sought for nor received the views of my court and write only for myself.

1. 36 U.S.C. § 186 (1994).

2. See 36 U.S.C. § 170 (1994); see also H.R. REP. NO. 84-1959, at 1 (1956), reprinted in 1956 U.S.C.C.A.N. 3720, 3720 (quoting national anthem as stating, "Then conquer we must when our cause it is just, / And this be our motto—'In God is our trust'").

3. See Act of Mar. 3, 1865, ch. 100, 13 Stat. 517, 518. The motto is now mandatory on all coin and currency. See 31 U.S.C. §§ 5112(d), (e), 5114(b) (1994).

4. See 100 CONG. REC. 6348 (1954) (statement of Sen. Ferguson).

5. See 36 U.S.C. § 172 (1994).

6. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 213 (1963).

7. See 2 U.S.C. §§ 61d, 84-2 (1994) (listing current House and Senate Chaplains' salaries).

8. See *Schempp*, 374 U.S. at 213.

9. See *id.*

10. See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.").

11. See JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 37-39 (2000).

to the Constitution was ratified. With regard to religion, this time-honored amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." <sup>12</sup> This phrase consists of two clauses, which some suggest have contradictory meanings to an extent. <sup>13</sup> One clause, the "Free Exercise Clause," gives individuals the right to worship as they choose without the fear of governmental regulation or reprisal. <sup>14</sup> The other clause, the "Establishment Clause," has proven to be more difficult for the courts of this land to explain or understand.

Several Supreme Court cases interpret the Establishment Clause as creating an impenetrable wall that prohibits any relations between a government and the churches within its borders. <sup>15</sup> However, nowhere in the Constitution are the words "separation of church and state" to be found. <sup>16</sup> Those of us who earn our living in the legal system have sometimes coined phrases that help us to understand principles underlying the various doctrines with which we work. At times, these phrases, such as "separation of church and state," are so widely and repeatedly used that we begin to substitute the phrase for the actual underlying rule. Many legal historians believe that the courts have misunderstood the Framers' intent in drafting the Establishment Clause. <sup>17</sup> It has been argued that a more realistic phrase to describe the original meaning of the Establishment Clause would be "no preferential treatment for a particular church." <sup>18</sup> Some scholars assert that the Supreme Court itself has admitted to misreading the historical meaning of the Establishment Clause, yet instead of fol-

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12. U.S. CONST. amend. I.

13. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 1157 (2d ed. 1988).

14. See *id.*

15. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Reynolds v. United States*, 98 U.S. 145 (1878).

16. In fact, none of the twenty drafts of the religion clauses generated by the state ratification process and the First Congress contained this or similar phrases. Among state constitutions, only the Constitution of Utah (1896) contained such a guarantee. See WITTE, *supra* note 11, at 91-92.

17. See ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); CLIFTON BRYAN KRUSE, THE HISTORICAL MEANING AND JUDICIAL CONSTRUCTION OF THE ESTABLISHMENT OF RELIGION CLAUSE OF THE FIRST AMENDMENT (1963).

18. See generally Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129 (1986); *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

lowing the Framers' intentions, the Court has perpetuated a contemporary rendition of the First Amendment that erroneously bars any mixing of church and state.<sup>19</sup>

I have long advocated interpreting the Constitution and the Bill of Rights based upon the intent of the Constitutional Founders (Founders) and of the Framers of the Bill of Rights (Framers).<sup>20</sup> Such an approach, I hold, follows naturally from the constitutional principle of separation of powers, as well as from the intrinsic value of democracy.<sup>21</sup> The people ratified the First Amendment through their chosen delegates,<sup>22</sup> who were commissioned with the responsibility of setting social policy. Those delegates devoted a substantial amount of study, debate, and compromise to arrive at a final draft of the First Amendment.<sup>23</sup> Looking to original intent also "provides [greater] predictability and stability" in matters of constitutional law.<sup>24</sup> Recognizing Congress's role as policy setter and lawmaker, the courts have traditionally looked to history in religion cases to aid in their interpretation of the amendments.<sup>25</sup> But in its historical analysis,<sup>26</sup> the Supreme Court has ignored certain crucial facts, creating a distorted picture of what the Framers intended.

In this article, I reexamine what the members of Congress meant by the Establishment Clause when they prohibited "an establishment of religion." Part II reviews aspects of the broader context in which the Constitution and First Amendment were drafted. Part III focuses

19. See John S. Baker, Jr., *The Establishment Clause as Intended: No Preference Among Sects and Pluralism in a Large Commercial Republic*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 41, 41–42, 45–47 (Eugene W. Hickok, Jr. ed., 1991) (citing Justice Stevens's majority opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985)).

20. See, e.g., J. Clifford Wallace, *A Two Hundred Year Old Constitution in Modern Society*, 61 *TEX. L. REV.* 1575, 1579–80, 1586 (1983) [hereinafter *Constitution in Modern Society*]; J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 *GEO. WASH. L. REV.* 1, 1, 11–14 (1981) [hereinafter *Judicial Restraint*].

21. See *Judicial Restraint*, *supra* note 20, at 2–8.

22. See *Resolution of the First Congress Submitting Twelve Amendments to the Constitution*, in *DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES* 1063–65 (1927) [hereinafter *DOCUMENTS*] (containing original amendments sent to the states and action taken thereon).

23. See *Wallace*, 472 U.S. at 93–98 (Rehnquist, J., dissenting) (discussing congressional debate and compromise on Establishment Clause); MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 6–14 (1978).

24. *Constitution in Modern Society*, *supra* note 20, at 1580.

25. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 425–30 (1962); *Everson v. Board of Educ.*, 330 U.S. 1, 9–15 (1947).

26. See, e.g., *Everson*, 330 U.S. at 9–15.

on the text of the Establishment Clause and discusses the beliefs, actions, and statements of the Founders and Framers. This section also examines the role played by Thomas Jefferson during this period. Part IV applies the principles of interpretation gleaned from the analysis in Parts II and III to three cases recently decided by the Supreme Court: *Mitchell v. Helms*,<sup>27</sup> *Santa Fe Independent School District v. Doe*,<sup>28</sup> and *Board of Regents v. Southworth*.<sup>29</sup>

## II. CHURCH AND STATE IN HISTORICAL CONTEXT

Throughout history, world and national leaders have turned to deity in prayer for guidance.<sup>30</sup> Both Western and Eastern leaders<sup>31</sup> have looked to their god, or gods, for approval of acts such as the crowning of kings,<sup>32</sup> going to war,<sup>33</sup> returning from war (whether in success or defeat),<sup>34</sup> the establishment of borders,<sup>35</sup> the founding of cities,<sup>36</sup> and for routine matters, such as determining the compensation to be received by one whose ox has been gored by the ox of his

27. 530 U.S. 793 (2000).

28. 530 U.S. 290 (2000).

29. 529 U.S. 217 (2000).

30. See CHESTER JAMES ANTIEAU, *THE HIGHER LAWS: ORIGINS OF MODERN CONSTITUTIONAL LAW* 1–3 (1994).

31. See *id.* at 1. During the Golden Age of Chinese Philosophy, sages such as Confucius and Mencius affirmed “that ultimate political authority is in God alone, with temporal rulers being delegated only some of His power, and always subject to the ‘law of God,’ or, as sometimes expressed, ‘the law of Heaven.’” *Id.* (footnotes omitted). The Chinese philosophers proclaimed that the basic principle of the “Will of Heaven” or “Mandate of Heaven” was that “rulers were but stewards for the people.” *Id.*

32. See 1 *Samuel* 15:1 (King James) (“Samuel also said unto Saul, The Lord sent me to anoint thee to be king over his people, over Israel: now therefore hearken thou unto the voice of the words of the Lord.”).

33. Herodotus recounts that at the battle at Plataea between the Greeks and the Persians the Greeks would not engage in fighting until the sacrifices were favorable. HERODOTUS, *THE HISTORY* 639–40 (David Grene trans., Univ. Chicago Press 1987).

34. See *Deuteronomy* 20:4 (King James) (“For the Lord your God is he that goeth with you, to fight for you against your enemies, to save you.”).

35. See *Numbers* 34:1–12 (King James).

36. According to one legend, Romulus and Remus felt impressed to found a city at the spot where they had been abandoned as infants, and both “determined to ask the tutelary gods of the countryside to declare by augury which of them should govern the new town.” LIVY, *THE EARLY HISTORY OF ROME*, 39–40 (Aubrey de Sélincourt trans., Penguin Books 1960). Remus saw six vultures while Romulus saw twelve. Their followers began fighting over the meaning of the two omens, and in the struggle, Remus was killed. Romulus named the new city after himself, Rome, and offered sacrifices to the gods. See *id.* at 40.

neighbor.<sup>37</sup> Our Founders' predecessors also regularly petitioned God for assistance; these prayers included asking for his aid in relocating to the New World.<sup>38</sup> The Mayflower Compact, as well as the charters of many colonies, specifically asked for divine guidance in political endeavors.<sup>39</sup> During the American Revolution and the founding era, religion continued to play a vital role in the political arena.<sup>40</sup> At the start of the American Revolution in 1775, nine of the thirteen colonies had established churches.<sup>41</sup> When the Constitutional Convention began in 1787, five states still retained their established faiths.<sup>42</sup> State-established churches continued during the Convention, state ratification, and acceptance of the First Amendment. Indeed, it was not until 1833, forty-six years after the Constitutional Convention and forty-two years after the First Amendment was ratified, that Massachusetts disestablished the last state-sponsored church.<sup>43</sup> The fact that these official state churches existed and continued to exist after the ratification of the First Amendment is strong evidence that the Framers meant the Establishment Clause to apply only to the federal government; the First Amendment left the states

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37. See *Exodus* 21:35 (King James).

38. A great many of the early colonies were formed by dissident religious minorities who left Europe in order to escape powerful political systems. See *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947) (“A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches.”).

39. See DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 7 (1988) (“The political covenants written by English colonists in America lead us to the church covenants written by radical Protestants in the late 1500s and early 1600s, and these in turn lead us back to the Covenant tradition of the Old Testament.”); CHARLES E. RICE, *THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT* 159–65 (1964) (discussing the Mayflower Compact and the charters of colonies in Virginia, Massachusetts, Maryland, Connecticut, Rhode Island, and Pennsylvania).

40. See LUTZ, *supra* note 39, at 140 (“The prominence of ministers in the political literature of the period attests to the continuing influence of religion during the founding era.”). Lutz examined the public political literature written between 1760 and 1805. He found that the Bible was the most frequently cited book in that literature and that the peak period of biblical citation occurred during the 1770s. *Id.* at 140–41. Lutz writes, “[a]pproximately 80 percent of the political pamphlets published during the 1770s were reprinted sermons.” *Id.* at 140, 142.

41. ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 36–37 (1964).

42. See CORD, *supra* note 17, at 4 (identifying Georgia, South Carolina, Connecticut, Massachusetts, and New Hampshire as still having state-established religions).

43. See *id.*

free to decide the propriety of having state churches.<sup>44</sup>

Virginia's experience in the disestablishment of an official state church is an important and oft-mentioned example. The Anglican Church was the established church in Virginia, and its ministers were paid by the state.<sup>45</sup> Those who favored disestablishing the church were led by Thomas Jefferson and James Madison.<sup>46</sup> The two men wrote persuasive and powerful documents: Madison's *Memorial and Remonstrance Against Religious Assessments*<sup>47</sup> and Jefferson's *Bill for Establishing Religious Freedom*.<sup>48</sup> Not only did the Framers of the First Amendment look to these documents, but so did the United States Supreme Court 150 years later in interpreting the Establishment Clause.<sup>49</sup> In reaction to Madison's and Jefferson's writings, Virginia disestablished its church.<sup>50</sup> However, as we shall see, other evidence may be more indicative of the Framers' intent for the Establishment Clause than these documents, written prior to the First Amendment's ratification.<sup>51</sup>

### III. THE NONPREFERENTIALIST ESTABLISHMENT CLAUSE

#### *A. From the Constitutional Convention to State Ratification*

Like their predecessors, the Founders were essentially religious people,<sup>52</sup> and, not surprisingly, their religious beliefs influenced their political actions. The Declaration of Independence contains four ref-

44. In 1808, Thomas Jefferson wrote, "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 state, as far as it can be in any human authority." CORD, *supra* note 17, at 14.

45. *See id.*

46. *See* RICE, *supra* note 39, at 32.

47. The precise meaning of this document remains in dispute. Some scholars have seen the "Memorial" as evidencing Madison's objections to any state aid to religion. On the other hand, it can also be argued that Madison was opposed to Virginia's law because it was discriminatory and gave improper preference to Christianity. *See* CORD, *supra* note 17, at 20.

48. *See* RICE, *supra* note 39, at 32; CORD, *supra* note 17, at 244-50 (containing text of these two documents).

49. *See* *Everson v. Board of Educ.*, 330 U.S. 1, 11-13 (1947).

50. The Anglican church was established in Virginia in 1609 and disestablished in 1786. *See* CORD, *supra* note 17, at 4.

51. *See infra* Part III.B-C.

52. All of the fifty-five Founders, with the exception of three, or possibly five, were members of an organized church. *See* M.E. BRADFORD, *A WORTHY COMPANY* viii (1982).

erences to God,<sup>53</sup> yet its author, Thomas Jefferson, is the same man who later wrote that a “wall of separation” should be erected between church and state.<sup>54</sup> In 1777, the Continental Congress imported 20,000 Bibles for use in the United States, and in 1782, it commissioned an American edition of the Bible.<sup>55</sup>

During the Constitutional Convention, Benjamin Franklin, a man often cited as being opposed to any state connection to religion,<sup>56</sup> proposed that each day the Convention begin with prayer.<sup>57</sup> He proclaimed that calling on divine assistance would aid the resolution of the serious matters before the Convention. Dr. Franklin, addressing President Washington, stated:

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

I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that Service.<sup>58</sup>

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53. See THE DECLARATION OF INDEPENDENCE paras. 1, 2, 5 (U.S. 1776) (speaking of “God,” the “Creator,” “the Supreme Judge of the world,” and “the protection of Divine Providence”).

54. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), reproduced in THE COMPLETE JEFFERSON 518–19 (Saul K. Padover ed., 2d ed. 1969). Strict separationists must rely on a letter written to Baptist Church leaders, who had been leaders in the disestablishment of the Anglican Church. See ENCYCLOPEDIA OF AMERICAN HISTORY 824 (Richard B. Morris & Jeffrey B. Morris eds., 6th ed. 1982).

55. See Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569, 600 (1984) (citing STOKES & PEEFFER, *supra* note 41, at 85). However, the First Congress did not act on petitions it received from various religious groups to standardize the text of the Bible. See William C. diGiacomantonio, *To Form the Character of the American People: Public Support for the Arts, Sciences, and Morality in the First Federal Congress*, in INVENTING CONGRESS: ORIGINS AND ESTABLISHMENT OF THE FIRST FEDERAL CONGRESS 208, 233 (Kenneth R. Bowling & Donald R. Kennon eds., 1999) [hereinafter INVENTING CONGRESS].

56. See, e.g., Paul E. Salamanca, *The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous*, 65 U. CIN. L. REV. 1093, 1101–02 (1997).

57. See RICE, *supra* note 39, at 36–39.

58. *Debates in the Federal Convention of 1787 as Reported by James Madison*, in DOCUMENTS, *supra* note 22, at 295–96. Some suggest that the story has less force as evidence of the Founders' thoughts on church and state matters since Franklin's motion for prayers did

Franklin's request that "one or more of the Clergy" be asked to participate suggests that Franklin was concerned about not giving any one religion preferential treatment; his advocating of prayer during the Convention does not suggest that he favored an absolute separation of church and state.

The Constitution that left the Convention contained no specific protections for the individual and his or her choice of religion. The only clause in the main body of the Constitution that had anything to do with religion was one prohibiting any religious test as a qualification for public office at the national level.<sup>59</sup> During the state ratification process, the Constitution's lack of a Bill of Rights, including any guarantee regarding religious liberty, generated significant controversy.<sup>60</sup> Federalists gave assurances that Congress did not have authority over subjects, such as religion, that were not enumerated in the Constitution. However, only four states agreed to ratify without first being promised that the First Congress would draft a bill of rights.<sup>61</sup> Seven states proposed provisions for a federal bill of rights; six of these proposed religious liberty clauses.<sup>62</sup> Virginia, for example, proposed "that no particular religious sect or society ought to be favored or established, by law, in preference to others."<sup>63</sup> State ratifying conventions in Maryland, New York, North Carolina, and Rhode Island recommended similar language. Such proposals manifested these states' concern that a federal religion might be established; in other words, they feared that the federal government might give preference to one of the many particular sects then existing in the states.<sup>64</sup> Although during ratification Madison joined with the feder-

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not carry. However, Madison's notes from the Convention show that lack of funds to pay a chaplain, not antipathy to government-organized prayer, may have been the real reason for the omission of prayer. *Id.* at 296.

59. See U.S. CONST. art. VI, cl. 3; ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 137 (1997). Indeed, the Constitutional Convention was characterized by the absence of discussions about religious liberty. See Smith, *supra* note 55, at 601.

60. See WITTE, *supra* note 11, at 63.

61. See *id.*

62. See *id.*

63. 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (Jonathan Elliot ed., rep. ed., Burt Franklin 1987) [hereinafter DEBATES].

64. See CORD, *supra* note 17, at 6-7. For instance, New York proposed an amendment reading, "no religious sect or society ought to be favored or established by law in preference to others." 1 DEBATES, *supra* note 63, at 328. For information on the many religious sects in the

alists in arguing that a Bill of Rights was unnecessary,<sup>65</sup> he grew concerned that without one antifederalists would withdraw all support from the new Constitution and thereby hinder the progress of the infant nation.<sup>66</sup> Thus, as a member of the First Congress, he drew upon the state proposals and presented to Congress the first draft of the Bill of Rights.<sup>67</sup>

### *B. Reading the Establishment Clause*

Madison's initial draft of the Establishment Clause clearly expresses a no-preference attitude toward religion. It reads, "nor shall any national religion be established."<sup>68</sup> Despite assertions that Madison in his *Memorial and Remonstrance* argued against all state aid to religion,<sup>69</sup> his obvious concern in this first draft was that no church should be established by the federal government or raised in status by it above another church; he wanted the multiplicity of religious sects in the United States to flourish.<sup>70</sup> Madison was also working to address the concern expressed by the states during the ratification process that the "necessary and proper clause" of Article I, Section 8 would induce Congress to form a national church.<sup>71</sup> Further, it is recorded in congressional annals that Madison "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."<sup>72</sup>

After debate and compromise, the Establishment Clause as we know it today ultimately passed both Houses of Congress and finally

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United States at the time, see LEO PFEFFER, *CHURCH, STATE AND FREEDOM* 93–95 (rev. ed. 1967).

65. See Theodore Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1406 (1966).

66. See GOLDWIN, *supra* note 59, at 71–73; MALBIN, *supra* note 23, at 5. Madison may also have been concerned that his staunch Baptist supporters, who strongly favored adding a guarantee of religious freedom, would fail to rally behind him in the first federal election contest, in which he was running against James Monroe. See R.B. Bernstein, *A New Matrix for National Politics: The First Federal Elections, 1788–90*, in *INVENTING CONGRESS*, *supra* note 55, at 109, 130–31.

67. See WITTE, *supra* note 11, at 65.

68. MALBIN, *supra* note 23, at 4 (citing 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)).

69. See *supra* notes 46–51 and accompanying text.

70. See PFEFFER, *supra* note 64, at 93–95; GOLDWIN, *supra* note 59, at 72–73.

71. See CORD, *supra* note 17, at 9.

72. 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789).

gained the necessary approval by the states. Numerous jurists and scholars have addressed the actual House debates on the First Amendment.<sup>73</sup> Chief Justice Rehnquist's conclusions concerning the First Congress's debates on the First Amendment are worth reciting:

The evil to be aimed at, so far as those who spoke [during the First Congress's debates on the First Amendment] were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly.<sup>74</sup>

### *C. Actions of the Framers*

Unless the Framers were extremely hypocritical and unwilling to practice what they preached, a close scrutiny of their actions near the time of and subsequent to the ratification of the First Amendment reveals important insight as to the meaning they attached to the Establishment Clause. The First Amendment was approved in the House of Representatives by a vote of thirty-seven to fourteen.<sup>75</sup> On the same day, September 25, 1789,<sup>76</sup> the House followed a practice begun during the Revolution<sup>77</sup> and proposed a resolution requesting President George Washington to issue a Thanksgiving Day Proclamation, asking the nation to set aside a "day of public humiliation and prayer."<sup>78</sup> The debate surrounding this resolution is particularly striking. A South Carolina Antifederalist, Thomas Tudor Tucker, opposed the motion and asserted that "it was 'a business with which Congress ha[s] nothing to do; it is a religious matter, and, as such, is proscribed by us.'"<sup>79</sup> However, even after hearing this argument, the

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73. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 93-100 (1985) (Rehnquist, J., dissenting); MALBIN, *supra* note 23, at 6-17; Baker, *supra* note 19, at 42-45.

74. *Wallace*, 472 U.S. at 99 (Rehnquist, J., dissenting).

75. See GOLDWIN, *supra* note 59, at 166-67.

76. See M.E. BRADFORD, ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION 93 (1993); diGiacomantonio, *supra* note 55, at 230-31.

77. See STOKES & PFEFFER, *supra* note 41, at 504.

78. See Baker, *supra* note 19, at 42-43.

79. diGiacomantonio, *supra* note 55, at 231 (quoting 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 1500-01 (Charlene Bangs Bickford et al. eds., 1992)).

resolution passed by a great majority.<sup>80</sup> Washington, who had served as the president of the Constitutional Convention, issued the proclamation without any apparent concern that he might be mixing government and religion. The first line of Washington's proclamation reads, "Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor . . . ."<sup>81</sup> Of the Framers or Founders who later became Presidents, three issued proclamations calling for prayer and thanksgiving. Washington issued at least two,<sup>82</sup> Adams at least two,<sup>83</sup> and Madison at least four.<sup>84</sup>

In addition to urging the Thanksgiving Proclamation, the House of Representatives authorized the use of its hall for religious services,<sup>85</sup> and the First Congress established a Congressional Chaplain system.<sup>86</sup> An annual salary of \$500 was to be paid for public prayers in Congress.<sup>87</sup> The Congress further authorized the President "by and with the advice and consent of the Senate" to appoint a chaplain for the "military establishment of the United States."<sup>88</sup> In 1789, the First Congress reenacted the Northwest Ordinance, which provided that "[r]eligion, morality, and knowledge" were necessary to good government and happiness.<sup>89</sup> It also stated that schools should promote religious and related values as part of their curriculum.<sup>90</sup>

In 1790, a group of Quakers petitioned the First Congress to enact antislavery regulation.<sup>91</sup> Their efforts were met by vigorous opposition by delegations from Southern states.<sup>92</sup> Several Southern congressmen questioned the petition because of the religious affilia-

80. *See id.*; BRADFORD, *supra* note 76, at 98.

81. 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 56 (1896).

82. *See id.* at 56, 171-72.

83. *See id.* at 258-60, 274-76.

84. *See* 2 RICHARDSON, *supra* note 81, at 498, 517-18, 543, 545-46.

85. *See* STOKES & PFEFFER, *supra* note 41, at 90.

86. *See* Marsh v. Chambers, 463 U.S. 783, 787-88 (1983).

87. *See id.* at 788 & n.7.

88. Act for Raising and Adding Another Regiment to the Military Establishment of the United States, and for Making Farther Provision for the Protection of the Frontiers, ch. 28, § 5, 1 Stat. 222 (1791); *see also* H.R. REP. NO. 33-124 (1854).

89. Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 52 (1789) (reenacting Northwest Ordinance of 1787).

90. *See id.*

91. *See* diGiacomantonio, *supra* note 55, at 237.

92. *See id.*

tion of those who brought it and further disparaged the Quakers' prayer on the grounds that "religious scruples" could not be a basis for congressional policy.<sup>93</sup> Significantly, these congressmen made these fatuous arguments to the other members of Congress by couching their concern in the language of nonpreferential treatment for, and not of outright disengagement from, religious organizations. Congressman Tucker, for example, stated, "If we are to pay attention to the religious scruples of one sect, we are equally bound to pay attention to all."<sup>94</sup>

Similar rhetoric was also employed during the third session of the First Congress in arguing against Quaker petitions that asked for exemptions from military service. Again, attention to the language employed in the debates demonstrates that those who opposed the petitions did not rely for their arguments on a "wall of separation" but rather claimed that the petitions would improperly prefer one religion, the Quakers, over all other religions. Congressman Jackson asserted, "[W]e could not more effectually encourage that religion by making it the religion of the land, than we should by annexing these privileges to it."<sup>95</sup> He also stated, "The constitution places all religions on an equal footing."<sup>96</sup> "What right then, have we, the mere creatures of the constitution, to create and give rank and stability to one church more than another?"<sup>97</sup>

Several treaties provide further evidence that the Establishment Clause does not create an absolute separation of church and state. President Washington concluded a treaty with the Oneida, Tuscorora, and Stockbridge Native American Tribes pursuant to which the United States was to pay \$1,000 toward the building of a church at Oneida.<sup>98</sup> In 1803, President Jefferson proposed a treaty, which was ratified by the Senate, providing for a church to be built for the Kaskaskia Tribe out of government funds.<sup>99</sup> The church was to be

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93. *Id.* at 238.

94. *Id.*

95. *Id.* at 241.

96. *Id.*

97. *Id.*

98. *See* A Treaty Between the United States and the Oneida, Tuscorora, and Stockbridge Indians, Dwelling in the County of the Oneidas, Dec. 2, 1794, art. IV, 7 Stat. 47, 48 (1785).

99. *See* A Treaty Between the United States of America and the Kaskaskia Tribe of Indians, Aug. 13, 1803, art. III, 7 Stat. 78, 79 (1803).

Roman Catholic with a yearly stipend paid to the priest.<sup>100</sup> President James Monroe, Madison's former Secretary of State, entered into a treaty with the Wyandots and other Native Americans and, because of their attachment to the Catholic Religion, granted land "to the rector of the Catholick [sic] church of St. Anne of Detroit" for the use of a church.<sup>101</sup> A treaty with the Osage Tribe signed in 1825 included a land grant "for the benefit of [the Harmony Missionary establishment]" in Missouri, "so long as said Missions shall be usefully employed in teaching" the tribe.<sup>102</sup> From 1796 to 1804, Congress passed laws that in effect subsidized an evangelical Christian sect to proselytize among the Indians in the Territory of Ohio.<sup>103</sup>

These acts by the Framers and their successors shed light on their intent in adopting the Establishment Clause of the First Amendment. Subsequent court decisions cannot rewrite this history.

#### *D. Jefferson and the Establishment Clause*

A comment must be made about Thomas Jefferson. The Supreme Court has heavily relied on Jefferson's writings concerning church-state matters, especially his statement that the Establishment Clause erected "a wall of separation between church and State."<sup>104</sup> Interestingly, however, Jefferson was neither a delegate to the Convention in Philadelphia nor a member of the First Congress; in fact, Jefferson was out of the country at the time.<sup>105</sup> Thus, he was neither a Founder nor a Framers. His "wall of separation" comment was made in a letter fourteen years after the First Congress passed the First Amendment—hardly contemporary with the adoption of the First Amendment.<sup>106</sup>

It is true that Jefferson was a leader in the separation of church and state crusades.<sup>107</sup> In Virginia, Madison introduced Jefferson's "Bill for Establishing Religious Freedom," which became law in

100. *See id.*

101. Articles of a Treaty, Sept. 29, 1817, art. 16, 7 Stat. 160, 166 (1817).

102. Articles of a Treaty, June 2, 1825, art. 10, 7 Stat. 240, 242–43 (1825).

103. *See* PROGRESS OF THE SOCIETY OF THE UNITED BROTHERS IN PROPAGATING THE GOSPEL AMONG THE INDIANS, S. DOC. NO. 17-189 (1822), *reprinted in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 372 (1834).

104. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (citation omitted).

105. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

106. *See id.*

107. *See supra* notes 45–51 and accompanying text.

1786.<sup>108</sup> On the same day, however, Madison also introduced a bill by Jefferson that called for severely punishing “Sabbath Breakers.”<sup>109</sup> Later, Jefferson, as president of the University of Virginia, proposed nonsectarian religious study as part of the university curriculum, and he invited sects to conduct religious exercises on the campus with the qualification that all sects have equal access.<sup>110</sup> He also thought it appropriate for the Charlottesville courthouse to be used as a “common temple” on a rotating basis by the churches in town.<sup>111</sup> Is this an advocate of a “wall of separation,” let alone, as suggested by the Supreme Court, a “high and impregnable wall”?<sup>112</sup> Some who have examined Jefferson’s actions in church-state affairs suggest that his concern was not church-state intermingling in general but the federal government’s involvement in religion and that he believed the Constitution left the states free “to develop what they deemed to be the proper relationship with religion.”<sup>113</sup> Even with Jefferson’s aversion to federal involvement with religion, however, the Capitol was used for religious services during Jefferson’s presidency,<sup>114</sup> and, as mentioned earlier, his administration negotiated a treaty with the Kaskaskia Tribe, which provided for building a Roman Catholic church and paying the priest a yearly stipend with government funds.<sup>115</sup> These acts better describe Jefferson’s views than a throw-away line in a letter to a small, New England church committee.<sup>116</sup>

*E. Early Commentators on the Establishment Clause*

One last source that is useful in understanding the original meaning of the Establishment Clause is the statements of early constitutional commentators. Justice Joseph Story, a long-time member of the Court and professor at Harvard Law School, wrote: “The real object of the [First] [A]mendment was . . . to prevent any national

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108. See *supra* note 54 and accompanying text.

109. See Joel F. Hansen, Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 BYU L. REV. 645, 666 (quoting 2 THE PAPERS OF THOMAS JEFFERSON 556 (J. Boyd ed., 1950)).

110. See *id.* at 669–72.

111. See *id.* at 667–68.

112. *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

113. Hansen, *supra* note 109, at 673.

114. See STOKES & PFEFFER, *supra* note 41, at 90.

115. See *supra* notes 99–100 and accompanying text.

116. See *supra* note 54.

ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.”<sup>117</sup> Likewise, Thomas Cooley, a later contemporary of Justice Story, emphasized that the First Amendment prevented “discrimination in favor of any one denomination or sect.”<sup>118</sup> These statements support the evidence described earlier that the Framers intended the Establishment Clause of the First Amendment to forbid a national religion and sectarian preference.

#### IV. THE ESTABLISHMENT CLAUSE TODAY

Today, the Establishment Clause remains a source of substantial litigation and is hotly debated. Cases involving the constitutionality of prayers or scripture reading in public schools,<sup>119</sup> legislative chaplains,<sup>120</sup> tax exemption for church property,<sup>121</sup> Sunday closing laws,<sup>122</sup> tuition credits for parents who send their children to private church schools,<sup>123</sup> and municipal Nativity scenes<sup>124</sup>—to mention just a few—have inevitably found their way to the nation’s highest Court.

Last year was no exception. The Court addressed the Establishment Clause in three cases dealing with religion and public education. First, in *Santa Fe Independent School District v. Doe*,<sup>125</sup> the Court used the Establishment Clause to strike down a local school board policy that permitted “student-led, student-initiated prayer at [high school] football games.”<sup>126</sup> In *Mitchell v. Helms*,<sup>127</sup> a fractured Court held that the Establishment Clause did not bar the use of federal funds channeled through state and local educational agencies for “services, materials, and equipment,” such as library books,

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117. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 631–32 (Melville M. Bigelow ed., 5th ed. 1994).

118. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 471 (De Capo 1972).

119. See *Wallace v. Jaffree*, 472 U.S. 38, 38 (1985); *School Dist. v. Schempp*, 374 U.S. 203 (1963).

120. See *Marsh v. Chambers*, 463 U.S. 783 (1983).

121. See *Walz v. Tax Comm’n*, 397 U.S. 664 (1970).

122. See *McGowan v. Maryland*, 366 U.S. 420 (1961).

123. See *Mueller v. Allen*, 463 U.S. 388 (1983).

124. See *Lynch v. Donnelly*, 465 U.S. 668 (1984).

125. 530 U.S. 290 (2000).

126. *Id.* at 301 (citation omitted).

127. 530 U.S. 793 (2000).

computers, and audio-visual equipment, that are “secular, neutral, and nonideological.”<sup>128</sup>

Another case, while technically a free speech case, built upon a previous Establishment Clause case. Five years ago, in *Rosenberger v. Rector of the University of Virginia*,<sup>129</sup> the Court held that a religious student newspaper at a public university could, without violating the Establishment Clause, apply for and receive money from a university program that provided funds for the printing of student publications if the program was viewpoint-neutral.<sup>130</sup> In *Board of Regents v. Southworth*,<sup>131</sup> the Court considered “the antecedent question, acknowledged but unresolved in *Rosenberger*: whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance.”<sup>132</sup> The Court answered yes, holding that the use of *mandatory* student activity fees at a public university to fund extracurricular student activities that furthered the university’s broad educational mission was constitutional, even though some of the funded organizations engaged in political and ideological expression offensive to some students, because the activity fee program was viewpoint-neutral.<sup>133</sup>

What might have happened in these cases if the nonpreferentialist Establishment Clause described above<sup>134</sup>—no federal church and no preferential treatment—had been applied?<sup>135</sup> In *Santa Fe*, the high school prayer case, the outcome might have been different and the school board policy upheld: praying at a football game is not the establishment of a national religion, and since the policy required “nonsectarian and nonproselytizing” prayers,<sup>136</sup> it probably would not have given preference to one church. The dissent, written by

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128. *Id.* at 802 (quoting 20 U.S.C. § 7372(a)(1)).

129. 515 U.S. 819 (1995).

130. *See id.* at 837–46.

131. 529 U.S. 217 (2000).

132. *Id.* at 233.

133. *See id.* at 229–30.

134. *See supra* Part III.

135. I wish to make it clear that these thoughts do not foretell my vote on First Amendment issues. By my oath, I am bound to follow the Supreme Court’s interpretation of the First Amendment—and I will do so scrupulously. Nevertheless, it is informative to review the intent of those who wrote and voted upon the First Amendment. This I have tried to do in an objective fashion.

136. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 298 n.6 (2000) (quoting school policy).

Chief Justice Rehnquist, stated, “Neither the holding nor the tone of the [majority] opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights proclaimed a day of ‘public thanksgiving . . . .’”<sup>137</sup> In *Mitchell*, the educational materials case, the Court would likely have reached the same result and upheld the federal act in question, since that act does not establish a federal religion or prefer one religious sect above another.<sup>138</sup> The plurality opinion,<sup>139</sup> written by Justice Thomas, contains several passages that evince attention to the principles of neutrality found in the Establishment Clause.<sup>140</sup> For example, Justice Thomas stated:

If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would . . . reserve special hostility for those who take their religion seriously . . . .<sup>141</sup>

Finally, to the extent *Southworth*, the university free speech case, built upon the Establishment Clause principles in *Rosenberger*, the result would probably have been the same because the funds generated by the student activity fee program were not to be used to favor one religious organization above another.<sup>142</sup>

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137. *Id.* at 318 (Rehnquist, C.J., dissenting).

138. *See Mitchell v. Helms*, 530 U.S. 793, 802 (2000) (plurality) (stating that the Education Consolidation and Improvement Act of 1981 required “‘services, materials, and equipment’” provided to private schools must be “‘secular, neutral, and nonideological’”).

139. Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy joined in this opinion. *See id.* at 794.

140. Indeed this fact was of great concern to Justice O’Connor and Justice Breyer, who concurred in the judgment, and to the dissenters. Justice O’Connor stated, “Reduced to its essentials, the plurality’s rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content.” *Id.* at 837 (O’Connor, J., concurring). Justice Souter in dissent wrote, “What is more important is the view revealed in the plurality opinion, which espouses a new conception of neutrality as a practically sufficient test of constitutionality that would, if adopted by the Court, eliminate enquiry into a law’s effects.” *Id.* at 869 (Souter, J., dissenting).

141. *Id.* at 827.

142. *Board of Regents v. Southworth*, 529 U.S. 217, 234 (2000) (stating that parties had stipulated that student fee program involved was viewpoint neutral).

## V. CONCLUSION

From this brief examination of the actions and words of the Framers of the First Amendment, it is clear that what they had in mind regarding the “establishment of religion” clause was that no federal church would be established and that Congress would not give preferential treatment to an individual sect. The Framers did not intend to inhibit religion, only to prevent Congress from favoring one over another. At the state level, citizens were left free to develop religious policy through representative democracy.<sup>143</sup> The merits of a system providing for “separation of church and state” was not decided by the First Amendment; rather, it specified only where that decision might be made. Based upon the original intent of the Framers, that forum was to be located in the several states, not in the federal courtroom.<sup>144</sup>

I recognize that many do not share my view of Establishment Clause history and perhaps question its relevance in light of the decades of precedent that do not support such an interpretation. However, like others, I am optimistic that the Supreme Court may turn more toward the foundation upon which the Establishment Clause is based and apply an interpretation consistent with that foundation. Three Justices, led by the Chief Justice of the United States, have at least made this point last year in *Santa Fe Independent School District*.<sup>145</sup> Perhaps others will follow.

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143. See, e.g., Hansen, *supra* note 109, at 645–46 (“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. . . . 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.” (footnotes omitted)).

144. I realize, of course, that the Supreme Court has, through the Fourteenth Amendment, incorporated the First Amendment such that it now applies to the states. See *Everson v. Board of Educ.*, 330 U.S. 1, 14–15 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the Free Exercise Clause to the states). However, as Mark DeWolfe Howe has written, “[I]t seems to me extraordinarily difficult to take seriously the suggestion that the framers and the ratifiers of the Fourteenth Amendment believed that its adoption was going to have a significant effect upon the country’s religious institutions.” MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 72 (1965).

145. 530 U.S. 290, 318–26 (2000) (Rehnquist, C.J., Thomas, J., Scalia, J., dissenting).