

11-1-2004

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Recommended Citation

Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide*, 2004 BYU L. Rev. 1617 (2004).

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More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide

*Steven G. Gey**

The jurisprudence of the First Amendment's religion clauses is one of the most history-laden of any area of constitutional law. From the beginning of the modern era in the Court's church-state jurisprudence, nearly every discussion of note regarding the meaning of the Establishment and Free Exercise Clauses has revolved around the country's religious history.

When the Supreme Court first announced that the Establishment Clause was incorporated into the Fourteenth Amendment's Due Process Clause and therefore applicable to the states, much of the Court's discussion concerned religious discrimination in the early colonies and the fight over religious establishments more than a century and a half earlier in Virginia.¹ When the Court upheld the constitutionality of legislative prayers several decades later, it did so largely on the ground that Congress had itself hired a chaplain nearly two centuries earlier.² When Justice Thomas recently argued in favor of government funding of religious schools, he relied on the "shameful pedigree" of anti-Catholic discrimination during the nineteenth century.³ Members of the Court even argue about whether the views of particular historical figures deserve recognition

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1. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 11–13 (1947); *id.* at 31–42 (Rutledge, J., dissenting).

2. *Marsh v. Chambers*, 463 U.S. 783 (1983). Chief Justice Burger observed: It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Id. at 790.

3. *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000).

in debates about the Constitution's original meaning. Although the Court has long based its interpretation of the religion clauses on the views of Thomas Jefferson, for example, Chief Justice Rehnquist has argued that Jefferson's views "are less than [an] ideal source of contemporary history" of the Establishment Clause because at the time the First Amendment was written Jefferson was in France.⁴

The problem is not that any of these historical discussions are inaccurate or entirely irrelevant to the discussion of the meaning of the religion clauses. The problem, rather, is that these discussions are so selective and tendentiously one-sided that they contribute little to a reasonable understanding of the modern theory of the First Amendment. Consider the other side of the four historical discussions mentioned in the previous paragraph. Although in its first major examination of the Establishment Clause the Court correctly noted that James Madison and other opponents defeated Governor Patrick Henry's Bill for Religious Assessments, for example, the Court neglected to mention that other states such as Massachusetts would continue to finance religious exercises well into the next century.⁵ Likewise, although the first Congress indeed paid for legislative chaplains, the author of the First Amendment himself would later write that this action directly contravened the Establishment Clause.⁶ As for Justice Thomas's citation to anti-Catholic discrimination as the impetus for resistance to government financing of religion, he failed to note the abundant evidence of nondiscriminatory opposition to such financing—including the evidence amassed during the Court's earlier foray into the history of the battle over religious assessments in Virginia.⁷ Finally, the illogic

4. Compare *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (identifying Jefferson as "an acknowledged leader of the advocates of the measure [i.e., the First Amendment]" and noting that his views "may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured"), with *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (noting that Jefferson was in France at the time Congress passed the First Amendment and concluding that "[h]e would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment").

5. See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1458.

6. James Madison, untitled manuscript, reprinted in Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 558-62 (1946).

7. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-13 (1947); *id.* at 31-42 (Rutledge, J., dissenting).

of Justice Rehnquist's attempt to banish from discussions of church-state relations the author of the Virginia Bill for Establishing Religious Freedom speaks for itself. Jefferson's views on the First Amendment may not be, as Chief Justice Waite once asserted, "authoritative,"⁸ but they clearly contribute a great deal to the interpretive matrix in which the meaning of the First Amendment must be defined.

The frequent use—and misuse—of history in current discussions of religion-clause doctrine comes to mind in reading Carl Esbeck's contribution to this conference on the church-state settlement in the early American republic.⁹ Professor Esbeck provides an excellent survey of the various approaches to the church-state relationship throughout the early republic and mostly avoids the historical selectiveness of many other judicial opinions and academic articles on the subject. His article provides the full flavor of the rich diversity evident in early American religious and political culture.

My main cavil regarding Professor Esbeck's account concerns a few of the lessons he attempts to draw from this history. In particular, this Comment contests two central themes of Professor Esbeck's account. First, I believe Professor Esbeck is wrong to suggest that history provides any definitive answers to the various issues raised by the Establishment Clause. As Professor Esbeck's own historical evidence indicates, the history of religion in this country is a complicated and even contradictory affair. Second, to the extent that historical evidence supports any theory of the Establishment Clause, it certainly does not support Professor Esbeck's conclusion that the Establishment Clause permits the government to derive public policies directly from religious principles and justifications. The only historical evidence that supports such an interpretation of the Establishment Clause involves instances of overt political favoritism of Protestant Christianity—the sort of historical tendency that one hopes this much more religiously diverse country has now moved beyond. After sketching the themes that can be drawn from Professor Esbeck's discussion of early American religious history, I

8. *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (writing that Jefferson's views are "accepted almost as an authoritative declaration").

9. Esbeck, *supra* note 5.

will turn to the lessons these themes suggest for modern Establishment Clause doctrine.

I. THE THEMES OF RELIGION IN AMERICAN HISTORY

Professor Esbeck's rendition of the history of religion in America provides a good example of the difficulties posed by attempts to define present doctrine by reference to past practices. In short, there is no one history of religion in America. There are actually multiple histories, each of which would support a somewhat different interpretation of the proper constitutional relationship between religion and government. Ascribing a current meaning to the Constitution's religion clauses requires choosing among the various alternative (and often conflicting) historical models of church-state relations.

Consider just two of the conflicting currents of history in the evidence assembled by Professor Esbeck. First, consider the very different ways in which the original states dealt with the problem of religious establishments. As Professor Esbeck notes, it is common practice to cluster the original states into three groups: the New England states, whose political regimes based on Puritan establishments lasted well into the nineteenth century in states like Massachusetts; the middle states, which tended to have weak religious establishments or none at all; and the southern states, which started out with Anglican establishments but soon pursued disestablishment to accommodate both the surge of Protestant dissenters and the hostility toward an Anglican church that was closely associated with the former colonial ruler.¹⁰ What is one to make of this history? A consistent theme is hard to derive, except insofar as it is clear that the trend throughout the country was away from religious establishments.¹¹ Even Massachusetts abandoned its

10. *Id.* at 1457-59.

11. One response to the assertion that there is no clear trend in the states is to fall back on the federalism interpretation of the First Amendment, which asserts that the First Amendment was little more than a limitation on the federal government's ability to interfere with the various states' approaches to church-state relations. *See, e.g., id.* at 1576. There are several problems with this response. First, it rests on the controversial premise that the adoption of the Fourteenth Amendment did not federalize rights by applying the principles of the Bill of Rights to the states. Whatever meager merits this approach may have in the abstract, it does nothing to help define the scope of the First Amendment in the context of the modern constitutional universe. For better or worse, it is long settled that the First Amendment has

Puritan establishment before the new country had existed more than a few decades.¹² But it is unquestionably true that the different sectors of the country exhibited very different attitudes toward institutional religion and its direct influence over public policy.

The second set of conflicting currents running through American religious history reinforces the first. This is the tendency of religious fervor to rise and fall during different historical periods. Professor Esbeck details how the First and Second Great Awakenings were split by a period of relatively muted religious feelings in the period leading up to the American Revolution.¹³ The American Revolution occurred during this interregnum. At the time of the Revolution, religious feelings were not the primary concern of the American political or social culture. It is true that during the Awakenings religion came more to the fore, but even then religious Americans were often indifferent. As Professor Esbeck points out, “few Americans formally joined a church (though they still attended regularly), and fewer still took part in the sacrament of

been incorporated into the Fourteenth Amendment and is therefore applicable to state and local government action. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”). *But see* *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2328 (2004) (Thomas, J., concurring) (arguing that “the Establishment Clause is a federalism provision, which, for this reason, resists incorporation”).

Second, even if one accepts the modern application of the federalism interpretation of the First Amendment, it is by no means clear that the states ratifying the First Amendment intended by their vote to embrace the legitimacy of overt religious establishments such as those found in the New England states at the time. Certainly it would be difficult to conceive of any such endorsement from states such as Rhode Island and Pennsylvania, which never had religious establishments and strongly resisted religious interference with state affairs. *See* Esbeck, *supra* note 5, at 1414. Using the policies of the proestablishment states to give meaning to the modern Establishment Clause is especially problematic given the fact that three of the seven states that continued to maintain some form of formal religious establishment in 1791—Connecticut, Georgia, and Massachusetts—did not even ratify the Bill of Rights until the twentieth century. *See* U.S. CONST. amend. I, *reprinted in* 1 U.S.C. at lxii n.12 (2000) (listing ratification dates).

12. Esbeck, *supra* note 5, at 1524.

13. *Id.* at 1451 (“Between the two Awakenings there was an interruption in church growth and a pause in interest in spiritual matters. This was caused, in part, by preoccupation with the Revolutionary War . . .”).

communion.”¹⁴ When the often lackadaisical religious allegiance of much of the population is coupled with the influence of rationalists like Ethan Allen and Thomas Paine, and Deists like James Madison and Thomas Jefferson, the religious picture of the United States at its founding appears much more complicated than that of an overwhelmingly devout polity concerned with preserving the cultural influence of religion in general and religious organizations in particular. This more complicated atmosphere casts doubt on Professor Esbeck’s argument that principles requiring “a socially or juridically enforced separation of religious values from public affairs . . . [have] no antecedent in the early American republic.”¹⁵

Amidst these inconsistent and even contradictory elements defining the American religious atmosphere leading up to and immediately following the founding, there are a few uniform themes that one may say define the church-state landscape in the early republic. Two themes that appear throughout Professor Esbeck’s account strongly support the liberal protection of religious liberty. A third theme, however, tends to contradict assumptions about widespread public support for any such protection.

The first liberal theme is the steady growth of voluntarism, individualism, and religious privatism in the seventeenth and eighteenth centuries—to the point that by the beginning of the nineteenth century this characteristic had become a defining feature of the American religious experience. Professor Esbeck chronicles how even the traditionally hierarchical and structurally rigid churches had to adapt to this quintessentially American approach to religious faith and practice.¹⁶ The Anglican Church reconstituted itself after the Revolution, significantly loosening its ties with the mother church in England and strengthening the laity’s control over local officials and governing structures.¹⁷ Similar changes occurred in the American Methodist and (to a somewhat lesser extent) Catholic churches.¹⁸ Professor Esbeck recounts how these religious traits coincided with many of the new country’s political preferences and

14. *Id.* at 1451 n.224.

15. *Id.* at 1393 n.20.

16. *Id.* at 1547–51.

17. *Id.* at 1559–61 & nn.634–38.

18. *Id.* at 1561–62.

attributes.¹⁹ Religious themes therefore dovetailed with the individualistic political themes in the writings of John Locke, as well as with those of Jefferson, Madison, and other American secular political elites.²⁰

The second consistent theme running through Professor Esbeck's account is related to the first. The notions of voluntarism and individualism that characterized the American religious culture around the time of the Revolution were accompanied by an antiauthoritarian spirit that viewed all hierarchies and authoritarian structures as suspicious and even antithetical to the emerging American ethos.²¹ In part, this was a natural outgrowth from the political opposition to the country's British overlords; more generally, it was also part of a recurrent American resistance to any centralized authority—either political or religious. This helps explain the joint action of religious dissenters and secularist liberals in opposing proposed state and federal religious establishments, but it also has implications for determining the broader meaning of the legal term “establishment of religion.” The clearest implication of this antiauthoritarianism is that any attempt to assert the preeminence of God's will over secular legislation cuts against one of the deepest grains in the American character. Professor Esbeck correctly notes that modern proposals to erect state-sponsored Ten Commandments displays are contrary to this antiestablishment trait: “We should expect these arguments to lose, and for the most part they do.”²²

In contrast to the complementary and liberty-enhancing themes of individualism and antiauthoritarianism, there is a third theme in Professor Esbeck's account that reveals a darker trend in the country's early religious and political history. This third theme is the persistent favoritism of Protestant Christianity. Even as states embraced disestablishment values, their actions often continued to favor Protestantism. Examples of this tendency span the country. Despite North Carolina's abandonment of its Anglican establishment

19. *Id.* at 1564–66.

20. *Id.*

21. *See id.* at 1456 & n.239.

22. *Id.* at 1583.

in 1776, it still had a “decidedly Protestant” general establishment.²³ New Hampshire finally abandoned its religious tax by adopting the Toleration Act in 1819, but “maintained the conception that New Hampshire was a Christian—in fact a Protestant—commonwealth.”²⁴ As Professor Esbeck notes, even though the culture of the Revolutionary era was clearly more accommodating to dissenting Protestants, it still exhibited persistent hostility toward non-Protestants and especially Catholics, Jews, and nonbelievers.²⁵ Even the rare state of Vermont, which eventually broadened its religious tax laws to include Catholics, continued to exclude from the benefits of these laws Deists, Jews, and Universalists.²⁶ The stark reality was that “[o]nly one of the thirteen states [Rhode Island] under the Articles of Confederation afforded equal rights to all non-Protestants with respect to the practice of religion.”²⁷ Modern paens to religious ecumenicalism notwithstanding, this country has a long and sordid history of viewing some faiths as “more equal” than others. At best, as Justice Story would later write, “[t]he real object of the [First] amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects”²⁸

II. THE LESSONS OF HISTORY

The only incontestable statement that one can make about the historical materials reviewed by Professor Esbeck is that the history of religion in the early republic is varied and often contradictory.²⁹ What other lessons can be drawn from Professor Esbeck’s account of the various themes in the country’s early history? Professor Esbeck draws three conclusions from his historical account.

First, Esbeck notes that the history of the American religious experience is defined largely by the victory of voluntarism. He concludes that separationism has a legitimate pedigree to the extent

23. *Id.* at 1483.

24. *Id.* at 1533–34 & n.539.

25. *Id.* at 1504 n.417.

26. *Id.* at 1527.

27. *Id.* at 1550.

28. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (Fred B. Rothman & Co. 1991) (1833).

29. Esbeck, *supra* note 5, at 1393.

that it draws on this voluntarist tradition, but he also argues for a particular kind of separationism—one that protects individual conscience but is at the same time intended primarily to protect the independent prerogatives of the church. Under this version of separationism, the government remains amenable to “moral values based on religion [that are welcome] in the marketplace of ideas and in the formation of public policy and law.”³⁰

The second general conclusion Professor Esbeck draws from his historical account is that “American liberals” have been unfaithful to the American religious settlement by “attempting to drive the religious voice out of the public square.”³¹ According to Professor Esbeck, examples of this phenomenon include restrictions on religious speech in public buildings and schools.³² Esbeck argues that the Supreme Court should respond to these actions by saying “once and for all” that it is not possible to use Establishment Clause concerns as a compelling interest to justify “overrid[ing] free speech or free exercise rights.”³³

Finally, the third lesson Professor Esbeck draws from history is the idea that the Establishment Clause is primarily a structural provision intended to impose a “one-way restraint” against governmental intrusion into the realm of religious organizations.³⁴ From Professor Esbeck’s perspective, therefore, the separation of church and state is properly viewed as separation of the state from the church, but not the other way around. “When separation of church and state is taken to mean a socially or juridically enforced separation of religious values from public affairs and governmental policy formation, such separation has no antecedent in the early American republic.”³⁵

Some of Professor Esbeck’s conclusions are unexceptionable. Certainly the need to protect individual religious conscience is a logical outgrowth of the early religious disputes that led to the voluntarist religious settlement. Likewise, the introduction of

30. *Id.* at 1579–80.

31. *Id.* at 1584–85.

32. *Id.*

33. *Id.* at 1586.

34. *Id.* at 1389 n.9.

35. *Id.* at 1393 n.20.

religious ideas into the intellectual marketplace and the welcoming of religious speakers into the public forum are equally laudable. Even the structuralist interpretation of the Establishment Clause is not problematic, at least if the theory is described at a fairly high level of generality and not used as the basis for denying individuals the right to enforce the protections of the Clause.³⁶ But some of Professor

36. A structural interpretation of the Establishment Clause may cause procedural enforcement problems in two respects. First, the Supreme Court has recently become reluctant to infer private rights of action from structural legal provisions. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (refusing to infer a private right of action from the federal Family Educational Rights and Privacy Act); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (refusing to infer a private right of action to enforce Title VI of the 1964 Civil Rights Act). Although these cases involved statutes rather than constitutional provisions, they cast some doubt on older precedents in which the Court expressed a willingness to infer individual rights from structural constitutional provisions such as the Commerce Clause. *See Dennis v. Higgins*, 498 U.S. 439 (1991) (inferring a private right of action from the Commerce Clause). In a possible indication of things to come, the Court recently refused to extend the implied constitutional remedy originally promulgated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (allowing private suits for damages against federal agents who allegedly violate a citizen's constitutional rights), to suits against private actors who allegedly violate the Constitution while operating under color of federal law. *Correctional Serv's Corp. v. Malesko*, 534 U.S. 61 (2001). In his concurring opinion, Justice Scalia underscored the Court's more restrictive modern view of implied rights of action:

Bivens is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be “implied” by the mere existence of a statutory or constitutional prohibition. As the Court points out, we have abandoned that power to invent “implications” in the statutory field. There is even greater reason to abandon it in the constitutional field, since an “implication” imagined in the Constitution can presumably not even be repudiated by Congress.

Id. at 75 (Scalia, J., concurring) (citations and internal cross-references omitted).

A second way in which Professor Esbeck's interpretation of the Establishment Clause may implicate the ability to enforce that clause is through the standing doctrine. An overemphasis on the structural operation of the Establishment Clause, to the exclusion of the individual rights implications of that clause, may lead the Court to consider all individual efforts to enforce the provision as generalized grievances, which would fail to satisfy the Article III cases and controversies requirement. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (holding that an attempt to enforce the Incompatibility Clause was a generalized grievance); *United States v. Richardson*, 418 U.S. 166 (1974) (holding that an attempt to enforce the constitutional requirement of a regular statement and account of government expenditures was a generalized grievance). Although Establishment Clause challenges involving the expenditure of government money for religious purposes may circumvent the generalized grievance problem via the taxpayer standing mechanism, *see Flast v. Cohen*, 392 U.S. 83 (1968), it is not always simple to identify the financing nexus that is a necessary component of that standard, *see, e.g., Alabama Freethought Ass'n v. Moore*, 893 F. Supp. 1522 (N.D. Ala. 1995) (denying taxpayer-standing status to plaintiffs who failed to show that the government spent money purchasing or maintaining a Ten Commandments plaque hanging in a state courtroom).

Esbeck's conclusions are more dubious, and his attempt to link these conclusions with the country's early religious history—and thereby give them legitimacy and an added jurisprudential heft in modern constitutional debates—illustrates how treacherous such constitutional historicism can be.

My main reservations about Professor Esbeck's conclusions pertain to his contention that, based on the country's early history, it should be permissible for the government to use religion as the basis for the formation of public policy and legal rules.³⁷ It is one thing to insist that religion should contribute to the marketplace of ideas along with other perspectives; it is quite another to propose that religion should be used by the government as the basis for public policy decisions and the legal mandates that enforce those decisions on everyone in society. The former proposition is the inevitable consequence of a vibrant private sector in which a liberal society encourages multiple religious allegiances to flourish. The latter proposition is the first step toward crushing a healthy religious pluralism under the boot of religious majoritarianism. Indeed, Professor Esbeck's support for both private-sector religious pluralism and religiously motivated legislation illustrates the dangers of attempting to draw modern constitutional conclusions from historical experience. Here is one of Professor Esbeck's conclusions about the historical basis of religiously motivated politics:

[A] separation of religion-based values from government and public affairs would have been received with wide disapprobation in the new nation. This is because civic virtue, now to be formed in the independent sectors of home, church, voluntary society, and school, was still deemed essential for the orderly exercise of liberty and acquisition of the self-discipline necessary to sustaining a republic.³⁸

This is probably a fair summary of the spirit prevailing at the time of the founding. But the reasons the governing elite of the new country believed religion was a necessary component of public affairs are far more problematic in the modern era. The founders of the country believed religion was an indispensable ingredient of

37. *See, e.g.*, Esbeck, *supra* note 5, at 1393 n.20.

38. *Id.* at 1580.

governance because they uniformly thought of the country as a Protestant Christian nation. Whether or not they articulated the implications of their views as clearly as Justice Story eventually did,³⁹ those governing the early republic had an exclusionary view of the link between religion and civic virtue. Religion—by which the founders meant Protestant Christianity—contributed to the values advanced by the government in part to ensure that the government would not be infected by the values of other groups the founders perceived as iniquitous. Those falling within the excluded category would include several groups—Catholics, Jews, Muslims, rationalists, and others—that now constitute a large and growing portion of the modern country's population. One cannot embrace the legitimacy of a religiously based political regime without also explaining how to overcome the exclusionary nature of that regime.⁴⁰

It is unlikely that, in the modern world, an explanation can ever be devised to work around the unacceptable consequences of religiously based politics. In the far more pluralistic modern context, citizens of the United States will never be able to coalesce around one core set of faith-based political values. From a religious perspective, we simply cannot agree—as the Framers probably could—about which specific religious values should predominate, or about which public values should follow from the chosen religious perspective, or even about whether religion should play a direct role in the public sphere.

At one point, Professor Esbeck argues that his structural interpretation of the Establishment Clause is preferable to an individual-rights model because Establishment Clause battles under an individual-rights model inevitably dissolve into culture wars.⁴¹ Esbeck argues that battles over the Establishment Clause are inevitably fractious because the “Establishment Clause . . . is often portrayed as addressing ‘who’s in charge’—that is, the worldview (religious and nonreligious) that holds the mantle of cultural authority. Such culture wars are divisive.”⁴² The obvious response to this assertion is that if we permit the government to enact and

39. See *supra* note 28 and accompanying text.

40. See Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005.

41. Esbeck, *supra* note 5, at 1390 n.11.

42. *Id.*

enforce religiously based public policy, culture wars become not only inevitable but also more momentous.

This is because religion involves deep and uncompromising beliefs about ultimate goods. In a country as diverse as the modern United States, religious disputes will therefore inevitably involve disputes over various groups' mutually irreconcilable concepts of ultimate goods. In the modern era, these disputes are likely to be even more intense—because the range of religious variation is more extreme—than the often-violent religious factionalism the Framers experienced. If government policies can incorporate the religious values of the political victors, then each group is likely to compete even more vigorously to control the key apparatus for infusing the culture with their vision of a proper society.

The only way around a potentially destructive war of competing ultimates is to read the Establishment Clause as mandating a mode of politics in which the reasons for political decisions are cast in a form that are accessible to all and do not resort to exclusionary articles of religious faith. Obviously, this is not a new or unique idea. It is basically a claim that the government must abide by something akin to the requirements of Rawlsian public reason—i.e., that legislation should only be justified on terms that are perceived as reasonable to people of diametrical worldviews and ultimate beliefs.⁴³ This requirement can be incorporated into a structural view of the operation of the Establishment Clause, but contrary to Professor Esbeck's claim,⁴⁴ an interpretation of the First Amendment that incorporates this view necessarily will grant individual citizens the right to be free from state-imposed religion. Without such a right, any structural protections offered by the Establishment Clause would be substantively empty and impossible to enforce in any event.⁴⁵

43. See JOHN RAWLS, *The Idea of Public Reason Revisited*, in *THE LAW OF PEOPLES* 129, 131–32 (1999). The emphasis on regulating public rationales for legislation provides an effective balance between the free exercise and free speech rights of politicians to believe what they will in their private capacities and the Establishment Clause interest in protecting nonsectarian governance over a pluralistic society.

44. See Esbeck, *supra* note 5, at 1388 (“Avoiding treatment of the Establishment Clause as an individual right to be free from religion is important here.”).

45. See *supra* note 36.

There is ample historical support for this reading of the Establishment Clause. To cite only the most obvious examples, this reading of the Clause is implicit in Jefferson's notorious wall-of-separation metaphor⁴⁶ and in Madison's elaborate comments in his *Memorial and Remonstrance* on the inevitably corrupting effect religious establishments have on both religion and government.⁴⁷ On the other hand, I also recognize that barring the government from using religion as the basis for legislation and other forms of public policy would have been an anathema to many of those living at the time the Constitution was crafted. But we no longer have the luxury of governing the country as if multiple waves of immigration and the attendant explosion of different forms of religious belief (and nonbelief) have not changed the face of the country the Framers knew. With regard to our determination of what the Constitution means today, the contradictory historical evidence is simply not dispositive. The history of the Constitution will always contribute depth and texture to discussions of constitutional theory and application. But it is time to shift the focus of constitutional discussions from the past to the present and to treat constitutional interpretation in light of an active and vibrant religious reality rather than a static and uniform religious history.

III. CONCLUSION

When all is said and done, the historical account of church and state in the early republic leaves us right where we started: facing a

46. Thomas Jefferson, *To Nehemiah Dodge and Others, A Committee of the Danbury Baptist Association, in the State of Connecticut* (1802), reprinted in *THE PORTABLE THOMAS JEFFERSON* 303 (Merrill D. Peterson ed., 1975).

47. Madison wrote:

During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution . . . What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just Government, instituted to secure & perpetuate, it needs them not.

James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶¶ 7-8 (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 67-68 (1947).

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complicated picture of a religiously diverse culture and the difficult task of configuring for ourselves a constitutional regime in which religion and religious organizations can flourish but not oppress. However, an honest fealty to history will yield an Establishment Clause that no religiously pluralistic modern democracy would want or accept. If the concept of establishment means nothing more than the prohibition of establishing any particular branch of Protestantism, then we may as well not have an Establishment Clause at all. We are not, as most of the Framers probably believed, a Protestant nation. Nor, for that matter, are we a Christian nation, nor even a uniformly religious nation. In this diverse political atmosphere, allegiance to religious ideals or religious institutions is not a logically necessary component of virtuous political governance, even if most of our forefathers believed it to be so.

None of this is intended to suggest that the history studiously recounted by Professor Esbeck is irrelevant to the determination of what the religion clauses mean. The point here is that the history must be kept in perspective. History frames the discussion about constitutional meaning and provides a context in which the various dimensions of constitutional questions can be viewed in sharp relief. History provokes us to ask the right questions, but it will never give us all the right answers.

