

Church and State Originalism

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[t] has been my intention, for several years past, to publish my thoughts upon religion; I am well aware of the difficulties that attend the subject, and from that consideration, had reserved it to a more advanced period of life. . . . The circumstance that has now taken place . . . has not only precipitated my intention, but rendered a work of this kind exceedingly necessary, lest, in the general wreck of superstition, of false systems of government, and false theology, we lose sight of morality, of humanity, and of the theology that is true.¹

I. INTRODUCTION

The legal separation between church and state enumerated in the First Amendment was an unprecedented step in Western-style democracy. Unfortunately, contemporary courts have systematically dismantled this extraordinary framework for separation. Indeed, for all too many current jurists and scholars, including many self-labeled “originalists,” James Madison’s principles of separation represent not a liberty but a threat of state-sanctioned discrimination against religion. This break from original religious liberty has resulted in substantial federal intrusion into religious organizations and practices.

This Article demonstrates that church operations are now funded by government assessments with the full consent of the courts. As more churches seek government support, modern society increasingly views church functions as extensions of partisan politics rather than spiritual works. Shifts in the political order now represent direct threats to church operations. Worst of all, the abandonment of church and state separation is occurring at a time when the potential for religious conflict within American society has never been greater or more unique.

1. THOMAS PAINE, THE AGE OF REASON 21 (Moncure Daniel Conway ed., G.P. Putnam’s Sons 1896) (1794).

For the first time in American history, a substantial portion of the population for whom religion plays no active role is living alongside a population for whom religion plays a daily role.² Of course, the Founders envisioned a diverse religious population, and they attempted to design a governing system that separated religion from the state that to prevent religious strife among diverse populations. However, the United States Supreme Court has moved away from these foundational principles and instead has chosen to favor religion in the law, particularly Christianity, at the expense of free conscience liberty for religious-ness.

In an effort to reverse the course of modern religious liberty doctrine and restore a Madisonian framework, this Article presents two claims: first, that current separation doctrine is far more narrow than originally intended and, second, that a broader, original Madisonian-type framework is superior. Part II of this Article analyzes original separation of church and state in both theory and practice. Part III provides a historical, textualist analysis of the First Amendment's Establishment Clause. Part IV explores the Blaine-type framework of religious liberty that the states established during the nineteenth century. Part V examines the development of modern religious liberty doctrine after incorporation of the First Amendment to the states, detailing how the courts erroneously transformed Madisonian anti-establishment liberty into impermissible discrimination against religion. Part VI concludes by highlighting the value in restoring Madisonian free conscience liberty.

II. ORIGINAL SEPARATION OF CHURCH AND STATE, IN THEORY AND PRACTICE

An intellectual distinction between “civil” and “spiritual” authority long preceded the founding of the United States.³ However, this

2. See RONALD A. LINDSAY, *THE NECESSITY OF SECULARISM: WHY GOD CAN'T TELL US WHAT TO DO* 13 (2014).

3. The origins of separation in the United States are in large measure attributable to John Locke and his work *A Letter Concerning Toleration in Focus*, but could also include Thomas Aquinas's *Summa Theologica*, John Calvin's *Institutes of the Christian Religion*, and John Trenchard and Thomas Gordon's *Cato's Letters*. See JON BUTLER, *AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE* 199 (1990); NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—*

distinction would not become a legal reality until the United States ratified the idea in its Constitution.⁴ Unlike most other historic provisions debated during ratification, the Establishment Clause in the First Amendment did not come with battle lines based on political affiliation, educational background, or religious association.⁵ The reason for unification behind such an unprecedented commitment was that most Founders viewed the principle behind separation—the so-called “liberty of conscience”—as an inalienable right necessary to the Lockean commitment to life, liberty, and property.⁶

Of course, how the abstract principle of free conscience was expressed in practice depended on the concerns, customs, and institutions

AND WHAT WE SHOULD DO ABOUT IT 27–33 (2005) [hereinafter FELDMAN, *DIVIDED BY GOD*]. For a broader examination of the principle underpinnings, see generally Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002) [hereinafter Feldman, *Intellectual Origins*].

4. See Feldman, *Intellectual Origins*, *supra* note 3, at 428.

5. See SUSAN JACOBY, *FREETHINKERS: A HISTORY OF AMERICAN SECULARISM* 27 (2004) (“[S]ome of the most influential Federalists, including [John] Adams and [George] Washington, fully shared [Thomas] Jefferson’s views on the separation of religious and civil affairs even though they did not share his profound suspicion of all government power.”); Feldman, *Intellectual Origins*, *supra* note 3, at 350 (discussing how “[s]ome clothed the argument in biblical citations; others preferred a more rationalist-philosophical terminology” but that all strands of ideas on church-state relations made during the Founding era nevertheless “proceeded from the same premises to the same conclusion by the same logical steps”).

6. See FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 32–33 (2005); see also Feldman, *Intellectual Origins*, *supra* note 3, at 384–85 (“Puritans, evangelicals, deists, and even ‘civic republicans’ on the eve of the Constitution shared a basic theory of religious liberty and drew on the same sources and Lockean ideas to express their views. The now-commonplace academic view, which emphasizes the differences among various views of religious liberty, obscures this fact. Late eighteenth-century writers from disparate perspectives sometimes differed in their rhetoric, but in substance, the only important difference among them was the practical question whether systems that provided nonpreferential aid to religion had the effect of violating liberty of conscience. This is not to deny theological differences among the various proponents of the view that nonpreferential systems violated conscience. Thomas Jefferson was no Calvinist. The point, rather, is that differences of religious attitude cannot be shown to be associated with substantively different arguments for liberty of conscience. Both Baptists and Enlightenment thinkers made Lockean arguments. Their opponents agreed that liberty of conscience was a natural right, but they thought that state support of religion was compatible with it, so long as there existed exemptions for dissenters.”).

of the time. At the time of the Founding, the citizenry's two chief concerns were limitations on the power of the federal government in general and, more particularly, limitations on the government's power to tax. The antitax rhetoric of the American Revolution produced "from the moment of independence from England in 1776 . . . formal protests with state legislatures around the country, demanding to be freed of the responsibility to pay taxes to support churches from whose doctrines they dissented."⁷ Such widespread responses demonstrated an obvious practical reality for the Founders: mandatory religious taxation at the federal level was problematic in such a religiously diverse country.⁸ However, there were still some at the state level who remained committed to the government's funding of churches.⁹ This desire to keep

7. FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 33.

8. *See id.* at 33–34. Given that "most of the population of the United States at the time of its founding was at least nominally Christian," it might seem odd to use a term like "diverse" for a description of the religious makeup for the period. LINDSAY, *supra* note 2, at 41. However, any objective study demonstrates that using a generic term like "Christian" or even "Protestant Christian" as a primary description would completely obfuscate the religious makeup of society at the time. *See id.* at 41. The differences between Episcopalians, Baptists, Congregationalists, Lutherans, Presbyterians, Methodists, and Quakers were vast from a theological standpoint, and these significant differences often led to social conflicts, even violence. *See id.* at 40–41. Moreover, the conflict and violence these differences produced was something that the Founders wanted to avoid in the future. *See id.* at 40. The Founders themselves were even more religiously diverse than the society in which they lived. *See id.* at 41 ("Many belonged to one Protestant denomination or another, but more than a few were deists or Unitarians, including key Founders such as Jefferson, Franklin, Adams, and Washington. Therefore, it is even less likely that the Founders would have submerged their distinct personal religious beliefs into a homogenous Christian stew and have this jumble serve as the cornerstone of the nation. Such a decision also would have been wholly at odds with the political writings of the Founders, who, time after time, emphasized they accepted the Lockean understanding of the state, with its sharp separation between civil matters, the business of government, and religious matters, the exclusive province of religious institutions.").

9. *See FELDMAN, DIVIDED BY GOD*, *supra* note 3, at 34. Of course, this commitment to religious assessments at the state level reflected the lack of diversity within many individual states as opposed to one state from another. *See id.* at 34–35. For example, in New England, Congregationalist majorities dominated the political realm; yet, the religious assessment frameworks still permitted exemptions. *See id.* at 34. Religious minorities in New England nevertheless strongly objected that even granting certificates of exemption would still be an admission "that the state had the right to

tax assessments for religious purposes at the state level led to informative debates regarding the fundamental elements of religious separation.

The most famous and influential of these debates occurred in pre-Constitution Virginia, where a proposed bill would have permitted tax assessments for churches while affording citizens complete individual autonomy to select which church could receive the funds.¹⁰ The bill also included specific exemptions for Quakers and Mennonites if they belonged to churches without clergy.¹¹ Along with the specific exemptions, all undesignated funds were to be directed to the state general fund for the development of “seminaries of learning,” which were not required by the text of the bill to be religious in nature to receive funding.¹²

From the perspective of the Virginia bill’s proponents, including Founder Patrick Henry, the absence of continued public funding of religion at the state level was “fatal to the Strength and Stability of Civil Government.”¹³ Because the proposed bill in Virginia “would have no Sect or Denomination of Christians privileged to encroach upon the rights of another” and granted the individual total autonomy to direct the funds, the bill’s proponents argued that they were offering “a General and equal contribution of the whole State upon the most equitable footing that is possible to place it.”¹⁴ To James Madison, however, this nonpreferential aid applied neutrally, and the individual-choice-assessment framework proposed in Virginia remained impermissibly coercive to freedom of conscience.

collect religious taxes and coerce conscience if chose, thereby ‘implicitly acknowledging that power in man which . . . belongs only to God.’” FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 34 (quoting 2 ISAAC BACKUS, *A HISTORY OF NEW ENGLAND WITH PARTICULAR REFERENCE TO THE DENOMINATION OF CHRISTIANS CALLED BAPTISTS* 202 (David Weston ed., 2d ed. 1871)).

10. *See id.* at 37, 41.

11. *Id.* at 37.

12. *Id.* at 37 (citing Patrick Henry, *A Bill Establishing a Provision for Teachers of the Christian Religion* (1784), in JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., *RELIGIOUS FREEDOM* 171–72 (2001)).

13. 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 389 (1950).

14. *Id.* at 388. As Part IV demonstrates, this religious assessment bill in pre-Constitution Virginia offered a more equitable footing than many modern assessments. *See infra* Part IV.

According to Madison, utilizing civil mechanisms such as taxation to support religion constituted a per se violation of freedom of conscience, no matter the framework used.¹⁵ To accept civil support was to Madison a contradiction of religion itself, “for every page of it disavows a dependence on the powers of this world.”¹⁶ “Civil support for religion also presented ‘a contradiction in terms’ to Madison because it weakened ‘those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author.’”¹⁷ In other words, Madison felt religion did not need civil assistance, and providing even neutrally applied government aid directed by individual citizens themselves, as laid out in the Virginia assessment bill he opposed, impermissibly undermined religion’s exclusive authority.¹⁸

Madison ultimately succeeded in defeating Virginia’s proposed religious assessment bill.¹⁹ However, Madison’s victory in establishing his own framework of religious freedom of conscience was at first limited to the state of Virginia.²⁰ In fact, many other states adopted the

15. See FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 37–38. The substance of Madison’s opposition came in connection with the views of Thomas Jefferson. See *id.* at 37–38. The preamble to the Virginia religious liberty statute explicitly addresses the matter of religious taxation:

[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical . . . even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness

Thomas Jefferson, *A Bill Establishing Religious Freedom* (1779), in 2 *THE PAPERS OF THOMAS JEFFERSON* 545 (Julian P. Boyd ed., 1950) (emphasis omitted) (footnote omitted); see also FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 37–38.

16. Tyler Broker, *Modern Religious Liberty Doctrine is Grossly Imbalanced, ABOVE THE LAW* (Sept. 18, 2018, 1:18 PM) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in 5 *THE FOUNDERS’ CONSTITUTION* 83 (Philip B. Kurland & Ralph Lerner eds., 1987)), <https://abovethelaw.com/2018/09/modern-religious-liberty-doctrine-is-grossly-unbalanced/>.

17. *Id.* (quoting Madison, *supra* note 16).

18. *Id.*

19. See FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 37–38.

20. *Id.*

type of framework Madison successfully defeated and kept such systems in place well after ratification of the federal Constitution.²¹ Although not every state legislature adopted Madison's exact structure, during ratification of the federal Constitution, Madison successfully persuaded Congress to embrace the principled version of freedom of conscience that he had passed in Virginia.²²

It was not until 1947—when the Supreme Court held that the Due Process Clause of the Fourteenth Amendment incorporated the First Amendment's Establishment Clause to the states—that Madison's version of religious freedom of conscience also became binding on all the states.²³ To understand how the anti-establishment principles championed by Madison in Virginia became the fundamental American precepts of religious separation in the federal Constitution, one need only examine the history and plain language of the First Amendment's Establishment Clause.

III. A HISTORICAL, TEXTUALIST ANALYSIS OF THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE

The Supreme Court has often justified its diversion from Madisonian principles using textualist or originalist analytical principles.²⁴

21. See FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 41.

22. See U.S. CONST. amend. I. During the federal ratification debate, Madison utilized the very same principles he employed in Virginia. See Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 895 (1986) ("For several reasons, the debates in Virginia were most important. First, the arguments were developed most fully in Virginia. Second, Madison led the winning coalition, and he played a dominant role in the adoption of the establishment clause three years later. Third, the debates in Virginia may have been the best known.").

23. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–18 (1947). For a "logical, textual, and historical" justification for Establishment Clause incorporation, see generally Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669 (2013).

24. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2012–25 (2017). The "textualist" construction of constitutional law requires an adherence to the "plain language" of a statute or provision. At its most logical extreme, textualism would not consider legislative intent when interpreting a statute or provision; it would only consider the general meaning of the final text of the provision at the time of its enactment. However, textualism can overlap with an originalist framework, often making the two forms of construction interchangeable. Professor Michael

However, using these interpretive doctrines to analyze the Establishment Clause reveals a Madisonian standard that is far broader than the contemporary scope of protection.²⁵ Accordingly, to understand how Madison’s vision was meant to be greater than exists today, this Part analyzes the Establishment Clause first by using a traditional originalist, contextual method that focuses on the legislative process of the First Congress to determine its intent. Second, this Part provides an analysis of the Establishment Clause using a textualist interpretation that strictly adheres to the general meaning of its “plain language” with no other considerations.

A. *Anti-Establishment Originalism*

On June 8, 1789, “Madison introduced” his drafts for a “Bill of Rights in the House of Representatives.”²⁶ Concerning religious separation, Madison introduced—in what is now the First Amendment—the following text: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”²⁷ After some debate,²⁸ the House delivered to the Senate this modified version of Madison’s draft: “Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.”²⁹

Ramsey, who helps run the Center for the Study of Constitutional Originalism at the University of San Diego School of Law, has said of the distinction between textualism and originalism: “Historical textualism (in constitutional interpretation) is essentially a branch of originalism; with originalism’s modern focus on original public meaning I would say it’s the dominant view.” Michael Ramsey, *Thomas Lee on Textualism and Originalism*, ORIGINALISM BLOG (Jan. 13, 2016, 6:44 AM), <http://originalismblog.typepad.com/the-originalism-blog/2016/01/thomas-lee-on-textualism-and-originalismmichael-ramsey.html>.

25. See *supra* Part II. See generally Gedicks, *supra* note 23.

26. LINDSAY, *supra* note 2, at 36. Madison initially proposed twelve; Congress only adopted ten. See *id.* at 35.

27. 1 ANNALS OF CONG. 434 (1789).

28. This debate, unfortunately, is not recorded. *Lee v. Weisman*, 505 U.S. 577, 613 (1992) (Souter, J., concurring).

29. *Id.* (quoting 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 136 (Linda Grant De Pauw et al. eds. 1972) [hereinafter DOCUMENTARY HISTORY]).

The Senate's first documented motion was to strike a portion of the House text and replace it with language that altered the Establishment Clause's "plain meaning" to permit neutral aid to religion.³⁰ The Senate "briefly entertained this language," but the language was ultimately rejected and replaced with "a provision identical to the House's proposal, but without the clause protecting the 'rights of conscience.'"³¹ Although the House accepted most of the Senate's general modifications to the Bill of Rights, "the House rejected the Senate's version of the [religious separation clauses] and called for a joint conference committee" between the two houses to come to an agreement as to the final language.³² After debate between the joint committee, the "House conferees ultimately won out, persuading the Senate to accept this as the final text . . . : 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'"³³

The historical context for how the "plain language" of the Establishment Clause was finalized undermines the argument that the

30. The proposed language was: "Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed." *Id.* (quoting DOCUMENTARY HISTORY, *supra* note 29) ("The sequence of the Senate's treatment of this House proposal, and the House's response to the Senate, confirm that the Framers meant the Establishment Clause's prohibition to encompass nonpreferential aid to religion.").

31. *Id.* at 613–14 (quoting DOCUMENTARY HISTORY, *supra* note 29). The omission of the phrase "freedom of conscience" mattered little to the context to the final language that was to be adopted in the First Amendment. See Feldman, *Intellectual Origins*, *supra* note 3, at 404 ("The reasons for the Senate's omission of the reference to conscience are not clear. What is certain is that the notion of liberty of conscience was not being abandoned; rather, protection of free exercise and a ban on establishment, taken together, were thought to cover all the ground required to protect the liberty of conscience. Once these had been specified, it was apparently unnecessary to mention liberty of conscience specifically, because it was included. No new theory of why establishment was wrong suddenly emerged before the Senate or the conference committee. No one involved in the debate over the religion clauses, or indeed anywhere in the eighteenth-century American debates over state and religion, argued against liberty of conscience as a general proposition. It was the theoretical basis for both religion clauses and remained so even after the word 'conscience' disappeared from the draft language.").

32. *Weisman*, 505 U.S. at 614.

33. *Id.*

plain language merely requires the government to be neutral.³⁴ The conclusion that the plain language does *not* merely require the government to be neutral is supported by Congress's repeated rejection of language that, if enacted, would have had such an effect. To insist otherwise is, from an originalist perspective, "akin to arguing that a proposed sales price for a house is binding on the seller even when the price was explicitly considered and rejected during contract negotiations."³⁵

The fundamental purpose behind the Bill of Rights also contradicts the claim that the First Amendment permits the government to supply nonpreferential or neutral-type aid to religious institutions.³⁶ The purpose of the Bill of Rights was to remove doubts regarding the limits of government authority under the Constitution's framework. However, what has only recently become well-known is that Madison, "the principal architect and chief sponsor of the Bill of Rights, initially

34. See *id.* at 612; see also FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 48 ("By selecting broader language that encompassed a ban on any establishment at all, Madison swept in a prohibition on nonpreferential establishment as well. . . . [T]he framers understood perfectly well that nonpreferential support for religion could and probably would be understood as an establishment of religion.").

35. LINDSAY, *supra* note 2, at 38. Despite the fact that all historical evidence at the time of the passage of the First Amendment directly contradicts the notion that the government must only remain neutral towards religion in its tax assessments, many have simply refused to acknowledge that the Establishment Clause does anything other than prohibit the government from taking preference for one religion over another; some have even taken this argument further by going as far as to say that the Framers never intended separation *at all*. See, e.g., Leonardo Blair, *Rep. Steve Scalise Declares You 'Can't Separate Church and State' at National Prayer Breakfast*, CHRISTIAN POST (Feb. 8, 2018), <https://www.christianpost.com/news/rep-steve-scalise-cant-separate-church-and-state-national-prayer-breakfast-216980/> ("[Y]ou can't separate church and state This is a nation that was not founded in agnostic views.").

36. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."); see also Laycock, *supra* note 22, at 907 ("When he introduced the Bill of Rights, Madison explained that even limited powers could be abused, that Congress had discretion as to means, and that a bill of rights could protect against abusive measures that might otherwise be necessary and proper means of implementing delegated powers." (citing 1 ANNALS OF CONG. 432–33, 438 (1789))).

opposed” the amendments.³⁷ On the matter of separation specifically, Madison stated that it was redundant to enumerate a commitment to religious separation in the Constitution given that “there is not a shadow of a right in the general government to intermeddle with religion.”³⁸ This argument, nonetheless, did not satisfy most of Madison’s fellow Framers who wanted specific assurances.³⁹ In the end, after some added pressure from Thomas Jefferson, Madison acquiesced and eventually became the Floor Leader in Congress for the Bill of Rights.⁴⁰

This history illustrates that the Framers originally intended the religious separation clauses in the Bill of Rights to restrict government authority. Therefore, arguing that the Establishment Clause permits neutral government support of religion requires the claim that the Establishment Clause—unlike every other provision within the Bill of Rights—*expands* government authority where government authority previously did not exist.⁴¹ All evidence from the time of the Establishment Clause’s genesis contrasts with such an expansionist view. We must therefore “presume, since there is no conclusive evidence to the contrary, that the Framers embraced the significance of their textual judgment.”⁴²

To put it simply, there exists no logical or historical contextual basis to conclude that the Constitution itself possesses any “shadow of a right” to intermeddle with religion.⁴³ Moreover, all available evidence indicates that in the First Congress the Framers took the additional step of enumerating specific provisions to forbid government “support for religion in general[,] no less than support for one religion or some.”⁴⁴ This evolution of the Establishment Clause’s language by the First Congress makes clear that Madison’s principled freedom-of-

37. LINDSAY, *supra* note 2, at 34.

38. *Id.* at 34 (quoting James Madison, Conventions of Virginia, in 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (Jonathan Elliot ed., 2d ed. 1836)).

39. *See id.*

40. *See id.* at 34–35.

41. *Id.* at 38.

42. *Lee v. Weisman*, 505 U.S. 577, 616 (1992) (Souter, J., concurring).

43. FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 44 (quoting Madison, *supra* note 38).

44. *Weisman*, 505 U.S. at 616.

conscience-type separation that he first established in Virginia ultimately won the day in Congress.⁴⁵ Yet, even if one were to limit the analysis to only the “plain language” of the First Amendment’s separation clauses, thereby disregarding the intent of its drafters, this only reinforces the evidence supporting a broad view of anti-establishment liberty that encompasses all forms of government aid to religion.

B. *Anti-Establishment in Plain Language*

The language of the Establishment Clause that prohibits laws “‘respecting’ . . . an establishment of religion” contains “a couple of noteworthy aspects.”⁴⁶ As a Supreme Court Justice has noted, “the prevailing language is not limited to laws respecting an establishment of ‘a religion,’ ‘a national religion,’ ‘one religious sect,’ or specific ‘articles of faith’” but is instead limited to the “establishment of religion” in general.⁴⁷ Therefore, according to the plain language, a law would “not have to favor one particular religion to violate the First Amendment; it merely has to favor religion in general.”⁴⁸ The plain language of the Establishment Clause also explicitly “prohibits any law ‘respecting,’ that is, regarding or relating to, the establishment of religion.”⁴⁹ This language expresses that the Framers were not just concerned with specific earmarks or “special” assessments that unambiguously establish religion but also with laws that support religion through state validation or financial aid.⁵⁰

However, perhaps the most compelling aspect of the final language of the Establishment Clause is not what is included but what is excluded. Nowhere in the Constitution, including the Bills of Rights, does there exist any textual justification for the propositions that government may favor religion over nonreligion;⁵¹ that government de-

45. *See id.* at 614.

46. LINDSAY, *supra* note 2, at 37.

47. *Weisman*, 505 U.S. at 614.

48. LINDSAY, *supra* note 2, at 38.

49. *Id.* at 37.

50. *See id.* at 37–38.

51. That government could favor religion over nonreligion was a favorite argument by the late Justice Antonin Scalia. *See* David Gibson, *Supreme Court Justice Scalia: Constitution Says Government Can Favor Religion*, WASH. POST (Jan. 4,

rives authority, even moral authority, from religious scripture or a deity;⁵² or that government “may employ Religion as an engine of Civil policy.”⁵³ In other words, all language that the Founders enumerated at the federal level, and now applicable to the states, plainly prohibits civil mechanisms from providing support to religious matters or institutions. As Part IV demonstrates, however, anti-establishment liberty received significant political challenges in the nineteenth century pre-modern era.

IV. ENTANGLEMENT IN THE PRE-MODERN ERA

Although the American Revolution represents a dramatic shift away from government involvement in religion,⁵⁴ which many Revolutionary leaders embraced as a principle of individual liberty, the

2016), https://www.washingtonpost.com/national/religion/supreme-court-justice-scalia-constitution-says-government-can-favor-religion/2016/01/04/951d18d8-b32b-11e5-8abc-d09392edc612_story.html?utm_term=.5171ae25f6b1. However, nothing in the original text supports such an argument. In fact, given that the Constitution prohibits requiring a religious oath to hold office, Scalia’s view directly contradicts the plain language and history of the document. *See* U.S. CONST. art. VI, § 1, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”). Expressly prohibiting a religious test for office amounts to a direct statement that government cannot favor religion. It takes a massive, unsubstantiated leap, given the Article VI language alone, to find that government may indeed favor religion over nonreligion.

52. By the explicit text of the Preamble, “We the People,” the Constitution states unequivocally that its power derives from the consent of the governed. U.S. CONST. pmbl. That there is no mention of a deity in the Constitution is equally telling. As is evidenced by “minimum age requirement[s] for the presidency,” the Senate, and the House, “and [by] numerous other provisions, when the Founders wanted to be very precise, they had no trouble doing so.” Ronald A. Lindsay, *Scalia and Originalism: May They Rest in Peace*, HUFFPOST (Feb. 15, 2017, 12:56 PM), https://www.huffingtonpost.com/ronald-a-lindsay/scalia-and-originalism-may_b_9237446.html. It simply defies all common sense to read the “plain language” of the Constitution to say the Framers intended to set up a nation that derived its power from religious authority, when the Founders completely omitted all references to a divine authority in their founding document.

53. *See* Madison, *supra* note 16.

54. *See* Feldman, *Intellectual Origins*, *supra* note 3, at 428.

hands-off Lockean approach to religion later became the subject of attack in a political war against irreligion.⁵⁵ Beginning in the early nineteenth century, a religiously inspired political movement sought to redefine or distort founding religious liberty for political gain. By the mid-nineteenth century, the entanglement of religion and government at the state level led to institutionalized religious bigotry within public schools. Eventually, religion-fueled state political battles culminated in a notorious proposal to amend the Constitution.

A. Religion in Early American Politics

Although some Founders, such as Thomas Jefferson, were deists, many other Founders were Christians, including (probably) Madison himself. Because the Constitution reflected this diverse reality,⁵⁶ the government framework established by the Founders offered the greatest protection to religious independence the Western world had ever seen. However, because the Establishment Clause applied only to the federal government until 1947,⁵⁷ many states continued to have established churches well into the nineteenth century.⁵⁸ Nevertheless, the

55. See BUTLER, *supra* note 3, at 218 (“Deism became a chief object of attack in the war against irreligion. The choice proved particularly clever, not least because it clothed a familiar specter in new dress. . . . Most important, deism offered extraordinary opportunities to its critics to demonstrate the need for real religion, meaning orthodox Christianity, in the new republic. This was possible because, to its critics, deism was the epitome of hypocrisy. It masqueraded as religion but was thoroughly irreligious. Deists admitted the justice of religious claims, but they made religion irrelevant to contemporary life.”).

56. See sources cited *supra* note 8 and text accompanying. The debate over Madison’s personal religious beliefs is as unresolvable as it is unimportant to the legal analysis of the religious separation provisions contained in the First Amendment.

57. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–18 (1947).

58. See, e.g., *Stansbury v. Marks*, 2 U.S. (2 Dall.) 213, 213 (Pa. 1793) (regarding a court’s £10 fine for a Jew refusing to be sworn as a witness, because it was Saturday, his Sabbath); *People v. Philips*, Court of General Sessions, City of New York (June 14, 1813). *Philips* “involved the exemption of a Catholic priest from compliance with a subpoena requiring him to testify to matters he heard in the confessional.” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1504 (1990).

issue over religious separation first took on broader significance during the election of 1800.⁵⁹

To understand the implications of the 1800 presidential campaign, as well as American sentiments about religion in general, one must consider the split that existed among Americans with regard to the French Revolution. The Federalists, who opposed the pro-French Jefferson campaign, portrayed Jefferson as a godless radical who would plunge the country into a reign of terror similar to the one witnessed in France.⁶⁰ In American politics, the label of “deist” suddenly became synonymous with terms such as “Jacobin” and “atheist”—scare words used to frighten the public into opposing Jefferson’s candidacy.⁶¹ These attacks on Jefferson demonstrated that heightened concerns regarding the alleged connection between morality and religion could lead to a politically distorted view of anti-establishment liberty,⁶²

59. To Thomas Jefferson, the overall aim of separation was not to eliminate religion from American society, as his political opponents charged, but rather to temper religion’s negative sectarian effects upon the populace. See David Little, *Thomas Jefferson’s Religious Views and Their Influence on the Supreme Court’s Interpretation of the First Amendment*, 26 CATH. U. L. REV. 57, 58–64 (1976); see also Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), in THOMAS JEFFERSON: WRITINGS 1464 (Merrill D. Peterson ed., 1984).

60. See Peter Onuf, *Thomas Jefferson: Campaigns and Elections*, MILLER CTR., <https://millercenter.org/president/jefferson/campaigns-and-elections> (“The Federalists attacked the fifty-seven-year-old Thomas Jefferson as a godless Jacobin who would unleash the forces of bloody terror upon the land. With Jefferson as President, so warned one newspaper, ‘Murder, robbery, rape, adultery, and incest will be openly taught and practiced, the air will be rent with the cries of the distressed, the soil will be soaked with blood, and the nation black with crimes.’ Others attacked Jefferson’s deist beliefs as the views of an infidel who ‘writes aghast the truths of God’s words; who makes not even a profession of Christianity; who is without Sabbaths; without the sanctuary, and without so much as a decent external respect for the faith and worship of Christians.’”) (last visited Nov. 10, 2019).

61. See BUTLER, *supra* note 3, at 218–20.

62. This distorted political view stubbornly persists to this day. Scholars such as Ronald Lindsay have reasoned that anti-establishment liberty is often distorted because many

mistakenly equate secularism with atheism (and they further equate atheism with suppression of religion). But secularism and atheism are distinct views and don’t even belong in the same category; secularism is a political/ethical philosophy; atheism is a belief about the ultimate nature of reality, that is, it’s the belief there is no deity. Espousing one of these views does not entail acceptance of the other.

a distorted view of anti-establishment liberty that later gained national significance over the issue of public education.⁶³

B. Religion's Role in the Development of Public Education

Founders such as Benjamin Franklin and Thomas Jefferson were among the first to express a belief in the necessity of public education to maintain a strong republican government whose citizenry could be “fitted for learning any Business, Calling[,] or Profession.”⁶⁴ However, despite the personal sentiments of Jefferson and Franklin, tax assessments for public education would have been a scheme unimaginable to most Founders.⁶⁵ When the individual states themselves began to allocate funds for education, they generally distributed money to many denominations of religious schools.⁶⁶ It was not until the 1828

LINDSAY, *supra* note 2, at 17–18.

63. See FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 56.

64. See Benjamin Franklin, *Idea of the English School* 8 (Jan. 7, 1751), <https://quod.lib.umich.edu/e/evans/N05275.0001.001?rgn=main;view=fulltext>; see also FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 58–59.

65. In fact, at the time of the Founding, the United States “did not allocate funds for schools in the federally administered territories, and government-supported education in the territories was limited to some scattered Indian schools.” FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 57. That most of the Founders could not have anticipated the assessment specifically should carry no weight, however, in determining whether an assessment in any period since the Founding violates anti-establishment First Amendment liberty. The framework for separation Madison successfully passed through Congress did not depend on anticipating every single private activity Congress would allocate assessments for in the future. All Madison sought to do, and did, was have Congress adopt a free conscience protection within the federal framework ensuring religion would be the *only* private activity that was to be excluded from all future government assessments. See *supra* Part II.

66. See RICHARD J. GABEL, *PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS* 180 (1937). For the states that differed from the federal Establishment Clause’s prohibition on non-preferential aid, this allocation would not have violated any anti-establishment principle. See *id.* at 180–262 (reporting state-by-state survey of government support for religious and other private schools in the early national period); see also LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL 1825–1925*, at 1–19 (1987) (surveying state aid to private schools in the early years); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860*, at 166–67 (1983) (noting examples).

election of Andrew Jackson, who advocated for schools “run by government and available to all,” that the issue of public education began to draw national attention.⁶⁷

In the pre-modern nineteenth century, and at both the federal and state levels, debates over the formulation of public education functioned within a “Protestant-Catholic conflict.”⁶⁸ The reason the dispute took on an entirely religious form was that, unlike today, “[t]he notion of teaching children morality by some means that did not involve religion would hardly have entered the American mind.”⁶⁹ However, viewing religious instruction as essential to government funded public education created an improbable challenge similar to the one faced by the Founders: the inability to accommodate the vast religious diversity of the American populace.

To make matters even more difficult than at the Founding, in the first several decades of the nineteenth century the already-religiously-diverse United States entered a Second Great Awakening that resulted in the creation of innumerable religious sects.⁷⁰ Catholicism saw the most substantial population growth and aligned itself against the initial framework for government-run common schools.⁷¹ Catholics mainly

67. Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 144 (2017). In President Jackson’s time, education came to be viewed generally as a public necessity to enable participation by the poorer, and more numerous, lower classes in the civic life of American government to prevent a collapse of the republic into a populist democracy. See FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 59; see also Laycock, *supra*. The debate over the use of public funds for religious instruction still lasts to this today. See CHARLES L. GLENN, *THE AMERICAN MODEL OF STATE AND SCHOOL: AN HISTORICAL INQUIRY* 164–73 (2012).

68. See Laycock, *supra* note 67, at 145.

69. FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 59. As of late 2017, polling has suggested that “[m]ost U.S. adults now say it is *not* necessary to believe in God to be moral and have good values (56%), up from about half (49%) who expressed this view in 2011.” Gregory A. Smith, *A Growing Share of Americans Say It’s Not Necessary to Believe in God to Be Moral*, PEW RES. CTR. (Oct. 16, 2017), <http://www.pewresearch.org/fact-tank/2017/10/16/a-growing-share-of-americans-say-its-not-necessary-to-believe-in-god-to-be-moral/>.

70. FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 60.

71. See *id.* at 63. Due in large measure to the Great Famine in Ireland, the Catholic populace in the United States would rise to over a million by the mid-nineteenth century. See GEORGE W. POTTER, *TO THE GOLDEN DOOR: THE STORY OF THE IRISH IN IRELAND AND AMERICA* 133–34 (1960) (asserting Irish immigration as

objected to the use of the King James Bible, a Protestant version of the Bible, to teach schoolchildren morality.⁷² The common school curriculum dictated that each individual student interpret the bible in his or her own way, instead of relying on the clergy's interpretation—as Catholicism required at the time.⁷³ For Catholics, the implementation of individual interpretation of the Protestant King James Bible appeared to be a form of “sectarian Protestantism in disguise.”⁷⁴

However, instead of adhering to the free conscience concerns raised by Catholics, “Protestants responded in the time-honored fashion of the intolerant when faced with a claim of conscience: instead of offering an accommodation, they simply refused to acknowledge Catholics’ concern and used their legislative majorities to refuse the funding of Catholic schools.”⁷⁵ After the denial of their own public school funding, Catholics then began to petition state governments to prohibit the Bible from being interpreted in public schools entirely, and their calling for the removal of the Bible increased the hostility of Protestant majorities, which led the debate to take on forms of racial animus.⁷⁶ This bigoted quarrel eventually reached the highest levels of federal

1,321,725 immigrants between 1847 and 1854); *see also* FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 63.

72. *See* FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 63.

73. *See id.*

74. *See id.* Many state representatives, however, did not even try to hide the preference for Protestantism in their common school structure. *See id.* at 85.

75. *Id.* at 66. Of course, because the First Amendment did not apply to the states until the incorporation of the Fourteenth Amendment, states were not required to respect Catholic objections and could in fact legally enact their own assessments, which established Protestant practices in schools; not until the First Amendment's incorporation to the states did every such state “nonsectarian” approach to common schools become a violation of constitutionally guaranteed free conscience protection.

76. *See id.* at 66–67 (“The argument against Catholic schools became part of the nativist argument against the transformation of America through the immigration of Irish Catholics. If Protestantism was associated with republicanism through the association of liberty of conscience in religion and free choice in politics, then Catholicism could be associated with despotism through its insistence on authority. If Catholics were unprepared for republican political participation, then they needed the Protestant-inflected education of the common schools all the more.”); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 300–05 (2001).

government, culminating with the introduction of the Blaine Amendment.⁷⁷

C. *The Blaine Amendment*

The Blaine Amendment was a proposed amendment to the Constitution, introduced by Congressman James G. Blaine of Maine, that in effect “would have written the Protestant position on [common schools] into the Federal Constitution, protecting Bible reading in the public schools and prohibiting government funding of any school that taught the beliefs of any sect or denomination.”⁷⁸ Despite the anti-Catholic, anti-Irish intent, proponents of the Blaine Amendment in the Senate claimed that the basis for the Blaine Amendment was a commitment to “nonsectarianism”—a claim that no senator at the time could support or defend.⁷⁹ In the end, however, the Senate rejected the Blaine Amendment,⁸⁰ and the Supreme Court later acknowledged the underlying bigotry behind advocating for its passage.⁸¹

Despite the abundance of bigotry, Catholics were told that their freedom of conscience was not being violated. Blaine Amendment proponents maintained that Catholics had the “freedom” to choose whether their children would attend common schools or, if they had

77. See Laycock, *supra* note 67, at 145.

78. *Id.* The Amendment ultimately failed in the Senate. See 4 CONG. REC. 5595 (1876). Yet, a majority of the states were able to adopt some form of the Blaine Amendment so that anti-Catholic prejudice would endure. See Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 111, 111 (2011).

79. See FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 85 (“When Senator Francis Kernan of New York (one of the only Catholics on the floor at the time) pointed out that the consciences of Jews would be violated even by nonsectarian Christianity, and that the only truly nonsectarian schools would be those that avoided moral teaching altogether, no one bothered to disagree. It was obvious to the senators that such schools would fail to satisfy the objectives of educating children in republican values. . . . Nonsectarianism, in other words, was an ideology of inclusiveness that was fully prepared to exclude.”).

80. However, the Blaine framework was adopted by almost every state. *Id.* at 86.

81. See *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 720–21 (2002) (Breyer, J., dissenting) (summarizing the bigoted history of the Blaine Amendments).

objections to common schools, attend separate Catholic institutions.⁸² Under the federal standard championed by Madison, any assessment that distributes government funds to a religious practice or belief—such as interpreting the Bible in a particular manner—violates the freedom of conscience of the taxpayer, *even if* no taxpayer objects to the assessment.⁸³ It simply would not matter to First Amendment anti-establishment analysis if Catholics had the freedom to choose not to attend the common schools. The violation of free conscience would have occurred via a state assessment that forced all citizens to fund a government program mandating an interpretation of religious text for purposes of morality.⁸⁴

The Blaine Amendment framework of nonsectarianism shared similar elements with Virginia’s rejected religious assessment bill in that both sought to establish religion in subtle but effective ways.⁸⁵ The Blaine Amendment-type nonsectarianism was also deeply rooted in a political pressure that, since the days of Jefferson’s 1800 presidential run, was fundamentally distorting Founding religious separation principles in order to attack disfavored politicians and religious and ethnic

82. See FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 66. This reliance on the purported existence of an autonomous “choice” is comparable to the justifications offered by those who supported the nonpreferential, choice-of-recipient religious assessment bill in Virginia during Madison’s time. See *supra* Part II. The debate over the nonpreferential assessments in Virginia, however, had already demonstrated that the mere existence of a choice, or whether an assessment allows for autonomous distribution by individual citizens, does not satisfy Madisonian anti-establishment scrutiny.

83. See *supra* note 15.

84. As a Catholic group in Michigan put it at the time of the nonsectarian Blaine framework, “our Public School Laws compel us to violate our conscience . . . and also impose on us taxes for the support of schools which, as a matter of conscience, we cannot allow our children to attend.” *Petition for a Division of the School Funds*, in *READINGS IN PUBLIC EDUCATION IN THE UNITED STATES: A COLLECTION OF SOURCES AND READINGS TO ILLUSTRATE THE HISTORY OF EDUCATIONAL PRACTICE AND PROGRESS IN THE UNITED STATES* 577 (Elwood P. Cubberly ed., 1920).

85. See *supra* source cited note 79 and accompanying text.

groups.⁸⁶ The government practices that developed out of nonsectarianism undoubtedly violated freedom of conscience protections enumerated in the Constitution.⁸⁷

Unfortunately, the bigoted Blaine-type policies that forced citizens to pay for denominational interpretations of the Bible in schools proceeded well into the twentieth century until the modern Court struck them down.⁸⁸ However, although the Court rightly criticizes the Blaine Amendment framework in the modern era, the Court nevertheless embraces the underlying fallacies the Blaine framework rested upon. The result has been a doctrinal shift away from the principled version of religious separation and free conscience that James Madison fought so hard and for so long to establish.

V. CHURCH AND STATE IN THE MODERN ERA: A NEW DOCTRINE BUILT ON OLD FALLACIES

The first half of the twentieth century was a period of slow-moving change in the way the Court viewed the relationship between church and state.⁸⁹ The legal shift began in 1925,⁹⁰ and it gradually expanded over the course of several decades in which the Court issued a series of opinions that expanded First Amendment protections to the states via the Due Process Clause of the Fourteenth Amendment.⁹¹ Although the expansion of First Amendment anti-establishment protection

86. The power of this political pressure cannot be overstated. It forced staunch defenders of freedom of conscience, such as Madison himself, to betray their own constitutional principles. See James Madison, *Detached Memoranda*, reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 93–94 (Robert Alley ed., 1985) (recounting Madison’s acknowledgement that George Washington’s declaration of a national day of Thanksgiving violated Madison’s own principles of freedom of conscience).

87. See *supra* Section III.C.

88. See *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

89. With few exceptions, such as the “Sunday mail service or the cynical Blaine amendment,” the debate had been traditionally limited to state-level concerns. FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 153. This reflects the original constitutional intent that the Bill of Rights was to apply only to the federal government. See *Barron v. Baltimore* 32 U.S. (7 Pet.) 243, 248–50 (1833).

90. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that “free speech” was incorporated to the states).

91. See *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (incorporating free exercise); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating free assembly).

over the states has overturned assessment frameworks on a case-specific basis,⁹² a broader Madisonian standard is far from what exists today.⁹³

The first case to illustrate the difficulty of answering how First Amendment free conscience liberty would apply to the states involved the issue of forced patriotic loyalty exercises in state common schools—exercises designed to secure “effective loyalty to the traditional ideals of democracy.”⁹⁴ As it had in the past, political pressure maintained a powerful influence over the Court in the modern era, which stated that its “judicial conscience is put to its severest test” when balancing “liberty of conscience” and the “authority to safeguard the nation’s fellowship.”⁹⁵ The need to safeguard the “nation’s fellowship” in the mid-twentieth century required “a total mobilization unlike any . . . in the nation’s history,” and the pressure of this mobilization had a significant impact on how free conscience objections were perceived.⁹⁶ Upon en-

and right to petition the government); *Near v. Minnesota*, 283 U.S. 697, 707, 722–23 (1931) (incorporating freedom of the press to the states). Recently, “in a series of decisions, culminating in the *McDonald [v. Chicago]* decision, . . . the Court decided the Second Amendment applied to the states.” Eugene Volokh, *Does the Seventh Amendment Civil Jury Trial Right Apply to the States (and to Puerto Rico)?*, WASH. POST (Aug., 12, 2014, 6:36 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/12/does-the-seventh-amendment-civil-jury-trial-right-apply-to-the-states-and-to-puerto-rico/>. Currently, the Court takes the position “that all of the rights that previously were not applied to the states applied to them except the three jury rights—the civil jury right, the grand jury right, and the criminal jury unanimity requirement—what I refer to as the ‘nonincorporated rights.’” *Id.*

92. See *Locke v. Davey*, 540 U.S. 712, 725 (2004) (holding that Washington State’s refusal to fund the religious education of a citizen to join a ministry did not violate the Free Exercise Clause).

93. See *infra* Section VI.A.2.

94. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940). The enforcement of patriotic displays was harsh and violent. See Neil M. Richards, *The “Good War,” the Jehovah’s Witnesses, and the First Amendment*, 87 VA. L. REV. 781, 788 (2001) (reviewing SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* (2000)).

95. *Minersville*, 310 U.S. at 591 (“But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation’s fellowship, judicial conscience is put to its severest test.”).

96. See David French, *This Culture War Isn’t About the Flag; It’s About Conscience*, NAT’L REV. (Sept. 27, 2017, 7:42

try into World War II, the political pressures and fears increased dramatically.⁹⁷ Yet even in the darkest times, the Court in *West Virginia State Board of Education v. Barnette* passionately reaffirmed Madison's free-conscience federal framework by declaring that all assessments enacted to establish practices for the general welfare must remain "faithful to the ideal of secular instruction and political neutrality."⁹⁸

However, the *Barnette* decision also developed what would become a reoccurring controversy between the members of the Court regarding the relationship between religion and "civic measures of general applicability."⁹⁹ The Jehovah's Witnesses in *Barnette* were refusing to engage in patriotic displays because their religious beliefs disagreed with the compelled speech.¹⁰⁰ In fact, the dissent in *Barnette* expressed fear that by allowing religious exemption from "civic measures of general applicability," religious division and conflict would increase in society.¹⁰¹ However, the *Barnette* Court was not granting an exception to the Jehovah's Witnesses that it might have to

PM), <https://www.nationalreview.com/2017/09/standing-national-anthem-voluntary-not-required/> ("At the height of the war, a staggering 37.5 percent of the nation's Gross National Product would be dedicated to defense. A much smaller population than America has today would ultimately put 16 million men under arms. Patriotism was essential.").

97. See *id.* ("I think back to January 1942—arguably the lowest point for American arms in the history of the nation. Much of the striking power of the Pacific fleet was sunk or disabled. The Bataan campaign was underway, and it would ultimately result in arguably America's worst military defeat. Nazi Germany dominated Europe, Japan was on the offensive across Southeast Asia, and civilization itself hung in the balance. You think we live in troubling times now? *Those* were troubling times.").

98. 319 U.S. 624, 637 (1943).

99. *Id.* at 653 (Frankfurter, J., dissenting).

100. *Id.* at 629 (majority opinion). The Court framed the *Barnette* case "as one about free speech rather than the free exercise of religion—although the Witnesses' motivation not to salute the flag was religious, the Court said, a nonreligious motivation would have been just as good a reason not to be compelled to speak out against one's will." FELDMAN, DIVIDED BY GOD, *supra* note 3, at 157.

101. *Barnette*, 319 U.S. at 653 (Frankfurter, J., dissenting). Unless the First Amendment protects citizens from the government coercing them to make statements they do not believe, the plain language of Madison's principled vision of freedom of conscience—passed by Congress and contained within the First Amendment—would be entirely meaningless.

grant to all religious sects differently. Rather, the Court was upholding a right of Madisonian free conscience: that no citizen should be coerced by the government into propagating opinions he or she does not hold.¹⁰²

The concerns raised in the *Barnette* dissent over the relationship between religion and generally applicable laws continue to this today. The dispute became more prominent during the twentieth century when the United States Congress enacted an unprecedented wave of public welfare legislation.¹⁰³ Determining whether religious institutions were eligible for general public welfare funds became a reoccurring controversy for the Court to resolve post-*Barnette*. The reason the debate has remained so pervasive is largely because the Court's approach to free conscience liberty, post-*Barnette*, has been to embrace contradictory principles of discrimination.¹⁰⁴

102. See *id.* at 641 (majority opinion) (“Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”).

103. See *Historical Background and Development of Social Security*, SOC. SECURITY ADMIN., <https://www.ssa.gov/history/briefhistory3.html> (“So as 1934 dawned the nation was deep in the throes of the Depression. Confidence in the old institutions was shaken. Social changes that started with the Industrial Revolution had long ago passed the point of no return. The traditional sources of economic security: assets; labor; family; and charity, had all failed in one degree or another. Radical proposals for action were springing like weeds from the soil of the nation’s discontent. President Franklin Roosevelt would choose the social insurance approach as the ‘cornerstone’ of his attempts to deal with the problem of economic security.”).

104. See Laycock, *supra* note 67, at 138 (“*Everson*’s two principles are inconsistent; each can expand to cover all the cases. Every law providing for any form of neutrally distributed government funding can be understood as public welfare legislation. And any part of that funding that goes to a religious organization can be understood as support for religion. The Court has never acknowledged the conflict between these two principles, but it has struggled with that conflict for seventy years.”).

A. *How the Modern Court Transformed Madisonian Anti-Establishment Liberty Into Impermissible Discrimination Against Free Exercise: Everson v. Board of Education*

Just four years after the *Barnette* case, a taxpayer claimed in *Everson v. Board of Education* that a New Jersey statute that “authorized reimbursement to parents [for the transportation] of children attending parochial schools” violated the First Amendment’s Establishment Clause.¹⁰⁵ When upholding the subsidy, the *Everson* Court based its reasoning on the fact that the assessment subsidized bus rides for every child and therefore could be categorized as having a neutral, non-religious function.¹⁰⁶ Madison’s principled form of anti-establishment liberty, however, did not depend on whether the assessment could conceivably be utilized by both secular and religious institutions. The only fact that mattered to Madisonian liberty was whether religious institutions are eligible at all.

As illustrated in Part II, Madison opposed assessments that mirrored the assessment at issue in *Everson*. Both the religious assessment Madison was opposing when writing his *Memorial and Remonstrance Against Religious Assessments* and the one at issue in the *Everson* case directed money (or conceivably could under the assessment framework) to religious and secular institutions. Both assessments utilized a neutral or individually autonomous distribution system. Madison expressly opposed and defeated this type of assessment simply because it utilized civil mechanisms for the financial support of church operations. In other words, nothing in the historical record suggests that Madison’s principled anti-establishment framework made any sort of distinction between religious and nonreligious functions of churches. Indeed, as current Justice Neil Gorsuch has correctly observed, it is logically impossible to separate any church function or act from the church’s religious nature.¹⁰⁷

105. *Everson v. Bd. of Educ.*, 330 U.S. 1, 5–8 (1947).

106. *See id.* at 17–18. The Court has since characterized the aid in *Everson* as “secular, neutral, or nonideological services, facilities, or materials.” *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

107. *See* Noah Feldman, *Supreme Court Weakens Wall Between Church and State*, BLOOMBERG: OPINION (June 26, 2017, 10:39 AM), <https://www.bloomberg.com/view/articles/2017-06-26/supreme-court-weakens-wall-between-church-and-state> (“Justice Neil Gorsuch wrote separately to say that he couldn’t join Footnote

The effect of the *Everson* ruling, therefore, was a doctrine that pitted anti-establishment and free exercise liberty against one another. Denials of assessments to religious organizations are no longer an extension of anti-establishment liberty nor respectful of religion's exclusive province over spiritual works. Now, a contradictory free exercise standard can declare that denials of government aid are discriminatory.¹⁰⁸ Additionally, in *Everson*, original anti-establishment liberty was re-baptized as a struggle over religious equality, when in fact it was actually about protecting the individual citizen from being coerced into paying taxes for or otherwise supporting religious institutions from which the individual citizen might dissent.¹⁰⁹ The reasoning behind the Court's decision in *Everson* has therefore greatly undermined¹¹⁰ and

3 because it's impossible really to distinguish the actor, a church, from the act His point was that when churches do things, they do them religiously. . . . Money is fungible, and state money that supports playground resurfacing free up funds for paying ministers. That's why the distinction between religious and nonreligious functions for churches doesn't have roots in the history of the establishment clause. And it's why the framers of the Constitution, especially Madison, who was most committed to religious liberty, would have found the decision incoherent.”).

108. In *Everson*, the Court stated that the government “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” 330 U.S. at 16 (emphasis omitted).

109. The *Everson* opinion was written by Justice Hugo Black, who declared the overall purpose of the Establishment Clause was to prevent the type of discrimination that had “shock[ed] the freedom-loving colonials into a feeling of abhorrence” against religious establishment. *Id.* at 11. As Professor Feldman has explained, in effect the *Everson* Court was replacing Founder intent with modern concerns. See FELDMAN, *DIVIDED BY GOD*, *supra* note 3, at 175 (“When Justice Black quoted Madison and Jefferson on the importance of the liberty of conscience, as he went on to do in the opinion, he read them through the lens of the Holocaust and concluded that the reason to protect conscience was to protect minorities from violent persecution. For the framers, however, the motivation had run in the opposite direction: the reason to prohibit government coercion in the realm of religion was to protect individual conscience from self-contradiction and sin.”).

110. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 731 (2002) (“[T]he equality approach has contributed to the breakdown of separation of church and state and has created the possibility of egalitarian establishment. Put simply, political equality is as happy (or possibly happier) with a multiple, equal establishment as it is with the separation of

restructured the meaning of enumerated federal religious liberty wholly outside of the intent of the First Amendment's drafters.¹¹¹

After *Everson*, the Court doubled down on its break with original intent in *Lemon v. Kurtzman*, a case involving government funded salary supplements for teachers in sectarian schools that taught secular subjects.¹¹² In *Lemon*, not only did the Court reiterate that an assessment should be weighed by its "primary effect,"¹¹³ the Court also added that continuous government monitoring would logically be required to enforce such a statute so the state could be "certain . . . that subsidized teachers do not inculcate religion."¹¹⁴ However, the problem with such monitoring is that it would violate *Lemon's* rule against "entanglement."¹¹⁵ Thus, the *Lemon* standard did nothing but add to the incoherence of a modern doctrine that the Court increasingly separated from Madison's original intent with each passing opinion.¹¹⁶

church and state. The political-equality theory, developed to explain and justify separation, has become an engine to undermine it. The Establishment Clause of today is not the Establishment Clause of 1947. It has been transformed."). Unfortunately, this is not the only instance in the modern era when the Court has transformed First Amendment liberties dependent upon conjured, contradictory distinctions. See Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2195 (2015).

111. Madison was not establishing the denial of assessments to churches as a handicap to religion as the Court repeatedly describes denials in the modern era. Madison was establishing separation as a matter of *religious liberty*. To Madison, neutrally applied aid from the government was the only handicap to religion because government aid undermined religion's exclusive province over spiritual matters. See Madison, *supra* note 16, at 82–84.

112. 403 U.S. 602, 611–25 (1971).

113. *Id.* at 612.

114. *Id.* at 619.

115. *Id.*

116. See Laycock, *supra* note 67, at 139 ("*Lemon* invalidated aid for teacher salaries, but more fundamentally, it created a doctrinal Catch-22. It said that if any government money was used to support the school's religious functions, that would have the primary effect of advancing religion, and thus would be unconstitutional. The state 'must be certain . . . that subsidized teachers do not inculcate religion.' To achieve this certainty would require continuing government monitoring, which would be an unconstitutional entanglement of church and state. Monitoring violated *Lemon's* rule against entanglement, but not monitoring violated *Lemon's* rule against advancing religion." (footnotes omitted) (quoting *Lemon*, 403 U.S. at 619)).

Since the mid-1980s, however, the Court has focused less on the distinctions that could be derived from the *Lemon* decision and has instead returned to resolving cases under *Everson*'s contradictory non-discrimination principles.¹¹⁷ Nevertheless, the result has been a modern doctrine that does not align with Madison's intent for anti-establishment liberty to be a working part of free conscience liberty.¹¹⁸ For example, in *Witters v. Washington Department of Services for the Blind*, the Court held that the Establishment Clause did not prevent a student from receiving state funds to attend a sectarian college.¹¹⁹ In evaluating the assessment "as a whole," the *Witters* Court relied on the fact that the student had a choice whether to use the government money to attend a sectarian college.¹²⁰ However, as demonstrated in Part II, the existence of individual autonomy in the application of a government assessment does not satisfy the Madisonian framework of anti-establishment liberty.¹²¹ If individual autonomy was indeed a permissible Madisonian exception, Madison would not have opposed the pure individual autonomous choice framework offered in Virginia.¹²²

In *Zelman v. Simmons-Harris*, the Court held that because the assessment provided a "true private choice" for families, government

117. See *id.* at 140.

118. See James Madison, President of the United States, Address to the House of Representatives on 1811 Veto Act (Feb. 21, 1811), <https://millercenter.org/the-presidency/presidential-speeches/february-21-1811-veto-act-incorporating-alexandria-protestant> (explaining his decision to veto an Act incorporating a Protestant Episcopal Church in Washington, D.C.); see also Rob Boston, *James Madison and Church-State Separation*, AMS. UNITED FOR SEPARATION CHURCH & ST. (Mar. 2001), <https://www.au.org/church-state/march-2001-church-state/featured/james-madison-and-church-state-separation> ("During his presidency, Madison vetoed two bills that he believed would violate the separation of church and state. One was the church incorporation bill The second was a measure giving some federal land to a Baptist church in Mississippi. In his veto message, dated [February] 28, 1811, Madison wrote, 'in reserving a parcel of land of the United States for the use of said Baptist Church comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that "Congress shall make no law respecting a religious establishment."').").

119. 474 U.S. 481, 489 (1986).

120. *Id.* at 487–88.

121. See Madison, *supra* note 16, at 82–84.

122. See *id.*; see also *supra* text accompanying note 10.

funds could be directed to sectarian schools.¹²³ In *Rosenberger v. Rec-tor*, the Court also rejected Madison’s view of First Amendment free conscience liberty, which protected against taxing citizens to pay for the “propagation” of religious opinions, when the Court held that the refusal by the government to fund a religious magazine violated the Free Speech Clause.¹²⁴ For an all-too-brief period, the Court in *Locke v. Davey* later appeared to retreat from relying purely on *Everson*’s contradictory nondiscrimination principles and indeed appeared open to adopting a broader Madisonian standard.¹²⁵ However, this retreat would be short-lived, for in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court not only reaffirmed that government *may* fund religion but it issued a death knell to Madison’s free conscience liberty and held that governments *must* subsidize church property with direct cash assessments.¹²⁶

B. The End of Madisonian Free Conscience Liberty: Trinity Lutheran Church of Columbia, Inc. v. Comer

The *Trinity* case was brought after the state of Missouri denied a \$20,000 public grant to Trinity Lutheran Church to resurface its playground.¹²⁷ Trinity Lutheran brought an action against Missouri on free exercise grounds, arguing that the state discriminated against Trinity Lutheran by denying state funds solely because of its religious character.¹²⁸ Although the case involved government funds being directly assessed to a church for property improvements, “the Court mention[ed] the Establishment Clause only to note the parties’ agreement that it ‘does not prevent Missouri from including Trinity Lutheran.’”¹²⁹ The

123. 536 U.S. 639, 653 (2002).

124. See 515 U.S. 819, 845–46 (1995); see also *supra* note 15 and accompanying text.

125. See 540 U.S. 712, 715 (2004).

126. See 137 S. Ct. 2012, 2024–25 (2017).

127. *Id.* at 2028 (Sotomayor, J., dissenting).

128. *Id.* at 2018 (majority opinion).

129. *Id.* at 2028 (Sotomayor, J., dissenting). The absence of anti-establishment analysis by a majority opinion in a case involving direct financial property aid to a church assessed by the state, and that both parties knew it was pointless to raise anti-establishment concerns, demonstrates just how far the Court has departed in the modern era from Madison’s Founding intent for the Establishment Clause. See *id.*

Court's general approach to religious liberty in *Trinity* is rather indicative of its entire modern era jurisprudence, where encroachments on free exercise receive the "most rigorous" scrutiny while infringements on anti-establishment liberty receive, quite literally, no attention whatsoever.¹³⁰

Unlike the Free Exercise Clause, which is more protected in modern society at the federal level than it was in Madison's time,¹³¹ anti-establishment liberty is often dismissed in the modern era because scholars and the Court routinely attach a narrow intent to the clause.¹³² The legislative history and plain language of the First Amendment's Establishment Clause detailed in Part II, however, makes clear that this narrow view is mistaken. The scope of Madison's anti-establishment protection went beyond unambiguous or "special funding" to churches. Madisonian anti-establishment liberty explicitly and demonstrably en-

130. See *id.* at 2024 (majority opinion) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). This observation is not at all limited to "secular" legal scholars; it is flatly apparent, and troubling, to modern religious leaders. See Bob Allen, *Baptist Leader Says 'One-Sided' Religious Liberty Task Force Falls Short*, BAPTIST NEWS GLOBAL (Aug. 2, 2018), <https://baptistnews.com/article/baptist-leader-says-one-sided-religious-liberty-task-force-falls-short/#.W3WmsdJKhpg> (discussing a religious leader's dismay at the "near total omission of any concern for government promotion of religion").

131. The Religious Freedom Restoration Act of 1993 ("RFRA") provides broad protection for free exercise and was passed in part to repudiate the Supreme Court's controversial decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). See 42 U.S.C. §§ 2000bb to -4 (2018). While RFRA creates a broader federal standard than the First Amendment requires, the Court has held the RFRA does not apply to states via the Fourteenth Amendment's Due Process Clause. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); see also Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc (2018) (mandating a similar test as in RFRA for land use and prisoner rights claims).

132. See Laycock, *supra* note 67, at 142–43 ("The issue at the Founding was an earmarked tax to support the religious functions of churches—most commonly the salaries of clergy, and sometimes also the construction of church buildings—at a time when government funded almost nothing else in the private sector. The issue was 'religious assessments,' which is how the dissent accurately refers to them throughout its state-by-state review. The Founders 'made a considered decision that civil government should not fund ministers and their houses of worship.' This Founding-era debate settled the issue. Religious assessments—special funding for the religious functions of churches—are unconstitutional.").

compassed neutrally applied assessments for private activity that offered the individual taxpayer sole discretion to direct government-assessed funds to religious organizations.¹³³ Given Madison's clear opposition to such neutral assessment frameworks, the same freedom of conscience objection should have applied in the *Trinity* case; thus the case should have been decided under the federal standard that Madison led Congress to establish.¹³⁴

Instead of addressing Founding anti-establishment concerns, a majority of the *Trinity* Court circumscribed the harm to a modern *Everson* anti-discrimination issue. According to the Court, Missouri's prohibition on assessing property aid to the church "impose[d] a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny."¹³⁵ The Court was specific that in *Trinity Lutheran's* case, "[t]he express discrimination against religious exercise . . . is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant."¹³⁶

What is difficult to square with the holding in *Trinity*, however, is that Madison's version of separation logically requires some form of

133. The historical, theoretical, and practiced tenets of Madisonian free conscience liberty contradicts the modern notion that assessment frameworks today are "fundamentally different from the issue at the Founding" given "[t]here were no programs in which government broadly funded some private activity that both churches and secular organizations engaged in." See Laycock, *supra* note 67, at 142–44. As stated throughout this Article, but worth repeating again here, Madison was familiar with assessments that sought to broadly fund private activity that could include both religious and secular organizations, and he consistently and successfully rejected such assessments on the grounds that access was being permitted to religious institutions. See *supra* Parts III, IV.

134. See *supra* Section III.A; see also Laycock, *supra* note 22, at 899 ("Virginians understood the vote against the bill as a rejection of *any form* of financial aid to churches." (emphasis added)).

135. *Trinity*, 137 U.S. at 2024 (quoting *Lukumi*, 508 U.S. at 546). Why free exercise concerns receive "the most rigorous" scrutiny while anti-establishment concerns regarding subsidizing property aid for a church do not merit the slightest consideration by the majority is perplexing to say the least. This is made even more perplexing by the fact that the Court admitted the denial of property aid was minimized to "a few extra scraped knees." *Id.* at 2025.

136. *Id.* at 2015.

differential treatment by the government towards churches, for example, when the government provides access to civil support mechanisms. Therefore, whenever the government lawfully denies access to such mechanisms, this denial does not amount to a peculiar burden upon religion given that such denial exemplifies the very intent of the Establishment Clause. Likewise, when the government upholds a unique free exercise of religious belief, as the Court did in *Barnette*, it is not granting a certain religion a “peculiar exemption[.]”¹³⁷ In other words, the problem with the “express discrimination” found by the Court in *Trinity* is that original anti-establishment liberty under a First Amendment Madisonian standard was enumerated precisely to ensure that very outcome. The fundamental aim of Madisonian separation was that religious organizations would not be operating through, much less competing for, civil support mechanisms.¹³⁸ Moreover, the “plain language” of the Establishment Clause reflects Madison’s intent to grant to the individual citizen the sole discretionary power “to render to the Creator such homage and such only as he believes to be acceptable,”

137. See Madison, *supra* note 16. Madison declared that government violates “equality which ought to be the basis of every law” when it subjects “some to peculiar burdens” while “granting to others peculiar exemptions.” *Id.* at 82–83. Of course, the application of equality under the law should not subvert the intent of the law itself, and conceptions of Madisonian equality cannot logically supplant Madison’s own intended purpose to enact a law that separates church and state.

138. Madison believed religion should be “wholly exempt” from “Civil Society,” not competing for its benefits because any overlap between the two, including overlap with mutual aid, would nevertheless demean or undermine religious authority. In Madison’s own words, the idea of government support to religion presented

a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them, and not only during the period of miraculous aid, but long after it had been left to its own evidence and the ordinary care of Providence. Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.

Id. at 83.

without utilizing civil mechanisms.¹³⁹ Unfortunately, there could hardly be a greater dichotomy between Madison's principled framework for anti-establishment liberty, which requires the denial of government assessments to religious organizations, and contemporary federal courts, which regularly permit such assessments.

In *Trinity*, the Court took an unprecedented step in dismissing from its religious liberty doctrine a central tenet of Madison's framework—that religion required no civil assistance and government aid to religion could only undermine religion itself.¹⁴⁰ To restore Madison's principled freedom-of-conscience framework in the First Amendment, the Court must abandon its modern reliance on contradictory nondiscrimination principles.

VI. THE VALUE IN RESTORING MADISONIAN FREEDOM OF CONSCIENCE LIBERTY

The great obstacle to the modern Court's embracing of a more originalist Madisonian view of religious liberty and free conscience is that Madison's principles of separation have since become a menacing

139. *Id.* at 82.

140. *See Trinity*, 137 U.S. at 2025. Despite being reminded repeatedly by dissenters, Madison's intent is ignored by a majority of the Court in the modern era. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 30–32 (1947) (Rutledge, J., dissenting) (“We have to consider only whether this ruling accords with the prohibition of the First Amendment implied in the due process clause of the Fourteenth. Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was ‘a Model of technical precision, and perspicuous brevity.’ Madison could not have confused ‘church’ and ‘religion,’ or ‘an established church’ and ‘an establishment of religion.’ The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding *every form* of public aid or support for religion.” (emphasis added) (footnotes omitted)).

threat to many originalists.¹⁴¹ An originalist position that subverts Founding intent represents a stark contrast to how originalism traditionally functions as an ideology of statutory or constitutional interpretation. Originalists often produce opinions that are labeled harsh and that stick strictly to original meaning.¹⁴² Although originalists consistently express sympathy for those who may be negatively affected by such strict enforcement or even admit their own personal disagreement with the law itself, the typical originalist answer is that they are not legislators but are legally bound to the original meaning of the law; neither, it is said by originalists, should their goal be to produce personally desired outcomes for perceived sympathetic parties.¹⁴³

141. For example, the former Attorney General Jeff Sessions, an avowed “originalist,” has stated repeatedly and openly that unless one believes in God, that individual is unfit to take part in American government. See Jay Michaelson, *Jeff Sessions Said ‘Secularists’ Are Unfit for Government*, DAILY BEAST (Apr. 11, 2017, 4:10 PM), <https://www.thedailybeast.com/jeff-sessions-said-secularists-are-unfit-for-government>. Furthermore, Sessions has also claimed having unbelievers in government poses a serious threat to freedom of conscience liberties in the First Amendment such as freedom of speech. See *id.* (“Ultimately, freedom of speech is about ascertaining the truth And if you don’t believe there’s a truth . . . if you’re an utter secularist, then how do we operate this government? . . . I do believe that we are a nation that, without God, there is no truth, and it’s all about power, ideology, advancement, agenda, not doing the public service.”).

142. When describing one of originalist Justice Neil Gorsuch’s dissents, Senator Dick Durbin stated: “See, there was no heater in the truck, and according to [the truck driver’s] recollection, it was so cold, it was 14 degrees below—not as cold as your dissent, Judge Gorsuch, which argued that his firing was lawful.” *Durbin: Gorsuch Has a Troubling Record of Ruling Against Workers and Families*, DICK DURBIN: U.S. SENATOR ILL. (Mar. 21, 2017), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-gorsuch-has-a-troubling-record-of-ruling-against-workers-and-families>.

143. In response to the criticism of his dissent in an employment case that involved interpreting the intended meaning of a statute passed by Congress, Justice Gorsuch stated during his confirmation hearings:

My job is to apply the law that you write. The law as written said he would be protected if he refused to operate. By any plain understanding, he operated the vehicle I said it was an unkind decision, I said it might have been a wrong decision, a bad decision, but my job isn’t to write the law, senator, it’s to apply the law. If congress passes a law saying the trucker in those circumstances gets to choose how to operate his vehicle, I’ll be the first in line to enforce it.

Yet, with First Amendment anti-establishment liberty, as demonstrated in Part V by cases such as *Trinity*, originalists retreat from their avowed method of interpretation and instead embrace a doctrine that directly contradicts both the plain meaning of the text and original intent. Neglecting original intent for one of this country's most valued liberties discredits the claim of originalists that original intent is a more objective form of analysis than other forms of constitutional interpretations. Put simply, the refusal to adopt an originalist view of First Amendment anti-establishment free conscience religious liberty undermines the originalist analytical theory and leaves it vulnerable to significant criticism.

Anti-establishment liberty has been so abused and stripped of original meaning that embracing Madison's intent would eliminate billions of dollars of government support for religion at both the state and federal level.¹⁴⁴ However, the benefits of applying fundamental principles of anti-establishment liberty would be substantial.

A. *Ending Modern Favoritism of Religion*

Even a cursory examination of the current United States federal tax code reveals that churches enjoy a plethora of unique exemptions not shared by other tax-exempt organizations.¹⁴⁵ For example, "unlike

See Jane C. Timm, *Confronted by Freezing Trucker Case, Gorsuch Pushes Back: I'm Not a Legislator*, NBC NEWS (Mar. 21, 2017, 12:57 PM), <https://www.nbcnews.com/card/confronted-freezing-trucker-case-gorsuch-pushes-back-im-not-legislator-n736511>.

144. It was recently estimated that U.S. annual "subsidies" to religious organizations are approaching \$100 billion annually and in fact may already be there depending on which model one uses and whether one finds tax exemptions to be subsidies (the latter is a very contentious question in itself). *See* Dylan Matthews, *You Give Religions More Than \$82.5 Billion a Year*, WASH. POST (Aug. 22, 2013, 1:32 PM), https://www.washingtonpost.com/news/wonk/wp/2013/08/22/you-give-religions-more-than-82-5-billion-a-year/?utm_term=.e85a37a87dba. Yet, even if one were to circumscribe the analysis to direct cash grants, via federal programs such as the Faith-Based Initiative program, direct government cash support figures remain in the billions annually. *See id.*

145. *See Special Rules Limiting IRS Authority to Audit a Church*, IRS, <https://www.irs.gov/charities-non-profits/churches-religious-organizations/special-rules-limiting-irs-authority-to-audit-a-church> (last updated June 5, 2019); *see also* Editorial Board, *Trump is Wrong. Pulpit Freedom Already Exists*, WASH. POST (Aug. 5, 2016), <https://www.washingtonpost.com/opinions/trump-is-wrong-pulpit-freedom->

[every] other [tax-]exempt organization[], a church does not even need to apply for tax-exempt status.”¹⁴⁶ Additionally, “Congress has imposed *special* limitations . . . on how and when the IRS may conduct civil tax inquiries and examinations of churches.”¹⁴⁷ On their face, these unique tax code exemptions both demonstrate systemic preferential treatment by the government for religious institutions and impose unique burdens on all other forms of charitable organizations. Evidence reveals that these unique exemptions result in serious harm to society.¹⁴⁸ The solution, however, does not require that the federal government cease all tax exemptions for churches.¹⁴⁹ Rather, the government only needs to remove the exemptions that are intended to favor religious organizations at the expense of every other type of organization.¹⁵⁰

already-exists/2016/08/05/77706c10-5815-11e6-9aee-8075993d73a2_story.html?utm_term=.610ccde71608 (“[M]ore than 2,000 mainly evangelical Christian clergy have deliberately violated the law since 2008 as a form of protest against it; only one has been audited by the IRS, and none punished, according to the Alliance Defending Freedom . . .”).

146. Robert W. Wood, *Why Churches Are the Gold Standard of Tax-Exempt Organizations*, FORBES (Sept. 22, 2015, 8:40 AM), <https://www.forbes.com/sites/robertwood/2015/09/22/lets-tax-churches/#17bef0a3322b>.

147. IRS, *supra* note 145 (emphasis added). This exemption represents a truly staggering level of inequity between churches and all other 501(c)(3)s because every other tax-exempt organization must adhere to a level of government audit that requires reporting of income and expenses. See Wood, *supra* note 146.

148. See Leonardo Blair, *Growing Fraud Sucks Billions From Churches Annually; This IRS Fix Could Help, Expert Says*, CHRISTIAN POST (Aug. 12, 2018), <https://www.christianpost.com/news/fraud-billions-churches-annually-irs-form-990-226477/> (“Research cited by Brotherhood Mutual Insurance Company, the second largest U.S. provider of property and casualty insurance to Christian churches and related ministries, says reported cases of church financial fraud has been rising by about 6 percent annually and is expected to reach the \$60 billion mark by 2025. The level of reported fraud in churches is dwarfed, however, by the 80 percent of church fraud cases that are estimated to go unreported.”).

149. Neither does it mean that tax exemptions are per se unconstitutional. In fact, one could easily argue that the more separation the better. However, the Court has declared that protected First Amendment industries such as the press do not possess immunity from every tax. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

150. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full

Unfortunately, despite Madison's stated intent, and in the face of the plain language of the Establishment Clause itself,¹⁵¹ some of the most prominent originalists cling to the notion that the Establishment Clause permits the government to grant special favor to religion—even for one religion over another.¹⁵² The view that certain religions “ought to receive encouragement from the State” in the tax code or elsewhere is predicated primarily on the long-standing practices of the states beginning in Madison's time¹⁵³—and in some instances in federal policy such as the Thanksgiving proclamation.¹⁵⁴

Relying on these past practices to justify the currently applicable doctrine of anti-establishment liberty, however, has two glaring problems. First, although an originalist would be correct in pointing out that not every state adopted Madison's original framework and instead blurred the line between church and state, Madison nevertheless successfully implemented his version of anti-establishment liberty at the federal level,¹⁵⁵ and the federal standard remains the only standard applicable to the states today.¹⁵⁶ Second, relying on past practices of government, even the federal government, when such practices conflict with the current “text, structure, and original understanding” of the Constitution, violates the essential principle of judicial oversight.¹⁵⁷

members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”).

151. *See supra* Section III.B.

152. According to these “originalists,” the government can outright “disregard” the beliefs “of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting). Justice Clarence Thomas has even gone so far as to say the Establishment Clause's Incorporation to the states is unconstitutional. *See* Richard F. Duncan, *Justice Thomas and Partial Incorporation of the Establishment Clause: Herein of Structural Limitations, Liberty Interests, and Taking Incorporation Seriously*, 20 REGENT U. L. REV. 37, 44–45 (2007).

153. *See* *Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting).

154. *See supra* note 86.

155. *See supra* Section III.B.

156. *See* Gedicks, *supra* note 23, at 670.

157. *See* *NLRB v. Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring) (“[P]ast practice does not, by itself, create power.’ . . . That is a necessary corollary of the principle that the political branches cannot by agreement alter the constitutional structure. Plainly, then, a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court . . . does not

Most importantly, the value in embracing a more original Madisonian framework has never been greater. This is an unprecedented moment in our nation's history "where for several generations we will have a 'mixed' population, with those who see no need for religion living alongside those for whom religion still plays an important role in their lives. This has never happened before."¹⁵⁸ Continually allowing government to favor religion—or some religions—in the tax code and elsewhere severely weakens constitutional protection against the kind of social unrest the Establishment Clause was intended to prevent.¹⁵⁹

relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding." (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008))). It is undeniable that political pressure forced some Founders to violate the liberties they once enumerated. For example, John Adams abandoned his former free speech principles in order to silence his critics once he obtained the power of the presidency. See CHARLES SLACK, *LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON, AND THE MISFITS WHO SAVED FREE SPEECH* 91 (2015) (Stating Adams' decision to sign the Sedition Acts "rises to the level of tragedy because it represents a stark, personal betrayal of his deepest held beliefs, one of those moments when a great man under pressure contradicts his conscience"). Moreover, when it came to federal policies such as the Thanksgiving proclamation, Madison admitted such a declaration violated his own free conscience standard. James Madison, *Detached Memoranda*, reprinted in JAMES MADISON ON RELIGIOUS LIBERTY 93–94 (Robert Alley ed., 1985).

158. LINDSAY, *supra* note 2, at 16.

159. The dangers are currently being exploited for political purposes at the highest levels of government. See Aliza Nadi & Ken Dilanian, *In Closed-Door Meeting, Trump Told Christian Leaders He Got Rid of a Law. He Didn't*, NBC NEWS (Aug. 28, 2018, 3:00 PM), <https://www.nbcnews.com/politics/elections/trump-told-christian-leaders-he-got-rid-law-he-didn-n904471> ("The level of hatred, the level of anger is unbelievable," [President Trump] said. "Part of it is because of some of the things I've done for you and for me and for my family, but I've done them. . . . This Nov. 6 election is very much a referendum on . . . free speech and the First Amendment." If the GOP loses, [President Trump] said, "[the Democrats] will quickly overturn everything that we've done and they'll do it quickly and violently . . . There's violence."); see also LINDSAY, *supra* note 2, at 26 ("For most of us living in the contemporary developed world, the reasons for these bitter disputes seem absurd. One of the main points of contention between Protestants and Catholics was their disagreement over the significance of the Eucharist, the Christian ceremony commemorating the Last Supper. Catholics insisted that Jesus really is present in sacramental bread after it is consecrated during mass (the bread literally becomes the flesh of Christ), whereas Protestants scoffed at this belief. As one historian has noted, '[a]t this distance in time it may seem strange that so many furies set loose by the Reformation had to do with a wafer of sacramental bread. Nonetheless, this strictly theological dispute caused rage, hatred, executions, and war.'").

B. The Value of Madisonian Prohibitions Against Utilizing Civil Support Mechanisms for Religion

Recent testimony before Congress revealed that over 2,000 federal contracts award direct cash grants to “religious organizations” each year.¹⁶⁰ This has resulted in many religious institutions becoming significantly dependent on federal funds,¹⁶¹ whereby if government programs were cut, “many religious organizations would lose major parts of their operating budgets.”¹⁶² Religious institutions’ dependence on government funding is in part the result of landmark decisions such as *Everson* and *Zelman* that established the principle that government cannot deny public funds to religious organizations.

Restoring a Madisonian standard for religious separation would mean a total ban on the distribution of any public funds to religious organizations. Under this approach, the categorization of a government

160. 162 CONG. REC. H3288–H3290 (daily ed. May 26, 2016), <https://www.congress.gov/114/crec/2016/05/26/CREC-2016-05-26-pt1-PgH3288-2.pdf>; see also Emma Green, *Can Religious Charities Take the Place of Welfare State?*, THE ATLANTIC (Mar. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/03/budget-religion/520605/>.

161. See Edward Queen, *History, Hysteria, and Hype: Government Contracting with Faith-Based Social Service Agencies*, RELIGIONS 11 (Feb. 10, 2017) (“Unsurprisingly, a large percentage of these dollars went to religious social service providers. The magnitude of this can be seen by the fact that by the close of the 20th century the seven largest religious social service agencies were serving over 60 million people annually. For many of these organizations government monies dwarf all other sources of funding. In 2015, 62% of Catholic Charities USA’s funding came from government sources and Lutheran Social Services of America received over 45% of its support from government funding. Even organizations that, for religious or structural reasons, are cautious about accepting government monies still received significant amounts from the government. These include World Vision 19.5%, Habitat for Humanity, 9.8% and the Salvation Army 8.4%.”)

While several studies demonstrate the near-universal fact that religious social-services providers of every size receive significant amounts of governmental monies one example is illustrative. Stephen Monsma in examining government funding of nonprofit agencies found that of 137 child service agencies that identified themselves as religious, 51% reported receiving over 40% of their income from public funds and only 18% reported taking no governmental monies at all.” (footnotes omitted).

162. See Green, *supra* note 160; see also 162 CONG. REC. H3288–H3290 (daily ed. May 26, 2016), <https://www.congress.gov/congressional-record/2016/05/26/house-section/article/H3288-2>.

distribution as indirect, in an effort to reflect a “private choice” of individual citizens, would be insufficient to pass constitutional scrutiny.¹⁶³ This is because the original intent of First Amendment free conscience liberty was to remove government involvement with funding of religion entirely. While this restoration of Madisonian principles would have an immediate effect on the operating budgets of many churches, the value in reinstating original intent and anti-establishment liberty is that it restores individual control of those budgets.

As churches become more operationally dependent on government support, their functions become increasingly viewed as extensions of politics and government rather than spiritual works.¹⁶⁴ Members of our nation’s highest political office describe shifts in the political order as dire threats to religion.¹⁶⁵ These realities demonstrate that without independent operational separation from government, the entire concept of separation logically becomes meaningless and impossible to implement.¹⁶⁶

For the religiously pluralistic Founders, protecting free conscience meant that prohibiting government expansion into unqualified areas such as religion was a desired outcome.¹⁶⁷ The modern break from this Founding intent is still a relatively new phenomenon,¹⁶⁸

163. Madison’s opposition to the assessment bill in Virginia clearly demonstrated this fact. Again, had a “private choice” been an acceptable element Madison would not have opposed the framework in Virginia which sought to allow individuals the autonomy to distribute government assessments to churches. See Madison, *supra* note 16.

164. See *infra* note 172 and accompanying text.

165. See *supra* note 159; see also Michael Novak, *Lose the Story, Lose the Culture*, NAT’L. REV. (July 2, 2016, 8:00 AM), <https://www.nationalreview.com/2016/07/religious-liberty-america-threatened-secularism/> (stating that unless free conscience attaches its meaning to religious belief in a deity, the constitutional “conception of religious freedom collapses of its own weight. With what, then, will secular thinkers replace it? On what basis and how will they construct a theory of liberty of conscience?”).

166. See Feldman, *supra* note 110, at 726 (“Can it seriously be maintained that a law, passed with the full understanding that it would create a broad-based, direct government funding of religion, would not constitute a law ‘respecting an establishment of religion?’”).

167. See *supra* Part II and Section III.B.

168. See *supra* Part II; see also Jeffries, Jr. & Ryan, *supra* note 76, at 281.

meaning a correction may be more familiar than a shock. Most importantly, restoring Madison's vision so that no church is dependent on government support to carry out its beliefs and operations should not be seen as a burden or discriminatory; rather, such restoration should be viewed as essential for religious liberty as it was originally intended. The Founders rightly feared that if government was allowed to fund religion, those in political power would, as they had in the past, begin to feel that they could define which operations are truly religious.¹⁶⁹ A government that possesses no authority to define or meddle in religion represents the best guarantor of religious liberty.

C. The Value of Prohibitions on Laws and Policies That Carry the Effect of Establishing Religion as an Engine of Civil Policy

In the twenty-first century, Congress has claimed “faith-based organizations are often more successful in dealing with difficult societal problems than government and non-sectarian organizations.”¹⁷⁰ However, this claim is ironically used to justify policies increasing government influence over religious organizations.¹⁷¹ In effect, these policies establish churches as the engine of civil policy to combat difficult societal problems.

Additionally, Congress has passed laws that put phrases such as “In God We Trust” on government currency or include “under God” in government pledges of allegiance, thereby creating the demonstrable effect that all civil duty is derived from religious authority instead of

169. See Madison, *supra* note 16, at 82–84.

170. Kathryn Dunn Tenpas, Opinion, *Need Facts to Promote Faith-Based Initiatives*, BROOKINGS (Oct. 8, 2003), <https://www.brookings.edu/opinions/need-facts-to-promote-faith-based-initiatives/>.

171. See Kelly Riddel, *Catholic Church Collects \$1.6 Billion in U.S. Contracts, Grants Since 2012*, WASH. TIMES (Sept. 24, 2015), <https://www.washington-times.com/news/2015/sep/24/catholic-church-collects-16-billion-in-us-contract/> (“The Church and related Catholic charities and schools have collected more than \$1.6 billion since 2012 in U.S. contracts and grants in a far-reaching relationship that spans from school lunches for grammar school students to contracts across the globe to care for the poor and needy at the expense of Uncle Sam, a Washington Times review of federal spending records shows. Former Sen. Daniel Patrick Moynihan of New York once famously noted in 1980 that the government funded 50 percent of Catholic Charities’ budget, commenting ‘private institutions really aren’t private anymore.’”).

the constitutionally enumerated consent of the governed people.¹⁷² Of course, nothing regarding anti-establishment liberty prevents government actors from expressing references to a belief or trust in any religious book, principle, or deity. After all, free speech remains a critical part of the First Amendment.¹⁷³ Accordingly, a member of a legislature could openly state, without invoking any constitutional concerns, that his or her vote or support on a bill came from a direct command from god. However, what First Amendment anti-establishment liberty does require is that the bill itself be derived entirely from civil authority and, in effect, does not encroach on the free conscience of citizens.

Religious freedom under a First Amendment standard is fundamentally based on the principle that the individual alone holds the power to make up his or her own mind about what service to give to religion.¹⁷⁴ The Court understands this principle against coercion well and applies the First Amendment prohibition correctly in other contexts.¹⁷⁵ Yet, the Court in the modern era has been resistant in applying this original intent principle in the anti-establishment liberty context.

172. The existence of such laws has created a logical impression that anti-establishment liberty does not even exist. See Wally White, Letter to the Editor, *Founders Didn't Write Pledge of Allegiance*, NEWS & REC. (July 23, 2018), https://www.greensboro.com/opinion/letters_to_editor/founders-didn-t-write-pledge-of-allegiance/article_ba2a865e-587c-5c73-a271-073a0a8902a4.html (“During Rockingham County’s primary election, religion came up quite a bit. At a meet-and-greet in Ruffin, the Rev. Jerry Carter, the Republican candidate for the N.C. House in District 65, said that the Founding Fathers never intended a separation of church and state. His proof was, ‘If they did, then why did they put “one nation under God” in the Pledge of Allegiance?’ The crowd applauded him, and he sat, smiling. Here’s the problem: Not only did the Founding Fathers not write that phrase into the pledge, they didn’t write the pledge at all.”).

173. See Tyler Broker, *Free Speech Originalism*, 81 ALB. L. REV. 45, 62 (2018).

174. See *supra* Part II.

175. See Tyler Broker, *Religious Liberty Is Under Significant Threat This Term*, ABOVE THE LAW (Nov. 13, 2018, 1:29 PM), <https://abovethelaw.com/2018/11/religious-liberty-is-under-significant-threat-this-term/> (“In *Janus v. AFSCME*, the Court held the state of Illinois could not extract agency fees from nonconsenting public-sector employees. In issuing its opinion in *Janus*, the Court stated: ‘Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends. When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free

VII. CONCLUSION

*“The Constitution is not a living organism, it is a legal document. It says something, and doesn’t say other things.”*¹⁷⁶

Just as many today believe in the importance of a broad separation of church and state,¹⁷⁷ so too did many in the founding generation.¹⁷⁸ While the divide over religion may appear stark at times,¹⁷⁹

and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence.’ In fact, the famous phrase the Court relies on in the *Janus* case, ‘to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical,’ comes from Thomas Jefferson’s preamble to the Virginia Statute for Religious Liberty. It is astounding to think the Court could utilize religious liberty protections against coercion to prevent a state from compelling public-sector union speech, yet find it completely acceptable for a state to extract money from citizens to compel large and expensive religious monuments. Such a result is to make a mockery of our Constitutional religious liberty principles and I hope the Court does not reach it.”).

176. Garrett Epps, *Constitutional Myth #1: The Right is ‘Originalist,’ Everyone Else is ‘Idiotic,’* THE ATLANTIC (May 25, 2011), <https://www.theatlantic.com/national/archive/2011/05/constitutional-myth-1-the-right-is-originalist-everyone-else-is-idiotic/239291/>.

177. See Gregory A. Smith, *Most Americans Oppose Churches Choosing Sides During in Elections*, PEW RES. CTR. (Feb. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/02/03/most-americans-oppose-churches-choosing-sides-in-elections/> (“Even among the religious groups that are most in favor of church endorsements of candidates—black Protestants and white evangelicals—just 45% of the former and 37% of the latter say it’s OK for churches to endorse political candidates. And support is lower still among Catholics (28%), the religiously unaffiliated (26%) and white mainline Protestants (21%).”).

178. See *supra* Section III.A.

179. See David French, *What Democrats Don’t Get About the South*, TIME (July 26, 2018), <http://time.com/5349531/democrats-dont-get-the-south/> (“The South is America’s most churchgoing region. How is it possibly going to connect with a Democratic Party dominated by a secular, progressive elite?”).

recent data demonstrates that, as a whole, the country is steadily moving away from such exclusionary concepts of American identity.¹⁸⁰ The danger to social harmony, where it exists, comes from attempts by modern courts to renegotiate the boundaries of original First Amendment separation between church and state. This renegotiation can only fracture the intended unity of free conscience the Founders sought to establish.¹⁸¹

Over the course of several decades, the Court has chipped away at Madisonian principles of anti-establishment liberty to the point where Madison's original framework holds little, if any, doctrinal influence.¹⁸² If the deterioration of this basic liberty continues, other constitutional liberties may be open to similar restructuring.

Adjusting course back to the Founders' idea of anti-establishment liberty requires abandoning the modern doctrine established in *Everson* and reinstating the original First Amendment prohibitions on government involvement in religious affairs.¹⁸³ The value in doing so is arguably more apparent today than it was at the Founding.¹⁸⁴ Restoring Madison's vision will require significant legal victories; however, it will also entail correcting the hearts and minds of millions of American citizens (and members of the Court) who have come to see Madison's vision of separation not as an ultimate protection of religious liberty but as an attack on religion itself.

180. See Lynn Vavreck, *The Great Political Divide Over American Identity*, N.Y. TIMES: UPSHOT (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/upshot/the-great-political-divide-over-american-identity.html> ("In 2004 . . . 64 percent of the population thought being Christian was important to being an American. This was up 10 points from the 53 percent who thought so in 1996, an increase most likely caused by the Sept. 11, 2001, terrorist attacks. But a decade later (in 2014), the number of people who thought being Christian was important to American identity had not only gone back to where it was in 1996 but had also dropped further—nearly 10 more points—down to 44 percent on average. In the Democracy Fund study of voters in 2016, the average was 39 percent.").

181. As Justice Sandra Day O'Connor famously observed: "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

182. See *supra* Part V.

183. See *supra* Part V.

184. See *supra* Part VI.