# THOMAS JEFFERSON'S RETROSPECTIVE ON THE ESTABLISHMENT CLAUSE

DOUGLAS G. SMITH*

As the Supreme Court continues to reexamine its jurisprudence concerning the proper relationship between church and state,[1] scholars recently have taken a new look at the historical foundations of the Establishment Clause. In particular, more than one recent work has focused on the historical origins of the view that the First Amendment was designed to create a "wall of separation" between religion and government.[2] Daniel Dreisbach's book, *Thomas Jefferson and the Wall of Separation between Church and State* is a valuable contribution to that debate.[3]

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* Partner, Kirkland & Ellis, Chicago, IL.; J.D., Northwestern University School of Law; M.B.A., The University of Chicago; B.S./B.A., State University of New York at Buffalo. The views expressed in this article are solely those of the author and do not necessarily reflect those of Kirkland & Ellis or its clients.

1. *See, e.g.*, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Mitchell v. Helms, 530 U.S. 793 (2000); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

2. *See, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693 (1997); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995); Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453 (2000); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663 (2001); J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 BYU L. REV. 755.

3. DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002) [hereinafter DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION]. Professor Dreisbach has written several articles on religion and government. *See, e.g.*, Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223 (2000) [hereinafter Dreisbach, *A Lively and Fair Experiment*]; Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927 (1996) [hereinafter Dreisbach, *In Search of a Christian Commonwealth*]; Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of*

Professor Dreisbach focuses on Thomas Jefferson's famous pronouncements concerning the "wall of separation," which have been the foundation for much of the Supreme Court's twentieth-century jurisprudence in this area. Dreisbach maintains that the traditional interpretation of Jefferson's statements in his 1802 letter to the Danbury Baptist Association regarding the "separation" between church and state is flawed. According to Dreisbach, Jefferson was merely attempting to convey his view that there was a wall of separation between the *federal* government and religion. Under the Constitution, the federal government was delegated certain enumerated powers—the power to regulate in areas involving religious matters not being among them. However, according to Dreisbach, Jefferson did not contemplate any such separation between the various state governments and religion. Indeed, the separation principle, as Dreisbach notes, was understood by Jefferson to preclude the federal government from preempting the state governments' authority in matters of religion.

In bringing together a body of evidence regarding Jefferson's views, Dreisbach provides a valuable service in attempting to reconcile Jefferson's pronouncements with the prevailing views of the time. Commentators such as Philip Hamburger have recently suggested that Jefferson's statements regarding "separation" were out of step with contemporaneous understandings. Professor Dreisbach, however, takes the argument one step further, maintaining that the historical evidence suggests that Jefferson did not actually believe that the Establishment Clause set up any sort of rigid separation between religion and government. Rather, according to Dreisbach, Jefferson understood the separation principle to be based in federalism: "In short, the 'wall' Jefferson erected in the Danbury letter was between the federal government on one side and church authorities and state governments on the other."[4]

This review evaluates the evidence put forth by Dreisbach concerning Jefferson's views on the proper relationship between religion and government. Part I provides a brief overview of Dreisbach's work. Part II then discusses the relevance of Jefferson's views in the constitutional debate over the Establishment Clause. There are a variety of reasons one may properly conclude that

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*Church-State Relations*, 69 N.C. L. REV. 159 (1990); Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 CONST. COMMENT. 627 (1999).

4. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 68.

Jefferson's views are of only limited relevance in determining the original meaning of the establishment provision. First, Jefferson's statements were all made years after ratification of the First Amendment. Second, the "separation" metaphor bears little relationship to the constitutional text, which forbids Congress from making any law "respecting an establishment of religion." Third, the separation metaphor, while attractive on its face, has not proven particularly useful in deciding actual cases. Fourth, given Professor Dreisbach's conclusion that even Jefferson viewed the First Amendment's prohibition as a federalism norm, his views are of only limited value in determining whether or to what extent the ratifiers of the Fourteenth Amendment decades later intended to impose upon the state governments some sort of restriction regarding the intermixture of religion and government. Finally, after considering these issues, Part III offers a brief conclusion.

## I. THOMAS JEFFERSON'S RETROSPECTIVE

As Professor Dreisbach observes,[5] beginning with its 1947 decision in *Everson v. Board of Education*, the Supreme Court relied heavily on the views expressed by Thomas Jefferson as a basis for its conclusion that the Establishment Clause was intended to erect a rigid wall of separation between religion and government.[6] In particular, the Court has frequently cited Jefferson's 1802 letter to the Danbury Baptist Association in which he indicated that the American people,

5. *Id.* at 2 (observing that "the graphic phrase 'wall of separation between church and state' . . . for more than a century has profoundly influenced church-state law, policy, and discourse"); *id.* at 102 ("[Jefferson's] Danbury letter was cited frequently and favorably in the cases that followed *Everson*."); *see also* Dreisbach, *A Lively and Fair Experiment*, *supra* note 3, at 224 (observing that in *Everson* there was "lavish use of strict separationist rhetoric in both the majority and minority opinions").

6. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"); Lee v. Weisman, 505 U.S. 577, 599-600 n.1 (1992) (Blackmun, J., concurring) (observing that the Court had "accepted Thomas Jefferson's letter to the Danbury Baptist Association 'almost as an authoritative declaration of the scope and effect' of the First Amendment" (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879))); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1172 (1988) ("The dominant theme of the Supreme Court's establishment clause doctrine is the separationist philosophy that the Court first embraced in *Everson*."); Wallace, *supra* note 2, at 767 (observing that "[t]he Supreme Court has heavily relied on Jefferson's writings concerning church-state matters, especially his statement that the Establishment Clause erected 'a wall of separation between church and State'"). *But see* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.").

in ratifying the Establishment Clause, were "building a wall of separation between Church & State."[7]

In fact, the Court's reliance on Jefferson's views is so extensive that his pronouncements have become "a virtual rule of constitutional law."[8] The Court has assumed not only that Jefferson's views have some relevance to the proper interpretation of the First Amendment, but also that Jefferson's statements regarding "separation" of church and state connoted a rigid barrier between government and religion.

The results of this reliance have been profound. In case after case, the Court has struck down various practices of the state governments that it has concluded evince a prohibited "entanglement" between religion and government.[9] While the boundaries of the prohibition have frequently shifted during the last fifty years, the framework the Court has used in analyzing such questions has been built on the separation metaphor.

In examining the origins of the separation principle in Jefferson's writings, Dreisbach states that his purpose, in part, is to present a "sourcebook for jurists and scholars who use Jefferson's metaphor."[10] In the process, Professor Dreisbach outlines his own theory regarding Jefferson's views concerning the Establishment Clause. In putting Jefferson's letter to the Danbury Baptist Association in historical context, Dreisbach observes that then-President Jefferson sought to "explain his reasons for refusing to issue presidential proclamations of days for public fasting and thanksgiving."[11] The response to the Baptists' letter provided a useful opportunity for doing so and at the

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7. Letter from Thomas Jefferson to Danbury Baptist Assoc. (Jan. 1, 1802), *reprinted in* DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 148.

8. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 3; *see also id.* at 17 ("The celebrated 'wall of separation' metaphor, conceived by Jefferson in 1802, would, in the course of time, be accepted by many Americans as an authoritative expression of the First Amendment and adopted by courts as a virtual rule of constitutional law.").

9. *See, e.g.*, *Weisman*, 505 U.S. at 584-85 ("[T]o satisfy the Establishment Clause a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion."); Agostini v. Felton, 521 U.S. 203, 232 (1997) (determining whether there is a prohibited "entanglement" between religion and government involves looking "to 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority'" (quoting *Lemon*, 403 U.S. at 615)). *But see id.* at 233 (observing that "[n]ot all entanglements . . . have the effect of advancing or inhibiting religion. . . . Entanglement must be 'excessive' before it runs afoul of the Establishment Clause").

10. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 6.

11. *Id.* at 2.

same time allowed Jefferson to put at ease the concerns of the "[m]any pious citizens" who "lamented his abandonment of this venerable tradition."[12]

Dreisbach claims that Jefferson's comments regarding the separation of church and state were based on notions of federalism.[13] In coming to this conclusion, Dreisbach relies on certain language in Jefferson's letter that seems to support this view. In his rather brief response to the Danbury Baptist Association, Jefferson described the Establishment Clause as arising from the "act of the whole American people which declared that *their* legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."[14] Thus, the text of Jefferson's letter references only the federal government and the federal legislature, in particular, making his statements regarding a "wall of separation" potentially limited in scope.

At the same time, however, other language in Jefferson's letter could be construed to suggest that his words were not so limited. Jefferson prefaced his comments regarding a "wall" of separation by stating that "religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, [and] that the legitimate powers of government reach actions only, & not opinions."[15] If one takes Jefferson at his word that the "legitimate powers of government" should not extend to matters of religious opinion, then neither the states nor the federal government should be legislating in matters of religion. Nonetheless, the only explicit textual reference Jefferson cites is the First Amendment's prohibition, which he firmly ties to congressional legislation. Moreover, Jefferson's words could be construed as merely laying out as a foundation a prescriptive principle that *should* be followed in setting up a government—one that Jefferson believed was textually embodied in the Constitution and applied to Congress, but one that might not necessarily be applied to the various state governments in their own constitutions.[16]

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12. *Id.* at 21.

13. *Id.* at 50 ("Both Jefferson and the Baptists understood that, as a matter of federalism, the nation's chief executive could not disturb church-state relationships and policies that concerned religious liberty in the respective states.").

14. Jefferson, *supra* note 7, at 148.

15. *Id.*

16. Jefferson's reference to his desire to "restore to man all his natural rights," *id.*, may further support this reading given that Jefferson may have viewed the "wall" of separation

However, Professor Dreisbach does not rely solely upon the language of a single letter. In support of his reading of Jefferson's views, Dreisbach compiles evidence from, among other things, Jefferson's contemporaneous writings, in which he more clearly expressed the view that the federal government in particular had no power over matters of religion.[17] Moreover, Dreisbach cites evidence that he claims shows that, in contrast, Jefferson viewed the state governments as having such powers[18]—making the "separation" described by Jefferson in part a matter of the proper division of authority between the federal and state governments.[19]

Similarly, Dreisbach claims that "[a] careful review of Jefferson's actions throughout his public career suggests that he believed, as a matter of federalism, that the national government had no jurisdiction in religious matters, whereas state governments were authorized to accommodate and even prescribe religious exercises."[20] Accordingly, through both words and deeds Jefferson seemed to recognize that the state governments could properly have some role in religious matters.

Based on this historical analysis, Dreisbach concludes that Jefferson's "wall" of separation differs both in "function and location" from the "'high and impregnable' barrier erected in 1947 by Justice Hugo L. Black and his judicial brethren in *Everson v. Board of Education.*"[21] As Professor Dreisbach explains:

> Whereas Jefferson's "wall" explicitly separated the institutions of

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as a natural right that may or may not have been embodied in the constitutional framework of the various state governments.

17. For example, Dreisbach cites an 1808 letter from Jefferson to Samuel Miller in which Jefferson states that the federal government has not been delegated any authority over religion. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 55, 64 ("In his letter to Samuel Miller, as in the Kentucky Resolutions, Jefferson tied together the First and Tenth Amendments to explain his reasons, rooted in the principles of federalism and strictly delegated powers, for refusing to designate a day for religious observance."); *see also id.* at 65 (contending that "[a]dditional confirmation that the 'wall of separation' was erected between religious establishments (i.e., church) and the federal regime is found in Jefferson's second inaugural address, delivered in March 1805").

18. Dreisbach points to a manuscript of a proposed bill sponsored by James Madison that was "endorsed" by Jefferson, which would have "authorized Virginia's chief executive to designate days in the public calendar for fasting and thanksgiving"—a power that Jefferson refused to exercise in his role as the nation's chief executive. *See id.* at 59. According to Dreisbach, "Jefferson saw no inconsistency in authorizing a religious proclamation as a state official and refusing to release a similar proclamation as the federal chief executive." *Id.* at 60.

19. *See id.* at 60 (observing that Jefferson's statements "had less to do with the separation between church and all civil government than with the separation between the federal and state governments").

20. *Id.* at 59-60.

21. *Id.* at 125.

> church and state, Black's wall, more expansively, separates religion and all civil government. Moreover, Jefferson's "wall" separated church and the federal government only. By incorporating the First Amendment nonestablishment provision into the due process clause of the Fourteenth Amendment, Black's wall separates religion and civil government at all levels—federal, state, and local.[22]

Thus, Dreisbach's historical analysis provides a powerful critique of the Court's current interpretation of, and reliance upon, Jefferson's views as expressed in his letter to the Danbury Baptist Association.

Moreover, Dreisbach makes a claim that goes somewhat beyond recent scholarship. The traditional view is that Jefferson envisioned some sort of rigid separation between government and religion. Even commentators who have recently questioned the Court's historical analysis concerning the original meaning of the Establishment Clause argue only that Jefferson's views were out of step with those of the time, and more importantly did not represent those of the individuals responsible for drafting or ratifying the First Amendment.

For example, in his recent book, *Separation of Church and State,* after reviewing the historical record, Philip Hamburger observes that the separationist position adopted by Thomas Jefferson and others arose only after the provisions regarding religious establishment were added to the Constitution:

> In the opening years of the nineteenth century, some Republicans, including eventually Thomas Jefferson, began to advocate versions of separation. In so doing, they intimated for the first time that the religious liberty protected by American constitutions should be understood as a separation between religion and government or, at least, between church and state.[23]

Thus, the separationist interpretation was foreign to those responsible for drafting and ratifying that provision. Indeed, Professor Hamburger argues that even when Jefferson expressed such views during the nineteenth century, they represented a decidedly minority position.[24] As he observes, "[a]lmost none of the dissenters who

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22. *Id.*

23. HAMBURGER, *supra* note 2, at 109.

24. *See id.* at 162 (contending that at the time Jefferson expressed such views, they were not "widely published or even noticed"); DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 67 ("By taking the position that thanksgiving day proclamations by the federal chief executive offended the First Amendment, Jefferson adopted a more extreme view than the First Federal Congress and his two presidential predecessors. Indeed, his views on this matter were outside the mainstream."). *But see id.* at 27 ("If the past was a reliable guide, Jefferson knew that whatever he wrote to the

struggled for their liberty from religious establishments revealed any desire for a separation of church and state or for a separation of religion and government."[25] Rather, those who objected to the established state religions objected primarily to religious discrimination. When states established churches, citizens were forced to support religions other than their own through tax assessments, and clergy of non-established churches often experienced certain disabilities.[26] More fundamentally, the consensus at the time was that religion was "a necessary basis of the morality required for government."[27] Accordingly, Professor Hamburger concludes that "the constitutional authority for separation is without

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Danbury Baptists would soon be widely publicized and, in all likelihood, reprinted in Baptist and partisan organs throughout the country.").In fact, Professor Hamburger concludes that even Jefferson did not "directly advocate separation" in statements that he made after he wrote his letter to the Danbury Baptist Association. *See* HAMBURGER, *supra* note 2, at 181 ("After writing to the Danbury Baptist Association in 1802, Jefferson himself apparently did not again directly advocate separation. He continued to denounce the union of church and state, but he seems not to have expressly urged separation.").

25. HAMBURGER, *supra* note 2, at 19; *see also id.* at 13 ("[T]he dissenters who campaigned for constitutional barriers to any government establishment of religion had no desire more generally to prevent contact between religion and government."); *id.* at 9 ("[I]t is misleading to understand either eighteenth-century religious liberty or the First Amendment in terms of separation of church and state . . . ."); DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 52 ("Although no friend of religious establishments, many evangelical dissenters resisted efforts to inhibit religion's ability to influence public life and culture, to deprive religious leaders of the civil liberty to participate in politics armed with political opinions informed by religious values, and to restrain the freedom of churches to define and advance their own mission and ministries, whether spiritual, social, or civic."); Wallace, *supra* note 2, at 756 (observing that "nowhere in the Constitution are the words 'separation of church and state' to be found").

26. Professor Dreisbach describes the religious discrimination in Connecticut around the time that Jefferson wrote his letter as follows:

> Congregationalists enjoyed many privileges, and dissenters suffered many disabilities, both social and legal, under this regime. Most important, all citizens, Congregationalists and dissenters alike, had to pay taxes for the support of the established church on Sunday or to observe public fasts and thanksgivings, and positions of influence in public life were reserved for Congregationalists. Dissenters were often denied access to meetinghouses, their clergy were not authorized to perform marriages, and dissenting itinerant preachers faced numerous restrictions and harassment by public officials.

DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 32-33; *see also* Dreisbach, *In Search of a Christian Commonwealth*, *supra* note 3, at 960 ("Many states had exclusive religious establishments or settlements, and it was generally conceded that the federal government could not displace those arrangements."); Lash, *supra* note 2, at 1086 ("[A]t the time of the Founding, the vast majority of state governments supported and encouraged religious exercise in one form or another."); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 320 (1986) ("Many states maintained established churches at the time they ratified the first amendment and '[a]lmost every colony exacted some kind of tax for church support.'" (quoting *Everson*, 330 U.S. at 10 n.8)).

27. HAMBURGER, *supra* note 2, at 67.

historical foundation."[28]

If Professor Dreisbach's historical analysis were correct, it would bring Jefferson's views more closely in line with those responsible for drafting and ratifying the First Amendment.[29] A number of commentators in recent years have concluded, after reviewing materials from the Founding period, that the Establishment Clause was designed to be primarily a "jurisdictional" provision.[30] For example, Steven Smith has concluded that "[t]he religion clauses were understood as a federalist measure, not as the enactment of any substantive principle of religious freedom."[31] Similarly, Kurt Lash has noted that the wording of the First Amendment "simultaneously forbids the federal government from establishing a religion at the federal level, or attempting to *disestablish* religion at the state level."[32] If such views are correct, the Establishment Clause may well have been designed to *protect* the established state religions from federal interference.[33] While Jefferson's statements regarding "separation" are often viewed as being at odds with this original meaning, Dreisbach's novel analysis of Jefferson's views may

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28. *Id.* at 481.

29. *Cf.* Dreisbach & Whaley, *supra* note 3, at 652 (claiming that "Jefferson embraced th[e] jurisdictional view, which was virtually unchallenged in the founding era").

30. *See, e.g.*, MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); SMITH, *supra* note 2, at 17-18 (arguing that the "religion clauses were purely jurisdictional in nature; they did not adopt any substantive right or principle of religious freedom" and that "[t]he religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism"); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371 (1954).

Dreisbach, himself, has expressed this view as well. *See, e.g.*, Dreisbach & Whaley, *supra* note 3, at 650 ("In short, ratification of the Constitution in 1788 and the Bill of Rights in 1791 had no immediate legal effect on church-state arrangements in the states and altered nothing in matters regarding federal involvement with religion. They merely made explicit the jurisdictional policies that were already implicit in the constitutional order."); Dreisbach, *In Search of a Christian Commonwealth*, *supra* note 3, at 954 ("[T]he religion clauses affirmed state jurisdiction over religious matters.").

31. SMITH, *supra* note 2, at 30.

32. Lash, *supra* note 2, at 1091.

33. *See* Dreisbach & Whaley, *supra* note 3, at 651 ("'Odd as it may seem today, the First Amendment was not only a guarantee to the individual that Congress could not establish a national religion, but also a guarantee to the states that they were free to determine the meaning of religious establishment within their jurisdictions, and to newly establish, maintain, or disestablish religion as they saw fit.'" (quoting James McClellan, *The Making and the Unmaking of the Establishment Clause*, *in* A BLUEPRINT FOR JUDICIAL REFORM 295, 314-15 (Patrick B. McGuigan & Randall R. Rader eds. 1981))); Paulsen, *supra* note 26, at 317 ("The original intention behind the establishment clause . . . seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion.").

provide a basis for reconciling the two positions.

## II. THE RELEVANCE OF JEFFERSON'S VIEWS

Nonetheless, despite Professor Dreisbach's thorough historical inquiry, the relevance of Jefferson's views in interpreting the Establishment Clause must be called into question for a number of reasons. First, as several commentators have noted, Jefferson's views are clearly a *post hoc* gloss on the constitutional text by an individual who did not actively participate in the drafting or ratification of the relevant provision.[34] As Judge Wallace has observed, Jefferson's "'wall of separation' comment was made in a letter fourteen years after the First Congress passed the First Amendment—hardly contemporary with the adoption of the First Amendment."[35]

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34. As Professor Dreisbach observes, "The First Congress debated the content of a provision, which came to be known as the First Amendment, in the summer of 1789 and approved the final text in September; Jefferson returned to American shores in November 1789. Thus, his influence on the actual text of the First Amendment was at most indirect." DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 98-99; *cf.* Dreisbach, *A Lively and Fair Experiment*, *supra* note 3, at 237 ("*Everson*'s critics allege that the Court perpetuated a profoundly flawed version of history in order to buttress its strict separationist predilections."); Lash, *supra* note 2, at 1085 (observing that the Court in *Everson* relied on "citations to James Madison and Thomas Jefferson, not the members of the Thirty-ninth Congress").

35. Wallace, *supra* note 2, at 767; *cf.* DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 5 (questioning whether it is "appropriate, as a matter of constitutional law, for a metaphor from a presidential missive to supplement or supplant constitutional text"). As Professor Dreisbach observes: "Constitutional text, it is argued, should not be supplanted by a phrase from a private letter written by a man who was a member of neither the Constitutional Convention nor the First Federal Congress, which framed the First Amendment, and whose influence on the framing of the First Amendment was at most indirect." *Id.* at 124.

Further undercutting the trustworthiness of Jefferson's statements, Professor Hamburger presents evidence that they were "a rather less elevated attempt to deter Federalist clergymen from exercising their freedom of religion and speech" by supporting political candidates opposing Jefferson's Republican party. HAMBURGER, *supra* note 2, at 111 ("The idea so frequently portrayed as one of Jefferson's profound contributions to American liberty was introduced into the presidential campaign of 1800 by leading Republican intellectuals as a means with which they hoped simultaneously to attract antiestablishment votes and to browbeat Federalist clergy for preaching about politics."). Professor Dreisbach discusses similar documentation:

> Drawing on the recently revealed text of a preliminary draft of the Danbury letter, James H. Hutson, at the Library of Congress, similarly has argued that the Danbury letter served both to soothe Jefferson's allies and to frustrate his enemies. It was a political statement written to reassure Jefferson's Baptist constituents in New England of his continuing commitment to their religious rights and to strike back at the Federalist-Congregationalist establishment in Connecticut for shamelessly vilifying him as an "infidel" and an "atheist" in the rancorous presidential campaign.

DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 29 (footnote omitted).

Second, Jefferson's "separation" language bears little relationship to the language of the First Amendment.[36] The Establishment Clause nowhere mentions a "separation" between church and state. Rather, it relates only to religious "establishments" and merely prohibits Congress from making any law "respecting" the establishment of religion.[37] Accordingly, there is little reason to believe that Jefferson's gloss on the text is an accurate reflection of the meaning originally attributed to the establishment provision by either the drafters or those responsible for ratifying the First Amendment.

Third, the "separation" principle has not proven particularly useful in deciding actual disputes. As Professor Dreisbach observes, "[c]ritics complain that the 'wall' provides little practical guidance for the application of First Amendment principles to real world church-state controversies, short of recommending a policy of absolute separation."[38] This is not particularly surprising given that the principle is based on a single, brief letter, which did not contain much in the way of elaboration concerning the exact contours of the doctrine.

Fourth, if Professor Dreisbach is correct in asserting that Jefferson viewed the Establishment Clause as being based in federalism, one must ask whether his views are relevant given the subsequent ratification of the Fourteenth Amendment.[39] In *Everson*, the Supreme

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36. *See, e.g.*, DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 52 ("Whereas the First Amendment forbids certain laws and, in this way, limits civil government, Philip Hamburger has observed, the phrase made famous by Jefferson seems to require that church and state stay apart and thus, apparently, limits not only civil government but also religious organizations."); *see also* Dreisbach, *A Lively and Fair Experiment*, *supra* note 3, at 231 (observing that "[c]onventional and common sense rules of interpretation suggest that the interpretation of a constitutional provision begin with an examination of, first, the text and, second, the deliberations of the body that drafted and adopted it"); Conkle, *supra* note 6, at 1142 ("The language of the fourteenth amendment, coupled with the federalistic motivation for the establishment clause, make it exceedingly difficult to argue that the framers and ratifiers of the fourteenth amendment intended to incorporate the establishment clause for application against the states."); M.G. "Pat" Robertson, *Squeezing Religion Out of the Public Square—The Supreme Court, Lemon, and the Myth of the Secular Society*, 4 WM. & MARY BILL RTS. J. 223, 258 (1995) ("*Everson's* secular imperative is not a natural reading of the Establishment Clause's language. The First Amendment nowhere mentions 'separation' or 'walls' or 'fences' or anything else of the sort.").

37. *See* U.S. CONST. amend. I.

38. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 124 ("In short, the 'wall' is incapable of providing specific, practical guidelines that can be implemented in difficult disputes that require a delicate balancing of competing constitutional values, such as freedom of speech, association, religious exercise, and the nonestablishment of religion.").

39. As Michael Paulsen has observed:

> [T]o the extent the Framers drafted the establishment clause to address concerns

Court ruled that the Fourteenth Amendment incorporated the First Amendment's establishment prohibition, making it applicable to the state governments. However, the Fourteenth Amendment itself makes no mention of the First Amendment, or even religion. Thus, on its face, it is difficult to see how the Fourteenth Amendment incorporated the anti-establishment principle, making it applicable to the states. And, even if it did incorporate such a principle, the ratifiers' understanding of that principle during the mid-nineteenth century may have differed significantly from that of the ratifiers of the First Amendment.

Nonetheless, the Fourteenth Amendment could have been intended to embody a broader anti-establishment norm or to extend some form of the anti-establishment principle to the state governments.[40] After all, by the time the amendment was ratified, the state establishments had faded. Accordingly, those responsible for ratifying the Fourteenth Amendment likely would have had little objection to enacting greater restrictions on the state governments regarding their activities in the area of religion.[41]

However, a number of recent commentators examining the history of the Fourteenth Amendment have concluded that, even if the Fourteenth Amendment was designed to "incorporate" or apply certain Bill of Rights guarantees to the states, guarantees sounding in federalism rather than individual rights likely were not subject to

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> of federalism, it makes no more sense to "incorporate" it against the states than it does to incorporate the other provisions in the Bill of Rights which are federalism-oriented. . . . Undaunted, the Supreme Court forced a square historical peg into a round doctrinal hole by filing off a few of the more inconvenient sharp edges of history. The revisionist version emerged as law in the leading case of *Everson v. Board of Education*.

Paulsen, *supra* note 26, at 317-18 (footnote omitted); *see also* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 844 (1986) ("While the evidence of the nonapplicability of the first amendment to the states is clear and convincing as far as the intent of the authors and ratifiers of the first amendment is concerned, that intent alone does not answer the question whether the religion clauses, any more than the speech and press clauses, should be treated today solely as restraints on the national government. Modern learning and precedents demonstrate that these provisions of the first amendment have been held applicable to the states through the fourteenth amendment.").

40. *See, e.g.*, Lash, *supra* note 2, at 1154 (arguing that "[b]y 1868, the (Non)Establishment Clause was understood to be a liberty as fully capable of incorporation [under the Fourteenth Amendment] as any other provision in the first eight amendments to the Constitution").

41. However, it is noteworthy that subsequent efforts to amend the Constitution to impose constraints on the states' ability to support religion, such as the Blaine Amendment, were defeated. *See* HAMBURGER, *supra* note 2, at 298 (discussing the Blaine Amendment); Conkle, *supra* note 6, at 1138-39 (same); Lash, *supra* note 2, at 1144-51 (same).

incorporation.[42] Thus, if one accepts Jefferson's views as relevant in interpreting the First Amendment, Professor Dreisbach's conclusion that Jefferson viewed the Establishment Clause as a primarily federalism-based provision would mean that the clause would not have been incorporated by the Fourteenth Amendment and made applicable to the state governments.

Professor Dreisbach hints at this conundrum at the end of his work. He concludes that "[b]y extending its prohibitions to state and local jurisdictions, [Justice] Black [in the *Everson* decision] turned the First Amendment, as ratified in 1791, on its head. Incorporation, in short, destroyed a vital purpose for which the First Amendment (and Jefferson's 'wall') had been written."[43] If the Fourteenth Amendment were viewed by the drafters and ratifiers of that provision as rendering such a change, then Justice Black's ruling in *Everson* would rest on a solid foundation. Nonetheless, at a minimum, the explicit rationale expressed in the opinion must be called into question given that it ironically is based on the views of a man—Jefferson—who, if Professor Dreisbach is correct, viewed the Establishment Clause as a federalism-based provision that was actually designed to *protect* the state establishments.

In the end, one must look to the contemporaneous understanding of the ratifiers to determine the original meaning of the Fourteenth Amendment. Thus, Jefferson's views, expressed decades earlier, would be almost entirely irrelevant in interpreting the effect of an amendment that was enacted much later. Only insofar as the ratifiers of the Fourteenth Amendment looked to Jefferson's views about church-state relations and sought to embody them in the text would they have some relevance. Yet, the text of the Fourteenth Amendment makes no mention of "separation" of church and state (or religion for that matter). Moreover, there is little or no evidence that Jefferson's

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42. *See, e.g.*, AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 221 (1998) (in determining whether a provision of the Bill of Rights is incorporated by the Fourteenth Amendment, "we must ask whether it is a personal privilege—that is, a private right—of individual citizens, rather than a right of states or the public at large"); Conkle, *supra* note 6, at 1137 ("[T]he framers and ratifiers of the fourteenth amendment, whatever their intentions with respect to the Bill of Rights generally . . . did not intend to incorporate *the establishment clause* for application to the states."); Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469, 508 n.257 (1993) ("There is less than a scintilla of evidence indicating that the Thirty-Ninth Congress intended to limit the state government's power to establish religion.").

43. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION, *supra* note 3, at 125-26.

views held any sway over those responsible for drafting or ratifying the amendment. Indeed, as Professor Dreisbach observes, it was only later, during the twentieth century, that Jefferson's views regarding church-state relationships attained any significance. Accordingly, Jefferson's opinions should at best be subsidiary in determining what, if any, application the non-establishment norm has to the state governments by way of the Fourteenth Amendment.

Nonetheless, even if all of these points are valid, Jefferson's views have some relevance in one respect: As noted above,[44] they form an integral part of the Court's current Establishment Clause jurisprudence. As Professor Dreisbach has observed, in *Everson*, "[t]he Court contended that its separationist construction of the First Amendment was rooted in its reading of history."[45] Whether correctly or not, the Court has latched on to Jefferson's statements as useful rhetoric in its Establishment Clause cases. Accordingly, a careful exposition of Jefferson's statements regarding separation has relevance, if for nothing else, in evaluating the Court's historical conclusions.

## III. CONCLUSION

*Thomas Jefferson and the Wall of Separation Between Church and State* makes a valuable contribution to our understanding concerning Jefferson's views regarding government and religion. Insofar as those views have become central to the Court's decision-making in this area, Professor Dreisbach's work is sure to have some impact in evaluating the Court's past and future decisions. Yet, his discussion of the history surrounding Jefferson's now-famous statements raises several questions concerning whether those views are relevant at all in interpreting the Establishment Clause.

There are many reasons to question the Court's reliance on Jefferson's statements. They were made after ratification of the Establishment Clause by an individual who was not involved in drafting that provision, and therefore are of dubious significance. Furthermore, they were made decades before the Fourteenth Amendment was ratified, making them of limited relevance in determining whether and to what extent the anti-establishment norm was made applicable to the states. Moreover, if Professor Dreisbach's thesis is correct and Jefferson did, in fact, hold a more conventional

44. *See supra* notes 5-7 and accompanying text.

45. Dreisbach, *A Lively and Fair Experiment*, *supra* note 3, at 224.

view of the clause as a federalism-based or jurisdictional provision, then it is unclear what Jefferson has to add to the more relevant contemporaneous materials surrounding the clause's drafting and ratification. Similarly, if this interpretation of Jefferson's views is correct, then the relevance of his views in determining what restrictions, if any, have been placed on the state governments through the Fourteenth Amendment recedes in significance. Rather, if certain recent interpretations of the Fourteenth Amendment have any credence, Jefferson's interpretation may merely reinforce the view that no anti-establishment norm was applied against the states. Thus, by thoroughly analyzing Jefferson's views, Professor Dreisbach may have succeeded in further demonstrating their irrelevance in interpreting the constitutional provisions regarding religion and government.