EVERSON MUST FALL

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I. INTRODUCTION

In June 2022, in *Dobbs v. Jackson Women's Health Organization*,[1] the Supreme Court overturned *Roe v. Wade*, the infamous 1973 decision that purported to discover a right to an abortion in the text of the Constitution.[2] It was a remarkable achievement. For decades, conservative lawyers, scholars, clergymen, and activists had devoted overwhelming attention to ending the Supreme Court-mandated abortion regime established under *Roe*. This almost obsessive focus on overturning *Roe* was largely a reflection of the uniquely odious character of the American "abortion on demand" regime, which had turned abortion into a pillar of America's culture of sexual license and a kind of sacrament of post-War liberalism.

But the *Dobbs* decision is likely to be regarded as a watershed in American constitutional history for reasons that go well beyond the abortion issue itself. For in recognizing that the Constitution includes no right to an abortion, the Court seemed to be bringing to a close a period of seventy-five years in which it had consistently discovered previously unknown "rights" in the Constitution and Bill of Rights, and imposed these new rights on the states through an authority it claimed to have found in the Fourteenth Amendment.

This mechanism had permitted the Court to progressively strip the states of their constitutional authority to determine their own

1. 142 S. Ct. 2228 (2022).
2. 410 U.S. 113 (1973).

laws, not only with respect to the issues of racially motivated violence and abuse that had motivated the passage of the Fourteenth Amendment after the Civil War, but also on a vast array of other areas pertaining to health, religion, and morals—the very police powers entrusted to the States by the Constitution in 1787. It is no exaggeration to say that by the method described above, the federal structure of the American republic was systematically dismantled by liberal courts anxious to place issues relating to race, religion, and morals beyond the reach of state legislatures.

In the wake of the *Dobbs* decision, America's sleepy state legislatures have once again emerged as the dominant venue for the most demanding and important political debates, exercising responsibility for republican self-government to an extent they have not known for decades. While opinions vary as to whether the ultimate resolution of the abortion issue, specifically, should be at the state or federal level, it is undeniable that American federalism has been given a new lease on life due to *Dobbs*. As President Donald Trump put it following *Dobbs*, whatever the states determine will be "the law of the land."[3]

This move to reinstate the federal structure of American government appears to be part of a broader project of constitutional restoration undertaken by the Supreme Court under Chief Justice John Roberts. From the strengthening of the Second Amendment right of citizens to carry arms in *New York State Rifle & Pistol Association, Inc. v. Bruen*,[4] to the "major questions doctrine" case of *West Virginia v. EPA*,[5] to the demise of so-called "affirmative action" programs in *Students for Fair Admissions v. Harvard*,[6] to the limitations of the

3. Jill Colvin and Meg Kinnard, *Trump declines to endorse a national abortion ban. He says limits should be left to the states*, ASSOCIATED PRESS (Apr. 8, 2024), https://apnews.com/article/trump-abortion-2024-ban-7bf06e0856b88a710c79a6eb85cffa6a [https://perma.cc/UZ8G-Q95W].

4. 142 S. Ct. 2111 (2022).

5. 142 S. Ct. 2587 (2022).

6. 143 S. Ct. 2141 (2023).

powers of the administrative state in *Loper Bright Enterprises v. Raimondo*,[7] the Supreme Court has shown a consistent interest in rehabilitating important and long-moribund provisions of the Framers' Constitution. In this context, the Roberts Court's willingness to recalibrate the relationship between the national government and the states, building upon the work begun by the Rehnquist Court that preceded it, is best understood as an indication that we have entered a period in which the terms of the original Constitution are being revisited and revived.

Let us suppose that we've read this watershed moment correctly, and that the Supreme Court is prepared to go beyond overturning *Roe*, and to engage in a more general restoration of the ailing American constitutional order as a distinctly federalist one. What, then, should be the next great aim of this Court and of American conservatives seeking such a constitutional restoration?

The American constitutional order was designed, in no small part, to allow the respective states—the laboratories of policy—ample room to experiment with different settlements on questions of public religion and morals. It was designed, in other words, to defuse the rationalists' yearning to devise a single answer to every vexing question of religion and morals, and to impose this one answer on a vast continent in which diverse communities had established themselves. [8]

Today, more than ever, we can see the wisdom in this design and understand how much good, and even national healing, could come from returning to it now.

With this larger purpose in mind, we propose that the next long-term goal for the conservative legal movement must be to seek a reversal of *Everson v. Board of Education*, the Court's 1947 ruling that originally imposed the misguided and ahistorical doctrine of "separation of church and state" on the states.[9] More than any other decision, it was this ruling that paved the way for the destruction of

7. 144 S. Ct. 2244 (2024).

8. An excellent discussion of early American cultural diversity is DAVID HACKET FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (1989).

9. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947)

America's federalist system, especially as it pertains to laws concerning the establishment of religion and public morals,[10] and for the Supreme Court's subsequent campaign to suppress traditional religious and moral norms that had animated public life in America for centuries.

Everson must fall.[11]

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10. In both U.S. Supreme Court case law and in popular legal culture, the term *establishment* as it pertains to religious institutions has at least two distinct meanings. On the one hand, it can refer to official state endorsement and support for a particular religious denomination and creed. In this sense, we say, for example, that the Church of England is the "established" church in England. But this term is now also used in a more general sense to refer to affirmative state encouragement of religion and religious norms of speech and behavior. In this sense, religious "establishment" in the United States can take the form of a general support for Protestantism, or for Christianity in general (including Catholicism and other Christian faith traditions), or for widely-followed religions in general (including Judaism, for example). It is this broader meaning of the term that has been used by the courts in much of their discussion of the First Amendment since the 1940s. In this article, we will usually use the term in its broader sense, specifically noting those occasions in which the historical context requires us to understand it as referring to state support for a particular religious denomination.

11. Our argument is centered, like Justice Alito's *Dobbs* majority opinion, on text, history, and tradition. The original text of the First Amendment, the historical background preceding it, and the interpretive tradition following its ratification all militate against incorporation of the Establishment Clause into the constitutions of the states—especially the aggressive and highly dubious post-*Everson* Establishment Clause applications to what ought to be considered innocuous cases. Our historical method in the inquiry at hand aims to counteract the lackluster surveys of most of the relevant precedent in this area.

In pursuing this inquiry, we take our inspiration from Justice David Brewer and Judge Bernard Meyer. The former's 1905 lectures, building off his majority opinion in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), and later compiled as THE UNITED STATES: A CHRISTIAN NATION (1905), chart a course through source material that is instructive with respect to the colonial, pre-ratification constitutional documents at the state level. Judge Meyer rightly discerned in his majority opinion for the New York Supreme Court in *Engel v. Vitale*, 191 N.Y.S.2d 453 (1959), that an idiosyncratic overreliance on certain writings of Thomas Jefferson or James Madison, for example, is invariably ill-advised. Such *ad hoc* Founding-era opinions frequently contradict one another—or worse, are altogether misleading. Instead, Judge Meyer advised that "one must look to the history of the times and examine the state of things when the [constitutional] provision in question was adopted." *Id.* at 471. For these reasons, we will prioritize public, consensus documents in our historical assessment, especially state constitutions that preceded ratification of the federal Constitution in 1788.

II. *EVERSON* AND THE DOCTRINE OF CHURCH-STATE "SEPARATION"

The First Amendment to the United States Constitution, ratified in 1791, reads as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[12]

The plain terms of the First Amendment restrict Congress in two ways as it legislates on questions of religion and morals: The Establishment Clause forbids Congress from making laws involving "an establishment of religion," while the Free Exercise Clause forbids laws "prohibiting the free exercise thereof."

As has been said many times, neither of the First Amendment's clauses regarding religious establishments refer to the principle of "separation of church and state."[13] On the contrary, the Religion Clauses of the First Amendment were intended to protect the power of state governments to settle contentious matters of religion and morals without interference from the national Congress.[14] In doing so, they ensured that a legal and political union would be established at the national level, while retaining the historic practices and privileges of self-government enjoyed by the states.[15] This included reserving the management of domestic affairs to the states, especially in matters of religion and morals.[16] By contrast, the

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

13. *See* Wallace v. Jaffree, 472 U.S. 38, 91–100 (1985) (Rehnquist, J., dissenting) ("one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.").

14. As Steven Smith puts it in reviewing statements by James Madison, Richard Dobbs Spaight, and others, "Any act of Congress on this subject would be a usurpation." STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 52 (2014).

15. MAX EDLING, PERFECTING THE UNION: NATIONAL AND STATE AUTHORITY IN THE US CONSTITUTION 10, 75–104 (2021).

16. *Id.* at 103.

external affairs of the states, in matters such as diplomacy, trade, and inter-state relations, were assigned to the national government.[17]

Another way of saying this is that the Religion Clauses of the First Amendment were provisions pertaining to jurisdiction. As Steven Smith puts it:

> In keeping the most essential matters of religion within the jurisdiction of the states, the religion clauses stipulated that these matters would not be within the province of the national government. Consequently, there would be no national church, and no interference by the national government with the exercise of religion—not because the enactors had deliberately constitutionalized commitments to church-state separation or religious freedom, but because these matters were not within the jurisdiction of the national government.[18]

In other words, the Religion Clauses of the First Amendment placed the religious establishments of the states outside the jurisdiction of the national or federal legislature, which was prohibited from disrupting them or tampering with them.[19] They ensured that questions pertaining to the establishment and free exercise of religion were to remain, as they had been before 1789, under the jurisdiction of the states.

How, then, did the present constitutional regime, with its elaborate "wall of separation" between church and state, come into being?[20]

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17. *Id.* at 25. In other words, the Constitution of 1787 "was designed to preserve the states, not replace them." *Id.* at 68.

18. SMITH, *supra* note 12, at 8.

19. "The clauses were merely reaffirming… the jurisdictional status quo; they were not adopting any particular principle or theory of the relation between government and religion." *Id.* at 55–56. *See also* Akhil Amar, *Anti-Federalists, The Federalist Papers, and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL'Y 115 (1993).

20. The Religion Clauses were never treated by the Supreme Court until 1845 in the little-known case, *Permoli v. Mun. No. 1 of the City of New Orleans*, 44 U.S. (3 How.) 589 (1845). And the only point of this discussion by the court was to remind the petitioners that the First Amendment did not apply to the states. *Id.* at 609.

The story begins with the passage of the Fourteenth Amendment in Congress in 1866, which prohibited the states from "abridging the privileges or immunities of citizens," including freed slaves; and from "depriving any person of life, liberty, or property, without due process of law."[21] In context, the purpose of this Amendment was unequivocal: It sought to protect former slaves from violence and persecution at the hands of state and local governments.

But in 1925, the Supreme Court decided to expand the remit of the Fourteenth Amendment's Due Process Clause. In *Gitlow v. New York*,[22] the Court upheld New York's criminal anarchy statute,[23] which banned the publication of calls to overthrow the government. At the same time, however, this decision, written by Justice Edward Terry Sanford, also asserted that the First Amendment's protections of freedom of speech and of the press, originally adopted to restrict the powers of the national Congress, were "among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states."[24]

Thus began a process of "incorporating" the liberties protected by the First Amendment (as well as much of the Bill of Rights) into the Fourteenth Amendment's prohibition of the states from "depriving any person of life, liberty, or property, without due process of law." By 1940, the Supreme Court had already declared, in *Cantwell v. Connecticut*, that both the Establishment Clause and the Free Exercise Clause of the First Amendment would henceforth be applied to the legislatures of the states.[25] In *Cantwell*, the Supreme Court overturned a Connecticut statute requiring the licensing of

21. U.S. CONST. amend. XIV.

22. 268 U.S. 652 (1925).

23. N.Y. PENAL LAW §§ 160, 161 (1902).

24. *Gitlow*, 268 U.S. at 666.

25. The decision of the Court, penned by Justice Owen Roberts, asserted: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." 310 U.S. 296, 303 (1940).

individuals soliciting funds for allegedly religious causes as a violation of the Free Exercise Clause, declaring that "such censorship of religion . . . is a denial of the liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."[26]

It is against this backdrop that we come to the Supreme Court's 1947 ruling in *Everson*.[27] In 1941, New Jersey instituted a policy of providing reimbursements to parents of children taking public transportation to and from school. This applied to both public and private school students.[28] Mr. Arch Everson, a New Jersey taxpayer, filed a complaint against the state, claiming that such compensation to families sending their children to private religious (mostly Catholic) schools, violated the Establishment Clause of the First Amendment, which now—under the doctrine of incorporation into the Fourteenth Amendment—prohibited New Jersey from making a law "respecting an establishment of religion."[29]

Everson lost in the state courts and appealed to the Supreme Court of the United States, which decided against him as well. The Court ruled 5-4 that because the reimbursements were applied indiscriminately to all students and paid to parents, not religious institutions, the policy did not violate the Constitution.[30] But much as it had in *Gitlow*, the Court used the opportunity to elaborate an expansive theory of how the Establishment Clause was to be applied to the states under the Fourteenth Amendment. This time, the court insisted that the Constitution required the forty-eight state legislatures to refrain from encouraging religion in any way.[31]

Although the Court's legal reasoning in *Everson* was modeled on its decision in *Gitlow*, the two cases differ fundamentally. This is because the respective provisions of the First Amendment are not

26. *Id.* at 305.

27. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947).

28. *Id.* at 3.

29. *Id.* at 3–4.

30. *Id.* at 17–18.

31. *Id.* at 16. The chief objection of the four dissenters did not pertain to Justice Black's interpretation of the Establishment Clause, but only to his refusal to strike down the law immediately in question as a violation thereof. *Id.* at 44–45 (Rutledge, J., dissenting).

analogous: While the latter clauses of the First Amendment prohibit Congress from interfering with rights that are reserved to private individuals and groups (the free exercise of religion, freedom of speech and of the press, the right to peaceably assemble, and the right to petition government), the Establishment Clause was designed with an entirely different purpose in view. Its aim is to prohibit Congress from interfering with rights that are reserved to the states—for laws concerning the establishment of religion and public morals were, under the American Constitution, the responsibility and prerogative of the respective states.

In *Everson*, however, the Court recast the establishment of religion, not as a responsibility and a right reserved to the states, but as a new, previously unknown right of private individuals: The right not to have any portion of one's taxes used to support public religion anywhere in the United States.

In order to justify this revolutionary new reading of the Constitution, Justice Hugo Black, writing for the majority, found it necessary to offer a lengthy new interpretation of the American Founding—one that regards America as having been born out of a broad hostility to government encouragement of religion. Among other things, he writes:

> It is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted. A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious

> group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.[32]

Thus, in Black's retelling, religion is no longer the source of American democracy and independence—as it had been, for example, in Franklin Roosevelt's State of the Union address eight years earlier in 1939.[33] On the contrary, religion, or at least state support of religion, was treated by the Supreme Court as a danger, a threat to democratic freedoms. Indeed, the very form of the Constitution was now reimagined as a response to the danger posed by government encouragement of religion.

In light of this interpretation of the motives behind the First Amendment, Black concludes that:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another…. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[34]

In this passage, we see the reinterpretation of the Establishment Clause as referring to the rights of the individual—because taxing Arch Everson ("in any amount, large or small") for funds that were to be used for the support or encouragement of religion by the federal government or by the state of New Jersey would be a violation of his personal liberties.

From this insistence that national and the state governments must be purified of any "laws that aid one religion, aid all religions, or prefer one religion over another,"[35] to Thomas Jefferson's infamous

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32. *Id.* at 8–9.

33. For discussion, *see* YORAM HAZONY, CONSERVATISM: A REDISCOVERY 261–67 (2022).

34. *Everson*, 330 U.S. at 15–16.

35. *Id.* at 15.

proposal of a "wall of separation between Church and State,"[36] is but a small step. In *Everson*, both Justice Black's majority opinion and Justice Wiley Rutledge's dissenting opinion, explicitly take this step. As Black put it:

> 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." . . . The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.[37]

Justice Black is here referring to a brief letter of 1802 that Jefferson, then President, wrote to the Baptist congregation of Danbury, Connecticut, in which he described the Religion Clauses of the First Amendment as "building a wall of separation between Church and State."[38] What precisely Jefferson intended in using this metaphor in relation to the First Amendment's Religion Clauses is difficult to know. But it is clear from the text of his letter that Jefferson viewed "faith and worship" as a private matter, and that he thought promoting or demoting any particular religious tradition, doctrine, practice, or sect to be outside "the legitimate powers of government."[39] The concept of a "wall of separation between church and state" is thus derived from the more basic intuition that the state exceeds its legitimate powers the moment that it encourages or propagates any kind of religious knowledge or practice.

In *Everson*, then, the Supreme Court adopts a wholly new judicial doctrine on matters of religion and state. No longer would the First

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36. Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, a committee of the Danbury Baptist association ("Letter to the Danbury Baptists") (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html [https://perma.cc/XKQ8-DXTF].

37. 330 U.S. at 16, 18.

38. Letter to the Danbury Baptists, *supra* note 34.

39. The relevant passage of the letter reads: "Believing with you that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that 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." *Id.*

Amendment leave the states free to determine the place of religion in public life as was accepted until the 1940s. Instead, the First Amendment was now proclaimed, on Jefferson's authority, to have envisioned a "high and impregnable"[40] wall separating church and state—a wall whose purpose was to prevent national, state, and local governments from encouraging religion in any way. It was this wall that the states, in their ignorance and folly, had breached time and again since the ratification of the Fourteenth Amendment seventy-nine years earlier.

III. THE SUPREME COURT IN THE SHADOW OF EVERSON

The Supreme Court did not find New Jersey to have breached the wall of separation of church and state in *Everson*. But it was only a matter of months before the Court began hearing arguments in a case in which it would discover such a breach . In *McCollum v. Board of Education*,[41] the Supreme Court reviewed a program in Illinois schools that had been offering a weekly class in Protestant or Catholic religion on a voluntary basis to children whose parents had registered them for it. A weekly class in Judaism had sometimes been offered as well.[42] Justice Hugo Black wrote the decision for the Court in *McCollum*, striking down education in Christianity and Judaism in America's public schools. As he wrote:

> This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the states by the Fourteenth) as we interpreted it in *Everson v. Board of Education*.

In making this argument, Black once again quoted Thomas Jefferson to the effect that the First Amendment had erected "a wall of separation between church and state."[43] He then proceeded, citing

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40. *Everson*, 330 U.S. at 18.

41. Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty., Ill., 333 U.S. 203 (1948).

42. *Id.* at 209.

43. *Id.* at 211.

his own words in the *Everson* decision, to declare that "the First Amendment, properly interpreted, has erected a wall of separation between Church and State"—and to insist that this principle must be the grounds for removing any and all religious instruction from the Illinois schools. As he wrote:

> As we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable. Here, not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps provide pupils for their religion classes through the use of the State's compulsory public school machinery. This is not separation of church and state."[44]

This is clearly not how the First Amendment's Religion Clauses were intended to operate. In *Everson*, Justice Black seemed to be concerned almost exclusively with the possible persecution of religious or non-religious persons deviating from the state's religious establishments. By contrast, he showed no interest at all in the traditional American understanding of the states' responsibility to affirm and promote religion and morals as an integral part of sound government. In theory, his fear of permitting the persecution of religious minorities could have been assuaged by requiring the states to incorporate the First Amendment's Free Exercise Clause into their jurisprudence, leaving them unbound by the Establishment Clause. In this way, state of Illinois might have been left free to encourage Protestantism, Catholicism, and Judaism, while at the same time protecting the freedom of conscience of that state's religious minorities due to the incorporation of the Free Exercise Clause. Yet Black's campaign to eradicate religious education from schools across the country was not driven by a simple desire to protect minorities from persecution. His more fundamental purpose

44. *Id.* at 212.

was to ensure that any trace of traditional American state encouragement or endorsement of religion was rejected as exceeding "the legitimate powers of government."[45]

On the heels of the Supreme Court's rulings in *Everson* and *McCollum*, a long series of cases added bricks and mortar to the barrier the Supreme Court had begun erecting between religion and public life. In 1961, in *Torcaso v. Watkins*, the Supreme Court ruled that the State of Maryland's constitutional requirement of a declaration of belief in God to hold public office violated the First Amendment. As Justice Black wrote for a unanimous Court:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs . . . . [The fact] that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.[46]

Then in 1962, another opinion from Justice Black in *Engel v. Vitale* held that voluntary, non-denominational teacher-led school prayer was unconstitutional. The text of the prayer in question, approved by the New York Board of Regents, was as inoffensive as can be imagined:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen.

Yet despite receiving amicus briefs in support of the prayer from twenty-two states, the Court ruled 6-1 that the separation of church and state had again been violated.[47] And in *Abington School District v. Schempp*, the Court declared by a vote of 8-1 that Bible reading

45. Letter to the Danbury Baptists, *supra* note 34.
46. 367 U.S. 488 (1961)
47. 370 U.S. 421 (1962).

and recitation of the Lord's Prayer in public schools were "unconstitutional under the Establishment Clause, as applied to the states through the Fourteenth Amendment."[48] The Court's opinion, written by Justice Tom Clark, claimed that such a complete separation of religion from the institutions of the state had not been initially achieved due to the American colonists' "close ties the Mother Country. However, the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States."[49]

The line of cases directly descending from *Everson* reached its nadir in *Wallace v. Jaffree* (1985), which banned even a "moment of silence" from being instituted in schools because such moments would permit children wishing to do so to say a prayer.[50] In *Lee v. Weisman*, a divided Court found that Christian and Jewish clergy delivering invocations or benedictions at public school graduation ceremonies was likewise a violation of the Establishment Clause.[51]

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48. School Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 205 (1963).

49. *Id.* at 205, 214. *Schempp* led directly to *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The latter, in particular, haunted Establishment Clause jurisprudence for some time. In *Lemon*, the Court injected the question of a "separation between secular and religious educational functions" of various school systems into the Establishment Clause, an obvious absurdity given the Clause's history. 406 U.S. at 613. Despite the Court's insistence in *Zorach v. Clauson*, 343 U.S. 306 (1952), that the government was not to exhibit "callous indifference" to religion, *id.* at 314, *Lemon* all but insured that it would. The *Lemon* opinion shrank in influence for many years before being formally overturned by *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022). In addition, *Lee v. Weisman*, 505 U.S. 577 (1992) outlawed clergy from offering even non-denominational prayers in public schools. *See also* Thomas H. Bickel, *Engel Was Grievously Wrong and Should Be Overturned*, HARV. J.L. & PUB. POL'Y: PER CURIAM (Mar. 2, 2023), https://journals.law.harvard.edu/jlpp/engel-was-grievously-wrong-and-should-be-overruled-thomas-h-bickel/ [https://perma.cc/CM6Z-FUAZ]. In a similar vein, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) banned student-organized on-field prayer.

Regarding Roger Williams, recent scholarship has shown that his influence on the trajectory and development of religious liberty in America has been greatly exaggerated. His works "were unknown to Americans of the revolutionary generation." And, "[h]ad they been known, his principal argument for religious liberty would have been unintelligible, or at least irrelevant, to the Founders." JAMES HUTSON, CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 25 (2008).

50. 472 U.S. 38, 59 (1985).

51. 505 U.S. 577 (1992).

Justice Anthony Kennedy, writing for the majority, succinctly captured the gist of the entire line of decisions since *Everson* in declaring that "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere[.]"[52]

Moreover, the acceptance of a "separation of church and state" as a formula describing the supposed purpose of the First Amendment has had a doctrinal impact far beyond those Establishment Clause cases in which *Everson* is explicitly recognized as controlling.

For example, in the case of *Joseph Burstyn, Inc. v. Wilson*, the New York Supreme Court upheld a state statute prohibiting the distribution of films whose content was "sacrilegious."[53] In doing so, the court accepted the view that it is a legitimate concern of the state that "[n]o religion, as that word is understood by the ordinary reasonable person, shall be treated with contempt, mockery, scorn and ridicule[.]"[54] The Supreme Court overturned the decision of the New York court the following year, ostensibly relying on the First Amendment's prohibition of laws "abridging freedom of speech," rather than on the *Everson* decision and the doctrine of "separation of church and state." But look carefully at the key passage in Justice Tom Clark's majority opinion. He writes:

> Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views.[55]

Thus, according to Justice Clark, a film that mocks or abuses Christianity, Judaism, or Islam must be permitted thanks to the

52. *Id.* at 589.
53. 303 N.Y. 242, 246 (1951).
54. *Id.* at 258.
55. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952)

First Amendment's protection of "freedom of speech and the press." But this determination involved a large and sudden expansion of the First Amendment's free speech protections against the states, which now assumed a scope they had never had before. Previously, including in the aftermath of *Gitlow* a mere twenty-seven years before, the First Amendment's speech and press protections were typically held to be consonant with strong state-level protections of public decency and curtailments of blasphemy.

So, what made Justice Clark's expansion of extant First Amendment doctrine possible?

Justice Clark's reasoning in support of expanding the right of free speech is that "the state has no legitimate interest in protecting any or all religions from views distasteful to them." But this reasoning merely echoes the wording of the Court's decision in *Everson*, according to which "Neither a state nor the Federal Government can . . . pass laws that aid one religion, aid all religions, or prefer one religion over another."[56] Without *Everson*'s assertion that the states have neither an obligation nor a right to aid one religion or all religions, there would have been no basis for Justice Clark's sweeping determination.

To understand just how great the impact of *Everson*'s new construal of "the legitimate powers government" was on Clark's ruling in *Burstyn*, one need only compare his decision to that of the New York Court of Appeals in the same case.[57] In the opinion of the lower court, written by Judge Charles William Froessel in a 5-2 decision, it seemed perfectly acceptable that no religion, as "understood by the ordinary, reasonable person,"[58] should be mocked or treated with contempt. Indeed, the lower court had rejected the appellant's assertion that the censorship in question infringed on freedom of religion as "specious."[59] The statute in question was deemed legitimate in that it was "clearly directed to the promotion of the

56. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15 (1947).
57. 303 N.Y. 242.
58. *Id.* at 258.
59. *Id.*

public welfare, morals, public peace and order," which were "traditionally recognized objects of the exercise of police power."[60] Moreover, as America was an "essentially a religious nation,"[61] the state had a duty and right to protect religion generally from open vice and contempt. Any other posture, "would be at war with our national tradition."[62] Thus the First Amendment right to the "free exercise" of religion required that the state be empowered to protect religion from "attacks or persecution" by private or commercial concerns, as it always had been. As Judge Froessel put it:

> To say that government may not intervene to protect religious beliefs from purely private or commercial attacks or persecution, whatever the underlying motive, and however skillfully accomplished, as distinguished from the assertion of conflicting beliefs, is to deny not only its power to keep the peace, but also the very right to "the free exercise" of religion, guaranteed by the First Amendment[.] We are not aware that this power has ever been even impliedly denied to the States.
>
> This nation is a land of religious freedom. It would be strange indeed if our Constitution, intended to protect that freedom, were construed as an instrument to uphold those who publicly and sacrilegiously ridicule and lampoon the most sacred beliefs of any religious denomination to provide amusement and for commercial gain.[63]

In these passages from New York's highest court, we catch a glimpse of an entirely different understanding—indeed, the "traditional" understanding—of the First Amendment, which recognized both a duty and a right of government to protect religion from public abuse. Yet in the wake of *Everson*, these efforts to protect religion were abruptly discovered to be outside "the legitimate powers of government."

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60. *Id.* at 259.
61. *Id.* (quoting Church of Holy Trinity v. United States, 143 U.S. 457, 465 (1892)).
62. Quoting from *McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).
63. *Id.* at 259–60.

In *Burstyn*, we thus find a resounding expression of the novel theory of the legitimate powers of government promulgated by the Supreme Court in *Everson*. But the *Burstyn* decision also proposes a second conceptual revolution: A dramatic shift in the presumed role of religion in national life. As we have seen, the New York courts in *Burstyn* had ruled that state protection of religion was "clearly directed to the promotion of the public welfare, morals, public peace and order."[64] However, such a ruling could only make sense in light of the traditional, commonplace assumption that religion has both the ability and the responsibility to encourage social restraint and a civilized public life by inculcating norms as to what is tasteful and distasteful, moral and immoral.[65] It is precisely this public function of religion that had provided American life with a "common sense" of how one should live, and with "guardrails" (as we now call them) that militated against corruption, dissolution, disorder, and violence.

Yet in Justice Clark's assertion that "the state has no legitimate interest in protecting any or all religions from views distasteful to them,"[66] we find that this ancient view of the public function of religion has simply been discarded. The court assumes, without argument, that what is "distasteful" to Christianity and Judaism is a matter of indifference to the state. The possibility that this "distaste" on the part of God-fearing Christians and Jews might itself be the crucial barrier standing in the way of dissolution, disorder, and violence is not even considered.

In *Burstyn*, then, the floodgates are opened for the destruction of every inherited norm of speech and behavior that had been inculcated by religion. One need only think of the exceedingly rapid

64. *Id.* at 259.

65. For example, in *Barnes v. Inhabitants of First Parish in Falmouth*, Theophilus Parsons reasoned that without "assistance from some superior power, whose laws extend to the temper and disposition of the human heart," government would be "extremely defective." 6 Mass. 401, 405 (1810). Hence, Massachusetts had "adopted and patronized a religion" which, in cooperation with government, would "promote and secure the happiness of the citizens." *Id.* at 406. On the "civil utility" of religion, see HUTSON, *supra* note 47, at 53–57.

66. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952).

changes undertaken with respect to traditional marriage and sexual mores, divorce, abortion, pornography, mental illness, illegal substances, Sabbath laws, and much else—all of it in the wake of a general sense that America's legal regime had "no legitimate interest" in aiding religion or the standards of speech and behavior that had been upheld by religion.[67]

Thus, while the Supreme Court's explicit citations of its decision in *Everson* have been limited only to certain subjects, its unspoken aftershocks have been felt in virtually every aspect of the Court's First and Fourteenth Amendment jurisprudence. More than anything else, *Everson* established the theory of what was in effect a new, Enlightenment-liberal constitution, which was to be imposed by the Federal government on the states—and whose cornerstone was the doctrine of "separation of church and state."[68]

IV. THE ORIGINAL PURPOSE AND MEANING OF THE ESTABLISHMENT CLAUSE

Among the noteworthy aspects of the *Everson* decision, and of the many subsequent cases that built upon it, is the paucity of historical sources upon which Justice Hugo Black and his followers relied to conclude that the First Amendment prohibits the states from providing any and all support for religion in America. The most famous of these is, of course, Jefferson's 1802 letter to the Danbury Baptists, in which he had indicated his support for a "wall of separation" between church and state.[69] But this brief correspondence

67. *See* Timon Cline, *Well-Regulated for Well-Being: Public Health and the Public Good in Nineteenth and Early Twentieth Century American Caselaw*, 16 U. ST. THOMAS J.L. & PUB. POL'Y 147 (2023).

68. The last few years have seen incremental improvement of matters at the level of the Supreme Court in cases such as *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020), and *Carson v. Makin*, 142 S. Ct. 1987 (2022).

69. *See supra* notes 34 and 37. The first Supreme Court case to introduce Jefferson's maxim into the American legal imagination was *Reynolds v. United States*, 98 U.S. 145 (1878). But *Reynolds* was not a precedent useful for advancing a separation of church and state in America. It is now remembered for upholding the Morrill Anti-Bigamy Act, Pub. L. 37-126, 12 Stat. 501 (1862), against Mormon appellants who argued that the

with a private religious organization did not commit the federal government, much less the governments of the states, to a policy resembling "separation of church and state." Indeed, the Danbury Baptists letter does not even represent the official views of Jefferson's own administration. We know this from Jefferson's own presentation of his administration's achievements during his first term in his Second Inaugural Address in 1805, in which he emphasized that he had continued the policy of non-interference with the religious establishments of the various states. As he put it:

> [We have] considered that free exercise is placed by the constitution independent of the powers of the general [i.e., national] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it: but have left them, as the constitution found them, under the direction and discipline of the state or church authorities acknowledged by the several religious societies.[70]

In other words, whatever Jefferson's personal views concerning the desirability of state indifference to religion, he understood that he had a constitutional duty to protect the right of the respective states to establish or disestablish Christianity in the matter that seemed best to them. In short, he had to leave the matter of public religion to the states, "as the constitution found them."[71] And as we

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law violated their religious liberties. As in *Everson*, the appellants lost their Free Exercise claim, but not before Chief Justice Morrison Waite had invoked Jefferson's "wall" as the appropriate understanding of the American church-state settlement. *Reynolds*, 98 U.S. at 164. Waite's position was simply that Jefferson's "wall" could not be interpreted to preclude moral legislation that comported with traditional common law practice. Practice, if not belief, could justly be regulated. *See* Mark Movsesian, *How the Supreme Court Found the Wall,* **First Things** (Feb. 13, 2013) https://firstthings.com/how-the-supreme-court-found-the-wall/ [https://perma.cc/HJX5-42EX].

70. Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805).

71. Jefferson reiterated the same position in response to inquiries as to why he issued no Thanksgiving Proclamation. The general government was "interdicted by the constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises… Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must thus rest with the states." *See* Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), https://founders.archives.gov/documents/Jefferson/99-01-02-7257

will see in Parts V–VI of this essay, the status quo in Jefferson's day was that most of the states continued to uphold public Christianity in various forms, including officially established churches, religious tests for office, public support for ministers, blasphemy and Sabbath laws, and much else.

In addition to his repeated references to this one letter from Jefferson's pen, Justice Black invoked two additional sources for his argument that the First Amendment was designed to advance the doctrine of a "wall of separation between church and state." These are James Madison's anonymous 1785 pamphlet *Memorial and Remonstrance Against Religious Assessments;* and Virginia's Statute for Religious Freedom, authored by Jefferson in 1786.[72] These documents do indeed remind us that, prior to the ratification of the Bill of Rights, Jefferson and Madison had in fact succeeded in persuading their fellow Virginians to adopt a policy of formal disestablishment and a "separation of church and state," which could serve as an inspiration for the Supreme Court in the 1940s and thereafter.

But these three texts hardly constitute an exhaustive survey of the American Founders' views on the subject of church-state relations, or of the intentions behind the First Amendment when it was adopted. In fact, as Carl Esbeck and Jonathan Den Hertog point out, Virginia was "an oddity" in terms of its militant and early disestablishment, which was in no way representative of the other states at the time.[73] And since this was the case, it is worth asking whether the Court's exclusive reliance on the example of Virginia, without consideration of any further historical examples or context, was not disingenuous and deceptive.

A look at the broader context surrounding the adoption of the First Amendment is instructive here.

[https://perma.cc/8C5T-V8BH]. Consistent with this reasoning, while governor of Virginia, Jefferson had issued a proclamation for a day of thanksgiving and prayer in 1779. *See* Proclamation Appointing a Day of Thanksgiving and Prayer (Nov. 11, 1779), https://founders.archives.gov/documents/Jefferson/01-03-02-0187 [https://perma.cc/E6BD-B97C].

72. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 12–13 (1947).

73. Carl Esbeck & Jonathan Den Hartog, *Introduction*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT 11 (Carl Esbeck & Jonathan Den Hartog eds., 2019).

In his study of the ratification of the First Amendment, Phillip Vincent Muñoz shows definitively that the Amendments to the Constitution that now comprise the Bill of Rights were largely adopted in order to placate Anti-Federalist concerns over the strength and scope of the national government under the Constitution of 1787. As he writes, "The fear of national establishment was part of the Anti-Federalists' more general concern that a country as large as the proposed United States could not remain free under a set of uniform laws[.] Some Anti-Federalists saw a national religious establishment as a leading example of how the new constitution would result in centralization, consolidation, and—through enforced uniformity of religious practice—oppression."[74] What the Anti-Federalists did not object to was the establishment of religion as such. As Muñoz puts it:

> The Anti-Federalist concern regarding a national religious establishment was not animated by a general principle of opposition to government support of religion…. They were for republican localism. No one asserted non-establishment to be an individual right, and no Anti-Federalists called for an amendment to restrict the states from supporting or establishing religions.[75]

James Winthrop, a Massachusetts Anti-Federalist writing under the pseudonym Agrippa in 1788, captured this sentiment well:

> It is plain, therefore, that we require for our regulation laws which will not suit the circumstances of our southern brethren, and the laws made for them would not apply to us. Unhappiness would be the uniform product of such laws. For no state can be happy when the laws contradict the general habits of the people[.] We may go further, and say, that it is impossible for any single legislature so fully to comprehend the circumstances of the different parts of a very extensive dominion, as to make laws adapted to those circumstances.[76]

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74. Vincent Phillip Muñoz, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING 131 (2022).

75. *Id.* at 133–42.

76. *Letters of Agrippa XII*, MASS. GAZETTE (Jan. 11, 1788), *in* 4 COMPLETE ANTI-FEDERALIST 94 (Herbert J. Storing ed., 1981).

For their part, Federalists such as James Madison, Alexander Hamilton, and James Wilson made sure to reassure their opponents that the provisions of the proposed Constitution were meant only to set limitations on the national government, not the states, and, therefore, would in no way thwart state-level religious practices.[77] As the laboratories of policy, the states would retain their colonial police powers inherited via their charters. This included, perhaps especially, authority over religion and morality.

Thus, at the time of their passage in Congress in 1789, the accepted meaning of the two Religion Clauses of the First Amendment was that no particular denomination or church could be established at the national level; and that the national legislature could make no laws affecting the existing state-level religious establishments.[78] It is important in this context to recall that the first Congress voted to appoint congressional chaplains who would lead prayers in that chamber. Similarly, in the Northwest Territory Ordinance of 1789, the first Congress explicitly stipulated that schools were to be established in the territory as a means to cultivate the "religion, morality, and knowledge," since these were "necessary to good government and the happiness of mankind."[79] And three days after the First Amendment was submitted to the states for ratification, Congress established a public day of Thanksgiving recognizing, in the words of President Washington, "the duty of all nations to acknowledge the providence of Almighty

77. Muñoz, *supra* note 72, at 151; Edling, *supra* note 13, at 38, 77–78; Carl Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn From the Plain Text*, THE FEDERALIST SOC'Y (Feb. 23, 2021), *https://fedsoc.org/fedsoc-review/the-establishment-clause-its-original-public-meaning-and-what-we-can-learn-from-the-plain-text* [https://perma.cc/T9L4-KFXU].

78. In fact, the option of applying the religion clauses of the First Amendment to the states had been considered during the ratification debates and had been explicitly rejected. Muñoz, *supra* note 72, at 146–47.

79. Art. III, An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio (Northwest Ordinance) (1787), *in* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 236–38, 441–75 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor."[80]

Steven Smith can therefore accurately conclude that "the religion clauses of the First Amendment were understood at the time as doing nothing especially noteworthy—which is why . . . they were enacted with almost no discussion or controversy either in Congress or in the state ratifying conventions."[81]

V. WHAT DID STATE-LEVEL ESTABLISHMENT LOOK LIKE IN 1789?

What did state-level religious establishments look like at the time of the passage and ratification of the First Amendment?[82]

In the majority of states, some form of religious establishment—whether a general establishment of Protestantism or a denominationally specific establishment of Congregationalism or Anglicanism—existed at the time of ratification.[83] This entailed, among other things, financial support for the historically state-recognized church. In most states, religious tests for office were also enforced—and a religious test generally meant a Christian denominational test. The licensing of churches and ministers was another familiar

80. George Washington, Thanksgiving Proclamation (Oct. 3, 1789). None of this was considered "coercive." *See* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

81. SMITH, *supra* note 12, at 8. *See also id.* at 48–75.

82. That is to say, the pre-ratification, state-level background must be understood for the original proponents of the First Amendment to be understood. As Justice Sutherland put it in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), "The Union existed before the Constitution." *Id.* at 317. Commenting on *Curtiss-Wright*, Adrian Vermeule notes that Justice Sutherland "reasons, not so much from the formation of the Constitution, as from the formation of the constitutional order," which, for our purposes, includes the background state-level conditions in view here. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 88 (2022).

83. On the range of styles of establishments, *see* Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 606–13 (2006). Hutson, *supra* note 47, at 47–138; WINTHROP S. HUDSON, AMERICAN PROTESTANTISM 1–48 (1961).

element of the establishment apparatus.[84] None of this was particularly vexing for most people given the religious culture in which the candidate magistrates and ministers were raised. Schooling especially, from grade school to college, was presumptively Christian.[85]

It is important to note that these religious establishments in every case existed alongside explicit recognition of a right to freedom of conscience. The New Hampshire Constitution of 1784 was typical in guaranteeing a "liberty or estate for worshipping God" to every individual:

> Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he does not disturb the public peace, or disturb others, in their religious worship.[86]

Yet this concern for the religious freedom of the individual was not seen as contradicting the need for government to support the Christian religion. And so, the New Hampshire constitution continues:

> As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society by the institution of the public

84. Esbeck & Den Hartog, *supra* note 71, at 6–7. Today, there are also progressive scholars who argue that some form of religious establishment is inescapable. Christian pathologies pervade even our "religious liberty" jurisprudential attempts at liberal neutrality. See, for example, KHYATI Y. JOSHI, WHITE CHRISTIAN PRIVILEGE: THE ILLUSION OF RELIGIOUS EQUALITY IN AMERICA (2020).

85. SAMUEL ELIOT MORISON, HARVARD COLLEGE IN THE SEVENTEENTH CENTURY (1936); LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607-1783 (1970); DANIEL L. DREISBACH, READING THE BIBLE WITH THE FOUNDING FATHERS (2016).

86. N.H. CONST. pt. I, art. I, § V.

> worship of the Deity, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this state have a right to impower, and do hereby fully impower the legislature to authorize, from time to time, the several towns, parishes, bodies-corporate, or religious societies within this state, to make adequate provision at their own expense, for the support and maintenance of public Protestant teachers of piety, religion and morality.[87]

As in most other states, public officials in New Hampshire were required to be of the Protestant religion—including members of the State House ("Every member of the house of representatives shall be of the Protestant religion"), the State Senate ("No person shall be capable of being elected a senator who is not of the Protestant religion"), and the chief executive, known as the President of the State ("No person shall be eligible to this office, unless at the time of his election, he . . . shall be of the Protestant religion.").[88]

Other state constitutions adopted during and after 1776 had similar provisions for the establishment of religion. Delaware required public officials to make a profession of faith in the Holy Trinity and the divine inspiration of the Bible.[89] Public officials in Massachusetts had to pledge fealty to Christianity.[90] Pennsylvania insisted that officeholders acknowledge God as creator of the universe and the author of the Old and New Testaments.[91] And Maryland demanded that its civil officers be Christians.[92]

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87. This section also guaranteed that "the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance." In this way, the right of the state of New Hampshire to establish religion was translated into a right of local communities to select religious leaders suitable to their local needs. N.H. CONST. pt. I, art. I, § VI. This constitutional provision for publicly supported Christianity was adopted from the Massachusetts Constitution of 1780, whose primary drafter was John Adams.

88. N.H. CONST. pt. II (1784, amended 1877).

89. DE. CONST. art. XXII (1776).

90. MASS. CONST. ch. II, § 1, art. II (1780). In addition to tests for office, Massachusetts charged all men with the duty to "worship the Supreme Being, the great Creator and Preserver of the universe." MASS. DECLARATION OF RIGHTS, art. II (1780).

91. PA. CONST. § 10 (1776).

92. MD. CONST. art. LV (1776).

While promising the rights of conscience to all inhabitants, New Jersey limited full civil rights, including holding office, to Protestants. Its constitution declared:

> That there shall be no establishment of any one religious sect in this province in preference to another; and that no Protestant inhabitant of this colony shall be denied the enjoyment of any civil right merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the legislature, and shall fully and freely enjoy every privilege and immunity enjoyed by others, their fellow subjects.[93]

Similarly, affirmation of the "Protestant religion" was required of all office holders in North Carolina,[94] Georgia,[95] and Vermont.[96] Further revisions to Vermont's constitution in 1793 enjoined Christians to observe the Sabbath and conduct prayer services.[97]

South Carolina declared that "All persons and religious societies who acknowledge that there is one God, and a future state of re-

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93. N.J. CONST. art. XIX (1776). Accordingly, John Fea characterized the New Jersey constitutional convention as codifying "the existing pattern of church-state relations in the colony" stretching back to the 1665 *Fundamental Constitution for the Province of East New Jersey in America* which, inter alia, limited membership in the "common Council, or any other place of publick trust" to those who professed faith in "Christ Jesus." John Fea, *New Jersey*, *in* DISESTABLISHMENT, *supra* note 71, at 30. Likewise, the West Jersey *Concessions and Agreements* in 1677 required officeholders to uphold "Christian Belief" which entailed affirmation of the Trinity and acknowledgement of the divine inspiration of the Bible, a standard which did not exclude Catholics in West Jersey. The state constitution of a unified New Jersey almost a hundred years later clearly marked a return to the more common view as expressed by William Penn which limited full religious freedom to Protestants. *Id.* (citing WILLIAM PENN, ONE PROJECT FOR THE GOOD OF ENGLAND (1679)).

94. N.C. CONST. § XXXII (1776).

95. GA. CONST. art. VI (1777).

96. VT. CONST. ch. I, § III (1777).

97. VT. CONST. ch. I, art. III (1793). Similarly, the guarantee of the religious toleration in New York's constitution relieved "ministers of the gospel" from serving in civil or military office so that they would not "be diverted from the great duties of their function," namely, "the service of God and the care of souls." N.Y. CONST. art. XXXIX (1777).

wards and punishments, and that God is publicly to be worshipped, shall be freely tolerated."[98] But it also declared that "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State."[99] In practice, this meant that any Protestant denomination enjoyed "equal religious and civil privileges" and were allowed to incorporate congregations.[100]

John Adams recorded that his initial draft of the Massachusetts Declaration of Rights was revised by the drafting committee because he had failed to specify that Protestant "teachers of piety," or ministers, would be supported by township funds.[101]

Two states, Connecticut and Rhode Island, decided not to draft a new state constitution after independence, instead continuing to govern themselves in accordance with their colonial charters. Connecticut's 1639 charter dedicated the colony to the propagation of the Christian faith, in keeping with the colony's original Fundamental Orders, which established a "public state or commonwealth" to "maintain and preserve the liberty and purity of the gospel of our Lord Jesus which we now profess."[102] In addition, Connecticut's 1784 criminal code penalized violations of the Sabbath, required all families to possess a Bible, provided tax support for churches and ministers, and maintained religious oaths for public office.[103] Even when a new constitution was adopted in 1818, Connecticut specified that its guarantee of religious freedom was confined to "any Christian sect" and to "every society or denomination of Christians in the state."[104]

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98. S.C. CONST. art. XXXVIII (1778).

99. *Id.*

100. *Id.*

101. THE WORKS OF JOHN ADAMS 221 n.3 (Charles Francis Adams ed., 1856).

102. FUNDAMENTAL ORDERS OF CONNECTICUT (1639), https://oll.libertyfund.org/page/1639-fundamental-orders-of-connecticut [https://perma.cc/ST88-BSCS].

103. 1784 Conn. Pub. Acts 22, 258. The regularity of enforcement of each provision is beside the point. The message with respect to the state's support for Christianity was clear.

104. CONN. CONST. art. I, § 4 (1818) (maintaining, as in Massachusetts, that it is "the duty of all men to worship the Supreme Being, the great Creator and Preserver of the

Rhode Island likewise retained its 1663 charter, granted by "Charles the Second . . . Defender of the Faith," wherein "that liberty, in the true Christian faith and worship of God" was promised to residents.[105] The aim of this promise was that Rhode Islanders could pursue together "their sober, serious and religious intentions, of godly edifying themselves and one another in the holy Christian faith and worship as they were persuaded."[106] Rhode Island's founding covenant of 1638 had sworn "in the presence of Jehovah" to form their colony in submission to "our Lord Jesus Christ."[107]

All of this was assumed valid and left untouched by the First Amendment. No challenge to any of these state religious establishments was raised at the ratification conventions that approved the First Amendment. Indeed, had anyone believed that the First Amendment was intended to negate or uproot the Christian character of government in nearly all the states, it would never have been ratified.[108]

Universe."). For more on early state establishments and their colonial background, *see* Timon Cline, *Our Distinctly Protestant States*, AM. REFORMER (Apr. 28, 2022), https://americanreformer.org/2022/04/our-distinctly-protestant-states/ [https://perma.cc/S23B-GAZU]; Timon Cline, *Against Public Atheism*, THE AM. CONSERVATIVE (Aug. 2, 2022), https://www.theamericanconservative.com/against-public-atheism/ [https://perma.cc/G3SD-NQQF].

105. CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), *https://avalon.law.yale.edu/17th_century/ri04.asp* [https://perma.cc/S7AS-E6HJ].

106. *Id.*

107. *Id.*; *compare* NW. ORDINANCE art. III (1787) ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").

108. It is instructive that "No state modeled its constitution after the First Amendment or even considered the amendment when making state religion law." Esbeck & Den Hartog, *supra* note 71, at 9. Again, this disposition is informed by the colonial background. On the relationship between ecumenical Protestantism and American identity, *see generally* DAVID BREWER, THE UNITED STATES: A CHRISTIAN NATION (1905); BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM (1994); Timon Cline, *American History is Protestant*, AMERICAN MIND (Dec. 8, 2023), https://americanmind.org/features/what-is-christian-nationalism/american-history-is-protestant/ [https://perma.cc/2935-JF6A].

VI. WHAT DID STATE-LEVEL ESTABLISHMENT LOOK LIKE AFTER THE ADOPTION OF THE CONSTITUTION?

State constitutions were frequently altered after the adoption of the Constitution and the Bill of Rights, leading to the gradual discontinuation of direct state sponsorship of particular Christian denominations. The last formally established church in the United States, the system of state-supported Congregationalist churches in Massachusetts, was finally relieved of its official status in 1833.[109]

However, the discontinuation of official state sponsorship of particular Christian denominations did not produce anything resembling a "wall of separation between church and state." On the contrary, Christianity continued to be considered intrinsic to and a part of American law. This fact was repeatedly emphasized by America's most widely read nineteenth-century interpreter on the Constitution, Justice Joseph Story.[110] As he wrote in his *Commentaries on the Constitution of the United States*:

> The right of a society or government to interfere in matters of religion will hardly be contested by any persons who believe that piety, religion, and morality are intimately connected with the well-being of the state, and indispensable to the administration of civil justice. The promulgation of the great doctrines of religion . . . never can be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive, how any civilized society can well exist without them. And at all events, it is impossible for those who believe in the truth of Christianity as a divine revelation, to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience.[111]

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109. John D. Cushing, NOTES ON DISESTABLISHMENT IN MASSACHUSETTS, 1780–1833, 26 WM. & MARY Q. 170 (1969).

110. Gerald T. Dunne, *The American Blackstone*, 1963 WASH. U. L.Q. 321.

111. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1865 (1833).

In this passage, Story emphasizes a point we have already encountered: Prior to the 1940s, American law saw no contradiction between the existence of an "especial duty of government" to "foster and encourage" religion; and the parallel duty of government to protect "the freedom of public worship according to the dictates of one's conscience." Indeed, these two co-existing duties of government, when taken together, offer a powerful articulation and explanation of the traditional American view of the proper relationship between church and state.

This recognition of a duty of government to "foster and encourage" religion was not merely commentary. It was the law. In *Vidal v. Girard's Executors*, Justice Story, writing for a unanimous Court, famously upheld the Pennsylvania courts' recognition that "the Christian religion is a part of the common law," and this holding was regularly acknowledged by nineteenth- and early twentieth-century American courts.[112] As the Illinois Supreme Court wrote in 1883, a Christian society would predictably and justifiably feature laws and institutions "based upon and embodying the teachings of the Redeemer of mankind. It is impossible that it should be otherwise . . . . Our civilization and institutions are emphatically Christian."[113]

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112. 43 U.S. (2 How.) 127, 198 (1844); *see also* Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824). Matthew Hale had emphasized that "Christianity is parcel of the laws of England" in *R. v. Taylor* (1676), 86 Eng. Rep. 189 (KB). Numerous additional state court decisions upheld the view that American law should "give faith and credit to the religion of Christ, as the religion of the common people." State v. Chandler, 2 Del. 553, 562–63 (1837). As the Pennsylvania Supreme Court put it in 1848: "In a Christian community, it is not surprising that they should have received the legislative sanction." Specht v. Commonwealth, 8 Barr. 312, 325 (Pa. 1848). For further court rulings along these lines, see Jayson Spiegel, *Christianity as Part of the Common Law*, 14 N.C. CENT. L. REV. 494 (1984); Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27 (1998); Timon Cline, *Common Good and Common Belief in the Common Law*, ANCHORING TRUTHS (Nov. 30, 2021), https://www.anchoringtruths.org/common-good-and-common-belief-in-the-common-law/ [https://perma.cc/VQ2N-QYEW].

113. Richmond v. Moore, 107 Ill. 429, 435 (1883). As Chief Justice John Marshall wrote to the South Carolinian preacher Jasper Adams, the American population "is entirely Christian, and with us Christianity and Religion are identified. It would be strange indeed, if with such a people, our institutions did not presuppose Christianity." Letter

This fundamental orientation toward laws fostering and encouraging religion meant that even after the old Congregationalist Standing Order fell in New England, prayer and Bible reading continued in state-funded schools—including in the non-sectarian ones.[114] As the historian Mark David Hall has pointed out, well after Massachusetts abandoned its official sponsorship of Congregationalism in 1833, states continued to require religious tests for public office and prayer in schools.[115] And more generally, the introduction of publicly funded schools in America conformed to, and was animated by, the commonly held conviction that republican citizenship depended on a religious education. This view was expressed, for example, by the great American educator Noah Webster in the Preface to his 1832 textbook *History of the United States* (which begins with God's creation of Adam and Eve), in which he wrote that "Our citizens should early understand that the genuine source of correct republican principles is the Bible, particularly the New Testament or the Christian religion."[116]

Sabbath laws and blasphemy laws also continued to be enforced by the states and upheld by the courts as well.[117] For example, the New York case *People v. Ruggles* upheld the state's laws against public, anti-Christian blasphemy.[118] No constitutional challenge

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from John Marshall to Jasper Adams (May 9, 1833), *in* RELIGION AND POLITICS IN THE EARLY REPUBLIC: JASPER ADAMS AND THE CHURCH-STATE DEBATE 39, 51 (Daniel Dreisbach ed., 1996).

114. The controversy in *Schempp* centered on Pennsylvania and Maryland laws mandating Bible reading in public schools. *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963). For background on the "Standing Order" in New England, *see generally* RICHARD L. BUSHMAN, FROM PURITAN TO YANKEE: CHARACTER AND THE SOCIAL ORDER IN CONNECTICUT, 1690–1765 (1970): PETER S. FIELD, THE CRISIS OF THE STANDING ORDER: CLERICAL INTELLECTUAL AND CULTURAL AUTHORITY IN MASSACHUSETTS, 1780–1833 (1998).

115. Hall, *Did America Have a Christian Founding?*, HERITAGE FOUND. (June 7, 2011), https://www.heritage.org/political-process/report/did-america-have-christian-founding#_ftn36 [https://perma.cc/279F-E82Z].

116. **Noah Webster, History of the United States** 1 (New Haven: Durrie and Peck, 1832). *See also* Benjamin Rush, *Essays, literary, moral and philosophical* (1806), 94-113 (defending "the use of the Bible as a school book.").

117. James T. Ringgold, *Sunday Laws in the United States*, 40 U. PA. L. REV. 723 (1892).

118. 8 Johns. R. 290 (N.Y. 1811).

under the First Amendment was made,[119] and in fact, state laws punishing blasphemy endured well into the twentieth century. Comparable statutes in Massachusetts punished anyone "denying, cursing or contumeliously reproaching God, His creation, government or final judging of the world or by cursing or contumeliously reproaching Jesus Christ or the Holy Ghost, or by cursing or contumeliously reproaching or exposing to contempt and ridicule, the holy word of God contained in the holy scriptures shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars, and may also be bound to good behavior."[120] And Maryland's 1879 anti-blasphemy provisions, which had been continually renewed since 1723, was not declared unconstitutional until 1970.[121] Pennsylvania's remained in place until 2010.[122]

Similarly, in the Tennessee case of *Gunter v. State*, the conviction of men hunting on the Sabbath was upheld by the courts due to "the manifest corruption of the public morals, to the evil example and common nuisance of all good citizens."[123] According to the state supreme court, "secular labor on a Sunday" was "prejudicial" to the predominant "morals and health of the community."[124] Sabbath laws were consistently justified by state courts for their benefit to "the moral and physical well-being of the people, and the peace,

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119. *See generally* Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689 (2021). Even in cases like *Lindenmuller v. People*, 33 Barbour 561 (N.Y. Sup. Ct. 1861), that denied an establishment in New York affirmed that Christianity was "and ever has been, the religion of the people," and, therefore, deserved protection. *See also State v. Chandler*, 2 Del. 553, 562 (1837) ("every court in a civilized country is bound to notice in the same way, what is the prevailing religion of the people.").

120. MASS. GEN. LAWS ch. 272, § 36 (2006). *See also Commonwealth v. Abner Kneeland*, 37 Mass. 206 (1838) (marking the last time Massachusetts jailed a citizen for blasphemy, though the statute remained on the books).

121. State v. West, 9 Md. App. 270 (1970).

122. Kalman v. Cortes, 723 F.Supp.2d 766 (E.D. Pa. 2010).

123. 69 Tenn. 129, 129 (1878). On Sabbath laws generally, *see* Bethany Rupert, *The Sunday Rest Bill and the Battle to Keep the Civil Sabbath*, 39 SETON HALL LEGIS. J. 285 (2015); Benjamin Kline Hunnicutt, *The Jewish Sabbath movement in the Early Twentieth Century*, 69 AM. JEWISH HIST. 196 (1979); R. C. WYLIE, SABBATH LAWS IN THE UNITED STATES (1905); Cline, *supra* note 65, at 168–69.

124. *Gunter*, 69 Tenn. at 130.

quiet, and good order of society"[125]—and again, Sabbath laws (or "blue laws") remained in place in many states until only recently and still endure in some municipalities.

In general, then, public life in the states after the ratification of the First Amendment continued to be conducted on the basis of assumptions drawn from Christian tradition. No thoroughgoing challenge to the legality and legitimacy of such laws is known to American history prior to the establishment of "separation of church and state" as a formal constitutional doctrine of the Supreme Court after the Second World War. Although official support of particular denominations was discontinued, this did not preclude government support or promotion of religion.[126] To nineteenth century Americans, these two positions were perfectly consistent with one another.

Against this understanding of history, it is often argued that the addition of so-called Blaine Amendments in the laws of many of the states demonstrates that the principle of separating church and state was in fact rapidly becoming accepted in nineteenth century America. Let's consider this argument.

In 1876, a new constitutional amendment was proposed by Republican Congressman James Blaine of Maine, which would have incorporated the Establishment Clause into the constitutions of the states, as well as imposing an explicit ban on the use of public funds for schools controlled by "religious sects and denominations."[127]

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125. People v. Moses, 140 N.Y. 214, 215 (1893). *See also* People v. Havnor, 149 N.Y. 195, 197 (1896).

126. Thomas C. Berg, *Disestablishment from* Blaine *to* Everson*: Federalism, School Wars, and the Emerging Modern State*, *in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 307, 312 (2012).

127. The proposed amendment read: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." Jane G. Rainey, *Blaine Amendments*, FREE SPEECH CENTER (July 5, 2024), https://firstamendment.mtsu.edu/article/blaine-amendments/ [https://perma.cc/WN8R-UKGB].

The Blaine Amendment was passed in the House of Representatives but defeated in the Senate. Thereafter, many of the states adopted similar "Blaine Amendments" to their constitutions or incorporated such provisions into their laws.

To contemporary ears, this nineteenth century campaign to ban the use of government funds for "sectarian" schools sounds like the "separation of church and state" doctrine adopted in *Everson* and then used to remove the Bible and prayer from public schools in the 1960s. But it was nothing of the sort. In the 1870s, and in fact up until the First World War, the country was still so thoroughly Protestant that the states' "non-sectarian schools" were what we would today call non-denominational Protestant schools.[128] Meanwhile, large-scale Catholic immigration and fear of papal influence gave life to the movement to cut off access to public funds by "sectarian" schools—primarily meaning Catholic schools.

In this context, President Grant's famous 1875 speech endorsing "common schools," in which education would be "unmixed with sectarian, pagan, or atheistical tenets," was universally understood to mean that the American government should provide no support to education provided by Catholics, pagans, or atheists.[129] These common schools were not, therefore, a secular project, but rather an effort to "Americanize" immigrants by teaching them the King James Bible and prayers in keeping with Protestant norms.[130] It is instructive that Pope Pius IX's *Syllabus of Errors* was read from the Senate floor during debate over the federal Blaine Amendment to illustrate the view that Catholic education was intellectually restrictive and contrary to the Protestant principle of liberty of conscience.[131] Grant's endorsement of common schools was, in other

128. On the dominance of Protestantism until 1914, *see* HUDSON, *supra* note 81, at 129.

129. Ulysses S. Grant, Remarks at the Ninth Annual Meeting of the Army of the Tennessee in Des Moines, Iowa (Sept. 29, 1875), https://www.presidency.ucsb.edu/documents/remarks-the-ninth-annual-meeting-the-army-the-tennessee-des-moines-iowa [https://perma.cc/65A9-WP4E].

130. Berg, *supra* note 123, at 315.

131. *See* Toby Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 138–39 (2000); RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800–1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM (1938), 437-440 (demonstrating the dichotomy,

words, a reflection of his acceptance of the inseparability of Protestant norms from American public culture.

It is true that in the twentieth century, the "non-sectarian" Protestant religious instruction offered by the public schools—which had been endorsed by proponents of the Blaine amendments—itself came to be seen as sectarian. This means that Blaine-type additions to the state constitutions, whose original purpose had been to strengthen Protestantism at the expense of Catholicism, were later turned to a new purpose: Strengthening the theory of the "neutral state" and prohibiting the promotion of religion of any kind.[132] In this way, a predominately Protestant America succeeded in undermining the future of Christianity in the country with its own hands. By denying government support to private religious schools, the groundwork was laid for the modern Establishment Clause jurisprudence that we reject as improper and harmful.

Moreover, the congressional debate over the Blaine Amendment in 1876 teaches us something important about the Fourteenth Amendment, which became the constitutional basis for the Supreme Court's reasoning in *Everson* and much subsequent precedent. As Muñoz points out, the Blaine Amendment was debated in Congress just eight years after the Fourteenth Amendment was ratified in 1868.[133] At that time, Congress included some twenty-three members who had themselves voted to approve the Fourteenth Amendment, including two who had served on the drafting committee. The fact that the Blaine Amendment was entertained by Congress at all therefore supports the inference that "a significant portion of those who drafted and ratified the Fourteenth Amendment did not understand it to incorporate the Establishment Clause" into the constitutions of the states.[134] In other words, the fact that Congressman Blaine and his supporters hoped to amend

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from the standpoint of various anti-Catholic societies, between "Romanism" and liberty of conscience). *See also* 4 Cong. Rev. 5587-88 (Sen. George Edmunds declaring that there was liberty of conscience "in every church but one.").

132. For a survey of state enactments, see Berg, *supra* note 123, at 323–28.

133. *See* Muñoz, *supra* note 72, at 634–35.

134. *Id.*

the Constitution in order to apply the Establishment Clause to the states demonstrates both that they did not believe the Establishment Clause had been applied to the states with the passage of the Fourteenth Amendment eight years earlier, and that neither they nor anyone else in Congress considered the Fourteenth Amendment to be a suitable mechanism for doing so.[135]

VII. THE CONSERVATIVE RESPONSE TO *EVERSON*

We are not the first, of course, to recognize that the doctrine established in *Everson* is an ahistorical reading of the purposes and intentions behind the passage of the First Amendment. Every scholar of the subject knows that the nineteenth- and early twentieth-century consensus was that articulated by Justice Story in his *Commentaries*. As he wrote:

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.[136]

Story's wording here is nearly the exact opposite of the words of Justice Black in *Everson*. From them we understand that the First Amendment was "not meant to level all religions," nor to "hold all in utter indifference." Any such purpose would have been rejected universally during the period when the First Amendment was ratified. He continues:

> The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical

135. *Id.*

136. STORY, *supra* note 108, at § 1868.

> establishment[.] Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.[137]

Again, the First Amendment was intended, and long understood, to prevent inter-denominational conflict at the federal level. It was indeed meant to avoid sectarian conflict. But it was decidedly not designed to interfere with the obligation and the right of the states to encourage and support religion in a manner that was appropriate to their respective traditions and settlements.

When the new, ideologically loaded reading of the First Amendment was advanced in *Everson* and *McCollum*, not a single dissenting voice was raised in defense of the traditional understanding of the Constitution. But in the *Engle* and *Schempp* cases of the 1960s, which were responsible for banning prayer and Bible reading from public schools, Justice Potter Stewart became that lone voice. In *Schempp*, he attempted to develop a compromise position that would allow the application of the First Amendment's Religion Clauses to the states, while at the same time leaving room for Christianity in the schools and in public life. In the process, he noted the "irony" of using the First Amendment, which had been ratified to protect the states' autonomy in religious affairs, in order to impose a ban on state legislatures exercising this very right:

> As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments…. It is not without irony that a constitutional provision evidently designed to leave the states free to go their own way should now have become a restriction upon their autonomy.[138]

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137. *Id.* at §§ 1871, 1873.

138. School Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 308–10 (1963) (Stewart, J., dissenting).

Justice Stewart also seems to have been the first justice of the Supreme Court to state plainly that the post-*Everson* decisions were in fact establishing a "religion of secularism" in the schools:

> A compulsory state education system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed in an artificial and state-created disadvantage[.] And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at least, as governmental support of the beliefs of those who think that religious exercises should be conducted only in private.[139]

Justice Stewart's prediction that the *Schempp* decision would lead to the conclusion "that religious exercises should be conducted only in private" proved prescient. Twenty-nine years later, Justice Kennedy's majority opinion in *Lee v. Weisman* confirmed the view that that the Constitution was designed to relegate religious beliefs and worship "to the private sphere."[140]

Justice Stewart initiated a tradition of dissenters on the "separation of church and state" question that would eventually include Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas—each of whom questioned the way in which post-*Everson* jurisprudence had applied the Establishment Clause to rendering public religion illegitimate in America.

To date, then-Justice Rehnquist's dissent in *Wallace v. Jaffree* remains the most powerful and direct demolition of *Everson*'s doctrine of a "wall of separation between church and state" written by any member of the Supreme Court. In *Wallace*, the majority, led by Justice John Paul Stevens, ruled that an Alabama statute requiring a one-minute period of silence in public schools "for meditation or voluntary prayer" was "a law respecting the establishment of religion" and thus violated the First Amendment.[141]

Rehnquist replied with thinly veiled anger at the way in which the history of the American founding had been manipulated by the

139. *Id.* at 313.
140. 505 U.S. 577, 589 (1992).
141. 472 U.S. 38, 42 (1985).

Court since *Everson* to give the impression that the First Amendment was intended to establish a ban on government support of religion. His dissent can be seen as one of the first modern arguments for a systematic reinstatement of the original intentions of the authors of the Constitution. As he wrote:

> The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decision-making that has plagued our Establishment Clause cases since *Everson*.[142]

For Justice Rehnquist, then, it is only the actual history surrounding the ratification of the First Amendment that can speak with authority as to its intended meaning. As a first step to retrieving this history, he pointedly removes Jefferson—the idol of the Enlightenment-liberal Court—from the discussion of the meaning of the First Amendment. As he writes:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor [of a "wall of separation between church and state"] for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.[143]

After emphasizing that Jefferson had nothing to do with the drafting or ratification of the First Amendment, Justice Rehnquist proceeds to pinpoint precisely where Jefferson's erstwhile protégé,

142. *Id.* at 113 (Rehnquist, J., dissenting).
143. *Id.* at 92.

James Madison, who was serving in the House of Representatives, stood during the relevant period in 1789. It was Madison, after all, who proposed the Bill of Rights to Congress, so it is helpful to read Rehnquist's account of Madison's own first draft of the Religion Clauses, the reasons he gives for them, and the replies of his colleagues in Congress.[144] After surveying this material, Rehnquist concludes:

> It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.[145]

To conclude his historical case, Rehnquist assesses the views of the Congress more generally by looking at its other concurrent legislative activities, which included reenactment of the Northwest Ordinance (among other things, providing land grants for establishing schools because "religion, morality, and knowledge [are] necessary to good government and the happiness of mankind"); and passage of a resolution calling on President George Washington to issue a Thanksgiving Day proclamation (that Congress envisioned as "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.")[146]

Having examined these concurrent legislative activities and the records of the congressional debate over the Religion Clauses, as well as the interpretation of leading jurists after ratification, Justice Rehnquist concluded that there is no historical basis for the claim that the First Amendment was intended to institute in America a

144. Madison's first draft read: "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." James H. Read, *James Madison*, FREE SPEECH CENTER (July 5, 2024), https://firstamendment.mtsu.edu/article/james-madison/ [https://perma.cc/KG5E-DMK4].

145. *Jaffree*, 472 U.S. at 98 (Rehnquist, J., dissenting).

146. *Id.* at 100–01.

regime characterized by a "separation of church and state." As he puts it:

> It would seem from the evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: It forbade the establishment of a national religion, and forbade preference among religious sects or denominations…. The Establishment Clause did not require government neutrality between religion and irreligion, nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.[147]

Similar views have since been taken up, with different emphases, by Justices Scalia and Thomas. For example, in *Van Orden v. Perry*, Chief Justice Rehnquist led a divided Court in upholding the constitutionality of a monument displaying the Ten Commandments on the grounds of the Texas State Capitol in Austin.[148] This might have been an exceptionally fitting moment for the Court to revisit the 25-year-old decision in *Stone v. Graham*, in which a 6-3 majority had ruled that a Kentucky statute requiring the posting of the Ten Commandments in schoolrooms violated the Establishment Clause. In *Stone*, a younger Justice Rehnquist had forcefully dissented.[149] But in the meantime, the Court's "separation of church and state" jurisprudence had become so convoluted and hesitant that Chief Justice Rehnquist's majority in *Van Orden* did not even venture to overrule the *Stone* precedent, much less to attempt to overturn the principle of "separation of church and state" on which two generations of rulings now rested.

Looking over the incoherence of the Court's Establishment Clause rulings in his concurrence in *Van Orden*, Justice Scalia wrote that he was willing to join the opinion of the chief justice only "because I think it accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence

147. *Id.* at 106.

148. 545 U.S. 677 (2005).

149. 449 U.S. 39, 43–46 (1980) (Rehnquist, J., dissenting).

we currently apply some of the time." He could not, however, accept that this jurisprudence was in fact correct. Instead, he proposed a different approach to the Establishment Clause, which would recognize that "there is nothing unconstitutional in a state's favoring religion generally." As he wrote:

> I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our nation's past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a state's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a non-proselytizing manner, venerating the Ten Commandments.[150]

This was a natural conclusion for Scalia, who had already committed himself, in *Weisman*, to the view that "The Establishment Clause was adopted "to prohibit . . . an establishment of religion at the federal level"; and "to protect state establishments of religion from federal interference."[151]

But the most thoroughgoing challenge to post-*Everson* Establishment Clause jurisprudence came from Justice Clarence Thomas in *Elk Grove v. Newdow*.[152] In this case, the Court left in place recitations of the Pledge of Allegiance in schools despite the fact that the wording of the pledge invokes the image of America as "one nation under God." Although the decision rested on jurisdictional technicalities rather than on a direct confrontation with First Amendment jurisprudence, Justice Thomas, in a concurring opinion, observed that a consistent application of the doctrine of "separation of church and state" from *Everson* "would require us to strike down the Pledge policy" as well.[153] Rather than continuing to torment itself with an impossible doctrine, Justice Thomas suggested that the

150. *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).
151. Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).
152. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).
153. *Id.* at 46 (Thomas, J., concurring in the judgment).

Court "take this opportunity to begin the process of rethinking the Establishment Clause."[154]

What he had in mind was the wholesale rejection of the notion, first advanced in *Cantwell*, that the Establishment Clause could be "incorporated" into the constitutions of the states by way of the Fourteenth Amendment. Thomas begins by reviewing the purpose of the Establishment Clause as it had already been described by Justices Story, Potter, Rehnquist, and Scalia:

> As a textual matter, this Clause probably prohibits Congress from establishing a national religion. Perhaps more importantly, the Clause made clear that Congress could not interfere with state establishments[.] Nothing in the text of the Clause suggests that it reaches any further.[155]

On the basis of this observation, Justice Thomas concludes that the Establishment Clause simply has a different purpose from the other clauses in the First Amendment:

> The Establishment Clause does not purport to protect individual rights. By contrast, the Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the First Amendment expressly disable Congress from "abridging [particular] freedom[s]." This textual analysis is consistent with the prevailing view that the Constitution left religion to the States. History also supports this understanding: At the founding, at least six States had established religions[.][156]

> Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand . . . . An incorporated Establishment Clause prohibits exactly what the Establishment Clause

154. *Id.* at 45.
155. *Id.* at 50.
156. *Id.*

> protected: State practices that pertain to "an establishment of religion."[157]

In these passages, Thomas asks how the Court can stand by its "incorporation" of the Establishment Clause into the state constitutions, when the result of this judicial maneuver is the exact opposite of the plain and intended meaning of this clause of the First Amendment. This argument appeared again in *Town of Greece v. Galloway* and in other more recent cases as well.[158]

Justice Thomas's concurrence in *Espinoza v. Montana Department of Revenue*[159] provides further evidence of his willingness to reconsider First Amendment jurisprudence as it stands, and of his recognition of the ongoing harms inflicted by the *Everson* decision in particular. In *Espinoza*, the Court ruled 5-4 that a state scholarship program providing public funding for private education cannot exclude religious schools. In so doing, it determined that Montana's version of the Blaine Amendment—the "No-Aid Provision," which prohibited direct state appropriations to religious organizations[160]—violated the First Amendment's Free Exercise Clause because it discriminated against religious citizens of the state.

While agreeing that the Montana scholarship program violated the Free Exercise clause, Justice Thomas's concurrence lays the blame for this violation of the constitutional rights of religious individuals and institutions on the Supreme Court's Establishment Clause jurisprudence, beginning in *Everson* in 1947. As he writes:

> As the Court stated in [*Everson*,] its first case applying the Establishment Clause to the States, the government "cannot pass laws which aid one religion, aid all religions, or prefer one religion over another." . . . This "equality principle," so the theory goes, prohibits the government from expressing any preference for

157. *Id.*

158. 572 U.S. 565, 604, 606–07 (2014) (Thomas, J., concurring in part and concurring in the judgment); *see also* Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 74 (2019) (Thomas, J., concurring in judgment) ("As I have explained elsewhere, the Establishment Clause resists incorporation against the States.")

159. 140 S. Ct. 2246 (2020).

160. 2015 Mont. Laws 2168, § 7.

> religion—or even preventing any signs of religion in the governmental realm. Thus, when a plaintiff brings a free exercise claim, the government may defend its law, as Montana did here, on the ground that the law's restrictions are *required* to prevent it from "establishing" religion. This understanding of the Establishment Clause is unmoored from the original meaning of the First Amendment . . . Properly understood, the Establishment Clause does not prohibit States from favoring religion.[161]

Having thrown down this remarkable challenge to the entire doctrine of "separation of church and state" going back to *Everson,* Justice Thomas presents a vision of a restored Establishment Clause, which would permit great debates about the place of religion in government and society to be revived at the state and local level:

> The Court's current understanding of the Establishment Clause actually thwarts, rather than promotes, equal treatment of religion. Under a proper understanding of the Establishment Clause, robust and lively debate about the role of religion in government is permitted, even encouraged, at the state and local level. The Court's distorted view of the Establishment Clause, however, removes the entire subject of religion from the realm of permissible governmental activity . . . . It communicates a message that religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion.[162]

If we take Justice Thomas's arguments in these cases seriously, there is only one reasonable conclusion that can be drawn. The so-called "incorporation" of various provisions of the Bill of Rights can only make sense when what is under consideration is an individual liberty that is being guaranteed against violation by a state government. In the case of the Establishment Clause, there is no such individual liberty, as Justice Thomas has noted often. What is guaranteed by the Establishment Clause is the right of the states to their own religious establishments, with each state pursuing the religious and moral norms that are suited to it without interference from the national government. As originally understood, this right

161. *Espinoza*, 140 S. Ct. at 2263–64 (Thomas, J., concurring).
162. *Id.* at 2266.

even included the integration of religion into state-sponsored education.

Notice the power of the First Amendment's vision when read in this light. According to this view, the First Amendment, with its two Religion Clauses, recognizes the religious freedom of communities as well as that of individuals—and it pledges not to encroach on either. This is the essential balance that was struck by the Constitution with its Bill of Rights—indeed, with its entire overarching structure. It is this essential balance that was destroyed with the attempt to incorporate the Establishment Clause into the constitutions of the states in the 1940s.

One may, of course, take a more radical view, arguing that the entire enterprise of incorporating the Bill of Rights into the Fourteenth Amendment since *Gitlow* has been misconceived. But even if we assume that the liberties protected by the Fourteenth Amendment are to be identified with the individual liberties secured by the Bill of Rights, it is clear that while the Free Exercise Clause does contemplate such an individual liberty, the Establishment Clause does not. This means that the application of the Establishment Clause to the states in *Cantwell*, and especially the project of establishing "a wall of separation between church and state" that begins with *Everson*, must be rejected.

VIII. RESTORING PUBLIC RELIGION IN AMERICA

But as a practical political matter, can *Everson* be overturned? There are reasons to believe that such a restoration of the original meaning of the Constitution in matters of church and state is possible.

In part, this assessment is a consequence of the Supreme Court's decision in *Dobbs*,[163] as well as the recent ruling striking down race-based admissions policies in *Students for Fair Admissions*.[164] In each of these cases, a misguided ruling of the Court from the 1970s had triggered a massive shift in American public culture whose direct

163. 142 S. Ct. 2228 (2022).

164. 143 S. Ct. 2141 (2023).

harms had continued for fifty years. Few of us who lived through these years believed that the Supreme Court would ever be so bold as to attempt to restore the American Constitution by overturning these decisions. Yet it has now happened. And this in itself has opened up the possibility that other wrongly decided cases may be revisited in the same way.

But there is a deeper reason for thinking that the time for the repeal of *Everson* has at last arrived. Everyone understands that the cultural upheavals of recent years have left America divided to a degree unknown since the Civil War era. A great bitterness separates the various camps from one another, with all too many commentators speaking of the need for a "national divorce."[165]

This is dangerous talk. A far wiser path would be the restoration of American federalism, with each of the fifty states determining the character of public life for itself. Indeed, in the wake of *Dobbs*, many states have taken to their legislatures or their ballot boxes to specify the abortion law that is best suited for their own public.[166] Such federalism could open a period of co-existence among radically different kinds of societies. And it would provide real-world laboratories in which these competing proposals can be tested not only in theory, but in practice.

There is a close connection between American federalism and the Establishment Clause of the First Amendment. As we've seen, the Establishment Clause was not the product of Enlightenment liberalism and the ideal of a neutral state, as liberals have often claimed. On the contrary, the Establishment Clause has a different, more conservative provenance: Its purpose is to codify an American version of the Peace of Augsburg, a 1555 treaty between Emperor Charles V and the Schmalkaldic League that ended the conflict between Lutheran and Catholic states within the Holy Roman Empire

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165. David French, *Take Threats of 'National Divorce' Seriously*, N.Y. TIMES (Mar. 5, 2023), https://www.nytimes.com/2023/03/05/opinion/national-divorce-civil-war.html# [https://perma.cc/VD38-EMZE].

166. *2023 and 2024 abortion-related ballot measures*, BALLOTPEDIA, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures [https://perma.cc/L6RZ-LCEQ] (noting that the two years post-*Dobbs* had set records for the most abortion-related ballot measures).

by allowing each principality to determine its confessional basis. Calvinist territories were similarly recognized after 1648 following the Thirty Years' War.[167]

In Britain, too, the Act of Union of 1707 created the Kingdom of Great Britain, with a single monarch and a single parliament—yet the established church in England remained Anglican, and the established church in Scotland remained Presbyterian.

These famous German and British precedents were the true model and inspiration for the Establishment Clause of the First Amendment, which recognized that peace can be established by means of a mutual recognition (or at least a mutual toleration) of competing state religious establishments, each enacted in accord with its own unique history and traditions; and a principle of non-interference on the part of the overarching national government.

The idea that Americans may wish to live under a genuinely federal system—one permitting different models of religious and moral governance—is more compelling at this moment than at any time since the Second World War. And for precisely this reason, overturning *Everson*'s doctrine of a "wall separating between church and state," and restoring the original meaning of the Establishment Clause as a federalism provision of the Constitution, is a step whose time has come.

This view has been growing steadily stronger among conservatives. For a number of years now, the need to revise the post-Second World War liberal settlement has been a matter of open discussion. Many now recognize the need to embrace a form of conservative democracy or Christian democracy that will be concerned not only with individual liberties, but also with the conservation and transmission of the American religious and moral inheritance.[168]

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167. The diplomatic nature of the Constitution has been commented on considerably. Historian David Hendrickson compares the Constitution to the Treaties of Westphalia (1648), Utrecht (1713), and Vienna (1815). *See* David C. Hendrickson, *Bring the State System Back In: The Significance of the Union in Early American History, 1763-1865*, *in* STATE AND CITIZEN: BRITISH AMERICA AND THE EARLY UNITED STATES 114 (Peter Thompson & Peter S. Onuf eds., 2013).

168. HAZONY, *supra* note 31, at 259–347. *See also* PATRICK DENEEN, WHY LIBERALISM FAILED (2018); RUSTY RENO, RETURN OF THE STRONG GODS: NATIONALISM, POPULISM,

However, due to the declining commitment to Christianity in America, many have simply assumed that no such restoration of a pre-*Everson* commitment to conservative democracy is possible.

We disagree with this assessment. Ironically, the much-discussed decline of Christianity in America is one of the factors that have made it much more likely that *Everson* will be overturned. The reasons should be obvious: The doctrine of a "wall of separation between church and state" was one that could only have been implemented at a time when Christianity was still an overwhelmingly powerful force in American life. The vast Christian majority in America in 1947 or 1963 could believe there was no need for affirmative government encouragement of religion because they lived in an era in which a steep decline in religious belief and practice seemed impossible.[169] Although some among the era's elites doubtless knew what they were doing, few within the broader public expected that this doctrine might be used to eliminate public religion entirely.

But the decline of religion and the arrival of a genuine cultural revolution have awakened many to a more realistic assessment of what the liberal "separation of church and state" doctrine really means. Christians are finally coming to see that "separation of church and state," taken to its logical conclusion, has yielded the complete disintegration of traditional Christian norms of speech and behavior in public life, even as radical ideologies, unimaginable even a generation ago, have been imposed on the nation's foremost public institutions as a substitute.

Nor is this view limited to Christians alone. Orthodox Jews (including two of the three co-authors of this essay) and many other

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AND THE FUTURE OF THE WEST (2019); CHRISTOPHER CALDWELL, THE AGE OF ENTITLEMENT: AMERICA SINCE THE SIXTIES (2020).

169. *See* Frank Newport, *Five Key Findings on Religion in the U.S.*, GALLUP (Dec. 23, 2016), https://news.gallup.com/poll/200186/five-key-findings-religion.aspx ("In the late 1940s and 1950s, when Gallup began regularly measuring religious identity, over nine in 10 American adults identified as Christian—either Protestant or Catholic. … About one in five U.S. adults (21%) don't have a formal religious identity. This represents a major change from the late 1940s and 1950s when only 2% to 3% of Americans did not report a formal religious identity when asked about it in Gallup surveys.").

non-Christians maintain a commitment to the biblical inheritance as the surest foundation for decency in American public life. Many of them have seen enough to understand that a school system stripped of any reference to God and Scripture is not an appropriate place to educate children; and that a public arena stripped of God and Scripture is one that will not be capable of surviving the profound social and cultural crises that the United States now faces.

These are compelling reasons for believing that America's *Everson*-era "separation of church and state" dogmas have run their course—and that the time has come to return to the states the original responsibilities and powers that were assigned to them under the Establishment Clause of the First Amendment.

When we turn our attention from the public arena to the American judiciary, we see that here, too, there has been a ripening of the conditions necessary for such an historic decision. We have already cited the opinions of Supreme Court justices who have long understood that the doctrine of "separation of church and state" is unworkable. And indeed, recent years have seen a spate of Court rulings, such as *Van Orden*,[170] *Town of Greece*,[171] *American Legion v. American Humanist Association*,[172] and *Kennedy*,[173] in which they Court has taken a more accommodating view of prayer in city council meetings and sporting events, public displays of the Ten Commandments, public display of Christian crosses, and so forth.

No less important has been the Supreme Court's increasingly skeptical view of the doctrine of *stare decisis*—the principle that, as a general matter, the Court should leave the law as it has been decided. Many recent high-profile decisions of the Roberts Court evince a greater willingness to overturn what Justice Thomas and others have called "demonstrably erroneous"[174] precedent: *Dobbs*[175]

170. Van Orden v. Perry, 545 U.S. 677 (2005).

171. Town of Greece v. Galloway, 572 U.S. 565 (2014).

172. 139 S. Ct. 2067 (2019).

173. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

174. Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring); *see also* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

175. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

(which overturned *Roe*[176]), *Students for Fair Admissions*[177] (which overturned *Bakke*[178]), and *Loper Bright Enterprises*[179] (which overturned so-called "*Chevron* deference"[180]) are particularly illustrative. The timing is propitious for an effort to overturn *Everson*—particularly so given the Oklahoma religious charter school case now pending at the Supreme Court, discussed below. The Roberts Court, as currently constituted and as likely to be constituted for a while longer, is neither reluctant nor bashful about overturning flawed, anti-constitutional precedent even if that precedent has been around for a while.

When it comes to overturning *Everson*, the underlying provision whose "demonstrably erroneous" interpretation must be overturned is the Establishment Clause of the First Amendment. We look forward to this question being taken up by *stare decisis*-skeptical justices not long from now.

It is also worth evaluating *Everson* in light of recent debates over the place of the Preamble to the Constitution and considerations of the "general welfare" or the "common good" in American jurisprudence. We are of the view that the Preamble to the Constitution, no less than the common law inheritance, requires us to interpret the laws in accordance with their original purpose in securing the national interest and general welfare of the American people.[181] It is difficult to conceive of a better example of a common good originalist cause than the effort to overturn *Everson* and return decisions about public religion and morals to the states.

These considerations lead us to believe that the federal judiciary will be increasingly prepared to revisit *Everson* in the coming years. What is needed now is for state legislatures to play their part, and

176. Roe v. Wade, 410 U.S. 113 (1973).

177. Students for Fair Admissions v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

178. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

179. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

180. See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

181. *See* Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917 (2021); HAZONY, *supra* note 31, at 239–49.

to enact legislation that will give the Supreme Court a direct opportunity to rule on the "federalism provision" aspect of the Establishment Clause—especially with regard to matters directly affecting the place of religion in state-supported schools, which has been at the heart of the debate over "separation of church and state" since 1947.

Three recent developments in the states are relevant and instructive. In June 2024, the Oklahoma Supreme Court ruled that the nation's first overtly religious charter school, St. Isidore of Seville Catholic Virtual School, operated by the Roman Catholic Archdiocese of Oklahoma City and the Catholic Diocese of Tulsa, is unconstitutional.[182] As of this essay's publication, the Supreme Court is currently hearing this case on appeal. The case, consolidated as *St. Isidore of Seville Catholic Virtual School v. Drummond*, represents the best opportunity in decades for the justices to overturn *Everson* and reaffirm the legitimacy of direct governmental support of religion. We hope the justices will avail themselves of this opportunity to restore the original meaning and balance of the First Amendment's Religion Clauses.

However, there are other active cases that may serve this purpose as well. In November 2024, a federal judge ruled unconstitutional a Louisiana law requiring that the Ten Commandments be displayed in the classrooms of all schools that receive public funding, including colleges and universities.[183] Meanwhile, the New Hampshire

182. Drummond ex rel. State v. Okla. Statewide Virtual Charter Sch. Bd., 558 P.3d 1 (Okla. 2024), *cert. granted*, 2025 WL 288308 (Mem.) (2025) (No. 24-396, 2024 Term); *see also* Jasper Ward, *Oklahoma's top court rejects establishment of first publicly funded Catholic school*, REUTERS (June 25, 2024), https://www.reuters.com/legal/oklahomas-top-court-rejects-establishment-first-publicly-funded-catholic-school-2024-06-25/; Sarah Mervosh, *Oklahoma Approves First Religious Charter School in the U.S.*, N.Y. TIMES (June 7, 2023), https://www.nytimes.com/2024/06/25/us/oklahoma-supreme-court-religious-charter-school.html.

183. Roake v. Brumley, 2024 WL 4746342 (M.D. La. Nov. 12, 2024); *see also* Sara Cline & Kevin McGill, *Federal judge blocks Louisiana law that requires classrooms to display Ten Commandments*, ASSOCIATED PRESS (Nov. 13, 2024), https://apnews.com/article/ten-commandments-law-blocked-public-schools-louisiana-87b3dde94e583fdbb9ecb26db42b0206; Chelsea Brasted, *Louisiana Set to Become First State Requiring Ten Commandments Be Posted in Schools*, AXIOS (May 17, 2024),

legislature recently removed the words "sectarian" and "nonsectarian" from the state's statutes dealing with subsidization of public programs, thereby removing the principal legal barrier to direct state funding of religious schools.[184] All these skirmishes, including the Oklahoma case now pending at the Supreme Court, highlight a growing effort on the part of state officials and legislatures to move past *Everson* and resume the affirmative encouragement of religion in public educational institutions.

To be clear, we believe that American legislatures and courts should uphold the venerable American tradition of excusing children from instruction and exercises to which their parents have a religious or moral objection. Moreover, the availability of such exemptions should be clearly spelled out in state statutes or in state constitutions.

But with this provision for freedom of conscience in place, state legislatures should provide for the funding of denominational schools, as well as for schools offering multiple religious and denominational tracks. Furthermore, state legislatures should explicitly indicate their support for school prayer and instruction in the Bible wherever there is a majority that supports such education for its children.

Finally, state legislatures might consider clarifying in explicit statutory or state constitutional language that atheist or Satanic "churches" and similar organizations will not be eligible to benefit from state-level provisions supporting religion. Nothing in the meaning or the history of the Establishment Clause requires states to adopt a posture of "neutrality" between traditional religious institutions and those whose manifest purpose is to mock religion and inculcate immorality. States examining the adoption of measures encouraging religion will have to experiment with lan-

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https://www.axios.com/local/new-orleans/2024/06/19/louisiana-ten-commandments-in-classrooms.

184. Tim Rosenberger & Nicole Stelle Garnett, New Hampshire's Religious Freedom Revival, CITY JOURNAL (Mar. 13, 2024), https://www.city-journal.org/article/new-hampshires-religious-freedom-revival [https://perma.cc/6F6V-E42E].

guage permitting a narrower or broader range of religious traditions to receive public support, and these standards, varying from state to state, will need to be crafted in light of local conditions. But the considerations taken into account should include (i) the historical presence of a given religious tradition within the state, (ii) the civilizational significance of the texts, beliefs, and practices it proposes to teach, and (iii) its contribution to upholding traditional standards of public morality and decency.

IX. CONCLUSION

We stand at a difficult juncture in history of the United States and of all Western nations. The forces of cultural revolution have undermined much that was worthy in the inheritance received from our ancestors. A pattern of judicial resistance against this trend has been visible for some years, most obviously in the decision of the Supreme Court in *Dobbs*, which has opened a path for the restoration of both common sense and America's federalist constitutional order. We can now see clearly that the next step along this path is the formal abrogation by the Supreme Court of its decision in *Everson v. Board of Education*.

Two issues of unsurpassed importance hang in the balance as we begin a debate over *Everson*: First, whether it is legitimate for any of the American states to exercise their historic right to place Christianity, or religion in general, in a position of predominance as regards the public life and culture of a certain portion of the country. And second, whether it is legitimate to place such a fateful decision in the hands of the people's elected representatives in each of the fifty states.

We answer these questions in the affirmative.

Every day it becomes clearer that the purportedly value-neutral, proceduralist liberalism that has dictated American politics since the Second World War will not suffice as a counterweight to the excesses of modern progressivism. In this moment, with the neo-Marxist onslaught having made the institutional and cultural inroads that it has, the question facing conservatives is not whether

they must respond in kind, but what will constitute the substance of their vision of the good in law and politics.

Fortunately, conservatives do not have to look very far. Our substantive vision of the good, like that of George Washington and his party during the early years of America's independence, should be built upon the primacy of God and Scripture, and of religion as the greatest potential source for national and moral renewal.

One does not need to embrace the old New England preference for an established church of a particular denomination to recognize the damage that *Everson*'s doctrine of "separation of church and state" has wrought in the United States—and, indirectly, in many other nations. It is important to remember that in 1947, no established church remained anywhere in America. *Everson* was therefore never about combating government endorsement of a single denomination to the exclusion of all others. It was about excluding America's Christian and biblical heritage from public life and introducing a new Enlightenment-liberal principle in its place. That Enlightenment-liberal principle has always claimed to be making government "neutral" toward religion. But in the decades since *Everson*, we have seen that, in reality, the principle of "separation of church and state" is not neutral, but destructive. It unleashes not moderation and tolerance, but a vicious spirit of hostility toward the men and women, institutions, beliefs, and ways of life that America has received as an inheritance from the two great biblical religions, Christianity and Judaism.

Today, the Court's doctrine in *Everson* stands as perhaps the principal obstacle to the restoration of a sound understanding of the First Amendment, to a revived American federalism, and to the recognition that state governments have a both a right and a responsibility to support public religion and morals wherever there is a Christian or "pro-Christian" majority that approves of such support. In short, the wrongly decided *Everson* decision is the principal obstacle to the restoration of a genuinely conservative public life in at least some of the American states, and to a peaceable toleration between conservative states and their progressive and liberal neighbors. For these reasons, it must fall.