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ARTICLES

The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle

Kurt T. Lash*

INTRODUCTION

Pity the Establishment Clause.¹ Today, more than fifty years after its application against the states, no one seriously believes that this was the original intent of those who drafted and ratified the Fourteenth Amendment. When the Supreme Court decided *Everson v. Board of Education*,² it did so with citations to James Madison and Thomas Jefferson, not the members of the Thirty-ninth Congress.³ Since *Everson*, the Court has generally followed the advice of Justice Clark,⁴ and dismissed the issue of historical intent as “of value only as an academic exercise.”⁵

* Associate Professor, Loyola Law School (Los Angeles). I would like to thank Jay Bybee, Michael Curtis, David Leonard, Sam Pillsbury, Steven Smith, and Larry Solum for their encouragement and helpful suggestions. All errors, of course, remain my own. Thanks also to the indefatigable efforts of my research assistant, John Walsh.

1. “Congress shall make no law respecting an establishment of religion” U.S. CONST. amend. I.

2. 330 U.S. 1, 15 (1947).

3. *Id.* at 11-13 (discussing the role played by James Madison and Thomas Jefferson in the passage of the Virginia Bill for Religious Liberty and the adoption of the First Amendment).

4. There are a few notable exceptions. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 254-55 (1963) (Brennan, J., concurring); *Illinois ex rel. McCullom v. Board of Educ.*, 333 U.S. 203, 215 (1948) (Frankfurter, J.).

5. *Abington Sch. Dist.*, 374 U.S. at 217. The issue seemed to be forced upon the Court in 1985 when District Judge Brevard Hand explored the available historical evidence and concluded that the framers of the Fourteenth Amendment had not intended to incorporate the Establishment Clause against the states. *Jaffree v. Board of Sch. Comm’rs*, 554 F. Supp. 1104, 1124 (1983). The Supreme Court reversed without addressing a single historical argument made by Judge Hand. *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985). Although the Supreme Court regularly refers to history in its Establishment Clause decisions, invariably the references are to the ideas of the Founders, and not the intentions of those who drafted and adopted the Fourteenth Amendment. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 612-15 (1992) (Souter, J., concurring); *Rosenberger v. Rector*, 115 S. Ct. 2510, 2528-31 (1995) (Thomas, J., concurring); *id.* at 2535-37 (Souter, J., dissenting).

In fact, in the 70 years since *Gitlow* first incorporated the First Amendment protections of speech and press against the states,⁶ the Establishment Clause has been a boon to incorporation's enemies and an embarrassment to its friends. Scholars who make the historical case for general incorporation either ignore, or carefully distinguish, the case of the Establishment Clause.⁷ Anti-incorporationists, on the other hand, use the case against incorporation of the Establishment Clause as their *cause celebre*.⁸

So wonderfully ambiguous is the history surrounding this opening line of the Bill of Rights that originalists use it to attack incorporation, and nonoriginalists use it to attack originalism.⁹ For example, at the time of the Founding, the vast majority of state governments supported and encouraged religious exercise in one form or another.¹⁰ Originalists cite this state of affairs as evidence that the Establishment Clause could not have been

6. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

7. For example, Professor Akhil Amar notes that the Establishment Clause may not have contained a "personal freedom" that could be sensibly incorporated against the states. Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1232 (1992) [hereinafter Amar, *Fourteenth Amendment*]; Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157 (1991) [hereinafter Amar, *Constitution*]. Michael Kent Curtis, whose work has invigorated so much of recent historical scholarship regarding incorporation, never specifically addresses the unique case of the Establishment Clause. MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE* (1986). Various scholars who are otherwise sympathetic to incorporation in general have distinguished the historical case for incorporation of the Establishment Clause. See MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 253 n.19 (1988) ("[A]lthough the right to free exercise of religion is a 'liberty,' the guarantee against establishment does not protect anything readily characterized as a personal liberty or as property In addition, to the extent that the framers of the first amendment sought to protect state establishments against national action, it is not entirely coherent to say that the amendment is now applicable to the states."); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1115, 1136 (1988) ("[The historical evidence] strongly suggests that the fourteenth amendment, as originally understood, did not incorporate the establishment clause for application to state government action.").

8. See, e.g., Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1, 16 (1983); F. William O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L. REV. 137, 195-99 (1963); Alfred N. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 941 (1951); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 86-87 (1949).

9. For a general introduction to the debate over originalism, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

10. See *infra* part II.

intended to apply against the states.¹¹ Nonoriginalists, on the other hand, cite the sheer variety of the Founders' views regarding religious establishments as the primary example of why the search for a single "original intent" is fundamentally flawed.¹²

These conflicting approaches are linked by a common assumption: The historical period surrounding the adoption of the original Establishment Clause is directly relevant to determining the intent behind the *incorporated*

11. See generally, William K. Leitzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1210 (1990) ("While many specific Bill of Rights incorporations have been criticized, none are so thoroughly contradicted by the historically discernible intentions of our forefathers than that of the establishment clause."); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 314 (1986) ("The Supreme Court's reading of the religion clauses is completely indefensible—historically, textually, and practically."); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 407 ("The inclusion of the establishment clause into the liberty of the Fourteenth Amendment by the Supreme Court has no firm basis in the history of the clause or in logic"); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1703 (1992). See generally GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982).

12. See Stephen G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 129 (1990) ("At most, Rehnquist's originalist arguments prove that history provides support for two alternative traditions concerning the role of religion in our political culture Although history helps to define the choices between these alternative traditions, it cannot make this choice for us."); Frank Guluzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 DRAKE L. REV. 343, 372 (1993) (noting originalism's failure to resolve historical contradictions when it comes to the adoption of the religion clauses); William P. Marshall, *Unprecedented Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 930-31 (1986) (arguing that the historical record is ambiguous in regard to whether the establishment clause was intended to allow accommodation of religion or require strict separation between church and state); TUSHNET, *supra* note 7, at 32-36 (arguing that due to the historical ambiguity surrounding the adoption of the clause, originalist judges are no more "restrained" than nonoriginalist judges); Mark Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 LOY. L. REV. 221, 229 (1987) ("[D]ifficulties with originalist theories of the establishment clause simply exemplify the general problem with originalism, which is that social change makes it a theory of constitutional interpretation that regularly fails to provide guidance on matters of contemporary constitutional controversy because it disregards the complexities of both the historical record and the current situation."). See also MARK DEWOLF E. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 72 (1965) ("In the face of such pervasive uncertainties as to the meaning of the First Amendment's prohibitions it seems to me extraordinarily difficult to take seriously the suggestion that the framers and the ratifiers of the Fourteenth Amendment believed that its adoption was going to have a significant effect upon the country's religious institutions."). Recently, Steven Smith reflected on the history surrounding the original adoption of the clause and concluded that the historical search for a substantive principle underlying the religion clauses is doomed to fail because the clauses were intended to be no more than a "jurisdictional" allotment of power to the states. STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 45-48 (1995).

Establishment Clause. Such an assumption, however, places the Founding cart before the Incorporation horse. Incorporation doctrine assumes that, at some point, the people changed their collective mind about the role of federalism in the protection of individual liberties; what was once left to state discretion is now restricted by the Fourteenth Amendment. But if the people changed their mind about the role of federalism in the promotion of individual liberty, perhaps they also changed their mind about the role of the Establishment Clause. In fact, we are not the first generation since Madison wrote his Memorial and Remonstrance to question the melding of the scepter and the cross. Obscured in the search for the Founders' intent are the *subsequent* struggles over the meaning and value of the Establishment Clause. In the years following the adoption of the Bill of Rights, state after state grappled with the issue of civil power over the subject of religion. Slowly, through a long series of cases and controversies, the idea evolved that citizens ought to be free from government-imposed religious establishments.

By exploring the *re*interpretation of the federal Establishment Clause, I hope to rehabilitate the Clause and place it on equal footing with the rest of the incorporated First Amendment. This article does not address the general debate over the Court's decision to incorporate most of the Bill of Rights by way of the Fourteenth Amendment. Nor does it directly address the debate over originalism as an interpretive principle. The argument I make is simply this: To the extent that incorporation of *any* right can be justified as a matter of historical intent, there is *no less reason* to incorporate the Establishment Clause than any other provision in the First Amendment.

This modest proposition, however, has some significant consequences. If I am right, then the case of the *original* Establishment Clause no longer stands as an argument against originalism or incorporation. Those battles must be fought on other grounds. More significantly, shifting attention away from the Founding implies that the intent behind the *incorporated* Establishment Clause is not to be found in the writings of Thomas Jefferson or James Madison (or Joseph Story, for that matter). Instead, the roots of the modern principle of nonestablishment are located in the contemporary understanding of personal freedom in the period just after the Civil War.

Part I of this article explores the debates which surrounded the adoption of the religion clauses. Here I agree with recent scholarship that indicates the original Establishment Clause was intended to prohibit federal power over the subject of religion, reserving the same to the states. In this way, the original Establishment Clause expressed the principle of federalism: The federal government could neither establish religion at the federal level, nor

disestablish religion in the states. The Clause made no statement regarding the merits of religious establishments as such.

Part II traces the evolution of the nonestablishment principle and the reinterpretation of the Establishment Clause in the first half of the nineteenth century. As northern state judges struggled with the issue of civil power over the subject of religion, their decisions increasingly invoked the federal Establishment Clause in support of the principle of nonestablishment. This interpretation of the Establishment Clause focused on the rights of the individual, rather than the prerogatives of the states, and marked a departure from the federalist roots of the Establishment Clause. Moreover, just as the original Clause played the dual role of preventing the federal government from either establishing or disestablishing religion, so the principle of nonestablishment was understood to prohibit any government from either supporting *or* suppressing religion as religion.

Part III looks at events occurring south of the Mason-Dixon line and explores the regulation of religion in the slaveholding states. Nascent principles of nonestablishment were trampled upon by the southern establishment of pro-slavery Christianity and the suppression of “dangerous” religious ideas. Preventing such suppression of religious belief and practice—the hallmark of religious establishments—was cited by the architects of Reconstruction as one of the purposes behind the adoption of the Fourteenth Amendment.

The article concludes with a discussion of the Blaine Amendment and the implications of a nonestablishment jurisprudence that focuses on the *second* adoption of the Establishment Clause.

I. THE ORIGINAL PRINCIPLE OF “NO POWER” OVER THE SUBJECT OF RELIGION

A. *The Federalist Establishment Clause*

From the beginning, the Establishment Clause has been about power. Following the convention in Philadelphia, the Constitution was sent to the several states for debate over its ratification. Those opposing the Constitution were especially vocal about the lack of a bill of rights which protected, among other things, the “rights of conscience.”¹³ Proponents of

13. See AN OLD WHIG, NO. 5 (Fall 1787), reprinted in 5 THE FOUNDERS' CONSTITUTION 85, 86-87 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS' CONST.] (“[I]f a majority of the continental legislature should at any time think fit to establish a form of religion, for the good people of this continent, with all the pains and penalties which in other countries are

the new Constitution responded by pointing out that the proposed federal government would have no legitimate power over the subject of religion. According to Madison in the Virginia ratification debates, “[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.”¹⁴ James Iredell in the North Carolina convention declared:

Upon the principles I have stated, I confess the restriction on the power of Congress, in this particular, has my hearty approbation. They certainly have no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentleman should conceive they have. Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm. If they could, sir, no man would have more horror against it than myself. Happily, no sect here is superior to another. As long as this is the case, we shall be free from those persecutions and distractions with which other countries have been torn.¹⁵

Madison, of course, objected to religious establishments on separationist grounds: He believed that no government, *state or federal*, had any legitimate power over religion as such.¹⁶ Separationists, however, were not the only ones who insisted that the federal government have no authority over religion. During the drafting of what would become the religion clauses of the First Amendment, representatives from states with established religions expressed their concerns that the proposed phrasing “no religion shall be established by law” might be construed as an excuse for the federal

annexed to the establishment of a national church, what is there in the proposed constitution to hinder their doing so? Nothing; for we have no bill of rights, and every thing therefore is in their power and at their discretion.”); *see also* A MARYLAND FARMER, NO. 7 (Apr. 11, 1788), *reprinted in* FOUNDERS’ CONST. *supra*, at 87, 88.

14. James Madison, Virginia Ratifying Convention (June 12, 1788), *in* FOUNDERS’ CONST., *supra* note 13, at 88, 88.

15. James Iredell, Debate in North Carolina Ratifying Convention (July 30, 1788), *in* FOUNDERS’ CONST., *supra* note 13, at 89, 90; *see also id.* at 92 (remarks of Mr. Spaight) (“As to the subject of religion, I thought what had been said would fully satisfy that gentleman and every other. No power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation.”).

16. *See* James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* FOUNDERS’ CONST., *supra* note 13, at 82, 82 (“We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.”). Madison also unsuccessfully attempted to amend the federal Constitution to prevent states from interfering with the “equal rights of conscience.” House of Representatives, Amendments to the Constitution (Aug. 15, 1789), *in* FOUNDERS’ CONST., *supra* note 13, at 92, 93 (remarks of Mr. Madison).

government to interfere with state regulation of religion. According to Representative Huntington:

[H]e feared . . . that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. . . . The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meetinghouses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment.¹⁷

The version ultimately adopted satisfies Huntington's concern by prohibiting Congress from making any "law respecting an establishment of religion." This wording simultaneously forbids the federal government from establishing a religion at the federal level, or attempting to *disestablish* religion at the state level. Either attempt would be a law "respecting an establishment of religion."¹⁸ Such deference to the principle of federalism echoes the general tenor of the antifederalists' call for a bill of rights. In fact, when Madison proposed an amendment which would have required that "no State shall infringe the equal rights of conscience,"¹⁹ Mr. Tucker responded that "[i]t will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much."²⁰ Madison's proposal passed the House but was rejected in the Senate.²¹

In the end, the prohibition on establishments was limited to the federal government and was worded in a way that would satisfy the concerns of representatives from states with existing religious establishments.²² Under

17. House of Representatives, Amendments to the Constitution (Aug. 15, 1789) (remarks of Mr. Huntington), in *FOUNDERS' CONST.*, *supra* note 13, at 92, 93.

18. As a number of scholars have previously noted. See Amar, *Constitution*, *supra* note 7, at 1157; Lietzau, *supra* note 11, at 1199; Paulsen, *supra* note 11, at 321-23; Note, *supra* note 11, at 1705.

19. House of Representatives, Amendments to the Constitution (Aug. 17, 1789), in *FOUNDERS' CONST.*, *supra* note 13, at 92, 93.

20. *Id.* at 93-94.

21. See Amar, *Fourteenth Amendment*, *supra* note 7, at 1202.

22. Gerard Bradley argues that the ultimate language of the Establishment Clause implies only a partial renunciation of power over the subject of religion. He bases this view on the fact that an earlier version proposed by New Hampshire's Samuel Livermore ("Congress shall make no law touching religion, or infringing the rights of conscience") would have completely denied Congress power over the subject of religion. Because this version was rejected in favor of a (supposedly) narrower prohibition on laws respecting an *establishment* of religion, this indicates that the

the federal Establishment Clause, religious establishments were neither good nor bad—they were simply a matter left to the states. On this issue, the federal government was to remain agnostic.

B. Post-Adoption Commentary on the Establishment Clause and “No Federal Power” Over the Subject of Religion

Post-adoption commentary on the religion clauses is remarkably consistent in its description of the “no federal power” principle behind the religion clauses.²³ In his Kentucky Resolutions against the Alien and Sedition Act, Thomas Jefferson noted that:

limitation on congressional power over the subject of religion was only partial. BRADLEY, *supra* note 11, at 92-96; *see also* SMITH, *supra* note 12, at 31-33. Although there is no record of why Livermore’s proposal was rejected, Bradley’s interpretation seems particularly inappropriate. To begin with, the ultimate version is much more explicit in its ban on federal interference with state religious establishments. That reason alone might have been enough to make the final version more attractive than Livermore’s. Secondly, Bradley’s idea that the drafters of the Bill of Rights were concerned with *protecting* certain areas of federal power over the subject of religion is startling, given the anti-federal power sentiment of the antifederalists and the separationist views of men like James Madison. Finally, whatever the reason for choosing the ultimate language over Livermore’s proposal, there is a complete dearth of post-adoption interpretation of the Establishment Clause along the lines that Bradley proposes.

23. I have located only one example of a contemporary interpretation of the religion clauses that would allow for some exercise of federal power over the subject of religion. According to the Virginia Senate’s critique of the proposed religion clauses:

The 3rd amendment, recommended by Congress, does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General Government as to give it a decided advantage over others, and in process of time render it as powerful and dangerous as if it was established as the national religion of the country.

BRADLEY, *supra* note 11, at 117. Gerard Bradley calls this statement “the clearest, most concise, most authoritative definition of the religious clauses in the entire history of ratification by the states.” *Id.* at 118. Why this statement should have such considerable standing is not clear, especially considering the fact that *no one else* forwarded a similar interpretation either before or after the adoption of the Bill of Rights. In fact, Bradley concedes that this interpretation was prompted by a group of antifederalists who were attempting to derail the adoption of the Bill of Rights in order to force a second constitutional convention. *Id.* at 117; *see also* Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEG. HIST. 197 (1994).

Bradley’s ultimate point is to refute the idea that the Establishment Clause was intended to forbid aid to religion. In support of this view, Bradley refers to various laws passed by Congress in the Founding period which involved aid to religion in one manner or another. BRADLEY, *supra* note 11, at 97-104. The significance of state aid in this period, however, is ambiguous. *See infra* pp. 1095-98. Moreover, Bradley’s rejection of the no-federal-power principle is contradicted by an almost unanimous chorus of federalists and antifederalists, as well as both pro and anti-establishmentarians. *See this part.* Nevertheless, I believe Bradley is right to criticize past “no

“[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people;” and that, *no power* over the freedom of religion . . . being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people.²⁴

Jefferson further notes that the Alien and Sedition Acts violated rights belonging to the “several states.”²⁵

Likewise in Virginia, the debate over the constitutionality of the Sedition Acts reveals a widespread understanding that the Establishment Clause prohibited federal power over the subject of religion. The great Chief Justice of the Supreme Court, John Marshall, although arguing in favor of congressional power over speech and the press, nevertheless conceded that the phrase “respecting” in the Establishment Clause implied that Congress had no power over the subject of religion:

Congress is prohibited from making any law RESPECTING a religious establishment, but not from any law RESPECTING the press. When the power of Congress relative to the press is to be limited, the word RESPECTING is dropt [sic], and Congress is only restrained from the passing any law ABRIDGING its liberty. This difference of expression with respect to religion and the press, manifests a difference of intention with respect to the power of the

incidental aid” decisions by the Supreme Court, where such aid is generally distributed along secular lines. *See infra* part III.

24. Kentucky Resolutions (Nov. 10 & 14, 1798), *reprinted in* FOUNDERS’ CONST., *supra*, note 13, at 131, 132. In 1830, Senator and future Vice-President of the United States Richard M. Johnson noted:

Congress acts under a constitution of delegated and limited powers. The committee looks in vain to that instrument for a delegation of power authorizing this body to inquire and determine what part of time, or whether any, has been set apart by the Almighty for religious exercises. On the contrary, among the few prohibitions which it contains, is one that prohibits a religious test, and another which declares that Congress shall pass no law respecting an establishing of religion, or prohibiting the free exercise thereof.

2 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 17 (1950).

25. Kentucky Resolutions, *reprinted in* FOUNDERS’ CONST., *supra* note 13, at 133-34 (“[T]his commonwealth does therefore call on its co-states for an expression of their sentiments on the acts concerning aliens That they will view this as seizing the rights of the states, and consolidating them in the hands of the general government, with a power assumed to bind the states, not merely in cases made federal, but in all cases whatsoever”).

national legislature over those subjects, both in the person who drew, and in those who adopted this amendment.²⁶

James Madison rejected Marshall's attempt to distinguish the "respecting" language from the rest of the First Amendment and maintained that "the liberty of conscience and freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States."²⁷ Whatever the merits of Marshall's approach to power over speech, it is telling that both he and Madison agreed that there was no federal power over the subject of religion.²⁸

Legal treatises of the day also reflected the "no power" reading of the religion clauses. According to William Rawle in his 1829 treatise on the Constitution, "[t]he first amendment prohibits [C]ongress from passing *any law respecting an establishment of religion; or preventing the free exercise of it*. It would be difficult to conceive on what possible construction of the Constitution such a power could ever be claimed by [C]ongress."²⁹ Even pro-establishment Joseph Story,³⁰ in his famous *Commentaries on the*

26. John Marshall, *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799), reprinted in *FOUNDERS' CONST.*, *supra* note 13, at 136, 138.

27. JAMES MADISON, *MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS* (1800), reprinted in 4 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 546, 576 (Ayer Co., 1987) (1888).

28. In fact, both Madison and Jefferson collapsed the religion clauses into the single proposition that federal government had no power over the subject of religion. In his Virginia Resolutions, Madison argued that the federal government had no more power over "the free exercise of religion" than it did over "laws respecting establishments." See JAMES MADISON, *REPORT ON THE VIRGINIA RESOLUTIONS* (Jan. 1800), reprinted in *FOUNDERS' CONST.*, *supra* note 13, at 141, 146. Similarly, Jefferson described the religion clauses as "the provision that no law shall be made respecting the establishment, or free exercise, of religion . . ." Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), in *FOUNDERS' CONST.*, *supra* note 13, at 98, 98 (emphasis added). Jefferson continues: "Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the states, as far as it can be in any human authority." *Id.*

29. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* (1829), reprinted in *FOUNDERS' CONST.*, *supra* note 13, at 106, 106. Rawle continues: "The time has long passed by when enlightened men in this country entertained the opinion that the *general welfare of a nation* could be promoted by religious intolerance, and under no other clause could a pretence for it be found. Individual states whose legislatures are not restrained by their own constitutions, have been occasionally found to make some distinctions; but when we advert to those parts of the Constitution of the United States, which so strongly enforce the equality of all our citizens, we may reasonably doubt whether the denial of the smallest civic right under this pretence can be reconciled to it." *Id.*

30. Story argued against the complete disestablishment of religion in his home state of Massachusetts. See 2 WILLIAM G. M'CLOUGHLIN, *NEW ENGLAND DISSENT: 1630-1833*, at 1150, 1158 & 1255 (1971).

Constitution,³¹ agreed with Madison and Jefferson that “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.”³²

In a variety of controversies that arose in the early nineteenth century, both Congress and the Supreme Court interpreted the Establishment Clause as a limitation on the power of Congress, and a preservation of power in the states. In 1810, Congress passed a law requiring federal post offices to remain open every day there was mail.³³ For the next two decades, Congress was flooded with petitions claiming this violated the Christian duty to keep the Sabbath holy.³⁴ In a report issued in 1829 by the Senate Committee on Post Office and Post Roads, Senator and future vice-president of the United States Richard M. Johnson rejected the notion that Congress should repeal a law on the ground that it was contrary to the law of God. Johnson believed that:

If this principle is once introduced, it will be impossible to define its bounds [T]he Constitution has wisely withheld from our Government the power of defining the divine law. It is a right reserved to each citizen; and while he respects the equal rights of others, he cannot be held amenable to any human tribunal for his conclusions.³⁵

In a version of his report later published in book form, Johnson notes that power over religion remains a prerogative of the states:

But were it expedient to put an end to the transmission of letters and newspapers on Sunday because it violates the law of God, have not the petitioners begun wrong in their efforts? If the arm of government be necessary to compel man to respect and obey the laws of God, do not the state governments possess infinitely more power in this respect?³⁶

31. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Carolina Acad. Press 1987) (1833).

32. *Id.* § 992. Unlike Madison, however, Story thought that such power had been delegated to the state legislatures and that those legislatures had “the especial duty . . . to foster, and encourage [Christianity] among all the citizens and subjects.” *Id.* § 986. See generally *infra* part III.

33. See ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 253 (1964) (One volume edition) [hereinafter 4 STOKES].

34. *Id.*

35. 2 STOKES, *supra* note 24, at 15-16.

36. REPORT OF THE COMMITTEE ON POST-OFFICES AND POST-ROADS OF THE UNITED STATES SENATE (Jan. 1829), reprinted in SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 274 (Joseph L. Blau ed., 1947).

In 1833, the Supreme Court rejected an appeal from Catholic priests who had been convicted under a New Orleans city ordinance forbidding open casket funerals.³⁷ Counsel for the City argued that the federal Constitution did not forbid “the enactment of law or ordinance, under state authority, in reference to religion. The limitation of power in the [F]irst [A]mendment to the Constitution is upon Congress, and not the states.”³⁸ The Court agreed and held that “protecting the citizens of the respective states in their religious liberties . . . is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.”³⁹

Of course, just what constituted “power over the subject of religion” was a matter of considerable debate. As Gerard Bradley has pointed out, the new federal government engaged in a variety of actions that could be construed as exercises of power over the subject of religion.⁴⁰ For example, from the beginning Congress provided for congressional and military chaplains,⁴¹ various Presidents throughout the period issued Thanksgiving proclamations,⁴² and a number of actions in the territories implicated religion, including provision for missionary schools and laws prohibiting blasphemy and mandating observance of the Sabbath.⁴³

Each of these examples, however, is ambiguous in regard to whether it violated the “no power” principle. To begin with, not even Madison believed that Thanksgiving proclamations were direct exercises of power over the subject of religion; rather, it was their implied delegation of authority in religious matters that offended him.⁴⁴ Congress defended the

37. *Permoli v. New Orleans*, 44 U.S. 589 (1845).

38. *Id.* at 606.

39. *Id.* at 609. Dissenting in the case *Ex parte Garland*, Justice Miller objected to the courts' striking down on ex post facto grounds a law requiring priests to take an oath that they had supported the union. According to Miller, “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.” 71 U.S. 333, 397-98 (1867) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1878). This part of Justice Miller's dissent applied to the accompanying case, *Cummings v. Missouri*, 71 U.S. 277 (1867).

40. BRADLEY, *supra* note 11, at 97-104.

41. For a general discussion of the history behind congressional chaplains, see Marsh v. Chambers, 463 U.S. 783, 786-90 (1983).

42. See, e.g., JAMES MADISON, PROCLAMATION (Nov. 16, 1814), *reprinted in* FOUNDERS' CONST., *supra* note 13, at 102.

43. See generally BRADLEY, *supra* note 11, at 97-104; CHESTER J. ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 159 (1964).

44. See James Madison, Detached Memoranda (ca. 1817), *in* FOUNDERS' CONST., *supra* note 13, at 105 (“Altho' recommendations only, they imply a religious agency, making no part of the trust delegated to political rulers.”). More forcefully, Jefferson argued that even a

traditional appointment of congressional and military chaplains on Free Exercise grounds⁴⁵ and explicitly renounced any attempt to exercise power along religious lines.⁴⁶ In regard to the funding of sectarian schools for the Native Americans, it remained an issue throughout the nineteenth century whether incidental aid to a sectarian organization violated the principle of

recommendation might carry the "penalty" of "proscription perhaps in [adverse] public opinion," and that this assumed authority over religious exercises which properly belonged in the states. Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *in* FOUNDERS' CONST., *supra* note 13, at 98, 99.

45. See JAMES THOMPSON, H.R. REP. NO. 171, 31st Cong., 1st Sess. 3 (1850) (James Thompson), *available in* UNITED STATES SERIAL SET NO. 583 ("Were the office [of military chaplain] abolished, the soldier or sailor might with more than a show of plausibility complain that the "free exercise" of religion was denied him; that his constitutional rights were infringed."); H.R. REP. NO. 124, 33d Cong., 1st Sess. 8 (1854) (Mr. Meachum), *available in* UNITED STATES SERIAL SET NO. 743 ("If you do not afford them the means of religious service while at sea, the Sabbath is, to all intents and purposes, annihilated, and we do not allow the crews the free exercise of religion."). Madison himself recognized the force of the Free Exercise argument in regard to military chaplains. See James Madison, Detached Memoranda (ca. 1817), *in* FOUNDERS' CONST., *supra* note 13, at 104 ("The object [of army and navy chaplains] is seducing; the motive to it is laudible. But is it not safer to adhere to a right principle, and trust to its consequences, than confide in the reasoning however specious in favor of a wrong one. . . . The case of navies with insulated crews may be less within the scope of these reflections.").

Criticisms of the appointment of federal chaplains were themselves based on the idea that the federal government had no power over the subject of religion. See INHABITANTS OF LIVINGSTON COUNTY, KENTUCKY, REMONSTRANCE AGAINST THE APPOINTMENT OF CHAPLAINS TO CONGRESS, H.R. DOC. NO. 9, 23d Cong., 1st Sess. 1-2 (1833), *available in* UNITED STATES SERIAL SET NO. 254; see also KEHUKEE PRIMITIVE BAPTIST ASSOCIATION IN NORTH CAROLINA, MEMORIAL, S. MISC. DOC. NO. 2, 30th Cong., 2d Sess. 1-2 (1848), *available in* UNITED STATES SERIAL SET NO. 533.

46. According to an 1853 Senate Judiciary Report, Senator Badger declared that religious establishments were:

inconsistent with religious freedom, as a matter of natural right to be enjoyed in its full latitude, and not measured out by tolerance and concession from the civil rulers. If Congress has passed, or should pass, any law which, fairly construed, has in any degree introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars—endowment at the public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions—such law would be a "law respecting an establishment of religion." . . . But no law yet passed by Congress is justly liable to such an objection.

S. REP. NO. 376, 32d Cong., 2d Sess. 2 (1853), *available in* UNITED STATES SERIAL SET NO. 671. Badger argued that the particular religious choices made by the individual Congressmen could not be ascribed to the law, which itself made "no distinction whatever between any of the religions, churches, or professions of faith known to the world. Of these none, by law, is excluded; none has any priority of legal right. True, selections, in point of fact, are always made from some one of the denominations into which Christians are distributed; but that is not in consequence of any legal right or privilege, but by the voluntary choice of those who have the power of appointment." *Id.* at 3.

separation of church and state.⁴⁷ Finally, territorial regulations involving blasphemy and the Sabbath breaking make perfect sense given the dual nature of the original Establishment Clause: as proto-states, territorial governments would be presumed to have all the powers not forbidden to them by the Federal Constitution.⁴⁸ Also, territorial regulations involving blasphemy and Sabbath breaking make perfect sense given the agnostic nature of the original Establishment Clause. However inappropriate it may have been for territorial governments to enact laws that violated the substantive principles of the Bill of Rights—say abridging speech or the right to jury trial—no substantive principle would be violated by the mere exercise of power over the subject of religion.⁴⁹ Freedom from establishments was not yet considered a fundamental right.

This is not to say that all congressional actions and motives during this period were consistent with the principle of “no federal power” over the subject of religion.⁵⁰ Nevertheless, statements by those involved in the

47. See *Quick Bear v. Leupp*, 210 U.S. 50, 81-82 (1908) (upholding use of Native American treaty funds for the funding of Catholic schools on the principle of free exercise of religion); *Bradfield v. Roberts*, 175 U.S. 291, 295-300 (1899) (upholding congressional appropriation for hospital run by Catholic nuns). Land grants for the erection of churches and provision for the establishment of missionary schools raise troubling questions regarding the faithful application of the “no power principle.” See *CORD*, *supra* note 11, at 57-80. On the other hand, most of these provisions are ambiguous in their significance regarding government power over religion. For example, Jefferson’s treaty with the Kaskasia Indians, which provided for a grant of money for the maintenance and support of a Catholic church for the tribe, was part “compensation for the relinquishment made to the United States in the first article.” See *id.* at 38. The money spent was thus the tribe’s, not the federal government’s. See *Quick Bear v. Leupp*, 210 U.S. at 80. Likewise, the provision for educational missions was made in the pursuit of otherwise secular goals (education of the Native Americans). Again, this is not to say that evangelization was beyond the intentions of the parties involved. However, it may well have been the ambiguous nature of such aid that allowed it to continue despite a constant and unanimous chorus of voices both at the state and federal level that the government had no *legitimate* power over the subject of religion.

48. See *SMITH*, *supra* note 12, at 28 (Acting in its role as territorial governor, Congress may have “acted essentially as a state and hence continued to enjoy all the powers that the religion clauses concededly left to the states.”). According to Bradley, the Northwest Ordinance of 1787 “presumed to extend to the territories the ‘fundamental principles of civil and religious liberty’ guaranteed by the state constitutions.” *BRADLEY*, *supra* note 11, at 101. Exactly right. State constitutions in the early part of the nineteenth century assumed state power over the subject of religion.

49. Nor would jurists of the early nineteenth century understand such laws to violate free exercise. Most state constitutions at that time simultaneously tolerated some degree of free exercise while giving the state power to regulate dissenting religions that were considered threats to the established culture. See *infra* pp. 1100-05.

50. For example, Senator Meacham in his 1854 House Judiciary Report on Chaplains rejected the idea that Congress can make no provision for the exercise of Christianity. H.R. REP. NO. 124, *supra* note 45, at 6 (“At the time of the adoption of the of the constitution and the amendments, the universal sentiment was that Christianity should be encouraged—not any one sect. Any attempt to level and discard all religion, would have been viewed with universal indignation.”). Other

framing of the Establishment Clause, early constitutional treatise writers, numerous congressional leaders, and even the Supreme Court, are remarkably consistent in their interpretation of the Establishment Clause as representing no power to the federal government and reserving the same to the states.

C. Incorporation and the Federalist Establishment Clause

For incorporationists, a federalist Establishment Clause poses a problem. Whether accomplished through the Due Process Clause, or as recent scholarship suggests, the “Privilege or Immunities” Clause,⁵¹ incorporation assumes the existence of a personal freedom that can sensibly be protected against state action. But how can the original Establishment Clause—an expression of the rights (or powers) of *states*—be read as a personal liberty *against* the states? It would make just as much (or as little) sense to incorporate the Tenth Amendment.⁵² For this reason, some scholars have concluded that, whatever may be the case for the rest of the Bill of Rights, the Establishment Clause is a uniquely unfit candidate for incorporation.⁵³

The problem with this argument is that it assumes that the Establishment Clause meant the same thing in 1868 that it did in 1789. If it did, then the framers of the Fourteenth Amendment could not have intended to incorporate *that* Clause, even if they intended to incorporate the rest of the First Amendment. On the other hand, what if the words of the Establishment Clause had been reinterpreted to express the principle that no person should be subject to state-imposed religious establishments? If *this* was the understanding of the Establishment Clause circa 1868, then it would not have been illogical for the framers of the Fourteenth Amendment to

proponents of congressional chaplains realized the argument in their favor was less strong than in the case of military chaplains. See THOMPSON, H.R. REP. NO. 171, *supra* note 45, at 4 (“The propriety and necessity for [congressional chaplains] does not, perhaps, stand upon an equal footing in some respects with that of the services already referred to. . . . Time and usage have given sanction to the employment of chaplains.”).

51. See generally Amar, *Fourteenth Amendment*, *supra* note 7; CURTIS, *supra* note 7; see also Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

52. See Conkle, *supra* note 7, at 1141; see also TUSHNET, *supra* note 7, at 252-53 (“Originalist strict separation cannot account for the indisputable fact that most framers explicitly understood that the religion clauses were designed to bar the national government from certain actions, among which was interference with existing establishments or religion in the states . . .”); BRADLEY, *supra* note 11, at 95.

53. See Amar, *Constitution*, *supra* note 7, at 1157-60; Leitzau, *supra* note 11, at 1206-11. Steven Smith has concluded that, because of the federalist nature of the original religion clauses, neither clause contained any substantive content that could later be incorporated against the states. See SMITH, *supra* note 12, at 17-54.

expect its incorporation along with the rest of the First Amendment. In other words, we cannot know whether there was an intention to incorporate the Establishment Clause without understanding the status of that Clause at the time of the adoption of the Fourteenth Amendment. That question, however, requires an extended look at the evolution of nonestablishment in the period between the Founding and Reconstruction.

II. CHRISTIANITY AND THE COMMON LAW

A. *The Common Law and Protestant Christianity*

Christianity, general christianity is and always has been, a part of common law . . . not Christianity founded on any particular religious tenets; not christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men.⁵⁴

At the Founding, although numerous state constitutions protected “free exercise” or the “rights of conscience,”⁵⁵ no state constitution prohibited a “law respecting an establishment of religion.”⁵⁶ In fact, many acknowledged Christianity and made some provision for its support.⁵⁷ According to Joseph Story:

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 it is not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and make it

54. *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824), *reprinted in* FOUNDERS' CONST., *supra* note 13, at 170.

55. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

56. *See generally* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1111 (1994).

57. For example, the Vermont Constitution of 1786 declared:

[N]o authority can, or ought to be vested in, or assumed by any power whatsoever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship: Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

VT. CONST. OF 1786, ch. 1, art. 3, *reprinted in* FOUNDERS' CONST., *supra* note 13, at 85.

a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.⁵⁸

The most (in)famous examples of religious establishments in this period were the religious tax assessments in the New England States.⁵⁹ In the early decades of the nineteenth century, however, the last of these assessment schemes fell in a withering crossfire of criticism from both Separationists and disgruntled minority religions.⁶⁰ Although the so-called “disestablishment movement” has been well-discussed elsewhere,⁶¹ the role this movement has played in Establishment Clause mythology warrants some reflection. A number of scholars and Supreme Court Justices have suggested that the fall of the last assessment in 1833 signaled the triumph of separationism in the states.⁶² Thus, by the time of Reconstruction, federalist concerns about state power to establish religion no longer barred Jefferson and Madison’s original views about the separation of Church and State.⁶³

There are some serious problems with this view. First, as Professor Conkle has pointed out, had the Establishment Clause been understood to include Madisonian values of separatism, it would not have been enacted.⁶⁴ Secondly, state power over the subject of religion remained alive and well in the states long after the fall of the last tax assessment. The establishment was not statutory: it was an inherent part of the common law.

1. The Common Law Crime of Blasphemy

In the common law blasphemy case, *Ruggles v. People of New York*,⁶⁵ Chancellor Kent conceded that, in New York, “[t]he free, equal, and

58. STORY, *supra* note 31, at § 988.

59. See 1 STOKES, *supra* note 24, at 358-446.

60. See McConnell, *supra* note 55, at 1469-71.

61. See generally 2 MCLOUGHLIN, *supra* note 30.

62. See William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 772-78 (1984); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1156 n.5 (2d ed. 1988); see also Abington Sch. Dist. v. Schempp, 374 U.S. 203, 254-58 (1963) (Brennan, J., concurring). See also Amar, *Constitution*, *supra* note 7, at 1158 n.131 (“On the other hand, because states had dissolved their formal establishments well before the Civil War, and at least one state had adopted a state establishment clause with ‘respecting’ language tracking that of the federalist First Amendment, the original federalism dimension of the federal clause was probably less obvious in the 1860’s than in the early 1800’s.”).

63. Van Alstyne, *supra* note 62, at 778-79; TRIBE, *supra* note 62, at 1156, n.5.

64. See *supra* note 17 and accompanying text (remarks of Representative Huntington at Philadelphia Convention); see also Conkle, *supra* note 7, at 1135 n.109; SMITH, *supra* note 12, at 21-22; STORY, *supra* note 31, § 988.

65. 8 Johns 290 (N.Y. 1811), reprinted in *FOUNDERS’ CONST.*, *supra* note 13, at 101. The defendant had declared that “*Jesus Christ* was a bastard, and his mother must be a whore.” *Id.*

undisturbed, enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured." Nevertheless, "to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right."⁶⁶ Significantly, the law presumed a *Christian* community. According to Kent:

Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the grand *Lama*; and for this plain reason, that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those impostors.⁶⁷

Ruggles was the seminal opinion in a series of cases in the early nineteenth century that presumed that Christianity was part of the common law. In the 1824 blasphemy case *Updegraph v. Commonwealth*,⁶⁸ Justice Duncan for the Pennsylvania Supreme Court quotes approvingly from *Ruggles*, including Chancellor Kent's restriction to attacks on Christianity.⁶⁹ Duncan then notes that "[n]o society can tolerate a willful and despicable attempt to subvert its religion, no more than it would break down its laws—a general, malicious, and deliberate intent to overthrow Christianity, general Christianity."⁷⁰ Similarly, in the 1844 case *Vidal v. Girard's Executors*,⁷¹

66. *Id.*

67. *Id.* Note that Chancellor Kent is not merely expressing deference to the scruples of the majority, whatever their religion. Contenders for the souls of Americans are "impostors" with no right to have their views admitted to the sturm and drang of public debate. *But cf.* Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 318 (1988) (Kent's opinion is reducible to "breach of peace" principles.).

68. 11 Serg. & Rawle 394 (Pa. 1824), *reprinted in* FOUNDERS' CONST., *supra* note 13, at 170. The defendant had declared "[t]hat the Holy Scriptures were a mere fable, that they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies." *Id.*

69. *Id.* at 173 ("In the Supreme Court of *New York* it was solemnly determined, that Christianity was part of the law of the land, and that to revile the Holy Scriptures was an indictable offense. The case assumes, says Chief Justice Kent, that we are a Christian people, and the morality of the country is deeply engrafted on Christianity. Nor are we bound by any expression in the constitution, as some have strangely supposed, not to punish at all, or to punish indiscriminately the like attack upon *Mahomet* or the *Grand Luma*.").

70. *Id.* Duncan distinguishes blasphemy from "good faith" theological disputes, and lists the "species of offense" under the following classifications: "1. Denying the Being and Providence of God. 2. Contumelious reproaches of Jesus Christ; profane and malevolent scoffing at the Scriptures, or exposing any part of them to contempt and ridicule. 3. Certain immoralities tending to subvert all religion and morality, which are the foundations of all governments. Without these restraints no free government could long exist." *Id.*

Justice Story stated in dicta that Christianity was part of the common law in “this qualified sense, *that its divine origin and truth are admitted*, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public.”⁷² Therefore, “[i]t is unnecessary for us . . . to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country.”⁷³

When Story, Kent, and Duncan declared that the exercise of true religion was essential to good government, they meant true *Protestant* religion. In the early nineteenth century, the religious sensibilities of Roman Catholics,⁷⁴ Jews, Muslims, or other “impostors” were often not considered within the penumbra of the rights of conscience. The law of blasphemy thus furthered the goals of religious orthodoxy. However, in the period following the demise of the last religious assessment, there was a noticeable shift in the legal basis for blasphemy prosecutions. In the 1837 case *Commonwealth v. Kneeland*,⁷⁵ Chief Justice Shaw upheld a conviction for blasphemy,⁷⁶ but narrowly construed the scope of the statute:

[U]nderstanding the statute against blasphemy as we do . . . that it is not intended to prevent or restrain the formation of any opinions or the profession of any religious sentiments whatever, but to restrain and punish acts which have a tendency to disturb the public peace, it is not repugnant to, but entirely consistent with, [the State constitutions’] Declaration of Rights.⁷⁷

71. 43 U.S. (2 How.) 127 (1844). *Vidal* involved a challenge to a will in which a bequest was made to an institution for the poor on the condition that no clerics be allowed to teach at the institution. The bequest was challenged on the ground that the anticleric proviso was unchristian and unenforceable in a Christian country. Justice Story upheld the will on the grounds that non-clerics were not prevented from teaching Christianity. *Id.* at 200-01.

72. *Id.* at 198 (emphasis added) (citing *Updegraff v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824)).

73. *Id.*

74. See *infra* part II.C (discussing anti-Catholicism in mid-19th century America).

75. 37 Mass. (20 Pick.) 206 (1837) (Shaw, C.J.).

76. The defendant had written and published, “Universalists believe in a god which I do not; but believe that their god, with all his moral attributes (aside from nature itself) is nothing more than a mere chimera of their own imagination.” *Id.* at 207. This was prosecuted under a state statute prohibiting “any person [from] willfully blasphem[ing] the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world.” *Id.* at 213.

77. *Id.* at 221. According to Leonard Levy, Abner Kneeland “was the last man to be jailed by Massachusetts for the crime of blasphemy.” LEONARD LEVY, *BLASPHEMY IN*

That same year, the Delaware Supreme Court expanded *Kneeland's* distinction between religious-based blasphemy prosecutions and prosecutions for "breach of the peace." In *Delaware v. Chandler*,⁷⁸ the court canvassed English blasphemy cases and concluded "[h]e therefore, who subverted, reviled or ridiculed the religion of our English ancestors, was punished at common law, not for his offense against God, but for his offense against man, whose peace and safety as they believed was endangered by such conduct."⁷⁹ Christianity was a part of the "common law" only to the extent that it remained "the prevailing religion of the people."⁸⁰

If in Delaware the people should adopt the Jewish or Mahometan religion, as they have an unquestionable right to do if they prefer it, this court is bound to notice it as their religion, and to respect it accordingly.⁸¹

This interpretation departs from the principles underlying Story's *Commentaries* and the decisions of *Ruggles* and *Updegraph*. To Joseph Story and Chancellor Kent, the purpose of blasphemy laws was not limited to protecting prevailing religious sensibilities. Such laws were intended to entrench the Protestant-Christian faith which they believed was essential to good government. Although *Chandler* cites *Ruggles* and *Updegraph* as precedent,⁸² the court clearly rejects the idea that Christianity is somehow an inherent part of the common law:

It will be seen then that in our judgment by the constitution and laws of Delaware, the [C]hristian religion is part of those laws, so far [as blasphemy] is punishable, while the people prefer it as their religion, and no longer. The moment they change it and adopt any other, as they may do, the new religion becomes in the same sense, a part of the law, for their courts are bound to yield it faith and credit, and respect it as their religion. Thus, while we punish the offense against society alone, we leave [C]hristianity to fight her own battles⁸³

Kneeland and *Chandler* rejected religious-based interpretations of blasphemy statutes as a matter of common law, not as an interpretation of state or federal constitutions. But common law in the nineteenth century was

MASSACHUSETTS: FREEDOM OF CONSCIENCE AND THE ABNER KNEELAND CASE vii (Da Capo Press 1973).

78. 2 Del. (2 Harr.) 553 (1837).

79. *Id.* at 557.

80. *Id.* at 562-63.

81. *Id.*

82. *Id.* at 577.

83. *Id.* at 572.

informed by a variety of sources. Judges did not create common law. Instead, its principles were “discovered” by judges as they explored legal sources such as the Magna Charta and the Petition of Right.⁸⁴ One potential source was the federal Constitution; even if not binding upon the states, the Bill of Rights could nevertheless be read as expressing certain fundamental freedoms which ought not to be abridged by any government—state or federal.

This reading of the Bill of Rights, of course, presumes an interpretation that focuses not on federalism, but on the “rights retained by the people.”⁸⁵ The Establishment Clause in particular would have to undergo an interpretive transformation before it could be read as a limitation on *state* power over religion. In fact, at the same time state courts were reinterpreting their own law on matters of Church and State, they also reinterpreted the federal Establishment Clause.

B. The Rhetorical Establishment Clause

1. Sunday Closing Laws

In the early decades of the nineteenth century, most states regulated Sunday observance as a religious matter of civil importance.⁸⁶ For example, in the 1817 case *Commonwealth v. Wolf*,⁸⁷ the Pennsylvania Supreme Court upheld the conviction of a man accused of violating the sanctity of the Sabbath. The court based its decision on the need of civilized government to have a populace “taught to revere the sanctity of an oath, and look to a future state of rewards and punishments for the deeds of this life.”⁸⁸ Therefore, “[i]t is of the utmost moment . . . that they should be reminded of their religious duties at stated periods.”⁸⁹

By the 1840s, however, justifications for the enforcement of Sunday Closing laws began to change. In *City Council of Charleston v. Benjamin*,⁹⁰ the South Carolina Court of Errors repeated the standard Christian

84. See Amar, *Fourteenth Amendment*, *supra* note 7, at 1205.

85. U.S. CONST. amend. IX.

86. This, in itself, was a shift from the purely religious rationales which had previously justified such laws. See Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 935 n.85 (1992).

87. 3 Serg. & Rawle 48 (Pa. 1817). For a general history of Sunday Closing laws, see *McGowan v. Maryland*, 366 U.S. 420, 470-73 (1961) (Frankfurter, J., separate opinion).

88. *Wolf*, 3 Serg. & Rawle at 50.

89. *Id.*

90. 21 S. C. Eq. (2 Strob. Eq.) 508 (1846).

community rhetoric, but then went on to note that the law is not just a religious law, it is “in a political and social point of view, a mere day of rest. Its observance, as such, is a mere question of expediency.”⁹¹ That same year, the Pennsylvania Supreme Court heard arguments which criticized the religious-based rationale in *Wolf* as being out of step with religious liberty under both the state and *federal* constitutions. In *Specht v. Commonwealth*,⁹² the defense asked the court to overrule *Wolf* and hold that civil government has no power over religion:

If the legislature can direct that religious observance, then there is no limit to their power over religious subjects. If they can direct the people to stay at home quietly, they can direct them to go to church, and if they can direct them to attend church, they can indicate the church to be attended. In short, if they have any power over religious subjects, they have all power. Such power would be a perfect union of church and state, so much abhorred by the people of this republic. It would inevitably lead to religious persecutions, and finally to civil and religious tyranny.⁹³

Then, after citing the religion clauses of the First Amendment:

I think I may safely say, that the *constitutions of the United States* and of Pennsylvania are founded on no religion, but on purely civil considerations—on the unalienable rights of man; one of which is *that man shall not interfere with the rights of conscience*.⁹⁴

Although the court upheld the law as a mere civil regulation,⁹⁵ it acknowledged that *Wolf*'s rationale implicated “the unrestrained liberty of

91. *Id.* at 529.

92. 8 Pa. 312 (1848).

93. *Id.* at 315.

94. *Id.* at 317 (first emphasis added). According to the defense:

What else was it but the doctrine ‘that the Christian religion was a part of the law,’ and to be enforced by the civil arm, that gave the Holy Inquisition such horrid force, and placed the civil and religious liberty, and the lives of nations of men, at the mercy of the bloodiest power that ever inflicted misery upon the human race, in the name of Demons or of Gods!

Id. at 316. The defense argued that, because Sabbatarian merchants (in this case, Seventh Day Baptists) were already compelled to close their shops on Saturday, the Sunday Closing law “‘gives a preference to other modes of worship.’ It allows some six full days to labour, and restrains others to five.” *Id.* at 319 (emphasis in original).

95. *Id.* at 323. The court distinguished between a law based on religious doctrine, and a regulation accommodating the religious beliefs of the majority:

All agree that to the well-being of society, periods of rest are absolutely necessary. . . . In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labour, it is not surprising that that day should have received the legislative

conscience guarant[e]d by the *constitution of the United States*, and of the several states of the confederacy, including our own.”⁹⁶ Accordingly, the *Specht* court rejected any language in *Wolf* which indicated that Christianity has a special status under the law. Not only were “the Christian, the Jew, the M[a]hmedan, and the Pagan” entitled to protection, but even “the Infidel, who madly rejects all belief in a Divine Essence, may safely do so, in reference to civil punishment, so long as he refrains from the wanton and malicious proclamation of his opinions with intent to outrage the moral and religious convictions of a community, the vast majority of whom are Christians.”⁹⁷

By the 1850s, the idea that civil penalties should not be meted out on religious grounds appeared in a variety of state court decisions—many of them overruling prior cases. In the 1849 case *Sellers v. Dugan*,⁹⁸ the Supreme Court of Ohio held a contract void on the ground that it was made on a Sunday in violation of state law prohibiting “common labor on Sunday.”⁹⁹ In dissent, Judge Caldwell declared that “[i]f the [state] can punish an act of this kind, they can another, and their power to persecute, to punish for whatever they may consider abstractly wrong, is unlimited.”¹⁰⁰ In 1853, Caldwell’s belief that the state had no legitimate power over religion prevailed. In *Bloom v. Richards*,¹⁰¹ the Ohio Supreme Court reversed its holding in *Sellers v. Dugan* and declared “[n]either Christianity nor any

sanction: and as it is also devoted to religious observances, we are prepared to estimate the reason why the statute should speak of it as the Lord’s day, and denominate the infraction of its legalized rest, a profanation. Yet this does not change the character of the enactment. It is still, essentially, but a civil regulation made for the government of man as a member of society, and obedience to it may properly be enforced by penal sanctions. To say that one of the objects of the legislature was to assert the sanctity of the particular day selected, is to say nothing in proof of the unconstitutionality of the act, unless in this the religious conscience of others has been offended and their rights invaded.

Id.

In a concurring opinion, Judge Coulter rejected the rationale of the majority. Coulter would have upheld the Act “because it guarded the Christian Sabbath from profanation, and, in the language of the act, prohibited work or worldly employment on the *Lord’s Day*, commonly called *Sunday*; and not because of the mere usefulness of the day as a day of rest and cessation from worldly labour.” *Id.* at 327.

96. *Id.* at 322 (emphasis added).

97. *Id.*

98. 18 Ohio 489 (1849).

99. *Id.*

100. *Id.* at 496.

101. 2 Ohio St. 387 (1853) (holding that contracts entered into on Sunday are enforceable, but upholding general Sunday Closing laws).

other system of religion is a part of the law of this state.”¹⁰² According to Judge Thurman, “[w]e have no union of church and state, nor has our government ever been vested with authority to enforce any religious observance, simply because it is religious.”¹⁰³ Laws must be supported by secular, not religious rationales:

[T]he statute upon which the defendant relies, prohibiting common labor on the Sabbath, could not stand for a moment as a law of this state, if its sole foundation was the [C]hristian duty of keeping that day holy, and its sole motive to enforce the observance of that duty. *For no power over things merely spiritual, has ever been delegated to the government*, while any preference of one religion over another, as the statute would give upon the above hypothesis, is directly prohibited by the constitution.¹⁰⁴

In fact, the only case of this period to explicitly uphold a Sunday Closing law on religious grounds, did so as a matter of *free exercise*. In *State v. Ambbs*,¹⁰⁵ Judge Scott rejected the claim that the state’s Sunday Closing law interfered with the rights of conscience:

The Sunday law was not intended to compel people to go to church, or to perform any religious act, as an expression of preference for any particular creed or sect, but was designed to coerce a cessation of labor, that those who conscientiously believed that the day was set apart for the worship of God, might not be disturbed in the performance of their religious duties Thus the law, so far from affecting religious freedom, is a means by which the rights of conscience are enjoyed.¹⁰⁶

102. *Id.* at 387.

103. *Id.* at 391. Judge Thurman thus rejected the theory of religious “toleration”: “We sometimes hear it said that all religions are tolerated in Ohio; but the expression is not strictly accurate—much less accurate is it to say, that one religion is a part of our law, and all others only tolerated. It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes not upon the leniency of government, or the liberality of any class or sect of men, but upon his natural indefeasible rights of conscience, which, in the language of the constitution, are beyond the control or interference of any human authority.” *Id.* at 390-91.

104. *Id.* at 391 (emphasis added); *see also* STATE ASSEMBLY OF NEW YORK, REPORT OF THE COMMITTEE ON THE JUDICIARY, ON THE PETITION PRAYING THE REPEAL OF THE LAWS FOR THE OBSERVANCE OF THE SABBATH, 5 State of New York Assembly Docs., Doc. No. 262 (1838) (rejecting the petition and construing such laws “merely as a civil institution” and not an enforced observance of religious duty), *quoted in* McGowan v. Maryland, 366 U.S. 420, 498-500 (1961).

105. 20 Mo. 214 (1854).

106. *Id.* at 218.

By 1858, at least one court had struck down Sunday Closing laws as establishing compulsory religious observance. In *Ex parte Newman*,¹⁰⁷ the California Supreme Court held that the state's Sunday Closing law "enforce[d], as a *religious institution*, the observance of a day held sacred by the followers of one faith, and entirely disregarded by all the other denominations within the State."¹⁰⁸ According to the court, the act required "a periodical cessation from ordinary pursuits, not as a civil duty necessary for the repression of any existing evil, but in furtherance of the interests, and in aid of the devotions of those who profess the Christian religion."¹⁰⁹ Over the dissent of future United States Supreme Court Justice Stephen Field, Chief Justice Terry declared:

When our liberties were acquired, our republican form of government adopted, and our Constitution framed, we deemed that we had attained not only toleration, but religious liberty in its largest sense—a complete separation between Church and State, and a perfect equality without distinction between all religious sects.¹¹⁰

Although the holding relied on the state constitution, Chief Justice Terry saw no distinction between the rights expressed in the California and federal constitutions. In support of his holding, Terry quoted "Mr. Johnson[']s . . . celebrated Sunday-mail report," where Johnson declared:

Our Government . . . is a civil and not a religious institution. . . . Let the National Legislature once perform an act which involves the decision of a religious controversy, and it will have passed its legitimate bounds. . . . Our Constitution recognizes no other power than that of persuasion.¹¹¹

107. 9 Cal. 502 (1858). In *Newman*, a Jewish man was fined and imprisoned when he failed to pay a fine for selling clothing on Sunday. The court held in favor of petitioner and issued writ of habeas corpus. *Id.* at 504-05.

108. *Id.* at 506 (emphasis added).

109. *Id.* The court rejected as "mere assertions" the holdings in *Specht v. Commonwealth* and *City Council v. Benjamin* that such laws establish "merely a civil rule, and make no discrimination or preference in favor of any religion." *Id.*

110. *Id.* at 507.

111. *Id.* at 507-08. In his concurring opinion in the same case, Justice Burnett declared:

Under the Constitution of this State, the Legislature cannot pass any act, the legitimate effect of which is *forcibly* to establish any merely religious truth, or enforce any merely religious observances. The Legislature has no power over such a subject. When, therefore, the citizen is sought to be compelled by the Legislature to do any affirmative religious act, or to refrain from doing anything, because it violates simply a religious principle or observance, the Act is unconstitutional.

By 1861, the two justices who voted to strike down the Sunday Closing law had been replaced and the Supreme Court of California had a new chief justice—the formerly dissenting Justice Field. When the California Legislature passed a new Sunday Closing law, the Field court did not disagree with the principle of “no power over religion,” but upheld the new law as a civil regulation that simply ensured a day of rest.¹¹² That the law happened to coincide with the religious observance of the majority of the population was irrelevant.¹¹³

That same year, the New York Court of Appeals also upheld a Sunday Closing law as a civil regulation.¹¹⁴ Although the court declined to overrule *Ruggles’* statement that Christianity was part of the common law, the statement was carefully explained:

Christianity is not the legal religion of the State, as established by law. If it were, it would be a civil or political institution, which it is not; but this is not inconsistent with the idea that *it is in fact, and ever has been, the religion of the people*. This fact is every where [sic] prominent in all our civil and political history, and has been, from the first, recognized and acted upon by the people, as well as by constitutional conventions, by legislatures and by courts of justice.¹¹⁵

By distinguishing between the religion of the people and the law of state, courts could uphold laws that provided special protections to the Christian Sabbath while at the same time distancing themselves from the *Ruggles* idea that civil power could be exercised on religious grounds.¹¹⁶ Nor was this

Id. at 515.

112. *See Ex parte Andrews*, 18 Cal. 679, 685 (1861) (“The operation of the act is secular, just as much as the business on which the act bears is secular; it enjoins nothing that is not secular, and it commands nothing that is religion; it is purely a civil regulation, and spends its whole force upon matters of civil economy.”). The court did not address the *Newman* court’s more general point that the state and federal constitutions rejected “toleration” and embraced “separation.”

113. *Id.* at 684 (“While the primary object of legislation, which respects secular affairs, is not the promotion of religion, yet it can be no objection to laws, that while they are immediately aimed at secular interests, they also promote piety.” (citing, as examples, “acts of incorporation of churches, exemption from taxation . . . , protection of meetings from interruption, and the like acts.”)).

114. *Lindenmuller v. People*, 33 Barb. 548 (N.Y. 1861).

115. *Id.* at 561 (emphasis added). In this way, the law’s recognition of Christianity meant that the legislature could act to “secure to the community the privilege of undisturbed worship.” *Id.* at 657.

116. *See, e.g., Zeisweiss v. James*, 63 Pa. 465, 471 (1870). In *Zeisweiss*, the Supreme Court of Pennsylvania held that the law could not recognize a devise for the creation of the “Infidel Society of Pennsylvania” on the grounds that the law would not incorporate such a society. The court cited *Updegraph* and *Vidal* and then noted:

trend limited to Sunday Closing laws. From 1840 to 1860, a variety of claims challenged the notion that the law of the land was based on Christianity. One by one, laws once based on religious principles were reconstrued to conform to the idea that the civil state has no power over the subject of religion.

2. The Church Property Cases

In the 1813 English case, *Craigdallie v. Aikman*,¹¹⁷ Chancellor Lord Eldon ruled that church property was held in trust for the persons who had contributed money for the original acquisition of the church. Developing this principle in the later case *Attorney-General ex rel. Mander v. Pearson*,¹¹⁸ Lord Eldon declared that church property was held in trust for the propagation of certain religious doctrines and that it was the duty of the court to award the property to the faction adhering to the traditional doctrines of the church. The so-called "*Pearson Rule*" was soon adopted in the new world by way of state common law.¹¹⁹

Although application of the *Pearson Rule* required detailed examination of church doctrine, such inquiries fit well in a world where courts routinely decided issues of blasphemy and proper deportment on the Sabbath.¹²⁰

It is unnecessary here to discuss the question under what limitations the principle is to be admitted that Christianity is part of the common law of Pennsylvania. . . . It is in entire consistency with this sacred guarantee of the rights of conscience and religious liberty to hold that, even if Christianity is no part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to disturb the public peace. The laws and institutions of the state are built on the foundation of reverence for Christianity. To this extent, at least, it must certainly be considered as well as settled that the religion revealed in the Bible is not to be openly reviled, ridiculed or blasphemed, to the annoyance of sincere believers who compose the great mass of the good people of the Commonwealth.

Id. (citing *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824) and *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127 (1844)).

117. 1 Dow. 1, 3 Eng. Rep. 601 (H.L. 1813) (Scot.).

118. 3 Mer. 353, 418-19, 36 Eng. Rep. 135, 156-57 (Ch. 1817).

119. *See, e.g.*, *Bowden v. M'Leod*, 1 Edw. Ch. 588, 592 (N.Y. Ch. 1833) ("where a religious society is formed, a place of worship provided, and either by the will of the founder, the deed of the trust through which the title is held or by the charter of incorporation, a particular doctrine is to be preached in the place and the latter is to be devoted to such particular doctrines and service. In such a case, it is not within the power of the trustees of the congregation to depart from what is thus declared to be the object of the foundation or original formation of the institution and teach new doctrines and set up a new mode of worship there"); *see also* *Wilson v. Presbyterian Church of John's Island*, 19 S.C. Eq. (2 Rich. Eq.) 192 (1846).

120. In the case of *Kniskern v. Lutheran Churches of St. John and St. Peter*, 1 Sand. Ch. 439 (N.Y. Ch. 1844), the court considered whether adherence to the Augsburg Confession is an essential characteristic of a Lutheran Congregation. The court concluded that it was. *Id.* at 558.

However, just as theological rationales grew less routine in blasphemy cases, so the *Pearson* Rule came under fire as a remnant of “establishment England.” By the 1840s, litigants on the side of doctrinal innovation began to cite both the state and federal constitutions for the principle that the state had no power—and the courts no jurisdiction—to interfere in matters involving religious doctrine and church government.

As early as 1842, Kentucky courts had rejected the *Pearson* Rule, noting that “[t]he judicial eye of the civil authority of this land of religious liberty, cannot penetrate the veil of the Church, nor can the arm of this Court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excised members.”¹²¹ In the 1845 case *Miller v. Gable*,¹²² litigants cited both the New York constitution and the “Const. U.S. Amendment, art. 1” for the proposition that “the trustees of a religious corporation in this country have the sole charge and management of the temporalities, and the courts cannot interfere with their acts on account of

In order to allow some doctrinal evolution in churches, some state courts modified the Rule and made it applicable only when there had been a “fundamental doctrinal departure.” See, e.g., *Miller v. Gable*, 2 Denio 492, 548 (N.Y. 1845) (“Between that extreme which confers all power upon the congregation or the trustees, and the doctrine which subjects the property to forfeiture for departures from doctrine or forms of government, in matters not indispensable to the great ends to be obtained by religious organization, there is a wide interval where we may take our stand sustained by the law and by a sober and enlightened public sentiment.”); *Trustees of the Lutheran Congregation of Pine Hill v. St. Michael’s Evangelical Church*, 48 Pa. 20, 21 (1864) (changing from one synod to another within a general denomination does not constitute a fundamental departure from doctrine). See generally, William G. Ross, *The Need for an Exclusive and Uniform Application of “Neutral Principles” in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L.J. 263 (1987).

121. *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 259 (1842); see also, *Ferarría v. Vasconcelles*, 23 Ill. 456, 460-61 (1860) (citing same language from *Frost*); *McBride v. Porter*, 17 Iowa 203, 206 (1864) (“Under our form of government, there is a complete severance of the church from the State; and in this State we have constitutional provisions inhibiting the legislature and the courts from interfering with the rights of parties on account of their opinions on the subject of religion.”); *German Reformed Church v. Seibert*, 3 Barr. 282, 291 (Pa. 1846) (“Any other than [ecclesiastical courts] must be incompetent judges of matters of faith, discipline and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals.”).

Similar thoughts were occurring to judges in the slaveholding states. According to the South Carolina Supreme Court in 1843, “[i]t belongs not to the civil power to enter into or review the proceedings of a Spiritual Court. The structure of our government has for the preservation of Civil Liberty, rescued the Temporal Institutions from religious interference. On the other hand, it has secured Religious liberty from the invasion of the Civil Authority.” *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87 (1843). Unfortunately, South Carolina, like the other slaveholding states, was in the process of regulating all but the most pro-slavery forms of Christianity. See *infra* part III.

122. 2 Denio 492 (N.Y. 1845).

any departure from the faith of the founders.”¹²³ In the same paragraph, the parties distinguished British case law on the ground that, in England, there is an “established church.”¹²⁴ Although *Miller* applied a modified form of the *Pearson* rule,¹²⁵ five years later the New York courts rejected the idea that the state had any power to decide matters of religious doctrine:

Those to whom was intrusted [sic] the establishment of our free governments in this new world, knew the calamitous effects of the struggle between the sceptre and the crosier in the old; and resolved that there should be perfect *liberty of conscience* here. In this spirit our constitutions were framed and our laws enacted, and heresy became unknown to our criminal code. . . . It follows, that there is no power in the state, legislative, executive or judicial, that can interfere with this complete religious liberty.¹²⁶

One by one, state courts rejected the *Pearson* Rule as violating the “liberty of conscience” and “separation of church and state.”¹²⁷ In 1846, the Vermont Supreme Court noted that “[t]he situation of our country, our constitutional provisions in relation to religious freedom, forbid, that the authority of [the *Pearson Rule*] should here be recognized.”¹²⁸ Similarly, in 1869 the Missouri Supreme Court declared “[i]n this country, there is a total disconnection between the church and state, and neither will interfere with

123. *Id.* at 536.

124. *Id.*

125. *See supra* notes 117-18.

126. *Robertson v. Bullions*, 9 Barb. 64, 106-07 (N.Y. App. Div. 1850) (emphasis added); *see also id.* at 104 (“The church establishment of England, from which country we derive the great body of our laws, occupies a great space there; and has not and never can have any representative here.”).

127. *See Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253 (1842); *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87 (1843); *Robertson*, 9 Barb. 64; *Bellport v. Tooker*, 29 Barb. 256 (N.Y. App. Div. 1859); *McGinnis v. Watson*, 41 Pa. 9 (1861); *McBride v. Porter*, 17 Iowa 203 (1864); *Missouri ex rel. Watson v. Farris*, 45 Mo. 183 (1869); *see also Bernard Roberts, Note, The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211, 223 (1991). Similarly, in *Ferraria v. Vasconcelles*, 23 Ill. 456, 462-63 (1860), the court appears to apply the departure from doctrine rule and awards the church property to the minority faction that has remained loyal to the mother church. However, in doing so, the court articulates a principle of hierarchical autonomy:

The object of the donations of money, the purchase of the property and the erection of the church edifice, was to afford a place of worship according to the usages and principles of the body as then organized, and not according to the usages of some other body. When the defendants and their party withdrew from the church, and refused to recognize its authority, they abandoned all right to the use of the property as an independent body or organization.

Id. at 462. Thus, the church hierarchy is allowed to decide who is a current member of the church and entitled to its use.

128. *Smith v. Nelson*, 18 Vt. 510, 555 (1846).

the other when acting within their appropriate spheres.”¹²⁹ According to the Illinois Supreme Court, “[f]reedom of religious profession and worship cannot be maintained if the civil courts trench upon the domains of the church—construe its canons and rules—dictate its discipline and regulate its trials.”¹³⁰ Case law which seemed to apply the *Pearson* Rule was dismissed as a remnant of prior state religious establishments and out of step with modern notions of religious liberty.¹³¹ All of the decisions rejecting the *Pearson* Rule ultimately relied on state common, statutory, and constitutional law.¹³² Four years after the adoption of the Fourteenth Amendment, the United States Supreme Court rejected the *Pearson* Rule as a matter of federal common law.

3. *Watson v. Jones*

Immediately following the Civil War, the General Assembly of the Presbyterian Church of the United States (“PCUS”) adopted a resolution that required new members who had previously advocated the divine nature of slavery to “repent and forsake these sins” before being allowed to join the church.¹³³ Enforcing this resolution tore apart the Walnut Street

129. *Watson v. Farris*, 45 Mo. at 198.

130. *Chase v. Cheney*, 19 Am. Law Reg. 295, 304 (Ill. 1871).

131. See, e.g., *Robertson*, 9 Barb. at 117 (“The cases in Massachusetts and Connecticut give but little light on the subject, owing to the peculiarity of the semi-established systems under which they arose.”); *Chase*, 19 Am. Law Reg. at 306 (noting the contrary decisions in Massachusetts, but attributing them to the state religious establishment which existed in that state from 1780 to 1833).

132. New Hampshire was one of the few—if not the only—northern state during this period to continue to follow the *Pearson* Rule. In *Hale v. Everett*, 53 N.H. 9 (1868), a split New Hampshire Supreme Court awarded church property to the faction most loyal to the Protestant doctrines of the original church charter. In doing so, the majority cited Story’s Commentaries for the proposition that “power over the subject of religion is left exclusively to the state governments.” *Id.* at 124. In his dissenting opinion, the future Chief Justice of the New Hampshire Supreme Court, Charles Doe, rejected the assertion made in cases like *Ruggles*, *Updegraph*, and *Vidal* that Christianity was part of the common law. According to Judge Doe,

[U]ntil church and state shall be united, [this] assertion will continue to be a sounding and deceitful phrase, —a mere rhetorical expression, unintelligible in law and untrue in fact. . . . “Toleration,” said Chief Justice Smith, “came to be considered a duty. With us it is exploded, for it implies an establishment which we have not. Here the doctrine of toleration has given place to the most perfect equality of rights.”

Id. at 210-11 (quoting *Muzzy v. Wilkins*, 1 Smith 133 (N.H. 1803)).

133. For a discussion of the background to the *Watson* case, see Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religious Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980); JOHN T. NOONAN, JR., *THE BELIEVER AND THE POWERS THAT ARE* 182-84 (1987). In the 1868 church property case *Gartin v. Penick*, 68 Ky. (5 Bush) 110 (1868), the Kentucky Court of Appeals awarded the church property to the Presbyterian faction that refused to follow the General Assembly’s resolution. The court declared that the resolution not only

Presbyterian Church of Louisville, Kentucky.¹³⁴ Claiming that the requirement violated the Presbyterian Constitution, a majority of the local church trustees and a minority of the congregation seized control of the Walnut Street Church and attempted to sever the Church's ties with PCUS. The General Assembly promptly declared the local pro-Union members to be the "true" Walnut Street Church and proceeded to appoint new trustees. Both factions claimed control of the Church property and the dispute landed in state court.¹³⁵ The Kentucky Supreme Court rejected the idea that the dispute involved a "question purely ecclesiastical, to be settled by the synod itself and the general assembly,"¹³⁶ and held that the General Assembly had departed from its own laws when it installed the new trustees.¹³⁷ The losing

violated the original doctrines of the Presbyterian church, it also violated the separation of church and state. *See id.* at 127-30. In fact, the resolution "signalized the Assembly as an intermeddling and revolutionary partisan in an unconstitutional, unholy, and bloody work of abolition by armies, and even servile war and insurrection." *Id.* at 130. The Chief Justice of the Court of Appeals dissented:

[W]hen the jurisdiction of the civil courts over the church constitutions and organizations, as civil contracts, is once firmly fixed, there will be but few questions, immediately or remotely affecting individual rights in church property . . . that may not . . . be reviewed by the civil courts, and thus the independence of church courts will be destroyed, [and] the freedom of the church from the State becomes a mere myth.

Id. at 152, quoted in HOWE, *supra* note 12, at 79.

134. *Watson v. Avery*, 65 Ky. (2 Bush) 332 (1867).

135. *Id.* at 343-44.

136. *Id.* at 348. According to the court:

Such a construction of the powers of church tribunals would, in our opinion, subject all individual and property rights, confided or dedicated to the use of religious organizations, to the arbitrary will of those who may constitute their judicatories and representative bodies, without regard to any of the regulations or constitutional restraints by which, according to the principles and objects of such organizations, it was intended that said individual and property rights should be protected.

Id. This decision appears to conflict with prior cases decided by the Kentucky Supreme Court. *See id.* at 376-78 (Williams, J., dissenting) (citing both *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253 (1842), in which the court refused to apply the departure from doctrine theory in a congregational church dispute, and *Gibson v. Armstrong*, 46 Ky. (7 B. Mon.) 481 (1847), in which the court indicated that, *when in doubt*, it should defer to the church tribunals.).

137. According to the court:

[W]e are of the opinion that the said order of the Synod, directing said election of additional ruling elders in said church, was contrary to the constitution of the Presbyterian Church, and not obligatory upon the session and congregation of said Walnut Street Church; and said Avery, McNaughton, and Leech, not having been elected as ruling elders according to the laws and regulations of the church, were not thereby constituted ruling elders, nor were they so constituted by said declaration of the general assembly.

Id. at 362.

pro-Union faction then sought relief in federal court,¹³⁸ and the case eventually made its way to the U.S. Supreme Court.

In *Watson v. Jones*,¹³⁹ the Supreme Court declared that in the United States “[t]he right to organize voluntary religious associations . . . and to create tribunals for the decision of controverted questions of faith . . . is unquestioned.”¹⁴⁰ This right would be “totally subverted” if secular courts were given the power to reverse the decisions of ecclesiastical tribunals.¹⁴¹ Therefore, “[i]t is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.”¹⁴² Finally, the Court rejected the “departure from doctrine” approach of *Pearson* as an appropriate principle of federal common law:

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.¹⁴³

Although *Watson* was decided on grounds of federal common law,¹⁴⁴ the rationale had broader implications. The Court in *Watson* refused to give effect to the state court’s determination that the elders who prevailed in the Supreme Court were not elders at all. Justice Miller attempted to gloss over this conflict with the Kentucky courts by holding that the elders who prevailed in state court had since removed themselves from the governance of the PCUS.¹⁴⁵ Whether they had a *right* to remove themselves along with the church property, of course, was the essence of the dispute.¹⁴⁶ In essence, the Supreme Court reversed a decision in the same case by the

138. The circuit court accepted diversity jurisdiction. See *Adams & Hanlon*, *supra* note 133, at 1298.

139. 80 U.S. (13 Wall.) 679 (1871).

140. *Id.* at 728-29.

141. *Id.* at 729.

142. *Id.*

143. *Id.* at 728.

144. The Supreme Court would later characterize the opinion as “informed by First Amendment considerations.” *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445 (1969).

145. *Watson*, 80 U.S. (13 Wall.) at 734.

146. See also HOWE, *supra* note 12, at 80-81 (“In truth, the Supreme Court’s exercise of jurisdiction in the case of *Watson v. Jones* was extraordinary—perhaps even outrageous.”).

state's highest court, and did so in order to vindicate the people's "right to *establish* tribunals for the decision of [religious] questions."¹⁴⁷

4. Summary

By the 1860s, state courts for the most part had disentangled blasphemy and Sabbath laws from their religious origins. Likewise, church property disputes were no longer decided on the basis of a departure from religious doctrine. Each of these developments was accompanied by declarations that "liberty of conscience" includes freedom from state-imposed religious orthodoxy. On the other hand, the evolving principle of nonestablishment was not understood to prevent the state from deferring to the religious sentiments of the community. Prosecutions for breach of the peace, for example, might depend upon the religious sensibilities of the community. Likewise, the day chosen as the day of rest would depend on which day most people chose to go to church. These deferences to public sentiment were not considered exercises of power over the subject of religion because, supposedly, the state did not care which day was chosen or which religious beliefs were held by the community.¹⁴⁸

Although laws remained on the books and prosecutions were upheld, in the context of the mid-19th century this shift in the basis for the law was nothing short of radical. By assuming an agnostic stance, the state had abandoned its role as guardian of the borders of religious orthodoxy. Civil government was no longer officially concerned with which—if any—religious beliefs were held by the people. This marks a clear departure from the Religious Republican sensibilities that dominated at the Founding.¹⁴⁹

Remarkably, the rise of the principle of nonestablishment occurred in an extraordinarily religious age. The so-called Second Great Awakening of the early nineteenth century sparked a dramatic increase in religious fervor and

147. *Watson*, 80 U.S. (13 Wall.) at 729 (emphasis added).

148. An example of this at the federal level can be found in the 1854 debate over legislative chaplains. Recommending against the abolishment of congressional chaplains, the Senate Judiciary Report articulated what would become the dominant trend in the states: agnostic accommodation of religious sentiment. According to Senator George Badger:

The chaplain is an officer of the house which chooses him, and nothing more. He owes his place not to his belonging to a particular religious society, or holding a particular faith, but to the voluntary choice of the members of the house, and stands, in this respect, upon the same footing with any other officer so elected.

S. REP. NO. 376, 32d Cong., 2d Sess. 2 (1853).

149. See Tushnet, *supra* note 12, at 228 (most of the framers thought religion was an essential element in the defense of virtue, without which the republic could not long survive); see also Lash, *supra* note 56, at 1118.

church attendance.¹⁵⁰ As tens of thousands were attending religious revivals along the western frontier,¹⁵¹ hundreds of religious reform movements were organizing in the east.¹⁵² One explanation for the rise of the nonestablishment principle during such a period may be the fragmentation of Protestant denominations and the incentive of religious minorities to put a nonestablishment spin on the “no power” Establishment Clause.¹⁵³ This alone, however, seems inadequate to explain why such a religious age embraced a provision originally intended to protect *state* churches, and reinterpreted it to forbid the *union* of Church and State. Perhaps at least part of the explanation lies with one of the most significant religious conflicts of the nineteenth century: the clash between the Protestant majority and the influx of Roman Catholic immigrants.

C. *Anti-Catholicism and the Nonestablishment Principle*

In 1834, Samuel Morse published a series of letters that claimed that the monarchies of Europe had conspired with the Catholic Church to subvert the spread of democracy by sending Catholic immigrants to take control of the American West.¹⁵⁴ In 1835, the abolitionist Lyman Beecher published *A Plea for the West* which, in addition to echoing the concerns of Morse,

150. See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 415 (1972).

151. *Id.* at 432. The Cane Ridge revival of 1801 near Lexington, Kentucky is estimated to have attracted a crowd of ten to twenty-five thousand people. *Id.* at 433.

152. The Second Great Awakening resulted in the rapid growth of religious-based movements against gambling, drinking, horse racing, dueling, swearing, Sabbath breaking, and, most explosively, slavery. See Lash, *supra* note 56, at 1131; GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 335 (1991).

153. This appears to have happened in the debates over the tax assessments in the New England states. As the anti-assessment movement in Massachusetts gained momentum, the Baptist *Christian Watchman* declared:

No government nor any religious sect has the power of toleration in the accurate or strict sense of the word, and that all governments ought to be so constructed and administered as to render its exercise unnecessary. This principle is thoroughly recognized in the Constitution of the United States and ought to be so in all the Constitutions of each State.

Christian Watchman, Nov. 16, 1832, at 182, *quoted in* 2 MCLOUGHLIN, *supra* note 30, at 1255. Similarly, in Connecticut, Baptist Elder Asahel Morse, in an address to the Republican Party, maintained that “[i]t is much more to be desired that the constitution and statutes of every state were strictly conformable in all ecclesiastical affairs to the federal constitution.” MCLOUGHLIN, *supra* note 61, at 1007.

154. SAMUEL F. B. MORSE, *FOREIGN CONSPIRACY AGAINST THE LIBERTIES OF THE UNITED STATES* (New York, 1835). Morse believed that the Leopold Association, founded in Vienna in 1829, ran the operation to finance the building of Catholic churches in America. TYLER ANBINDER, *NATIVISM AND SLAVERY* 9 (1992).

warned against the influence of Catholic schools on American children.¹⁵⁵ Maria Monk had a runaway best seller with her *Awful Disclosures of the Hotel Dieu Nunnery of Montreal* which described illicit convent sexual practices.¹⁵⁶

As the polemic spread, so did anti-Catholic violence. The same year Morse published his letters, a mob burned the Ursile convent in Charlestown, Massachusetts after a rumor had started that a nun was being imprisoned.¹⁵⁷ In the 1840s, anti-Catholic riots in Philadelphia left Catholic homes burned, churches destroyed, and several people dead.¹⁵⁸ In the 1850s, on what came to be known as "Bloody Monday," anti-Catholic rioting in Louisville left twenty people dead, three quarters of them "foreigners," and hundreds wounded.¹⁵⁹

Nativists, and their representatives in the notoriously anti-Catholic Know-Nothing Party,¹⁶⁰ linked Catholicism to slavery,¹⁶¹ drunkenness,¹⁶²

155. A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 185 (1985) ("The Catholic Church holds now in darkness and bondage nearly half the civilized world. . . . It is the most skilled, powerful, dreadful system of corruption to those who wield it, and of slavery and debasement to those who live under it.") (quoting Lyman Beecher); see also 1 STOKES, *supra* note 24, at 826.

156. No other book in America sold more copies until the publication of *Uncle Tom's Cabin*. ANBINDER, *supra* note 154, at 9.

157. *Id.*

158. 1 STOKES, *supra* note 24, at 830.

159. JAMES J. HENNESEY, *AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES* 125 (1981).

160. See ANBINDER, *supra* note 154, at 12.

161. According to a typical Know-Nothing resolution from Norfolk, Virginia: Roman Catholicism and slavery being alike founded and supported on the basis of ignorance and tyranny; and being, therefore, natural allies in every warfare against liberty and enlightenment; therefore, be it Resolved, That there can exist no real hostility to Roman Catholicism which does not embrace slavery, its natural co-worker in opposition to freedom and republican institutions.

Reprinted in HENNESEY, *supra* note 159, at 145. Although Pope Gregory XVI condemned the slave trade in 1838, no Catholic Bishop in America supported abolition prior to the Civil War. REICHLEY, *supra* note 155, at 184. Another reason Catholics were generally regarded by abolitionists as being "soft" on slavery was the fact that Catholics were predominantly Democratic—the party arguing in favor of the expansion of slavery. See Robert P. Swierenga, *Ethnoreligious Political Behavior in the Mid-Nineteenth Century: Voting, Values, Cultures, in RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S* (Mark A. Noll ed., 1990).

162. According to the editors of the *Cleveland Leader*, "[Irish Catholics are] sots and bums who crawled out of the 'rotten nests of filth' on election days to cast 'ignorant' ballots for the candidates of the 'slaveocracy.'" These "'cattle' lured to the polls by huge quantities of whisky, worshipped the three deities of the Ruffian Party—the Pope, a whisky barrel, and a nigger driver." Swierenga, *supra* note 161, at 159 n.63. Catholics were also blamed for blocking attempts by the growing Temperance Movement to pass prohibition bills. ANBINDER, *supra* note 154, at 43-44.

monarchy,¹⁶³ sexual immorality,¹⁶⁴ and the union of Church and State.¹⁶⁵ States passed laws preventing Bishops from holding property and barring from public office anyone who owed allegiance to any “foreign prince, power, or potentate” (the Nativist catchwords for Roman Catholic).¹⁶⁶ More than anything else, however, Roman Catholicism was viewed as threatening the existence of the new public school system.¹⁶⁷

1. The Bible and Public Education

The English Bible, in some way or other, has, ever since the settlement of Cambridge, been read in its public schools, by children of every denomination; but in the year 1851, the ignorant immigrants, who have found food and shelter in this land of freedom and plenty, made free and plentiful through the influence of these very Scriptures, presume to dictate to us, and refuse to let their children read as ours do, always have done, the Word of Life. The arrogance, not to say impudence, of this conduct, must startle

163. ANBINDER, *supra* note 154, at 119 (According to the Ohio President of the Know-Nothing Party, Thomas Spooner, “That the natural and constant tendencies of Romanism, are Monarchical, and of Protestantism, Republican, the history of both faiths abundantly proves.”).

164. No doubt in response to publications like Ms. Monk’s, the Nativist Know-Nothing Party in Maryland and Massachusetts became convinced that nunneries were the setting for sexual misconduct by Catholic Priests. Accordingly, they set up committees to inspect the convents. ANBINDER, *supra* note 154, at 137.

165. An 1832 encyclical letter of Pope Gregory described the liberty of conscience as an “absurd and erroneous doctrine.” BRADLEY, *supra* note 11, at 124-25. In 1864, Pope Pius IX issued his “Syllabus of Errors,” which included, among other “errors,” “[t]he Church has not the power of using force, nor has she any temporal power, direct or indirect.” 2 STOKES, *supra* note 24, at 393. The result of such pronouncements, despite claims to the contrary by American catholic leaders, was to encourage the view that Roman Catholics in America were attempting to join the powers of Church and State. *See id.* at 394-95.

166. According to the Massachusetts Constitution of 1855:

Resistance to the aggressive policy and corrupting tendencies of the Roman Catholic Church in our country by the advancement of all political stations—executive, legislative, judicial or diplomatic—of those only who do not hold civil allegiance, directly or indirectly, to any foreign power, whether civil or ecclesiastical, and who are Americans by birth, education and training, thus fulfilling the maxim “Americans only shall govern America.”

See generally ANBINDER, *supra* note 154, at 141.

167. When Catholics raised their voices against the reading of the King James Bible in the common schools, Protestants responded that this was an attempt to destroy the Protestant public school system and leave nothing but Catholic parochial schools. Thus, Catholic dissent was denounced as an attempt by the “black brigade of the Catholic Priesthood” to “form an ecclesiastical kingdom of God within the Republic.” Harold M. Helfman, *The Cincinnati “Bible War,” 1869-1870*, 60 OHIO ST. ARCHAEOLOGICAL & HIST. Q. 369, 379 (1951) (quoting AMORY D. MAYO, RELIGION IN THE COMMON SCHOOLS: THREE LECTURES DELIVERED IN THE CITY OF CINCINNATI 23, 28 (1869)).

every native citizen, and we cannot but hope that they will immediately take measures to teach these deluded aliens, that their poverty and ignorance in their own country arose mainly from their ignorance of the Bible.¹⁶⁸

Religious Republicanism emphasized the development of man's moral nature; not only was virtue necessary for good government, it also led to material success and social well-being.¹⁶⁹ In 1787, the Northwest Ordinance declared "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."¹⁷⁰ The Ordinance expressed the commonly held view that "effective moral instruction must be based upon and vitalized by religion."¹⁷¹ The Bible was the proper source of such instruction because it contained the "best code of moral instruction known to man."¹⁷² Thus, it is no surprise that the rapidly growing number of state-supported "common schools"¹⁷³ invariably began their day with devotional services including Bible reading, prayer, and the singing of hymns.¹⁷⁴

168. Editorial, 14 COMMON SCH. J., Jan. 1, 1852, at 9, reprinted in Thomas James, *Rights of Conscience and State School Systems in Nineteenth-Century America*, in TOWARD A USEABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 126-27 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

169. Michael Les Benedict, *Victorian Moralism and Civil Liberty in the Nineteenth-Century United States*, in THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE 91, 99 (Donald G. Nieman ed., 1992).

170. The Northwest Ordinance (1787), reprinted in 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY 85, 88 (Melvin I. Urofsky ed., 1989). The Ordinance became the model for state constitutions adopted during the first half of the nineteenth century. See 1 STOKES, *supra* note 24, at 480. Interestingly, although the Ordinance appears to imply agency over the subject of religion, it too came to be interpreted otherwise. See *infra* note 191 and accompanying text. As mentioned earlier, the Ordinance involves territorial policy—a matter closely aligned to prerogatives of states.

171. *Ohio Teacher's Association - Proceedings*, 29 OHIO EDUC. MONTHLY 257-58 (1870), quoted in Bernard Mandel, *Religion and the Public Schools of Ohio*, 58 OHIO ST. ARCHAEOLOGICAL & HIST. Q. 185, 188-89 (1949).

172. William Slocumb, *School Government*, 19 OHIO EDUC. MONTHLY 2 (1868), quoted in Mandel, *supra* note 171, at 188-89.

173. See Benedict, *supra* note 169, at 99-100. In 1647, Massachusetts created "the first system of public education in the American colonies." See 2 STOKES, *supra* note 24, at 50. Although rooted in the New England states, especially colonial Massachusetts, the movement towards free "common schooling" did not gain momentum in other states until the 1830s. See G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 89 (1989).

174. Mandel, *supra* note 171, at 187. In 1820, school teachers in Providence, Rhode Island were encouraged "to impress on the minds of the scholars a sense of the Being & Providence of God & their obligations to love & reverence Him, . . . [and] the observance of the Sabbath as a sacred institution." BRADLEY, *supra* note 11, at 128. Instruction in religion was also common in orphanages, poorhouses, asylums, prisons, and reformatories. Benedict, *supra* note 169, at 105.

Horace Mann, the Massachusetts Unitarian and public school advocate, was adamant about the prohibition of sectarian doctrine in the new common schools.¹⁷⁵ By sectarian, however, Mann was referring to doctrines peculiar to one or more *Protestant* sects. Thus, the “non-sectarian” version of the Bible to be read in schools was the Protestant King James, not the Roman Catholic Douay Bible.¹⁷⁶ Unlike the King James, the Douay version includes the collection of books known as the “Apocrypha” and is annotated to provide the official Church interpretation of the text. Accordingly, when the Massachusetts public schools followed Horace Mann’s advice that the Bible be read “without note or comment,” this was as much a prohibition on the Roman Catholic way of reading the Bible as it was a provision intended to avoid Protestant sectarian strife.¹⁷⁷

2. The Catholic Challenge

Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they

175. According to Mann:

[I]f a man is taxed to support a school, where religious doctrines are inculcated which he believes to be false, and which he believes that God condemns, then he is excluded from the school by divine law, at the same time that he is compelled to support it by human law. This is a double wrong.

HORACE MANN, ANNUAL REPORT (1845-48), *quoted in* 2 STOKES, *supra* note 24, at 57.

176. *See id.* “Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion, it welcomes the religion of the Bible; and in receiving the Bible, it allows it to do what it is allowed to do in no other system,—to speak for itself.” *Id.*

Protestant materials in the public schools went beyond the Bible. One early 19th century public school textbook included the following math problem:

Fifteen Christians and 15 Turks bound at sea in one ship in a terrible storm, and the pilot declaring a necessity of casting one half of these persons into the sea, that the rest might be saved, they all agreed that the persons to be cast away should be set out by lot in this manner, viz., the 30 persons should be placed in a round form like a ring and then, beginning to count at one of the passengers and proceeding regularly every ninth person should be cast into the sea until of the 30 persons there remained only 15. The question is, how these 30 persons ought to be placed that the lot might fall infallibly upon the 15 Turks, and not upon any of the 15 Christians.

PAUL BLANSHARD, RELIGION AND THE SCHOOLS: THE GREAT CONTROVERSY 15 (1963).

177. *See Spiller v. Woburn*, 94 Mass. 127, 129 (1866) (affirming the expulsion of a Catholic student for refusing to bow her head during the morning Bible reading in compliance with state law that required the daily reading of the Bible “without note or oral comment”). Protestants, of course, rejected the idea that the scriptures had to be “officially interpreted.” For example, Baptist Elias Smith declared that Christians were “wholly free to examine for [themselves] what is truth, without being bound to a catechism, creed, confession of faith, discipline or rule excepting the scriptures.” ELIAS SMITH, THE LOVING KINDNESS OF GOD DISPLAYED IN THE TRIUMPH OF REPUBLICANISM IN AMERICA 27 (1809), *reprinted in* GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 332 (1991).

imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools, which are alike open to the children of the rich and the poor, of the stranger and the citizen.¹⁷⁸

The social transformations of the nineteenth century exacerbated the conflict brewing in the public schools. The period between 1830 and 1860 witnessed a massive migration of immigrants from Western Europe, many of whom did not share the Protestant views of Horace Mann. In 1800, there were about 50,000 Catholics in the United States. In the 1840s, fleeing the starvation brought on by the infamous potato blight, 2,000,000 Irish left their home country. Nearly three quarters of that number arrived in the United States, and 90% of these were Catholic.¹⁷⁹ By 1850, the Roman Catholic Church was the largest church in America.

As early as 1829, Catholic bishops had begun to encourage local churches to build their own parochial schools. By 1840, over two hundred such schools had been established,¹⁸⁰ many of them supported by the same public funds that supported the common schools.¹⁸¹ By the 1850s, however, states began to amend their constitutions to declare that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."¹⁸² Political organizations like the Know-Nothing Party were devoted to staunching the flow of immigrants and battling the Catholic challenge to Protestant hegemony in the public schools. For example, the 1856 election platform of the Know-Nothing Party promoted:

The education of the youth of our country in schools provided by the State, which schools shall be common to all, without

178. *Donahoe v. Richards*, 38 Me. 379, 413 (1854) (upholding the school board's decision to expel a Roman Catholic student for refusing to participate in Protestant religious exercises).

179. ANBINDER, *supra* note 154, at 6-7. Between 1,000,000 and 1,500,000 people died of starvation or starvation-related illness during the blight. *Id.* at 6.

180. MARTIN E. MARTY, *PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA* 27 (1984).

181. 2 STOKES, *supra* note 24, at 57.

182. OHIO CONST. art. VI, § 2 (1851). According to Anson P. Stokes, "[f]rom 1844 on, all states amending their constitutions, and new states when admitted to the Union (except West Virginia, which later corrected the omission), decreed in their fundamental laws against any diversion of public funds to denominational purposes." 4 STOKES, *supra* note 33, at 271. Stokes fails to note here, or in his three volume treatise *CHURCH AND STATE IN THE UNITED STATES* (1950), the role anti-Catholicism played in the passage of these laws, reading them instead as pro-separationist statutes. *See, e.g.*, 4 STOKES, *supra* note 33, at 271.

distinction of creed or party, and free from any influence or direction of a denominational or partisan character.

And, inasmuch as Christianity, by the Constitutions of nearly all the States; by the decisions of most eminent judicial authorities, and by the consent of the people of America, is considered an element of our political system, and the Holy Bible is at once the source of Christianity and the depository and fountain of all civil and religious freedom, we oppose every attempt to exclude it from the schools thus established in the States.¹⁸³

Catholic protests that Bible reading violated their rights of conscience fell on deaf ears.¹⁸⁴ In 1859, eleven year old Thomas Wall of Boston followed the advice of his priest and refused to recite a prayer or read from the Protestant King James Bible during morning exercises in the public school. After Wall's teacher beat his hands with a rattan stick for thirty minutes, Wall submitted. The Boston Police Court upheld the beating on the ground that "[o]ur schools are the granite foundation on which our republican government rests."¹⁸⁵ Granting Wall an exemption would lead to similar claims by other denominations and result in a "war upon the Bible and its use in the common schools."¹⁸⁶

Some Catholic leaders sought to resolve the impasse by calling for separate but equal common schools: Allow both Protestants and Catholics to run their own schools supported by the same common school fund.¹⁸⁷ The

183. Reprinted in 2 STOKES, *supra* note 24, at 67-68.

184. See *Donahoe v. Richards*, 38 Me. 379 (1854) (rejecting a Catholic student's claim to be exempt from required reading of the King James Bible).

185. H. Frank Way, *The Death of the Christian Nation: The Judiciary and Church-State Relations*, 29 J. OF CHURCH & STATE 509, 519 (1987) (quoting *Commonwealth v. Cook*, 7 Am. L. R. 417 (1859)).

186. *Id.*

187. See JAMES CARDINAL GIBBONS, DISCOURSES AND SERMONS ON THE SECTIONAL CRISIS, 1830-1865, 87 (David B. Cresebrough ed., 1991) ("a discerning and fair-minded American people, . . . will, I trust, one day recognize and exercise the sacred duty of giving us equitable share in the public school fund"). The so-called "Poughkeepsie Plan", advocated by Archbishop Ireland of St. Paul, would have allowed each religion to have its own schools that were supported and inspected by the state, but the teachers would have been of the religion's own denomination. 2 STOKES, *supra* note 24, at 361. In 1839, New York Governor William Seward, after learning that Catholic parents kept their children out of school because teachers used the Protestant King James Bible, proposed that a portion of the common school funds be devoted to the formation of parochial schools. In these schools, immigrants could be "instructed by teachers speaking the same language with themselves and professing the same faith." See ANBINDER, *supra* note 154, at 10. At the last minute Seward amended his proposal to allow each city ward to elect its own school commissioner who would then determine the ward's school curricula. The result was the election of commissioners who "almost uniformly required reading of the King James Bible." *Id.* at 11. In 1842, the New York Legislature prohibited public funding of any school in which "any religious sectarian doctrine or tenet shall be taught, inculcated, or practiced." See G. Alan Tarr, *Church and*

attempts failed in a whirlwind of anti-Catholic legislation and constitutional amendments that prohibited “religious sects” from receiving public school funds.¹⁸⁸ The prohibition on the use of public funds in sectarian institutions had the effect of freezing out Catholics from an equal share of education funds, while simultaneously establishing Protestantism as the sole doctrine taught in public schools. If the ban caused parochial schools to close for lack of funding and thus forced Catholic students into the Protestant common schools, so much the better.¹⁸⁹

By the 1860s, it was clear that anti-Catholicism would thwart any attempt at equal time or equal funds. To the Roman Catholic leadership, the only way out of the impasse was to call for the removal of *all* religious instruction from the classroom. Citing recent case law in the areas of blasphemy, Sunday Closing laws, church property disputes, as well as recent interpretations of state and federal constitutions, Catholics argued that civil government had no power over the subject of religion: The Bible must be removed from the public schools.

3. *Minor v. Board of Education of Cincinnati*

In response to Catholic complaints, the 1869 Cincinnati School Board prohibited all religious instruction and Bible reading in the city’s public schools. Newspapers throughout the United States denounced the school board’s action and warned that the “Bible exclusion movement” was a product of “priestly craft and cunning” and was aimed at disrupting the entire public school system.¹⁹⁰ A group of Cincinnati residents immediately

State in the States, 64 WASH. L. REV. 73, 92 (1989) (quoting V. LANNIE, PUBLIC MONEY AND PAROCHIAL EDUCATION: BISHOP HUGHES, GOVERNOR SEWARD, AND THE NEW YORK SCHOOL CONTROVERSY 233 (1968)). This law prevented any attempts by the New York City Assembly to permit funding for Catholic parochial schools in districts where Catholics were a majority. The Supreme Court recently cited the New York experience as an example of that state’s historical rejection of specially designated and funded school districts for religious minorities. See *Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2491 (1994). There was no hint of irony in the citation.

188. See 4 STOKES, *supra* note 33, at 271. During this same period, the federal government barred land grants to sectarian schools. See *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting); see also Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 845 (1992); Tarr, *supra* note 173, at 94.

189. After the Massachusetts Legislature passed a law requiring daily reading of the King James Bible in the public schools, it approved an amendment to the state constitution which barred the use of state funds for sectarian schools. “This, Know Nothings hoped, would make parochial schools financially unfeasible, forcing the children of Catholics to learn ‘American’ customs in the public schools.” ANBINDER, *supra* note 154, at 136.

190. “Deacon Dick” Smith, editor of the *Cincinnati Gazette* (Sept. 1869), reprinted in, Helfman, *supra* note 167, at 374. Other newspapers criticizing the Board’s action included, *Cleveland Leader*, *Philadelphia Bulletin*, *Baltimore American*, *Buffalo Express*, *New York Sun*,

applied to the superior court of Cincinnati for a restraining order against the enforcement of the new regulation.¹⁹¹

The plaintiffs argued that Christianity was a part of the common law of the state and that no government could survive absent state-supported religion.¹⁹² For support, the plaintiffs cited Chancellor Kent's opinion in *People v. Ruggles* and Story's *Commentaries*.¹⁹³ The lawyers for the School Board in turn argued that state law did not and could not recognize religion.¹⁹⁴ Citing recent opinions from other states on blasphemy, Sunday Closing, and church property disputes, lawyers for the School Board maintained that the courts could not require religious exercises on the grounds that to do so would constitute a "law respecting the establishment of religion."¹⁹⁵

Despite their disagreement on the merits, both sides agreed that a major issue in the case was whether the state had power over the subject of religion. According to plaintiffs' lawyer William Ramsey, Ohio's constitutional protection of religious freedom "and its counterpart in the Federal Constitution" had been erroneously construed as "the declaration of the utter indifference of the State to all religion."¹⁹⁶ Ramsey rejected Jefferson's separationist views and instead cited provisions from various state

Toledo Commercial, Dayton Journal, Washington Chronicle, Albany Journal, and Philadelphia Press. See Helfman, supra note 167, at 380 nn.38-39.

191. See Robert G. McCloskey, *Introduction* to THE BIBLE IN THE PUBLIC SCHOOLS: ARGUMENTS BEFORE THE SUPERIOR COURT OF CINCINNATI IN THE CASE OF MINOR V. BOARD OF EDUCATION OF CINCINNATI xi (Da Capo Press 1967) (1870) [hereinafter BIBLE IN THE PUBLIC SCHOOLS]. The lawyers involved in the case were an astonishing assemblage and reflected the importance of the controversy. For the plaintiffs were William R. Ramsey, a prominent member of the Cincinnati bar, George R. Sage, later a federal district judge, and Rufus King, grandson of the statesman who had signed the Constitution, former student of Joseph Story at Harvard Law School, and then Dean of the Cincinnati Law School. For the defendants were Johann B. Stallo, later appointed by President Cleveland as minister to Italy, George Hoadley, professor at Cincinnati Law School and future Governor of Ohio, and Stanley Matthews, future United States Senator and Supreme Court Justice. *Id.*

192. *Id.* at 44-46 (argument of W. R. Ramsey) (citing Story, Rawle, and Kent's sections on religious liberty for the proposition that the law is not "indifferent" to religion).

193. *Id.* at 44-45 (argument of W. R. Ramsey) and 158-59 (argument of George R. Sage).

194. *Id.* at 125 (argument of George Hoadley) ("We have no union of Church and State, nor has our government ever been vested with authority to enforce any religious observance, simply because it is religious.") (quoting *Bloom v. Richards*, 2 Ohio St. 387, 388 (1853)).

195. *Id.* at 259 (argument of Stanley Matthews) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1st ed. 1868)); *id.* at 125-26 (argument of George Hoadley) (citing *Bloom* and other recent state court decisions for the proposition that "no power is possessed by the Legislature over things spiritual, but only over things temporal").

196. *Id.* at 41.

constitutions which invoked God and promoted religion and piety.¹⁹⁷ Although worded differently, “it is apparent that they intend the same thing—protection to the various forms of religious belief, and thereby the encouragement and promotion of religion.”¹⁹⁸ To Ramsey, all such provisions reflected the vision of the *federal* Establishment Clause:

I do not care to make a further reference to the various state conditions. They are uniform in substance, though various in form, and they are well illustrated by the commentary of Judge Story upon the similar provision of the Constitution of the United States: “The real object of the amendment was not to countenance much less advance Mohammedanism, or Judaism, or Infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government.”¹⁹⁹

Note that Ramsey does not cite Joseph Story’s statement that the Establishment Clause leaves the states free to regulate religion.²⁰⁰ Nor does he quote Madison or Jefferson to the same effect.²⁰¹ In fact, the plaintiffs completely ignored the originally federalist nature of the Establishment Clause. Instead, they assumed that the federal Establishment Clause expressed some kind of “nonestablishment” value, a value which informed the content of “counterpart” provisions in state constitutions.²⁰² For example, plaintiffs’ lawyer George Sage argued that there “is nothing in all this which tends to the establishment of church and state,” and cited recent

197. *Id.* at 41-44.

198. *Id.* at 44.

199. *Id.* at 44-45. Article I, section 7 of the Ohio Constitution, to which Ramsey was referring, states:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief

Id. at 40.

200. See STORY, *supra* note 30, at 702-03 (“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.”).

201. See *supra* note 27 and accompanying text.

202. BIBLE IN THE PUBLIC SCHOOLS, *supra* note 191, at 44-45. In fact, Ramsey goes on to cite Rawle and Chancellor Kent’s interpretation of the federal religion clauses in support of his interpretation of Ohio law. *Id.* at 45-46.

congressional debates over the federal Establishment Clause in support of his argument.²⁰³ Even though it would be in their interests to do so, none of the plaintiffs' lawyers interpreted the federal Establishment Clause to reserve power over religion to the states. Indeed, no one made any distinction between the substantive content of the federal Establishment Clause and the vastly different religion clauses of the Ohio, or any other state, constitution.²⁰⁴

The trial court held for the plaintiffs and instructed the school board to resume religious exercises in the public schools.²⁰⁵ In reaching his conclusion, Judge Hagans noted that "[i]t is one of the glories of our country that we have no religious establishments: and our experience has not only demonstrated the wisdom and justice of these principles, but the success of our example is being felt all over the world. Thus far, this section of the Bill of Rights has in view the safety, security, happiness, and freedom of the conscience of, the *individual citizen*."²⁰⁶ Nevertheless, religion and the state necessarily were connected in the State constitution,²⁰⁷ and the school board had wrongly "cut off the instrumentality by which those essentials to good government are cultivated."²⁰⁸

In dissent, Judge Alphonso Taft characterized the reading of the Protestant Bible as a sectarian religious exercise. Citing Cooley's statement that no state may pass any law "respecting an establishment of religion," Taft declared:

203. *Id.* at 200.

204. Interestingly, counsel for the *defendants* pointed out that the First Amendment "does not prevent, was not designed to prevent, the *States* from creating church establishments." *Id.* at 144 (remarks of George Hoadley) (emphasis in original). As a historical matter, Hoadley is correct; the First Amendment was not "designed" to be applied against the states. Hoadley apparently did not consider the Fourteenth Amendment, ratified the year before, to be applicable. Other scholars have addressed the issue of "silence" surrounding the incorporation of the Bill of Rights. See Amar, *Fourteenth Amendment*, *supra* note 7, at 1246. For the purposes of this paper, however, it is irrelevant. I hope only to show that the Establishment Clause is as *capable* of incorporation as any other clause in the original Bill of Rights. In other words, nonestablishment was considered a right of all citizens. On this point, Hoadley clearly believed that separation of Church and State was required in order to protect the "liberty of conscience."

205. *Id.* at 370 ("Our common schools cannot be secularized under the Constitution of Ohio. It is a serious question whether as a matter of policy merely, it would not be better that they were, rather than offend conscience. With this, however, we have now nothing to do.") (Hagans, J., opinion).

206. *Id.* at 359 (emphasis in original).

207. The Ohio Constitution provided "religion, morality, and knowledge . . . being essential to good government, it shall be the duty of the General Assembly to pass suitable laws . . . to encourage schools and the means of instruction." OHIO CONST. art. I, § 7 (1851).

208. BIBLE IN THE PUBLIC SCHOOLS, *supra* note 191, at 369. Judge Storer concurred with the judgment of Judge Hagans in an opinion which passionately defended the Bible as the revealed word of God and the root of all true systems of morals. *Id.* at 381-82.

This great principle of equality in the enjoyment of religious liberty, and the faithful preservation of rights of each individual conscience is important in itself, and is essential to religious peace and temporal prosperity, in any country under a free government. But in a city and State whose people have been drawn from the four quarters of the world, with a great diversity of inherited religious opinions, it is indispensable.²⁰⁹

On appeal, the Supreme Court of Ohio agreed with Taft and rejected Judge Hagan's notion that the law and religion were connected in any way.²¹⁰ According to Judge Welsh, "[l]egal Christianity is a solecism, a contradiction of terms."²¹¹ "Religion is not—much less is Christianity or any other particular system of religion—named in the preamble to the Constitution of the United States as one of the declared *objects* of government."²¹² Although the Ohio Constitution mentions religion as essential to good government, this did not mean that government was essential for religion.²¹³ Instead, religion was best secured by adopting "the 'hands off doctrine'":

Let the state not only keep its own hands off, but let it also see to it that religious sects keep their hands off each other. Let religious doctrines have a fair field, and a free, intellectual, moral and spiritual conflict. The weakest—that is, the intellectually, morally and spiritually weakest—will go to the wall, and the best will triumph in the end. This is the golden truth which it has taken the world eighteen centuries to learn, and which has at last solved the terrible enigma of "church and state."²¹⁴

Judge Welsh believed that the Ohio Constitution embraced this doctrine,²¹⁵ and that the principles themselves "are as old as Madison, and were his favorite opinions."²¹⁶ Welsh then completes his argument by quoting Madison's letter to Governor Livingston: "I observe with particular pleasure the view that you have taken of the *immunity* of religion from civil

209. *Id.* at 417 (Taft, J., dissenting).

210. *Board of Educ. v. Minor*, 23 Ohio St. 211, 246 (1872).

211. *Id.* at 248; *see also id.* at 246-47 ("We are told that this word 'religion' must mean 'Christian religion,' because 'Christianity is a part of the common law of this country,' lying behind and above its constitutions. Those who make this claim can hardly be serious.").

212. *Id.* at 248 (emphasis added).

213. *Id.* Welsh thus reads the Northwest Ordinance and its Ohio counterpart as neither containing nor implying governmental power over the subject of religion.

214. *Id.* at 250-51.

215. *Id.*

216. *Id.* at 253.

government, in every case where it does not trespass on private rights or the public peace."²¹⁷

4. Summary

The fight over the Bible in the public schools would continue long after *Cincinnati v. Minor* was decided.²¹⁸ What is significant, for the purposes of this article, is the dynamic created by the controversy between the Protestant majority and the Catholic minority. Rejecting Roman Catholicism as a threat to (Protestant) democracy, Protestants called for “no aid” to sectarian institutions on the ground of “separation of church and state.” Catholics, dismayed by coerced Protestant religious instruction in the public schools, also called for “separation” and the abolishment of compelled instruction in the King James Bible. Both groups sought to use the federal constitution’s norm of “no power” as a rhetorical tool in their fights—fights which most often took place on a state level. Finally, this “mixing up” of state and federal constitutions had the result of obscuring the federalist origins of the Establishment Clause and engrafting upon the Clause a statement of personal liberty: freedom from religion. This helps to explain how “no power” rhetoric could flourish in a world where the majority of people still believed that religious faith was crucial to a well-functioning democracy.

Perhaps most significantly, the *Cincinnati* case reveals the rhetorical impact of a “no power” Establishment Clause. Both sides in the *Cincinnati* case assumed that the federal Establishment Clause expressed a nonestablishment principle, and that this principle was analogous to similar provisions in all state constitutions. Accordingly, a lot was at stake depending on whether the Clause stood for nonestablishment, or simply “nonsectarianism.” Ultimately, the Ohio Supreme Court followed the lead of state court decisions on blasphemy, Sunday Closing laws, and church property, and embraced an interpretation of the Establishment Clause that stood for personal “immunity” from state establishment of religion.²¹⁹

217. *Id.* at 254 (quoting James Madison to Governor Livingston (July 10, 1822)). After having generated so much excitement when the trial began, the opinion of the Ohio Supreme Court that allowed the Board to drop religious exercises created no controversy at all; it received little newspaper attention. Helfman, *supra* note 167, at 386. In the municipal elections of April 1870, five of the eight board members who voted to exclude the Bible won reelection. *Id.*

218. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (holding that daily Bible readings in the public schools violate the incorporated Establishment Clause).

219. In an earlier article, I stated my belief that by the early 19th century, it was clear that the federal government would play a role in the promotion of general religion. See Lash, *supra* note 56, at 1119 (citing among other things, support of missionaries and the Second Great Awakening). I still believe this was the case for the first 30–40 years of the 19th century. Although I now believe that nonestablishment principles were ascendant by Reconstruction, this coincided with a general

Protestants who decried the Catholic Church's joining of Church and State now found themselves hoist by their own petard.

D. The "Put God in the Constitution" Movement

Perceiving the subtle and persevering attempts which are made to prohibit the reading of the Bible in our Public Schools, to overthrow our Sabbath laws, to corrupt the family, to abolish the Oath, Prayer in our National and State Legislatures, Days of Fasting and Thanksgiving, and other Christian features of our institutions, and so to divorce the American Government from all connection with the Christian religion . . . a written Constitution ought to contain explicit evidence of the Christian character and purpose of the nation which frames it.²²⁰

Those who continued to believe that Protestant Christianity was the state religion chafed against the drum roll of decisions to the contrary. Faced with the inexorable divorce of Christianity from the law of the land, religious Republican groups focused their attention on the federal Constitution and the rhetorical effect of its failure to acknowledge the providence of the Christian

view that the religious voice played a major role in the formation of public policy. Indeed, the distinction courts made in the areas of Sunday Closing and blasphemy were predicated on such a view. In this way, the rise of nonestablishment does not undermine my general point that the framers of the Fourteenth Amendment would have assumed that the concerns of religion and government could legitimately overlap.

In fact, I now believe that the transformation of the Free Exercise Clause cannot be understood apart from the transformation of the Establishment Clause. In my Free Exercise article I noted that Religious Republicanism, as exemplified by laws against polygamy, removed a doctrinal barrier to the embrace of religious exemptions in that it rejected Madisonian strict separation. I did not explain, however, how the duty to protect the religion of the majority was transformed into the duty to protect the religious exercise of the individual. *See id.* at 1130. I believe now that a crucial missing piece of the puzzle was the evolving idea that, although the government could promote morality as informed by religious sensibilities, it could not pass a religious-based law without violating the norm of "no power." Interesting in this regard is the choice of the Congress to remove the reference to Christianity in the polygamy law's preamble on the grounds that it contains "what should not be inserted in a law." *See id.* at 1125 n.80.

If anything, understanding the reinterpretation of the Establishment Clause makes the case for free exercise exemptions all the more plausible. Free exercise under religious establishments amounted to no more than "religious toleration"—a pro-majoritarian doctrine that is unlikely to have called for religious exemptions for dissenting religious groups. Free Exercise could not exist as an independent norm until nonestablishment removes the idea that free exercise is dependent on the "toleration" of the majority. Finally, if nonestablishment norms prohibit laws directly targeting religion for support or suppression, that "frees up" the Free Exercise Clause to apply to burdens on religion not covered by the Establishment Clause: burdens imposed by generally applicable law.

220. Constitution of the National Reform Association, 1864, *reprinted in* 2 STOKES, *supra* note 24, at 260.

God.²²¹ In 1864, a group calling itself the National Reform Association formally petitioned Congress to adopt the following amendment to the Constitution:

We the people of the United States, humbly acknowledging Almighty God as the source of all authority and power in civil government, the Lord Jesus Christ as the Ruler among the nations, and His revealed will as the supreme law of the land, in order to constitute a Christian government . . . do ordain and establish this Constitution for the United States of America.²²²

In 1874, the Congress referred the matter to the Committee on the Judiciary which recommended the petition be rejected:

[The Founders] in full realization of the dangers which the union between church and state had imposed upon so many nations of the Old World, [decided] with great unanimity that it was inexpedient to put anything into the Constitution or frame of government which might be construed to be a reference to any religious creed or doctrine.²²³

221. The complaint about the Constitution's failure to acknowledge God goes as far back as the Founding. See 3 STOKES, *supra* note 24, at 582 (Letter of William Williams to Oliver Ellsworth). The movement for national recognition of the Deity gained momentum during the crisis of the Civil War. In 1861, the Secretary of the Treasury, Samuel Chase, sent the Director of the Mint the following message: "Dear Sir: No nation can be strong except in the strength of God, or safe except in His defense. The trust of our people in God should be declared on our national coins. You will cause a devise to be prepared without unnecessary delay with a motto expressing in the fewest and tersest words possible this national recognition." DAVID K. WATSON, HISTORY OF AMERICAN COINAGE 214 (1899). In 1863, the Director of the Mint wrote in his annual report:

I would respectfully and earnestly ask the attention of the Department to the proposition in my former report, to introduce a motto upon our coins expressive of a National reliance on Divine protection, and a distinct and unequivocal National recognition of the Divine Sovereignty. We claim to be a Christian Nation—why should we not vindicate our character by honoring the God of Nations in the exercise of our political Sovereignty as a Nation? . . . 'Tis an hour of National peril and danger—an hour when man's strength is weakness—when our strength and our nation's strength and salvation, must be in the God of Battles and of Nations. Let us reverently acknowledge his sovereignty, and let our coinage declare our trust in God.

Quoted in 3 STOKES, *supra* note 24, at 602. In 1864, the motto "In God We Trust" appeared for the first time on American coins. By Act of Congress in 1865, the Secretary of the Treasury was authorized to add these words upon all current and future coins. *Id.* at 602. There are no recorded debates in Congress regarding the passage of the Act. Whatever else Congress may have believed about the motto, they explicitly rejected attempts to make Christianity a part of the nation's organic law. See *infra* this section.

222. 3 STOKES, *supra* note 24, at 584-85 (emphasis in original).

223. *Id.* at 588. Referring to the same movement, and writing three years after the adoption of the Fourteenth Amendment, Supreme Court Justice Bradley wrote:

The Founders had been anything but unanimous about the dangers of a union between church and state and had not intended to express any such nonestablishment value. However, by Reconstruction, northern state courts had translated the prohibition of the original Establishment Clause to be an expression of fundamental religious liberty. So complete was the reinterpretation of the Establishment Clause that its language—*sui generis* at the Founding—now began to appear in the organic law of the states. For example, the Iowa Constitution of 1857 declared: “The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”²²⁴

I have never been able to see the necessity or expediency of the movement for obtaining such an amendment. The Constitution was evidently framed and adopted by the people of the United States with the fixed determination to allow absolute religious freedom and equality, and to avoid all appearance even of a State religion, or a State endorsement of any particular creed or religious sect And after the Constitution in its original form was adopted, the people made haste to secure an amendment that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. This shows the earnest desire of our Revolutionary fathers that religion should be left to the free and voluntary action of the people themselves. I do not regard it as manifesting any hostility to religion, but as showing a fixed determination to leave the people entirely free on the subject.

Religion, as the basis and support of civil government, must reside, not in the written Constitution, but in the people themselves. And we cannot legislate religion into the people. It must be infused by gentler and wiser methods.

MISCELLANEOUS WRITINGS OF JOSEPH P. BRADLEY 57-59 (1901), *quoted in* Abington School Dist. v. Schempp, 374 U.S. 203, 257-58 n.23 (1963) (Brennan, J., concurring).

224. IOWA CONST. of 1857, art. I, § 3, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 552, 552-53 (Ben. Perley Poore ed., 2d ed. 1878) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; *see also* CONSTITUTION OF THE STATE OF DESERET [Utah], art. VIII, § 3 (1849), *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 375, 380 (William F. Swindler ed., 1979) [hereinafter SOURCES AND DOCUMENTS] (“All men shall have a natural and inalienable right to worship God according to the dictates of their own consciences, and the General Assembly shall make no law respecting an establishment of religion, or of prohibiting the free exercise thereof.”) (Utah’s draft constitution of 1860 contained essentially the same provisions, including the language of the federal constitution); CONST. OF JEFFERSON TERRITORY, art. I, § 3 (1859), *reprinted in* 2 SOURCES AND DOCUMENTS, *supra*, at 18 (“The General Assembly shall make no laws respecting an establishment of religion, nor shall any religious test be required of any citizen; neither shall anyone be required to support any sect or denomination.”). Other state constitutions tracked the general approach of the federal constitution, though without the peculiar “respecting” language of the federal Establishment Clause. *See* ALABAMA CONST. of 1819, art. I, § 3 (“That no religion shall be established by law”); SOUTH CAROLINA CONST. of 1868, art. I, § 2 (“No form of religion shall be established by law.”);

Note that the Georgia Constitution of 1798 stated, “No one religious society shall ever be established in the State, in preference to another.” GEORGIA CONST. of 1798, art. IV, § 10. This clause was removed in the 1865 constitution, as was the provision protecting the rights of conscience. The Rights of Conscience provision was restored in the constitution of 1868.

As adopted by the states, formally or otherwise, the reinterpreted Establishment Clause retained its original “dual nature,” if in modified form. Recall that the original Establishment Clause had both a prohibitive and a protective aspect; it was intended to both prohibit establishments at the *federal* level while at the same time protecting establishments at the *state* level. Similarly, the principle of nonestablishment, which was by Reconstruction generally thought to inform the Clause, also had a prohibitive and a protective aspect; no government could legitimately prefer (prohibit) one religion over another or attempt to suppress (protect) religious exercise on religious grounds. According to Thomas Cooley in his “Treatise on Constitutional Limitations” (1868):

The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious denomination or mode of worship. There is not religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and, if based on religious grounds, is religious persecution. It is not toleration which is established in our system, but religious equality.²²⁵

Cooley thus sees “nonestablishment” as a dual protection: it is as much an “establishment” to make a distinction *against* “one class or sect” as it is to make a distinction *in favor* of one class or sect. Today, we think of establishment as government *support* of religion. In the mid-nineteenth century, however, government suppression of “heretical beliefs,” forced religious observance of the Lord’s Day, interference with church decisions involving their own doctrine and government, or forced participation in public school religious exercises were all “establishment” issues. According to an 1853 Senate Committee Report on congressional chaplains:

225. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 469 (1st ed. 1868). Although Cooley believed that official recognition of the general religious sentiment of the community was permissible, *id.* at 471, he rejected Story’s view that the common law admitted the “divine origin and truth” of Christianity, *id.* at 467. According to Cooley, the general belief was that the state should “leave questions of religious belief and religious worship to be questions between every man and his Maker, which human tribunals are not to take cognizance of, so long as public order is not disturbed.” *Id.* Cooley, however, was not entirely consistent. For example, he rested his argument in favor of laws against public profanity on “the natural impulses of every man who believes in a Supreme Being, and recognizes his right to our reverence.” *Id.* at 476. Nevertheless, Cooley agreed with the general trend of the common law away from religious justifications for Sunday Closing laws, blasphemy, and church property disputes. *Id.* at 476-78.

If Congress has passed, or should pass, any law which, fairly construed, has in any degree introduced, or should attempt to introduce, *in favor* of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars—endowment at the public expense, peculiar privileges to its members, *or disadvantages or penalties* upon those who should reject its doctrines or belong to other communions—such law would be a ‘*law respecting an establishment of religion,*’ and therefore in violation of the constitution.²²⁶

In this way, the Establishment Clause came to represent a personal freedom. Over time, popular interpretation of the Clause focused not on the principle of federalism, but on the principle of “nonestablishment.” By Reconstruction, the common interpretation of the Establishment Clause and its “counterparts” in the states was that no government had any legitimate power over religion as religion: the state could neither establish a preferred religion, nor could it visit “disadvantages or penalties” upon disfavored religious beliefs. Citizens by right were immune from such religious-based persecutions.

E. Nonestablishment Implications for the Incorporation of the Establishment Clause

Recall that the main objection to the incorporation of the Establishment Clause is that the Clause was intended to express a principle of states’ rights. Thus, it makes no more sense to incorporate this clause against the states than it does the Tenth Amendment. If, on the other hand, the Clause was understood to express a principle of personal freedom—the principle of nonestablishment—this is a freedom that can just as easily be applied against the states as the federal government: no government (state or federal) has any legitimate power over religion as religion. A “new” interpretation, however, does not in itself alter the fact that the original Clause stood for federalism, not personal freedom. If by Reconstruction most people interpreted the Establishment Clause to express the principle of nonestablishment, perhaps this merely illustrates how wrong people can be about the Constitution. As a matter of originalism, one might argue, that popular misunderstanding cannot change the original meaning of the Clause.²²⁷

If the focus of the inquiry was the “original meaning of the First Amendment,” the objection has some force. Post-adoption interpretation has

226. S. REP. NO. 376, 32d Cong., 2d Sess. 1-2 (1853) (emphasis added).

227. See SMITH, *supra* note 12, at 51.

but limited value, especially as the Founding recedes ever farther into the past. However, we are not seeking the *original* meaning of the Establishment Clause. Instead the endeavor is to determine the meaning of the *incorporated* Establishment Clause. This shifts the focus from the Founding to Reconstruction and the original meaning of the Fourteenth Amendment. If the people intended *this* Amendment to embrace the principle of nonestablishment, then the fact that they were “wrong” about the original Establishment Clause is irrelevant.²²⁸ Put another way, nothing prevents the people from reinterpreting the principle underlying the words of the Establishment Clause and incorporating this principle—as expressed by those words—into the Fourteenth Amendment.²²⁹

But what possible reason is there to believe the drafters of the Fourteenth Amendment gave a second thought to nonestablishment principles? Wasn't the immediate task at hand the protection of black civil rights in the South? What does *this* have to do with religion? As it turns out, quite a bit.

III. THE SOUTH AND THE FOURTEENTH AMENDMENT

A. *The South*

Following secession, the Confederacy adopted its own constitution. Modeled on the federal Constitution, one of the few changes was in the preamble:

We the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity—*invoking the favor and guidance of Almighty God*—do ordain and establish this Constitution of the Confederate States of America.²³⁰

228. Steven Smith raises the possibility that the “enactors of the Fourteenth Amendment might have intended to incorporate the original meaning of the religion clauses, *whatever that original meaning was*.” SMITH, *supra* note 12, at 51. Thus, even if there was no longer a conceptual barrier to incorporation of the religion clauses, the “intended meaning” of that incorporation remains ambiguous. *Id.* Since Smith agrees with me that the original Establishment Clause contained no substantive content, then it seems he would also agree that it would be *impossible* for the members of the 39th Congress to have intended to incorporate the original meaning of the Clause. Because incorporation assumes “substantive content,” that possibility is foreclosed.

229. This approach follows Akhil Amar’s insight that the first section of the Fourteenth Amendment was more about the incorporation of “principles” than it was about the incorporation of “words.” See Akhil R. Amar, *In Praise of Babbitt*, 72 TEX. L. REV. 1703, 1706 (1994).

230. THE CONFEDERATE CONSTITUTION, preamble, *reprinted in* UROFSKY, *supra* note 170, at 449 (emphasis added).

The explicit invocation of Almighty God in the organic charter of the civil government preserved the general approach of the slave-holding states. By 1860, the South had erected the most comprehensive religious establishment to exist on American soil since Massachusetts Bay.

1. Southern Regulation of Religion

The slave master *may* withhold education and the Bible; he *may* forbid religious instruction, and access to public worship. He *may* enforce upon the slave and his family a religious worship and a religious teaching which he disapproves. In all this, as completely as in secular matters, he is “entirely subject to the will of a master, *to whom he belongs.*” The claim of chattelhood extends to the soul as well as to the body, for the body cannot be otherwise held and controlled. There is no other religious despotism on the face of the earth so absolute, so irresponsible, so soul-crushing as this.²³¹

Fearing religiously inspired insurrection—particularly after the 1831 slave revolt led by the *Reverend* Nat Turner²³²—southern states enacted a constellation of laws that strictly controlled religious exercise. Black religious assemblies were heavily regulated;²³³ slaves were not permitted their own ministers, nor could they worship without the presence of a white man.²³⁴

231. WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* 254-55 (1968) (1853).

232. For an account of the Turner revolt, see 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION 1776-1854*, 178-81 (1990). For a general discussion of laws that directly and indirectly abridged religious exercise in the South, see Lash, *supra* note 56, at 1134-36.

233. In the District of Columbia, “all meetings for religious worship, beyond the hour of ten o’clock at night, of free negroes, mulattoes or slaves, shall be and they are hereby declared to be unlawful.” WORTHINGTON G. SNETHEN, *THE BLACK CODE OF THE DISTRICT OF COLUMBIA IN FORCE SEPTEMBER 1ST, 1848* (A. & F. Antislavery Society, 1848), *reprinted in* 2 *STATUTES ON SLAVERY: THE PAMPHLET LITERATURE 179, 224* (Paul Finkelman ed., 1988) (reprinting and quoting *ORDINANCES OF THE CORPORATION OF WASHINGTON* (Oct. 29, 1836)). See generally Lash, *supra* note 56, at 1134, n.133. Interestingly, as early as 1790, anti-establishmentarians like the Baptist John Leland denounced slaveowners’ violation of blacks’ “rights of conscience.” See CHARLES F. JAMES, *DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA* 86 (1899) (“Liberty of conscience, in matters of religion, is the right of slaves beyond contradiction; and yet many masters and overseers will whip and torture the poor creatures for going to meeting at night, when the labor of the day is over.” (quoting Elder John Leland)).

234. For example, according to an 1833 Alabama law:

§ 42. If any slave or free person of color shall preach to, exhort, or harangue any slave or slaves, or free persons of color, *unless in the presence of five respectable slave-holders*, any such slave or free person of color so offending, shall, on conviction before any justice of the peace, receive, by order of said

Particularly threatening to the southern establishment of slavery was the *idea* that the peculiar institution might violate the doctrines of Christianity. All black religious assemblies were carefully monitored to assure the promulgation of only pro-slavery Christianity.²³⁵ In the 1830s, a new wave of laws made it a crime, punishable by death, to write or distribute abolitionist literature.²³⁶ In 1850, Jesse McBride gave a young white girl a pamphlet on the Ten Commandments which suggested that slaveholders lived in violation of the Decalogue.²³⁷ McBride was convicted under a North Carolina statute making it a crime knowingly to circulate or publish any pamphlet with a tendency to cause insurrection or resistance in slaves.²³⁸ Throughout the South, preachers criticizing slavery as contrary to the will of God faced public outrage and legal prosecution.²³⁹

justice of the peace, thirty-nine lashes for the first offense, and fifty lashes for every offense thereafter; and any person may arrest any such slave or free person of color, and take him before a justice of the peace for trial: *Provided, That the negroes so haranguing or preaching, shall be licensed thereto by some regular body of professing Christians immediately in the neighborhood, and to whose society or church such negro shall properly belong.*

A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 398 (1833) (emphasis added); *see also* 2 STOKES, *supra* note 24, at 194.

235. *See* Lash, *supra* note 56, at 1135 n.135. Sermons to slaves invariably focused on the duty to obey one's master. The biblical justification for slave obedience was derived from the letters of Saint Paul in the New Testament, particularly Ephesians 6:5-8, Colossians 3:22, and Philemon. *See* 3 THE BLACK ABOLITIONIST PAPERS 435 n.17 (C. Peter Ripley ed., 1991).

236. *See, e.g.,* DIGEST OF THE LAWS RELATIVE TO SLAVES AND PEOPLE OF FREE COLOUR IN THE STATE OF LOUISIANA (Published by the Louisiana Constitutional and Anti-Fanatical Society 1835), *reprinted in* 2 STATUTES ON SLAVERY, *supra* note 233, at 47, 68.

237. *Crooks and McBride*, RALEIGH REG., Oct. 23, 1850, at 3, *quoted in* Michael K. Curtis, *The 1859 Crisis Over Hinton Helper's Book, the Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1136 (1993).

238. *Id.* *See* N.C. REV. STAT. ch. 34, § 17 (1837). McBride was sentenced "to imprisonment for one year, to stand in the pillory for one hour, and to twenty lashes." Curtis, *supra* note 237, at 1136.

239. The Reverend Elijah Pomeroy Lovejoy, editor of the *Observer*, a Saint Louis religious journal that attacked slavery, had his presses destroyed by pro-slavery mobs three times. On November 7, 1837, while defending his fourth press from destruction, he and one of his companions were killed. *See* 2 STOKES, *supra* note 24, at 36. In 1839, a certain Mr. Barrett had circulated an antislavery petition to Congress that denounced slavery in the District of Columbia as "a sin against God and a foul stain on the national character." *Commonwealth v. Barrett*, 6 Va. (9 Leigh) 665, 665 (1839); *see* Curtis, *supra* note 237, at 1135. He was prosecuted under a Virginia statute that prohibited "any member of an abolition or antislavery society . . . who shall come into this state, and shall here maintain, by speaking or writing, that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery." *See* An Act to Suppress the Circulation of Incendiary Publications, ch. 66, 1836 Va. Acts 44-45, § 1. Barrett was acquitted on the ground that the Act required proof that he was a member of an abolitionist society.

a. Objection #1: Breach of Peace Laws?

Although restrictions on “incendiary” literature fell most heavily on the religiously-inspired abolitionist, perhaps the laws themselves could be viewed as no more “religion-based” as the northern laws against public blasphemy. For example, given the inflammatory nature of the slavery debate and the southern fears of slave revolt, perhaps laws against public expression of antislavery sentiment were analogous to the North’s prohibition on blasphemous statements that breached the public peace.²⁴⁰

Despite the “public peace” rationale of both laws against blasphemy and “incendiary literature,” the laws were applied differently. In the North, blasphemy laws were interpreted to permit “good faith” expressions of religious or atheistic dissent.²⁴¹ By the 1860s, Buddhists, Mohammedans, and “Nullifidians” in the North had as much of a right as any one else to express their beliefs in an orderly manner.²⁴² In the South, laws were

240. In fact, the debate over slavery threatened speech in the North as well as in the slave-holding states. In 1836, Governor William Marcy of New York advocated legislation that would punish persons who engaged in acts calculated and intended to produce rebellion in other states. No law was passed, but the proposal elicited a response from the leader of the New York antislavery society, Alvan Stewart. Countering Marcy’s argument that suppression of abolitionist speech was not delegated to the federal government, but retained by the states, Stewart declared:

There is a class of rights of the most personal and sacred character to the citizen, which are a portion of individual sovereignty, never surrendered by the citizen . . . either to the State or General Government, and the Constitutions of the States and Union have told the world, after enumerating them, that there is a class of unsundered rights.

ALVAN STEWART, WRITINGS AND SPEECHES OF ALVAN STEWART ON SLAVERY 65 (Luther R. Marsh ed., 1860), *quoted in* Curtis, *supra* note 237, at 1132.

241. See *Specht v. Commonwealth*, 8 Pa. 312, 322 (1848) (“No man, living under the protection of our institutions, can be coerced to profess any form of religious belief, or to practise any peculiar mode of worship, in preference to another. In this respect, the Christian, the Jew, the Mohammedan, and the Pagan alike are entitled to protection. Nay, the Infidel, who madly rejects all belief in a Divine Essence, may safely do so, in reference to civil punishment, so long as he refrains from the wanton and malicious proclamation of his opinions with intent to outrage the moral and religious convictions of a community, the vast majority of whom are Christians.”); *Sellers v. Dugan*, 18 Ohio 489, 496 (1849) (“[I]t is the glory of our country that the right of belief in any particular religious tenet without molestation on account thereof, is granted to every one; but this principle can only be preserved by extending it equally to the unbeliever.”).

242. See *supra* part II.A.1. See also COOLEY, *supra* note 225, at 472. Cooley refuted Story’s proposition that the “truth of Christianity” has become part of the common law so that blasphemy may be prosecuted on those grounds. Instead, Cooley believed that one could dispute the truth of Christianity, but that “legal blasphemy implies that the words were uttered in a wanton manner, with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion.” *Id.* at 474. Jeremiah S. Black, Chief Judge of the Pennsylvania Supreme Court remarked in 1882: “Considering [laws against blasphemy] as religious offenses,—as sins against God alone,—I agree that civil laws should notice them not at all.” Jeremiah S. Black, *The Christian*

aimed at the suppression of the idea, *however expressed*, that slavery was against the will of God. Although such statutes were justified as "civil regulations" necessary to keep the peace, they were triggered by a particular belief about *God* and divine justice.

The distinction is crucial. The early blasphemy cases in the North outlawed public challenges to the existence of God on the grounds that such religious beliefs threatened to undermine the stability of the government.²⁴³ This view was eventually discarded and replaced by the requirement that all religious discussions take place in a manner unlikely to disturb the public peace. Of course, the northern law left room for orderly adoption of minority religious beliefs. In the South, however, the law *prevented* the adoption of minority beliefs. Views about God which challenged the legitimacy of slavery were, literally, unspeakable.

b. Objection #2: These Are "Free Exercise," Not "Establishment" Concerns

When viewed in terms of modern religious clause jurisprudence, laws suppressing black religious exercise in general, or the exercise of anti-slavery Christianity in particular, seem to be more violations of the Free Exercise Clause than impermissible religious establishments. This is due to the common (modern) tendency of viewing the central purposes of the Establishment and Free Exercise Clauses as prohibiting, respectively, the *support*²⁴⁴ or *suppression*²⁴⁵ of religion. Having traced the development of the nonestablishment principle in the mid-nineteenth century, however, we now know that throughout this period, the general understanding was that any law which supported *or* suppressed religion as religion violated the

Religion, in THE CHRISTIAN RELIGION, A SERIES OF ARTICLES FROM THE NORTH AMERICAN REVIEW 30 (1882).

243. See *supra* part II.A.1.

244. See, e.g., *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985) ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."); *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 772 (1973) ("Primary among those evils [against which the Establishment Clause guards] have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'") (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)); *Rosenberger v. Rector*, 115 S. Ct. 2510, 2541 (1995) (Souter, J., dissenting) ("At the heart of the Establishment Clause stands the prohibition against direct public funding [of religious activity].").

245. See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993); see also Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) (interpreting the combined religion clauses as "prohibit[ing] classification in terms of religion either to confer a benefit or to impose a burden"); Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373.

nonestablishment principle that government has no power over religion as such.²⁴⁶ Nonestablishment in the mid-nineteenth century was an aspect of the “rights of conscience” which prohibited laws directly targeting minority religious exercise.²⁴⁷

B. *The Fourteenth Amendment*

Having canvassed the evolution of the nonestablishment principle, we now stand at the threshold of the Fourteenth Amendment. Whether those who framed and adopted the Fourteenth Amendment specifically intended to incorporate any of the rights contained in the first eight amendments is beyond the scope of this article. My purpose is simply to determine whether the Establishment Clause would have been considered an appropriate candidate for incorporation *if there was* any such intention. Part II of this article responded to the primary barrier to establishment incorporation: the original federalist aspect of the Establishment Clause. By Reconstruction, this barrier had been removed by the reinterpretation of the Establishment Clause at both a state and federal level to express a principle of personal freedom—the immunity from government power of the subject of religion.

However, even if no conceptual barrier against Establishment incorporation existed, the question remains whether nonestablishment was a *likely subject* for Fourteenth Amendment protection. Because the Fourteenth Amendment was intended to remedy violations of fundamental rights in the southern states, the first part of this section explored southern regulation of religion. Unlike the North, which had repudiated the notion of power over the subject of religion, the South continued to exercise a great deal of power over the form and content of religious exercise. The final question, then, is whether there is reason to believe that the framers of the Fourteenth

246. According to an 1853 Senate Report on Congressional Chaplains, “If Congress has passed, or should pass, any law which, fairly construed, has in any degree introduced . . . disadvantages or penalties upon those who should reject its doctrines or belong to other communions—such law would be a ‘law respecting an establishment of religion,’ and therefore, in violation of the constitution.” S. REP. NO. 376, 32d Cong., 2d Sess. 1-2 (1853) (emphasis added); see also Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 12 (1949) (describing “respecting” language in the original Establishment Clause as “a two-edged word, which bans any law *disfavoring as well as any law favoring an establishment of religion*”) (emphasis in original).

247. Another possible objection is that such a reading of nonestablishment renders the Free Exercise Clause redundant. However, this would be true only if the Free Exercise Clause protects only against laws that explicitly target religious exercise. Although this tracks the current approach of the Supreme Court, see generally *Employment Div. v. Smith* 494 U.S. 872 (1990). I have argued elsewhere that this is an overly narrow reading of the incorporated Free Exercise Clause. See Lash, *supra* note 56.

Amendment either did not consider southern violations of the nonestablishment principle, or considered such violations as less important than other personal freedoms, such as the right to Free Exercise.

1. Commentary on Southern Regulation of Religion by the Architects of the Fourteenth Amendment

Southern regulation of religion was acknowledged and condemned by a variety of members of the Thirty-ninth Congress. Lyman Trumbull introduced the 1866 Civil Rights Act by pointing out that, under slavery, blacks were prohibited from “exercising the functions of a minister of the Gospel,”²⁴⁸ and that the Black Codes continued to violate these “privileges essential to freemen.”²⁴⁹ Congressman Cydnor B. Tompkins of Ohio noted that southern states would “condemn as a felon the man who dares proclaim the precepts of our holy religion.”²⁵⁰ Representative James M. Ashley pointed out that “[u]nder the plea of *Christianizing* [blacks], [the South] has enslaved, beaten, maimed, and robbed millions of men for whose salvation the Man of sorrows died It has silenced every free pulpit within its control, and debauched thousands which ought to have been independent.”²⁵¹

248. CONG. GLOBE, 39th Cong., 1st Sess. (Jan. 27 & 29, 1866), reprinted in THE RECONSTRUCTION AMENDMENT'S DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 121 (1967) [hereinafter RECONSTRUCTION DEBATES].

249. *Id.* According to Professor Gary Leedes, “[t]here is less than a scintilla of evidence indicating that the Thirty-Ninth Congress intended to limit the state government’s power to establish religion.” Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469, 508 n.257 (1993). As his sole support for this statement, Leedes quotes Lyman Trumbull in the Thirty-ninth Congress’s deliberations over the impending Civil Rights Bill: “Now, our laws are to be enacted with a view to educate, improve, enlighten, and *Christianize* the negro.” *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (emphasis added)). Leedes interprets Trumbull’s statement as “pro-establishment.” *Id.* Just what law Trumbull was proposing that would “Christianize” the freed blacks, Leedes does not say. As this section makes clear, however, Trumbull and most of the other abolitionist Republicans believed that providing blacks with the protections of the First Amendment would allow blacks to hear, accept, and practice the full Christian faith for the first time. Even a cursory review of Trumbull’s other comments makes clear that he had no intention of coercively Christianizing the freed blacks, or adopting any kind of religious-based law. If Trumbull also hoped that nonestablishment and free exercise would result in the “Christianizing” of the South, his views track those of his fellow abolitionists and in no way undermine his commitment to nonestablishment values. In this way, Trumbull’s comment has a vastly different connotation than that of James Ashley. See *infra* text accompanying note 251.

250. CONG. GLOBE, 36th Cong., 1st Sess. 1857 (1860); see also Remarks of Congressman Sidney Edgerton of Ohio, *id.* at 930 (preachers in the South could not “discuss the moral bearings of slavery”).

251. RECONSTRUCTION DEBATES, *supra* note 248, at 81 (emphasis added).

Given this recognition of southern regulation of religion, it is not surprising to find the Establishment Clause, along with the Free Exercise Clause, mentioned as “privileges or immunities,” which were to be protected under the Fourteenth Amendment. In 1871, John Bingham, the author of Section One of the Fourteenth Amendment, recited in their entirety the first eight amendments to the Constitution—including the Establishment Clause—and declared his belief that the Fourteenth Amendment was designed to protect all such “privileges and immunities.”²⁵² In an 1864 speech on the floor of the Senate, Senator and future vice-president Henry Wilson read the entire First Amendment—including the Establishment Clause—and declared that the southern states had trampled on these “great rights,” which were “essential to liberty.”²⁵³

Some scholars have noted that the people involved in the framing of the Fourteenth Amendment spoke more often about southern violations of “free exercise” and “the rights of conscience” than they did the “establishment of religion.” For example, in his 1864 speech, Henry Wilson noted how “[t]he bitter, cruel, relentless persecutions of the Methodists in the South, almost as void of pity as those which were visited upon the Huguenots in France, tell how utterly slavery disregards the right to a *free exercise* of religion.”²⁵⁴ Likewise, although Henry Dawes in the Forty-Second Congress listed “free exercise of his religious belief, and freedom of speech and of the press” as protected under the Fourteenth Amendment, he did not mention the Establishment Clause.²⁵⁵ As a final example, John Bingham, in a speech before the House in 1871, declared that the Fourteenth Amendment gave Congress the power to prevent the South from restricting “freedom of press,” “freedom of speech,” and “the rights of conscience.”²⁵⁶ As did Wilson and Dawes, Bingham mentions other First Amendment freedoms as protected under the Fourteenth Amendment, but omits any explicit reference to the Establishment Clause. Scholars such as Akhil Amar have suggested that these “abbreviated lists” imply that nonestablishment was not considered a personal right on the same level as free exercise or free speech.²⁵⁷

Upon reflection, it appears that these lists were exactly that: *abbreviations*. For example, in his 1864 speech, Henry Wilson first reads the *entire* First Amendment—including the Establishment Clause—and then

252. CONG. GLOBE, 42d Cong., 1st Sess. (Mar. 31, 1871), *reprinted in* RECONSTRUCTION DEBATES, *supra* note 248, at 510-11.

253. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

254. *Id.* (emphasis added).

255. See RECONSTRUCTION DEBATES, *supra* note 248, at 475-76 (remarks of Henry Dawes).

256. *Id.* at 85.

257. Amar, *Constitution*, *supra* note 7, at 1158 n. 132 (citations omitted).

goes on to paraphrase the amendment as protecting “[f]reedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition.”²⁵⁸ Notice how Wilson substitutes for the religion clauses the phrase “freedom of religious opinion.” Again, to modern ears, “freedom of religious opinion” sounds more like a matter for the Free Exercise Clause. However, to the nineteenth century mind, suppression of religious opinion was the quintessential example of a government-imposed religious establishment. Similarly, in 1871, Bingham first lists the *entire* First Amendment—including the Establishment Clause—as examples of the privileges or immunities protected under Section One of the Fourteenth Amendment.²⁵⁹ Only *later* does he refer to southern restriction of “the rights of conscience.”²⁶⁰ Even Senator Wilson’s lament about the violation of Methodist free exercise in the South is rendered ambiguous by his comparison to the French persecution of the Huguenots—a *religious-based* persecution.²⁶¹

In fact, the various remarks made by Reconstruction Congressmen reveal that little effort was made to distinguish between “free exercise,” “the rights of conscience,” and the wording of both the Establishment and Free Exercise clauses. This is not surprising given the fact that the rights of conscience were interpreted to include freedom from government-imposed establishments—a freedom which was itself considered an aspect of free exercise. Thus, even when the framers of the Fourteenth Amendment focused on the free exercise of religion, there is no reason *a priori* to interpret this as elevating the Free Exercise Clause over the Establishment Clause as a candidate for incorporation. The framers would not have made such a distinction: the rights of conscience included both free exercise and nonestablishment components. As *Democratic* Senator Thomas Norwood conceded in 1874:

Before [the adoption of the Fourteenth Amendment] any state might have established a particular religion, or restricted freedom of speech or of the press A state could have deprived its citizens of any of the privileges and immunities contained in those eight articles, but the Federal Government could not. But can a State do so now? If not why? . . . The reason is, that the citizens of the

258. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864), *reprinted in* RECONSTRUCTION DEBATES, *supra* note 248, at 65.

259. CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1864), *reprinted in* RECONSTRUCTION DEBATES, *supra* note 248, at 510.

260. *Id.* at 85.

261. *See generally* G.A. ROTHROCK, THE HUGUENOTS: A BIOGRAPHY OF A MINORITY (1979); N.M. SUTHERLAND, THE HUGUENOT STRUGGLE FOR RECOGNITION (1980).

States have the new guarantee under the fourteenth amendment; and though new privileges were not thereby conferred, additional guarantees were.²⁶²

C. The Blaine Amendment

In 1875, Representative James G. Blaine proposed a constitutional amendment that would have prohibited the states from making any law "respecting an establishment of religion or prohibiting the free exercise thereof."²⁶³ For years, the so-called "Blaine Amendment" has stood as an affront to the doctrine of incorporation: if the Fourteenth Amendment had already incorporated these rights through the Privileges or Immunities Clause, then why this attempt at redundancy? In fact, since the Blaine Amendment was ultimately rejected, isn't this evidence that popular sentiment was *against* incorporating the Establishment Clause against the states?²⁶⁴

While the full implications of the Blaine Amendment are beyond the scope of this article,²⁶⁵ certain aspects of the Blaine Amendment actually support the case for the incorporation of the Establishment Clause. For example, the Blaine Amendment places the language of the federal Establishment Clause side by side with the language of the Free Exercise Clause, and prevents the states from interfering with either one. This alone seems to indicate that the language of the Establishment Clause had become associated with substantive rights and was no longer interpreted merely as an

262. CONG. GLOBE, 43d Cong., 1st Sess. (1874), *reprinted in* RECONSTRUCTION DEBATES, *supra* note 248, at 676. Despite its application against the states, Norwood believed that no new "privileges" were conferred by the adoption of the Fourteenth Amendment. His statement reveals the pervasive reinterpretation of the federal Establishment Clause. The original clause conferred a "privilege" upon the states. The incorporated clause transfers this right from the states to individual citizens.

263. 4 CONG. REC. 205 (1875).

264. See Leitzau, *supra* note 11, at 1208; Conkle, *supra* note 7, at 1138-39 (citations omitted).

265. The significance of the Blaine Amendment for the general debate over incorporation has been exhaustively treated elsewhere. See CURTIS, *supra* note 7, at 169-70; Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435, 464-65 (1981) [hereinafter Berger, *Nine-Lived Cat*]; Raoul Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U. L. REV. 311, 346-47 (1979); Michael K. Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89, 114 (1982); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1, 16-17 (1983); Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); F. William O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L. REV. 137 (1963); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1713-14 (1992).

expression of federalism.²⁶⁶ Only after decades of reinterpretation could the language of the Establishment and Free Exercise Clauses be used in the same breath as candidates for “incorporation.” At the very least, this shows that nonestablishment is an *equal* candidate with the Free Exercise Clause for incorporation.

But perhaps this is no more than winning the battle and losing the war. If the Blaine Amendment stands for the proposition that *neither* the Free Exercise nor Establishment Clauses were intended to be incorporated into the Fourteenth Amendment, it is a hollow victory to prove that both rights were equally rejected. Upon closer examination, however, it is questionable that the Blaine Amendment had anything to do with the principles of nonestablishment *or* Free Exercise.

1. Anti-Catholic Animus and the Blaine Amendment

In 1875, President Grant recommended amending the Constitution to forbid “the teaching in [public] schools of religious, atheistic, or pagan tenets; and prohibiting the granting of any school funds, or school taxes . . . for the benefit or in aid, directly or indirectly, of any religious sect or denomination.”²⁶⁷ A few days later, Blaine introduced to the House of Representatives the following proposed amendment to the Constitution:

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.²⁶⁸

Passed by the House, the proposal was amended during debate in the Senate to read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust

266. As one example of this reinterpretation, consider the continued use of the word “respecting.” This was placed in the original clause in order to prevent interference with state establishments. Once the states themselves are prohibited from establishment of religion, there is no reason to continue using this peculiar language. No reason, that is, unless this peculiar language has come to be associated with personal freedom.

267. Ulysses S. Grant, Seventh Annual Message, December 7, 1875, *reprinted IN* ULYSSES S. GRANT, 1822-1885: CHRONOLOGY-DOCUMENTS-BIBLIOGRAPHICAL AIDS 92 (Philip R. Moran ed., 1968).

268. 4 CONG. REC. 205 (1875).

under any State. No public property, and no public revenue . . . shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect . . . shall be taught. . . . This article shall not be construed to prohibit the reading of the Bible in any school or institution.²⁶⁹

Opponents of Establishment Clause incorporation (or incorporation in general) argue that if incorporation occurred with the passage of the Fourteenth Amendment, the first clause of the Blaine Amendment is redundant.²⁷⁰ Proponents of incorporation respond that, by the time of the Blaine Amendment, Supreme Court decisions like *The Slaughterhouse Cases*²⁷¹ had eviscerated the scope of the Fourteenth Amendment. Thus, a Blaine-type amendment in 1875 would not be redundant.²⁷²

Both sides of the debate miss the mark.²⁷³ Each assumes that Blaine's proposal was intended to make the norms of the federal religion clauses applicable against states. In reality, the Blaine Amendment would have amended the norms of the First Amendment. In order to understand this, we must look beyond the first sentence of the Blaine Amendment and concentrate on what was almost certainly the main purpose of the proposal: Keeping public educational funds in the hands of the Protestant-dominated public schools and out of the hands of Roman Catholic parochial schools.

Blaine's proposal was not the first attempt to amend the Constitution to prohibit the funding of sectarian schools. In 1870, Mr. Burdett introduced in

269. *Id.* at 5580.

270. See, e.g., Berger, *Nine-Lived Cat*, *supra* note 265, at 464-65; Berger, *The Fourteenth Amendment: Light from the Fifteenth*, *supra* note 265, at 346-47; Meyer, *supra* note 265, at 939-45; O'Brien, *supra* note 265, at 137; Note, *supra* note 265, at 1712.

271. 83 U.S. (16 Wall.) 36 (1873).

272. See CURTIS, *supra* note 7, at 169-70.

273. Both sides have evidence in support of their view. Anti-incorporationists can cite Senator Frelinghuysen's remarks in support of the Blaine Amendment where he notes that the Amendment "prohibits the States, for the first time, from the establishment of religion, from prohibiting its free exercise, and from making any religious test a qualification to office." 4 CONG. REC. 5561 (1876). Pro-incorporationists can cite Senator Morton's lament that "the fourteenth and fifteenth amendments which we supposed broad, ample, and specific, have, I fear, been very much impaired by construction, and one of them in some respects almost destroyed by construction." *Id.* at 5585. Morton therefore suggested that the Blaine Amendment be made as specific as possible to avoid a similar fate at the hands of the Supreme Court. *Id.* Although I believe the pro-incorporationists have the better of the argument, it is more for the reasons stated in the text than on the basis of Morton's lament.

the House of Representatives the following proposed constitutional amendment:

Section 1. No State or municipal corporation within any State of the United States shall levy, or collect any tax for the support or aid of any Sectarian, Denominational or Religious School or educational establishment; nor shall the legislature of any State or the corporate authorities of any municipality within any State appropriate any money, or make any donation from the public funds or property of such State or Municipality for the support of or aid of any Sectarian, Religious, or Denominational school or educational establishment.²⁷⁴

Burdett's Amendment (which, like Blaine's, failed to win congressional approval) does not mention the religion clauses. Instead, the Amendment tracks the language of similar state constitutional amendments that were adopted during the same period.²⁷⁵ These amendments had nothing to do with separation of church and state; They were preemptive strikes against Roman Catholic efforts to share in the government funding of Protestant public schools.

As previously discussed,²⁷⁶ Protestant religious exercises were ubiquitous in the common schools of the mid-nineteenth century. Catholics, when given the choice between a free Protestant education and no education at all, often chose the latter.²⁷⁷ Although some states flirted with the idea of equal funding for public and private schools, Nativist opposition barred any efforts in that direction.²⁷⁸ In order to prevent any future attempts at equal funding, Nativists sponsored constitutional amendments which prohibited educational aid to sectarian institutions.²⁷⁹

274. H.J. Res. 254, CONG. GLOBE, 41st Cong., 2d Sess. 2754 (Apr. 18, 1870), *quoted in* F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L.J. 183, 204 (1965).

275. *See supra* note 182 and accompanying text.

276. *See supra* part II.C.1.

277. *See* Tarr, *supra* note 173, at 91. Tarr points out that although the Roman Catholic hierarchy encouraged the establishment of parochial schools, the poverty of the immigrant Catholic Church in America prevented the immediate institution of a wide-spread parochial school system. *Id.*

278. For example, in 1842, the New York Legislature prohibited public funding of any school in New York City in which "any religious sectarian doctrine or tenet shall be taught, inculcated, or practiced." *Id.* at 92. This blocked attempts by the New York City Assembly to permit funding for Catholic parochial schools in districts where Catholics were a majority. *Id.*

279. *See supra* note 182. In fact, states admitted to the Union after 1876 were compelled by Congress to write into their constitution a requirement that their school systems be "free from sectarian control." *See* McCollum v. Board of Educ., 333 U.S. 203, 220 n.9 (1948).

Sometimes cited by scholars (and the Supreme Court) as reflecting the inexorable evolution of Jeffersonian Separatism,²⁸⁰ these provisions were actually attempts to give the Protestant majority an educational monopoly. The most flagrant example of this is found in the Senate's version of the Blaine Amendment itself.²⁸¹ Although educational funds were denied to "sectarian" (read: Roman Catholic) schools, the amendment was not to be "construed to prohibit the reading of the Bible (read: Protestant King James version) in any school or institution."²⁸² This bears a striking resemblance to the 1856 Know Nothing election platform which also called for "schools without sectarian influence" while at the same time opposing Catholic attempts to remove the Bible from the public schools.²⁸³

By constitutionalizing the use of the Protestant Bible and prohibiting public funds to "sectarian" institutions, the Blaine Amendment would have significantly amended contemporary First Amendment norms. For the first time, the Constitution would have recognized and protected state power to coercively indoctrinate students in the tenets of a particular religion.²⁸⁴ Not only were such provisions adopted alongside of compulsory education laws, but the day was not far off where anti-Catholic animus would result in the passage of laws that attempted to shut down private schools and *force* attendance at public school.²⁸⁵

Those who participated in the debates over the Blaine Amendment were well aware of the real issue underlying the proposal. Senator Morton declared that America was a "Protestant country," and warned of a "large and growing class of people in this country who are utterly opposed to our

280. See 4 STOKES, *supra* note 33, at 271; McCollum, 333 U.S. at 218; Kiryas Joel v. Grumet, 114 S. Ct. 2481, 2490 (1994) (citing New York's refusal to equally fund Catholic Schools in the nineteenth century).

281. See *supra* note 268 and accompanying text.

282. *Id.*

283. The full text of the 1856 Know Nothing platform reads:

The education of the youth of our country in schools provided by the State, which schools shall be common to all, without distinction of creed or party, and free from any influence or direction of a denominational or partisan character.

And inasmuch as Christianity, by the Constitutions of nearly all the States; by the decisions of most eminent judicial authorities, and by the consent of the people of America, is considered an element of our political system, and the Holy Bible is at once the source of Christianity and the depository and fountain of all civil and religious freedom, we oppose every attempt to exclude it from the schools thus established in the states.

Reprinted in 2 STOKES, *supra* note 24, at 67-68.

284. See generally ANBINDER, *supra* note 154.

285. See *Pierce v. Society of the Sisters*, 268 U.S. 510, 534-35 (1925) (invalidating one such law on the basis of the Liberty Clause of the Fourteenth Amendment).

present system of common schools, and who are opposed to any school that does not teach their religion.” Democrats ridiculed the Republicans’ attempts to bootstrap an anti-Catholic amendment into the Constitution by attaching it to the uncontroversial proposition that states may not establish a religion.²⁸⁶ According to Democratic Senator Eaton, it was *already* the case that “no State can pass any law respecting religion or prohibiting the free exercise thereof.”²⁸⁷ In remarks made just before the vote that defeated the proposal,²⁸⁸ Senator Saulsbury deplored the Republicans’ cynical support of the amendment:

When I listened to-day to the debates upon this question, when I heard the appeals that were made by the Senators to the religious prejudices and passions of mankind, I trembled for the future of my country. . . . Have not religious persecutions and appeals to religious prejudices stained the earth with blood and wrung from the hearts of millions the deepest agonies? Yet I see springing up in my own country for the base purposes of a party, to promote a presidential election, a disposition to drag down the sacred cross itself and make it subservient to party ends. I appeal to Heaven to thwart the purpose of all such partisans!²⁸⁹

Given the Blaine Amendment’s anti-Catholic animus, as well as its substantial amendment of contemporary nonestablishment principles, the rejection of the Amendment seems rather weak evidence against incorporation in general and the Establishment Clause in particular. Indeed, it seems the opposite. Both the text and the debates over the Amendment indicate that the Establishment Clause was understood as the substantive equal of the Free Exercise Clause, and that the principle of nonestablishment applied at both a state and federal level.²⁹⁰

286. 4 CONG. REC. 5589 (1876) (remarks of Senator Bogy) (“The Pope, the old Pope of Rome, is to be the great bull we are all to attack.”); *id.* at 5583 (remarks of Senator Whyte) (“[the amendment is] nearly an accusation against a large body of fellow-citizens . . .”). The House Report indicated considerable disagreement as the necessity for any amendment at all. 4 CONG. REC. 5189 (1875).

287. 4 CONG. REC. 5592 (1876).

288. In a vote falling along strict party lines (with the exception of one Republican who voted against the amendment), the Blaine Amendment failed by two votes to get the needed two-thirds majority.

289. 4 CONG. REC. 5594 (1876).

290. Besides serving as a reminder of the discriminatory purposes which animated the “no aid” provisions of the nineteenth century, the failed Blaine Amendment also serves as a remarkable barometer of nonestablishment sentiment in the Reconstruction period. Whatever their views on incorporation, all sides agreed that no state should be free to establish a religion. Even the opponents of the amendment agreed with the principle of nonestablishment as one of the fundamental rights of conscience. *See id.* at 5581 (remarks of Senator Kernan) (although some

D. Implications: The Incorporation of the Nonestablishment Principle

1. Antidisestablishmentarianism

The incorporation of the nonestablishment principle calls into question a number of modern approaches to the Establishment Clause. Most proponents of establishment incorporation focus on the prohibitive aspect of the Clause: government may make no law which *establishes* religion. Anti-incorporationists, on the other hand, tend to concentrate on the *protective* aspect by highlighting the original intention to protect state establishments. By shifting the focus away from the founding, however, and taking seriously the evolution in thought that occurred between 1789 and 1868, neither aspect need be sacrificed: both are reconfigured.

Under the Fourteenth Amendment, laws which either support *or* inhibit religion as religion create Establishment problems. In this way, the incorporated Clause remains both prohibitive (keeping government from adopting its favorite religion) and protectionist (protecting dissenting religious institutions from government attempts at “disestablishment”). In fact, the Supreme Court recognized the protectionist (or antidisestablishment) aspect of the Establishment Clause in some of its earliest incorporation cases. For example, in *Everson v. Board of Education*,²⁹¹ Justice Black noted that “State power is no more to be used so as to handicap religions than it is to favor them.”²⁹² Although rarely applied by the Court in later Establishment cases,²⁹³ this aspect of the Clause is explicitly recognized in the second prong of the so-called *Lemon* test which prohibits government action that has the primary effect of advancing or *inhibiting* religion.²⁹⁴

The protectionist aspect of the incorporated Establishment Clause also sheds some light on the modern debate over government neutrality. Because

states at the founding made “distinctions based on religious creeds” most now had “liberal provisions . . . on the subject of the sacred rights of conscience.”). Democrat Bogy declared, “Who in this country is in favor of uniting church and state? Who in this country . . . is opposed to religious freedom? There would be no liberty . . . without entire separation of church and state.” *Id.* at 5589. Senator Eaton stated his belief that states were as likely to “legalize a system of religion” as they would be to “legalize murder.” *Id.* at 5592.

291. 330 U.S. 1 (1947).

292. *Id.* at 18. Similarly, in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), Justice Jackson described the Establishment Clause as prohibiting laws which either compelled or restricted religious exercise.

293. For a *free exercise* case that implicitly recognizes the “antidisestablishment” principle, see *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217, 2226 (1993) (citing prior Establishment Clause cases in support of decision striking down an attempt to “zone out” the practice of the Santeria religion).

294. See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

the principle goal of the incorporated Clause is to deny power over the subject of religion, this principle does not seem thwarted by the incidental aiding of religious exercise. In fact, if the incorporated clause prohibits government action which advances or inhibits on the basis of religious belief, not only might equal disbursement of government funds be allowed under the Clause, but refusal to do so on the basis of religious belief might well be prohibited.²⁹⁵ The antidisestablishment aspect of the incorporated Clause is triggered any time the government has disadvantaged a group solely on the basis of its religious viewpoint. At the very least, the Clause could never be invoked as a *bar* to equal treatment.²⁹⁶

2. Free Exercise Implications

The antidisestablishment aspect of the incorporated Establishment Clause also raises issues regarding the scope of the incorporated Free Exercise Clause. To our ears, laws that “disestablish” sound a lot like laws “prohibiting the free exercise of religion.” If so, doesn’t the incorporated Establishment Clause render the Free Exercise Clause redundant?

Not at all. The incorporation reading of the Establishment Clause prohibits laws which regulate religion as religion. The slaveholding states violated this principle when they regulated the religious exercise of the slaves, or controlled religious expression as it related to slavery. On the other hand, it is quite possible that generally applicable laws also might unjustifiably burden religious exercise. For example, in addition to southern laws which *directly* regulated religious exercise, a number of laws *indirectly* burdened religious exercise in the South. In particular, laws which prohibited slaves from learning to read necessarily prevented them from reading the Bible. These laws were also cited by members of the Thirty-ninth Congress as abridgments of “privileges or immunities” which

295. This is a point the Supreme Court initially emphasized in the first cases to apply the religion clauses against the states. See *Cantwell*, 310 U.S. at 302 (1940) (“The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.”); *Everson v. Board of Ed.*, 330 U.S. 1, 18 (“State power is no more to be used so as to handicap religions than it is to favor them.”).

296. The Supreme Court may be moving, if unsteadily, in this direction. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2520 (1995) (striking down on free speech grounds state university’s refusal to equally fund student publication with religious viewpoint). *But see* *Aguilar v. Felton*, 473 U.S. 402, 408-14 (1985); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 381-85 (1985).

impermissibly abridged the right to *free exercise* of religion.²⁹⁷ Thus, application of the incorporated religion clauses depends on whether the law directly or indirectly targets religion for a particular benefit or burden.²⁹⁸ Establishment concerns are triggered when a law directly targets religion as religion. Free Exercise concerns *simpliciter* are triggered when an otherwise religiously neutral law impermissibly burdens religious exercise.

CONCLUSION

When dealing with the subject of religion we have passed beyond the limits of human law, and are dealing with spiritual things that reach beyond time. The benefits of religion are not to be enforced by penal enactments.²⁹⁹

The scholars are right. The original Establishment Clause cannot be incorporated against the states. But time did not stop at the Founding. Our modern understanding of religious liberty did not spring full grown from the head of Thomas Jefferson, nor, for that matter, from the head of Justice Black.³⁰⁰ Obscured by decades of references to the Virginia Experience is a

297. See Lash, *supra* note 56, at 1152.

298. In fact, contemporary treatises on civil rights distinguished between laws that “disestablished” religion, and generally applicable laws that indirectly affected free exercise of religion. In his section describing “unlawful establishments,” Thomas Cooley notes: “[w]hatever establishes a distinction *against one class or sect* is, to the extent to which the distinction operates unfavorably, a persecution; and, if based on religious grounds, is religious persecution. It is not toleration which is established in our system, but religious equality.” COOLEY, *supra* note 225, at 469 (emphasis added). On the other hand, in his section on interference with free exercise, Cooley states that “[r]estraints upon the free exercise of religion according to the dictates of conscience” are also “not lawful.” *Id.* at 469-70. According to Cooley, “[n]o external authority is to place itself between the finite being and the Infinite, when the former is seeking to render that homage which is due, and in a mode which commends itself to his belief as suitable for him to render and acceptable to its object.” *Id.*

Cooley thus distinguishes between laws which “establish a distinction *against a religious belief*,” and laws which act as a “*restraint* upon the free exercise of religion.” Obviously, both affect free exercise. The difference is that the former does so *on the basis of religion* while the latter (by implication) does not. Thus, intentional regulation of religion (for or against) is an “establishment” matter, whereas non-religious based “restraints” belong to the realm of free exercise.

299. Senator Frederick Frelinghuysen, 42d Cong., 2d Sess. (1872), *reprinted in* RECONSTRUCTION DEBATES, *supra* note 248, at 622 (rejecting Sumner’s proposal to regulate southern churches).

300. In his critique of my article on Free Exercise, Steven Smith notes that, if I am right, “Madison, Jefferson, Isaac Backus and John Leland, would be displaced as definers of constitutional religious freedom by John Bingham, Thaddeus Stevens, Charles Sumner, and their contemporaries.” SMITH, *supra* note 12, at 53. Smith’s threat, of course, is only half-serious, since his own approach would wipe both sets of actors off the interpretive stage. See *id.* at 55

long and painful struggle over the meaning of “establishment” and “free exercise.” In arguments played out in countless state court proceedings, state legislative assembly meetings, and the debates of the Reconstruction Congress, lines were drawn between the proponents of religious toleration and the advocates of nonestablishment. Gradually, case by case, the federal Constitution’s declaration of “no power” was reinterpreted to express an aspect of the freedom of conscience. By 1868, the (Non)Establishment Clause was understood to be a liberty as fully capable of incorporation as any other provision in the first eight amendments to the Constitution.

(rejecting originalism as an interpretive norm). Far more serious, however, is Smith’s concern that using 19th century law as a touchstone would introduce Protestant triumphalism into the norms of the Establishment Clause. *Id.* at 53-54. As this article points out, however, a majority, made up of Protestants, Catholics and various stripes of religious separationists, came to interpret the Establishment Clause as expressing the nonestablishment principle of “no power” over the subject of religion.