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Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia 1776-1786: New Light on the Jeffersonian Model of Church-State Relations

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THOMAS JEFFERSON AND BILLS NUMBER 82-86 OF THE REVISION OF THE LAWS OF VIRGINIA, 1776-1786: NEW LIGHT ON THE JEFFERSONIAN MODEL OF CHURCH-STATE RELATIONS

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In 1777 Thomas Jefferson drafted the "Bill for Establishing Religious Freedom," one of many measures in an ambitious revision of the laws of Virginia. After a bitter legislative struggle to redefine the Commonwealth's church-state arrangement, the Virginia General Assembly enacted the bill into law on January 16, 1786. Jefferson biographers and church-state scholars of revolutionary Virginia typically have described the statute for religious freedom as the culmination of Jefferson's efforts to erect a "wall of separation between Church and State." It is frequently argued that the ideas enshrined in Jefferson's bill found eventual expression and ultimate influence in the First Amendment's religion clauses. In this Article Mr. Dreisbach argues that the "Bill for Establishing Religious Freedom" falls short of capturing Jefferson's complete vision of church-state relations; the bill was not drafted in a vacuum and must be interpreted in light of the historical, political and ideological context in which it was written. The Article examines the five consecutive bills concerning religion in the revised code of Virginia and argues that Jefferson embraced a more accommodating view of church-state relations than the separationist model attributed to him by conventional judicial interpretations of his bill for religious freedom. The Article concludes that insofar as the modern Supreme Court has relied on an erroneous conception of Jefferson's church-state views to inform its first amendment analysis, its legal pronouncements may lack analytical merit and historical validity.

I. INTRODUCTION

In the year 1777 Thomas Jefferson drafted one of the most celebrated and justly revered documents in American political history. His "Bill for Establishing Religious Freedom" was one of 126 measures in an ambitious revision of the laws of Virginia initiated in the wake of the American colonies' separation from

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Great Britain. Although the bill failed to gain passage in 1779 when it first was brought before the Virginia legislature, the religious freedom bill was enacted by the General Assembly on January 16, 1786.[1] Sponsored in the legislature by James Madison, the measure was adopted after a bitter legislative struggle to redefine the Commonwealth's church-state arrangement.

In the late years of his life Thomas Jefferson penned his own epitaph which now adorns the tombstone near his home, Monticello:

> Here was buried Thomas Jefferson,
> Author of the Declaration of American Independence,
> Of the Statute of Virginia for Religious Freedom,
> And Father of the University of Virginia.[2]

While there is much the master of Monticello could have memorialized on his tombstone describing his substantial contributions to the young nation,[3] these three achievements best encapsulate the tenor of his public endeavors and the principal ideals he devoted his life to furthering. He was dedicated to the pursuit of political independence, religious liberty, and freedom for scientific and academic learning, based on an ardent belief in the self-evident truth "that all men are . . . endowed by their Creator with certain unalienable Rights."[4]

Jefferson's "Bill for Establishing Religious Freedom" is a passionate affirmation of intellectual and spiritual independence which, in many respects, resembles the power and eloquence of his better known "Declaration of Independence."[5] The eminent Harvard historian Bernard Bailyn described the bill as "the most important document in American history, bar none."[6] "More than a statute," wrote Jefferson's biographer Merrill D. Peterson, "it was an

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1. 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 84-86 (W. Hening ed. 1823) [hereinafter HENING'S STATUTES AT LARGE]; VA. CODE ANN. § 57-1 (Repl. Vol. 1986).

2. 10 THE WRITINGS OF THOMAS JEFFERSON 396 (P. Ford ed. 1899).

3. *See* Price, *Thomas Jefferson's Statute of Religious Freedom*, in PROCEEDINGS OF THE FORTY-SECOND ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 245 (C. Chichester ed. 1931).

4. The Declaration of Independence para. 2 (U.S. 1776). *See generally* J. CRANE, THOMAS JEFFERSON: AUTHOR OF THE DECLARATION OF AMERICAN INDEPENDENCE, OF THE STATUTE OF VIRGINIA FOR RELIGIOUS FREEDOM, AND FATHER OF THE UNIVERSITY OF VIRGINIA (1948) (brief examination of the three achievements Jefferson memorialized in his epitaph); Briceland, *Thomas Jefferson's Epitaph: Symbol of a Lifelong Crusade Against Those Who Would "Usurp the Throne of God,"* 29 J. CHURCH & ST. 285 (1987) (examination of Jefferson's choice of these three "symbolic" accomplishments to represent his life's work); Plöchl, *Thomas Jefferson, Author of the Statute of Virginia for Religious Freedom*, 3 JURIST 182 (1943) (feats listed on Jefferson's tombstone summarized the guiding principles of his life-long endeavors: political, religious, and academic freedom).

5. *See* Plöchl, *supra* note 4, at 219 ("If the Declaration of Independence was a declaration against political tyranny, his Statute of Religious Freedom may be called the correlative Declaration against the suppression of free mind and conscience.").

6. Gimlin, *Religious Freedom's Bicentennial*, CONG. Q. (Editorial Research Reports), January 9, 1986 (quoting Bernard Bailyn). The eminent biographer of Jefferson, Dumas Malone, similarly opined: "[Jefferson's] bill for the establishing of religious freedom is, in my opinion, one of his most superb papers, and it is as fresh now as it was the day he wrote it." Malone, *Mr. Jefferson and the Traditions of Virginia*, 75 VA. MAG. HIST. & BIOGRAPHY 131, 137 (April 1967). Another commentator has described it as "one of the most important sources of this nation's founding principles outside the Constitution." Kessler, *Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom,"* 25 J. CHURCH & ST. 231 (1983).

eloquent manifesto of the sanctity of the human mind and spirit."[7] Indeed, James Madison grandly proclaimed that passage of the statute "extinguished for ever the ambitious hope of making laws for the human mind."[8]

Biographers of Jefferson and scholars of church and state in revolutionary Virginia typically have described the statute for religious freedom as the culmination of Jefferson's efforts to erect "an unbreachable wall of separation between Church and State and make religious opinions forever private and sacrosanct from intrusion."[9] The historian of revolutionary Virginia, Hamilton James Eckenrode, viewed passage of the statute even more broadly as the event that "marked the end of the conservative effort to check and control the growth of democracy and the spread of liberal ideas."[10] The revolutionary ideas enshrined in Jefferson's bill, it is frequently argued, found eventual expression and ultimate influence in the religion clauses[11] of the first amendment.[12]

While the "Bill for Establishing Religious Freedom" indisputably is an eloquent expression of the author's devotion to religious liberty and an essential document defining emerging American republicanism, it falls short of capturing Jefferson's complete vision for church-state relations. The bill was not drafted in a legislative vacuum. It must be interpreted in the light of the historical, political, and ideological context in which it was written. The religious freedom bill was the first of five consecutive bills concerning religion in the revised code of Virginia. The historical record indicates that Jefferson wrote these bills and Madison sponsored them in the Virginia legislature. Taken together, these five bills provide essential qualifications of the scope and meaning of the bill for religious freedom and Jefferson's model for church-state relations.

The modern Supreme Court, like most historians, has concluded that the legislative struggle in revolutionary Virginia to disestablish the Anglican

7. M. PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND 134 (1960).

8. Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), *reprinted in* 8 THE PAPERS OF JAMES MADISON 474 (R. Rutland, W. Rachal, et al. eds. 1973) [hereinafter THE PAPERS OF JAMES MADISON].

9. 1 N. SCHACHNER, THOMAS JEFFERSON: A BIOGRAPHY 160 (1951). *See also* W. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 69 (1986) (Jefferson's "conception of religious liberty, and complete separation of church and state, did come soon to prevail: in the constitutions of other states, in the First Amendment, in the mind of the public."); Gimlin, *supra* note 6 ("The statute became the cornerstone of the American tradition of religious liberty and separation of church and state." (quoting Merrill D. Peterson)).

10. H. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION 116 (1910). *See also* R. ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740-1790, at 293-95 (1982) (describing Jefferson's bill as part of an effort to replace the old Anglican Christian order with a new secular republican establishment); Hood, *Revolution and Religious Liberty: The Conservation of the Theocratic Concept in Virginia*, 40 CHURCH HIST. 170 (1971) (noting the liberal interpretation of Jefferson's bill).

11. The first amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

12. *See, e.g., Editors' Preface*, in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY ix (M. Peterson & R. Vaughan eds. 1988) [hereinafter VIRGINIA STATUTE] ("The principles of the [Virginia Statute for Religious Freedom] entered into the United States Constitution by way of the First Amendment . . . ."); Gimlin, *supra* note 6; Moore, *The Struggle for Religious Freedom in Virginia*, 11 BAPTIST HIST. & HERITAGE 160 (1976); Sitomer, *Two Hundred Years Later, Jefferson's Church-State "Wall" Is Still Under Siege*, Christian Science Monitor, Jan. 15, 1986, at 21, col. 3.

Church, and Jefferson's statute in particular, found equivalent expression in the subsequently enacted first amendment religion clauses.[13] A narrow focus on Jefferson's statute, isolated from its legislative context, distorts the comprehensive church-state model Jefferson envisioned for the Commonwealth and the nation. Collectively, the five bills suggest that Jefferson embraced a more accommodating view of church-state relations than the separationist model attributed to him by conventional judicial interpretations of his famous bill. Insofar as the Court has relied on an erroneous conception of Jefferson's church-state views to inform its first amendment analysis, its legal pronouncements may lack analytical merit and historical validity.[14]

The bill for religious freedom deserves the attention and adulation it has received and, without question, is the pre-eminent of the five bills discussed in this Article. The prominence given the religious freedom bill is justified for at least three related reasons. First, Jefferson clearly viewed the measure as the most important of all the bills in the revised code. Indeed, Jefferson counted the struggle for religious freedom in Virginia among the most significant causes of his public life.[15] Second, the document is passionate and artfully crafted and, for over two centuries, has proven to be a manifesto for intellectual freedom, not only in Virginia but also across the nation[16] and around the world.[17] Third, its subject is timely, and the insightful commentary offered by Jefferson on the perennial problem of church-state conflict merits close scrutiny. The arguments advanced in the bill have been woven into the fabric of American political thought, and, in the course of time, the conventional interpretation of the bill has attained the status of the "official" American position on church-state rela-

13. *See* 1 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 293 (1974) ("The United States Supreme Court has taken the Virginia Bill [for religious freedom] and the First Amendment to be coextensive and has acknowledged the intended wall of separation implicit in both.").

14. Justice Rehnquist similarly observed: "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history." Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). In the same opinion Rehnquist opined that the repetition of incorrect history "in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history." *Id.* at 99 (Rehnquist, J., dissenting).

15. The importance Jefferson attached to this bill is reflected in the fact that he selected his authorship of the bill as one of three achievements for which he wanted to be remembered by making note of it on his gravestone. *See supra* text accompanying note 2. It was the only bill from the revision of the laws of Virginia so distinguished. In his *Autobiography*, Jefferson recalled that the struggle for religious liberty in his native Commonwealth was the severest contest of his entire public life. T. JEFFERSON, AUTOBIOGRAPHY, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 41 (A. Koch & W. Peden eds. 1944) [hereinafter Koch & Peden]. *See generally* C. BENSON, THOMAS JEFFERSON AS SOCIAL SCIENTIST 188 (1971) (Jefferson considered his bill for establishing religious freedom his greatest contribution); W. MILLER, *supra* note 9, at 49-50 (discussing Jefferson's epitaph); C. SANFORD, THE RELIGIOUS LIFE OF THOMAS JEFFERSON 23 (1984) (Jefferson's efforts concerning religious freedom were some of the most difficult struggles of his political career); Huntley, *Jefferson's Public and Private Religion*, 79 SOUTH ATLANTIC Q. 286, 298 (1980) (same).

16. *See* Bond v. Bond, 144 W. Va. 478, 492, 109 S.E.2d 16, 23 (1959) ("[T]he Virginia Statute of Religious Freedom . . . is said to have formed a model for statutes and constitutional provisions throughout the land. . . . Its language is carried almost verbatim in Article III, Section 15 of the Constitution of West Virginia.").

17. The bill, for example, was circulated widely and discussed in Europe within months of its passage. *See* Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), *reprinted in* Koch & Peden, *supra* note 15, at 408.

tions.[18] It remains debatable, however, whether conventional interpretations of the bill truly reflect Jefferson's overall model for church-state relations.

This Article examines Jefferson's views on church-state relations as illuminated by his complete work on the revised code of Virginia. In the two sections of Part I that follow, the legislative history surrounding Jefferson's "A Bill for Establishing Religious Freedom" and the Supreme Court's reliance on that history to inform its church-state pronouncements are reviewed, respectively. Part II examines the legislative history of the revision of the laws of Virginia, including a summary of each of the five bills in the revised code addressing religious concerns. Part III discusses how these five bills alter conventional interpretations of Jefferson's views on church-state relations.

A. The Virginia "Bill for Establishing Religious Freedom" in Historical Perspective

The enactment of the "Statute for Establishing Religious Freedom"[19] was the climax of a tumultuous and divisive legislative struggle that gripped the Virginia General Assembly for a decade. The American declaration of independence from Great Britain rendered the monarchical-based established Church of England an anachronistic political institution in the fledgling American "republics." Long stifled by the dominance of the officially established church, Virginia's burgeoning nonconformist sects clamored for a new, less restrictive church-state arrangement in the independent Commonwealth.

In 1777, as part of the general revision of the laws of Virginia, Jefferson wrote his celebrated bill. Perhaps the most eloquent American declaration of religious liberty and freedom of conscience, the bill provided in its brief enabling clauses:

> that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[20]

In effect, the bill denied to any religious denomination the aid of civil authority to extend its influence.

Shortly after the revised laws were presented to the legislature and Jefferson was elevated to the Governorship in 1779, the Virginia General Assembly specif-

18. C. BENSON, *supra* note 15, at 190-91. *See also* M. PETERSON, *supra* note 7, at 98 ("The progress of Jefferson's principle went forward with slight interruptions until, in recent years, the Supreme Court has explicitly recognized his interpretation of the First Amendment — 'a wall of separation between Church and State' — as the orthodox principle of American institutions.").

19. This Article uses the terms "Act," "Bill" and "Statute" interchangeably to identify Jefferson's religious freedom bill.

20. 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 86.

ically declined to enact the bill for religious freedom.[21] Despite the atmosphere of revolutionary ardor in the Commonwealth, the eloquence of the bill and growing stature of its author, the document proved too radical for the times.[22] While Jefferson represented the movement to disestablish the official state church, there was another legislative current that championed an alternative approach to church-state relations — the idea of a general assessment.

The general assessment scheme proposed to tax the citizens of the state, not for the support of a single, official church "by law established," but for the support and maintenance of ministers representing a variety of denominations in the Commonwealth.[23] By 1779 the Virginia legislature had been inundated with petitions specifically requesting an assessment plan designed to rescue the financially strapped ecclesiastical institutions, as well as to enhance public morality. Public virtue, it was argued, had been in decline since tax support for the Anglican Church had been suspended by an act of the Virginia legislature passed in the wake of independence.[24] Despite substantial pro-assessment sentiment in the Commonwealth, neither a general assessment measure nor Jefferson's bill was enacted in 1779. The next six years were characterized by a bitter legislative battle between proponents of the two statutory schemes. The contest climaxed in the mid-1780s, culminating in the enactment of the "Statute for Establishing Religious Freedom."

In the autumn session of 1784, the Virginia Assembly was presented again with numerous petitions requesting an assessment for the support of teachers of the Christian religion. These petitions told of nations that had fallen because of the demise of religion and portrayed the alarming decline of morals in the Com-

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21. *See* D. Rhodes, The Struggle for Religious Liberty in Virginia, 1740-1802, at 121-22 (1951) (unpublished Ph.D. dissertation, Duke University).

22. W. MILLER, *supra* note 9, at 18.

23. *Id.* at 10. For an analysis of this bill, see D. Rhodes, *supra* note 21, at 122-28.

24. *See* 9 HENING'S STATUTES AT LARGE, *supra* note 1, at 164-67 ("An act for exempting the different societies of Dissenters from contributing to the support and maintenance of the church as by law established, and its ministers, and for other purposes therein mentioned."). The bill was passed by the House on December 9, 1776, JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA. ANNO DOMINI, 1776, at 89-90 (Richmond 1828) (Dec. 9, 1776), and became law on January 1, 1777. The Act issued the following declaration:

> That all and every act of parliament, by whatever title known or distinguished, which renders criminal the maintaining any opinions in matters of religion, forebearing to repair to church, or the exercising any mode of worship whatsoever, or which prescribes punishments for the same, shall henceforth be of no validity or force within this commonwealth.

9 HENING'S STATUTES AT LARGE, *supra* note 1, at 164. The net effect of this Act was to place all religious sects on a purely voluntary basis with respect to financial support (and terminate mandatory tax support for the church "by law established"), while giving the established church all the property and goods it possessed at the time of enactment. *See generally* T. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787, at 29-37 (1977) (describing the political climate surrounding the enactment of the bill); H. ECKENRODE, *supra* note 10, at 50-53 (detailing the compromise struck between political leaders over the bill to effect its passage); M. Kay, Separation of Church and State in Jeffersonian Virginia 40-47 (1967) (unpublished Ph.D. dissertation, University of Kentucky); M. Quinlivan, Ideological Controversy Over Religious Establishment in Revolutionary Virginia 71-77 (1971) (unpublished Ph.D. dissertation, University of Wisconsin). For an earlier draft of this bill and editorial notes on Jefferson's resolutions for disestablishing the Church of England in Virginia, see 1 THE PAPERS OF THOMAS JEFFERSON 525-35 (J. Boyd ed. 1950) [hereinafter THE PAPERS OF THOMAS JEFFERSON].

monwealth.[25] Other requests for the assessment argued that since religion was of general benefit to society, every citizen should be required to contribute to it. Some petitioners observed that financial support was needed to encourage good candidates to enter the ministry. In short, the assessment petitions called on the civil government to do all in its power to promote the noble cause of religion.[26] Support for the declining ecclesiastical institutions, proponents argued, was essential to maintaining republican virtues and preserving social order and stability.[27]

On November 11, 1784, the House went into a committee of the whole and held an in-depth debate on the assessment issue.[28] The debate, in many respects, was a replay of the legislative struggle in 1779 when both Jefferson's bill and a different, more strident assessment proposal[29] were debated in the chambers of the Virginia legislature.[30] The delegates in favor of an assessment rallied behind the dominant personality in the House, Patrick Henry. With Jefferson in Europe serving as the American minister to France, leadership of the opposition fell to James Madison. Many leading Virginians, including George Washington, John Marshall, and Richard Henry Lee, supported the pro-assessment movement.[31] Noting these influential statesmen's support for a general assessment, the eminent church-state scholar Anson Phelps Stokes wrote, "[i]t is clear that most Protestants in Virginia at the time favored the encouragement of religion by the state through financial aid to the Christian churches."[32] Henry won the first test of strength on the assessment issue by persuading his colleagues to adopt by a vote of forty-seven to thirty-two a resolution that stated: "[T]he people of this Commonwealth, according to their respectful abilities, ought to

25. *See* H. ECKENRODE, *supra* note 10, at 99; W. MILLER, *supra* note 9, at 24-25.

26. *See* H. ECKENRODE, *supra* note 10, at 84; T. BUCKLEY, *supra* note 24, at 90.

27. For more on the arguments offered in support of a general assessment, see M. Kay, *supra* note 24, at 83-84; M. Quinlivan, *supra* note 24, at 120-33. *See generally* Banning, *James Madison, the Statute for Religious Freedom, and the Crisis of Republican Convictions*, in VIRGINIA STATUTE, *supra* note 12, at 116; Little, *Religion and Civil Virtue in America: Jefferson's Statute Reconsidered*, in VIRGINIA STATUTE, *supra* note 12, at 242-43; M. Fleming, The Struggle for Religious Liberty in Colonial Virginia, 1747-1786, at 136-38 (1944) (unpublished B.D. thesis, Duke University); D. Rhodes, *supra* note 21, at 138-78.

28. JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA; BEGUN AND HELD IN THE CITY OF RICHMOND, ON MONDAY, THE EIGHTEENTH DAY OF OCTOBER, 1784, at 19 (Richmond 1828) (Nov. 11, 1784) [hereinafter JOURNAL OF THE HOUSE OF DELEGATES].

29. A "bill concerning religion," Oct. 25, 1779, in House of Delegates Bills, Resolutions, etc., Box 3, Rough Bills, October 1779, Virginia State Library. The final draft of this proposal is reprinted in H. ECKENRODE, *supra* note 10, at 58-61; T. BUCKLEY, *supra* note 24, at 185-88 app. I. For a comparison of the 1779 general assessment proposal and the 1784 proposal, see M. Quinlivan, *supra* note 24, at 94-109.

30. For a detailed account of the 1779 legislative debate, see H. ECKENRODE, *supra* note 10, at 56-64; T. BUCKLEY, *supra* note 24, at 46-61.

31. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 66-67 (1964); H. ECKENRODE, *supra* note 10, at 82-83; W. MILLER, *supra* note 9, at 27; 1 H. RANDALL, THE LIFE OF THOMAS JEFFERSON 222-23 (New York 1858); Hunt, *James Madison and Religious Liberty*, 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1901, at 168 (1902); Rutland, *James Madison's Dream: A Secular Republic*, in JAMES MADISON ON RELIGIOUS LIBERTY 202-03 (R. Alley ed. 1985); Singleton, *Colonial Virginia As First Amendment Matrix: Henry, Madison, and Assessment Establishment*, 8 J. CHURCH & ST. 344, 350-52 (1966).

32. 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 390 (1950).

pay a moderate tax or contribution, annually, for the support of the christian religion, or of some christian church, denomination or communion of christians, or of some form of christian worship."[33]

Patrick Henry immediately was appointed chairman of a committee commissioned to draft a bill providing a plan for a general assessment. If a proposal had been prepared quickly, it probably would have won swift passage in both chambers of the Virginia legislature.[34] Apart from Madison's opposition in the House, little organized resistance to an assessment existed, and Henry had garnered the support of delegates representing the most populous and wealthy constituencies in the Commonwealth.[35]

Alarmed at the growing support for Henry's assessment campaign and the perceived threat to religious liberty, Jefferson uncharitably suggested to Madison: "What we have to do I think is *devo*[u]*tly* to *pray* for *his* [Henry's] *death* . . . ."[36] Madison, however, had a less final solution: remove Henry from the legislature by having him elected Governor. Thus, with Madison's calculated support, on November 17, 1784, Henry was elected to the Governor's seat in an uncontested election.[37]

With Henry removed from the legislative arena, advocates of the religious assessment lost the man one Virginia clergyman described as "the great pillar of our Cause."[38] The forces for the assessment never regained the momentum lost by Henry's departure from the House. Henry's able rival, Madison, seized the opportunity to defeat the elder statesman's proposal. By late November and into December, petitions opposing an assessment began to surface.[39] Sensing a shift in sentiment, Madison jubilantly expressed doubt that an assessment bill would pass.[40]

Nevertheless, on December 2, English-educated planter and lawyer Francis Corbin, the delegate from Middlesex County, presented a bill to the House "establishing a provision for teachers of the christian religion."[41] This bill, drafted under Patrick Henry's direction, provided for a moderate tax with an unfixed rate upon all taxable property for the support of ministers or teachers of the

33. JOURNAL OF THE HOUSE OF DELEGATES, *supra* note 28, at 19 (1828 ed.) (Nov. 11, 1784). *See also* T. BUCKLEY, *supra* note 24, at 91-92 (brief account of passage of this resolution); H. ECKENRODE, *supra* note 10, at 86 (same).

34. *See* K. Brown, The Role of Presbyterian Dissent in Colonial and Revolutionary Virginia, 1740-1785, at 381-84 (1969) (unpublished Ph.D. dissertation, Johns Hopkins University).

35. *See* H. ECKENRODE, *supra* note 10, at 88.

36. Letter from Thomas Jefferson to James Madison (Dec. 8, 1784), *reprinted in* 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 178.

37. JOURNAL OF THE HOUSE OF DELEGATES, *supra* note 28, at 26-27 (1828 ed.) (Nov. 17, 1784). *See* I. BRANT, JAMES MADISON: THE NATIONALIST, 1780-1787, at 345-46 (1948); T. BUCKLEY, *supra* note 24, at 101; Singleton, *supra* note 31, at 355.

38. Letter from the Reverend Samuel Sheild to David Griffith (Dec. 20, 1784), *quoted in* T. BUCKLEY, *supra* note 24, at 102. *See generally* 1 M. ANDREWS, VIRGINIA: THE OLD DOMINION 322 (1937) (noting the importance of Henry's leadership on the pro-assessment issue); M. Fleming, *supra* note 27, at 146 (same).

39. *See* H. ECKENRODE, *supra* note 10, at 95-98.

40. *See* Letter from James Madison to James Madison, Sr. (Nov. 27, 1784), *reprinted in* 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 155.

41. JOURNAL OF THE HOUSE OF DELEGATES 51 (1828 ed.) (Dec. 2, 1784).

Christian religion.[42] The bill afforded each taxpayer the opportunity to designate the religious denomination that would receive this subsidy. A further provision directed that undesignated revenues be used by "seminaries of learning." The bill received a second reading the following day.[43]

The House, sitting as a committee of the whole, debated the assessment bill once again on December 22 and 23, 1784. According to Madison's account, "it was determined by a Majority of 7 or 8 that the word 'christian' should be exchanged for the word 'Religious.' On the report to the House the *pathetic zeal of the late governor Harrison* gained a like majority for reinstating discrimination."[44] Thus, a short-lived attempt to de-christianize the bill by extending its benefits to all "who profess the public worship of the Deity," be they Mohammedans or Jews, failed.[45] It is plausible that if the amendment had passed, Madison would have viewed the assessment scheme as nondiscriminatory and, thus, would have dropped his opposition to it.[46]

At the conclusion of the two day debate, Henry's bill was ordered to be engrossed by the narrow vote of forty-four to forty-two.[47] When the bill came up for the third reading the following day, opponents of the assessment moved to postpone the final reading until the next legislative session in November 1785. The motion passed by a vote of forty-five to thirty-eight.[48] Madison's side had won a temporary victory that afforded them time to consolidate their opposition to the assessment proposal.

In the interval between legislative sessions, Madison was inclined to wait

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42. The term "teacher" in this context referred to the minister of a church. *See* C. ANTIEAU, A. DOWNEY & E. EDWARDS, *supra* note 31, at 33; J. BRADY, CONFUSION TWICE CONFOUNDED: THE FIRST AMENDMENT AND THE SUPREME COURT 138 (1954).

43. JOURNAL OF THE HOUSE OF DELEGATES, *supra* note 28, at 52 (1828 ed.) (Dec. 3, 1784). *See* H. ECKENRODE, *supra* note 10, at 99-100.

44. Letter from James Madison to Thomas Jefferson (Jan. 9, 1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 229.

45. JOURNAL OF THE HOUSE OF DELEGATES, *supra* note 28, at 80-81 (1828 ed.) (Dec. 22-23, 1784). *See* Brann, *Madison's "Memorial and Remonstrance": A Model of American Eloquence*, in RHETORIC AND AMERICAN STATESMANSHIP 11 (G. Thurow & J. Wallin eds. 1984) (description of the legislative effort to "de-christianize" the assessment proposal). *See also* Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), *reprinted in* 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 149 ("The declaration of Rights, it seems to me, rather contends against forcing modes of faith and forms of worship, than against compelling contribution for the support of religion in general. I fully agree with the presbyterians, that true freedom embraces the Mahomitan and the Gentoo as well as the Christian religion."). For Madison's notes for the debates on the general assessment bill and a reconstruction of the exchange in the Virginia legislature, see 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 197-99; I. BRANT, *supra* note 37, at 345-46; Brant, *Madison: On the Separation of Church and State*, 8 WM. & MARY Q. 3, 8-9 (3rd series 1951).

46. *See also* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 20-23 (1982) (arguing that Madison opposed the assessment bill "because *it was discriminatory*, and thus placed Christianity in a preferred religious position" (emphasis in original)); Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569, 586-94 (1984) (arguing that Madison objected to the general assessment plan because it failed to treat all religious sects equally, not because it assisted or accommodated religion).

47. *See* T. BUCKLEY, *supra* note 24, at 108; H. ECKENRODE, *supra* note 10, at 102.

48. JOURNAL OF THE HOUSE OF DELEGATES, *supra* note 28, at 82 (1828 ed.) (Dec. 24, 1784).

quietly for the growing popular opposition to an assessment to manifest itself.[49] Allies in the House, however, notably brothers Wilson Cary Nicholas and George Nicholas, did not share Madison's optimism. Silence, warned George Nicholas, "would be construed into an assent."[50] Thus, Madison was persuaded to draft the *Memorial and Remonstrance Against Religious Assessments*[51] in the summer of 1785 and to circulate it anonymously.[52] The brothers Nicholas and George Mason, who knew of Madison's authorship, distributed the *Remonstrance* across the Commonwealth and orchestrated the successful drive to have the *Remonstrance* signed by the citizens at large.

After only brief consideration in the fall of 1785, Henry's bill quietly died in committee, losing by a mere three votes.[53] Historian Hamilton James Eckenrode wrote that the "weight of [anti-assessment] petitions settled the fate of the 'Bill for Establishing a Support for Teachers of the Christian Religion.' "[54] Although only one of many petitions drafted and circulated in the summer of 1785,[55] albeit the most eloquent and forceful, Madison's *Remonstrance* may well have been crucial in the outcome.

Many factors contributed to the defeat of Henry's bill.[56] A significant consideration often overlooked by modern commentators was the public's distaste

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49. *See* Hunt, *supra* note 31, at 168-69.

50. Letter from George Nicholas to James Madison (April 22, 1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 264.

51. The *Memorial and Remonstrance*, penned in 1785, outlined in fifteen numbered paragraphs the reasons for Madison's opposition to Henry's general assessment proposal.

> This petition is presented in the form of a *remonstrance*, that is, a protest, suggestively, of the "faithful," but it is not a mere protest, as are most present-day petitions. It is also a *memorial*, a declaration of reasons — every paragraph begins with a "because" — in the tradition of the Declaration of Independence.

Brann, *supra* note 45, at 16.

For the text of Madison's *Memorial and Remonstrance* and accompanying editorial notes, see 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 295-306.

52. In his "Detached Memoranda," written late in his life, Madison recalled that it was "[a]t the instance of Col: George Nicholas, Col: George Mason & others, the memorial & remonstrance against it [the assessment bill] was drawn up, . . . and printed Copies of it circulated thro' the State, to be signed by the people at large." *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 555 (3d series 1946); *see generally* 1 G. TUCKER, THE LIFE OF THOMAS JEFFERSON, THIRD PRESIDENT OF THE UNITED STATES 99-100 (Philadelphia 1837) (brief account of events prompting Madison to draft the *Remonstrance*).

Although a copy of the *Remonstrance* was printed as early as 1786 under Madison's own name, "[s]o successful was [Madison] in maintaining anonymity that a few libraries still have a printed version with speculative attributions of the work to other public men." *Editorial Note*, in 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 295. Madison did not publicly acknowledge his authorship of the document until 1826. *Id.*

53. 1 W. FOOTE, SKETCHES OF VIRGINIA, HISTORICAL AND BIOGRAPHICAL 431 (Philadelphia 1850). *See also* H. ECKENRODE, *supra* note 10, at 113 (speculating on the extent and nature of consideration given the general assessment bill in committee before it was defeated). *But see* K. Brown, *supra* note 34, at 392 (disputing Foote's account of the demise of Henry's bill in the autumn 1785 session of the legislature).

54. H. ECKENRODE, *supra* note 10, at 113.

55. For more on the *Remonstrance* and contemporaneous petitions against the assessment bill, see Isaac, *"The Rage of Malice of the Old Serpent Devil": The Dissenters and the Making and Remaking of the Virginia Statute for Religious Freedom*, in VIRGINIA STATUTE, *supra* note 12, at 146-56; D. Rhodes, *supra* note 21, at 179-90.

56. *See* M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 23-24 (1978).

for any new tax. A large portion of the Commonwealth, especially the impoverished western counties, was discontented with the existing tax burden and was inclined to oppose any new tax, no matter how noble the cause which motivated it.[57] Indeed, economic arguments lay behind the ninth and tenth paragraphs of the *Remonstrance*, although Madison's petition avoided direct mention of the tax issue "since such an unspiritual consideration would have undercut the lofty tone of the 'Remonstrance.' "[58] Instead, Madison argued that any denial of religious liberty attendant to the assessment bill would encourage an exodus from the Commonwealth and discourage new migration to thinly populated portions of Virginia. The lure of religious asylum was important because the economy thrived, in large measure, on immigrants.[59]

Enthused by the demise of the general assessment plan, Madison brushed the dust off Jefferson's "Bill for Establishing Religious Freedom" from the revised code and guided it to passage by a comfortable margin.[60] Jefferson's bill,

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57. H. ECKENRODE, *supra* note 10, at 103, 113; T. BUCKLEY, *supra* note 24, at 154-55; R. ISAAC, *supra* note 10, at 295; Isaac, *supra* note 55, at 147; Singleton, *supra* note 31, at 358.

58. Singleton, *supra* note 31, at 358.

59. The ninth and tenth paragraphs of the *Remonstrance* addressed concerns related to providing asylum for religious settlers and encouraging migration to the Commonwealth. Immigrants were essential to economic growth, especially in the sparsely populated and underdeveloped western portions of the Commonwealth. Madison wrote:

> 9. Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. . . . The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent, may offer a more certain repose from his Troubles.
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> 10. Because it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

Memorial and Remonstrance Against Religious Assessments, reprinted in 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 302.

60. Madison reintroduced in the Virginia House of Delegates the "Bill for Establishing Religious Freedom" (Bill No. 82 of the revised code) on October 31, 1785. JOURNAL OF THE HOUSE OF DELEGATES; BEGUN AND HELD IN THE CITY OF RICHMOND, ON MONDAY, THE SEVENTEENTH DAY OF OCTOBER, 1785, at 12-15 (Richmond 1828) (Oct. 31, 1785) [hereinafter JOURNAL OF THE HOUSE OF DELEGATES]. The measure was specifically brought to the attention of the House on December 14. JOURNAL OF THE HOUSE OF DELEGATES, *supra*, at 92. The committee of the whole debated the bill on the following day. JOURNAL OF THE HOUSE OF DELEGATES, *supra*, at 94. On December 16, it was moved that Jefferson's eloquent preamble be struck entirely and replaced by Article XVI of the Virginia Declaration of Rights. *See infra* note 167. This motion was defeated by a vote of 38 to 66, and the bill was ordered to be engrossed and read the third, and final, time. JOURNAL OF THE HOUSE OF DELEGATES, *supra*, at 95. It was also proposed in the course of this debate that the words in the preamble that state that coercion in matters of religion is "a departure from the plan of the holy author of our religion" be amended by inserting the term "Jesus Christ" before "holy author." The amendment was defeated. Jefferson later wrote that rejection of this amendment was "proof that [the House] meant to comprehend, within the mantle of [Bill No. 82's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination." T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 47. The engrossed bill was read on December 17, and passed by a convincing majority of 74 to 20. JOURNAL OF THE HOUSE OF DELEGATES, *supra*, at 96. Before passage, however, Bill No. 82 survived a mo-

much to the author's dismay, had languished in the legislature since 1779.[61] Thus, Madison's leadership and eloquent *Remonstrance* not only brought about the defeat of Henry's proposal, but also revived Jefferson's long endangered bill.[62]

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tion to postpone further consideration of the bill until the next legislative session, which was the same tactic successfully used to defeat Henry's assessment plan a year earlier.

The bill was read in the Senate for the first time on Saturday, December 17, 1785. JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA; BEGUN AND HELD IN THE CITY OF RICHMOND, ON MONDAY, THE 17TH DAY OF OCTOBER, 1785, at 54 (Richmond 1827) (Dec. 17, 1785) [hereinafter JOURNAL OF THE SENATE]. The bill was read the second time by the Senate on December 19 and sent to a committee of the whole for further consideration. JOURNAL OF THE SENATE, *supra*, at 56. When the Senate took up the bill again on Friday, December 23, 1785, it voted to replace the preamble with Article XVI of the Virginia Declaration of Rights. JOURNAL OF THE SENATE, *supra*, at 61. The bill was read for the third time, passed and returned to the House of Delegates.

The House, once again, rejected this amendment. JOURNAL OF THE HOUSE OF DELEGATES at 117 (Dec. 29, 1785); JOURNAL OF THE SENATE, *supra*, at 67 (Dec. 30, 1785). Unable to resolve the differences between the House and Senate versions of the bill, a conference committee was formed early in the new year. JOURNAL OF THE SENATE, *supra*, at 81 (Jan. 9, 1786). On January 16, 1786, the House considered the Senate's last amendments. The most significant amendment struck the following statement from the preamble: "that the religious opinions of men are not the object of civil government, nor under its jurisdiction." The Senate amendments were (perhaps reluctantly) accepted by the House. JOURNAL OF THE HOUSE OF DELEGATES, *supra*, at 143-44; JOURNAL OF THE SENATE, *supra*, at 92 (Jan. 16, 1786). The speaker signed the Act on January 19, 1786. JOURNAL OF THE HOUSE OF DELEGATES, *supra*, at 148. Thus, after many challenges, changes and delays, Bill No. 82 became law.

For a complete legislative history of the enactment of Bill No. 82, see T. BUCKLEY, *supra* note 24, at 155-65; H. ECKENRODE, *supra* note 10, at 113-15.

61. Most historians of the era have characterized Jefferson's "Bill for Establishing Religious Freedom" as incompatible with, if not directly opposed to, the various general assessment bills laid before the Virginia legislature. *See, e.g.*, L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 160 (1986) ("Confronted by two diametrically opposed bills [Jefferson's Bill and a 1779 general assessment bill], the Virginia legislature deadlocked, and neither bill could muster a majority."). This characterization, however, may be an inaccurate depiction of the way many Virginians viewed these bills at the time. Some Virginians, including religious dissenters, saw no contradiction between supporting Jefferson's bill and requesting the Virginia legislature to enact a general assessment. *See* 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 548 (presenting evidence that some dissenters supported both a general assessment and Jefferson's bill); T. BUCKLEY, *supra* note 24, at 74 (noting a petition both calling for religious toleration and a general assessment); Singleton, *supra* note 31, at 361 ("[I]t should be noted that some dissenters had, during the late 1770s, petitioned simultaneously for Jefferson's bill and for a common assessment."). *See generally* Hood, *supra* note 10 (There were prominent sects in revolutionary Virginia that did not believe government support for religion was incompatible with their conception of religious liberty.). Therefore, it *may* be erroneous to characterize Jefferson's bill and Henry's general assessment bill as opposing pieces of legislation. Significantly, the 1779 general assessment plan was more extreme than the 1784 version in the sense that the 1779 scheme favored, if not established, Christianity and outlined specific requirements of doctrine and worship. *See* T. BUCKLEY, *supra* note 24, at 108; W. MILLER, *supra* note 9, at 26.

62. The standard one-volume work on the disestablishment struggle in Virginia is H. ECKENRODE, *supra* note 10. Eckenrode's work, however, is incomplete and contains a number of factual errors. Two more recent works provide an excellent account of this era in the history of the Commonwealth. *See* T. BUCKLEY, *supra* note 24; Singleton, *supra* note 31.

For additional detail on religion in colonial Virginia and the disestablishment movement in revolutionary Virginia, see 3 J. ANDERSON, THE HISTORY OF THE CHURCH OF ENGLAND IN THE COLONIES (London 1856); G. BRYDON, THE ESTABLISHED CHURCH IN VIRGINIA AND THE REVOLUTION (1930); 2 G. BRYDON, VIRGINIA'S MOTHER CHURCH AND THE POLITICAL CONDITIONS UNDER WHICH IT GREW (1952); S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY (1902); E. GOODWIN, COLONIAL CHURCH IN VIRGINIA (1927); C. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (1900); T. JOHNSON, VIRGINIA PRESBYTERIANISM AND RELIGIOUS LIBERTY IN COLONIAL AND REVOLUTIONARY TIMES (1907); H. MCILWAINE, THE STRUGGLE OF PROTESTANT DISSENTERS FOR RELIGIOUS

B. *Jefferson's "Bill for Establishing Religious Freedom" and Madison's* Memorial and Remonstrance Against Religious Assessments *as a Matrix for the United States Supreme Court's Interpretation of the First Amendment Religion Clauses.*

The United States Supreme Court recognized that Virginia's struggle for religious liberty was relevant to a fuller understanding of the first amendment's religion clauses as early as 1878 in the first Mormon polygamy case of *Reynolds v. United States.*[63] Faced with defining the word "religion" in the first amendment, Chief Justice Waite reasoned that since "religion" was not defined in the amended Constitution, no place was more appropriate to turn in order to understand the meaning of the religion clauses "than to the history of the times in the midst of which the provision was adopted."[64] The Chief Justice recounted the dramatic legislative controversy in Virginia over Henry's general assessment plan and Jefferson's bill for religious freedom. He advanced the argument, which subsequent courts have found convincing, that the lessons of the Virginia contest were fresh in the minds of the Virginia representatives at the First Congress which drafted the first amendment in 1789 and were, thus, incorporated into the framers' understanding of the religion clauses through the efforts of the Virginia delegation.[65]

The Supreme Court did not offer a comprehensive interpretation of the first amendment pronouncement on church-state relations until 1947 in the landmark case of *Everson v. Board of Education.*[66] *Everson* was the "beginning

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TOLERATION IN VIRGINIA (1894); R. SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA (Richmond 1810); 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES, *supra* note 32; W. SWEET, RELIGION IN COLONIAL AMERICA (1942); W. SWEET, THE STORY OF RELIGIONS IN AMERICA (1930); W. THOM, THE STRUGGLE FOR RELIGIOUS FREEDOM IN VIRGINIA: THE BAPTISTS (1900); Ervin, *The Establishment, Government, and Functioning of the Church in Colonial Virginia*, 26 HIST. MAG. PROTESTANT EPISCOPAL CHURCH 65 (1957); Green, *The Early Virginia Argument for Separation of Church and State*, 11 BAPTIST HIST. & HERITAGE 16 (1976); Hood, *supra* note 10; Moore, *supra* note 12; Perry, *The Foundations of Church and State in Virginia*, 26 HIST. MAG. PROTESTANT EPISCOPAL CHURCH 34 (1957); Quinlivan, *From Pragmatic Accommodation to Principled Action: The Revolution and Religious Establishment in Virginia*, 15 W. GA. C. STUD. SOC. SCI. 55 (June 1976); G. Bauer, The Quest for Religious Freedom in Virginia (1967) (unpublished master's thesis, Wayne State University); K. Brown, *supra* note 34; N. Conner, Church and State in Virginia (1924) (unpublished master's thesis, University of Virginia); M. Fleming, *supra* note 27; T. Gage, The Established Church in Colonial Virginia, 1689-1785 (1974) (unpublished Ph.D. dissertation, University of Missouri-Columbia); J. Hagan, The Enlightenment and Religious Freedom in Virginia (1964) (unpublished master's thesis, Catholic University of America); C. Hicks, Baptists and the Church-State Controversy in Virginia, 1754-1802 (1966) (unpublished master's thesis, University of Louisville); M. Kay, *supra* note 24; R. McAninch, James Madison on Church and State Relations (1970) (unpublished master's thesis, West Virginia University); L. Meyers, Development of Religious Liberty in Colonial and Revolutionary Virginia (1966) (unpublished master's thesis, Columbia University); R. Osborn, The Establishment of Religious Freedom in Virginia, 1776-1786 (1975) (unpublished master's thesis, University of Maryland); M. Quinlivan, *supra* note 24; D. Rhodes, *supra* note 21; W. Taylor, The Decline of the Established Church in Virginia, 1699-1785 (1925) (unpublished master's thesis, University of Chicago).

63. 98 U.S. 145 (1878).

64. *Id.* at 162.

65. *See* Singleton, *supra* note 31, at 345.

66. 330 U.S. 1 (1947).

of an impressive and influential body of case law."[67] Citing historical facts and documents, the Court concluded that the "First Amendment has erected a wall between church and state . . . [that] must be kept high and impregnable."[68]

In *Everson*, the Board of Education of Ewing Township, pursuant to a New Jersey statute, reimbursed parents for money they spent for the transportation of their children to and from school in buses operated by the public transportation system. The families reimbursed included those with children attending Roman Catholic schools. A taxpayer brought suit claiming that reimbursing families for the transportation of children to and from parochial schools violated the provision of the first amendment prohibiting any "law respecting an establishment of religion."[69] The Court upheld the statute, noting that the state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[70]

More important than the holding itself was the majority and minority opinions' lavish use of separationist rhetoric and the Court's extensive reliance on selected historical events and documents to buttress its broad construction of the doctrine of church-state separation.[71] In defining the scope of the establishment clause, Justice Black, writing for a majority of five Justices, declared: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[72] In even more strident terms, Justice Rutledge asserted in a dissenting opinion that the first amendment's purpose was "to uproot" all religious establishments and "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[73]

In the years since *Everson*, church-state disputes have erupted into an increasingly controversial and rapidly changing area of constitutional law. The federal judiciary has been deeply divided on appropriate constitutional approaches to resolving church-state conflicts. One constant in the confused arena of church-state law, however, is that judges, regardless of their legal opinion, repeatedly have appealed to history to inform their respective interpretations of the religion clauses.[74] As Justice Rutledge opined in *Everson*:

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67. Kauper, Everson v. Board of Education: *A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 307 (1973).

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

69. U.S. CONST. amend. I, cl. 1.

70. *Everson*, 330 U.S. at 16 (emphasis in original).

71. *See* D. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 233-34 n.10 (1987) (One noteworthy aspect of the *Everson* opinions is the total lack of confrontation between the basic assumptions underlying the majority and minority opinions. Justice Black, for the Court, and Justices Jackson, Rutledge, Frankfurter and Burton, in dissent, were unanimous in their strict separationist interpretation of the establishment clause.).

72. *Everson*, 330 U.S. at 15.

73. *Id.* at 31-32 (Rutledge, J., dissenting).

74. Book Note, 97 HARV. L. REV. 1509, 1509 (1984).

> No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.[75]

The *Everson* Court and virtually all subsequent

> courts, in their efforts to discern the meaning of the establishment clause, have turned most frequently to the words and acts of Thomas Jefferson and James Madison, not only because of their activities in Virginia but also because their concept of a proper church-state relationship is thought to be expressive of the purposes of the establishment clause.[76]

In particular, the Supreme Court repeatedly has invoked Jefferson's "Bill for Establishing Religious Freedom" in its first amendment analysis.[77] The Court similarly has been attracted to Madison's *Memorial and Remonstrance Against Religious Assessments*, which, it argues, gives content and meaning to the religion clauses.[78] Both documents have been cited by lower federal and state

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75. *Everson*, 330 U.S. at 33-34 (Rutledge, J., dissenting) (citations omitted).

76. Comment, *The Supreme Court, The First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 79 (1963) (footnote omitted). *See also Editors' Preface*, in VIRGINIA STATUTE, *supra* note 12, at x ("The [Supreme Court] justices were much influenced in their understanding of the First Amendment by their understanding of the Virginia Statute for Religious Freedom and the circumstances that had produced it."); Strout, *Jeffersonian Religious Liberty and American Pluralism*, in VIRGINIA STATUTE, *supra* note 12, at 218 ("On the Court itself . . . Jefferson's statute enjoyed an extraordinary second life as Justices Rutledge, Black, and Frankfurter read the meaning of the statute into the First Amendment's 'religion' clauses."); *id.* at 220 ("Rutledge's vision of the Virginia Statute and the First Amendment as twins seemed to Black, Frankfurter, and Douglas what the last called 'durable First Amendment philosophy.' "); Perry, *Justice Hugo Black and the "Wall of Separation Between Church and State,"* 31 J. CHURCH & ST. 55, 61 (1989) (Justice Black's *Everson* opinion "summarized the hard-fought struggle to separate church and state in revolutionary America, with particular emphasis on Jefferson's Virginia Statute for Religious Freedom and Madison's Memorial and Remonstrance.").

77. The Supreme Court has cited Jefferson's "Bill for Establishing Religious Freedom" in a number of first amendment cases. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 605-06 (1987) (Powell, J., concurring); Flast v. Cohen, 392 U.S. 83, 104 n.24 (1968); Schneider v. Smith, 390 U.S. 17, 25 n.4 (1968); Abington School Dist. v. Schempp, 374 U.S. 203, 259 n.25 (1963); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 573-74 (1963) (Douglas, J., concurring); Engel v. Vitale, 370 U.S. 421, 428 (1962); International Ass'n of Machinists v. Street, 367 U.S. 740, 778 n.4 (1961) (Douglas, J., concurring); McGowan v. Maryland, 366 U.S. 420, 437-40 (1961); Everson v. Board of Educ., 330 U.S. 1, 12 (1947); Reynolds v. United States, 98 U.S. 145, 163 (1878).

78. The Supreme Court has referred to Madison's *Memorial and Remonstrance* in over a dozen first amendment cases. *See, e.g.*, Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 n.2 (1987) (Brennan, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 606 (1987) (Powell, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 53 n.38 (1985); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 n.31 (1977); Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 760 n.1, 770-71 n.28 (1973); Wisconsin v. Yoder, 406 U.S. 205, 218 n.9 (1972); Walz v. New York Tax Comm'n, 397 U.S. 664, 675 n.3 (1972); Flast v.

courts in scores of cases.[79]

Cohen, 392 U.S. 83, 103-04 (1968); Abington School Dist. v. Schempp, 374 U.S. 203, 213, 225 (1963); Engel v. Vitale, 370 U.S. 421, 431-32 nn.13-16, 436 n.22 (1962); Torcaso v. Watkins, 367 U.S. 488, 491 n.4 (1961); International Ass'n of Machinists v. Street, 367 U.S. 740, 778 n.4 (1961) (Douglas, J., concurring); McCollum v. Board of Educ., 333 U.S. 203, 214 (1948) (opinion by Frankfurter, J.); Everson v. Board of Educ., 330 U.S. 1, 12 (1947) (Justice Rutledge appended the *Memorial and Remonstrance* to his dissenting opinion; *id.* at 63-72); Reynolds v. United States, 98 U.S. 145, 163 (1878).

79. *See, e.g.*, the following cases citing Jefferson's "Bill for Establishing Religious Freedom": American Civil Liberties Union, Greater Pittsburgh Chapter v. Allegheny County, 842 F.2d 655, 665 n.1 (3d Cir.) (Weis, C.J., dissenting), *aff'd in part, rev'd in part*, 109 S. Ct. 3086 (1989); American Jewish Congress v. City of Chicago, 827 F.2d 120, 135-36 (7th Cir. 1987) (Easterbrook, C.J., dissenting); Donovan v. Tony and Susan Alamo Found., 722 F.2d 397, 401 (8th Cir. 1983), *aff'd sub nom.* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985); Anderson v. Laird, 466 F.2d 283, 286-87 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972); Zwerling v. Reagan, 576 F. Supp. 1373, 1375 (C.D. Cal. 1983); Gilfillan v. City of Philadelphia, 480 F. Supp. 1161, 1165 (E.D. Pa. 1979), *aff'd*, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981); Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1033 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980), *vacated*, 452 U.S. 911 (1981); Wilder v. Sugarman, 385 F. Supp. 1013, 1019 (S.D.N.Y. 1974); Anderson v. Salt Lake City Corp., 348 F. Supp. 1170, 1172-73, 1184-85 (D. Utah 1972), *rev'd*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973); Flast v. Gardner, 271 F. Supp. 1, 7 (S.D.N.Y. 1967) (Frankel, J., dissenting), *rev'd*, 392 U.S. 83 (1968); Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1, 21 (D.C. 1987); *In re* Estate of Brooks, 32 Ill. 2d 361, 367, 205 N.E.2d 435, 439 (1965); Horace Mann League of the United States v. Board of Public Works, 242 Md. 645, 665 n.14, 220 A.2d 51, 61 n.14, *cert. denied, appeal dismissed*, 385 U.S. 97 (1966); Americans United Incorporated as Protestants and Other Americans United for Separation of Church and State v. Independent School Dist. No. 622, Ramsey County, 288 Minn. 196, 213, 179 N.W.2d 146, 156 (1970) *appeal dismissed*, 403 U.S. 944 (1971); Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 789-90 n.1 (Minn. App. 1985), *aff'd*, 389 N.W.2d 205 (Minn. 1986); Tudor v. Board of Educ., 14 N.J. 31, 42-43, 100 A.2d 857, 863 (1953), *cert. denied*, 348 U.S. 816 (1954); Engel v. Vitale, 18 Misc. 2d 659, 680 n.93, 695 n.172, 191 N.Y.S.2d 453, 477 n.93, 492 n.172 (N.Y. Sup. Ct. 1959), *aff'd*, 11 A.D.2d 340, 206 N.Y.S.2d 183 (1960), *aff'd*, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961), *rev'd*, 370 U.S. 421 (1962); State v. Gamble Skogmo, Inc., 144 N.W.2d 749, 768 (N.D. 1966); Rhoades v. School Dist. of Abington Township, 424 Pa. 202, 216, 226 A.2d 53, 61, *appeal dismissed*, 389 U.S. 11, *cert. denied sub nom.* Worrell v. Matters, 389 U.S. 846 (1967); State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 107 (Tenn. 1975), *cert. denied sub nom.* Pack v. Tennessee, 424 U.S. 954 (1976); Sandsberry v. International Ass'n of Machinists, 156 Tex. 340, 363, 295 S.W.2d 412, 418 (1956) (McCall, J., dissenting), *cert. denied*, 353 U.S. 918 (1957); Jones v. Commonwealth, 185 Va. 335, 344, 38 S.E.2d 444, 448 (1946); Swart v. South Burlington Town School Dist., 122 Vt. 177, 183-84, 167 A.2d 514, 518, *cert. denied sub nom.* Anderson v. Swart, 366 U.S. 925 (1961); Brady v. Reiner, 157 W. Va. 10, 49, 198 S.E.2d 812, 834 (1973), *overruled*, Board of Church Extension v. Eads, 159 W. Va. 943, 230 S.E.2d 911 (1976); State *ex rel.* Hughes v. Board of Educ., 154 W. Va. 107, 119-20, 174 S.E.2d 711, 719 (1970), *cert. denied*, 403 U.S. 944 (1971); Bond v. Bond, 144 W. Va. 478, 492, 109 S.E.2d 16, 23 (1959).

See, e.g., the following cases citing Madison's *Memorial and Remonstrance*: American Civil Liberties Union, Greater Pittsburgh Chapter v. Allegheny County, 842 F.2d 655, 665 (3rd Cir. 1988) (Weis, C.J., dissenting), *aff'd in part, rev'd in part*, 109 S. Ct. 3086 (1989); American Jewish Congress v. City of Chicago, 827 F.2d 120, 124 (7th Cir. 1987); *id.* at 136 (Easterbrook, C.J., dissenting) (noting that the Supreme Court has relied on the *Memorial and Remonstrance* "too many times to count"); Universidad Central de Bayamon v. N.L.R.B., 793 F.2d 383, 395 n.7 (1st Cir. 1985) (Torruella, C.J., dissenting); Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 949-50 n.30 (6th Cir. 1985), *rev'd*, 477 U.S. 619 (1986); Catholic High School Ass'n of Archdiocese of New York v. Culvert, 753 F.2d 1161, 1170 (2d Cir. 1985); Gilfillan v. City of Philadelphia, 637 F.2d 924, 933-34 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981); Americans United for Separation of Church and State v. United States Dep't of Health, Educ. and Welfare, 619 F.2d 252, 259 n.44 (3rd Cir. 1980), *rev'd sub nom.* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982); Anderson v. Laird, 466 F.2d 283, 287 (D.C. Cir.), *cert. denied*, 409 U.S. 107 (1972); Smith v. Lindstrom, 699 F. Supp. 549, 560, 570 (W.D.Va. 1988), *aff'd sub nom.* Smith v. County of Albemarle, 895 F.2d 953 (4th Cir.), *cert. denied*, 1990 Lexis 4405 (1990); Zwerling v. Reagan, 576 F. Supp. 1373, 1375 (C.D. Cal. 1983); Citizens Concerned for Separation of Church and State v. City and County of Denver, 481 F. Supp. 522, 530-31 (D. Colo. 1979), *appeal dismissed*, 628 F.2d 1289 (10th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981); Gilfillan v. City of Philadelphia, 480 F. Supp. 1161, 1165 (E.D.Pa. 1979), *aff'd*, 637 F.2d 924 (3d Cir. 1980);

The Supreme Court has contended that in his native Commonwealth Jefferson advocated a sweeping separation of church and state, both at state and national levels. For example, Justice Powell in *Committee for Public Education and Religious Liberty v. Nyquist*[80] wrote, "Thomas Jefferson's Bill for Establishing Religious Freedom . . . contained Virginia's first acknowledgement of the principle of total separation of Church and State."[81] Justice Powell merely echoed Justice Black's observations in *Everson*:

> This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [for religious liberty].[82]

Justice Rutledge, in dissent, similarly wrote in *Everson*:

> The Remonstrance, following the Virginia statute's example, referred to the history of religious conflicts and the effects of all sorts of establishments, current and historical, to suppress religion's free exercise. With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever.[83]

The Supreme Court has assumed, in essence, that the Virginia experience confirms the separationist content of the religion clauses. This contention has been the subject of considerable criticism. A detailed examination of this literature is beyond the scope of this Article. In summary, however, commentators have argued that "[t]here is no substantial evidence to indicate that the no-establishment phrasing [of the first amendment] was generally understood to convey a meaning that could be equated with the Virginia Bill of Religious Liberty or with Madison's views or with the interpretation placed on it in *Everson*."[84]

Critics have sought to discredit the Court's "near blind faith" in Jefferson

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Rhode Island Fed'n of Teachers v. Norberg, 479 F. Supp. 1364, 1367 (D.R.I. 1979), *aff'd*, 630 F.2d 855 (1980); Anderson v. Salt Lake City Corp., 348 F. Supp. 1170, 1174-76, 1180-84 (D.Utah 1972), *rev'd*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973); Goodson v. Northside Bible Church, 261 F. Supp. 99, 103 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967); Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1, 71 (D.C. 1987) (Belson, J., concurring in part and dissenting in part); Americans United Incorporated as Protestants and Other Americans United for Separation of Church and State v. Independent School Dist. No. 622, 288 Minn. 196, 213-14, 179 N.W.2d 146, 156 (1970); Tudor v. Board of Educ., 14 N.J. 31, 43, 100 A.2d 857, 863 (1953); Zorach v. Clauson, 303 N.Y. 161, 191, 100 N.E.2d 463, 479 (1951) (Fuld, J., dissenting), *aff'd*, 343 U.S. 306 (1952); Zimbler v. Felber, 111 Misc. 2d 867, 872, 445 N.Y.S.2d 366, 370 (N.Y. Sup. Ct. 1981); Engel v. Vitale, 18 Misc. 2d 659, 669 n.34, 680, 691, 695 n.172, 696 n.180, 191 N.Y.S.2d 453, 466-67 n.34, 477, 486, 492 n.172, 493-94 n.180 (N.Y. Sup. Ct. 1959).

80. 413 U.S. 756 (1973).

81. *Id.* at 771 n.28.

82. Everson v. Board of Educ., 330 U.S. 1, 13 (1947).

83. *Id.* at 40 (Rutledge, J., dissenting). It is worth noting that the *Everson* opinions invoked the names of Madison and Jefferson, singly or jointly, some three and a half dozen times (excluding footnotes).

84. Kauper, *supra* note 67, at 318.

and Madison.[85] They have challenged as misplaced emphasis the Court's reliance on Virginia's disestablishment movement as the example followed by the First Congress when it drafted the religion clauses.[86] *Everson* opponents have rejected the notion that Jefferson and Madison were zealous advocates of a pervasive separation of the spheres of religious activity and civil authority. Madison's *Memorial and Remonstrance*, critics counter, was an argument against the use of public monies for the *discriminatory* and unequal advancement of *one* religion,[87] while Jefferson's "Bill for Establishing Religious Freedom" was designed, in general, to codify the expanding scope of religious liberties increasingly available in Virginia. Indeed, Jefferson's bill, the eminent legal historian Mark DeWolfe Howe observed, did not "in its enacting clauses explicitly prohibit establishment."[88] These documents, critics thus conclude, were not briefs for an absolute separation of religion and the state.[89]

Other commentators have argued that even if one concedes that Jefferson and Madison were ardent separationists, confirmed by the religious freedom bill and the *Remonstrance*, there is little evidence that these views found eventual

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85. Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U.L. REV. 207, 216 (1978).

86. Significantly, both Justices Black and Rutledge in their respective *Everson* opinions devoted considerable space to recounting the church-state debate in colonial and revolutionary Virginia, yet they virtually ignored the legislative history of the first amendment religion clauses. The interpretation of the first amendment establishment clause was at issue in *Everson*. At the conclusion of his extensive review of Virginia history, Justice Rutledge summarily noted:

> In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. But if more were called for, the debates in the First Congress and this Court's consistent expressions, whenever it has touched on the matter directly, supply it.

Everson, 330 U.S. at 41 (Rutledge, J., dissenting). One critic has written: "What makes this passage so incredible is that neither Justice Rutledge's dissenting opinion nor its footnotes — either vaguely or precisely — indicate which debates in the First Congress prove that the First Amendment" promoted a strict separation of church and state. R. CORD, *supra* note 46, at 128. It is, indeed, noteworthy that the historical analyses of the *Everson* Court did not focus on the legislative history and original understanding of the religion clauses, but rather the Court sought to substantiate its interpretation of the religion clauses by reviewing the church-state controversy in Virginia. This interpretive approach is perplexing in terms of legal analysis.

87. *See* J. BRADY, *supra* note 42, at 97-101; R. CORD, *supra* note 46, at 20; J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 89 (1949); Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROBS. 3, 13 (1949); Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 72-74 (1962); O'Neill, *Nonpreferential Aid to Religion Is Not an Establishment of Religion*, 2 BUFFALO L. REV. 242, 254-55 (1953).

John Courtney Murray, in a biting critique of the *Everson* opinion, wrote: "I suspect that the Court was really saying that Madison's idea *should* have been the idea of the First Amendment, whether it actually was or not." Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 28 (1949).

88. M. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 44 (1965).

89. James M. O'Neill rejected the notion that Jefferson's bill advocated strict separation. He noted the following:

> [T]he attempt to get from it any support for the thesis that the First Amendment means, or was designed to mean, a complete separation of church and state in America, or specifically a prohibition of the use of public funds in impartial support of religion, does violence to Jefferson's language in this bill and to his whole record. There is not a word in the bill that warrants the claim that Jefferson was opposed to impartial government aid to religion.

O'Neill, *Nonpreferential Aid to Religion Is Not an Establishment of Religion*, *supra* note 87, at 248.

expression in the first amendment. While Madison may have wanted the religious clauses to embody a disestablishment principle like that he had campaigned for in Virginia, keen opposition in Congress to such an arrangement forced Madison to make substantial compromises.[90] Despite the impression left by the *Everson* Court, "Madison did not carry the country along with Virginia's sweeping separation of churches from the state: indeed, the country in some degree carried him."[91] Therefore, the modern Court should not limit its interpretation of the first amendment to the presumed ambitions of Madison. Rather, judicial interpretations of the first amendment should reflect the views of the majority of the First Congress which apparently diluted Madison's "sweeping" intentions.[92] The *Everson* Court failed to consider the possibility that Jefferson and Madison, instrumental as they were in formulating American church-state doctrine, embraced views on church-state separation decidedly more radical than those of a majority of their contemporaries.[93] Conceivably, the *Everson* Court distorted the intentions of the First Congress by elevating a minority opinion (the arguably radical views of Jefferson and Madison) to a central position in their deliberations on church-state disputes. Thus, even if Jefferson and Madison sought to foster a rigid separation of church and state in both the state and federal settings, it does not necessarily follow that such a vision was enshrined in the first amendment.

One can argue either way whether the Court's reliance on Virginia history, and in particular the presumed intentions of Jefferson and Madison, legitimately illuminates the original understanding of the first amendment. A review of the merits of the jurisprudence of original intent is beyond the scope of this Article. Unquestionably, however, the struggle for religious liberty in revolutionary Virginia profoundly informs the Supreme Court's interpretation of the religion clauses. It stands to reason that if the Court has relied on a misconception of Jefferson's church-state views to formulate first amendment doctrine, then its legal holdings may lack analytical merit and historical validity. Thus, further

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90. *See* J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION, *supra* note 87, at 97; W. PARSONS, THE FIRST FREEDOM: CONSIDERATIONS ON CHURCH AND STATE IN THE UNITED STATES 31, 43-45 (1948).

91. C. STROUT, THE NEW HEAVENS AND NEW EARTH: POLITICAL RELIGION IN AMERICA 97 (1974). *See also* Gilfillan v. City of Philadelphia, 637 F.2d 924, 933 (3rd Cir. 1980) (acknowledging that Madison's views on church-state relations "may not have been shared by a majority of the drafters of the Constitution").

92. There are obvious reasons why the struggle in Virginia often is given extensive coverage in judicial and scholarly accounts of the history of church-state relations in America. "No doubt historians focus their attention on the Virginia story," Leonard W. Levy has written, "because the sources are uniquely ample, the struggle was important and dramatic, and the opinions of Madison . . . and of Jefferson were fully elicited." L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 60 (1986) (footnote omitted). Levy further notes, however, that if the "object is to understand what was meant by 'an establishment of religion' at the time of the framing of the Bill of Rights, the histories of the other states are equally important, notwithstanding the stature and influence of Jefferson and Madison as individuals." *Id. See also* Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 895-96 (1986) (reasons why first amendment ratification debates in Virginia were important).

93. *See* Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427, 434 (1983); Fink, *supra* note 85, at 212; Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183, 184 (1980).

review of the historical record may cast light on the legitimacy of the Court's church-state analysis. The pages that follow examine Jefferson's views on church and state in the light of his contributions to the revision of the laws of Virginia.

II. THE REVISION OF THE LAWS OF VIRGINIA

A. General Background

Conventional interpretations and judicial constructions of the "Bill for Establishing Religious Freedom" have misrepresented Jefferson's model for church-state relations by taking his celebrated bill out of its broader legislative context. The bill was only one of 126 measures in a dramatic revision of the laws of Virginia prompted by the Commonwealth's political separation from Great Britain. The signing of the Declaration of Independence on July 4, 1776, not only signaled political autonomy from the English crown, but also severed the colonies' formal legal links with the mother country. Thus it seemed desirable, indeed necessary, to bring the laws of the individual colonies into conformity with republican principles and to strip the existing legal codes of any remaining vestiges of monarchical rule.[94]

The separation from Great Britain was no simple colonial rebellion against English imperialism. Rather, it was a social and legal revolution on a profound

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94. *Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 313. *See also* D. MUZZEY, THOMAS JEFFERSON 54 (1918) ("When the breach with England came, the most immediate and urgent duty of patriots, next to vindicating their independence in arms, was to reshape the government of their new-fledged 'States' to accord with the political principles which had been developing in the American mind."); W. BILLINGS, J. SELBY & T. TATE, COLONIAL VIRGINIA: A HISTORY 357 (1986) ("The revision [of the code of Virginia] became a welcome opportunity to reform the code more thoroughly and bring it more fully into accord with the new republican order."); Cullen, *Completing the Revisal of the Laws in Post-Revolutionary Virginia*, 82 VA. MAG. HIST. & BIOGRAPHY 84, 84 (January 1974) ("The formation of state governments in the former colonies following the break with Great Britain was a difficult endeavor, made more arduous by the necessity of agreeing upon a body of laws as part of the foundations of those governments."). For a general discussion on the transformation of the Commonwealth's legal culture from one rooted in monarchism to one based on republican principles, see A. G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810, at 160-202 (1981). For a description of how various new American states handled this legal transition, see A. HOWARD, THE ROAD FROM RUNNYMEADE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 241-47 (1968).

Although the laws of all the colonies were disrupted by the political separation from England, one historian has suggested that the laws of Virginia, perhaps more than any other colony, were in urgent need of revision.

> In no other State was the need of reform more crying than in Virginia. New England, often aristocratic and intolerant enough in practice, had, nevertheless, the seeds of democratic institutions in its founding. . . . The Middle States, with their cosmopolitan population, their commercial preoccupations, their religious variations, escaped the cramping mould of a social type-form. But Virginia was social England transplanted. The Old Dominion, "most faithful of the King's distant children," as Charles II called it, clung tenaciously to its habits when its children came of age. . . . The landed aristocracy lacked only the titles of their English cousins to be a complete caste . . . .
>
> Stupid and cruel laws stood on the statute-books of Virginia, laws the more cruel and stupid because the exercise of the royal veto in the colony had discouraged the efforts for reform.

D. MUZZEY, *supra*, at 54-55.

scale. For many in the colonies, independence was the end towards which the American "revolution" was directed; but for Jefferson, it was only the beginning.[95] "When I left Congress, in '76," Jefferson wrote in his *Autobiography*,

> it was in the persuasion that our whole code must be reviewed, adapted to our republican form of government; and, now that we had no negatives of Councils, Governors, and Kings to restrain us from doing right, it should be corrected, in all its parts, with a single eye to reason, and the good of those for whose government it was framed.[96]

The patriots' objectives could not be counted accomplished until the newly independent and fledgling states were placed on republican legal foundations.[97]

Accordingly, on October 12, 1776, Jefferson introduced a bill in the Virginia General Assembly for the revision of the laws of the Commonwealth,[98] which passed on October 26.[99] The legislature appointed a committee of prominent Virginians, chaired by Thomas Jefferson, to "revise, alter, amend, repeal, or introduce all or any of the said laws" of the Commonwealth.[100] In addition to Jefferson, the Committee selected by the General Assembly included Edmund Pendleton, George Wythe, George Mason and Thomas Ludwell Lee.[101] Despite this formidable brain trust,[102] it was soon apparent that the thirty-three-year-old Jefferson would assume the lion's share of the work in organizing and drafting the revised code.[103] Jefferson recounted in his *Autobiography* that when the Committee

> proceeded to the distribution of the work, Mr. Mason excused himself, as, being no lawyer, he felt himself unqualified for the work, and he resigned soon after. Mr. Lee excused himself on the same ground, and died, indeed, in a short time. The other two gentlemen, therefore, and myself divided the work among us.[104]

The historical record indicates that most of the work initially assigned to Lee and Mason fell to Jefferson,[105] and Pendleton was only minimally involved in the drafting process.[106] No one took a more prominent role in the legal re-

95. M. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 100 (1970).

96. T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 44.

97. *See generally* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 91-124 (1969) (discussing the transition to republicanism in America).

98. JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA. ANNO DOMINI, 1776, at 10 (Richmond 1828) (Oct. 12, 1776).

99. JOURNAL OF THE HOUSE OF DELEGATES 28 (1828 ed.) (Oct. 26 1776).

100. 9 HENING'S STATUTES AT LARGE, *supra* note 1, at 175-77 (1821); 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 562-63.

101. JOURNAL OF THE HOUSE OF DELEGATES 41 (1828 ed.) (Nov. 5, 1776).

102. One biographer of Jefferson described the members of the committee as "some of the best and most acute minds to be found in all Virginia." 1 N. SCHACHNER, *supra* note 9, at 149. *See also* 1 G. TUCKER, *supra* note 52, at 105 (noting that Pendleton and Wythe were "the best lawyers in Virginia").

103. *See Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 313 ("There can be no doubt that Jefferson was nominally and actually the leading figure in the revisal.").

104. T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 45.

105. *Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 316.

106. *Id.* at 320. The remaining members of the Committee, Jefferson, Wythe and Pendleton, met in Williamsburg in February 1779 to examine critically the progress on the revision as a whole. Pendleton apparently was called home from the meeting, and he authorized Jefferson and Wythe to

forms that followed the declaration of independence and the adoption of the Virginia constitution than Jefferson, and in the long run no one had more influence on Virginia law.[107]

The Committee of Revisors convened in Fredericksburg on January 13, 1777, to set forth their objectives and distribute the work among themselves. The Committee first considered "whether [it] should propose to abolish the whole existing system of laws, and prepare a new and complete Institute, or preserve the general system, and only modify it to the present state of things."[108] Ironically, Jefferson, who was never one to shy away from a momentous challenge such as composing a "new Institute, like those of Justinian and Bracton, or that of Blackstone,"[109] advocated minor alterations only while the usually more conservative Pendleton argued for sweeping changes.[110] Jefferson's view prevailed, largely because a radical restructuring of the laws undoubtedly would have proven to be an "arduous undertaking," involving "vast research, . . . great consideration and judgment" and, in all probability, would have exceeded the Committee's legislative mandate.[111]

George Mason, the Fairfax planter from Gunston Hall on the Potomac and author of the Virginia Declaration of Rights, outlined the general objectives adopted by the Committee:

> The Common Law are not to be medled with, except where Alterations are necessary.
>
> The Statutes to be revised & digested, alterations proper for us to be made; the Diction, where obsolete or redundant, to be reformed; but otherwise to undergo as few Changes as possible.
>
> The Acts of the English Commonwealth to be examined.

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consider his vote in agreement with any decisions they reached. Jefferson and Wythe unhappily discovered that the bills Pendleton prepared failed to conform to the general plan and style agreed upon. Instead of clarifying and simplifying the language of the old statutes, Pendleton had merely copied the old statutes, eliminating only the provisions obviously inapplicable to the new republican government. Jefferson and Wythe thought it necessary to rewrite Pendleton's portion of the assignment in order to present a uniform code. Once again, Jefferson assumed much of the work previously assigned to Pendleton, further enhancing his personal imprint on the revised laws. C. BOWERS, THE YOUNG JEFFERSON, 1743-1789, at 180 (1945). This development is worth noting since several of bills number 83-86 may have been assigned initially to Pendleton pursuant to the original division of labor among the Committee members. Pendleton had agreed to revise the Virginia Acts of Assembly prior to independence.

107. N. CUNNINGHAM, JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 54 (1987). *See generally* Kean, *Thomas Jefferson as a Legislator*, 11 VA. L.J. 705 (December 1887) (synopsis of Jefferson's career as a legislator).

108. T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 44.

109. *Id.*

110. *See* C. BOWERS, *supra* note 106, at 178-79; M. PETERSON, *supra* note 95, at 111; 1 H. RANDALL, *supra* note 31, at 208; 1 N. SCHACHNER, *supra* note 9, at 150.

111. T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 44-45. *See generally* E. DUMBAULD, THOMAS JEFFERSON AND THE LAW 133-34 (1978) (abolishing the whole system would have been a bold move beyond the intent of the legislature); A. MAPP, JR., THOMAS JEFFERSON: A STRANGE CASE OF MISTAKEN IDENTITY 122 (1987) (Jefferson argued that a complete new code would be subject to criticism and litigation.). Although the Committee resolved to make only alterations to existing laws, Boyd noted that the "Committee of Revisors so drastically altered many existing laws as to amount to the proposal of wholly new legislation." *Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 315. A case in point was Bill No. 86 concerning marriage law, which is discussed *infra*.

> The Statutes to be divided into Periods: the Acts of Assembly, made on the same Subject, to be incorporated into them.
> The Laws of the other Colonies to be examined, & any good ones to be adopted.
>
> Provisoes &c. which wou'd do only what the Law wou'd do without them, to be omitted.
> Bills to be short; not to include Matters of different Natures; not to insert any unnecessary Word, not omit a useful one.
> Laws to be made on the Spur of the present Occasion, and all innovating Laws, to be limited in their Duration.[112]

According to Jefferson's ambitious account, the revised code — especially the bills abolishing the laws of entail and primogeniture and promoting general education and religious freedom — was intended to create "a system by which every fibre would be eradicated of ancient or future aristocracy; and a foundation laid for a government truly republican."[113] A further objective, in Jefferson's words, was "to leave out everything obsolete or improper, insert what was wanting, and reduce the whole within as moderate a compass as it would bear, and to the plain language of common sense, divested of the verbiage, the barbarous tautologies and redundancies which render the British statutes unintelligible."[114] In short, the Committee[115] sought "to reform the language of the

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112. 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 327-28 (R. Rutland ed. 1970).

113. T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 51. Late in life, Madison similarly commented on both the purpose of the revisal and Jefferson's contribution to the process:

> The Revised Code, in which [Jefferson] had a masterly share, exacted, perhaps the most severe of his public labours. It consisted of 126 bills, comprising and recasting the whole Statutory Code, British and Colonial, then admitted to be in force, or proper to be adopted, and some of the most important articles of the unwritten law, with original laws on particular subjects; the whole adapted to the Independent and Republican form of Government. The work, though not enacted in the mass, as was contemplated, has been a mine of Legislative wealth; and a model, also, of statutory composition, containing not a single *superfluous* word, and preferring always words and phrases of a meaning fixed as much as possible by oracular treatises or solemn adjudications.

Letter from James Madison to Samuel H. Smith (Nov. 4, 1826), *reprinted in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 532 (R. Worthington ed. 1884).

114. Letter from Thomas Jefferson to Skelton Jones (July 28, 1809), *reprinted in* 12 THE WRITINGS OF THOMAS JEFFERSON 299 (A. Lipscomb & A. Bergh, eds. 1905) [hereinafter THE WRITINGS OF THOMAS JEFFERSON]. In his *Autobiography*, Jefferson elaborated on this point, amusingly characterizing the literary style of lawyers in a manner that is no less true today than it was in Jefferson's day:

> I thought it would be useful, also, in all new draughts, to reform the style of the later British statutes, and of our own acts of Assembly; which, from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty, by *saids* and *aforesaids*, by *ors* and by *ands*, to make them more plain, are really rendered more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves.

T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 46. Jefferson was a frequent critic of legal verbiage. *See, e.g.*, Letter from Thomas Jefferson to George Wythe (Nov. 1, 1778), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 229-30; Letter from Thomas Jefferson to J.C. Cabell (Sept. 9, 1817), *reprinted in* 17 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 417-18.

115. Mr. Pendleton, according to Jefferson, sadly missed this point. *See* Letter from Thomas

Virginia laws, and reduce the matter to a simple style and form."[116]

After agreeing to a general plan of action, the Committee members distributed the work among themselves.[117] Jefferson, according to his biographer, Dumas Malone, specifically assumed responsibility for drafting the bills pertaining to crimes and punishment, descents, education, and *religion*.[118]

Two years later, in February 1779, Wythe and Jefferson reconvened in Williamsburg.[119] Meeting on a daily basis, they examined their drafts "sentence by sentence, scrutinizing and amending, until [they] had agreed on the whole."[120] On June 18, 1779, the Speaker laid before the House of Delegates a report on the revisal submitted by Jefferson (who recently had been elevated to the Governor's office) and Wythe.[121] The Committee had prepared 126 bills, the titles of which were included in an accompanying catalog.

Several bills were considered sufficiently important that they were extracted from the revisal and promptly enacted.[122] The bulk of the revisal, however, was shelved for the next half decade.[123] During this period, the uncertainty and pressures of war distracted the legislature from considering the revisal as a whole.[124]

In mid-1784, "for the purpose of affording to the citizens at large, an opportunity of examining and considering a work which proposes such various and material changes in our legal code," the House of Delegates ordered five hundred copies of "a complete set of the bills contained in the said revisal" to be printed and distributed.[125] The product of this resolution was a ninety-six-page

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Jefferson to Skelton Jones (July 28, 1809), *reprinted in* 12 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 114, at 300. *See* J. PARTON, LIFE OF THOMAS JEFFERSON 215 (1874).

116. Letter from Thomas Jefferson to Skelton Jones (July 28, 1809), *reprinted in* 12 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 114, at 300.

117. Jefferson was assigned the task of reforming the whole field of the common law and statutes of England down to the foundation of the colony of Virginia in 1607. The British statutes from 1607 to the end of the colonial era were assigned to Wythe, and the laws of the Commonwealth during the same period were assigned to Pendleton. *Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 315-16.

118. D. MALONE, JEFFERSON THE VIRGINIAN 262 (1948). *See also* N. CUNNINGHAM, *supra* note 107, at 54-55 (Jefferson's papers indicate that legislative matters relating to religion concerned Jefferson greatly at this time.).

119. Jefferson recalled in his *Autobiography*, written in 1821 at the age of seventy-seven long after the described events, that Pendleton participated in the Williamsburg meetings. Subsequent scholarship suggests that Jefferson's recollection was mistaken, and Pendleton was not present. *See Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 317; T. BUCKLEY, *supra* note 24, at 46.

120. T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 46.

121. JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 56-57 (Richmond 1827) (June 18, 1779).

122. *See Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 321.

123. *See id.* at 305 ("[T]he revision as a whole has, for the most part, faded into obscurity against the background of ordinary legislation in the decade from 1776 to 1786, with an occasional landmark standing out in bold relief.").

124. E. DUMBAULD, *supra* note 111, at 136. In his *Notes on Virginia*, written in the early 1780s, Jefferson predicted that the legislature would not turn its full attention to the revisal "till a restoration of peace shall leave to the legislature leisure to go through such a work." T. JEFFERSON, NOTES ON VIRGINIA, in Koch & Peden, *supra* note 15, at 254.

125. JOURNAL OF THE HOUSE OF DELEGATES 26-27 (1828 ed.) (May 29, 1784). *See generally* Cullen, *supra* note 94, at 84-85 (brief legislative history of the revised code).

printed folio entitled, *Report of the Committee of Revisors Appointed by the General Assembly of Virginia in MDCCLXXVI.*[126]

On October 31, 1785, Madison revived Jefferson's vision of enacting the proposed code as a whole when he laid before the General Assembly 118 of the bills contained in the *Report of the Revisors* which had not yet been enacted into law.[127] Thirty-five bills were adopted at this legislative session, and a further twenty-three eventually were passed in the autumn 1786 session.[128] Despite Madison's commitment to the revisal and Jefferson's desire to see it enacted as a whole, the General Assembly had no intention of acting upon the revised code as a united body of law.[129] In the autumn of 1785 Jefferson was the American minister in France. Nevertheless, he remained influential in the legislative strategy to enact these bills, with James Madison acting as the chief legislative sponsor of the pending bills.[130] By the mid-1780s, Madison was a leading figure in the General Assembly, and so successful was his handling of the revisal that nearly half of the bills eventually were enacted without significant amendment under his legislative guidance.[131]

The most celebrated bill in the revisal, Jefferson's "Bill for Establishing Religious Freedom," was enacted by the Virginia General Assembly in January 1786.[132] This was Bill No. 82 of the revisal and only the first of five consecutive bills dealing with religion.[133] Jefferson himself assumed responsibility for draft-

126. REPORT OF THE COMMITTEE OF REVISORS APPOINTED BY THE GENERAL ASSEMBLY OF VIRGINIA IN MDCCLXXVI (Richmond 1784) [hereinafter REPORT OF THE REVISORS]. The most complete legislative and documentary history of the REPORT OF THE REVISORS is found in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 304-665.

127. JOURNAL OF THE HOUSE OF DELEGATES 12-15 (1828 ed.) (Oct. 31, 1785).

128. *See* E. DUMBAULD, *supra* note 111, at 137; 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 389-402; *Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 322.

129. *Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 322.

130. W. MILLER, *supra* note 9, at 43 (Miller described Madison as the "floor manager" of Jefferson's "Bill for Establishing Religious Freedom."). *See also* J. PARTON, *supra* note 115, at 214 (Madison was a "most persistent and persuasive advocate" of the revisal.) For a general description of Jefferson and Madison's transatlantic coordination of efforts in the passage of various bills from the revisal, see A. KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 26-31 (1950); Malone, *The Madison-Jefferson Friendship*, in JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 31, at 303-05.

131. In his *Autobiography*, Jefferson paid tribute to "the unwearied exertions of Mr. Madison, in opposition to the endless quibbles, chicaneries, perversions, vexations and delays of lawyers and demi-lawyers," in overseeing the eventual passage of most of the revisal. T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 47. *See also* D. MALONE, JEFFERSON AND THE RIGHTS OF MAN 103 (1951) (Madison "deserved the lion's share of credit for the success of such of these enlightened and humane measures as were enacted."). For a general description of Madison's emerging leadership in the General Assembly, see H. ECKENRODE, *supra* note 10, at 83; W. MILLER, *supra* note 9, at 32.

132. The Statute, passed by the Virginia General Assembly in January 1786, was printed in the *Acts* (Richmond [1786]) of that legislative session and later reprinted in 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 84-86. Jefferson had the Act printed as a four-page pamphlet in Paris in 1786, and he included this text, which differs slightly from the enacted statute, as Appendix No. 3 to the Stockdale edition of the NOTES ON VIRGINIA (1787). For a complete legislative history of Bill No. 82, see *supra* note 60.

133. At least two additional bills are arguably religious in content: Bill No. 98, "A Bill Prescribing the Oath of Fidelity, and Oaths of Certain Public Officers," and Bill No. 119, "A Bill Permitting Those Who Will Not Take Oaths to be Otherwise Qualified." 2 THE PAPERS OF THOMAS JEFFER-

ing the bills touching upon the subject of religion.[134] Taken as a whole, these five bills hardly make a convincing argument for modern judicial constructions of a "high and impregnable" wall of separation between church and state.[135] Rather, they suggest a flexible church-state model that fosters cooperation between religious interests and civil government and prohibits governmental interference with the freedom of religious beliefs. In short, they illustrate that Jefferson's ultimate objective was less separation of church and state than the fullest possible expression of religious belief and opinion.[136]

B. Bills Number 82-86 of the Revision of the Laws

1. Bill Number 82, "A Bill for Establishing Religious Freedom."

No act of the Virginia legislature more appropriately symbolized the republican reformation of the laws of Virginia than the "Statute for Establishing Religious Freedom."[137] When the American declaration of independence rudely swept away an obsolete regime, the established Church of England became an anachronism, unfit in its actual legal form for the independent, republican Commonwealth of Virginia.[138]

Bill No. 82 is one of the most dramatic and influential documents in American history. Jefferson counted the bill among his supreme achievements,[139] and its reputation and influence extended far beyond Jefferson's native Commonwealth.[140] The prevailing interpretation of Bill No. 82 today is that in its

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SON, *supra* note 24, at 589-90, 638. Boyd indicated in the *Editorial Note* on the revision of the laws that Jefferson also prepared these two bills. *Id.* at 319-20, 590, 638.

It is noteworthy that the five bills examined in this essay (Bills No. 82-86) were followed immediately by two bills addressing issues of historical interest to the Christian church. Bill No. 87 was called "A Bill against Usury," and Bill No. 88 was entitled, "A Bill to Prevent Gaming." 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 558-61. Although Jefferson's imprint on these bills is less than clear, he surely endorsed their content, and it is plausible that he was directly involved in their drafting. This conclusion is consistent with the evidence marshaled in this Article.

134. A leading biographer of Jefferson, Dumas Malone, observed that Jefferson's assignment included the drafting of those laws concerning religion. D. MALONE, *supra* note 118, at 262. That would include, at least, Bills No. 82-86.

135. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

136. *See* R. HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 140 (1962); Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 135-36 (1986); Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645, 666-67.

137. REPORT OF THE REVISORS, *supra* note 126, at 58-59. The bill is reprinted in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545-47; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 84-86.

138. Plöchl, *supra* note 4, at 192.

139. *See supra* text accompanying notes 2, 15-18.

140. In a letter to James Madison, Jefferson somewhat immodestly noted:

> The Virginia act for religious freedom has been received with infinite approbation in Europe, and propagated with enthusiasm. I do not mean by the governments, but by the individuals who compose them. It has been translated into French and Italian, has been sent to most of the courts of Europe, and has been the best evidence of the falsehood of those reports which stated us to be in anarchy. It is inserted in the new "Encyclopedie," and is appearing in most of the publications respecting America.

Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), *reprinted in* Koch & Peden, *supra* note 15, at 408-09. *See also* Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786), *reprinted in* 10 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 244 ("Our act for freedom of

"sweeping language Jefferson sought to create an unbreachable wall of separation between Church and State and make religious opinions forever private and sacrosanct from intrusion."[141] According to its express terms, however, the bill was not a manifesto for a "sweeping" separation of religion and the state. Indeed, Jefferson's bill, as legal historian Mark DeWolfe Howe emphasized, did not "in its enacting clauses explicitly prohibit establishment."[142] Rather, Jefferson, who drew inspiration from Locke's *A Letter Concerning Toleration*,[143] designed the bill to promote religious freedom by specifically terminating compelled support for any ecclesiastical institution and alleviating penalties, financial and otherwise, on religious dissenters who publicly expressed their opinions.[144]

The statute for religious freedom consists of three sections. The first is the eloquent preamble. Four times the length of the act itself, the preamble sets

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religion is extremely applauded. The Ambassadors and ministers of the several nations of Europe resident at this court have asked of me copies of it to send to their sovereigns."). The international attention his statute received is attributed largely to Jefferson's own promotion. Jefferson was responsible for having the Bill translated, printed, and circulated as widely as he could. C. BENSON, *supra* note 15, at 196-97; D. MALONE, *supra* note 118, at 279; D. MALONE, *supra* note 131, at 103-04. In a letter to William Carmichael, August 22, 1786, Jefferson revealed that he had instigated the translation of the statute for religious freedom into French and Italian. 10 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 288. *See also* 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 550 (describing Jefferson's efforts to promote Bill No. 82 in Europe); Chinard, *Jefferson's Influence Abroad*, 30 MISS. VALLEY HIST. REV. 171 (1943) (discussing generally the influence of Jefferson's work in Europe).

141. 1 N. SCHACHNER, *supra* note 9, at 160.

142. M. HOWE, *supra* note 88, at 44. *See also* Comment, *supra* note 136, at 665 ("To conclude, however, that because the bill outlawed tax support of religion it was designed as a 'wall of separation between church and state' or that it was intended to effect a 'total separation' is to ignore historical realities."). Another historian observed:

> This act, the authorship of which Mr. Jefferson desired to be noted on his tombstone, is frequently referred to as the establishment of religious liberty in Virginia. But it contained no principle which had not already been more solemnly enacted in the [Sixteenth section of the Virginia] Bill of Rights more than nine years before its passage.

Henry, *The Part Taken by Virginia, under the Leadership of Patrick Henry, in Establishing Religious Liberty as a Foundation of American Government*, 2 PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION; REPORT OF THE PROCEEDINGS OF THIRD ANNUAL MEETING 27 (1887).

143. While Locke's influence on Jefferson's bill is undeniable, Jefferson went beyond Locke's policy of toleration and enacted complete religious freedom, not only for all Christian denominations, but also for all religious sects. C. SANFORD, *supra* note 15, at 28.

Michael J. Malbin is one of many scholars who has illustrated similarities and differences between John Locke's *A Letter Concerning Toleration* and the views expressed in the first amendment. *See* M. MALBIN, *supra* note 56, at 29-36. For more on Locke's influence on Bill No. 82, see W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 15-24 (1976); Kessler, *Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom,"* 25 J. CHURCH & ST. 231 (1983); Pfeffer, *The Deity in American Constitutional History*, 23 J. CHURCH & ST. 215, 216 (1981); Sandler, *Lockean Ideas in Jefferson's Bill for Establishing Religious Freedom*, 21 J. HIST. OF IDEAS 110 (1960). For a discussion on Locke's views on religious toleration, see Giffin, *John Locke and Religious Toleration*, 9 J. CHURCH & ST. 378 (1967).

Some legal historians similarly noted that Madison's views on religious liberty were influenced by Locke, especially the *Memorial and Remonstrance*. *See, e.g.*, T. BUCKLEY, *supra* note 24, at 131-33; R. CORD, *supra* note 46, at 22; 8 THE PAPERS OF JAMES MADISON, *supra* note 8, at 297; Brann, *supra* note 45, at 9; Rutland, *James Madison's Dream: A Secular Republic*, in JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 31, at 203; Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1425 (1966).

144. *See* American Jewish Congress v. City of Chicago, 827 F.2d 120, 135 (7th Cir. 1987) (Easterbrook, C.J., dissenting) ("The bill does not protest government use of persuasion on matters religious; it is concerned with compulsion alone.").

forth in passionate terms the reasons for the enactment, which may be summarized as follows:[145]

1) "Almighty God hath created the mind free," and willed "that free it shall remain."[146] The mind of man, Jefferson argued, was, by the intrinsic free-ranging nature and individual variety deliberately created in it by God, not intended to be coerced into intellectual conformity. "[T]he holy author of our religion, who being lord both of body and mind," chose that religion should be propagated by reason and not by coercion.[147]

2) "[L]egislators and rulers, civil as well as ecclesiastical," have impiously "assumed dominion over the faith of others," and because of their own fallibility and use of coercion have "established and maintained false religions over the greatest part of the world."[148]

3) It is "sinful and tyrannical" to compel a man to support a religion "which he disbelieves and abhors."[149] It is also an infringement on his freedom of choice to force him to support a "teacher of his own religious persuasion," since it inhibits the free encouragement of the minister whose moral pattern and righteousness the citizen finds most persuasive and worthy of support.[150]

4) "[C]ivil rights have no dependance on our religious opinions, any more than our opinions in physics or geometry;" and, therefore, imposing religious qualifications for civil office deprives the citizen of his "natural right" and tends to corrupt religion by bribery to obtain purely external conformity.[151]

5) To use the civil magistrate to suppress the propagation of opinions and principles, even of allegedly false tenets, is undesirable because "truth is great and . . . has nothing to fear from the conflict" with error "unless by human interposition disarmed of her natural weapons, free argument and debate."[152] "[I]t is time enough" for officers of civil government "to interfere when principles break out into overt acts against peace and good order."[153]

The statute's second section, the operative portion, enacted the following

145. The summary outlined below draws upon the commentary offered in the following sources: L. PFEFFER, CHURCH, STATE, AND FREEDOM 101-02 (1953); C. SANFORD, *supra* note 15, at 29-30; Plöchl, *supra* note 4, at 217-18, 220; D. Rhodes, *supra* note 21, at 194.

146. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545. The words "that free it shall remain" were deleted from the preamble by Senate amendment on Jan. 16, 1786.

147. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 84.

148. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 84-85.

149. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545. The words "and abhors" were deleted from the preamble by Senate amendment on Jan. 16, 1786.

150. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 85.

151. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545-46; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 85.

152. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 546; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 85.

153. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 546; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 85.

provisions: In the Commonwealth of Virginia no man shall (1) be compelled by civil government to attend or support any religious worship, place, or ministry, nor (2) be punished or interfered with by the Commonwealth on account of his religious opinions or beliefs; but, on the contrary, every man shall (3) be free so far as the civil government is concerned to profess and contend for his religious opinions and beliefs, and (4) such activity shall in no way affect his civil capacities.[154]

The third, and final, section acknowledged that any subsequent legislature has the authority to repeal the statute, but declared that if it does so, such an act will be an infringement of natural rights.[155] "In the corpus of Jefferson's work," one commentator observed, "there is no equal in terms of binding future generations."[156]

Jefferson's statute, significantly, was not neutral toward religion. Indeed, the measure presupposed a belief in God.[157] The existence of "Almighty God" who "hath created the mind free" and willed that "free it shall remain,"[158] Jefferson argued, provided the rationale for governmental recognition of religious

154. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 546; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 86.

155. REPORT OF THE REVISORS, *supra* note 126, at 59; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 546-47; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 86.

156. Buckley, *The Political Theology of Thomas Jefferson*, in VIRGINIA STATUTE, *supra* note 12, at 92.

For further discussion on Bill No. 82, see VIRGINIA STATUTE, *supra* note 12; P. ROBERTSON, AMERICA'S DATES WITH DESTINY 73-85 (1986); M. UROFSKY, A "WALL" OF SEPARATION (1986) (pamphlet prepared for Citizens Committee to Commemorate the Virginia Statute for Religious Freedom); THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: A BICENTENNIAL CELEBRATION, JANUARY 16, 1986 (1988) (pamphlet sponsored by Council for America's First Freedom, Virginia Commission on the Bicentennial of the United States Constitution); Bryan, *The Statute for Establishing Religious Freedom*, in THE WRITINGS OF THOMAS JEFFERSON, *supra* note 114, at i-xi; Miller, *The Bicentennial of the Virginia Statute*, THE CHRISTIAN CENTURY 1171 (Dec. 18-25, 1985); Plöchl, *supra* note 4; Price, *supra* note 3; Smylie, *Jefferson's Statute for Religious Freedom: The Hanover Presbytery Memorials, 1776-1786*, 63 AM. PRESBYTERIANS J. PRESBYTERIAN HIST. 355 (Winter 1985); Swaney, *Religious Freedom*, 12 VA. L. REV. 632, 636-41 (1926); Miller, *The Freedom that Made America*, The Washington Post, Sunday, Sept. 28, 1986, at C1, col. 1; M. Ruth, The Contribution of Thomas Jefferson to Religious Liberty in America (n.d.) (unpublished master's thesis, Seton Hall University); M. Zipperer, Thomas Jefferson's "Act for establishing religious freedom in Virginia" vom 16 Januar 1786, ein verfassungsgeschichtlicher und recht svergleichender Beitrag zum Staatskirchenrecht (1961) (unpublished Inaugural dissertation, Friedrich-Alexander-Universitat, Erlangen-Nurnberg).

See also S. KNOX, A VINDICATION OF THE RELIGION OF MR. JEFFERSON, AND A STATEMENT OF HIS SERVICES IN THE CAUSE OF RELIGIOUS LIBERTY (Baltimore 1800) (an early tract supporting Jefferson's efforts on behalf of religious liberty, especially in the light of political attacks on Jefferson by opponents questioning his moral character and fitness for public office); J. SWANWICK, CONSIDERATIONS ON AN ACT OF THE LEGISLATURE OF VIRGINIA, ENTITLED, AN ACT FOR THE ESTABLISHMENT OF RELIGIOUS FREEDOM (Philadelphia 1786) (an early tract denouncing Jefferson's bill because it allegedly undermined the vital role of religion in society and civil government).

157. Buckley, *The Political Theology of Thomas Jefferson*, in VIRGINIA STATUTE, *supra* note 12, at 93. *See also* B. HART, FAITH & FREEDOM 341-42 (1988) (Jefferson's "bill justifies itself on Protestant theological principles"); American Jewish Congress v. City of Chicago, 827 F.2d 120, 135 (7th Cir. 1987) (Easterbrook, C.J., dissenting) ("The preamble to the bill is itself an exercise in religious persuasion.").

158. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545. The words "that free it shall remain" were deleted from the preamble by Senate amendment on Jan. 16, 1786.

freedom.[159] The statute, which presumed a creator who was involved in human affairs,[160] fell short of advocating an absolute rule that civil government and religion may never interact in a cooperative manner.[161] This statutory recognition of the deity and Jefferson's assertion that religious liberty is derived from the "plan of the holy author of our religion"[162] would surely offend strict separationists today.[163] Furthermore, the statute's reference to, if not reliance on, the "supreme will" of God[164] renders the Act constitutionally suspect under prevailing establishment clause analysis. As one modern jurist opined, "[i]f all endorsement by the state of Christian beliefs is forbidden, then any state that today enacted Jefferson's Bill for Establishing Religious Freedom would be violating the Establishment Clause!"[165] Jefferson's bill did not advocate a strict separation between religion and civil government, nor was it a blueprint for a wholly secular state.[166] Commentators taking a narrow construction of Bill No. 82 have long maintained that the bill, in essence, was simply a further exposition of the free exercise guarantee enshrined in the Virginia Declaration of Rights.[167]

2. Bill Number 83, "A Bill for Saving the Property of the Church Heretofore by Law Established."

The second revised bill dealing with religion, Bill No. 83, was entitled, "A

159. *See* Graham, *A Restatement of the Intended Meaning of the Establishment Clause in Relation to Education and Religion*, 1981 B.Y.U. L. REV. 333, 348 ("Far from ordaining a separation of church and state, the Virginia Statute of Religious Freedom proclaimed a cooperative friendship between the two: the existence of God who made the mind free was the statutory reason for governmental recognition of religious freedom.").

160. *See* Buckley, *The Political Theology of Thomas Jefferson*, in VIRGINIA STATUTE, *supra* note 12, at 87.

161. *See* J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION *supra* note 87, at 73.

162. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 84.

163. *See* Comment, *supra* note 136, at 665 (The bill's prefatory language arguing that it was Almighty God's will that the human mind should remain free "might be offensive to some total separationists.").

164. REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 545. The words "supreme will" were deleted from the preamble by Senate amendment on Jan. 16, 1786.

165. American Jewish Congress v. City of Chicago, 827 F.2d 120, 136 (7th Cir. 1987) (Easterbrook, C.J., dissenting).

166. *But cf.* R. ISAAC, *supra* note 10, at 295 (describing Bill No. 82 as among "Jefferson's proposals for a secular republican establishment").

167. *See, e.g.*, Graham, *supra* note 159, at 350; Henry, *supra* note 142, at 27. George Mason was the chief architect of the Virginia Declaration of Rights, a precursor to the federal Bill of Rights. Article XVI of the Declaration specifically addressed the issue of religious liberty. Drafts of the Declaration were thoroughly debated and amended before its final passage in June 1776. Madison is credited with amending Article XVI of the Declaration from a mere restatement of the principle of toleration to the first legislative pronouncement of religious liberty. Everson v. Board of Educ., 330 U.S. 1, 34 (1947) (Rutledge, J., dissenting). Reflecting a compromise between Mason's original proposal and Madison's amendments, Article XVI stated in its final form:

> That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.

VA. CONST. art. I, § 16.

Bill for Saving the Property of the Church Heretofore by Law Established."[168] Although never formally enacted,[169] this bill, in the words of a nineteenth-century biographer of Jefferson, "somewhat mitigated" the radical perception among the more conservative backers of the general assessment scheme that Bill No. 82 may have possessed.[170]

The bill provided that glebes, churches, furniture, arrearages, as well as church property real and personal of private donation, "should be saved in all time to come to the members of the English church" resident in the parish. This property was to be used as the parishioners deemed appropriate for the support of the ministry. The surviving vestry men in every parish were to have authority to fulfill legal obligations entered into before January 1, 1777, even if a levy or tax on all parishioners should become necessary for that purpose. Where prior levies had exceeded the law and surpluses above indebtedness were on hand, on the above mentioned date, such funds were to be paid into the poor rates of the parish. However, if the parish had no glebe, the surplus was to be applied toward the acquisition of one. This last provision undoubtedly was based on the rationale that until a glebe was purchased, no surplus could actually ensue because prior to 1776 the purchase of a glebe was a legal charge on the parish.

The principal consequence of this measure was to reserve to the Anglican Church all property legally in its possession. Legal title and control of such property, however, was to be transferred from the vestries to the parish members who would be bound to apply it to the support of a ministry, but would be the sole judges of the conditions of such application. "The bill," according to a nineteenth-century commentator, "seems to have aimed to steer between a violation of vested rights, and using property for other purposes voluntarily devoted to religious objects by its owners — and the arming of a hierarchical body with perpetual power to use a fund contributed by *all* denominations for the exclusive support of a particular *class of tenets*."[171]

Bill No. 83 was designed to protect the property interests of the Anglican Church that recently had lost its tax subsidies.[172] Insofar as the bill exclusively aided one sect, it arguably would offend the *Everson* Court's separationist prohi-

168. REPORT OF THE REVISORS, *supra* note 126, at 59. The bill is reprinted in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 553-54.

169. For a legislative history and analysis of a 1779 version of the bill, see D. Rhodes, *supra* note 21, at 129-32. Rhodes attributes authorship of this bill to George Mason. *Id.* at 129. Regardless of who actually drafted the bill, it is clear Jefferson endorsed it. *See infra* note 235.

170. 1 H. RANDALL, *supra* note 31, at 221. Randall implies this bill was the product of Mr. Jefferson's pen. *Id.* at 219-21. *See also Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 320 (attributing authorship to Jefferson).

> It is worth noting that although his detractors claimed Jefferson was hostile to the established church because of his impiety, his bill for religious freedom was always brought up together with a proposal for saving the church's property, which would seem to show either incredible duplicity or a desire to compromise with the friends of the Episcopal Church in the General Assembly, or genuine good will for the just interests of that institution.

M. Kay, *supra* note 24, at 58-59.

171. 1 H. RANDALL, *supra* note 31, at 221 (emphasis in original).

172. See the Act reported in 9 HENING'S STATUTES AT LARGE, *supra* note 1, at 164-67. *See supra* note 24.

bition on "laws which aid one religion, aid all religions, or prefer one religion over another."[173] The bill is also difficult to reconcile with a strict separationist construction of Bill No. 82 as a measure designed to uproot and eradicate all relations between church and state.

3. Bill Number 84, "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers."

On October 31, 1785, Madison introduced the third bill of the revisal dealing with religion, which was appropriately entitled, "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers."[174] This legislation, the evidence suggests, also was drafted by Jefferson.[175] Bill No. 84 exempted clergymen from being arrested while performing religious services in any church, chapel, or other place of worship.[176] It also mandated severe punishments, including imprisonment and amercement, for disturbers of public worship or citizens laboring on Sunday. The third paragraph of the bill, which would undoubtedly offend modern judicial sensibilities, stated:

> If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary houshold [sic] offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offence.[177]

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173. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

174. REPORT OF THE REVISORS, *supra* note 126, at 59. The bill is reprinted in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 555; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 336-37.

175. *See Editorial Note*, in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 318-20; R. MCANINCH, *supra* note 62, at 53.

176. A modern analogue of this provision can still be found in the Virginia Code.

> [T]he following persons shall not be arrested, apprehended, or detained under any civil process during the times respectively herein set forth, but shall not otherwise be privileged from service of civil process by this section: . . . Ministers of the gospel while engaged in performing religious services in a place where a congregation is assembled and while going to and returning from such place.

VA. CODE ANN. § 8.01-327.2 (1984).

177. REPORT OF THE REVISORS, *supra* note 126, at 59; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 555. This portion of Bill No. 84 survived as the law of Virginia with only minimal amendment until 1960. This language from the revised code, proposed in 1779, initially was passed in 1786. 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 336-37. A virtually identical prohibition on Sabbath labor was passed by the General Assembly on December 26, 1792. *See* "An Act for the effectual Suppression of Vice, and punishing the Disturbers of Religious Worship and Sabbath Breakers," A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA 275-76 (Richmond 1803). This statutory language remained substantially unchanged until 1960. *See* VA. CODE of 1887, § 3799; Acts 1908, at 259; Acts 1916, at 751; Acts 1932, at 596; Acts 1954, ch. 131, at 127, 128.

In 1960 the General Assembly revised the old Sunday law. The new version preserved a general prohibition against Sunday "work, labor or business . . . except in household or other work of necessity or charity." The revised statute enumerated specific items, the sale of which were expressly deemed not to be a work of necessity or charity. Therefore, the sale of these items on Sunday was proscribed. The statute also listed specific exemptions for certain activities expressly deemed to be works of necessity, such as the operation of furnaces, the sale and distribution of newspapers and motor fuels, and the operation of recreational facilities. VA. CODE ANN. §§ 18.1-358, 18.1-358.1-.2

The bill was designed to benefit adherents of all denominations by preserving the sanctity of religious worship, but it did not expressly require church attendance in order to avoid punishment for Sabbath breaking. The bill was passed on November 27, 1786, in a slightly amended form.[178]

Bill No. 84 was not merely a "blue law."[179] Rather, it was an affirmation of civil government's responsibility to protect the formal act of worship.[180] It provided that a "minister of the gospel" shall not be arrested while performing a religious meeting, and services of divine worship shall not be disrupted by private citizens or interrupted by public officials. Civil government, in short, was foreclosed from disturbing the citizenry in the peaceful expression of their religious beliefs.

The title of Bill No. 84 unequivocally states that this legislation was written to punish those who worked on the "Sabbath" day.[181] The religious intent of the bill is undeniable, made obvious by the use of the word "Sabbath" as compared to a religiously neutral term like "Sunday."[182] The word "Sabbath" reflects the Judeo-Christian tradition of commemorating the Lord's "day of rest"[183] and the fourth commandment which required that the Sabbath be kept free from secular defilement.[184] Use of the word "Sabbath" would, thus, tend to weaken the argument that the measure was drafted for wholly neutral purposes or otherwise intended merely to reserve by law one day a week for recreation and rest from secular employment. In short, there is no indication that the sponsors of this legislation advanced the bill principally for a secular purpose,

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(1960). *See* Mandell v. Haddon, 202 Va. 979, 121 S.E.2d 516 (1961) (legislative history of the 1960 Sunday labor law).

In 1974 the General Assembly once again rewrote the Sunday closing law. The 1974 revision, which was amended frequently in subsequent years, was the most recent analogue to Bill No. 84. VA. CODE ANN. § 18.2-341 (Repl. Vol. 1988). It also contained a general prohibition against Sunday labor but extended a blanket exemption to all transactions conducted by over 60 "industries or businesses" grouped in 22 categories of exemptions. Among the exempt activities were those attendant to agriculture, medicine, mining and manufacturing. Many retail stores engaged in the sale of a broad array of merchandise also were covered by the exemptions.

In 1988 the Supreme Court of Virginia held that the Sunday closing laws, as applied, were "special laws" and thus violated the state constitution. Benderson Dev. Co. v. Sciortino, 236 Va. 136, 150-51, 372 S.E.2d 751, 759 (1988).

178. 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 336-37.

179. For a brief history of "blue laws," see D. LABAND & D. HEINBUCH, BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS 7-45 (1987). *See generally* W. BLAKELY, AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION (rev. ed. 1911); G. HARRIS, A TREATISE ON SUNDAY LAWS. THE SABBATH—THE LORD'S DAY, ITS HISTORY AND OBSERVANCE. CIVIL AND CRIMINAL (1892); A. LEWIS, A CRITICAL HISTORY OF SUNDAY LEGISLATION FROM 321 TO 1888 A.D. (1888); J. RINGGOLD, SUNDAY: LEGAL ASPECTS OF THE FIRST DAY OF THE WEEK (1891).

180. R. HEALEY, *supra* note 136, at 140.

181. REPORT OF THE REVISORS, *supra* note 126, at 59.

182. *See* A. JOHNSON, THE LEGAL STATUS OF CHURCH-STATE RELATIONSHIPS IN THE UNITED STATES 237 (1934) ("The religious origin of the present Sunday statutes of many of the states is revealed in such religious terms as 'Lord's day,' 'Sabbath day,' 'Christian Sabbath,' 'worldly employment,' 'secular business,' 'holy time,' 'Sabbath observance,' 'Sabbath breaking,' 'profanation of Lord's day,' 'violate the Sabbath,' and many similar expressions.").

183. *Genesis* 2:2-3.

184. *Exodus* 20:8-11; *Exodus* 31:12-18; *Deuteronomy* 5:12-15; *see generally* Comment, *Sunday, the Sabbath, and the Blue Laws*, 30 TENN. L. REV. 249, 249-54 (1963) (discussion of religious origins of Sabbath legislation).

such as reducing the burdens on exploited laborers in the same way progressive social legislation earlier this century limited the number of working hours in a day.[185]

This bill and Sunday closing laws in general arguably discriminate against individuals who choose not to preserve the sanctity of the "day of rest" observed by practitioners of the Christian faith.[186] Acknowledgment of the Christian "Sabbath" in the official calendar and its preservation by law apparently conflicts with a separationist ban on government support for religion, its activities or institutions. Less forceful statutes today have been criticized as violations of the separation doctrine.[187]

Strict separationists might argue that while Jefferson endorsed laws against disturbers of religious worship and Sabbath breaking at the state level, he never would have tolerated such an arrangement at the federal level, especially in the light of the subsequently enacted first amendment prohibition on "an establishment of religion."[188] During his presidential administration, however, Jefferson signed into law an act, with even more severe penalties than Bill No. 84, that confirmed his desire to prevent the desecration of divine worship. This Act of April 10, 1806, stated:

> It is earnestly recommended to all officers and soldiers, diligently to attend divine service; and all officers who shall behave indecently or irreverently at any place of divine worship, shall, if commissioned officers, be brought before a general court martial, there to be publicly and severely reprimanded by the president; if non-commissioned officers or soldiers, every person so offending shall, for his first offence, forfeit *one sixth of a dollar*, to be deducted out of his next pay . . . .[189]

The provisions of Bill No. 84, as well as the Act of April 10, 1806, are consistent with Jefferson's lifelong commitment to protecting the citizenry's right to express peacefully religious beliefs and opinions. The principal objective

185. R. CORD, *supra* note 46, at 219; *see also* McGowan v. Maryland, 366 U.S. 420, 449-53 (1961) (Supreme Court upheld state Sunday closing law because the statute's present purpose and effect were not to aid religion by facilitating church attendance but to set aside a day for recreation and rest from secular employment).

186. *See* Gangi, Book Review, 7 HARV. J.L. & PUB. POL'Y 581, 600 (1984).

187. *See* R. HEALEY, *supra* note 136, at 140. It is interesting to note the Supreme Court's opinion in a landmark case challenging the State of Maryland's Sunday Closing (or Blue) Laws. Chief Justice Warren, writing for the Court, acknowledged Madison's role in the enactment of Bill No. 84. The Court indicated that Madison saw no inconsistency between this Act and support for religious freedom. McGowan v. Maryland, 366 U.S. 420, 438-39 (1961). This citation also reveals that the Court as early as 1960 was aware of at least one bill dealing with religion in the *Report of the Revisors* other than Jefferson's "Bill for Establishing Religious Freedom."

188. U.S. CONST. amend. I, cl. 1.

189. 2 THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA (R. Peters ed. 1846), "An Act for establishing Rules and Articles for the government of the Armies of the United States," sess. I, ch. 20, art. 2, 2 Stat. 360 (emphasis in original).

Compare this Act signed by Jefferson with Justice Black's declaration in *Everson*: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will. . . . No person can be punished . . . for church attendance or non-attendance." *Everson*, 330 U.S. at 15-16. *See also* Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("Government . . . may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction.").

of both bills was to preserve the sanctity of religious worship and expression by deterring individuals who might seek to disturb such activities. Bill No. 84 also suggests that Jefferson's desire to separate church and state, even though compelling, was superseded by his devotion to the fullest possible freedom of religious expression. If religious liberty was realized in its richest sense through cooperation between the state and the church, then Jefferson, it would seem, endorsed such a limited union.[190]

4. Bill Number 85, "A Bill for Appointing Days of Public Fasting and Thanksgiving."

The fourth in the series of five bills addressing religious issues was a measure entitled, "A Bill for Appointing Days of Public Fasting and Thanksgiving."[191] This legislation, like the preceding bill, apparently was drafted by Jefferson and introduced in the Virginia legislature by Madison on October 31, 1785.[192] Bill No. 85 empowered the Governor or Chief Magistrate of the Commonwealth, with the advice of the Council, to appoint days of thanksgiving and fasting and to notify the public by a proclamation. Far from simply granting the Governor authority to appoint "days of public fasting and humiliation, or thanksgiving," Bill No. 85 issued the following punitive provision:

> Every minister of the gospel shall on each day so to be appointed, attend and perform divine service and preach a sermon, or discourse, suited to the occasion, in his church, on pain of forfeiting fifty pounds for every failure, not having a reasonable excuse.[193]

Bill No. 85 was never enacted. The final disposition of this bill, however, is unimportant to the present discussion. The relevant consideration here is that Jefferson and Madison jointly sponsored a bill that is difficult to reconcile with strict separationist constructions of the religion clauses and Jefferson's church-state views.[194] Moreover, Bill No. 85 illustrates how extensive judicial reliance on the Virginia statute for religious freedom, to the exclusion of Jefferson's and

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190. *See* J. Gurley, Thomas Jefferson's Philosophy and Theology: As Related to His Political Principles, Including Separation of Church and State 234 (1975) (unpublished Ph.D. dissertation, University of Michigan).

191. REPORT OF THE REVISORS, *supra* note 126, at 59-60. The bill is reprinted in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 556.

192. Although Julian P. Boyd, a leading authority on the revisal, did not explicitly attribute authorship of this bill to Jefferson, neither did he explicitly reject the possibility that Jefferson drafted Bill No. 85. Boyd drew attention to a surviving manuscript copy of Bill No. 85 with a notation in the "clerk's hand" indicating that the bill was "endorsed by TJ." 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 556. Other commentators have described Jefferson as the author of this bill. *See, e.g.*, R. CORD, *supra* note 46, at 220-21; R. HEALEY, *supra* note 136, at 135; Drakeman, *supra* note 93, at 441.

193. REPORT OF THE REVISORS, *supra* note 126, at 60; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 556.

194. Indeed, the punitive provisions of Bill No. 85 are difficult to reconcile with that portion of Bill No. 82 declaring "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." REPORT OF THE REVISORS, *supra* note 126, at 58; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 546; 12 HENING'S STATUTES AT LARGE, *supra* note 1, at 86. Perhaps the only way to interpret this apparent contradiction is Merrill D. Peterson's observation that "the revisal was not really intended to be a new code, rational and coherent throughout, and

Madison's other legislative contributions to the revisal, has misrepresented the views of the two Virginians on church-state relations. Courts and separationist commentators frequently have invoked Jefferson's "wall of separation" metaphor, which Jefferson first used as President in resisting pressure to issue a national thanksgiving day proclamation. This refusal to designate days for prayer and thanksgiving is often cited as confirmation of Jefferson's commitment to a complete separation of church and state. Bill No. 85, however, qualifies conventional interpretations of Jefferson's views on the efficacy of the official appointment of days for prayer and thanksgiving.

As President of the United States, Jefferson resolutely declined to declare a national day of fasting and thanksgiving. In a celebrated letter to the Danbury (Connecticut) Baptist Association, which had requested such a proclamation, Jefferson wrote:[195]

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[196]

Jefferson thereby erected his now famous "wall of separation" which has become

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there was much in it with which Jefferson did not agree in principle. Nor were his life, thought, and politics free of inconsistencies." Letter from Merrill D. Peterson to author (July 18, 1988).

It is similarly difficult to reconcile this bill with Justice Black's interpretation of the religion clauses in *Everson*: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will. . . . No person can be punished . . . for church attendance or non-attendance." Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). Justice Douglas offered a similar commentary in Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("government . . . may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction").

195. Shortly after Jefferson's election in 1800, a committee of the Danbury Baptist Association wrote him to express pleasure for his election and to request him to designate a national day of fasting and thanksgiving. *See* E. GAUSTAD, FAITH OF OUR FATHERS: RELIGION AND THE NEW NATION 45-46 (1987); "IN GOD WE TRUST": THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 134 (N. Cousins ed. 1958); 2 N. SCHACHNER, *supra* note 9, at 701. Jefferson drafted a reply but sought the advice of Attorney General Levi Lincoln, a Massachusetts Republican, before sending it. The Baptists' memorial, Jefferson determined, "furnishe[d] an occasion, too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings, as my predecessors did." Letter from Thomas Jefferson to Levi Lincoln (Jan. 1, 1802), *reprinted in* 8 THE WORKS OF THOMAS JEFFERSON 129 (P. Ford ed. 1899). The Danbury letter made no direct allusion to the issue of religious holiday proclamations. Rather, it included a general condemnation of the alliance between church and state in the federal regime. *See* R. HEALEY, *supra* note 136, at 130-33.

196. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *reprinted in* Koch & Peden, *supra* note 15, at 332-33.

a persistent theme of modern church-state analyses.[197] Indeed, the *Everson* Court indicated that the "wall" metaphor informed its construction of the establishment clause.[198]

Similarly, the *Everson* Court, in order to buttress its separationist rhetoric, drew attention to Madison's "Detached Memoranda."[199] This problematic document, written long after Madison had left public office,[200] leaves no doubt that at the time it was penned the author believed "[r]eligious proclamations by the Executive recommending thanksgivings & fasts" were unconstitutional.[201] Justice Black writing for the majority and Justice Rutledge for a minority footnoted Elizabeth Fleet's edition of Madison's "Detached Memoranda" which was published one year before the *Everson* decision.[202] This document, the Justices implied, confirmed that Madison, like Jefferson, espoused an absolute separation of church and state. Although Justices Black and Rutledge may have been unaware of Madison's sponsorship of Bill No. 85, they would have learned from Fleet's editorial notes to the "Memoranda" that on at least four occasions during Madison's presidential administration he issued religious proclamations.[203]

While Madison's "Memoranda" and Jefferson's "wall" metaphor are frequently invoked by the judiciary, their "Bill for Appointing Days of Public Fasting and Thanksgiving" is largely forgotten. The *Everson* Court either was unaware of or disregarded Jefferson's authorship and Madison's sponsorship of Bill No. 85. This omission is significant given the Court's reliance on Bill No. 82.[204] Reference to Bill No. 85, authorizing the official appointment of days for religious observances, tempers the rhetoric of Bill No. 82 and undermines the

197. *See generally* Healey, *Thomas Jefferson's "Wall": Absolute or Serpentine?*, 30 J. CHURCH & ST. 441 (1988) (tracing development of "wall" metaphor); Comment, *supra* note 136 (examining the origin and use of Jefferson's "wall"). For a critique of the Court's use of the "wall" metaphor, see Hutchins, *The Future of the Wall*, in THE WALL BETWEEN CHURCH AND STATE 17-25 (D. Oaks ed. 1963); Hammett, *The Homogenized Wall*, 53 A.B.A. J. 929 (1967).

198. Everson v. Board of Educ., 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' ").

199. *Everson*, 330 U.S. at 12 nn.12-13; *id.* at 37 n.21 (Rutledge, J., dissenting).

200. *See* Walz v. New York Tax Comm'n, 397 U.S. 664, 684 n.5 (1970) (Brennan, J., concurring) The church-state views offered in the "Detached Memoranda" were advanced long after the adoption of the establishment clause.

> They represent at most an extreme view of church-state relations, which Madison himself may have reached only late in life. He certainly expressed no such understanding of Establishment during the debates on the First Amendment. And even if he privately held these views at that time, there is no evidence that they were shared by others among the Framers and Ratifiers of the Bill of Rights.

Id. (Brennan, J., concurring).

201. Fleet, *supra* note 52, at 560. *See generally* Pfeffer, *Madison's "Detached Memoranda": Then and Now*, in VIRGINIA STATUTE, *supra* note 12, at 302-06 (outlining Madison's objections to religious proclamations).

202. *Everson*, 330 U.S. at 12 nn.12-13; *id.* at 37 n.21 (Rutledge, J., dissenting).

203. Fleet, *supra* note 52, at 562 n.54.

204. Rutledge, in dissent, offered a legislative history of the revision of the laws of Virginia. He acknowledged Jefferson's role in drafting the code and Madison's sponsorship of the revisal. *Everson*, 330 U.S. at 35 n.15 (Rutledge, J., dissenting). It would thus seem clear that the *Everson* Court was aware of the legislative history surrounding the Virginia statute for religious freedom, and should have been aware of Bills No. 83-86 which followed Jefferson's celebrated bill.

Court's contention that the public actions of Jefferson and Madison substantiate the strict separationist interpretation of the religion clauses.

Bill No. 85 was written a decade before the religion clauses were added to the federal Constitution. Thus, it could be argued that Jefferson's and Madison's joint sponsorship of the bill is less relevant to understanding the first amendment than the "Detached Memoranda" and the Danbury letter (both written long after the first amendment), which purport to give definition to the religion clauses. While this argument has merit, it ignores the fact that the Supreme Court has stated that the words and acts of Jefferson and Madison in their native Virginia, *before* the drafting of the first amendment, are expressive of the purposes of the religion clauses and give content and meaning to the first amendment.[205] If the statute for religious freedom, written long before the first amendment, is thought to have influenced the original understanding of the religion clauses, then it is plausible that Bill No. 85, written contemporaneously with Bill No. 82, may have modestly informed the understanding of church-state relations in the early republic. In any case, Bill No. 85 illustrates that Jefferson and Madison, contrary to many strict separationists,[206] did not consistently advocate absolute church-state separation throughout their public careers.

In marked contrast to the separationist imagery of the Danbury letter, Jefferson demonstrated an accommodationist inclination in the colonial and state government setting. For example, as a member of the House of Burgesses, on May 24, 1774, Jefferson participated in drafting and enacting a resolution designating a "Day of Fasting, Humiliation, and Prayer."[207] As Jefferson recounted in his *Autobiography*:

> We were under conviction of the necessity of arousing our people from the lethargy into which they had fallen, as to passing events [the Boston port bill]; and thought that the appointment of a day of general fasting and prayer would be most likely to call up and alarm their attention . . . . [W]e cooked up a resolution . . . for appointing the 1st day of June, on which the port bill was to commence, for a day of fasting, humiliation, and prayer, to implore Heaven to avert from us the evils of civil war, to inspire us with firmness in support of our rights, and to turn the hearts of the King and Parliament to moderation and justice.[208]

Jefferson seemed pleased with this accommodation between religion and the

205. *See supra* text accompanying notes 76-83.

206. *See, e.g., Everson*, 330 U.S. at 41 (Rutledge, J., dissenting) ("Madison and his coworkers made no exceptions or abridgments to the complete separation they created."); L. LEVY, *supra* note 61, at 145 ("Clearly he [Madison] remained constant on this subject [of religious liberty] all his life."); L. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 21 (1963) ("Jefferson's record on religious liberty was really quite exceptional — an almost consistent demonstration of devotion to principle."); L. PFEFFER, *supra* note 145, at 94 ("Throughout his adult life Jefferson never swerved from his devotion to the principle of complete independence of religion and government."); Levy, *Jefferson as a Civil Libertarian*, in THOMAS JEFFERSON 191 (L. Weymouth ed. 1973) ("He faithfully adhered to the principles of his bill [for religious freedom] throughout his life . . . . Jefferson's consistency in applying the principle of the separation of church and state was also evident in the field of education.").

207. 1 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 105.

208. T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 8-9.

state in May 1774 through a "cooked up" religious proclamation, cynically issued to excite a public reaction against Great Britain.[209] This political use of a solemn religious act took place only a few years before Jefferson wrote "A Bill for Establishing Religious Freedom."[210] In 1779, when Jefferson was Governor of Virginia, he issued a proclamation decreeing a day "of publick and solemn thanksgiving and prayer to Almighty God."[211] This proclamation was issued *after* Jefferson had written Bill No. 82. The 1774 and 1779 religious proclamations, as well as Bill No. 85, did not figure into the *Everson* Court's portrayal of Jefferson.

How is Jefferson's record in Virginia reconciled with the Danbury letter? A careful study of Jefferson's actions throughout his public career suggests that he believed, as a matter of federalism, the national government should avoid exercising all powers over religion, while the state governments were free to facilitate religious exercises as they saw fit.[212] A close reading of the Danbury letter reveals that Jefferson was not addressing the broader issue of separation of religion and civil government (both federal and state); rather, he was examining the narrower issue of whether the first amendment requires a separation between the entire *federal* government and religion. The Danbury letter indicates that the "wall" was erected only against the federal government.[213] This interpretation is confirmed by Jefferson's "maturer" commentary in his second inaugural address:[214]

> In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general [federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies.[215]

Thus, Jefferson saw no contradiction between authoring a religious proclama-

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209. *See* R. HEALEY, *supra* note 136, at 135; A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 95 (1985); Flower, *Jefferson's Service to Civilization During the Founding of the Republic*, in 7 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 114, at vi-viii; J. Gurley, *supra* note 190, at 231-32.

210. *See* M. MARTY, *The Virginia Statute Two Hundred Years Later*, in VIRGINIA STATUTE, *supra* note 12, at 9 ("This [Resolution] is hardly a noble charter, but it does show that Jefferson did, on occasion, allow for acts that clearly contradicted the bill of 1779 and the statute of 1786.").

211. 3 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 177-79.

212. Smith, *supra* note 46, at 622 n.210. *See also* J. Gurley, *supra* note 190, at 226-28 (arguing that Jefferson believed that state governments had the right to act on matters pertaining to religion, and power in such matters was denied the national government).

213. *See* R. CORD, *supra* note 46, at 115; D. DREISBACH, *supra* note 71, at 126; Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371, 389; Comment, *supra* note 136, at 656-59.

214. Edward S. Corwin described this portion of the second inaugural address, perhaps delivered in response to criticism of Jefferson's refusal to issue national religious holiday observances, as a "more deliberate, more carefully considered evaluation by Jefferson of the religious clauses" than the Danbury letter. Corwin, *supra* note 87, at 14.

215. Jefferson, Second Inaugural Address (March 4, 1805), *reprinted in* Koch & Peden, *supra* note 15, at 341. For a more complete statement of Jefferson's position, see Letter from Thomas Jefferson to the Reverend Samuel Miller (Jan. 23, 1808), *reprinted in* 1 A. STOKES, *supra* note 32, at 490-91.

tion to be issued by *state* authorities and refusing to issue a similar proclamation as the *federal* chief executive.

Madison's views in the "Detached Memoranda" similarly appear inconsistent with his actions in the Virginia legislature (sponsorship of Bills No. 83-86), the First Congress, and as President. Madison was a member of the first House of Representatives which on September 25, 1789, the day following its approval of the religion clauses, passed a resolution requesting President George Washington to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favours of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness."[216] According to the record of congressional proceedings, Madison, unlike at least one other member of the House,[217] offered no recorded objection to the recommendation. This episode is significant because the intended scope and meaning of the religion clauses were fresh in the minds of the congressmen, including Madison, who had drafted and endorsed them.[218]

As President, Madison disregarded the precedent established by Jefferson in declining to issue thanksgiving day proclamations and continued the tradition of Presidents Washington and Adams, who both issued religious proclamations. Madison issued his first proclamation on July 9, 1812.[219] He issued subsequent proclamations calling for days of public humiliation and prayer on July 23, 1813,[220] November 16, 1814,[221] and March 4, 1815.[222]

It is difficult to reconcile these public declarations of President Madison and his sponsorship of Bill No. 85 with the unequivocal pronouncement in the "Detached Memoranda." While Madison shared Jefferson's view of the role of religion in the federal structure, his notion of the "wall" between the federal government and religion apparently was less rigid than Jefferson's. Although Madison, unlike his immediate predecessor, was willing to issue religious proclamations as the nation's chief executive, he cautiously emphasized that prayers must remain voluntary and their formulation must be of private origin rather

216. 1 ANNALS OF THE CONGRESS OF THE UNITED STATES. THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 914 (J. Gales ed. 1834) [hereinafter ANNALS OF CONG.]; 1 A. STOKES, *supra* note 32, at 486.

217. The recommendation for a thanksgiving day proclamation was not passed in the House without opposition. Representative Thomas Tucker of South Carolina, clearly referring to the recently endorsed first amendment, argued that such a recommendation by the *federal* legislature "is a business with which Congress [can] have nothing to do; it is a religious matter, and, as such, is proscribed to us." 1 ANNALS OF CONG., *supra* note 216, at 915; 1 A. STOKES, *supra* note 32, at 487. The fact that Tucker raised a nonestablishment-type argument in opposition suggests that the thanksgiving day resolution of September 25, 1789, was considered carefully and the recommendation was not made thoughtlessly, by force of long tradition and without regard to the possible constitutional problems posed by such congressional action.

218. *See* Wallace v. Jaffree, 472 U.S. 38, 100-03 (1985) (Rehnquist, J., dissenting).

219. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 513 (J. Richardson ed. 1896).

220. *Id.* at 532-33.

221. *Id.* at 558.

222. *Id.* at 560-61.

than prescribed by civil government.[223] He solemnly insisted that only voluntary prayers "can be acceptable to Him whom no hypocrisy can deceive and no forced sacrifices propitiate."[224]

Strict separationist commentators frequently cite the Danbury letter and Jefferson's refusal, as President, to designate a national day of prayer and thanksgiving as proof of Jefferson's commitment to a high and unyielding wall of separation between church and state. Similarly, they offer commentary on religious proclamations in the "Detached Memoranda" as evidence of Madison's separationist predilections. The strict separationists disregard Jefferson's and Madison's public actions that suggest they endorsed a more accommodating vision of church-state relations. For example, Bill No. 85, authorizing the appointment of days of public fasting and thanksgiving in the Commonwealth, rarely is noted in discussions of the Danbury letter and the controversy that prompted Jefferson to write it.

Collectively, Bills No. 84 and 85 illustrate a church-state model whereby the church, although separated institutionally from civil government, could unite its mission with the state to encourage a "moral" society (or one that holds religion in reverence) and the fullest possible expression of religious beliefs.[225] Jefferson's principle of separation was flexible and could be relaxed where cooperation between church and state fostered uninhibited religious expression.[226] These two bills were no less a part of Jefferson's church-state model than the principles outlined in his celebrated bill for religious freedom.

5. Bill No. 86, "A Bill Annulling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage."

The last of the revised bills dealing with religion was entitled, "A Bill Annulling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage."[227] As the title indicates, the bill is pertinent to the present discussion in that it ostensibly enacted Biblical (and Mosaic) law by reference:

> Be it enacted by the General Assembly, that marriages prohibited by the Levitical law shall be null; and persons marrying contrary to that prohibition, and cohabiting as man and wife, convicted thereof in the General Court, shall be amerced [fined], from time to time, until they separate.[228]

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223. Smith, *supra* note 46, at 624.

224. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 219, at 533.

225. *See* Gilbert, *Religious Freedom and Social Change in a Pluralistic Society: A Historical Review*, in RELIGION AND THE PUBLIC ORDER 101-02 (D. Giannella ed. 1964).

226. *See* J. Gurley, *supra* note 190, at 234.

227. REPORT OF THE REVISORS, *supra* note 126, at 60. The bill is reprinted in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 556-58.

228. REPORT OF THE REVISORS, *supra* note 126, at 60; 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 556-57.

Madison presented this bill to the General Assembly on October 31, 1785, along with the preceding four bills concerning religion.[229] According to Boyd's editorial notes, Bill No. 86 passed the second reading in the legislature, but no final action was taken on it.[230]

The salient features of this bill required couples to obtain a marriage license and declare marriage vows in the presence of witnesses. Despite its reference to the Pentateuch, this bill significantly omitted any requirement that marriage ceremonies be performed under ecclesiastical authority.[231] The exclusive authority of clergy in the established church to perform legally sanctioned marriages had been a source of bitter criticism in colonial and revolutionary Virginia from the rapidly growing nonconformist (and unlicensed) religious sects.[232] In this sense, the bill may have weakened further the disintegrating monopoly formerly held by the officially established church.

The union of biblical authority with the reformed, republican legal code of Virginia is significant in the light of contemporary judicial analysis. The modern judiciary has warned of the dangers of a close identification, or "symbolic union," of the powers of the state with religious denominations. The Supreme Court has said that if such identification conveys a message of government endorsement or disapproval of religion, a core purpose of the first amendment nonestablishment provision has been violated.[233] The adoption of biblical law by reference in the revised code represents at least a "symbolic union" of religion and civil government that the Supreme Court today arguably would find unconstitutional.[234]

III. NEW PERSPECTIVE ON THE JEFFERSONIAN MODEL OF CHURCH-STATE RELATIONS

A. Rewriting History

It is, indeed, noteworthy that virtually all historians of revolutionary Virginia and the first amendment, as well as biographers of Jefferson, have neglected Jefferson's role in the drafting of Bills No. 83-86 of the revised code.[235]

229. There is less evidence establishing Jefferson's direct authorship of Bill No. 86 than the preceding bills in the revisal. There can be no doubt, however, that Jefferson authorized and endorsed the proposal, given the dominant role he played in reforming the laws, and Madison sponsored the bill on the floor of the Virginia legislature.

230. 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 558.

231. *Id.*

232. *See* T. BUCKLEY, *supra* note 24, at 67-68; M. Kay, *supra* note 24, at 66-68; M. Quinlivan, *supra* note 24, at 81-82.

233. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 389-90 (1985).

234. For more on the Supreme Court's "symbolic union" analysis, see Hirt, *"Symbolic Union" of Church and State and the "Endorsement" of Sectarian Activity: A Critique of Unwieldy Tools of Establishment Clause Jurisprudence*, 24 WAKE FOREST L. REV. 823 (1989); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); Note, *Symbolic Union and the Establishment Clause*, 53 MO. L. REV. 139 (1988).

235. Even if it were established that Jefferson was not the actual draftsman of any one of Bills No. 83-86, the thesis of this Article remains intact. Clearly, Jefferson was the chief architect of the revised code and was intimately associated with its preparation and presentation. It is widely ac-

They have, instead, focused on Bill No. 82 and Jefferson's reputation as the architect of the "wall of separation." Similarly, while commentators have paid great attention to Madison's legislative sponsorship of Bill No. 82 on October 31, 1785, they have ignored the fact that on the same day Madison, acting on Jefferson's behalf, introduced in the General Assembly a bill for punishing "Sabbath breaking" along with a bill for "Appointing Days of Public Fasting and Thanksgiving."[236]

As the architect of the "wall" and the author of Bill No. 82, Jefferson "appears most congenial to modern eyes. It is here that he takes his rightful position with the great liberating influences of all time."[237] This perception of Jefferson may explain, in part, why many modern commentators have been unwilling to challenge the conventional view of Jefferson and Madison as libertarian advocates of strict separation.[238] Traditional portrayals of the two Virginians are inconsistent with their sponsorship of bills that imposed civil penalties on "Sabbath breakers," "disturbers of religious worship," and "ministers of the gospel" who failed to perform services on days appointed for fasting and thanksgiving.[239]

Robert M. Healey is among the few historians who has recognized that Bills No. 82, 84 and 85 of the revisal together present a more flexible version of church-state separation than that proposed by modern advocates of the Jeffersonian "wall." The revisal as a whole, Healey argues, destroys the myth that after Jefferson wrote the "Bill for Establishing Religious Freedom" he must have

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knowledged that virtually all the bills were drafted by Wythe and Jefferson (*see supra* note 106 and accompanying text), and when the two met in Williamsburg in February 1779 for a final revision of the bills, the two examined the drafts "sentence by sentence . . . until [both men] had agreed on the whole." T. JEFFERSON, AUTOBIOGRAPHY, in Koch & Peden, *supra* note 15, at 46. It must be acknowledged that in this role Jefferson, at a minimum, authorized and endorsed Bills No. 83-86 which, it is argued in this Article, modify conventional interpretations of Bill No. 82.

236. Cord, *supra* note 136, at 135.

237. 1 N. SCHACHNER, *supra* note 9, at 154. *See also* Banning, *James Madison, the Statute for Religious Freedom, and the Crisis of Republican Convictions*, in VIRGINIA STATUTE, *supra* note 12, at 130 ("As Madison went on, instead, to even larger deeds, his magnificent 'Memorial' assumed a rightful place beside his friend's great statute [for religious freedom] among the documentary foundations of the libertarian tradition.").

238. Another explanation for the failure of virtually all biographers of Jefferson and students of church-state relations in revolutionary Virginia to acknowledge Jefferson's contributions to Bills No. 83-86 stems from extensive reliance on secondary sources. Most students of Jefferson have focused on the religious freedom bill in isolation or as interpreted by commentators. Few scholars have returned to primary source materials to evaluate the bill within its legislative context. Extensive reliance on secondary sources has tended to detach Bill No. 82 from the historical, political and ideological context in which it was written and has arguably promulgated the distortions of Jefferson's church-state views examined in this Article.

239. At a major academic conference in 1985 at the University of Virginia to celebrate and commemorate the bicentennial of the passage of Jefferson's bill for religious freedom, historian J.G.A. Pocock lamented that "no representative of [Christian] evangelicalism or fundamentalism was present" at the conference. Pocock, *Religious Freedom and the Desacralization of Politics: From the English Civil Wars to the Virginia Statute*, in VIRGINIA STATUTE, *supra* note 12, at 71. At least two related points are implicit in this candid observation. First, "conventional" interpretations of Jefferson's bill often go unchallenged in academic circles. Second, contrary interpretations are unrepresented, or at least under-represented, when the bill is discussed. It is unclear from Professor Pocock's comment what he believed the "alternative" interpretation would have added to the discussion. He only indicated that a noteworthy view was not expressed and, apparently, not invited to the forum.

dropped all wedding of church and state to stump for the "most rigid separation" of church and state.[240] Similarly, James Lafayette Gurley has concluded that "Jefferson, as proved by his actions, did not hold to such a rigid view of complete separation of Church and State as some modern secularists have read into his famous 'wall of separation' metaphor."[241]

Many modern scholars, however, have chosen to disregard Jefferson's complete work on the revised code, despite the fact that many give considerable attention to Bill No. 82. For example, William Lee Miller devotes nearly seventy-five pages of a recent work to a detailed examination of Bill No. 82 — "A Bill for Establishing Religious Freedom."[242] Professor Miller writes eloquently of the bill as the embodiment of truth, reason, and civilization. He acknowledges that the "same Assembly that passed Jefferson's religious liberty bill also passed a statute requiring the observance of Sunday as a day of rest" (Bill No. 84).[243] However, Miller reflects momentarily on Bill No. 84 not to place Jefferson's church-state views in a context broader than that suggested by reference to Bill No. 82 alone, but to illustrate that despite passage of Jefferson's bill for religious liberty in 1786, enlightened views on church-state separation did not yet prevail in the Virginia legislature. In other words, Bill No. 84, in Miller's opinion, reflected a reactionary remnant in the Virginia Assembly.[244] This apparent misconstruction of Jefferson's church-state views is compounded by the failure to acknowledge that the bill punishing "Sabbath breakers" was *not* the work of reactionaries in the Virginia legislature, but was the product of the same mind that framed the "Bill for Establishing Religious Freedom."

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240. R. HEALEY, *supra* note 136, at 135.

241. J. Gurley, *supra* note 190, at 231-35.

242. W. MILLER, *supra* note 9, at 1-75.

243. *Id.* at 49.

244. Other commentators have made similar, if somewhat misleading, observations.

> In the same sheaf of bills that contained the statute on religious freedom, Madison included [Bill No. 85]. . . . [T]here can be little doubt that Madison personally disapproved of it; but the fact that he included it in the collection was significant. Such incidents proceeded from the habits of mind and unchallenged assumptions about society of a people overwhelmingly Protestant Christian. They did not constitute deliberate contradictions of enunciated principles, but were rather a result of the absence within the new state of dissenters who might challenge Virginia's government to bring all its practices into harmony with its precepts.

T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 148 (1986).

> Almost immediately after the passage of Jefferson's Statute [for Establishing Religious Freedom] the General Assembly in Virginia passed a law compelling the observance of the Sabbath as a day of rest. It should be noted that even Protestants did not always live in a spirit of forebearance and charity' toward one another.

Smylie, *supra* note 156, at 360.

The noted scholar of Sunday legislation, William Addison Blakely, reached a similar conclusion when comparing Bill No. 82 with a modern analogue of Bill No. 84 — a 1908 Act of the Virginia legislature. Blakely writes:

> In view of the preceding "act of religious freedom,". . . which still appears on the latest statute books of Virginia, as a monument of the nobel principles of religious liberty wrought out by the fathers of the Revolution, how inconsistent and out of place appears such a law as this, penalizing and making a misdemeanor honest labor on what the law denominates "the Sabbath day."

W. BLAKELY, *supra* note 179, at 641 n.2.

Miller is not alone in perpetuating these misconceptions.[245] Presuming that most major historians of the era and biographers of Jefferson were aware of these bills, as indeed they should have been, one must conclude that they chose either to ignore or suppress the fact that Jefferson may have held a more accommodating view of church-state relations than the strict separationist version of legal history would suggest.

B. History Reconsidered

The *Everson* Court perpetuated the historical omissions and errors made by virtually every historian that preceded it. Relying primarily on secondary sources, the Court's narrative reflected the weaknesses of the analyses it drew upon. When presented with the opportunity to replace earlier misreadings of history with an alternative interpretation, however, the Justices have blithely disregarded their faulty history, acting, at times, as if recognition of their predecessors' errors liberated them from the need to reconsider the historical foundations of the Court's church-state pronouncements.[246] Justice Brennan's candid statement in a parallel historical debate that "it is certainly too late in the day" to review the historical foundation upon which current doctrine rests,[247] seemingly captures the Court's attitude regarding the documented errors of the *Everson* opinions.

Arguably, the Supreme Court could not have known of Jefferson's contribution to Bills No. 83-86 prior to the 1950 publication of Julian Boyd's pioneering archival work on the revised code.[248] Boyd examined the manuscripts and legislative documents in laborious detail, attributing authorship of the revised bills to various members of the Committee of Revisors. Boyd's seminal work was the first systematic effort to identify all the bills drafted by Jefferson and those written by Wythe and Pendleton.

True, Boyd's scholarship cast new light on the revisal, especially Jefferson's influence on the reformed code. Nonetheless, the *Everson* Court writing in 1947, three years prior to the publication of Boyd's notes, had access to ample primary and secondary source material that could have alerted the Justices to Jefferson's church-state views as revealed by his complete work on the revisal. Significantly, Justice Rutledge's dissenting opinion in *Everson* reveals that the Court was well aware of the legislative history of the revisal and Jefferson's unparalleled contribution as "chairman of the revising committee and chief draftsman"

245. Even Julian P. Boyd, whose editorial notes in 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, constitute the most thorough study of the revised code yet conducted, did not comment on the ramifications of Bills No. 83-86 for the conventional interpretation of Jefferson's church-state model.

246. M. MALBIN, *supra* note 56, at 2. Supreme Court Justices, like professional historians, have an obligation to know the history they claim to rely on. Justices of the Supreme Court, James M. O'Neill observed, enjoy "no immunity from the obligations of scholarship." J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION, *supra* note 87, at 2.

247. Abington School Dist. v. Schempp, 374 U.S. 203, 257 (1963) (Brennan, J., concurring) (addressing historical validity of incorporation of establishment clause into fourteenth amendment's due process clause).

248. 2 THE PAPERS OF THOMAS JEFFERSON, *supra* note 24, at 304-665.

of the revised code.[249] The text of the revisal was available in the printed *Report of the Revisors*,[250] long before publication of Boyd's notes. Furthermore, considerable fragmentary evidence existed prior to 1947 indicating Jefferson's contribution to and endorsement of the revised code in general and Bills No. 83-86 in particular. The Court did not address this evidence.

In the 1961 opinion, *McGowan v. Maryland*,[251] the Court specifically noted Madison's sponsorship of Bill No. 84 along with the companion bill for religious freedom (Bill No. 82) and the Virginia Declaration of Rights.[252] The Court, however, confined its analysis to the issue of Sunday closing laws and declined to address the larger conflict between Jefferson's law punishing "Sabbath breakers" and the strict separationist position attributed to Jefferson by the *Everson* Court.

Everson and its immediate progeny[253] prompted the publication of numerous treatises by reputable scholars which cast doubt on the accuracy of the Court's historical narrative.[254] The Court has declined to review the conflicting historical evidence and has never repudiated *Everson*. The Court's reliance on historical analysis has waxed and waned in the four decades following *Everson*. In the 1960s and 1970s, perhaps sensitive to the severe criticism that followed its historical analysis in *Everson*, the Court retreated from its extensive reliance on history. A cautious, if not apologetic, Justice Brennan wrote in the 1963 school prayer cases, "[a] too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected . . . ."[255] "[O]ur use of the history of [Jefferson's and Madison's] time," Brennan continued, "must limit itself to broad purposes, not specific practices."[256]

In the early 1980s, the Court returned to a decidedly historical approach in two highly publicized church-state decisions.[257] After surveying American history and tradition, a slender majority on the Court, fortified by several widely discussed new works challenging the separationist version of history recounted in *Everson*,[258] affirmed public practices accommodating religious expression. In

249. Everson v. Board of Educ., 330 U.S. 1, 35 n.15 (1947) (Rutledge, J., dissenting).

250. REPORT OF THE REVISORS, *supra* note 126.

251. 366 U.S. 420 (1961).

252. *Id.* at 437-39.

253. *See, e.g.*, Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

254. *See, e.g.*, C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 31; J. BRADY, *supra* note 42; M. HOWE, *supra* note 88; J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION, *supra* note 87; W. PARSONS, *supra* note 90; Corwin, *supra* note 87; Kruse, *supra* note 87.

255. Abington School Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

256. *Id.* at 241 (Brennan, J., concurring). While Brennan acknowledged the pitfalls of an extensive reliance on history in interpretiong constitutional provisions, he affirmed in *Schempp* "that the line [the Court] must draw between the permissible and the impermissible [involvement of religion in public life] is one which acords with history and faithfully reflects the understanding of the Founding Fathers." *Id.* at 294 (Brennan, J., concurring).

257. Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983).

258. *See, e.g.*, R. CORD, *supra* note 46; M. MALBIN, *supra* note 56; McClellan, *The Making and the Unmaking of the Establishment Clause*, in A BLUEPRINT FOR JUDICIAL REFORM 295 (P. McGuigan & R. Rader eds. 1981), *reprinted in* 130 CONG. REC. S2304 (daily ed. March 5, 1984). *See generally* Howard, *The Supreme Court and the Serpentine Wall*, in VIRGINIA STATUTE, *supra* note 12, at 333-34 (brief survey of new historical research brought to the Court's attention challenging the Court's past accounts of history).

Lynch v. Donnelly,[259] for example, Chief Justice Burger argued that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[260] In the previous term, the Court maintained in *Marsh v. Chambers*[261] that if these "historical patterns" have become a "part of the fabric of our society," then they are constitutional.[262] In *Lynch* the Court held[263] that a nativity display, "[w]hen viewed in the proper context of the Christmas Holiday season," merely "depicts the historical origins of this traditional event long recognized as a National Holiday."[264] Insofar as the crèche display was not a "purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message," the establishment clause was not violated.[265] In *Marsh* the Court found[266] the opening of legislative sessions with prayer offered by a chaplain paid from the public treasury to be a practice "deeply embedded in the history and tradition of this country."[267] Legislative prayers, the Court concluded, have "coexisted with the principles of disestablishment and religious freedom" since the founding of the Republic and do not pose a real threat to the establishment clause.[268] The Court thus indicated that even an overtly religious activity, if compatible with the "original purpose" of the first amendment and supported by tradition, does not violate the establishment clause. Rather, it is "simply a tolerable acknowledgment of beliefs widely held among the people of this country."[269] The Court, once again, invited scrutiny of history as a result of its own reliance on historical analyses to inform its pronouncements.

Any thought that the accommodationist tenor of *Lynch v. Donnelly* and *Marsh v. Chambers* signaled a wholesale repudiation of the separationist version of history recounted in *Everson* was short lived.[270] In *Wallace v. Jaffree*,[271] which invalidated moments of silence in public schools for meditation or volun-

259. 465 U.S. at 668 (1984) (upholding city-sponsored crèche in public display that included secular symbols of the holiday season).

260. *Id.* at 674.

261. 463 U.S. 783 (1983) (upholding maintenance of state-supported legislative chaplain who opened each session with prayer).

262. *Id.* at 790, 792.

263. Chief Justice Burger, joined by Justices White, Powell, Rehnquist and O'Connor, delivered the opinion of the Court. Justice O'Connor also wrote a separate concurring opinion. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, and Justice Blackmun, joined by Justice Stevens, wrote dissenting opinions.

264. *Lynch*, 465 U.S. at 680.

265. *Id.*

266. Chief Justice Burger, joined by Justices White, Blackmun, Powell, Rehnquist, and O'Connor, delivered the opinion of the Court. Justice Brennan, joined by Justice Marshall, and Justice Stevens filed dissenting opinions.

267. *Marsh*, 463 U.S. at 786.

268. *Id.*

269. *Id.* at 792.

270. For an analysis of the doctrinal shifts in the Supreme Court's church-state decisions in the first half of the 1980s and the role of historical arguments in select Court rulings, see Howard, *supra* note 258, at 318-35. Professor Howard concludes that "[t]hose who expected the Supreme Court, in deciding the 1984 Term's religion cases, to continue its apparent trend toward accommodation found their hopes dashed." *Id.* at 336.

271. 472 U.S. 38 (1985).

tary prayer,[272] the Court was explicitly invited to re-examine the historical foundations of its church-state pronouncements. Chief Justice Rehnquist's dissent in *Wallace*,[273] which reads like a short course in history, recounted in detail the milieu in colonial and revolutionary America giving rise to the first amendment, culminating in the debates in the First Congress on the religion clauses.[274] His dissent was a comprehensive and scathing critique of the separationist narrative adopted by Justices Black and Rutledge in *Everson*.[275] Rehnquist bluntly chastised the majority for its unwillingness to correct the errors of its past decisions and lamented the illegitimacy of decisions based on erroneous historical analysis.[276] Significantly, Justice O'Connor in concurrence[277] and Justice White in dissent[278] were receptive to Rehnquist's suggestion. The majority, however, declined Rehnquist's challenge on the basis of precedent,[279] but it did not refute Rehnquist's account of history.

Competing versions of history were recounted, in reduced detail, in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*.[280] The case addressed the constitutionality of two religious holiday displays prominently exhibited on government property.[281] The opinions of a deeply divided

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272. Justice Stevens, joined by Justices Brennan, Marshall, Blackmun, and Powell, delivered the opinion of the Court invalidating Alabama statutes authorizing one-minute of silence in public schools for meditation or voluntary prayer. Justice Powell filed a concurring opinion. Justice O'Connor wrote an opinion concurring in the judgment. Chief Justice Burger and Justices White and Rehnquist each filed separate dissenting opinions.

273. Chief Justice Rehnquist was then an Associate Justice of the United States Supreme Court.

274. *Wallace*, 472 U.S. at 91-114 (Rehnquist, J., dissenting).

275. *Id.* at 107 (Rehnquist, J., dissenting)

> Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication. . . . [N]o amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

Id. (Rehnquist, J., dissenting).

276. *Id.* at 92 (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history.").

277. *Id.* at 81 (O'Connor, J., concurring).

278. *Id.* at 91 (White, J., dissenting) ("I appreciate Justice Rehnquist's explication of the history of the Religion Clauses of the First Amendment. Against that history, it would be quite understandable if we undertook to reassess our cases dealing with these Clauses, particularly those dealing with the Establishment Clause.").

279. *Id.* at 52-55.

280. 109 S. Ct. 3086 (1989).

281. The *Allegheny* ruling continued the highly fact-specific and contextual mode of analysis used by the Court in its earlier religious holiday display cases. For example, in Lynch v. Donnelly, 465 U.S. 668, the Court held that a municipality could maintain a crèche in the context of a larger holiday display including secular symbols of the season. A fractured Court in *Allegheny* struck down the display of a crèche on the Grand Staircase inside the Allegheny County Courthouse and upheld the display of an 18-foot menorah at the entrance to a City-County Building. In a 5-4 decision, the Court held that the crèche display, which was donated and erected by private parties, conveyed an unmistakable message that the county government endorses and promotes the Christian religion in violation of the first amendment nonestablishment provision. *Allegheny*, 109 S. Ct. at 3104 (Blackmun, J.). A majority of six Justices agreed that the menorah display, erected next to a 45-foot Christmas tree, did not constitute an impermissible endorsement of religion. The Justices were divided as to their reasons for upholding the menorah display. The judgment of the Court striking down the crèche display, delivered by Justice Blackmun, was joined by Justices Brennan, Marshall, Stevens, and O'Connor. Justice Brennan, joined by Justices Marshall and Stevens, and

Court illustrated, once again, the divergent views of American history represented on the Court and the continuing controversy generated by the Court's extensive reliance on history to inform its church-state pronouncements.[282] Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, wrote a caustic opinion, denouncing the assistance lent by the plurality "to an Orwellian rewriting of history."[283] Justice Blackmun, writing for the Court, and the Justices writing separate opinions felt compelled to rebut Kennedy's

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Justice Stevens, joined by Justices Brennan and Marshall, also wrote separate opinions concurring in the decision to strike down the crèche display but dissenting in the decision to uphold the menorah display. Justice O'Connor wrote an opinion concurring in part and concurring in the judgment, which Justices Brennan and Stevens joined in part. Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, wrote an opinion concurring in the judgment upholding the menorah display but dissenting in the decision invalidating the crèche display. The pivotal swing votes were those of Justices Blackmun and O'Connor who found a constitutionally significant distinction between the crèche display and the menorah display.

For useful analyses of *Allegheny*, see Janocsko, *Beyond the "Plastic Reindeer Rule": The Curious Case of* County of Allegheny v. American Civil Liberties Union, 28 DUQ. L. REV. 445 (1990); Note, County of Allegheny v. ACLU: *Justice O'Connor's Endorsement Test*, 68 N.C.L. REV. 590 (1990); *The Supreme Court, 1988 Term — Leading Cases*, 103 HARV. L. REV. 137, 228-39 (1989).

282. The opinions of Justice Stevens, concurring in part and dissenting in part, and Justice Kennedy, concurring in the judgment in part and dissenting in part, placed particular emphasis on history. Justice Stevens, citing strict separationist commentators John Swomley and Leonard Levy, *Allegheny*, 109 S. Ct. at 3129 nn.1-2 (Stevens, J., concurring in part and dissenting in part), examined the historical origins of the establishment clause and concluded that the provision "should be construed to create a strong presumption against the display of religious symbols on public property." *Id.* at 3131 (Stevens, J., concurring in part and dissenting in part). Justice Stevens' analysis was for the most part consistent with the historical conclusions of the *Everson* Court.

Justice Kennedy, on the other hand, adopted a version of history consistent with Justice Rehnquist's dissenting opinion in Wallace v. Jaffree, 472 U.S. 38, 91 (1985). He approvingly cited Marsh v. Chambers, 463 U.S. 783, for the proposition that "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings." *Allegheny*, 109 S. Ct. at 3142 (Kennedy, J., concurring in the judgment in part and dissenting in part). Rejecting the historical conclusions reached by Justice Blackmun and Justice Stevens, Kennedy concluded that "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *Id.* at 3135 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Justice Blackmun, delivering the opinion of the Court, took aim at the pertinence, if not the accuracy, of Justice Kennedy's account of history. Blackmun attacked Kennedy's reading of *Marsh*, arguing that a finding by the Court "that all accepted [religious] practices 200 years old and their equivalents are constitutional today" would "gut the core of the Establishment Clause, as this Court understands it." *Id.* at 3106 (Blackmun, J.). Blackmun concluded: "This Court . . . squarely has rejected the proposition that the Establishment Clause is to be interpreted in light of any favoritism for Christianity that may have existed among the Founders of the Republic." *Id.* at 3107 n.55 (Blackmun, J.).

283. *Allegheny*, 109 S. Ct. at 3146 (Kennedy, J., concurring in the judgment in part and dissenting in part). In a sharply worded opinion, Justice Kennedy accused the majority of "embrac[ing] a jurisprudence of minutiae," "[d]eciding cases on the basis of . . . an unguided examination of marginalia," and "using little more than intuition and a tape measure." *Id.* at 3144-45 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy wrote that the majority's position reflected "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents." *Id.* at 3134 (Kennedy, J., concurring in the judgment in part and dissenting in part). "Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation," Justice Kennedy continued, "requires this Court to act as a censor," and "[t]his Court is ill-equipped to sit as a national theology board." *Id.* at 3146 (Kennedy, J., concurring in the judgment in part and dissenting in part). Kennedy suggested that the Court should be more concerned with whether the government's actions either coerced citizens to endorse a religious dogma or otherwise proselytized on behalf of religion.

assertion with references to histories buttressing their respective conclusions.[284]

The Court is understandably reluctant to reconsider the historical underpinnings of four decades of church-state case law. There are indications, however, that several members of the Court are concerned that continued reliance on erroneous versions of history undermines the legitimacy of evolving church-state law. The dissenters in *Wallace* and *Allegheny*, allied with Justice O'Connor,[285] represent significant sentiment on the current Court to re-evaluate the history recounted in *Everson* and relied on by the Court for over forty years. The arguments marshaled in this Article modestly contribute to the growing evidence contradicting the 1947 decision. Given the appropriate establishment-clause controversy, it is plausible that a narrow majority on the Court would reconsider *Everson*'s historical assertions or, perhaps, abandon the facile contention that *Everson*'s discredited history of church-state developments in colonial and revolutionary Virginia governs modern establishment-clause jurisprudence.

C. *The Revised Bills and the* Lemon *Test*

An evaluation of Bills No. 83-86 in light of contemporary judicial doctrines governing church-state relations proves an illuminating exercise. Application of current first-amendment doctrine to the bills sheds light on the question of whether Jefferson and Madison consistently embraced throughout their public careers a church-state theory consistent with that of the modern judiciary. The Supreme Court, one recalls, has said that its interpretation of the first amendment is informed by the public actions of Jefferson and Madison as officers of the Commonwealth of Virginia and the national government.

Chief Justice Burger, writing for the Court in *Lemon v. Kurtzman*,[286] outlined a tripartite test for determining whether state legislation concerning religion or aid to sectarian institutions is constitutional. First, the subject statute "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "[287] At least one federal judge has linked the *Lemon* tripartite test with Jefferson's celebrated "wall" metaphor.[288]

The *Lemon* test reveals whether, pursuant to modern church-state analysis, Jefferson and Madison breached the "wall of separation" by drafting and sponsoring, respectively, Bills No. 83-86. First, the *secular* legislative purposes of the bills punishing sabbath breakers and appointing fast days would seem to be, at best, indirect, and thus constitutionally suspect. Second, the primary effect of

284. *See, e.g.*, *id.* at 3099 n.39, 3102 n.46, 3106-09 nn.53-56 and accompanying text; *id.* at 3129-30 nn.1-4, 3133 n.14 and accompanying text (Stevens, J., concurring in part and dissenting in part).

285. *See supra* note 277.

286. 403 U.S. 602 (1971).

287. *Id.* at 612-13 (*quoting* Walz v. New York Tax Comm'n, 397 U.S. 664, 674 (1970)).

288. Americans United for Separation of Church and State v. Benton, 413 F. Supp. 955, 959 (S.D. Iowa 1975) ("In recent years the Supreme Court has developed three tests to serve as guidelines to be used in determining whether the 'wall of separation between church and state' has been breached.").

both bills is arguably the advancement of religion by preserving order at places of worship and requiring ministers to preach religious sermons on days publicly set aside for prayer, fasting and thanksgiving. This also arguably violates modern constructions of the establishment clause. Third, civil magistrates would find it difficult to avoid "excessive entanglement" since to enforce these bills they would have to monitor continually religious services and the performances of clergymen.

The ironic conclusion is that Bills No. 84 and 85 of Jefferson's revised code, under current establishment clause doctrine, would probably be struck down for breaching the author's own "wall of separation." Jefferson, it seems, envisioned a more complex and less rigid view of church-state relations than his metaphoric "wall" might indicate.[289]

D. In Pursuit of Religious Freedom

It is not argued in this Article that "A Bill for Establishing Religious Freedom" inaccurately represents Jefferson's views on church-state relations, nor is it suggested that Bill No. 82 is undeserving of its place in American intellectual thought. Rather, it is argued that Jefferson's imprint on Bills No. 83-86 modifies conventional interpretations of Bill No. 82 and qualifies the separationist church-state model the *Everson* opinions attributed to Jefferson. Exclusive reference to Bill No. 82 to illustrate Jefferson's vision for American church-state relations has distorted the historical understanding of the Jeffersonian model of church-state relations for Virginia and the nation.

The "wall of separation" Jefferson constructed was intended to foster an environment in which religious freedom could flourish. His driving motivation was to place the rights of conscience beyond the control of men and statist institutions. Freedom of opinion, he believed, was violated by the establishment of a specific church. Whenever the state enforced belief in doctrine, it simultaneously burdened true religion, Jefferson thought. Furthermore, whenever the church relied on the civil government for financial support, it became a parasite on society. Thus, Jefferson believed that state churches, as a rule, corrupted civil government and religion, inhibited the emergence of truth by denying competition in the marketplace of ideas, and, as far as he could tell, brought no improvement in the morals of society.[290] No concept, therefore, better communicated his personal idea of what was best for religion and best for society than the graphic "wall" metaphor.

True, Jefferson viewed the concepts of religious freedom and separation of church and state as dependent principles. Religious freedom could not long endure, he thought, as long as the state was a party to or adopted a specific religious dogma; and the state could not disengage itself from sectarian quarrels except in a milieu of social and intellectual freedom. Therefore, he believed an institutional "separation of church and state" was the preferred means of achiev-

289. Comment, *supra* note 136, at 657-58.

290. *See generally* J. GURLEY, *supra* note 190, at 217-18.

ing religious freedom. But the "wall" was only useful insofar as it advanced the end of religious freedom.[291] If that end was best served by a limited, strategic union of church and state, Jefferson was willing to breach the "wall."

IV. CONCLUSION

Much has been written about the Jefferson image in American political thought.[292] For a century and a half, that image has been cast and recast to serve political objectives or conform to modern ideals. The record of church-state relations in revolutionary Virginia, given the Supreme Court's continuing reliance on this history to inform its first amendment pronouncements, is similarly susceptible to manipulation by "law office historians"[293] and ideologues with partisan goals. The gloss, unfortunately, often obscures the true historical Jefferson and his contribution to church-state developments in the Commonwealth and the nation.

The Supreme Court's failure to reference Bills No. 83-86, despite its reliance on Bill No. 82, calls into question the legitimacy of its selective use of history to inform legal doctrine.[294] "By superficial and purposive interpretations of the past," Mark DeWolfe Howe lamented, "the Court has dishonored the arts of the historian and degraded the talents of the lawyer."[295]

Problems arising from the Court's reliance on Jefferson stem, perhaps, from a misguided search for consistency in Jefferson's church-state views. Jefferson never endeavored to articulate a comprehensive, systematic theory of American church-state relations, although he had much to say on the subject. Moreover, his public declarations and private ruminations over a long career are not free of contradiction, as is arguably illustrated by his contributions to the revisal.[296]

Yet, a persistent theme of devotion to freedom of conscience in religious beliefs emerges from Jefferson's public life. "Separation of church and state" was not so much an end in itself as it was a *means* toward achieving the *end* of religious liberty, broadly defined. Too often students of Jefferson have viewed the "wall" in isolation, separated from the liberty it was intended to engender. Jefferson and Madison jointly sponsored five bills in the revised code of Virginia that collectively demonstrate that neither man believed, in practice, in a high and impregnable wall of separation between church and state. True, they objected to the establishment of an official church and state practices infringing upon religious freedom, such as compelled tax support for teachers of the Christian religion. The "wall," however, was never meant to effectuate a complete

291. *See* Neuhaus, *Contending for the Future: Overcoming the Pfefferian Inversion*, in THE FIRST AMENDMENT RELIGIOUS LIBERTY CLAUSES AND AMERICAN PUBLIC LIFE 188-90 (1988).

292. *See, e.g.*, D. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON (1948); A. MAPP, JR., *supra* note 111; M. PETERSON, *supra* note 7.

293. The "law office historian," imbued with the adversary ethic, selectively recounts facts, emphasizing data that supports the recorder's own prepossessions and minimizing significant facts that complicate or conflict with that bias.

294. *See supra* note 276.

295. M. HOWE, *supra* note 88, at 4.

296. *See supra* note 194 (quoting letter from Merrill D. Peterson to author (July 18, 1988)).

and absolute separation of church and state prohibiting religious influence in state-sponsored activities and laws. Jefferson's chief aim was to foster freedom of religious expression, and if that objective was best served through statutory cooperation between church and state, Jefferson appeared willing to endorse it. To Jefferson, religious liberty meant that the civil authority had nothing to do with an individual's religion except to protect the individual in the enjoyment of the right to worship God, or not, according to the dictates of one's own conscience.