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Dr. Mark J. Chadsey

ABRAHAM BALDWIN AND THE ESTABLISHMENT CLAUSE

DR. MARK J. CHADSEY†

As most readers are no doubt aware, the opening ten words of the First Amendment, known as the Establishment Clause, provide that "Congress shall make no law respecting an establishment of religion."[1]

Until recently, both courts and scholars have focused their discussion about the Founding Fathers' role in the drafting and interpretation of these words on James Madison and Thomas Jefferson. This discussion has all but ignored the positions of other important participants and, as such, has limited what could be a more complete and accurate picture of the Founding Fathers' understanding of the Establishment Clause.

Even the broader discussion of religion in the founding era tends to expand the discussion to include only a small handful of well-known political elites such as Washington, Adams, and Franklin.[2] For instance, in their work *The Forgotten Founders on Religion and Public Life*, Daniel Dreisbach, Mark Hall, and Jeffery Morrison add only ten new names to the discussion.[3]

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† Associate Professor & Chair, Department of Political Science & International Studies, SUNY College at Brockport. Dr. Chadsey would like to thank his daughter, Meghan, for her editorial assistance on this paper.

[1] U.S. CONST. amend. I.

[2] Mark A. Noll, *Forward* to DANIEL L. DREISBACH ET AL., THE FORGOTTEN FOUNDERS ON RELIGION AND PUBLIC LIFE, at xv (2009). Noll notes that Edwin Gaustad's *Faith of Our Fathers* discusses only these five individuals, as does Steven Walderman's *Founding Faith: Providence Politics and the Birth of Religious Freedom in America*, and that David L. Holmes adds only James Monroe in *The Religion of the Founding Fathers*, while Brooke Allen in *Moral Minority: Our Skeptical Founding Fathers* adds only one additional founder, Alexander Hamilton to her list. Noll notes that "[a] similar approach is taken by Frank Lambert, Richard Hughes, Steven J. Keillor, and many others." *Id.* at xv.

[3] *See id.* at xiii–xix. Their list includes Abigail Adams, Samuel Adams, Oliver Ellsworth, Patrick Henry, John Jay, Thomas Paine, Edmond Randolph, Benjamin Rush, Roger Sherman and Mercy Otis Warren.

But even this expanded view of the Founders and religion largely ignores those who participated in crafting the actual language of the Establishment Clause. Beyond Madison, there were ten other members of the House who made up the select committee assigned to formulate the first draft of the Bill of Rights;[4] the entire House membership that eventually approved the Amendments; the Senate, which played an instrumental role in revising the House's proposal—especially on the issue of religion; the state legislatures that eventually ratified the Bill of Rights; and finally, the broader public, without whose approval the first ten amendments would never have been ratified.

If a significant number of these additional participants understood the Establishment Clause differently than Madison and Jefferson, then focusing heavily on those two individuals leads us to overlook a more complete interpretation that includes these additional views. It is vital to remember that no amendment regulating the relationship between church and state could have been ratified had it violated the principles of a significant percentage of these key contributors.

If, however, most of those participants shared what has come to be accepted as Madison's and Jefferson's interpretation of the Establishment Clause, then we need not waste our time seeking their independent counsel. My purpose here is to examine the beliefs of Abraham Baldwin—a member of the House select committee that drafted the first version of the Bill of Rights—to determine if he did indeed share Madison's and Jefferson's views regarding the proper relationship between church and state.[5] Though nothing has been written about Baldwin in this context, there is sufficient information about his views on church-state relations to provide a reasonable understanding of his probable interpretation of the Establishment Clause.

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[4] 1 ANNALS OF CONG. 685–86, 690–91 (1789) (Joseph Gales ed., 1834). The ten other members were John Vining (Delaware), Abraham Baldwin (Georgia), Roger Sherman (Connecticut), George Gale (Maryland), Aedanus Burke (South Carolina), Nicholas Gilman (New Hampshire), George Clymer (Pennsylvania), Egbert Benson (New York), Benjamin Goodhue (Massachusetts), and Elias Boudinot (New Jersey).

[5] I intend to conduct a similar investigation into all nine of the other members of the select committee to determine how their views comported with Madison as well. Eventually, I hope that works such as this will inspire scholars to look beyond even this inner circle to examine the views of others in the House and Senate who were so vital to the adoption of the Establishment Clause.

It should be noted that I am not assigning Abraham Baldwin a role larger or even as large as Madison's in the drafting and ratification of the Establishment Clause. Baldwin's contribution does not need to rise to that stature for us to consider him a key player regarding the Establishment Clause. That he was there at the first stages of the drafting of the Amendment is reason enough to be invested in his interpretation. In addition, he participated in the floor votes crucial to the passage of the Bill of Rights. Baldwin's views contributed to the making of the Establishment Clause; and therefore, examining his views will help us piece together a broader understanding of the Founders and the Establishment Clause.

To further establish Baldwin's credentials we should note that Baldwin was a delegate to the Constitutional Convention, where he played a key role in the dispute over whether or not representation in the Senate would be equal for each state or proportional to population.[6] In addition, his role as a chaplain in the Revolutionary Army, his signature on the Constitution, and his service in the First Congress establish him as a Founding Father, and his service on the House select committee that drafted the first version of the Bill of Rights ensures his status as an Establishment Clause founder.

Before looking at Baldwin's views on church and state, a brief summary of Madison's and Jefferson's views, as understood by the Supreme Court, is necessary to provide the foundation for a comparison.

I. MADISON AND JEFFERSON ON CHURCH AND STATE

The link between Madison, Jefferson, and the Establishment Clause was first established by the Court in the nineteenth-century Mormon polygamy case, *Reynolds v. United States*.[7] It was in this case, as well, that the Court made original intent the foundation for understanding the Establishment Clause when it stated it would seek its meaning in the "history of the times in

[6] HENRY C. WHITE, ABRAHAM BALDWIN: ONE OF THE FOUNDERS OF THE REPUBLIC, AND FATHER OF THE UNIVERSITY OF GEORGIA, THE FIRST OF AMERICAN STATE UNIVERSITIES 96–99, 101–03 (1926).

[7] 98 U.S. 145 (1878).

the midst of which the provision was adopted."[8] In seeking this historical meaning, the Court began by noting that, prior to the adoption of the Constitution, numerous states had passed laws requiring their citizens to support religion in general and sometimes even particular religious sects.[9] Some states, the Court added, went so far as to punish those who did not obey such laws.[10]

According to the Court, the controversies that surrounded such laws led to conflicts in numerous states but seemed to have "culminate[d] in Virginia"[11] in a struggle over "a bill establishing provision for teachers of the Christian religion."[12] This bill prompted a great deal of opposition from James Madison, among others, who in response to this proposal wrote his now famous "Memorial and Remonstrance Against Religious Assessments," which helped defeat the bill.[13] Citing from that work, the Court noted that Madison had argued " 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government."[14] Madison's remonstration was instrumental not only in defeating the bill to establish religion in Virginia, but also in helping to gain passage for a bill, written even earlier by Jefferson, to establish religious freedom in Virginia.[15] And so, the Court combined its understanding of Madison's remonstration with Jefferson's bill to establish religious freedom and began to decipher the meaning of the Establishment Clause.[16] The Court quoted Jefferson's bill at length:

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[8] *Id.* at 162. For an in-depth examination of the manner in which Chief Justice Waite examined the history surrounding the adoption of the Establishment Clause, see DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 21–73 (2010).

[9] *Reynolds*, 98 U.S. at 162.

[10] *Id.* at 162–63.

[11] *Id.* at 163.

[12] *Id.*

[13] James Madison, *Memorial and Remonstrance Against Religious Assessments*, FOUNDERS' CONSTITUTION (June 20, 1785), http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html [hereinafter *Memorial and Remonstrance*].

[14] *Reynolds*, 98 U.S. at 163 (citing ROBERT BAYLOR SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA 500–09 app. (George W. Beale ed. rev. 1894) (providing Madison's Memorial and Remonstration in full)).

[15] *Id.* This bill, originally written by Jefferson, who at the time of its passage was serving as an ambassador to France, was actually guided to passage by Madison. *See* A DOCUMENTARY HISTORY OF RELIGION IN AMERICA: SINCE 1877 229–31 (Edwin S. Gaustad & Mark A. Noll eds., 3d ed. 2003) for the full text of the bill.

[16] *Reynolds*, 98 U.S. at 162–65.

> In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the church and what to the State.[17]

Following this recital from Jefferson, the Court noted that during the process of ratifying the Constitution, five states proposed amendments to the Constitution that included, among other things, a guarantee of religious freedom.[18] These requests, the Court implies, prompted Madison, in the first session of Congress, to propose the Bill of Rights, which included the guarantee of religious freedom.[19]

In seeking to further clarify the meaning of the Establishment Clause, the Court then skipped ahead thirteen years—after Madison proposed the Amendments—to examine a letter written by Thomas Jefferson to the Danbury Baptist Association.[20] Citing the now-famous passage from the letter, the Court wrote the following:

> 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 the government reach actions only, and not opinions,-I [sic] 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

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[17] *Id.* at 163.
[18] *Id.* at 164.
[19] *Id.*
[20] *Id.*

> progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.[21]

The Court, somewhat surprisingly, ignored the fact that Jefferson was not a member of the First Congress or even in the country during the time the Bill of Rights was proposed and passed, and that this letter was written thirteen years after the Establishment Clause was proposed and ratified.[22] These facts notwithstanding, the Court went on immediately to assert that "[c]oming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."[23] Nonetheless, the Court offered no evidence to support its claim that Jefferson played any role at all, much less a leading role, in the drafting or adoption of the Establishment Clause other than citing the fact that he wrote a letter to an unidentified friend "express[ing] his disappointment at the absence of an express declaration insuring the freedom of religion."[24]

Unfortunately for Mr. Reynolds, none of these guarantees of religious freedom were seen by the Court to allow him the liberty to practice his faith's commitment to polygamy.[25] As a result, his conviction under a federal statute prohibiting such activity was affirmed.[26]

The Reynolds case had very limited impact on American society because it involved a federal statute applied in the territory of Utah.[27] It did nothing to expand the restrictions on government action in the area of religion beyond the

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[21] *Id.* (internal quotation marks omitted).

[22] *Id.* at 163. The Bills of Rights were first proposed in 1789, and Jefferson wrote his letter on New Year's Day 1802. *See* James Hutson, *"A Wall of Separation" FBI Helps Restore Jefferson's Obliterated Draft*, LIBRARY OF CONGRESS, http://www.loc.gov/loc/lcib/9806/danbury.html (last visited Feb. 28, 2013); *see also* Steve Mount, *First Twelve Articles of Amendment*, U.S. CONSTITUTION ONLINE, http://www.usconstitution.net/first12.html (last modified Jan. 15, 2010).

[23] *Reynolds*, 98 U.S. at 164.

[24] *Id.* at 163.

[25] *Id.* at 166–67.

[26] *Id.* at 168. The Court determined that while "Congress was deprived of all legislative power over mere opinion, [it] was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* at 164. Subsequently, it found the act of polygamy violated such social duties and was subversive to good order. *See id.* at 165–66.

[27] *See id.* at 146.

uncontroversial prohibitions apparent in the plain language of the Amendment. That is, it merely held that Congress was prohibited from regulating religion[28]—and, given that Mr. Reynolds' conviction was upheld, one can question if it even accomplished that limited goal. It did, however, firmly plant the roots of the Court's understanding of the Establishment Clause in Madison's and Jefferson's views, thereby enshrining Jefferson's "wall of separation between church and State" position.

The real impact of the Court's understanding of the Establishment Clause came to fruition in *Everson v. Board of Education* in 1947.[29] *Everson* proved monumental in terms of its impact on American society, not so much because of its new interpretation of the Establishment Clause, which was perfectly consistent with *Reynolds*, but rather because it was the first time that the Court employed the incorporation doctrine to apply the First Amendment to the States.[30]

Everson addressed the question of whether or not a New Jersey statute authorizing reimbursement to parents of money they spent for bus transportation of their children to and from Catholic parochial schools violated the Establishment Clause.[31] The Court, citing *Reynolds*, turned to history and original intent, saying "[o]nce again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted."[32] The

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[28] *Id.* at 162.

[29] 330 U.S. 1 (1947).

[30] *Id.* at 5, 15.

[31] *Id.* at 3, 7–8.

[32] *Id.* at 8 (citing *Reynolds*, 98 U.S. at 162). A clear indication of just how incorrectly some members of the Court understood the history of the Establishment Clause can be seen in a statement by dissenting Justice Jackson: "[t]his freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity." *Id.* at 26 (Jackson, J., dissenting). The Establishment Clause ended up being first in order for several reasons that have nothing to do with the Founders placing it there to signify its importance. To begin with, several other amendments were eliminated as a result of debates and edits in the House and Senate. In fact, even in Madison's original proposal, the provision for protecting religious freedom was fourth in the line. *See* 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834). In addition, what is now the First Amendment was in fact the third amendment when the proposals were sent to the states to be ratified. This is clear from the fact that on the day that the Annals recorded the House approving the proposals of the conference committee (that worked out the differences between the House and Senate version of the amendments) the "First Amendment" was the Third amendment. The First

Court then provided a brief recitation of what it saw as the numerous religious conflicts that had driven immigrants from Europe to the Colonies and the many instances where such religious conflicts were repeated by the colonists themselves.[33] From this history, the Court concluded that "[t]hese practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence."[34]

Turning then to the meaning of the Establishment Clause, the Court said—again following the decision in *Reynolds*—that while no one colony could receive full credit for the movement that led to the First Amendment, Virginia played a particularly significant role:

> The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous 'Virginia Bill for Religious Liberty' originally written by Thomas Jefferson. The preamble to that Bill stated among other things that[:]
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> > 'Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves,

Amendment only became the first because the states did not ratify the first two amendments Congress sent to them. *See id.* at 948.

[33] *Everson*, 330 U.S. at 8–10.

[34] *Id.* at 8–11.

> is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.'[35]

Repeating *Reynolds*'s assertion, the Court stated that "[t]his 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."[36] Again, as in *Reynolds*, the Court proffered no evidence to support its allegation of Jefferson's "leading role" in the drafting and adoption of the Establishment Clause.[37] In addition, it offered no evidence, beyond the overlapping role of Madison in both cases, of any connection between the bill for establishing religious freedom in Virginia and the Establishment Clause.[38] No evidence, for instance, was offered to demonstrate that representatives from other states were even aware of the Virginia bill, much less that they saw it as a model for the Establishment Clause. Finally, the Court returned to Jefferson's famous letter, claiming, once more, that the Establishment Clause was intended to "erect 'a wall of separation between church and state.' "[39]

Despite this seemingly ironclad language, the Court upheld the tax-supported transportation reimbursement plan for children attending Catholic schools.[40] The Court found that the First Amendment did not bar New Jersey "from spending taxraised [sic] funds to pay the bus fares of parochial school pupils as a part of a general program under which it pa[id] the fares of pupils attending public and other schools."[41]

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[35] *Id.* at 11–13 (alteration in original) (footnotes omitted).

[36] *Id.* at 13 (citing *Reynolds*, 98 U.S. at 164; Watson v. Jones, 80 U.S. 679, 730–34 (1871); Davis v. Beason, 133 U.S. 333, 342 (1890)).

[37] *See id.* at 11–13.

[38] *See id.* at 11–15.

[39] *Id.* at 16 (citing *Reynolds*, 98 U.S. at 164).

[40] *Id.* at 17.

[41] *Id. But see id.* at 29, 63 (Rutledge, J., dissenting); *id.* at 19, 28 (Jackson, J., dissenting) (arguing that the tax-supported transportation reimbursement program was a violation of the Establishment Clause).

Jefferson's "wall of separation," however, proved much sturdier in many cases that followed. For example, in *Illinois* ex rel. *McCollum v. Board of Education*,[42] the Court declared unconstitutional, under the Establishment Clause, a "released time" program that had religious instructors coming onto public schools grounds to teach religious instruction to students.[43] In *School District v. Schempp*,[44] the Court declared unconstitutional a Pennsylvania school's practice of starting the day with a Bible reading, and therefore, effectively ended prayer in public schools.[45] In *Lemon v. Kurtzman*,[46] the Court declared unconstitutional statutes in Rhode Island and Pennsylvania that supplemented the pay of religious schoolteachers who taught secular classes or reimbursed religious schools for secular textbooks or instructional materials.[47] In *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*,[48] the Court held that placing a crèche on the Grand Staircase of the Allegheny County Courthouse violated the Establishment Clause.[49] In *Stone v. Graham*,[50] the Court found the posting of the Ten Commandments in public schools unconstitutional.[51]

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[42] 333 U.S. 203 (1948). Three separate references to Jefferson's wall can be found in *McCollum*: (1) Justice Black's majority opinion, *id.* at 211; (2) Justice Frankfurter's concurrence joined by Justices Jackson, Rutledge, and Burton, *id.* at 213, 231 (Frankfurter, J., concurring); and (3) Justice Reed's dissent, *id.* at 247 (Reed, J., dissenting).

[43] *See id.* at 205, 223, 231–32 (majority opinion).

[44] 374 U.S. 203 (1963). The Court does not use the term "wall of separation," but it does state that the Establishment Clause's purpose was to "create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion," clearly mimicking Jefferson's language. *See id.* at 217 (quoting *Everson*, 330 U.S. at 31–32 (Rutledge, J., dissenting)).

[45] *Id.* at 223.

[46] 403 U.S. 602 (1971). The concurring opinion by Justices Douglas and Black referenced Jefferson and Madison and Madison's *Memorial and Remonstrance. Id.* at 630, 633–34 (citing Madison's *Memorial and Remonstrance Against Religious Assessments* as quoted in *Everson*, 330 U.S. at 63).

[47] *Id.* at 606–07.

[48] 492 U.S. 573 (1989). See Justice Stevens' opinion (concurring in part and dissenting in part with whom Justice Brennan and Justice Marshall join) discussing that a "high and impregnable wall should separate government funds from parochial schools' treasuries." *Id.* at 651 n.7 (Stevens, J., concurring in part & dissenting in part) (internal quotation marks omitted) (citing Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting)).

[49] *Id.* at 578–79 (plurality opinion).

[50] 449 U.S. 39 (1980).

[51] *Id.* at 39–40, 42 (per curium).

And in *Lee v. Weisman*,[52] the Court held that when schools allowed religious figures to offer prayers as part of high school graduation ceremonies, they violated the Establishment Clause.[53]

In addition to Madison's *Remonstrance*, some members of the Court have also made reference to his *Detached Memoranda*, written late in his life as a further explanation of his views on church and state, to support the wall of separation position.[54] In *Weisman*, Justice Souter, in a concurring opinion with whom Justice Stevens and Justice O'Connor joined, argued that Madison's *Detached Memoranda* demonstrated that the Establishment Clause in its final form forbids "everything like a state religious establishment."[55] Indeed, Justice Souter went on to note, "[t]he sweep is broad enough that Madison himself characterized congressional provisions for legislative and military chaplains as unconstitutional 'establishments.' "[56]

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[52] 505 U.S. 577 (1992).

[53] *Id.* at 599.

[54] *See* Van Orden v. Perry, 545 U.S. 677, 725 n.25 (2005) (Stevens, J., dissenting); *Lee*, 505 U.S. at 617, 624 (Souter, J., concurring); Marsh v. Chambers, 463 U.S. 783, 807 (1983) (Brennan, J., dissenting); Everson v. Bd. of Educ., 330 U.S. 1, 37 n.21 (1947) (Rutledge, J., dissenting). For the complete text of the "Detached Memorandum," see James Madison, *Detached Memoranda*, *in* JAMES MADISON, WRITINGS 745–70 (1999).

[55] *Lee*, 505 U.S. at 620 (Souter, J., concurring) (internal quotation marks omitted).

[56] *Id.* (quoting Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 558–59 (1946)). Evidence that Madison's views were out of step with his contemporaries, at least through the Revolutionary War, can be seen from the following provision in the Continental Congress' Articles of War passed June 30, 1775:

> *Art.* II. It is earnestly recommended to all officers and soldiers, diligently to attend Divine Service; and all officers and soldiers who shall behave indecently or irreverently at any place of Divine Worship, shall, if commissioned officers, be brought before a 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; for the second offence, he shall not only forfeit a like sum, but be confined for twenty-four hours, and for every like offence, shall suffer and pay in like manner; which money so forfeited, shall be applied to the use of the sick soldiers of the troop or company to which the offender belongs.

2 JOURNALS OF THE CONTINENTAL CONGRESS 112 (Worthington Chauncey Ford ed., 1905) (1775), *available at* http://avalon.law.yale.edu/18th_century/contcong_06-30-75.asp.

Although it is impossible to sum up the Court's Establishment Clause position(s) in a single neat phrase, perhaps the best summary of the "wall of separation" view can be found in *Everson* where the Court held that

> [t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[57]

Of course, not all members of the Court, and certainly not all scholars, have bought into the "wall of separation" interpretation, with those opposing it arguing that the Establishment Clause left room for government to support religion on a non-preferential basis.[58] Interestingly, for the most part, both sides in this debate focus the overwhelming bulk of their attention on Madison and Jefferson, rarely bothering to consider the other participants in the process.[59] With the hope of broadening that discussion, I now turn to Abraham Baldwin.

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[57] *Everson*, 330 U.S. at 15–16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)) (internal quotation marks omitted).

[58] *See* Daniel L. Dreisbach, Everson *and the Command of History: The Supreme Court, Lessons in History, and the Church-State Debate in America*, *in* EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS ch. 2 (Jo Renée Formicola & Hubert Morken eds., 1997); DRAKEMAN, *supra* note 8, at 4 (providing brief but cogent summaries of the scholarly debate between advocates of the two sides on this issue).

[59] *See* Noll, *supra* note 2. Drakeman makes this point as well:

> Despite the name calling by both camps, church-state disputants do not necessarily differ as to which framers' vision should inform our interpretation of the establishment clause, but, rather, they seek to invoke different words or deeds of the same Founding Fathers – most commonly Jefferson and Madison – to figure out what those particular framers really meant.

DRAKEMAN, *supra* note 8, at 17.

II. BALDWIN AND THE ESTABLISHMENT CLAUSE

Multiple votes were taken in the House during the passage of the Bill of Rights in general, and several on the religion clauses in particular, but it is difficult to learn anything about Baldwin's views from these votes. In most instances, the House records do not list individual votes during the passage of the Bill of Rights.

Madison first raised the topic of amendments to the Constitution on May 4, 1789, in the middle of a House debate on import and tonnage duties. On that date, Madison merely rose and informed his colleagues that he intended to "bring on the subject of amendments to the constitution, on the 4th Monday of [that] month."[60] For whatever reason,[61] he delayed introducing the topic until June 8. On that date, and over the objections of numerous colleagues, Madison made an argument in favor of a bill of rights and presented a proposal for nine attendant amendments.[62] The fourth of these amendments included, inter alia, Madison's version of the "establishment clause" which read, "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[63] In addition, the proposals included his would-be fifth amendment, which provided that "[n]o state shall violate the equal rights of conscience."[64] After a lengthy debate that included, among other things, a discussion about whether the timing of the introduction of the topic was appropriate and whether the Committee of the Whole should take up the issue—favored by Madison—or a select

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[60] 1 ANNALS OF CONG. 257 (1789) (Joseph Gales ed., 1834).

[61] Bernard Schwartz suggests that the delay resulted from the fact that the House was still in the midst of the tonnage debate. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1006 (Leon Friedman et al. eds., 1971).

[62] The suggestion that Madison proposed nine amendments is misleading. The number is derived from his counting system. Because Madison folded many rights into single provisions he actually proposed many more than what we would today consider nine provisions. For instance, his fourth provision included protections for religious freedoms, freedom of speech, freedom of the press, freedom of assembly, freedom to petition government, the right to bear arms, freedom to avoid military service because of religious beliefs, a prohibition against quartering soldiers, double jeopardy, property rights, protection against self incrimination, and many other protections. 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

[63] *Id.*

[64] *Id.* at 452.

committee, the House voted in favor of referring the issue of amendments to the Committee of the Whole.[65] The House then adjourned.

Madison next raised the topic on July 21, when he again asked the House to consider the issue of amendments.[66] In accordance with the June 8 vote, he asked the House to resolve itself into a Committee of the Whole, but this proposal was rejected and the members, having apparently changed their minds, instead voted to refer the topic to a select committee comprised of one member from each state.[67] It was this committee on which Baldwin sat, and it was this committee that wrote the first draft of the Establishment Clause that was considered and debated by the House.[68] It is worth noting that the whole House never debated Madison's original proposal.[69] It served as a prompt for action by the select committee, but never even rose to the level of formal discussion in the House itself.

History seems to have left us very few direct clues to the role Abraham Baldwin played on the select committee or in the drafting of the Establishment Clause. There is no known record of the deliberations of the select committee. Nor, apparently, did Baldwin leave any notes or personal papers that describe his role on the committee or that describe his understanding of how the Establishment Clause was to be understood. Still, certain things we do know.

To begin with, we know that the committee considerably changed Madison's first proposal for dealing with the issue of religious freedom. Madison's original proposal read as follows: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[70] The breadth of this language was narrowed substantially by the time this proposed amendment emerged from the select committee. The end product of the committee's work was reported to the House on July 28, 1789 by the chair of the select committee, John Vining of

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[65] *Id.* at 459–68.

[66] *See* BARRY ADAMSON, FREEDOM OF RELIGION, THE FIRST AMENDMENT, AND THE SUPREME COURT: HOW THE COURT FLUNKED HISTORY 82 (2008).

[67] *Id.* at 82–83.

[68] *See id.* at 82–84.

[69] *See id.* at 83.

[70] 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

Delaware, and was "ordered to lie on the table."[71] No record of the actual proposed amendments appears in the *Annals of Congress* on that date. The first time the committee's proposal for restrictions against congressional interference with religious liberty appears in the congressional record is on August 15th, and it provides that "no religion shall be established by law, nor shall the equal rights of conscience be infringed."[72]

While the committee's proposal certainly followed Madison's lead in attempting to protect religious liberty, Schwartz's claim that the committee "made no substantial alteration in the original Madison draft"[73] is certainly not correct. Gone was the entire first section that prohibited interference with anyone's civil rights on account of religious worship. Gone also was the very expansive language of Madison's last section guaranteeing that rights of conscience would not in "any manner, or on any pretext" be infringed.[74] In its place was the much less expansive guarantee that "equal rights of conscience [shall not] be infringed."[75]

It is difficult to imagine that Baldwin, with his strong reputation for exerting influence in committee work[76] and his very different views regarding the interplay between church and state—when compared to Madison, as I will document later— did not play a role, or at least support others who did play such roles, in the narrowing of this language.

Unfortunately, the Congressional records also provide us with no insights into Baldwin's role in the changes that occurred to the language of the Establishment Clause after the select committee made its report. For instance, on August 15th, the House, sitting as a Committee of the Whole, voted to change the language of the "establishment clause" from the language proposed by the select committee—" '[N]o religion shall be

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[71] *Id.* at 699.

[72] *Id.* at 757.

[73] 2 SCHWARTZ, *supra* note 61, at 1050.

[74] 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

[75] *Id.* at 757.

[76] As a legislator, Baldwin was not known for his great speeches, or for speaking publically at all. He did, however, develop a reputation for exerting great influence in committee meetings and through private conversations. *See* WHITE, *supra* note 6, at 85; *see also* E. MERTON COULTER, ABRAHAM BALDWIN: PATRIOT, EDUCATOR, AND FOUNDING FATHER 120 (1987). Dr. Coulter claims, "[w]ith his sound wisdom and friendly personality, he exerted a greater power in directing the work of Congress than others did by days and days of empty oratory." *Id.*

established by law, nor shall the equal rights of conscience be infringed' "[77]—to the language proposed by Representative Samuel Livermore: "Congress shall make no laws touching religion, or infringing the rights of conscience."[78] While the *Annals* say that Livermore's proposal was "passed in the affirmative" by a vote of thirty-one for and twenty against, they do not record the individual votes of House members.[79] The same is true of the August 20th vote in the House, which occurred after a motion by Representative Fisher Ames changing the wording to, " 'Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.' "[80] In this instance the *Annals* only record the proposal as "adopted."[81]

The second proposal Madison made regarding religious liberty was directed toward the states. In his original proposal, on June 8th, Madison put forth an amendment providing that " 'no State shall infringe the equal rights of conscience.' "[82] During the House debate on this provision, on August 17th, he said that he "conceived this to be the most valuable amendment in the whole list."[83] In defense of this prohibition he argued, "[i]f there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments."[84]

The select committee left this proposal intact, as evidenced by the discussion in the *Annals* on August 17th.[85] But again the House records tell us nothing about how Baldwin voted on this amendment because all the *Annals* tell us with respect to this vote is that the proposal was "agreed to";[86] however, even here tallies are missing.

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[77] 1 ANNALS OF CONG. 757 (1789) (Joseph Gales ed., 1834).

[78] *Id.* at 759.

[79] *Id.*

[80] *Id.* at 796.

[81] *Id.*

[82] *Id.* at 783. That Madison was thinking in terms of religious liberty when he used the words "rights of conscience" is clear from the fact that he used the same term in his proposal to bar Congress from infringing on religious liberty. *See id.* at 451; *see also supra* notes 70, 74–77 and accompanying text.

[83] 1 ANNALS OF CONG. 784 (1789) (Joseph Gales ed., 1834).

[84] *Id.*

[85] *Id.* at 783–84.

[86] *Id.* at 784.

Nonetheless we have ample evidence to conclude that Baldwin opposed the amendment prohibiting the states from interfering with religion. This proposal was eliminated in the Senate's version of the Bill of Rights and never found its way back thereafter. The evidence of Baldwin's disagreement with Madison regarding this provision can be found in a letter to his brother-in-law, Joel Barlow, on September 13, 1789, in which he writes, " '[t]he Senate has concurred in the greater part of our proposed amendments of constitution, they have struck out three or four of the worst.' "[87]

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[87] Letter from Abraham Baldwin to Joel Barlow (Sept. 13, 1789), *in* 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789 – 3 MARCH 1791, at 1536 (Charlene B. Bickford et al. eds., 2004). Baldwin wrote several other letters in which he made reference to the amendments. For instance, on 29 September 1789, he wrote the following to Barlow, " 'We have agreed in recommending some conciliatory amendments, about trial by jury, liberty of press, all power not given reserved &c. which will do no hurt and may give ground to antifeds to wheel about with a salve to their pride.' " Letter from Abraham Baldwin to Joel Barlow (Sept. 29, 1789), *in* DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra*, at 1642. His language regarding the amendments, " 'which will do no hurt and may give ground to antifeds to wheel about with a salve to their pride[,]' " certainly does not read like a ringing endorsement of the amendments. *See id.* And earlier on June 14, 1789, again writing to Barlow, he stated the following:

> A few days since, Madison brought before us propositions of amendment, agreeably to his promise—to his constituents. Such as he supposed would tranquillize [sic] the minds of honest opposers without injuring the system. viz. 'That what is not given is reserved, that liberty of the press & trial by jury shall remain *inviolable*, that the representation shall never be less than one for every 30,000 &c.' ordered to lie on the table. We are too busy at present in cutting away at the whole cloth, to stop to do any body's patching.

Letter from Abraham Baldwin to Joel Barlow (June 14, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra*, at 774–75. And even earlier on March 1, 1789, he wrote to Barlow the following:

> The advocates for amendments [*to the Constitution*] will be but few, perhaps two from Massachusetts, four from New York, four from Virginia, and three from South Carolina in the house of representatives, and the Senators of Virginia, and of this state if they ever agree to appoint any; I should rather say antifeds, for perhaps the feds. may agree—to propose some amendments after they have got through the business of their first session.

Letter from Abraham Baldwin to Joel Barlow (Mar. 1, 1789) (alteration in original), *available at* http://consource.org/document/abraham-baldwin-to-joel-barlow-1789-3-1/.

In addition to the proposal to bar states from interfering with religious liberty, the Senate had rejected only the House's proposal on appeals to the Supreme Court and the guarantee of trial by jury in criminal matters—which would be reinserted in the conference committee that resolved the differences between the House and Senate versions of the amendments.[88] Therefore, when Baldwin wrote that the Senate had eliminated three or four of the worst proposals, he must have been referring to, among other things, the prohibition against states interfering with rights of conscience. It was, after all, the single most significant change the Senate made and would not have gone unnoticed by Baldwin. Nor does Baldwin suggest that the Senate erred in any of its edits. If he had, it might have caused confusion about which of the Senate's edits he considered deserving of the axe and which he considered mistakes on their part. But because his language was inclusive, he leaves us with no doubt that he considered the prohibition against states interfering with rights of conscience to be among the worst of Madison's proposals.

That Baldwin used the phrase "three or four of the worst" in referring to the Senate's changes strongly suggests that he found other amendments objectionable as well. Whether these included the Establishment Clause is certainly unclear, but given his own words and actions, which I will turn to next, it is at least possible he objected to the church/state issue as well.

We also know that on September 24, 1789, Baldwin did vote to approve the Bill of Rights, which included the Establishment Clause. On this particular vote, the *Annals* record how each member voted.[89] Whether that signified his approval of the Establishment Clause cannot be determined because the House voted on the entire Bill of Rights collectively rather than each amendment individually. This vote might indicate that he approved of the Establishment Clause, at least as he interpreted it, or he may have voted to approve it, despite reservations, because he viewed the benefits of the entire Bill of Rights as outweighing any reservations he had about that particular provision.

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[88] SCHWARTZ, *supra* note 61, at 1146–47.

[89] 1 ANNALS OF CONG. 948 (1789) (Joseph Gales ed., 1834).

If the only evidence of Baldwin's views regarding the proper relationship between church and state was this limited record, we would be hard-pressed to draw any conclusions about his views. Fortunately Baldwin left us a rich and detailed record on this issue with which we can interpret his understanding the Establishment Clause.

III. ABRAHAM BALDWIN'S BACKGROUND

Abraham Baldwin traced his roots in America back to his great-great-great-grandfather Nathaniel Baldwin, who was among a group of Puritans who sailed from Devonshire, England, in 1639.[90] In New England, his paternal Puritan grandfathers were employed either in military service or as blacksmiths. Abraham Baldwin was born on the eve of the American Revolution in November 1754, and was one of the five children of blacksmith Michael Baldwin and his wife Lucy. She died giving birth to her fifth child in 1758 when Abraham was just four years old, and his father married Theodora Walcot in 1768. They had seven more children. Abraham played an important role in providing for the education of a number of his half brothers after the death of his father in 1787.[91] Among his full siblings was Dudley, who studied divinity at Yale but chose a legal career over the ministry;[92] two sisters who died in childbirth; and Ruth, who married the well-known poet and diplomat, Joel Barlow. Barlow was a lifelong friend of Abraham and had been his student when the latter was a tutor at Yale. Abraham's seven half-siblings included William, who died in childhood, and Michael, who graduated from Yale, moved to Ohio, practiced law, was a delegate to the convention that drafted Ohio's constitution, and served as Speaker of the House in Ohio. His other half-brother, Henry, also graduated from Yale, then moved to Pennsylvania, practiced law, was elected to Congress, and became an Associate

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[90] The brief biographical sketch that follows is derived from the two biographies of Baldwin. *See generally* COULTER, *supra* note 76; WHITE, *supra* note 6.

[91] *See* COULTER, *supra* note 76, at 123.

[92] One of Abraham Baldwin's biographers reported that Dudley "studied for the ministry but engaged in the practice of law in Fairfield." WHITE, *supra* note 6, at 14–15. His other biographer, Dr. E Merton Coulter, reports that Dudley "became a minister and lawyer." COULTER, *supra* note 76, at 22.

Justice of the United States Supreme Court. Three of his half-sisters married lawyers, while the fourth married an army officer.

Little is recorded of Abraham Baldwin's childhood, although his first biographer, Henry White, speculates that it was one of "decorum, gravity, obedience to the elders and strict observance of the teachings and admonitions of the church and 'minister' "—exactly what one would expect of a Calvinist childhood in Connecticut in the mid-eighteenth century.[93] He entered Yale College in 1768 at the age of fourteen and graduated four years later. Yale was run by a corporation of ministers, and its primary purpose at the time was to train more ministers. The curriculum was "weighted with the classical languages, Latin and Greek, and it was necessary to be able to read and translate a certain amount of these languages as an entrance requirement. A religious atmosphere prevailed on the campus, aided by frequent chapel attendance, courses in theology, and the Hebrew language."[94]

Debates, a common occurrence on campus, included topics such as "Was the Noah Flood universal?"[95] and "Will all the human race finally be saved?"[96]

After graduating, Baldwin remained at Yale studying divinity for an additional three years and was licensed as a minister by the New Haven Association of Ministers in 1775. Upon completing his divinity studies at Yale, he took a position at the school as a tutor in 1776—the year independence was declared and the Revolutionary War began in earnest[97]—which he held until he resigned to become a chaplain in the Revolutionary Army in 1779, serving in Brigadier General Samuel H. Parson's Connecticut brigade. He spent most of his time in the military assigned to the relatively quiet Hudson River Valley, "where he established ties with both Washington and

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[93] WHITE, *supra* note 6, at 17.

[94] COULTER, *supra* note 76, at 22.

[95] *Id.*

[96] *Id.*

[97] Notable students tutored by Baldwin included the aforementioned Joel Barlow; Noah Webster, author, champion of spelling, lexicographer and editor; Oliver Wolcott Jr., Secretary of the Treasury from 1795 to 1800 under President Washington and Governor of Connecticut from 1817 to 1827; and Joshiah Meigs, who later succeeded Baldwin as President of Georgia State University.

Nathanael Greene."[98] These ties, especially to Nathanael Greene, would prove instrumental in his post-war life.[99] He remained a chaplain until the end of the war in June of 1783.[100]

IV. BALDWIN ON CHURCH AND STATE

Baldwin's years of service as a chaplain provide us with several pieces of evidence regarding his early views on church/state relations.[101]

Consider that he took the position as a chaplain in the Revolutionary Army. In his *Detached Memorandum*, Madison argued that "[t]he law appointing Chaplains establishes a religious worship,"[102] which he saw as a violation of the Establishment Clause and of the principle that it represented. That Baldwin took such a position, albeit before the Establishment Clause had ever been contemplated, suggests strongly that he did not believe that the proper regulation of church/state relations required such a level of separation.

It was while serving as a chaplain that Baldwin wrote two sermons that, by inference, shed light on his thoughts about the relationship between church and state. He drafted both sermons following unfortunate events during the course of the Revolutionary War. The first is a sermon he intended to deliver at the hanging of the young British officer Major John André.[103] André had been convicted of spying in connection with Benedict Arnold's attempt to turn West Point over to the British.

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[98] *Abraham Baldwin, Representative from Georgia*, *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 87, at 550.

[99] *See id.*

[100] *See id.*

[101] For a broader discussion of the often political nature of American Chaplains' duties in the Revolutionary War, see Howard Lewis Applegate, *Duties and Activities of Chaplains*, *available at* David Library of the American Revolution.

[102] *Memorial and Remonstrance*, *supra* note 13 (discussing the portion dealing with religion and war).

[103] Patrick J. Furlong, *An Execution Sermon for Major André*, 51 N.Y. HISTORY 63, 64 (1970). Furlong notes that "James T. Flexner, in *The Traitor and the Spy: Benedict Arnold and John André* (New York, 1953), 391, says that André refused clerical attendance, but he cites no contemporary evidence." *Id.* at 63 n.1. Baldwin himself, in a note attached to the sermon, writes, "[p]roposed by the desire of the Adjutant General, to be spoken at the execution of Maj. André, but as he did not request it, I concluded not to attend." *Id.* at 65.

Baldwin was just short of 26 years old when he penned it on September 30, 1780. In the sermon Baldwin freely interlaces issues of church and state. He began by acknowledging the confusing array of emotions that many witnesses to the execution were no doubt feeling. These included most especially the contradictory "resentment"—apparently directed toward André's crime of spying—which were "joined to most poignant exercises of compassion" toward Major André, who had endeared himself to many of the continental officers.[104] Baldwin then proceeded to a brief discussion of natural and positive law and their respective roles in civil society. His discussion led him to a defense of capital punishment, wherein he noted the following:

> [o]ur laws are our only security, they are the band which unite the interest & happiness of the whole, the punishments which are annexed as sanctions to them are an indispensible part, our duty to ourselves to our fellow men and the most solemn of all engagements are pledged for the support of them.[105]

He added that "[h]owever gloomy therefore the transaction of which we are now to be witnesses yet in this view the tenderest feelings of the most lively sensibility cannot wish it to be reversed."[106]

Baldwin, perhaps wishing to move to a less melancholy topic, spent most of the remainder of his sermon telling his would-be audience that Benedict Arnold's plot was foiled by "[t]he all seeing God" who refused to "leave the fate of half the discovered world to be controlled and jumbled by blind chance . . . ."[107] Finally, as if God's assistance in uncovering the villainy of a traitor were not enough, he suggested that the Almighty had taken sides in the conflict when he wrote, "[o]ur Country, our Commander, & our Army are the special care of that holy Providence."[108]

Baldwin's second sermon likewise provides, albeit indirectly, insights into his thoughts about church/state relations. At the time Baldwin delivered this sermon on May 11, 1782, he was

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[104] *Id.* at 66.

[105] *Id.* at 68.

[106] *Id.* On the topics of natural/positive law and capital punishment, Baldwin is picking up on themes he had reviewed in the dissertation he presented for his license to practice law. *See* Abraham Baldwin, Dissertation Examination Address (unpublished dissertation) (on file with Yale University Library).

[107] Furlong, *supra* note 103, at 69.

[108] *Id.*

nearly 29 years old. The sermon was addressed to the Connecticut Line of the Revolutionary Army, whose soldiers had planned a mutiny that was hatched just one week prior. Private Lud Gaylord had been convicted and was to be hanged for his role in the mutiny two days after Baldwin delivered the sermon. Baldwin began the sermon by noting that "[i]n the business of this Days exercises I am about to leave the sacred theme which has usually employed me in the duties of my office, to address you upon a subject which your present particular situation renders no less necessary."[109]

And leave the sacred theme he did. His sermon made not a single reference to God, religion, or the Bible.[110] Indeed, the entire sermon addressed purely political and military issues. He began by reminding the Connecticut troops that they lived in a country that cherished mankind's unalienable rights, most particularly liberty, and that "[o]ur possessions, our freedom, and our lives, are not subject to any individual, or any body of men on earth, only to be directed by our own good . . . ."[111] He told them there were "distant tyrants" who wished to deprive them of those liberties.[112] He reminded them that at the start of the war they were a "free and scattered people" without a "common head to unite and direct [their] exertions."[113] He said that as soldiers "[t]hey must *for a time implicitly* resign their personal liberty to be *entirely* directed by some one of themselves as their head, or else they must resign it *forever* to be at the mercy of every invader."[114]

He then turned to the subject of their mutiny, excoriating them for their behavior, claiming they had betrayed themselves and their country. He told them that if they wished to engage in

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[109] Patrick J. Furlong, *Memoranda and Documents: A Sermon for the Mutinous Troops of the Connecticut Line, 1782*, 43 NEW ENG. Q. 621, 624 (1970).

[110] *See id.* at 629. He made one passing reference to a "satanic system of guile" which he claimed the enemy had used to pray upon the American troops, but he almost certainly did not mean this literally. *Id.* Elsewhere Furlong writes that Baldwin had "placed a note at this point, and wrote in the margin: 'an Arnold was found—an Imp of Satan, even among those who were placed in high military trust[,]' " but this too was probably not meant literally, nor does it appear he included it in his spoken sermon because the line in the main text referring to the betrayal references neither Benedict Arnold nor Satan. *Id.* at 629 n.9.

[111] *Id.* at 624.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 625.

such mutiny they should let neither "guards" nor "centinels" stand in their way, but rather they should hurry home to "aged Parents and friends, and their helpless offspring" and proclaim themselves deserters.[115] Then they should turn and watch the enemy "fatten themselves on the bowels of our country."[116] And he told them they might "hold out [their] own necks to receive the chains which shall hold [them] down in that perpetual slavery which such baseness and such treachery deserve."[117]

Although he never used Washington's name, he reminded them that their mutiny risked emboldening their enemy such that it might "unite[] rage against [their] General . . . who like a mountain at our head has braved all the storms to shelter us" and that such actions by "a rabble of [m]utineers" would "see him deserted and left to stand alone against them."[118]

Having completed this blistering reproach, he changed tack, suggesting he had gone too far. In an apparent effort to convert whatever anger his words had provoked to shame, he told the soldiers he knew them too well to believe they were the authors of the plot, suggesting instead that they had been "duped" and "deceived" by the enemy.[119] He then urged them to unite again to "seize the prize which even now rises upon us" and take their anger out on the enemy.[120]

The sermon, because of its utter lack of religious references, reveals nothing about Baldwin's religious views. It does, however, much like his sermon on the occasion of Major André's execution, tell us that at this point in his life he had virtually no qualms about mixing his role as a chaplain with politics.

Taken together, these two sermons, embracing as they do the topics of natural and positive law, the right of individuals to own private property controlled only by their own vision of good, capital punishment, God's role in the outcome of the war, political liberty, the proper and improper grounds for surrendering that liberty, patriotism, mutiny, and military duty, can be seen as nothing other than political speeches from the pulpit.

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[115] *Id.* at 626.
[116] *Id.* at 627.
[117] *Id.*
[118] *Id.* at 627–28.
[119] *Id.* at 628.
[120] *Id.* at 630.

Moreover, there is good reason to believe Baldwin had contemplated the issue of church/state relations at considerable length before delivering this sermon. He was, after all, literally one of the best-educated men in America, having graduated from Yale and gone on there to complete his studies in divinity. Moreover, he was a licensed minister in Connecticut and had already been offered the Professorship of Divinity at Yale, certainly one of the most prestigious professorships in the young country. It is worth noting that both of his biographers report that he turned the position down, in part because of the conflicts he had witnessed between the corporation of ministers who ran Yale and the state government of Connecticut.[121]

In addition, he had come of age during the years leading up to the revolution and was certainly aware of the role resentment and fear about religious issues, particularly the possibility that Parliament would appoint an Episcopacy for America, had played in spurring the revolution.[122] Nor can we forget that he was just three generations removed from the Puritans who had come to America to escape religious persecution in England, much less that he was raised within a day or two's ride from the very places where Roger Williams and Anne Hutchinson had raised such disturbances with their own brand of Puritanism.

Even so, we should perhaps be cautious about reading too much into these two sermons. Baldwin was, after all, only in his twenties when he wrote them and it would be nine years in the case of the first sermon, and seven years in the case of the second, until he served with Madison on the select committee that would draft the first version of the Bill of Rights. His views may well not have reached maturity on the topic of church/state relations, however much thought he had given to the topic.

One final event in Baldwin's life during his period as a chaplain—February 1778–July 1783—is worth noting. He studied law, on his own and without the assistance of a tutor or in an apprenticeship, and appeared before the Examination Counselors in Connecticut where, after he successfully delivered his dissertation, he was licensed to practice law.[123]

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[121] *See* COULTER, *supra* note 76, at 31; *see also* WHITE, *supra* note 6, at 31–32.

[122] *See* PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY AND POLITICS IN COLONIAL AMERICA 199–209 (1986); *see also* SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 361–64 (1972).

[123] COULTER, *supra* note 76, at 33.

Rather than remain in Connecticut after the war and begin his legal practice or return to the ministry, Baldwin headed for Georgia. His career was launched posthaste as he applied to practice law there on January 14, 1784. Coulter reports that his request was granted by the state legislature on January 20th, in spite of a state law passed that same day requiring non-native applicants to pass a special test and wait six months before beginning practice in Georgia.[124] Charles Beard claimed "[h]e soon rose to eminence in his profession, and was reckoned among the ablest and shrewdest lawyers."[125] On February 25th, he was appointed a trustee of the as yet nonexistent State University.[126] Then on October 22, 1784, he was granted two-hundred acres of land in Wilkes County under a state statute giving such land to anyone willing to move to that county.[127] Finally, in December of 1784—a very good year for Baldwin—he was elected to the state legislature from Wilkes County.

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[124] *Id.* at 39–40.

[125] CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 74 (2004). Beard wrote that Baldwin's "father was evidently well-to-do, for [Baldwin] enjoyed the advantage of a classical education at Yale before he established himself in the practice of law at Savannah, Georgia." *Id.* Given that Baldwin's father was a blacksmith who raised seven children with two wives, the first claim about Baldwin's father being well-to-do is almost certainly not true. Moreover, Beard's portrayal of Abraham Baldwin as a man of wealth does not comport with Baldwin's own assertions. For instance, in November of 1789, Baldwin wrote to the Speaker of the Georgia House of Representatives to complain that if he did not get paid for his services as a delegate to the Confederate Congress in New York, he could not "think of returning to that place, without being enabled in some measure to meet the expectations of those [*his creditors*] who have so long reposed confidence in [his] promises." Letter from Abraham Baldwin to the Speaker of the Georgia House of Representatives (Nov. 23, 1978), *in* 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 87, at 1717. See also his letter to Joel Barlow in which he says of his Congressional compensation that "our receipt is barely a support, nothing laid up[,]" Letter from Abraham Baldwin to Joel Barlow (Dec, 3, 1796) (on file with Yale University Library), and a letter to his sister Ruth "I have never in my life any ways concerned in any kind of buying or selling for gain, from which you must conclude I am worth but a trifle." Letter from Abraham Baldwin to Ruth Baldwin Barlow (Dec. 16, 1797) (on file with Yale University Library). That Baldwin would find himself hard pressed financially is not difficult to believe given that he spent most of his adult life as a public servant in either the Georgia state legislature, which paid $3.00 a day (only while in session), or as a Member of the federal House of Representatives and Senate, which paid a whopping $6.00 a day (again only while in session). COULTER, *supra* note 76, at 41, 123.

[126] COULTER, *supra* note 76 at 40.

[127] *Id.* at 37.

Early the following year, Baldwin, almost immediately after he was seated in the state legislature, was elected by that body to be a delegate to the national Confederate Congress—which existed under the Articles of Confederation—where he continued to serve until the Confederate Congress dissolved itself after the ratification of the Constitution. During this period, he did double duty as both a state and national legislator because of a provision in the Georgia Constitution that made all Georgia representatives in the Confederate Congress members of the state legislature as well. How frequently Baldwin attended the sessions of the state legislature is unclear. However, what is clear is that during his service to the Georgia state legislature, he authored several pieces of legislation that provide invaluable insights into his thinking about church/state relations.

Baldwin's biographers state that he had been drawn to Georgia for several reasons. While serving in the Continental Army, he became friends with General Nathanael Greene, who had so impressed the people of Georgia with his military skills during the Revolutionary War that they awarded him a large tract of confiscated Loyalist property. Both biographers—White and Coulter—agree that General Greene encouraged Baldwin to migrate to Georgia.[128] Both biographers also posit that Baldwin was probably enticed to move to Georgia by fellow Yale graduate, Gover Lyman Hall, who directly or through Ezra Stiles—then president of Yale—asked Baldwin to move to Georgia to help establish the first publicly-funded university in the nation.[129] It is not surprising then that the first piece of legislation that Baldwin shepherded to enactment, only eight days after joining the legislature, was a charter for this school. This charter provides irrefutable evidence into Baldwin's thoughts about church/state relations.[130] It begins with a preamble that explains

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[128] *Id.* at 35–36; *see also* WHITE, *supra* note 6, at 33–34.

[129] *See* COULTER, *supra* note 76, at 36; WHITE, *supra* note 6, at 34–35.

[130] *See* COULTER, *supra* note 76, at 41; WHITE, *supra* note 6, at 26–27. Baldwin played key roles in a number of important state issues during his time as a Georgia state legislator that are not central to my thesis, but are worth noting. He played peacemaker in a dispute between upstate and downstate rivals over the change in location of Georgia's state capital and the removal of archived records attendant to that move. He helped persuade the Georgia legislature of the need to grant the Confederate Congress authority to impose levies on imports, a provision which ultimately failed due to the refusal of Rhode Island to agree; he sat on a committee that forced citizens of Augusta to accept paper money as legal tender; and he sat on committees that proposed debt and tax relief.

Baldwin's understanding of the connection between public education and religion:

For the more full and complete Establishment of a public School of Learning in this State: [Approved Jan. 27, 1785]

> As it is the distinguishing happiness of free governments that civil order should be the result of Choice and not necessity, and the common wishes of the People become the Laws of the Land, therein public prosperity and even existance [sic] very much depends upon Suitably forming the minds and Morals of their Citizens. WHERE the minds of People in general are viciously disposed and unprincipled and their conduct disorderly, a free Government will be attended with greater confusions and with Evils more horried [sic] than the Wild uncultivated State of Nature—It can only be happy where the public principles are Opinions are properly directed and their manners regulated. This is an influence beyond the Stretch of Laws and punishments and can be claimed only by Religion and Education[.] It should therefore be among the first objects of those who wish well to the National prosperity to encourage and support the principles of Religion and Morality, and early to place the Youth under the forming hand of security that by Instruction they may be moulded [sic] to the love of Virtue and good order . . . .[131]

In this preamble, Baldwin answers a core challenge faced by all democracies: how do democratic societies prevent their citizens from using their right to participate in politics as nothing more than a tool for self-interested behavior? Or to use his language, how do they prevent this self-interested nature from unleashing "greater confusions and . . . [e]vils more horried [sic] than the Wild uncultivated State of Nature[?]"[132] Baldwin feared

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[131] *University of Georgia, reprinted in* 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA pt. 2, 363–64 (Allen D. Candler ed., 1911) [hereinafter COLONIAL RECORDS]; *see also The First Charter for a State University in This Country*, 5 GA. REV. 7, 7 (1951) [hereinafter *The First Charter*]. Baldwin made a speech to the Georgia State University's Board of Trustees, of which he was a member, prior to drafting the University's charter in which he made very similar remarks about the need for civil society to inculcate religious values through public education. Addressing the issue of how civil societies regulate the "passions and actions of men," he claimed the following: "The only methods by which Society pretends to claim this influence over its subjects are included in two words *Religion* and *education*." Abraham Baldwin, Speech to the University of Georgia Trustees (Feb. 28, 1785), *reprinted in* E.M. Coulter, *Abraham Baldwin's Speech to the University of Georgia Trustees*,10 GA. HIST. Q. 326, 327 (1926).

[132] COLONIAL RECORDS, *supra* note 131, at 363.

that "viciously disposed and unprincipled" men in society could cause problems "more horried [sic] than the Wild uncultivated State of Nature" precisely because in civil society men could use the instruments of government, nonexistent in the state of nature, to oppress their neighbor.[133] Here we find Baldwin wrestling with an issue that troubled many of the nation's most educated elites.[134]

These kinds of questions were largely unique to American leaders in the post-revolutionary period because virtually no other nation, save England—and there only to a lesser degree—allowed such broad political participation. As a result, leaders like Baldwin who were beginning the business of governing the first modern republic had no contemporary models to study or copy when seeking solutions to such issues. Baldwin's classical education at Yale would have made him acutely aware of the many ways Greece and Rome had faltered in answering these difficult questions. America had to chart a new course and find new answers. But that new course could not depend simply upon any system of "[l]aws and punishments" alone to provide the answer.[135] Keeping citizens in line with nothing but the threat of laws and punishments was the answer of virtually every other autocratic government in this world. But such measures would not work in a nation where self-interested citizens could simply elect leaders to change the laws and eliminate the punishments. In a democracy, citizens would somehow have to be trained to desire civil order through "choice" rather than "necessity." But how was this to be accomplished? For Baldwin, the answer was to be found in the creation of a new democratic citizen who would emerge from a public educational system infused with the teachings of religion and morality.

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[133] *Id.*

[134] The most well-known analysis of this dilemma can be found in Federalist No. 10 written by James Madison. Madison's solution, not surprisingly, differs in almost every respect from Baldwin's. Madison proposes a constitutional response to the issue. For him, the answer lies in taking some decision-making authority away from states, where local factions can control state legislatures, and giving that power to the national government. In his view, the greater number of factions that would have to compete for control over policy-making decisions at the national level insures the creation of a pluralistic society where factions solve the problem by keeping each other in check. *See generally* THE FEDERALIST NO. 10 (James Madison).

[135] COLONIAL RECORDS, *supra* note 131, at 363.

The solution depended upon public education because the American Republic would need a large percentage of educated citizens if its experiment with self-government was to succeed. The handful of private colleges and universities that existed at the time—Columbia, Yale, Harvard, and William & Mary—could not be expected to meet this demand.

It is important to note that Baldwin was not merely writing a charter for a public university; he was writing a charter for an entire public school system. In section one of the charter, Baldwin wrote that the Board of Trustees that oversaw the school system would have "general superintendance [sic] and regulation of the Legislature of this State, and [in] particular[,] of the public seat of Learning."[136] And further, in section thirteen, that the Trustees,

> at their stated annual meetings shall consult & advise not only upon the affairs of the University, but also to remedy the Defects, and advance, the Interests of Literature through the State in general, For this purpose it shall be the business of the Members, previous to their Meeting, to obtain an acquaintance with the State; and regulations of the Schools, and Places of education in their respective Counties that they may thus be possessed, of the whole, and have it lie before them for mutual assistance, and deliberation. Upon this Information, they shall recommend, what kind of Schools, and Academies [grammar schools] shall be instituted, agreeably to the Constitution, in the several parts of the State, and prescribe what branches of Instruction shall be taught, and inculcated in each: they shall also examine and recommend, the Instructors to be imployed in them, or appoint persons for that purpose. The President of the university as often as the duties of his Station will permit, and some of the Members, at least once in a Year, shall visit them, and examine into their order, and performances.[137]

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[136] COLONIAL RECORDS, *supra* note 131, at 365; *The First Charter*, *supra* note 131, at 8; THOMAS WALTER REED, 1 HISTORY OF THE UNIVERSITY OF GEORGIA 18 (1949), *available at* http://dlg.galileo.usg.edu/cgi-bin/ebind2html.pl/reed_c01.

[137] COLONIAL RECORDS, *supra* note 131, at 369–70; *see also The First Charter*, *supra* note 131, at 10–11; REED, *supra* note 136, at 21; COULTER, *supra* note 76, at 57–58 (discussing more fully the unified state school system proposed by Baldwin). Baldwin was, almost immediately thereafter, chosen as the first president of the University, an honor he almost certainly knew was coming his way. *See* WHITE, *supra* note 6, at 159.

For Baldwin, church and state were not institutions to be separated, as they were perhaps for Jefferson and Madison, but rather were institutions that had to be integrated through public education in order to solve one of democracy's greatest challenges. A properly educated individual, that is, one who had inculcated the best religious morals, would be a citizen capable of taking his place in a self-governing society. Moreover, the inculcation of these religious values was to begin at an early age in what today would be called elementary school.

As if to drive the point home, Baldwin went on in section nine of the charter to specify that "[a]ll Officers appointed to the Instruction and government of the University, shall be of the Christian Religion."[138] Thus, not only all administrators of the university, which again was really a state-wide school system rather than a university in the modern sense, but also all teachers in the system were obligated to be Christian.

It is perhaps not at all surprising to find that Baldwin's views on the need to use publically-funded education to infuse religious values in citizens were shared by another prominent Georgian of the time. Lyman Hall, a signer of the Declaration of Independence, now Governor of Georgia and, like Baldwin, a graduate of Yale, also believed that it was appropriate to use public education to instill religious values. Addressing the Georgia state legislature on July 8, 1783, about the need to establish a public school system, he said with respect to that school system, " '[e]very encouragement ought to be given to introduce religion . . . .' "[139] And to that end he encouraged them to provide the school system with "learned clergy to perform divine worship in honor of God and to cultivate principles of religion and virtue among our citizens."[140] Continuing, he said, "[f]or this purpose it will be your wisdom to lay an early

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[138] COLONIAL RECORDS, *supra* note 131, at 368; *see also The First Charter*, *supra* note 131, at 10.

[139] WHITE, *supra* note 6, at 154 (White does not cite any authority for this statement); *see also* 3 ALLEN D. CANDLER, THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 322 (1908) (noting that on the date cited by White, July 8, 1783, a "message from his Honor the Governor was read," but the contents of the message were not reported).

[140] WHITE, *supra* note 6, at 154.

foundation for endowing seminaries of learning . . . ."[141] He proposed using the income from the sale of public lands to support publicly-funded education.[142]

The legislature acted on the Governor's request when, just one month later, it noted, while sitting as a committee of the whole, "the most efficacious measures ought to be adopted and Pursued for the encouragements of Virtue and Suppression of Vice"[143] and repeated the Governors' sentiment: "[r]eligion and learning being the two great Pillars on which will depend the Happiness of Individuals and the greatness of our Nation."[144] It recommended passing a law "for the Promotion of these purposes."[145] White writes that in the following year the legislature, "probably" in compliance with the Governor's suggestion, instructed the county surveyors in two new counties being created in 1784—Washington and Franklin—"to lay out in each county twenty thousand acres of land of the first quality, in separate tracts of five thousand acres each, for the endowment of a college or seminary of learning."[146] The legislature named Governor Hall and Baldwin, among others, as trustees of that property.[147]

It appears safe to conclude that Baldwin's views regarding the need to intertwine public education and religion, and therefore church and state, were in no way unique or out of place in Georgia in 1785 when he drafted the first charter for a public school system in America. Moreover, at this point he was a mere four years away from taking his position on the select committee with James Madison to help draft the Bill of Rights.

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[141] *Id.*

[142] *Id.*

[143] CANDLER, *supra* note 139, at 389.

[144] *Id.*

[145] *Id.*

[146] WHITE, *supra* note 6, at 154–55. *Cf.* CANDLER, *supra* note 139, at 563. On the date cited by White, February 25, 1784, the Records showed the following:

> Resolved that His Honor the Governor be requested to grant eight Land warrants for five thousand Acres each, in the names of John Houstoun, James Habersham, William Few, Joseph Clay, Abraham Baldwin, William Houstoun and Nathan Brownson Esquires, or their Successors in Office, in trust for the Colledge, that is to be established in this State[.]

Id.

[147] WHITE, *supra* note 6, at 155.

It is important to note that for all of his willingness to brook interplay between church and state, Baldwin was still careful to protect the individual religious liberty of the students who would partake of this public school system. In section eleven he wrote the following:

> [t]he Trustees shall not exclude any person of any religious denomination, whatsoever, from free and equal Liberty, and Advantages of education, or from any of the Liberties, Privileges and Immunities of the University in his education, on account of his or their speculative Sentiments, in religion, on being of different Religious Profession.[148]

In providing an opportunity to students of all religious persuasions to attend the public school in Georgia, Baldwin was endorsing what has come to be known as the non-preferentialist position.

During his tenure as a Georgia state legislator, Abraham Baldwin shepherded an even more illuminating piece of legislation regarding church/state relations to passage.[149] During 1785, the same year that Madison wrote his famous *Memorial and Remonstrance* in Virginia, turning the tide against religious establishments in that state, Baldwin wrote a bill entitled *For the Regular Establishment and Support of the Public Duties of Religion* in Georgia.[150] In the preamble of this bill Baldwin wrote:

> AS THE KNOWLEDGE and practise [sic] of the principles of the Christian Religion tends greatly to make good Members of Society, as well as good Men, and is no less necessary to present, than to future happiness, its regular establishment and Support is among the most important objects of Legislature determination; And that the Minds of the Citizens of this State may be properly informed and impress'd [sic] by the Great Principles of Moral obligation and thus be induced by inclination furnished with opportunity, and favoured by Law to render Public religious honors to the Supreme Being.[151]

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[148] COLONIAL RECORDS, *supra* note 131, 368–69; *see also The First Charter*, *supra* note 131, at 10; REED, *supra* note 136, at 21.

[149] Although the legislative records do not confirm Baldwin as the author, both of his biographers agree he was. *See* COULTER, *supra* note 76, at 50–51; WHITE, *supra* note 6, at 89.

[150] *Establishment and Support of Religious Services* (1785), *reprinted in* COLONIAL RECORDS, *supra* note 131, at 395.

[151] *Id.*

The bill further provided:

> of the public tax from time to time paid into the Treasury of the state there shall be deducted at a rate of four pence on every hundred Pounds valuation of Property . . . for the County from which it was received by the Treasurer for the support of religion within such County.[152]

The bill did provide that "all the different sects and Denominations of the Christian religion shall have free and equal liberty and Toleration in the exercise of their Religion within this State."[153] Thus, as with the Charter for the University of Georgia, Baldwin appears to have accepted the principle of non-preferential support for religion, as least between various Christian sects.

It is worth noting that although the bill was approved by the Georgia legislature, it apparently was never put into effect. Indeed, White writes that "[t]here is no evidence that the tax was, at any time, set aside or appropriated as the Act directed."[154] However, this by no means diminishes the role played by Baldwin in attempting to provide tax support to ministers and priests, and thereby to establish Christian religions in Georgia. In sponsoring such a bill, Baldwin was taking the most extreme measures to intermingle the church with the state.

It is likewise worth noting that in both the university charter and the bill to provide public tax support to Christian religions, Baldwin makes no claim that such efforts will save the souls of Georgians. Indeed, his only concern appears to be to promote religion for the sake of the state, not the individual. Of course such a position would be perfectly consistent with the Calvinist tradition out of which his Congregationalist religious beliefs grew. Given the belief in the superiority of "faith" over "acts" within that tradition, it is to be expected that Baldwin would not posit any benefit to the soul from measures taken by the state. But that did not prevent him from believing that "[the knowledge] and practise [sic] of the principles of the Christian Religion tends greatly to make good Members of Society[.]"[155]

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[152] *Id.* at 396.

[153] *Id.* at 397.

[154] WHITE, *supra* note 6, at 90.

[155] *Establishment and Support of Religious Services*, *reprinted in* COLONIAL RECORDS, *supra* note 131, at 395.

Baldwin sponsored one final piece of legislation as a Georgia legislator, which, while not being anywhere near as significant a window into his view of church/state relations as his bill to support Christian religions or the university charter he authored, does, nonetheless, shed light on his opinions regarding church and state.[156] In 1786, a year after he sponsored the bill to support religion in Georgia, Baldwin proposed and saw through to passage a copyright protection bill.[157] The bill provided protection for intellectual property for fourteen years with a possible renewal for an additional fourteen years.[158] The copyright covered books, maps, charts, and pamphlets but explicitly denied such protection to any work "that may be[] profane, treasonable defamatory or Injurious to government Morals or Religion . . . ."[159]

Here, again, we see clear evidence of Baldwin's willingness to use the power of the state to protect religion. And unlike his actions as a young chaplain in the military, his views regarding church/state relations can now be expected to have fully matured. Moreover, he is, at this point, just three years away from sitting on the select committee that drafted the Establishment Clause. Once again we see a great difference between Baldwin's approach to church/state issues and Madison's. However much Baldwin may have supported the language of the First Amendment, he cannot possibly be seen as a supporter of the "wall of separation" position as many members of the Court understand that phrase. Indeed, everything about Baldwin's behavior as a state legislator suggests the opposite.

In Madison's view, religion had great potential to corrupt the state and the state was very likely to corrupt religion. Baldwin saw religion as supporting the state, particularly a Republic, because it would aid the state in "mould[ing citizens] to the love of Virtue and good Order" thereby avoiding "greater confusions and with Evils more horried [sic] than the Wild[,] uncultivated State of nature."[160] Moreover, as his bills to support Christian

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[156] *Compare id., and University of Georgia, reprinted in* COLONIAL RECORDS, *supra* note 131, at 368–69, *with Encouragement of Literature and Genius* (1786), *reprinted in* COLONIAL RECORDS, *supra* note 131, at 485.

[157] *Encouragement of Literature and Genius, reprinted in* COLONIAL RECORDS, *supra* note 131, at 489.

[158] *Id.* at 485–86.

[159] *Id.* at 485, 488–89.

[160] *Id.* at 363–64.

religions and copyright unquestionably attest, he believed the state had a duty to support religion. These two perspectives could not have been more different.

CONCLUSION

In *Everson*, the Court acknowledged that "[n]o one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty."[161] The Court then brushed aside its own words and proceeded to credit only Virginia and its two most well known Founders, James Madison and Thomas Jefferson, for the adoption of the Establishment Clause. Most scholars compounded this mistake by following the Court's lead on this issue, focusing their efforts on Madison and Jefferson. This is true regardless of whether they fall on the "wall of separation" or "non-preferential support for religion" side of the debate. This approach may appeal to the Court and scholars alike because it is extremely parsimonious. It fails to provide us, however, with any understanding of how the other key contributors who had roles in the proposal and adoption of the Establishment Clause interpreted that provision.

We can only reach such an understanding by examining the opinions of many more of the key individuals who participated in proposing and adopting the Establishment Clause. But we will need to infer their views from their other writings as well as their actions as very few of the participants in the process left us statements regarding the Establishment Clause. That Madison and Jefferson did is perhaps what has attracted the Courts and scholars to them in the first place. Though my approach is unlikely to result in a monolithic "this is what the founders believed" conclusion, it will certainly do far greater justice to the Constitution and the Founders.

Abraham Baldwin, as a member of the select committee that drafted the first House version of the Bill of Rights, ranks high on the list of those whose views we need to understand. He served as a chaplain in the Revolutionary War, a position Madison argued violated the Establishment Clause in his

[161] Everson v. Bd. of Educ., 330 U.S. 1, 11 (1947).

Detached Memoranda.[162] From the pulpit, as chaplain, he did not hesitate to address political problems, thereby signaling his readiness to mix issues of church and state. As a Georgia state legislator he drafted the charter for the first public school system in America, wherein he said that the teaching of religious values was to "be among the first objects" of that school system.[163] Moreover, the charter provided that all teachers and administrators in that school system "shall be of the Christian religion."[164] In specifying that they should be of the Christian faith rather than a particular Christian sect, he implicitly endorsed the non-preferentialist position, at least with respect to Christianity.

While Madison was hard at work writing his *Memorial and Remonstrance* in opposition to the bill for religious establishments in Virginia, Baldwin was drafting a bill to provide public tax support for religion in Georgia. And, as with the charter for the public schools in Georgia, Baldwin inserted non-preferential language, as between Christian sects, in this bill. He also drafted a copyright bill that specifically excluded protections for materials "Injurious to . . . Morals or Religion."[165]

Whereas Madison believed religion was a corrupting influence on government, Baldwin saw it as preparing men for public citizenship. Conversely, where Madison saw government corrupting religion, Baldwin saw a need for government to support religion because in doing so it would be serving its own

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[162] There Madison wrote the following:

> [i]s the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom? In strictness the answer on both points must be in the negative. The Constitution of the U. S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation.

James Madison, *Detached Memoranda*, FOUNDER'S CONSTITUTION (1817), http://press-pubs.uchicago.edu/founders/documents/amendI_religions64.html.

[163] CHARTER OF THE UNIVERSITY (1785), *reprinted in* REED, *supra* note 136, at 17.

[164] *Id.* at 20.

[165] *Encouragement of Literature and Genius* (1786), *reprinted in* COLONIAL RECORDS, *supra* note 131, at 489; *see also* COULTER, *supra* note 76, at 43–44.

interest. Baldwin saw men steeped in religious values and morals as better citizens, and better citizens make better societies.

Save for the single illuminating letter to Joel Barlow, Baldwin left no record of his thoughts about the whole process whereby the amendments protecting religious freedoms were proposed and ratified. That letter, perfectly consistent with everything he had said or done up to that point in his life, applauded the Senate for eliminating restrictions on the states' ability to become involved in matters of religion.

It is not inconceivable that Baldwin opposed the Establishment Clause because he was such a strong believer in the need to intertwine church and state, as evidenced by his bill to support religion in Georgia. A stronger case, however, can probably be made for his having supported the Establishment Clause with a non-preferential interpretation. When the House took up the topic of the select committee's proposal regarding religious freedom on August 15th, the committee's proposed amendment read that " 'no religion shall be established by law, nor shall the equal rights of conscience be infringed.' "[166] Representative Sylvester thought the language was vague enough that it might be given a different interpretation than had been offered by the select committee. Indeed, he thought the language broad enough that it might "abolish religion altogether."[167] To quell such fears, Madison offered the following interpretation of the proposed language: "[T]hat Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[168]

Representative Samuel Huntington then said that while he agreed with Madison's interpretation of the language, he too feared that the "words might be taken in such latitude as to be extremely hurtful to the cause of religion."[169] He went on to say that in his state, ministers and the expenses of building churches were supported by taxes and that he was concerned that "[i]f an action were brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could

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[166] 1 ANNALS OF CONG. 757 (1789) (Joseph Gales ed., 1834).
[167] *Id.*
[168] *Id.* at 758.
[169] *Id.*

not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment."[170] In response to this concern, Madison proposed inserting the word "national" before religion, so that the amendment would have read " 'no national religion shall be established by law, nor shall the equal rights of conscience be infringed.' "[171]

Baldwin, like many of his fellow House members, would likely have been very comfortable with Madison's interpretation of the purpose of the Establishment Clause. And this being the *only* extant interpretation Madison ever offered during the debates on the topic, it was, as far as we can tell, the definitive statement of his understanding of the purpose of the Establishment Clause. Baldwin would have been comfortable with this interpretation because he likely recognized that any attempt to establish a national religion, given the diverse number of religious sects in America, would lead to conflict. His endorsement of the non-preferential approach in both the bill to establish a public school system and the bill to provide public support for religion in Georgia suggests rather strongly that he would have recognized the folly of any attempt to establish a national religion.

What is not conceivable is that Baldwin would have supported any amendment that he saw as building a "wall of separation between church and state." Of course nothing about Madison's interpretation when the amendment was being debated—and he was working so hard to gather support from reluctant House members—suggested that the Establishment Clause would erect such a wall. Any such interpretation on Madison's part would come years later when the fate of the Establishment Clause no longer hung in the balance and he was not attempting to assuage his colleagues. But those revisionist views were not the ones Baldwin would have relied upon in coming to his understanding of the meaning of, or in voting to adopt, the Establishment Clause.

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[170] *Id.*

[171] *Id.* at 757, 759. Madison withdrew the suggestion after an objection was made by Eldridge Gerry that the meaning of the term "national" might be inverted as had the term "federal" during the debates between federalist and antifederalist. *Id.* at 759.

What then can we conclude about Baldwin's understanding of the Establishment Clause? He would have understood it as prohibiting the establishment of a national religion. At least as between Christian sects he would have understood it to allow every person freedom of conscience to worship as they pleased. He would not, however, have understood its purpose as prohibiting non-preferential support for religion. He worked too hard to provide just such non-preferential governmental support for religion as a Georgia state legislator to abandon this view when serving in Congress. We can also conclude that he did not understand the Establishment Clause as building a "wall of separation between church and state." Indeed, we can be quite certain that he believed that government ought to support religion and that religion had a duty to support government by inculcating men with religious values that would allow them to take their place as participants in a republic.

Understanding Abraham Baldwin's views about church and state as well as understanding Madison's or Jefferson's views gives us no right to make sweeping statements about how the Founders interpreted the Establishment Clause. There is still much work to be done before anyone can claim to understand the Founders on this issue. But understanding Baldwin's perspective does fill in one important piece of the Establishment Clause puzzle. Moreover, it demonstrates that those who claim that Madison or Jefferson spoke for the entire group of Establishment Clause Founders—whether they are members of the Supreme Court or scholars—are simply wrong.