Jefferson's Statute for Establishing Religious Freedom:
How We Got It, What We Did with It, and Implications for the First Amendment Debate

By

John A. Ragosta[1]

History sometimes takes a peculiar path, and an important personage or episode or document may seem to disappear from our historic vision for a period of time only to resurface later like a lost river finding its course. And so it is, some would say, with Jefferson's Statute for Establishing Religious Freedom. Today that document is honored as one of the most powerful statements of religious liberty in history and is looked to as a dramatic statement of the necessity of and justification for religious liberty around the world. Since 1878, beginning with the case of *Reynolds v. United States*, 98 U.S. 145 (1878), the Supreme Court has actively and consistently averred that the Statute, along with Jefferson's 1802 letter to the Danbury Baptist Association identifying a "wall of separation" between church and state and James Madison's somewhat less famous "Memorial and Remonstrance Against Religious Assessments," express the American vision and wisdom at the heart of the First Amendment's protection of religious liberty. Since that time, based upon the history enunciated in *Reynolds* and later in *Everson v. Board of Education*, 330 U.S. 1 (1947), Jefferson's Statute has taken center stage in our understanding of the First Amendment.

Yet, some modern critics of the Court's jurisprudence, most notably former Chief Justice William Rehnquist and Justice Clarence Thomas, have strongly contested the Jeffersonian-

---

1 Doctor Ragosta is author of *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution and Secured Religious Liberty* (Oxford University, forthcoming) and is continuing his work on Jefferson's Statute for Establishing Religious Freedom in the nineteenth century while lecturing at the University of Virginia and Randolph College. The author wishes to thank George Van Cleve for his very helpful comments. Any errors, of course, are the author's own.

Madisonian history laid-out by Chief Justice Morrison Waite in *Reynolds*.[2] These critics claim that, after its adoption in 1786, neither the Statute nor Jefferson's letter to the Danbury Baptist Association nor Madison's Memorial played a seminal role in the history and understanding of religious freedom in early America until, somewhat unexpectedly, they were resurrected in 1878 in a serendipitous conspiracy between historian George Bancroft – a great devotee of Jefferson – and Chief Justice Waite, who happened to be next door neighbors.[3] In fact, after adoption of the First Amendment, the majority of states continued to impose some form of religious test for office or civil participation and/or provided some form of state support for religious establishments. This, the modern critics insist, undermines the Court's jurisprudence and brings into question the entire doctrine of a strict separation of church and state as being based upon an inaccurate understanding of the origin and history of the First Amendment. In this view, Jefferson's Statute may well be eloquent, but it is not seminal.

What is couched in historical terms is, of course, a complex and heated legal dispute about the proper scope in modern times of the religious freedom guaranteed in the First Amendment, and I will certainly not here seek to resolve exactly how the First Amendment should be applied in particular circumstances. Yet, I will consider briefly the history of the making and nineteenth century maturation of Jefferson's Statute and, in the process, perhaps provide some useful information for those who seek to analyze the history of these documents and their impact on legal doctrine as well as those more generally interested in Jefferson's legacy and the origins

---

2 *E.g*. Wallace v. Jaffree, 472 U.S. 38, 92 *et seq*. (1985) (Rehnquist, J., dissenting); *Cutter v. Wilkinson*, 544 U.S. 709, 726-27 (2005) (Thomas concurring); *Elk Grove Unified School Dist.* v. *Newdow,* 542 U.S. 1, 50 (2004) (Thomas concurring).

3 C. Peter Magrath, "Chief Justice Waite and the 'Twin Relic': *Reynolds v. United States*," *Vanderbilt Law Review* 18 (1965), 507-43, provides a very informative discussion of Waite's and Bancroft's cooperation. *See also* Donald L. Drakeman, "Reynolds v. United States: The Historical Construction of Constitutional Reality," *Constitutional Commentary*, 21 (Winter 2004), 697-726.

of religious freedom in America. That history shows both the influence of Jeffersonian ideals on adoption of the First Amendment and that Jefferson's Statute did not disappear in the 100 years from its adoption until the Court made it legally seminal in 1878. Rather, while the Statute may have seemed to disappear from our historic sight for a period, it did not disappear in early America, and the influence of the Statute continued to grow, and the Statute, and more generally Jefferson's and Madison's vision of religious liberty, including the ideas expressed in the Danbury Baptist letter and Madison's "Memorial," played an important, although complex, role in Americans' evolving understanding of religious freedom.

* * * * *

As an initial matter, it seems appropriate to introduce a few thoughts on Jefferson's own religious beliefs, although I do not plan to dwell on them. Others have covered that topic extensively, including interesting papers presented at this conference.[4] A few thoughts, though, may assist us in understanding the centrality of the Statute to Jefferson's legacy.

Jefferson was a deist and, later in life, he suggested he was a Unitarian, a sect that was still in its infancy at the time that Jefferson made the comment in 1822 that "there is not a young man now living in the U.S. who will not die an Unitarian." He was strongly theistic. In his *Notes on the State of Virginia*, in discussing problems with slavery, for example, he asked "can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?" At the same time, Jefferson was

---

4 *See, e.g.,* Eugene R. Sheridan, *Jefferson and Religion* (Charlottesville: Monticello, 2002) (an excellent short volume); Edwin S. Gaustad, *Sworn on the Altar of God: A Religious Biography of Thomas Jefferson* (Grand Rapids: Wm. B. Eerdsmans Publishing Co., 1996), Paul K. Conkin, "The Religious Pilgrimage of Thomas Jefferson," in *Jeffersonian Legacies*, Peter S. Onuf, ed. (Charlottesville: University Press of Virginia, 1993), 19-49, and Peter S. Onuf, "Thomas Jefferson's Christian Nation," in *Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective*, ed. by Robert Fatton, Jr. and R.K. Ramazani (New York: Palgrave Macmillan, 2009), 17-36.

adamant that that "firm basis" must be developed in the home and church and through rational, personal examination, not through any state-sponsored medium.[5]

Jefferson was not a Christian, at least not as that term would be defined generally either in the eighteenth century or today. He did not believe in the divinity of Christ, the atonement, or the resurrection. Unfortunately, this topic has been complicated by Jefferson's seemingly emphatic declaration that "I am a Christian," which has been used by some as the sum total of what we need to know about his religion. In fact, he went on to explain "I am a Christian, in the only sense in which he [Jesus] wished anyone to be; sincerely attached to his doctrines, in preference to all others; ascribing to himself every *human* excellence; and believing he never claimed any other." Of course Jefferson, being Jefferson, had a unique ability to define terms to his own liking. Jefferson defined himself as Christian because he accepted the philosophy and morality of Jesus. Yet, efforts by early American and modern partisans to declare him a "Christian," in the common parlance, must be rejected. To conclude that Jefferson was a Christian is to assume that Jefferson might have declared "we are all Trinitarians, we are all Unitarians," and that religious leaders (or anyone) would have accepted that at the time or now.[6]

More generally, and crucial for our purposes, Jefferson was a devout opponent of priestcraft and any civil authority exercised by ministers or ecclesiastical authority exercised by officials; to Jefferson either were implicitly or explicitly coercive. Efforts by ecclesiastics to dictate

---

5 Jefferson to Dr. Benjamin Waterhouse, June 26, 1822, The Thomas Jefferson Papers Series 1, General Correspondence, 1651-1827, Library of Congress, http://memory.loc.gov/, image 254 (emphasis original). Thomas Jefferson, *Notes on the State of Virginia*, Query XVIII, *Thomas Jefferson: Writings,* Merrill D. Peterson, ed. (New York: The Library of America, 1984), 289.

6 Jefferson to Benjamin Rush, April 21, 1803, Andrew A. Lipscomb and Albert E. Bergh, eds., *The Writings of Thomas Jefferson*, 10 (Washington, D.C.: Thomas Jefferson Memorial Association of the United States, 1903), 380. *See, e.g.*, Thomas E. Buckley, "The Religious Rhetoric of Thomas Jefferson," in *The Founders on God and Government*, ed. by Daniel L. Dreisbach, Mark D. Hall and Jeffry H. Morrison (Lanham: Rowman & Littlefield Publishers, Inc., 2004), 53-56 (Buckley suggests Jefferson is a Christian though recognizing that Jefferson rejected the divinity of Christ).

doctrine, and truth itself, were at the center of Jefferson's avowal that "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man," a phrase now engraved on his memorial on the Tidal Basin in Washington, D.C. A highly telling point is that Jefferson, as he explained in his *Notes on the State of Virginia,* strongly opposed "putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently matured for religious enquiries;" to Jefferson, religious indoctrination risked tyranny over impressionable minds. Jefferson was, then, a child of the Enlightenment and a rationalist to the core.[7]

In discussing Jefferson and religious freedom, it is also worth remembering that he was viciously and publicly attacked for his religious beliefs, especially in the election of 1800. One trope used by New England Federalist clergy was to preach that to vote for Jefferson was "no less than rebellion against God." Others referred to Jefferson as the "arch-infidel." While he would not respond to these attacks publicly, Jefferson was deeply cut by such accusations. He repeatedly claimed, both publicly and privately, that his religion was something solely between him and his God, and he was more than willing to grant the same privilege to others. One can find grounds for this belief in Jefferson's theology, philosophy, and politics, but there is no doubt that it provided a strong impetus for many of his views on the proper role of religion in the polity. In the Statute, Jefferson saw the essence of this doctrine enacted.

Suffice it to say for our purposes that not only did Jefferson see religious freedom as an essential element in maintaining the intellectual integrity needed in a republic and for personal

---

7 Jefferson to Dr. Benjamin Rush, September 23, 1800, in Lipscomb and Bergh, eds., *Writings of Thomas Jefferson*, 10:175. Jefferson, *Notes*, Query XIV, in Peterson, ed., *Thomas Jefferson: Writings*, 273. *See generally* Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge: Belknap Press, 1963), 8-15.

intellectual achievement, but he also had a strong personal interest in its development, an interest heightened by his own political experience. There should be no doubt that Jefferson's beliefs on religion and religious freedom were deeply held and of long-standing; his personal correspondence as well as his drafting of the Statute in 1777 and efforts in the Virginia legislature during the Revolutionary War to end the Anglican establishment are evidence of that. Claims by some historians, for example James Hutson, that some of his more famous views on religious freedom and church/state relations, for example those expressed in the 1802 letter to the Danbury Baptists, were the result of pique at New England Federalists or were quickly drawn and not seriously considered lack a solid foundation in the historic record. That the 1802 letter was edited in an effort to minimize unnecessary political turbulence among potential Jeffersonian supporters in New England, as Hutson shows, is hardly proof that Jefferson, in the part of the letter that was retained, was not making a solid and deeply-felt point of principle (as his correspondence with his attorney general concerning the letter made clear).[8] The significance of his beliefs is evident in Jefferson's (and Madison's) efforts to ensconce a broad religious freedom in the fabric of the new American nation.

The Statute: How We Got It

8 William Linn, *Serious Considerations on the Election of a President: Addressed to the Citizens of the United States* (Trenton: Sherman, Mersmon & Thomas, 1800), 22. This was a very popular pamphlet during the 1800 election. On the campaign against Jefferson as a heretic, *see* Charles F. O'Brien, "The Religious Issue in the Presidential Campaign of 1800," *Essex Institute Historical Collections* 107 (Jan. 1971), 82-93; Constance B. Schulz, "'Of Bigotry in Politics and Religion': Jefferson's Religion, the Federalist Press, and the Syllabus," *Virginia Magazine of History and Biography* 91 (Jan. 1993), 73-91. James Hutson, "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," *The William and Mary Quarterly* 3rd Ser., 56:4 (Oct. 1999): 775-90. *Compare* Levy, *Jefferson and Civil Liberties*, 8 ("Jefferson had powerful convictions on the subject of religious liberty ….").

I may have already written more than is necessary about Jefferson's personal beliefs for the purpose of considering his Statute for Establishing Religious Freedom. Jefferson would certainly have said that neither his nor anyone else's personal religious views would change his emphatic position on the centrality of religious freedom. They do, though, help us to understand the strength of Jefferson's support for religious freedom and why, with the Declaration of Independence and the founding of the University of Virginia, the Statute was one of the short list of things that Jefferson identified as his legacy for his grave marker. The iconic nature of the Statute is exactly what Jefferson had hoped for. Equally important, the Statute and broadly defined religious liberty became an essential part of Jefferson's legacy and, thus, part of the Jeffersonian revolution. Jefferson's personal views of religion help to contextualize his role in the development of religious freedom and, in particular, the origins and significance of his Statute for Establishing Religious Freedom.

The Statute, which came into force on January 19, 1786, is generally seen as an emblematic statement of principle for eighteenth century Enlightenment thought. In fact, Jefferson was so pleased with the Statute that upon hearing of its adoption while he was serving as ambassador in France, he immediately had it translated into French, German, and Italian and ensured that its publication would give it broad circulation in Europe. Again evidencing his unique ability to define a public debate, he insisted upon translating and publishing his original version of the Statute rather than the slightly modified version actually adopted by the Virginia General Assembly. Attached. (One is reminded of Jefferson's efforts to ensure that his unedited, "better" version of the Declaration of Independence would also receive broad distribution and historic recognition.) In Europe, under Jefferson's watchful gaze, the Statute was hailed as a triumph of rationalism and liberalism.

The Supreme Court's analysis of the Statute, echoed by historians, has generally focused on its ideological history and, therefore, focuses heavily on Jefferson, with a bit of Madison and his "Memorial and Remonstrance" thrown in. Historians have spent considerable energy in finding philosophical parentage for Jefferson's Statute in the Scottish Enlightenment and Locke. The result has been a modern tendency to characterize the First Amendment in terms that are decidedly Enlightenment-oriented and based on the views of our early "great men," which in turn has supported an effort by opponents of the Supreme Court's interpretation to characterize that reading as wholly secularist.

Yet, while Jefferson (and Madison) adopted liberal notions of religious freedom based upon Enlightenment principles, they would have never been successful in convincing the Virginia legislature to end its religious establishment and to adopt the Statute but for the vociferous support of Virginia's growing population of evangelical dissenters (primarily Baptists and Presbyterians). As was often the case, Jefferson was able to harness intellectual ideology to a popular cause. Understanding this alliance between evangelical religion and Jeffersonian Enlightenment thought is essential to understanding how we got the Statute and how it should be understood.

Prior to the American Revolution, the Anglican Church was the established church in Virginia and benefitted from a number of important legal preferences. Most notably, Anglican ministers and churches were supported by a tax, generally the highest tax paid in colonial Virginia. Only marriages performed in the Anglican Church were valid, leaving the children of those married outside the church subject to claims of bastardy with consequent legal infirmities (relating to probate and terms of indenture for example). Anglican vestries exercised civil authority in a number of areas, including poor relief, supervision of orphans, and land boundaries. Failure to attend Anglican services or a licensed dissenting meeting house (of which there were rela-

tively few at the time) was subject to a fine, a fine which tended to be enforced selectively against religious dissenters.

Even more seriously, as the Revolution approached these legal disabilities were accompanied by a growing and serious persecution of dissenting evangelicals. Over 50 ministers, including about half of all the Baptist ministers in Virginia, were jailed for preaching, many for extended periods and in terrible conditions which were exacerbated by their jailers because of their religious non-conformity. Other dissenters, both congregants and ministers, were physically attacked, with black members of dissenting congregations being particularly viciously beaten. Thus, when eighteenth century Anglican observers reported the establishment as "mild," a claim taken up by many nineteenth century historians and repeated today, they simply ignored the dissenters' perspective, if not the facts. By comparison, when Jefferson and Madison suggested that the Virginia establishment bore the seeds of a bloody inquisition, a view which has often been discounted as grossly exaggerated, they were basing their fears on fact and a keen historic appreciation of how discrimination and persecution once accepted in principle could easily grow, especially when the church and the state were symbiotically bound. Certainly they echoed the perspective of the dissenters who had seen their ministers jailed and congregants beaten.

The result of this discrimination and persecution was that the dissenting population – which had been growing rapidly since the first Great Awakening and probably constituted one-quarter to one-third or more of the Virginia population by 1776 – was deeply angry with the gentry establishment leadership. That same leadership, who immediately before the war had defeated reforms to improve religious toleration and had often actively participated in the persecution of dissenters, dominated government in the new state. But, with the Revolution, those same

Anglican establishment leaders were anxiously calling upon the dissenters to take-up arms and support the new state.

I will not recount here the details of what followed. Suffice it to say that the dissenters entered into a complex and extended negotiation with establishment leaders whereby they insisted upon religious freedom in return for their support for mobilization, which the state's leaders desperately needed. In response, as military necessity dictated, the legislature made a series of incremental changes to liberalize religious freedom during the course of the war. These reforms began with the June 12, 1776 adoption of Article 16 of the Virginia Declaration of Rights declaring religious freedom generally and continued with the December 1776 suspension of the Establishment tax and termination of other penalties for religious offenses, an effort which Jefferson described as the most difficult legislative effort of his career.[9]

After Yorktown, though, the need for mobilization largely evaporated while full religious freedom had not been achieved. Wartime reforms had eliminated the establishment tax, but dissenters still found their right to marry restricted and Anglican vestries continued to enjoy some civil authority. More ominously, Virginia's legislature had repeatedly delayed consideration of a general tax assessment which would have benefitted all Christian sects. With some form of establishment and/or Christian oath imposed in eleven of the thirteen new states, and similar proposals circulating in Virginia, the status of religious freedom in Virginia was far from certain.[10]

---

9 These negotiations and adoption of Jefferson's Statute are discussed in detail in my forthcoming *Wellspring of Liberty*.

10 *E.g.* Delaware Constitution, Art. 22 (1776) (oath for office includes trinity, old and new testaments); Georgia Constitution, Art. VI (1777) (Protestant office holders); Maryland Declaration of Rights, Art. 33 (1776) (protection for Christians); Massachusetts Constitution, Art. 3 (1780) (establishment of Protestant religion); New Hampshire Constitution, Art. 6 (1784) (protection for Christians); New Jersey Constitution, Art. 19 (1776) (Protestants protected); New York Constitution, Art. 42 (1777) (anti-Catholic); North Carolina Constitution, Art. 32 (1776) (Protestant office holders); Pennsylvania Constitu-
(footnote continued)

With the need for dissenter cooperation in mobilization gone – and, not insignificantly, Jefferson on his way to France – supporters of the Anglican Church in Virginia began an effort to recapture ground for a church establishment culminating in November 1784 in the House of Delegates adopting a resolution calling for a general assessment to support all Christian sects. Led by Patrick Henry, and supported by many important leaders including Richard Henry Lee, Benjamin Harrison, Spencer Roane, Philip Barbour, and John Marshall, this effort seemed highly likely of success. A petition from the Hanover Presbytery, representing perhaps the largest dissenting denomination in Virginia, also seemed to provide lukewarm support for an assessment, dramatically improving its prospects. Alarmed by these proposals but facing what seemed to be determined political opponents, initially James Madison, newly returned to the Virginia House from service in the Confederation Congress, could only obtain a delay in consideration of the assessment bill, and even the votes to obtain that delay depended upon the support of the new, western, largely dissenting members of the Virginia House.

At this point, though, the extent of the establishment leaders' mistake became clear. While the need for mobilization had disappeared, it soon became evident that the negotiation process concerning religious liberty and mobilization during the war had, itself, politically activated dissenters, bringing them into the polity and republicanizing the pre-war, gentry-controlled Virginia political landscape. Presbyterian laymen, joined now by their chastened ministers who had initially seemed to support a general assessment, repudiated support for an assessment in any form, and they and the Baptists, both of which groups had been largely excluded from the polity before the war, flooded the General Assembly with petitions against the assessment. A petition

---

(footnote continued)
tion, Sec. 10 (1776) (office requires belief in God, old and new testaments); South Carolina Constitution, Arts. 3, 12 (1778) (Protestant office holders); Connecticut Fundamental Orders (1639) (Christian).

from Botetourt reflected evangelical views: "Civil Government & Religion are, and ought to be, Independent of Each other. The one has for its object a proper Regulation of the External conduct of men….; [the other] our internal or spiritual welfare & is beyond the reach of human laws." Or, as the Hanover Presbytery belatedly warned:

> We oppose the Bill ~ Because it is a Departure from the proper line of Legislation ~ … It establishes a precedent for further Encroachment, by making the Legislature a judge of religious Truth ~. If the Assembly have a right to determine the preference between Christianity & the other Systems of Religion that prevail in the world, they may also, at a convenient time, give a preference to some favoured sect among Christians ~

Their opposition was joined by Madison's "Memorial and Remonstrance," which laid-out perhaps the most intellectually sound assault on church/state entanglement ever drafted, noting in particular the danger entanglement posed to both religion and government. Still, the Baptist and Presbyterian petitions garnered far more signatures than did Madison's classic statement. (Petitions included over 10,000 signatures in opposition to the assessment, of which one form of a Baptist petition declaring that any church/state establishment violated the "Spirit of the Gospel" garnered almost 5000 signatures while Madison's "Memorial and Remonstrance" obtained just over 1500.) The final result was clear: the assessment proposal was swept away and Jefferson's Statute, after minor revisions insisted upon by the more conservative Virginia Senate, became law in January 1786. Contemporary observers had no doubt that the result was attributable to the political efforts of the dissenters.[11]

The point for our purposes is that this success was not the result of erudite intellectual arguments by Jefferson and Madison based on Enlightenment rationalism. Rather, what was es-

---

11 Botetourt County (November 29, 1785), Early Virginia Religious Petitions, www.memory.loc.gov/ammem/collections/petitions/. Hanover Presbytery Minutes: 1755-1823, May 19, 1785, microfilm reel P278a (Union Theological Seminary, Richmond). Rutland, Robert A., William M.E. Rachal, Barbara D. Ripel, and Fredrika J. Teute, eds., *Papers of James Madison* (Chicago: University of Chicago Press, 1973), 8:297, 268, 306.

sential was the political support of the dissenters both during the war, when their support for mobilization was desperately needed, and after, when their new found political activism took flight. Those dissenters saw full religious liberty, including separation of church and state, as critical to protect the church, not simply a system which would protect the state from undue ecclesiastic influence. Throughout the Virginia debate, the dissenters made it clear that any entanglement between church and state would pollute the church, any type of government aid would make their ministers mere ministers of state, any interference by civil authority would impair their independent choice to believe in and worship God, any government assessment or favoritism, even for Christianity generally, would suggest that government had the authority to establish a religion. This was not only a political doctrine for dissenters, but a theological one.

Consider the Baptists' position in particular: since God demanded an absolutely free will offering of devotion, and even infant baptism was a form of coercion against the soul of the child baptized without his personal and informed consent, how much more so did any state support of religion taint the proper private devotion demanded by God? Active cooperation between civil and ecclesiastic authorities was a chimera, threatening the independence of both. John Leland, a leading eighteenth century Baptist preacher who had himself suffered persecution in Virginia and who was deeply engaged in the development of religious freedom said it most emphatically: "[t]he notion of a christian Commonwealth, should be exploded forever, without there was a Commonwealth of real Christians. Not only so, but if all the souls in a government were saints of God, should they be formed into a society by law, that society could not be a gospel church, but a creature of state." Or "[e]very man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in a way that he can best reconcile to his conscience. If

government can answer for individuals at the day of judgment, let men be controlled by it in religious matters; otherwise, let men be free."[12]

The influence of the dissenters, and their deep commitment to keeping government entirely out of the business of the church, was not only fundamental in the adoption of Jefferson's Statute, but it is equally critical to understanding the subsequent history of the Statute and the First Amendment. The Enlightenment eloquence of Jefferson's Statute was deployed in a manner effectively to captivate and to motivate popular interests. Both Enlightenment and popular elements were essential. Jefferson and Madison with the evangelicals provided the intellectual case; evangelicals provided the political muscle.

This progression has several implications for understanding the significance of the Statute in the context of America's development of religious liberty: First, support for adoption of the Statute was broad-based and not elitist. Signatures on the petitions that flooded the General Assembly opposing adoption of a general assessment, many of which expressly urged adoption of Jefferson's Statute, outnumbered those that supported the assessment by more than five-to-one. As previously noted, a large majority of those came not on Madison's "Memorial and Remonstrance," but instead came on the Baptist and Presbyterian evangelical petitions which insisted, for example, that a general assessment was inconsistent with the "Spirit of the Gospel." Second, since what was at issue at the time was a general assessment to benefit all Christian teachers, modern advocates who urge that religious freedom in the eighteenth century meant only "non-discrimination" among denominations, or that "establishment" meant only the legal prefer-

---

12 John Leland, *The Virginia Chronicle: with Judicious and Critical Remarks under XXIV Heads* (Norfolk: Prentis and Baxter, 1790), 24 (Early American Imprints, Series 1, no. 21920). L.F. Greene, ed., *The Writings of the late Elder John Leland, including some events in his life, written by himself, with some additional sketches* (New York: G.W. Wood, 1845), 181.

ence for one given sect, are simply wrong with respect to the origins of the Statute. When Virginians were faced expressly with a provision to support all Christian sects, it was overwhelmingly rejected, and it was that rejection which led directly to adoption of Jefferson's Statute. Third, while Jefferson was deeply concerned with the dangers to the state posed by any entanglement of church and state, the dissenters were at least equally concerned with the dangers that such entanglement posed for religion. Both were understood to be protected by the Statute. Thus, while Virginia's dissenters emphatically supported a strict separation of church and state, they also expected the most robust possible protection for free exercise and fully expected that religion would have an important role in the public arena; that role, though, would be wholly private. None of the key actors, not the evangelicals and not Jefferson or Madison, stood in opposition to the eighteenth century commonplace that a republican government demanded virtue and that virtue required religion (although eventually checks and balances on governmental authority would take much of the weight previously borne by "republican virtue"). They did, though, reject the notion that religion needed, or could even benefit from, government assistance – financial or otherwise; in fact, the opposite was true. Thus was born the Statute for Establishing Religious Freedom.

Madison (and Jefferson) and the First Amendment

Whatever the Virginia origins of Jefferson's Statute, one of the more hotly contested issues today in First Amendment jurisprudence is the Supreme Court's reliance on the Statute, the Danbury Baptist letter, and Madison's "Memorial and Remonstrance" as definitional for purposes of the religious freedom guaranteed by the First Amendment. While Jefferson and Madison may provide brilliant expositions of religious freedom, what role did they, and the Statute,

play in adoption and understanding of the First Amendment and, second, what role did they play in the evolution of freedom of religion through the 1878 decision in *Reynolds v. United States*?

As a preliminary matter, it must be understood that this is not a question of determining what the "founding fathers" collectively meant by religious freedom, nor do I think the Court meant it to be. Philip Muñoz, for example, criticizes the Court's reliance on Jefferson and Madison by claiming that the Court "presumed, first, that the founding fathers shared a uniform understanding of religious liberty" and second that Jefferson and Madison reflected that understanding.[13] This criticism is misplaced. In fact, the Court has asked the correct question: Not "Is there one voice on religious freedom from the late eighteenth century?" but, rather, "Is there one (or several) voice(s) to which we should give special consideration?" The Court concluded, as have numerous historians, that the Virginia experience, particularly the adoption of Jefferson's Statute and enthusiasm for Madison's "Memorial and Remonstrance," played a seminal role in adoption of the First Amendment and the development of religious freedom.[14] This is a reasonable conclusion.

Several factors provide a starting-point for an analysis of the role of the Virginia experience in adoption of the First Amendment. Virginia was the largest and most powerful of the new

---

13 Vincent Phillip Muñoz, "Religion and the Common Good: George Washington on Church and State," in Daniel L. Dreisbach, Mark D. Hall, and Jeffry H. Morrison, *The Founders on God and Government* (Lanham: Rowman & Littlefield Publishers, Inc., 2004), 1.

14 Some of the many sources affirming that primacy include *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1, 11, 13, 33 (1947); *McGowan v. Maryland,* 366 U.S. 420, 437 (1961); *Reynolds v. United States*, 98 U.S. 145, 162-63 (1879); Leo Pfeffer, "Madison's 'Detached Memoranda': Then and Now," in *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History,* ed. by Merrill D. Peterson and Robert C. Vaughan (Cambridge: Cambridge University Press, 1988), 285; Martin E. Marty, "The Virginia Statute Two Hundred Years Later," in Peterson and Vaughan, eds., *Virginia Statute*, 1; Peterson and Vaughan, eds., *Virginia Statute*, x; Anson Phelps Stokes, *Church and State in the United States,* Vol. I (New York: Harper & Brothers, 1950), 366; Jon Butler, *Awash in a Sea of Faith: Christianizing the American People* (Cambridge: Harvard University Press, 1990), 265.

states (providing executive leadership to the new nation for 32 of the first 36 years and accounting for 10 of the 59 representatives who initially assembled in the House of Representatives). Madison was the original draftsman of the First Amendment and the most important member in the debates leading to adoption of the Bill of Rights – a point which even those who oppose a broad reading of the First Amendment generally concede. Virginia's decision to embrace religious freedom provided an important example for the rest of the nation. After all, before the Revolution, no state had a more entrenched establishment nor more aggressively protected that establishment and persecuted dissenters; after the Revolution, no state more broadly, and certainly none more eloquently, protected religious freedom. It was natural, then, that Virginia would prove an example and bellwether for religious freedom. Even contemporary commentators who attacked the notion of full disestablishment understood that Virginia provided the model. In South Carolina, for example, where the state constitution still endorsed a multiple establishment, a newspaper editor reprinted a very lengthy attack on Jefferson's Statute from a Philadelphia source, implicitly recognizing the centrality of Jefferson's Statute to a growing debate on the meaning of religious freedom. Reliance on the centrality of the Virginia experience can be based initially upon these factors.[15]

If the Court is to be criticized in its evaluation of the earlier Virginia experience, it is its lack of focus on the evangelical dissenters and the bargain that they struck for religious freedom in Virginia that deserves attention. Two points are worthy of particular consideration: First, not only did the Virginia evangelicals have the central political role in adoption of the Statute, but they played an equally critical role in election of Madison to the Virginia convention which rati-

15 *The Columbian Herald or the Patriotic Courier of North-America*, May 29, 1786, June 5, 1786, June 8, 1786, June 12, 1786.

fied the Constitution and his subsequent election to the House of Representatives which adopted the Bill of Rights. In each case, his election not only depended upon the evangelical vote, but was particularly dependent upon his commitment to the evangelicals that he would make every effort to protect religious freedom. In the election for the Virginia Convention, with growing Baptist opposition in Virginia to the Constitution, Madison faced a strong opponent in the person of John Leland, the Baptist preacher who was a devotee of Jefferson and equally adamant about religious freedom, and who was reportedly the most popular minister in Virginia; Madison won that election only after assuring Leland of his commitment to religious freedom under the Constitution and Leland's withdrawal from the race. Similarly, Madison faced a strong anti-federalist opponent in James Monroe – Henry's preferred candidate – when he ran for a seat in the first House of Representatives, and, again, Madison's commitment to Baptist (and Presbyterian) constituents to seek express protections for religious liberty proved central to his election. It is not unreasonable to conclude that the religious freedom that Madison committed to obtain was the broad religious freedom sought by the Virginia evangelicals. Notably, Madison not only reported to the evangelicals on his efforts culminating in adoption of the First Amendment but subsequently reported to Washington of the evangelicals' reaction to the Amendment, obviously viewing this as central to the political situation.[16]

Second, the two states which initially withheld support for the new Constitution – North Carolina and Rhode Island – were Baptist bastions which based their refusal to accept the Constitution in part on its failure to provide express protection of religious freedom (in the case of

---

16 Garnett Ryland, *The Baptists of Virginia, 1699-1926* (Richmond: The Virginia Baptist Board of Missions and Education, 1955), 134. William B. Sprague, *Annals of the American Pulpit*, *Vol.VI, Baptists* (New York: Robert Carter & Brothers, 1865), 180. James Madison to George Washington, November 20, 1789, Charles F. Hobson and Robert A. Rutland, eds., *The Papers of James Madison* (Charlottesville: University Press of Virginia, 1979), 12:453.

North Carolina, borrowing from some of the debates in Virginia). Thus, the understanding of the evangelicals as to the meaning of the First Amendment takes on particular significance not only in the history of the adoption of Jefferson's Statute and Madison's Memorial and Remonstrance, but in the specific efforts to amend the Constitution resulting in the Bill of Rights.

This leaves the question of the specific role of Jefferson and Madison and the Virginia experience in adoption of the First Amendment. Others have provided detailed reports on those proceedings; some comments, though, are called for.[17] Perhaps the most important fact to understand in seeking to analyze those debates is that the First Amendment, as adopted, only bound the federal government, not the states. The members of Congress were well aware that religious establishments and/or test acts were maintained in a large majority of states. As many commentators, including Justice Thomas, have noted, the founders obviously did not see these legal provisions as inconsistent with the First Amendment. Importantly, though, this was not because these provisions were understood to be consistent with the operative terms of the Amendment, but rather, because the members, given these state provisions, insisted that they be wholly outside of the jurisdictional scope of the Amendment, that it apply only to federal action. This understanding provided the essential conceptual framework for the compromise that resulted in the First Amendment: some delegates wanted strictly to limit federal authority in the area of religion so as it would not interfere with state establishments and other forms of religious regulation, others wanted strictly to limit federal authority because they believed that government had no proper

---

17 *E.g.*, Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: MacMillan Publishing Co., 1986); Butler, *Awash*, 285-88; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986), 193-222; Chester James Antieau, Arthur T. Downey and Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Milwaukee: Bruce Publishing, 1964), 123-42.

role with religion, both wanted the federal government, at least, strictly separated from the church.

This point is evident in the textual negotiation. When Madison first introduced proposed constitutional amendments concerning religious freedom, he proposed two provisions. The first was intended to apply to the federal government and was, as a result, more detailed. It provided: “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.” The second was intended to apply to the states and, as a result, was drafted to protect a more generic liberty of conscience: “No state shall violate the equal rights of conscience….” A certain lack of clarity was necessary in this latter case because the various states could not agree with precision on the appropriate level of religious freedom and most states maintained test oaths and/or establishments. As a result, Madison could propose a vague term that could be interpreted later, but which would be understood to provide some level of protection. The greater detail and higher standard applied to the federal government in Madison’s proposal was possible ONLY because it was not applicable to states.[18]

Madison’s language was modified in committee, but the general structure and intent was maintained (as Madison acknowledged on the floor of the House). The Committee proposed: “No religion shall be established by law, nor shall the equal rights of conscience be infringed,” and “No State shall infringe the equal rights of conscience….” The more detailed provision concerning restrictions on federal action received most of the attention in the debates. While Madison’s “national” language had been removed, he indicated that the intent had not change: “con-

18 Charlene Bangs Bickford and Helen E. Veit, eds., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791*, *Vol. IV: Legislative Histories* (Baltimore: The Johns Hopkins University Press, 1992), 10-11 (hereinafter *Vol. IV*).

gress should not establish a religion, and enforce legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience…." A strong objection was made by Benjamin Huntington of Connecticut, however, that the language of the first proposed clause might be used to attack state establishments. Huntington referred sarcastically to the problems that Rhode Island (at the time, a holdout from the Union) had because it lacked an establishment. Madison immediately said that this was why the "national" language was needed. Elbridge Gerry objected to the language "national" as it might suggest a consolidated government, something the anti-federalists had alleged during the ratification debate and the federalists had insisted was not the case. The House ultimately adopted language which addressed this serious problem by making it clear that the more detailed provision which became the First Amendment only applied to the federal government – "Congress shall make no law." Madison's more general provision applying liberty of conscience to the states was permitted to remain in the House proposal, although there was a serious objection raised by Thomas Tudor Tucker (SC) against any federal interference in state regulation of religion. The general language, though, being subject to flexible interpretation, apparently did not initially seem like an excessive threat to a majority of the members of the House. What was reported to the Senate was: "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed." "No State shall infringe … the rights of conscience…."[19]

The more conservative Senate suggested a number of changes after an apparently interesting – if not fully reported – debate. First, the Senate rejected language which would have spe-

---

19 *Vol. IV*, 28-29. Charlene Bangs Bickford, Kenneth R. Bowling, Helen E. Veit, eds., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791*, *Vol. XI: Debates in the House of Representatives* (Baltimore: The Johns Hopkins University Press, 1992), 1261-62, 1284 (hereinafter *Vol. XI*). *Vol. IV*, 36, 39.

cifically limited the coverage of the Amendment to non-discrimination among "One Religious Sect or Society in preference to others." Second, after some debate, the Senate agreed on language for the nascent First Amendment that removed the more general provision on liberty of conscience but still stated clearly that the proposed restriction applied only to the federal government: “Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion,…” Third, and perhaps most significantly, the Senate insisted that no restriction be applied by the federal Constitution to the states’ ability to regulate religion.[20]

Madison was adamant that preventing states from impairing the liberty of conscience was the “most important” of the proposed constitutional amendments, but faced with opposition from the Senate, and considerable opposition to imposing restrictions on state religious practices in the House, this was the major concession which the House made in the joint House-Senate conference on what was to become the Bill of Rights.[21]

* * * * *

Several things can be drawn from this debate. The fact that the First Amendment as adopted only applied to the federal government is critical, though, in understanding the various textual proposals. First, one can reject the oft-repeated argument that Madison’s use of the term “national religion” suggests that the First Amendment was intended to address only discrimination among sects. Madison had clearly intended to distinguish between a stricter provision affecting the federal (“national”) government and a more general provision affecting the states, and he

---

20 Linda Grant DePauw, Charlene Bangs Bickford, and LaVonne Marlene Siegel, eds., *Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791*, *Vol. 1: Senate Legislative Journal* (Baltimore: The Johns Hopkins University Press, 1972), 151 (hereinafter *Vol. I*). *Vol. IV*, 46. *Vol. 1*:158.

21 *Vol. IV*, 47-48.

initially expressed this with the term “national religion,” language which was rejected by the House Committee. When a member objected that the reformulation by the House Committee left open the possible application of the First Amendment to state establishment regimes that would be inconsistent with its terms, Madison reiterated his proposal that the provision should apply only to prevent establishment of a “national religion.” This was rejected in favor of language that “Congress shall make no law.” The context of Madison’s suggestion makes it clear that that was all that was intended: the more detailed provision (soon to be the First Amendment) applied only to Congressional action while only a more general “liberty of conscience” applied to the states, potentially permitting them to continue their current establishment practices under this amorphous standard. Even the more conservative Senate rejected language which would have specifically limited the impact of the Amendment to non-discrimination among "One Religious Sect or Society in preference to others."[22]

Philip Hamburger, making a more specific point, notes Madison’s proposal on a “national religion” as evidence that his commitment to broad religious freedom (and a separation of church and state as called for by the dissenters and in his 1785 “Memorial and Remonstrance”) had substantially waned at the time that he led the battle for the First Amendment. This point about Madison’s alleged change of heart, and Madison’s original opposition to a Bill of Rights, is also made by Justice Rehnquist.[23] Setting aside the actual limited purpose for which Madison had suggested use of the “national religion” language, this argument proves too much. Not only was Madison obviously deeply, personally committed to the broadest possible religious freedom, but his election to Congress was dependent in part on a comparable commitment; similarly, his sub-

---

22 *Vol. 1*, 151. *Vol. XI*, 1284-92.

23 Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002), 106. *Wallace v. Jaffree*, 472 U.S. at 98-99 (Rehnquist, J., dissenting).

sequent action as Jefferson's Secretary of State and as President and his own recollections (notably the "Detached Memorandum" which he wrote in retirement describing the battle for religious freedom) evidence his intent to obtain a strict separation and broad antiestablishment and protection for free exercise. Madison's initial opposition to a Bill of Rights was largely tactical – stemming from a fear that the anti-federalists' proposals to amend the Constitution before its adoption would derail ratification – and, in any case, was reversed by Madison in the face of Jefferson's support for a bill of rights, the evangelicals responsible for his election, and his own principles, not to mention the demands of North Carolina, Rhode Island and other states for protection against a possible expansive reading of the Constitution and federal authority.[24]

This leads to the second and more important implications of the restriction of the First Amendment to the federal government and elimination of any restrictions on state regulation of religion. The House insisted that the amendment to become the First Amendment be expressly limited to federal action to prevent any suggestion that it could impair state establishments, and even Madison's more general provision that would have required equal liberty of conscience be protected by all the states was rejected precisely because members recognized that they could not easily reach a consensus on what manner of religious freedom to impose on the states. Far easier to restrict the First Amendment to the federal government recognizing that they had made adequate changes to ensure that the standard imposed by its terms, while not consistent with many state constitutions and practices, was limited in its application. Thus, while it was clear that the

---

24. The argument that the federal government had no authority in the area of religion is closely related to the argument that the First Amendment is entirely jurisdictional. *Compare* Stephen D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995), 17 *et seq*. The most thorough histories of these developments are offered by Anson Stokes in *Church and State in the United States* and Philip Hamburger in his *Separation of Church and State*. The "no authority" argument was, of course, rejected in the adoption of the Bill of Rights when Madison, and others, recognized that the "necessary and proper" clause could easily be read expansively.

terms of the First Amendment would be inconsistent with some of the state regimes, a precise debate on the breadth of its terms was avoided by limiting its application to the federal government. Here, lack of consensus on the appropriate level of religious liberty in the new republic does not mean that the provision had to be vacuous, as some modern commentators suggest; rather, because it was limited in its application to the federal government, a higher standard could be applied: those opposing any church/state relationship obviously approved of that standard and those wishing to protect state flexibility supported a strict limitation on federal power. Logically, once it was clear that the First Amendment would not apply directly to the states, it made no sense to adopt a "least common denominator" approach; after all, those supporting a high standard could not accept a low standard, those in favor of a lower substantive standard could accept, in fact endorse, a higher standard, so long as it did not apply to their state practices but, rather, restricted the national government. The result was that the First Amendment was intended as a very strict restriction on the federal government's ability to intervene in the area of religion.

What, then, should we turn to in an effort to understand the contemporary meaning of the First Amendment? Given that the decision to restrict the application of the Bill of Rights was made in part because of the existence of state constitutional provisions that could not meet the First Amendment standard, the willingness of the states to adopt a myriad of church/state interactions at the state level in the early Republic says little about what the First Amendment was substantively meant to restrict (although it certainly is evidence of the fact that there was no consensus *at that time* that a strict separation of church and state was necessary in a republic). Looked at from a different perspective, the fact that Congress insisted that the Amendment not apply directly to the states was a recognition that most of those states could not satisfy its requirements.

If most states could not meet the standard of the First Amendment, in seeking to understand its breadth it is inappropriate to look at those states' practices and appropriate to give particular attention and credence to the practice in the one state which was certainly understood fully to satisfy its terms – Virginia (with Rhode Island having withheld consent to the Constitution until after the adoption of the Bill of Rights).[25] Herein lies another important basis for the focus on Virginia's role in adoption and understanding of the First Amendment.

* * * * *

Jefferson, of course, was not present when the First Amendment was proposed, albeit his views were adequately represented by James Madison. In fact, the important correspondence between Madison and Jefferson between the conclusion of the Philadelphia Convention and the adoption of the Bill of Rights – following on the triumphal correspondence from 1786 concerning adoption of the Statute – indicates that Jefferson had deep concerns about the Constitution and topping his list was the lack of express and broad protection for religious liberty. Madison clearly sought to assuage these concerns. In addition to his commitments to his dissenting constituents, this must have been on Madison's mind as he steered what would become the First Amendment through the first federal Congress, as would have been the most eloquent statement of religious freedom in America – Jefferson's Statute.[26] Based on these, and other historic factors noted by courts and commentators, there is certainly a strong argument for the primacy of the

---

25 Interestingly, in ratifying the Constitution and the Bill of Rights, the Rhode Island Convention did debate the question of whether a freedom of conscience requirement should be imposed upon all of the states. Ultimately, as delegate Marchant stated, while he "wishes all men would agree not to establish any Religi[on] – [it is] enough for us to keep it out of the Gen[eral] Gov[ernmen]t." Antieau, *Freedom from*, 153-54.

26 *E.g.* Jefferson to Madison, December 20, 1787, Jefferson to Madison, July 31, 1788, Madison to Jefferson, October 17, 1788, Jefferson to Madison, March 15, 1789 (especially "the legal check which it [a bill of rights] puts into the hands of the judiciary"), *Jefferson and Madison on Separation of Church and State,* Lenni Brenner, ed. (Fort Lee, NJ: Barricade Books, 2004), 93, 97-98, 99-100, 109.

Virginia experience, and Jefferson's Statute and Madison's Memorial and Remonstrance which played important roles in Virginia's experience, in understanding the contemporary meaning of the First Amendment. As noted above, there is equally a strong argument for considering the views of Virginia's religious dissenters.

In the end, there is no doubt that one can parse the language and argue from the various proposed changes to the language of the First Amendment made by multiple members of Congress for various shades of meaning, and these arguments are worthy of consideration. Yet, in interpreting that language it must be remembered that the language did not reflect a principle that the members were willing to apply to their states, quite the contrary. Thus, when Jefferson declares in 1802 that the First Amendment demands a "wall of separation" between church and the national government, he might equally have added that the states, on the other hand, were legally free to protect or restrict religious liberty as they saw fit, including maintaining a state church (which Massachusetts did, in various forms, until 1833) – although there is little question that Jefferson would like to see the other states adopt provisions comparable to those in Virginia. What the First Amendment did do was apply a broad restriction on the power of the federal government; given the limited nature of the restriction – applying only to the federal government – members of Congress (especially conservative members who might otherwise have balked at a strict separation of church and state) were willing to adopt substantive requirements that they would have not have agreed, at the time, to apply to their own states. Given this conjunction of events – the limited jurisdiction of the First Amendment, the influence of Virginia generally and especially on this important subject, Madison's seminal role and his commitment to the type of broad, Jeffersonian protection for religious freedom sought by his constituents and Jefferson and evidenced in the Statute – a strong case exists for Chief Justice Waite and the myriad of histori-

ans who see the foundation for the First Amendment in the experience of Virginia leading to the adoption of the Statute for Establishing Religious Freedom.

Jefferson and Madison and Religious Liberty in the Nineteenth Century

Still, this leaves the important alleged lacuna that seems to be one of the bases of Justices Rehnquist and Thomas' concern: If Jefferson's Statute (and letter to the Danbury Baptists and Madison's "Memorial and Remonstrance") defined religious liberty in the early republic, why did so many states maintain regimes that were inconsistent with those provisions (or at least their modern interpretation), and what basis did the Supreme Court have in 1878 for assigning them the role of American scripture?

It has already been suggested that inconsistent state practices cannot be seen as evidence of the narrow substantive nature of the First Amendment, to be applied only to the federal government. In fact, the contrary appears to be the case. What, though, should be made of practices in Virginia that appear to suggest the modern view of the First Amendment is too restrictive? A number of commentators cite as evidence against any separation of church and state instances of early government involvement with religion, for example early Blue Laws in Virginia or continued rules relating to vestries or days of thanksgiving. As a preliminary matter, to cite such minor exceptions in the face of clearly stated principles evidences a "sense for the capillary" and is generally unpersuasive. Relatively insignificant declarations or regulation must be considered in the full context of the fight for religious liberty and the necessity of untangling a complicated relationship between the pre-revolutionary church and state. Some alleged overlaps were necessitated by slow implementation of disestablishment, for example continued vestry regulation and rules concerning church property purchased during establishment. Others may have been incon-

sistent with separation of church and state, but "Congress, after all, sometimes breaches the limits of the Constitution." "Certainly in the present, legislators sometimes vote for measures that they could be fairly certain would be declared unconstitutional, and that may not even represent their own views about how the Constitution should be interpreted." As Justice Souter has stated, these type of examples "prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle." Jefferson and Madison often recognized that minor accommodations, while inconsistent with principles of religious freedom, might be unavoidable as a political matter when greater issues were at stake. For example, while Jefferson successfully ensured that the University of Virginia would not be a religious school and that attendance at religious worship would not be mandatory, he was forced, as a compromise, to permit ministers to hold services on campus. As historian Thomas Curry states: "That Americans during the revolutionary period did not always carry their principles into practice either in Church-State or other matters did not negate those principles." While one should seek to avoid interpretations that are inconsistent with pervasive or major restrictions, some flexibility in analysis is needed.[27]

Some, though, especially Justice Thomas, have argued that the First Amendment was so narrow that all it did was leave the issue to the states, i.e. it applied no substantive restriction to the federal government at all (which, he argues, had no authority in the area of religion in the first place). This argument rings hollow. By its terms, the Amendment provides a substantive standard and the debates concerning its content all suggest that while limitation to the federal

27 Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787* (Charlottesville: University Press of Virginia, 1977), 181-82. *See, e.g.,* Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion." *Harvard Law Review* 103, no. 7 (May 1990): 1409-1517. Kurt T. Lash, "Power and the Subject of Religion," Ohio State Law Journal 59 (1998), 1117 (quote). Kent Greenawalt, "Common Sense about Original and Subsequent Understanding of the Religion Clauses," University of Pennsylvania Journal of Constitutional Law 8 (May 2006), 497 (quote). *Lee v. Weisman*, 505 U.S. 577, 616 n.3 (1992)(Souter concurring). Curry, *First Freedoms*, 221 (quote).

government was central to its adoption, the specific scope of its application also mattered. While it is true that Madison had originally urged, when ratification of the Constitution was still in doubt, that no amendment was needed because the federal government wholly lacked authority in this area, he had abandoned that position (under pressure both from Jefferson and evangelical constituents) and after ratification whole-heartedly supported amendments, noting in the debates that, without express restrictions, the "necessary and proper" clause might be found to expand federal authority into the area of religion. The Bill of Rights was conceived as necessary for substantive reasons, and the debates surrounding the language of the First Amendment are largely meaningless if the provision has no substantive meaning and is wholly jurisdictional.[28]

Yet, the fact remains that the states obviously had different views of the appropriate scope of religious freedom in the early republic, views that, at least in 1791, were not as robust as Jefferson's and Madison's. Setting aside the intention to limit federal power strictly by the First Amendment, one might reframe the question as to whether Jefferson's Statute played some additional, significant role in the development of religious freedom by the time that the Supreme Court declared it seminal to American notions of religious freedom in 1878 (or declared it applicable to the states in 1940 as part of the ordered liberty guaranteed by the post Civil War amendments).[29] After all, as Justice Thomas urges, if the states did not intend to be bound by the substantive provisions of the First Amendment in 1789, why should they be now?

If the Supreme Court in 1878 saw the broad proscriptions of American religious freedom defined by Jeffersonian/Madisonian thinking, beyond the issues concerning the framing of the

---

28 *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring). A similar argument based on the limited jurisdiction of the first amendment is made by Hamburger, *Separation of Church and State*, 19, 54-55. That the first amendment was, in part, a jurisdictional provision does not rob it of substantive content.

29 *Cantwell v. Connecticut*, 310 U.S. 296 (1940)

First Amendment itself, discussed above, is there evidence that others also saw religious freedom more generally in a Jeffersonian/Madisonian light? Or, as Philip Hamburger states the question, "it would be valuable to learn … whether his [Jefferson's] words were as influential before 1947 as commonly supposed."[30]

Three related questions are worth some consideration: First, how did the states develop their own protections for religious freedom over this period? In particular, is there evidence that the states, or the understanding of the general populace or legal profession, were influenced by Jefferson's (and Madison's) thinking over this period? Second, is the trend in treatment of religious freedom from 1791 to 1878 relevant to the modern inquiry on the meaning of the First Amendment? Third, how does the application of the First Amendment to the states through incorporation under the Fourteenth Amendment affect this discussion?

First, as has been noted, most of the state constitutions at the time the First Amendment was adopted did not provide religious freedom in anything approaching the robust form adopted in Virginia and in the First Amendment. Yet, throughout the period from 1791 to 1878, state constitutional provisions relating to religious freedom went through substantial evolution and most of the movement was in the direction of liberalizing freedom in a manner more consistent with the First Amendment and with Jefferson's views. Changes included, for example, ending establishments or eliminating or narrowing religious tests (e.g. eliminating provisions restricting office to Protestants or modifying restrictions from protecting Protestants to Christians or all those believing in a future state of rewards and punishment). The changes are evident on the face of the constitutions themselves. The ever-popular John Leland made the point in 1811: "Since the revolution all the old states, except two or three in New England, have established religious

30 Hamburger, *Separation of Church and State*, 11.

liberty upon its true bottom;…" He goes on to explain his understanding of that "true bottom:" "Government should be so fixed, that Pagans, Turks, Jews and christians should be equally protected in their rights." Leland's inclusion of "Pagans" is particularly relevant as making it clear that non-discrimination among Christian sects or religion generally was not the only issue. As one historian, commenting on the changes in South Carolina's constitution, explained, "Federal constitutional reform spurred state constitutional reform. The religious clauses of the federal First Amendment and the strong freedom of conscience provisions of Article 8 of the South Carolina Constitution of 1790 were part of the same wave of revisions."[31]

Recognizing the broad nature of these state reforms at the end of the eighteenth and through the nineteenth century, both substantively and geographically, it can be difficult to tie them all expressly to Jeffersonian views. Several factors, though, justify a conclusion that Jefferson (and his Statute and letter to the Danbury Baptists) and, to a somewhat lesser extent, James Madison (and his Memorial and Remonstrance) provided essential ideological leadership for these reforms. First, it is very important that as the state reforms were occurring (and as Chief Justice Waite and his colleagues were being educated) there was a relatively broad dissemination of the Virginia Statute (and to a somewhat lesser extent Madison's "Memorial and Remonstrance" and Jefferson's letter to the Danbury Baptists) as emblematic of American ideas of religious freedom and separation of church and state, or, at least, what those doctrines should be. Second, there are some specific references to Jefferson's Statute in state constitutional debates

---

31 *See generally* Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* (Washington: Government Printing Office, 1909). *National Intelligencer*, September 14, 1811. James Lowell Underwood, "'Without discrimination or preference,' Equality for Catholics and Jews under the South Carolina Constitution of 1790," in *The Dawn of Religious Freedom in South Carolina*, James Lowell Underwood and W. Lewis Burke, eds. (Columbia: University of South Carolina Press, 2006), 61.

liberalizing religious freedom. Third, some of the reforms can be clearly traced to the success of Jeffersonian republicanism in the early nineteenth century.

In terms of a broad dissemination of Jefferson's views, a review of nineteenth century newspapers available on-line, for example, shows a number of instances in which the entire Statute or letter to the Danbury Baptists or Madison's lengthier Memorial and Remonstrance were reprinted with little commentary other than to note their prestigious lineage or to suggest that readers should remember the wisdom of Jefferson and/or Madison in considering contemporary church/state issues. These Jeffersonian documents tended to surface precisely when constitutional reform or significant church/state issues were agitating in a given state. Equally important, even when people attacked Jefferson politically and personally, they recognized that he had played a seminal role in developing and defining religious freedom, that is, American religious freedom was broadly associated with Jefferson. In fact, it seems particularly telling that when Jefferson was eulogized there were instances in which his Statute was read at a memorial service without reference to or recitation of the Declaration. Others stressed equally the importance of the Statute, the Reverend Samuel Smith in Baltimore, for example, noting Jefferson's particular pride in the "subversion of a dominant religion, commenced by him, and completed by Mr. Madison."[32]

---

32 *Evening Post* (*The New-York Evening Post*), September 23, 1802 ("The writings of Mr. Jefferson, upon civil and religious freedom, are pretty well known, his conduct in time of danger and peril has been hinted at, but is not so generally known."). *Richmond Enquirer*, July 25, 1826 (reporting on memorial services at Fredericksburg, reprinted from the *Herald*); *Richmond Enquirer*, August 8, 1826 (reporting on services at Suffolk). *Selection of Eulogies, Pronounced in the Several States, in Honor of those Illustrious Patriots and Statesmen, John Adams and Thomas Jefferson* (Hartford: D.F. Robinson & Co. and Norton & Russell, 1826), 87. Underwood notes that "[d]uring the months immediately prior to the [state constitutional] convention, South Carolina newspapers printed documents from other states that espoused a constitutional philosophy of broad religious freedom without establishment." Underwood, "Without," 64.

For newspapers that reprinted and/or commented favorably on Jefferson's Statute, *see State Gazette of South Carolina*, August 10, 1786; *City Gazette and Daily Advertiser* (Carolina), August 18, 1800;
(footnote continued)

More general sources at the time attribute much of the understanding of American religious freedom to Jeffersonian influence. One of the broadest claims for Jefferson's impact, and a not insignificant one historically, is made by George Bancroft in the magisterial *History of the United States of America, from the Discovery of the Continent*. Bancroft concludes that "[t]he preamble to the bill for establishing religious freedom, drawn by Jefferson, expressed the ideas of America…." And "[t]hese enunciations of Jefferson on the freedom of conscience expressed the forming convictions of the people of the United States;…"[33] Of course, Bancroft was one of the most widely-read and highly-regarded nineteenth century historians, and this statement, alone, would be worthy of consideration. Particularly interesting in this regard is the question:

(footnote continued)
Salem Gazette (Salem Register), MA, March 3, 1803; *New-Hampshire Gazette*, September 27, 1803; *World*, Bennington VT, July 11, 1804; *Eastern Argus*, Portland ME, November 10, 1808 (reprinting address of Baltimore Baptist Association to Jefferson); *Sun* (The Pittsfield Sun), Pittsfield MA, November 7, 1810; *Republican Farmer*, Bridgeport CN, November 21, 1810; *United States' Telegraph*, Washington DC, June 27, 1826; *Columbia Telescope and South Carolina State Journal*, November 21, 1826; *Raleigh Register, and North-Carolina Gazette*, April 29, 1930; *Pensacola Gazette and Florida Advertiser*, May 15, 1830; *Texas State Gazette*, Austin TX, July 7, 1855; *Liberator*, December 28, 1855; *The New York Herald*, August 15, 1859; *Daily Arkansas Gazette*, June 7, 1871.

For newspapers that reprinted or commented favorably on Madison's Memorial and Remonstrance, *see Sun* (The Pittsfield Sun), Pittsfield MA, November 7, 1810; *American Mercury*, Hartford CN, June 17, 1817; *American Yeoman*, Brattleboro VT, July 11, 1817; *American Beacon and Commercial Diary*, Norfolk VA, July 12, 1817; *Republican Farmer*, Bridgeport CN, November 21, 1820; *Columbia Telescope and South Carolina State Journal*, November 21, 1826 (reprinting from *Richmond Enquirer*); *Vermont Gazette*, Bennington VT, February 24, 1829; *Boston Investigator*, April 7, 1847, April 14, 1847.

For newspapers that reprinted or commented favorably on Jefferson's letter to the Danbury Baptists *see New Jersey Journal*, January 26, 1802; *Constitutional Telegraph*, January 27, 1802; *American Mercury*, January 28, 1802; *Salem Gazette*, January 28, 1802; *Rhode Island Republican*, January 30, 1802; *The Bee*, February 3, 1802; *The Temple of Reason*, February 6, 1802; *The Sun*, February 15, 1802; *Daily South Carolinian* (Columbia), May 4, 1855; *Boston Investigator*, May 30, 1855; *Boston Investigator*, January 9, 1869 (reprinting from *Richmond Whig*); *Boston Investigator*, June 9, 1869. *See also* Daniel L. Dreisback,"Thomas Jefferson, a Mammoth Cheese, and the 'Wall of Separation Between Church and State,'" in *Religion and the New Republic: Faith in the Founding of America*, ed. by James H. Hutson (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2000), 95n.18, citing *American Citizen and General Advertiser* (New York), January 18, 1802; *Independent Chronicle* (Boston) January 25, 1802; *New Hampshire Gazette*, February 9, 1802; *Centinel of Freedom* (Newark) February 16, 1802.

33 George Bancroft, *History of the United States of America, from the Discovery of the Continent*, VI (Boston: Little, Brown, and Company, 1879), 207-08.

What would an educated mid-nineteenth century person (or lawyer or judge) see as the antecedent of America's religious freedom? Certainly it was well known that America had led the world in development of religious freedom, but to what source would an educated nineteenth century person turn to understand the scope and meaning of that protection? The First Amendment itself would be looked to, but that involved only a federal restriction at the time; state constitutions would be considered, and they were changing in the direction of greater protection along Jeffersonian principles. What historic sources, primary and secondary, would they consider? Certainly Bancroft's history would not have been irrelevant and, as noted above, Jefferson's Statute, Madison's Memorial and Remonstrance, and the letter to the Danbury Baptists were well circulated. At the same time, as noted below, Joseph Story's *Commentaries on the Constitution* – the leading nineteenth century constitutional treatise – took a much narrower view of the First Amendment, and Story took a much less laudatory view of Jefferson generally. Still, the breadth of sources citing Jefferson's central role is certainly significant.

Second, in some instances there can be little question that state constitutional debates relied on Jefferson's Statute in efforts to broaden local protections for religious freedom. In North Carolina, delegates to a constitutional convention in 1835 were excoriated by some of their colleagues for a test oath in North Carolina's earlier Constitution. Delegate Edwards read into the record the preamble of Jefferson's Statute. Delegate Bryan, unsatisfied with that, read into the record the entire Statute. The new constitution was somewhat more liberal than its predecessor. This pattern is also evident in the case of Rhode Island which, after the electoral success of the Republicans, formally adopted a new constitution (having formerly relied upon the seventeenth century charter) which obviously borrowed the language of its religious freedom clause from Jefferson's Statute.

> Whereas Almighty God hath created the mind free; and all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend to beget habits of hypocrisy and meanness;… we, therefore, declare that no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person's voluntary contract; nor enforced, restrained, molested, or burdened in body or goods; nor disqualified from holding any office; nor otherwise suffer on account of such person's religious belief; and that every person shall be free to worship God according to the dictates of such person's conscience, and to profess and by argument to maintain such person's opinion in matters of religion; and that the same shall in no wise diminish, enlarge, or affect the civil capacity of any person.

Unfortunately, relatively sparse records and state pride in not relying expressly on another state's constitution do not provide frequent references to Jefferson, but even some express reliance on the Statute is relevant.[34]

Third, in some cases, even where state delegates might have been reluctant to rely expressly on developments in their sister states, clearly state constitutional reform was based upon Jeffersonian views of religious freedom. Certainly, Republican sources from the period urged that fidelity to Jefferson's ideals required the states to enhance their protection of religious liberty. In 1842, the *New Hampshire Patriot and State Gazette*, for example, warned that

> [t]he N.H. Patriot has often pointed out this odious feature in our constitution [officials must be Protestant], … and held them up to the view of our people as gross and monstrous violations of our professions of religious and political liberty, of equal rights and privileges to all…. if the people of New Hampshire would maintain their reputation as Republicans of the Jefferson school, they must come out boldly, and at once, and by erasing this dark feature from their code of laws, declare that men's speculative opinions, be they orthodox or heretical, *are their own*; that men's religion is a concern between themselves and their Maker; and, that, to encroach upon religious freedom, is to violate the privacy of conscience, and to trample upon those rights, which European despots despise and deny, but which the men of the revolution taught us to cherish and venerate.

---

34 *Proceedings and Debates of the Convention of North-Carolina called to amend the Constitution of the State which Assembled at Raleigh, June 4, 1835* (Raleigh: Joseph Gates and Son, 1836), 219, 239. 1843 Rhode Island Constitution (Art. 1.3).

In Danbury, Connecticut, where continued disputes over church/state issues were, perhaps, most contentious, a pamphlet published in 1803 entitled *Republican Notes on Religion* reprinted with the Statute the religion section of Jefferson's *Notes on the State of Virginia*. As Jeffersonian interests gained strength, the pattern continued. "By 1818 in Connecticut, the victory of the Jeffersonians in politics made possible the securing of a new constitutional right: No person could be compelled to join, support, or be legally classed with any religious association, and every denomination of Christians would have equal rights and privileges." Similarly, "[i]t was largely due to the influence of Jefferson's views that Massachusetts in 1800 repealed laws, passed in 1780, for the support of worship and the settling of ministers." As the Supreme Court explained in *Abington School District v. Schempp*, 374 U.S. 203, 214 (1963) (footnote omitted), "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States."[35]

There is a twist to this story, though. As noted above, Bancroft and Chief Justice Waite, who wrote the Court's opinion in *Reynolds*, were, for a time, next door neighbors, and their correspondence indicates that Waite, while preparing the opinion in *Reynolds*, specifically asked

---

35 *New-Hampshire Patriot and State Gazette*, Concord NH, September 22, 1842. *Republican Notes on Religion; And, an Act Establishing Religious Freedom, passed in the Assembly of Virginia, in the Year 1786* (Danbury, CN: Thomas Rowe, 1803). Anson Phelp Stokes and Leo Pfeffer, *Church and State in the United States*, rev'd edition (New York: Harper & Row, 1964), 52. Strout, "Jeffersonian Religious Liberty," in Petersen and Vaughan, *Virginia Statute*, 209-10. *See generally* Albert L. Sturm, "The Development of American State Constitutions," *Publius*, 12:1 (Winter 1982), 63 ("Major forces that influenced state constitutional changes during these years [1800-1860] included population growth and the movement westward, economic development, and the general pressures of Jeffersonian and Jacksonian democracy.").

Similarly, in one of his most famous pamphlets, "A Blow at the Root: Being a Fashionable Fast-Day Sermon, Delivered at Cheshire, Massachusetts, April 9, 1801," which was reprinted in at least five states, John Leland "did not fail to point out the contrast between the noble language of the statesmen of Virginia on the church-state relationship and 'the little pigmy *shall bes* and *shall not bes* of Massachusetts.'" L.H. Butterfield, "Elder John Leland, Jeffersonian Itinerant," *American Antiquarian Society*, 62:2 (1952), 210-11.

Bancroft for historic guidance on the origins of the First Amendment and was directed to the Statute and Madison's "Memorial." Opponents of a Jeffersonian/Madisonian interpretation point to this apparent elitist, Jeffersonian conspiracy to redefine the basis of the First Amendment. Yet, how to evaluate this historic fact is more complicated. Bancroft was, after all, one of the most highly-acclaimed historians of the era. Moreover, Justice Waite clearly did not rely solely upon Bancroft's conclusion but rather used it as a stepping stone to further research which tended to support Bancroft's conclusion.[36]

Of course, there was learning to the contrary. Most notably Justice Joseph Story, author of the very important *Commentaries on the Constitution,* specifically and vehemently attacked Jefferson's vision of religious liberty; in fact, he took the opportunity of his first lecture at Harvard as the Dane Professor of Law to do so – challenging Jefferson's argument that Christianity was not part of the "common law." Story, the conservative son of Massachusetts, insisted that the First Amendment was intended only to prevent discrimination among Christian sects. While a full discussion of the Jefferson/Story "common law" debates is well beyond the scope of this work, Story's limited view of the application of the First Amendment was clearly erroneous (as shown above) and certainly Story spoke against the trend evident in developments throughout the states.

This leads to another question which might be asked: What is the significance of these developments to understanding of the First Amendment as reflected by the Supreme Court in 1878? This question can be answered, in part, by observing that it is critics of the Supreme

---

36 In addition to standard legal texts and legal history, Waite, for example, also apparently relied upon Robert R. Howison, *History of Virginia from its Discovery and Settlement by Europeans to the Present Time* (Richmond: Drinker and Morris, 1848) and Robert B. Semple, *A History of the Baptists in Virginia* (1810). Drakeman, "Reynolds v. United States," 710-11, 716.

Court's broad modern reliance on Jefferson and Madison that have suggested that their views were exceptional, as evidenced by the maintenance of close church/state relations in most states after adoption of the First Amendment and through 1878. It would seem that it is very relevant, though, that notions of the meaning of religious freedom in America, as they matured in the early nineteenth century, were often expressly or implicitly based upon the views of Jefferson and Madison, particularly the Statute, the letter to the Danbury Baptists, and the Memorial and Remonstrance. Interestingly, after the Court's declaration in 1878 of the seminal nature of these documents, this view was widely accepted by the time the Supreme Court incorporated the First Amendment in the Fourteenth Amendment in 1940, thus applying it to the states. A 1926 article in the Virginia Law Review, for example, explained: "Two great Virginians [Jefferson and Madison] are by the unanimous verdict of all impartial students, entitled to the imperishable glory of having furnished the brains, pens and skilled leadership separating church and state and establishing religious freedom as it exists today. Thomas Jefferson drafted the celebrated statute of Virginia for religious freedom…." "This [Jefferson's] statute soon became a model for all of the American states and it is in substance embodied as a part of the bill of rights of every one of them. It was the direct and immediate cause of having a similar clause inserted in the first amendment to the Constitution of the United States." An early twentieth century historian hailed the Statute as "what we proudly cherish and proclaim as the American principle of absolute religious liberty." While such later evidence might be viewed as tainted by the Supreme Court's decision in 1878, it certainly is relevant that reliance on Jefferson and Madison was not viewed as remarkable at the time.[37]

---

37 W.B. Swaney, "Religious Freedom," *Virginia Law Review*, 12:8 (Jun. 1926), 636-37. Max J. Kobler, "Phases in the History of Religious Liberty in America, with Special Reference to the Jews," *Publications of the American Jewish Historical Society* 11 (1903):66, quoted in Cushing Stout, "Jeffer-
(footnote continued)

These questions of eighteenth and nineteenth century history lead to a third question, a full resolution of which is, again, beyond the scope of this paper but which should be explicitly recognized. As noted above, there is little question that early state constitutional provisions provided for far narrower protections of religious freedom than the First Amendment; indeed, many directly sanctioned some form of establishment. It is evident that the First Amendment's provisions on establishments and free exercise were not intended to apply to the states. While these state constitutions tended to be reformed in the direction of the broader protection of the First Amendment in the nineteenth century, the early state experience is heavily urged by those who oppose the Supreme Court's reliance on Jefferson and Madison for interpreting the First Amendment. The argument is, in part, that since the states were clearly not subject to such strict separation of church and state at the time the First Amendment was adopted, they cannot properly be so restricted today. This is not really an argument about the substantive breadth of the First Amendment at all. In essence, this is a veiled complaint about the post-Civil War amendments and "incorporation" of the Bill of Rights to apply to the states at all. Justice Thomas, more appropriately, has made this complaint about incorporation directly.[38]

(footnote continued)
sonian Religious Liberty and American Pluralism," in Peterson and Vaughan, *Virginia Statute*, 224. *See also* Joseph Fort Newton, "Thomas Jefferson and the Religion of America," *Forum* (Dec. 1927), 891-93, 894, quoted in Cushing Strout, "Jefferson's Statute and the Glorious First," *Proteus*, 4:2 (1987), 7 (Newton, a popular clergyman, explains that the Jefferson principle "absolute separation of church and state" won "the long fight for religious independence, first in the Statute of Virginia for Religious Freedom, and later, in the First Amendment to the national Constitution.").

38 *E.g. Cutter v. Wilkinson*, 544 U.S. 709, 726-27 (2005)(Thomas concurring); *Elk Grove Unified School Dist.* v. *Newdow,* 542 U.S. 1, 50 (2004)(Thomas concurring)("it makes little sense to incorporate the Establishment Clause"). Some commentators also complain more of incorporation than the scope of the First Amendment. *See, e.g.*, John Witte, Jr., *Religion and the American Constitutional Experiment*, 2nd ed. (Boulder: Westview Press, 2005), 139; Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995), 53; Joseph M. Snee, "Religious Disestablishment and the Fourteenth Amendment," *Washington University Law Quarterly*, 1954:4 (December 1954), 371-407. Snee's work is telling in this regard as it, like Justice
(footnote continued)

This question of incorporation is a separate and complicated matter. Broad and persuasive arguments have been made that the Supreme Court should have made the entire Bill of Rights immediately applicable to the states after the adoption of the Fourteenth Amendment guaranteed the "privileges and immunities… due process … and equal protection" of all U.S. citizens, although this position was rejected by the Court in the Reconstruction cases.[39] Two points are clear: First, one should not confuse the question of incorporation and the substantive breadth of constitutional rights. For example, this argument says nothing about the protections the First Amendment supplies against federal government action. If the First Amendment has been made applicable to the states, presumably the same protections apply against state establishment as federal establishment. Justice Thomas argues that this should not be the case, urging that even if the First Amendment is incorporated and applicable to the states, only the free exercise clause should apply as the establishment clause, because it was intended as a jurisdictional provision, provides no individual liberty but only provides rights for the states. This is a non-sequitur. Protecting individuals from government establishment was at the heart of what dissenters had sought in Virginia and they, and their allies, sought similar protections against the federal government. The entire drive for a Bill of Rights was quintessentially about protecting people's, not states', rights. Even those who wanted to restrict the reach of the First Amendment in order to protect states' rights in the area, did not oppose a substantive provision protecting individual freedom so long as it was applied only to the federal government. Other evidence from the Vir-

---

(footnote continued)
Thomas' opinions, makes clear that the argument is based upon the notion that the First Amendment's establishment clause does not provide any direct rights to persons (as opposed to the states), a position which Snee concedes is inconsistent with Madison's approach in the Memorial and Remonstrance.

39 *See, e.g.,* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham: Duke University Press, 1990).

ginia experience makes this clear. As Joseph Snee concedes, clearly Madison's Memorial and Remonstrance, and he might have added Virginia's dissenters, recognizes the anti-establishment clause to be a personal right.

More generally, I have suspected for some time that a problem at the bottom of the conservative assault on the modern Court's jurisprudence in the area of civil rights is largely, if implicitly, based on opposition to incorporation because it is inconsistent with the federalism notions that were dear to the early founders (and modern conservatives). While there is a voluminous literature on the question of incorporation which will not be rehearsed here, objections based upon federalism must be taken with at least some caution. At least at some level, the fact is that not only were the southern states who sought to protect slavery behind a veneer of states' rights thoroughly beaten in a devastating war, but that loss had institutional implications which, in an organic manner, changed the Constitution in terms of state/federal relations. (Indeed, it is ironic that those who most vehemently insist that the Civil War was about states' rights are most unwilling to concede that the South's loss resulted in a structural change in, and limitation to, those states' rights.) The post-war amendments were understood, at least in some manner, to change the previous balance in this area, and not simply in the area of slavery but, more broadly, in the area of citizens' rights. Late eighteenth century and early nineteenth century notions of states' rights, at least in their full breadth, were swept away at Appomattox.

In any case, if the establishment clause is incorporated in the protections of the post-Civil War amendments, applying a Jeffersonian meaning to that vastly expanded authority is consistent not only with the history of the adoption of the First Amendment, but also the evolution of the meaning of religious freedom in the early republic through the Supreme Court's decision in *Reynolds v. United States*.

Conclusion

If we are to evaluate the historic significance of Thomas Jefferson and his Statute for Establishing Religious Freedom in the development of religious freedom in America (before the Supreme Court effectively sanctified Jeffersonian understanding), there are several questions to consider: First, what role did it play in the origin and adoption of the First Amendment? Second, what role, if any, did it play in the evolution of meaning of religious freedom in the early republic? The answer to both questions is that Jefferson and his beloved Statute played a highly important, albeit certainly not exclusive, role in both. The Statute (and the dissenters who demanded its adoption and Madison who engineered its adoption) played an important, indeed defining, role in adoption and definition of the First Amendment. We can also say that the principles evident in the Statute, and in the First Amendment, took on greater and greater importance over the course of the nineteenth century as states modified their constitutions and adopted greater religious freedom and separation of church and state. While additional study and analysis is underway, modern suggestions that Chief Justice Waite (and his eight colleagues) were simply "making it up" in 1878, or relied inappropriately on Bancroft's idiosyncratic views, are unfounded.

The Virginia Statute for Establishing Religious Freedom

(language deleted from Jefferson draft in italics, inserts in brackets)

Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that [Whereas,] Almighty God hath created the mind free, *and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint;* that all attempts to influence 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, as was in his Almighty power to do, *but to extend it by its influence on reason alone,* that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and abhors,* 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, and whose powers he feels most persuasive to righteousness; and is withdrawing from the ministry those tempora*l*[ry] rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends *also* [only] to corrupt the principles of that *very* religion it is meant to encourage, by bribing, with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; *that the opinions of men are not the object of civil government, nor under its jurisdiction;* 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, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; 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; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.

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

And though we well know that this Assembly, elected by the people for the ordinary purpose of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act [to be] irrevocable would be of no effect in law; yet we are free to de-

clare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.