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**IN IMPARTIALITY WE TRUST:
A COMMENTARY ON GOVERNMENT AID
AND INVOLVEMENT WITH RELIGION**

THOMAS J. CLEARY*

[S]ay nothing of *my* religion. It is known to my God and myself alone. Its evidence before the world is to be sought in my life; if that has been honest and dutiful to society, the religion which has regulated it cannot be a bad one.¹

-Thomas Jefferson

I. INTRODUCTION

Government neutrality towards religion was not intended by the Framers of the U.S. Constitution, is not mandated by the First Amendment, and, strictly speaking, is not possible. Despite this, there has been a significant trend in the law towards establishing “neutrality” as the benchmark for proper government interaction with religion. In fact, many view the Establishment and Free Exercise Clauses of the First Amendment [hereinafter “Religion Clauses”] as erecting an impenetrable wall that separates government and religion. This is incorrect, however, as the Religion Clauses stipulate only that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”² Notably, the wall metaphor and the neutrality ideal

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¹ Letter from Thomas Jefferson to John Adams (Jan. 11, 1817), *in* THE ADAMS-JEFFERSON LETTERS, at 506 (Lester J. Cappon, ed., 1959) (emphasis added).

² U.S. CONST. amend. I.

are not referenced anywhere in the United States Constitution [hereinafter “Constitution”]. This is consistent with the fact that such an approach was not intended or implemented by the Framers.

In order to understand the neutrality ideal it is necessary to understand its evolution. In developing this understanding it is important to consider the sixteenth and seventeenth century “tolerance movement” and the development of religious liberty in the United States.³ This involves considering the views of James Madison and Thomas Jefferson. Also, the wall metaphor will be explored as its infusion into the jurisprudence of the United States Supreme Court [hereinafter “Supreme Court”] has produced a tumultuous and unstable area of law. This infusion has distorted the Religion Clauses and is the primary impediment to true religious freedom in the United States. Indeed, the unfortunate consequences of this infusion give new meaning to Justice Cardozo’s warning that “[m]etaphors in law are to be narrowly watched, for starting [as] devices to liberate thought, they end often by enslaving it.”⁴

In the context of the Religion Clauses, true neutrality requires not only impartiality and the absence of bias but also noninvolvement and general disinterest in religion. First, true neutrality is not possible because actual impartiality is not possible. Second, true neutrality is not possible because government and religion share a natural connection, which precludes noninvolvement and discourages disinterest. The connection existing between government and religion in society ensures that there must be a substantial degree of interaction between the two.

With a fresh memory of religious tyranny in Europe, it is not surprising that many of the colonists were eager to secure religious liberty after the Revolutionary War. The premiere importance of religious liberty is alluded to by the fact that the first sixteen words of the First Amendment to the

³ Throughout this text, “tolerance movement” refers to the gradual acceptance in popular sentiment of government tolerance of religious pluralism.

⁴ *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

Constitution were dedicated to establishing such security. These sixteen words proscribe government establishment of religion and prescribe the right of all citizens to freely exercise their religion. The debates of the First Congress on the proposed religion amendment, however, do not indicate a desire to foster government neutrality towards religion and irreligion. Rather, the debates strongly indicate that the First Amendment was *not* intended to mandate such neutrality. This interpretation is bolstered by the abundant examples in early America of direct government aid to and involvement with religion.

Ultimately, because true neutrality is not possible, nearly all government interaction with religion is to some degree friendly or hostile. One could argue, therefore, that government interaction with religion is *inherently* friendly or hostile in nature. As a consequence, establishing neutrality as the ideal misses the mark and has produced a swinging pendulum in the Supreme Court's jurisprudence. At one end of its arc the pendulum produces hostility towards religion and at the other end of the arc it produces friendliness towards religion. This is reflected in case law and in both early and modern government practices. Ultimately, the pendulum phenomenon must be brought to an end as it undermines uniformity, judicial economy, and societal stability.

Because government interaction with religion is generally friendly or hostile in nature, the question then becomes whether to adopt a friendly or hostile approach. Of the two, for a myriad of reasons, it is better to adopt a friendly approach. Nonpreferentialism represents the ideal friendly approach.⁵ This is true for four reasons. First, nonpreferentialism does not require neutrality between religion and irreligion, which is more aligned with the original understanding of the Religion Clauses.⁶ Second, it is

⁵ Nonpreferentialism is the view that government may not prefer one religion to another religion but may support religion in general. See discussion *infra* Section V, subsection A.

⁶ This is true, as it appears that these clauses were originally intended to prevent the national government from endorsing a particular religious

more consistent with the text of the Religion Clauses as the clauses themselves do not mandate government neutrality towards religion. Third, it would allow for nonpreferential aid to religious institutions, which perform many important social services. Finally, as Alexis de Tocqueville indicates, religion encourages morality. It is prudent to adopt a friendly approach, therefore, because such encouragement is key in producing government stability and longevity.

II. THE EVOLUTION OF GOVERNMENTAL NEUTRALITY TOWARDS RELIGION IN THE UNITED STATES

This section will examine the sentiments of John Locke⁷ and Charles-Louis de Secondat, Baron de Montesquieu⁸ [hereinafter “Montesquieu”] regarding religious tolerance and will provide context to the tolerance movement and the evolution of religious freedom in America. Specific attention will be given to the views of James Madison and Thomas Jefferson. A brief summary and review of the struggle for religious freedom in Virginia follows. Next, the genesis of the phrase “a wall of separation between church and state” will be examined. Finally, judicial adoption of this phrase will be considered together with the resulting impact on the jurisprudence of the Supreme Court.

sect or establishing a national church or religion. *See* discussion *infra* Section III, subsection A.

⁷ John Locke (1632 – 1704) was an English political philosopher. Of particular note, in his “Second Treatise of Government,” Locke proposed that a government was truly legitimate only when it protected the natural rights of life, liberty, and estate and when its governance was based on the consent of the governed. In his “Second Treatise of Government” Locke also argued that those governed without their consent had a right to rebellion. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon ed., Bobbs-Merrill Co., Inc. 1952) (1690).

⁸ Montesquieu (1689 – 1755) was a Frenchman widely regarded for his political philosophy. He argued that the essential functions of government could be divided into three categories: legislative, executive, and judicial. He argued that these three functions of government should be isolated from one another to prevent the consolidation and corruption of government power.

A. Locke, Montesquieu, and the Tolerance Movement

The Framers were true products of the Enlightenment Era. They were well educated.⁹ They were well read in terms of both classic and modern political philosophy.¹⁰ Indeed, many of the Framers were great political thinkers in their own right. There is no better testament to this fact than that document which sets forth the organic scaffolding for our unique system of government—the Constitution.

The Constitution was formulated to produce a system of government that would last throughout the ages. While many aspects of the Constitution are novel and owe their genesis to the minds of the Framers, it is important to keep in mind that the Framers were heavily influenced by Enlightenment political philosophy. The Enlightenment brought about a revolution in systematic rationality. The era is characterized, in part, by a resurgence and infusion of systematic thought, which produced principled and well-reasoned treatises on government.

In particular, many Enlightenment philosophers considered the relationship between government and religion.¹¹ This issue was considered by Locke in *A Letter Concerning Toleration*¹² and by Montesquieu in *The Spirit of Laws*.¹³ These important and influential works provide context to the development of religious liberty in America.

⁹ See generally M.E. BRADFORD, FOUNDING FATHERS: BRIEF LIVES OF THE FRAMERS OF THE UNITED STATES CONSTITUTION (University Press of Kansas 1994) (1981) (detailing the educational backgrounds of the individual Framers and concluding that they were highly educated).

¹⁰ *Id.*

¹¹ Implicit in this notion is the idea that a relationship *must exist* between government and religion.

¹² JOHN LOCKE, A LETTER CONCERNING TOLERATION (Prometheus Books 1990) (1689).

¹³ CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (Anne M. Cohler, Basia C. Miller, & Harold Stone, trans., Prometheus Books 2002) (1748) (Originally published in French as “*De l’Esprit des Lois*”).

American religious liberty was born out of the tolerance movement, which these works helped to produce.

The influence of Locke is heavily reflected in the Declaration of Independence¹⁴ and is well documented in the contentious colonial debates concerning ratification of the Constitution.¹⁵ Locke's treatise on toleration "became a bible to many in the eighteenth century, who were still contending against the old theories of religious uniformity."¹⁶ In *A Letter Concerning Toleration*, Locke examines the relationship between religion and government. Locke argues that above all things it is necessary to "distinguish exactly the business of civil government from that of religion."¹⁷ Locke argues that government does not naturally have the authority to compel the acceptance of particular religious beliefs and that such authority cannot be granted to it by consent of the people as "no man can so far abandon the care of his own salvation as blindly to leave it to the choice of any other."¹⁸ Overall, Locke strongly advocates government tolerance of religious beliefs.¹⁹ While he attributes much civil unrest to religious intolerance and the use of force to compel religious belief, Locke does not advocate neutrality towards religion.

¹⁴ This is true both in its formal recital of life, liberty, and the pursuit of happiness as inalienable rights and more broadly by the encapsulated notion that those governed without their consent have a right to rebellion. See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

¹⁵ See Arthur Lee, *Reply to Wilson's Speech: 'Cincinnatus' V*, in 1 THE DEBATE ON THE CONSTITUTION, 1787-1788, 114, 119 (Bernard Bailyn, ed., 1993) (In the New York Journal on Nov. 29, 1787 Arthur Lee admonishes his partner in debate for not having read Locke.); See also *Cato III*, in 1 THE DEBATE ON THE CONSTITUTION, 1787-1788, *supra* at 214, 216 (article discussing Locke's theories of government and the necessity of securing life, liberty, and estate that was originally published in the New York Journal on Oct. 25, 1787).

¹⁶ Library of Congress Exhibition, *Religion and the Founding of the American Republic*, <http://www.loc.gov/exhibits/religion/rel02.html> (last visited Nov. 15, 2006).

¹⁷ LOCKE, *supra* note 12, at 18.

¹⁸ *Id.* at 19.

¹⁹ *Id.* at 19.

Rather, he strongly advocates the use of rational persuasion to encourage religious morality.²⁰

The influence of Montesquieu on the Framers is clear as “[e]ven a cursory examination of the Constitution reveals the influence of Montesquieu’s thesis.”²¹ In his *Spirit of Governments* article printed in the National Gazette on February 20, 1792, Madison himself described the works of Montesquieu as having “lifted the veil from the venerable errors which enslaved opinion, and pointed the way to those luminous truths of which he had but a glimpse himself.”²² In *The Spirit of Laws* Montesquieu performs a careful examination of the connection between government, religion, and morality. In this treatise Montesquieu advocates religious tolerance but distinguishes between tolerating and approving a religion.²³ Based on this distinction Montesquieu finds it is necessary for civil laws to prevent religions from “embroiling” the state and from causing disturbances amongst themselves.²⁴ Montesquieu urges that “[h]uman laws, made to direct the will, ought to give precepts, and not counsels; religion, made to influence the heart, should give many counsels, and few precepts.”²⁵

Montesquieu, however, does not advocate government neutrality towards religion. Rather, he thinks that religion has helped to tame government tyranny and proclaims “we owe to Christianity, in government, a certain political law...[as it represents] a benefit which human nature can never sufficiently acknowledge.”²⁶ For instance, he observes that

²⁰ *Id.* at 20.

²¹ *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). *See, e.g.*, THE FEDERALIST NO. 47 (James Madison) (on the separation of powers). In addition, the “celebrated” Montesquieu was referenced explicitly during the debates on the constitutional convention of 1787 and during the colonial debates surrounding ratification of the Constitution.

²² JAMES MADISON, *Spirit of Governments*, NAT’L GAZETTE, Feb. 20, 1792 reprinted in JAMES MADISON WRITINGS, 509, 510 (Jack N. Rakove, ed., The Library of America 1999) (1792).

²³ MONTESQUIEU, *supra* note 13, at 51-52.

²⁴ *Id.* at 52.

²⁵ *Id.* at 32.

²⁶ *Id.* at 29.

religion has influenced princes to display greater humanity and self-control and rendered them more likely to be directed by laws.²⁷ Montesquieu states “the Christian religion, which ordains that men should love each other, would, without doubt, have every nation blest with the best civil law, the best political laws; because these, next to this religion, are the greatest good that men can give and receive.”²⁸ For these reasons Montesquieu advocates government tolerance of religious beliefs. It is also important to note that Montesquieu rejects the notion that all religions benefit government.²⁹ Overall, it appears unlikely that the Framers would have seen Montesquieu as advocating either a complete separation of religion from government or establishing absolute neutrality as the ideal relationship between the two.

In short, Locke and Montesquieu significantly influenced the Framers. In religion, this influence is most clearly reflected in the tolerance movement that spread throughout America during the late eighteenth century. The tolerance movement planted the seed for what would later become the unique notion of religious liberty and independence in America. As discussed below, this movement did not necessarily embrace government neutrality towards religion.

B. The Evolution of Religious Liberty in Colonial America

American colonization was fueled by a desire to escape religious persecution in Europe. Interestingly, many think that the Pilgrims came to America because the Pilgrims wanted freedom for everyone to practice different religions. This common misconception is patently false. Rather, the Pilgrims came to America because they wanted everyone to have the freedom to practice *the Pilgrims’ religious beliefs*. Thus, it is not surprising that religious intolerance and

²⁷ *Id.* at 29.

²⁸ *Id.* at 27.

²⁹ *See id.* at 30 (arguing that while we ought to embrace Christianity, we ought to reject “Mahommedan religions” as they have a destructive influence).

persecution is legion throughout the historical record of both Europe and colonial America. As Thomas Jefferson observed in his *Notes on the State of Virginia*, the first settlers to Virginia became possessed “of the powers of making, administering, and executing laws, [which] showed equal intolerance in this country with their Presbyterian brethren, who had emigrated to the northern government.”³⁰ Therefore, as the accounts of settlers such as Roger Williams and Anne Hutchinson illustrate, religious hostility predates religious tolerance in America.³¹

Religious tolerance in America can be traced to the colonies in Maryland, Rhode Island, Pennsylvania, Delaware, and Carolina. “These colonies, though established as sanctuaries for particular groups of religious dissenters, extended freedom of religion to groups—although often limited to Christian groups—beyond their own.”³² Throughout the mid-seventeenth century these colonies expressly provided for free exercise of the Christian religion. While this is far from true religious tolerance, it is certainly a step in that direction. For instance, in 1649 with its Act Concerning Religion, the Maryland Assembly enacted the first “free exercise” law.³³ Rhode Island’s Charter of 1663 went even further by protecting “residents from being ‘in any ways molested, punished, disquieted, or called into question, for any differences in opinion, in matters of religion, [which] do not actually disturb the civil peace of our said colony.’”³⁴ The tolerance movement spread rapidly and by 1789 “every State but Connecticut had incorporated some version of a free

³⁰ THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 150 (Harper & Row 1964).

³¹ During the seventeenth century both Williams and Hutchinson were banished from the Massachusetts Bay Colony due essentially to religious intolerance.

³² *Boerne v. Flores*, 521 U.S. 507, 551 (1997) (O’Connor, J., dissenting).

³³ *Id.* The Maryland Act Concerning Religion provided “[n]o person . . . professing to believe in Jesus Christ, shall from henceforth be any ways troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof.” *Id.*

³⁴ *Id.* (quoting Rhode Island Charter of 1663).

exercise clause into its constitution.”³⁵ As such, the tolerance movement played an essential role in developing religious liberty in America.

The principal advocates of religious liberty in America were James Madison and Thomas Jefferson. The positions advocated by Madison and Jefferson represents what can be properly characterized as an apex in colonial sentiment with regard to religious freedom. It is from the shadowy regions of this apex that the neutrality ideal would later emerge. Madison believed that danger resulted from “a *direct* mixture of Religion & civil Government,”³⁶ and he argued that there is “not a shadow of right in the *general government* to intermeddle with religion.”³⁷ Madison believed such intermeddling “would be a most flagrant usurpation.”³⁸ Further, both men share the notion that religion and government “will both exist in greater purity, the less they are mixed together.”³⁹ While this is not a *per se* endorsement of neutrality, it is surely a step in that general direction.

Both Madison and Jefferson played a fundamental role in championing religious liberty in Virginia. Although Virginia

³⁵ *Id.* at 553.

³⁶ JAMES MADISON, *Detached Memoranda*, in JAMES MADISON WRITINGS, *supra* note 22 at 510 (emphasis added). Qualifying the mixture as being “direct” seemingly implies either that there either may not be such a danger with an indirect mixture of government and religion or that while there may be some danger that an indirect mixture is unavoidable and therefore not worthy of comment.

³⁷ JAMES MADISON, *Speech in the Virginia Ratifying Convention on Taxation, a Bill of Rights, and the Mississippi*, in JAMES MADISON WRITINGS, *supra* note 22 at 382 (emphasis added) (Madison’s use of the word “general” in qualifying government likely refers to the federal government. This of course indicates that there is a corresponding state right to “intermeddle with religion.”).

³⁸ *Id.* In keeping with this is the indication that general government intermeddling would represent usurpation—seemingly of state authority. Further support for this interpretation is gained from the fact that Madison articulated essentially this same argument during the First Congress’s debates on the religion amendment.

³⁹ Letter from James Madison to Edward Livingston (July 10, 1882), in JAMES MADISON WRITINGS, *supra* note 22 at 789 (The 1786 Act for Establishing Religious Freedom in Virginia, written by Jefferson, appears to strongly support this notion).

provided for free exercise of religion and had disestablished the Church of England in 1776, it did not prohibit the support of Christianity by generally assessed taxes.⁴⁰ Jefferson opposed such taxes and drafted a bill to establish greater religious freedom in Virginia.⁴¹ Jefferson's bill was addressed and debated in the General Assembly in 1779 but was not adopted.⁴² A majority of the Virginia General Assembly clearly rejected Jefferson's radical views on religious liberty.

Consequently, on December 24, 1784, Virginia Congressman Patrick Henry "introduced 'A Bill Establishing a Provision for the Teachers of the Christian Religion,' which proposed that citizens be taxed in order to support the Christian denomination of their choice, with those taxes not designated for any specific denomination to go to a public fund to aid seminaries."⁴³ This proposal generated great controversy.⁴⁴ In light of this controversy, the Virginia General Assembly voted to postpone consideration of the religious assessment bill until the next legislative session.⁴⁵

In response to Patrick Henry's proposed bill, a Baptist's petition circulated opposing religious assessments on November 17, 1785.⁴⁶ Madison, however, led the chief opposition to the religious assessment bill. Madison wrote the

⁴⁰ *Boerne*, 521 U.S. at 560 (O'Connor, J., dissenting); *See generally*, JEFFERSON, *supra* note 30 at 150-51; *See also*, the 1776 Amendments to the Virginia Declaration of Rights, which stipulated that "it is the mutual duty of all to practice *Christian forbearance, love, and charity* towards each other." JAMES MADISON, *Amendments to the Virginia Declaration of Rights*, in JAMES MADISON WRITINGS, *supra* note 22 at 10 (emphasis added).

⁴¹ Library of Congress Exhibition, *Religion and the Founding of the American Republic*, <http://www.loc.gov/exhibits/religion/rel05.html> (last visited Nov. 15, 2006).

⁴² *Id.*

⁴³ *Boerne*, 521 U.S. at 560 (O'Connor, J., dissenting).

⁴⁴ This is well exemplified by the move to postpone voting on the religious assessment bill so as to bolster support in opposition of it. *See*, Library of Congress Exhibition, *supra* note 41.

⁴⁵ Madison led the move to postpone the bill. *Id.* Notably, future Chief Justice John Marshall was among those who voted for the tax assessment and against postponing the bill. *Id.*

⁴⁶ *Id.*

Memorial and Remonstrance Against Religious Assessments, which pragmatically detailed and delineated fifteen separate points in opposition to Henry's proposed bill. Ultimately, Madison's petition grounded his objection to Henry's bill on the belief that it violated an "unalienable" natural right to freedom of religion.⁴⁷ When the General Assembly of Virginia revisited the issue in 1785, not only was Madison able to defeat the proposed bill, but also in January 1786, he was able to secure passage of Jefferson's "Act for Establishing Religious Freedom."⁴⁸ While Jefferson's Act fell short of mandating government neutrality towards religion, proponents of religious liberty viewed passage of this Act as a great victory. The passage represented a concrete shift from mere tolerance to the establishment of religious freedom as a natural and inalienable right. More specifically, the Act proclaimed:

Well aware that Almighty God hath created the mind free...it [is] therefore 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 opinion or beliefs' 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 nowise diminish, enlarge, or affect their civil capacities...[T]o declare this act irrevocable, would be of no effect in law, yet we are free to declare, 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,

⁴⁷ *Id.*

⁴⁸ *Id.*

such act will be an infringement of natural right.⁴⁹

It is also important to briefly consider Madison's *Notes of Debates in the Federal Convention of 1787*. The majority of Madison's Constitutional Convention notes referencing religion are inconsistent with a strict separation approach.⁵⁰ Indeed, most can be accurately characterized as antithetical to the neutrality ideal. Still, there are a few passages that advocate for some degree of separation between the two. For instance, on June 6, 1787, Madison cautions that "[r]eligion itself may become a motive to persecution and oppression— [t]hese observations are verified by the Histories of every Country ancient [and] modern."⁵¹ In addition, on August 30, 1787, Mr. Charles Pinkney successfully moved to add to Article VI of the Constitution that "no religious test shall be required as a qualification to any office or public trust under the authority of the U[nited] States."⁵²

Finally, Madison's notes indicate that on September 14, 1787 he and Mr. Pinkney moved to list the establishment of "an University, in which no preferences or distinctions should be allowed on account of Religion" as a vested right of Congress.⁵³ The motion ultimately was defeated as six states voted against adoption and only 4 states voted in support of it.⁵⁴ Pennsylvania, Virginia, North Carolina, and South Carolina voted in support of the motion. New Hampshire, Massachusetts, New Jersey, Delaware, Maryland, and Georgia voted against the motion.⁵⁵ Connecticut was divided

⁴⁹ JEFFERSON, *supra* note 30, at 206-08.

⁵⁰ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 209-11 (W.W. Norton & Company 1987) (1920) (detailing Benjamin Franklin's proposed prayer during the Constitutional Convention).

⁵¹ *Id.* at 76.

⁵² *Id.* at 561 (All states voted to approve this language except Maryland, which was divided on the issue, and North Carolina, which voted against the motion.).

⁵³ *Id.* at 639.

⁵⁴ *Id.* at 639.

⁵⁵ *Id.* at 639.

on the issue.⁵⁶ While Madison's notes do not reveal why the states opposed it, it is likely that they opposed for religious considerations. The neutrality ideal is also undermined by the fact that Ben Franklin successfully called to open each day of the Constitutional Convention with prayer on June 28, 1787.⁵⁷

C. Thomas Jefferson and the Wall of Separation

Thomas Jefferson was an influential figure in America during the late eighteenth and early nineteenth centuries. As the primary author of the Declaration of Independence, the third President of the United States, and a champion of religious tolerance and liberty, Jefferson's views on religious liberty are reflected not only in his Act for Establishing Religious Freedom in Virginia but also in his professional and personal correspondence and his book, *Notes on the State of Virginia* [hereinafter "Notes"].

Jefferson recited in his Notes that freedom of conscience is a natural right.⁵⁸ Jefferson reasons that our government only has authority over the natural rights that we submit to them and that we have not, nor could we ever, submit to the government our rights of conscience.⁵⁹ Jefferson contemplates that the "legitimate powers of government extend only to such acts as are injurious to others."⁶⁰ With characteristic eloquence, Jefferson states, "it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg."⁶¹

Throughout his life Jefferson was an advocate of church and state separation.⁶² Historian Leonard Levy remarked this

⁵⁶ *Id.* at 639.

⁵⁷ *Id.* at 209-11.

⁵⁸ JEFFERSON, *supra* note 30, at 152. This sentiment is also reflected in the above quoted passage from Jefferson's 1786 Act for Establishing Religious Freedom in Virginia.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² LEONARD LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE*, 8 (Harvard University Press 1963).

was a position that Jefferson clearly defined, publicly stated, and vigorously defended.⁶³ From his extensive research on Jefferson, Levy concluded “[a]lthough it exposed him to abusive criticism he carried on his fight for separation of church and state, and for the free exercise of religion, throughout his long public career without significant contradictions.”⁶⁴ This is well exemplified by Jefferson’s recorded correspondence.

For example, in his January 23, 1808 letter to Rev. Samuel Miller, Jefferson explains his reluctance as President to continue the tradition of his predecessors and recommend a day of fasting and prayer.⁶⁵ This supports Jefferson’s thought that even indirect government involvement with religion ought to be avoided. Yet the prudence of such an approach is seemingly called into question by Jefferson’s own rhetorical assertion that “the liberties of a nation [cannot] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God.”⁶⁶ Still, Jefferson opines that simply recommending a religious observance would be to “*indirectly* assume to the U.S. an authority over religious exercises which the Constitution has directly precluded them from.”⁶⁷ Jefferson noted that the religious recommendations of his predecessors were made without due consideration of the general government’s authority and that the right to make such representations rested only in the state governments.⁶⁸

⁶³ *Id.* at 15.

⁶⁴ *Id.* at 15.

⁶⁵ University of Virginia Library Electronic Text Center, *Thomas Jefferson 1743-1826 Letters* <http://etext.virginia.edu/toc/modeng/public> (Last visited Nov. 15, 2006).

⁶⁶ JEFFERSON, *supra* note 30, at 156.

⁶⁷ *Id.*

⁶⁸ *Id.* While this is true, it is notable that Jefferson nevertheless did have some involvement with religion. See *e.g.* *Engle v. Vitale*, 370 U.S. 421, 447 (1962) (Stewart, J., dissenting). On March 4, 1805, President Jefferson proclaimed:

I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old...and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants,

This reflects the general understanding of our federalism as representing a system of dual sovereignties and is inconsistent with the neutrality ideal. Seemingly if the power to aid religion was reserved to the states, the First Amendment did not mandate neutrality.

The quintessential representation of Jefferson's opinion regarding church and state involvement is contained in his 1802 letter to the Danbury Baptist Association.⁶⁹ Jefferson wrote that the language contained in the Religion Clauses built "a wall of separation between church and state."⁷⁰ Notably, the wall metaphor was first used by Roger Williams, who advocated for a "hedge or wall of separation between the garden of the church and the wilderness of the world."⁷¹ While the wall metaphor may be representative of Jefferson's personal view on the matter, it is doubtful it authoritatively illustrates the First Congress's intent in formulating the Religion Clauses. Indeed, Justice Rehnquist persistently

guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations. *Id.*

⁶⁹ Library of Congress Exhibition, *Religion and the Founding of the American Republic*, <http://www.loc.gov/exhibits/religion/f0605as.jpg> (last visited Nov. 15, 2006) (Jefferson's letter was written in response to a congratulatory letter he received from the Danbury Baptist Association).

⁷⁰ *Id.* The Library of Congress extends thanks to the Federal Bureau of Investigation Laboratory, specifically:

[F]or recovering the lines obliterated from the [original] Danbury Baptist letter by Thomas Jefferson. He originally wrote "a wall of eternal separation between church and state," later deleting the word "eternal" ... [as he] must have been unhappy with the uncompromising tone of [the phrase], especially in view of the implications of his decision, two days later, to begin attending church services in the House of Representatives.

Library of Congress Exhibition, *Religion and the Founding of the American Republic*, <http://www.loc.gov/exhibits/religion/rel06-2.html> (last visited November 15, 2006).

⁷¹ Roger Williams, *Mr. Cotton's Letter Lately Printed, Examined and Answered*, in 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS, 108 (1644).

questioned Jefferson's status as an "ideal source of contemporary history as to the meaning of the Religion Clauses."⁷² Justice Rehnquist observed that Jefferson was "of course in France at the time...the Bill of Rights were debated by Congress and ratified by the States," and Jefferson's "letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress."⁷³ As such, the prudence of treating the wall metaphor as representative of the intended effect of the Religion Clauses is questionable at best.

Notwithstanding, in *Everson v. Board of Education*⁷⁴, Justice Black wrote for the majority stating, "[t]he First Amendment has erected a wall between church and state...[and that] wall must be kept high and impregnable...[because we] could not approve the slightest breach."⁷⁵ Justice Black, in holding that a State may provide funds to bus children to and from parochial schools, supported this assertion by positing that the First Amendment mandated government neutrality toward religion.⁷⁶ Justice Rutledge dissented from the Supreme Court's decision. He argued that the decision was inconsistent with perfect neutrality toward religion, which he believed was mandated by the First Amendment.⁷⁷ More specifically, Rutledge states, "the object [of the Religion Clauses] was broader than separating church and state in [the] narrow sense...[rather the object] was to create a complete and permanent separation of the spheres of religious activity and civil authority by

⁷² *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

⁷³ *Id.*

⁷⁴ *Everson v. Board of Education*, 330 U.S. 1 (1947).

⁷⁵ *Id.* at 18. The Supreme Court's first use of Jefferson's Wall phrase involved the assertion that "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Jefferson's 1802 letter to the Danbury Baptists).

⁷⁶ *Everson*, 330 U.S. at 18.

⁷⁷ *Id.* at 31-39.

comprehensively forbidding every form of public aid or support for religion.”⁷⁸

The Eversonian notion that the Religion Clauses were intended to create a wall of separation, mandating government neutrality towards religion, has significantly influenced the Supreme Court’s jurisprudence. All members of the Supreme Court, however, have not accepted this interpretation. In fact, the Rehnquist Court mounted considerable opposition to this belief.⁷⁹ Ultimately, the inherent ambiguity of the Religion Clauses, together with the controversy surrounding the Eversonian interpretation, has led to a tumultuous and internally inconsistent body of jurisprudence.

III. THE FIRST AMENDMENT DOES NOT MANDATE NEUTRALITY TOWARDS RELIGION NOR HAS THE GOVERNMENT ADOPTED IT IN PRACTICE

This section examines the debates of the First Congress on the proposed religion amendment to the Constitution with specific focus on whether the recorded debates indicate any intent to mandate government neutrality towards religion. In addition, progressivism and the appropriate degree of judicial deference to the intent of the Framers will be considered. Finally, eighteenth and nineteenth century United States government involvement with religion will be briefly surveyed. More specifically, a review will be made of state establishment of official religions, state use of religious taxes, religion and the Declaration of Independence, religion and the proposed government seals, Presidential reliance on religion, the use of public prayer, and religion in educational institutions.

⁷⁸ *Id.* at 31-32.

⁷⁹ Such opposition is perhaps best exemplified by Justice Rehnquist’s dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting), and is most recently exemplified by Chief Justice Rehnquist’s opinion in *Van Orden v. Perry*, 545 U.S. 677 (2005) (Plurality).

A. Debates of the First Congress on the Proposed Religion Amendments

In the House of Representatives on June 8, 1789, James Madison proposed that the Constitution be amended to stipulate that “[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”⁸⁰ The amendment was soon referred to a Select Committee that included Madison and nine other representatives.⁸¹ The Select Committee revised Madison’s proposed religion amendment to state, no “religion shall be established by law, nor shall the equal rights of conscience be infringed.”⁸² The revised amendment was debated in the House on August 15, 1789. During the debates Representative Peter Sylvester of New York stated that he “feared [the religion amendment] might be thought to abolish religion altogether.”⁸³ Representative Daniel Carroll of Maryland expressed his support for adopting this version of the amendment and articulated, as the basis for this support, his belief that “the rights of conscience are, in their nature, a peculiar delicacy, and will little bear the gentlest touch of governmental hand.”⁸⁴ Next, Madison tried to clarify the scope of the proposed amendment by noting he “apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”⁸⁵ This is a far cry from mandating government neutrality towards religion or erecting a high and impregnable wall separating church from state.

Directly after Madison’s clarification, Representative Benjamin Huntington of Connecticut responded that he

⁸⁰ 1 ANNALS OF CONG. 434 (Joseph Gales, ed. 1790).

⁸¹ *Wallace*, 472 U.S. at 95 (Rehnquist, J., dissenting).

⁸² *Id.*

⁸³ ANNALS OF CONG., *supra* at note 80, at 729.

⁸⁴ *Id.* at 729.

⁸⁵ *Id.* at 730.

feared “that the words might be taken in such latitude as to be extremely hurtful to the cause of religion...[and while he] understood the amendment to mean what had been expressed by [Madison]...others might find it convenient to put another construction on it.”⁸⁶ Huntington stated that he feared this language might actually *prevent* the compelled support of religion and he hoped “the amendment would be made in such a way as to secure the rights of conscience, and the free exercise of religion, but not to [act as a patron towards] those who professed no religion at all.”⁸⁷ Madison responded to the concerns of Huntington by moving for the word “national” to be inserted before religion, which he believed “would point the amendment directly to the object it was intended to prevent.”⁸⁸ Representative Elbridge Gerry of Massachusetts then opposed Madison’s use of the word “national” because the Constitution was ratified with the understanding that it created a federal and not a national government, which prompted Madison to withdraw his motion.⁸⁹

On August 20, 1789, the House adopted a version of the religion amendment stating “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience,” which it sent to the Senate for approval.⁹⁰ The floor debates in the Senate were kept secret and only a list of motions and votes is included in the *Senate Journal*. It is clear though that the version proposed by the House did generate significant controversy in the Senate as the *Senate Journal* lists that three separate motions to change the amendment were made on September 3, 1789. The controversy was caused by fear in the Senate that the religion amendment might be interpreted as completely separating church and state, thereby preventing

⁸⁶ *Id.*

⁸⁷ *Id.* at 730-31.

⁸⁸ *Id.* at 731.

⁸⁹ *Id.*

⁹⁰ *Id.* at 766 (Unfortunately, the Annals of Congress do not include any passages describing what prompted them to adopt this specific language).

nondiscriminatory aid from being given to religion.⁹¹ On September 3, 1789, the Senate came to an agreement and sent back to the House a version of the religion amendment stating, “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.”⁹² The changes made by the Senate to the amendment allow nondiscriminatory aid to religion.

Ultimately, because the House and Senate could not agree on the language of the religion amendment, a joint conference committee was created. On September 24, 1789, the House considered the report of this committee indicating a compromise between the House and Senate had been reached.⁹³ Subsequently, both the House and the Senate approved a final draft stating, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” which is the current language of the First Amendment.⁹⁴

Importantly, the First Congress did directly consider the applicability of the Bill of Rights to the states. On August 17, 1789, South Carolina Representative Thomas Tucker moved for the Bill of Rights to be applied to the States (hereinafter “Motion”).⁹⁵ The Motion was strongly supported by Madison who opined that the religion amendment was the most important of all the proposed amendments and that “[i]f there were any reason to restrain the government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the state governments.”⁹⁶ New Hampshire Representative Samuel Livermore also supported the motion and proposed that the Fourth Amendment state, “The equal rights of conscience, the freedom of speech or of the press, and the right of trial by

⁹¹ See generally WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (Basic Books, Inc. 1976).

⁹² *Wallace v. Jaffree*, 472 U.S. 38, 97 (1985) (Rehnquist, J., dissenting) (quoting C. Antieau, et al., *Freedom From Federal Establishment*, at 130 (1964)).

⁹³ ANNALS OF CONG., *supra* note 80, at 913-14

⁹⁴ U.S. CONST. amend. I.

⁹⁵ ANNALS OF CONG., *supra* note 80, at 755.

⁹⁶ *Id.*

jury in criminal cases, shall not be infringed by any state.”⁹⁷ Despite Livermore’s support the Motion was nevertheless defeated in the House⁹⁸ indicating that a majority of the First Congress wanted to *preserve* state aid and involvement with religion.

As Justice Rehnquist observed, “[i]t seems indisputable from these glimpses of Madison’s thinking...that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects...[but] did not see it as requiring neutrality on the part of government between religion and irreligion.”⁹⁹ Further, the debates of the First Congress strongly indicate that the Framers did not intend for government to have no involvement with religion. In fact, from the debates on the proposed religion amendment, it can be inferred that the Framers did not intend the Religion Clauses to create an impregnable wall separating church from state or mandating government neutrality towards religion.

Finally, it is necessary to address the requisite deference to be accorded to the intentions of the Framers regarding government aid and involvement with religion. Some might seek to posit progressivism as a means of questioning the relevance of the Framers’ intentions. Constitutional progressivism, as classically championed by Justice Brennan, is rooted in the belief that “the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and needs.”¹⁰⁰ Of course, to apply the Constitution’s great principles, one must

⁹⁷ *Id.*

⁹⁸ It is important to note that while the Framers voted against applying the Bill of Rights, and therefore the Religion Clauses, to the states, the Supreme Court has ruled that the Religion Clauses currently apply to the states through the Fourteenth Amendment, which was adopted in 1868. *See, Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *See also, Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

⁹⁹ *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

¹⁰⁰ Justice William Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEXAS L. REV. 433, 438 (1986).

first understand them. Inasmuch as the Religion Clauses are seen as mandating neutrality towards religion or erecting a “high and impregnable wall” separating government and religion, the Religion Clauses of the First Amendment have not been properly understood. In its capacity as a conduit for such notions, progressivism has functioned not as a coping mechanism but rather as part of the problem.

In explaining his progressive approach, Brennan admonishes “[i]t is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.”¹⁰¹ The proper relationship between government and religion, however, is hardly a contemporary question. It is not a question spawned by modern technology or one with only a contemporary application. Rather, this was a question that the Framers considered with great care. Therefore, principles of progressivism may have less force here than they would in other areas. That is not to say that progressivism is without merit or that originalism is always the preferable alternative.¹⁰²

In the context of the Religion Clauses, however, progressivism reveals itself as a red herring. Pragmatically, the application of strict neutrality will create more problems than it will resolve. In other words, trying to implement strict neutrality is *not* progress. More important, progressivism *qua* progressivism is a moot point as true government neutrality towards religion is not possible.

¹⁰¹ *Id.* at 435.

¹⁰² Some scholars have raised the question as to whether “original intent” actually exists. See, JUDITH BAER, *The Fruitless Search for Original Intent*, in REASON IN LAW. (Leif Carter & Thomas Burke eds., Pearson Longman Publishers 2001) (arguing that originalism presupposes that a single collective intent exists, is capable of being recorded, and can be ascertained in such a manner as to provide a reliable guide for Constitutional adjudication).

B. Early Government Aid and Involvement with Religion

Eighteenth and nineteenth century government practices also indicate that neutrality and a complete separation of church and state were not intended. An historical survey reveals that the legacy of government involvement with religion spans well into the twentieth century. Indeed, such an approach and its ramifications are readily apparent even in twenty-first century America.¹⁰³

First, in considering neutrality, it is important to remember that many states had official religions at the time the Constitution was ratified and the Bill of Rights adopted. For instance, it is well settled that the Church of England was established as the official religion in Georgia, North Carolina, South Carolina, New York, and Virginia.¹⁰⁴ Ultimately, “[t]he American Revolution immediately disrupted the relationship between religion and government in those states...[because the] Church of England was discredited during the Revolution by its connection to the Crown and the loyalist sympathies of most of its clergy.”¹⁰⁵ Proponents of religious freedom, such as Thomas Jefferson, capitalized on this disruption and sought to utilize such sentiments to abolish religious discrimination and official state religions. However, the Puritan or Congregational religion remained firmly established by law in Connecticut, Massachusetts, New Hampshire, and Vermont.¹⁰⁶ Establishments of religion in these states were “more firmly entrenched and emerged from the Revolution strengthened by their association with the patriot cause.”¹⁰⁷ In fact, these states continued to provide

¹⁰³ This will be discussed in greater detail at section V, subsection C, *infra*.

¹⁰⁴ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436 (1990).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1437.

¹⁰⁷ *Id.*

legal and financial support for religion after the ratification of both the Constitution and the Bill of Rights.¹⁰⁸ Clearly, neutrality and strict separation were not envisioned or implemented in practice.

The principal vehicle for financial support of religion in America was the levying of religious taxes and assessments. As the Virginia struggle between Madison and Henry illustrates, the issue of religious assessments was a divisive and hotly debated topic. Appeals for such support were made in a majority of the states. Aside from the substantial support for religious assessments in Virginia, “general assessment bills were [also] supported, after 1776, by the legislatures of five other states and by a galaxy of revolutionary heroes, including John Adams, Samuel Adams, John Hancock, Roger Sherman, Oliver Ellsworth, and in neighboring Maryland, Samuel Chase, William Paca and Charles Carroll.”¹⁰⁹ Support for religious assessments was also memorialized in the Massachusetts Constitution of 1780, which “authorized a general religious tax to be directed to the church of a taxpayers’ choice.”¹¹⁰ Such taxes and state establishments serve to illustrate that neutrality towards religion was not adopted in practice.

Governmental reliance on religion was memorialized in the celebrated Declaration of Independence [hereinafter “Declaration”]. This is of particular relevance given the inherent importance of the Declaration and the fact that Thomas Jefferson drafted it—after all he was perhaps the chief proponent of separating church and state. The Declaration justified dissolution of the “political bonds” that connected American colonists to the British by producing a detailed list of grievances, which violated the “Laws of Nature and Nature’s God.”¹¹¹ Jefferson ends the Declaration

¹⁰⁸ See generally *id.* at 1436.

¹⁰⁹ James Hutson, *James Madison and the Social Utility of Religion: Risks vs. Rewards*, in Library of Congress Symposium on James Madison, <http://www.loc.gov/loc/madison/hutson-paper.html> (last visited Nov. 15, 2006).

¹¹⁰ Library of Congress Exhibition, *supra* note 41.

¹¹¹ THE DECLARATION OF INDEPENDENCE (U.S. 1776)

with an appeal to “the Supreme Judge of the world” in which he pledges his support for the Declaration “with a firm reliance on the protections of divine Providence.”¹¹² To be sure, the Declaration was important for many reasons.¹¹³ Principally, the Declaration and its eloquent reliance on religion provided the moral justifications that would turn the cause for colonial independence from a mere insurrection into a glorious *and righteous* revolution.

The religious temperament of the Revolutionary era is also reflected in the quest for an official seal of the United States. On July 4, 1776, Congress appointed Benjamin Franklin, Thomas Jefferson, and John Adams to create the official seal.¹¹⁴ Jefferson suggested adopting a depiction of the “Children of Israel in the Wilderness, led by a Cloud by Day, and a Pillar of Fire by night.”¹¹⁵ Franklin proposed adopting the biblical parting of the Red Sea by Moses.¹¹⁶ Notably, both men agreed on an official motto to accompany the proposed seal: “Rebellion to tyranny; obedience to God.”¹¹⁷ The three later agreed on Franklin’s version, which was proposed but not adopted by Congress. The use of religious imagery for the government seal is particularly poignant as it was advocated by Jefferson—the man who is now seen by many as having advocated the high and impregnable wall of separation.

¹¹² *Id.*

¹¹³ Having provided the impetus for the revolution it could arguably be described as providing the impetus for the Civil War. During his debates on slavery with Senator Douglas, Abraham Lincoln relied heavily on the Declaration’s assertion that all men had certain unalienable rights and were created equal. *See*, Lincoln’s Speech at Springfield, Illinois, June 26, 1857.

¹¹⁴ Library of Congress Exhibition, *Religion and the Founding of the American Republic*, <http://www.loc.gov/exhibits/religion/rel04.html> (last visited Nov. 15, 2006).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Library of Congress Exhibition, *Religion and the Founding of the American Republic*, <http://www.loc.gov/exhibits/religion/f0402bs.jpg>, <http://www.loc.gov/exhibits/religion/f0402as.jpg>

(last visited Nov. 15, 2006).

Governmental reliance on religion is also reflected in the speeches, proclamations, and correspondence of nearly all United States Presidents. Indeed, “[e]ach of our Presidents, from George Washington to John F. Kennedy, has upon assuming his Office asked the protection and help of God.”¹¹⁸ As discussed in greater detail below, George Washington made frequent appeals to religion for both guidance and political stability. Washington’s predecessors continued his legacy of advocating formal government reliance on religion. On March 23, 1798, President John Adams continued the tradition begun in 1775 and issued a Fast and Thanksgiving Day Proclamation.¹¹⁹ In his Proclamation, Adams described prayer as a duty and sought the favorable judgment of God by directing citizens to “acknowledge before God the manifold sins and transgressions with which we are justly chargeable as individuals and as a nation...and to incline us, by His Holy Spirit, to that sincere repentance and reformation which may afford us reason to hope for his inestimable favor and heavenly benediction.”¹²⁰ Such sentiments continued well into the twentieth century. As observed by Justice Stewart, in 1961, President John F. Kennedy urged “[w]ith a good conscience our only sure reward, with history the final judge of our deeds, let us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God’s work must truly be our own.”¹²¹

Such statements represent only the tip of the iceberg in terms of officially sanctioned public prayer. On June 28, 1787, Franklin successfully called for such prayer to open each day of the Constitutional Convention.¹²² In its initial meeting in September of 1774, Congress invited Reverend

¹¹⁸ *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting).

¹¹⁹ Library of Congress Exhibition, Religion and the Founding of the American Republic, <http://www.loc.gov/exhibits/religion/rel06.html> (last visited Nov. 15, 2006).

¹²⁰ Library of Congress Exhibition, Religion and the Founding of the American Republic, <http://www.loc.gov/exhibits/religion/vc006493.jpg> (last visited Nov. 15, 2006).

¹²¹ *Engel*, 370 U.S. at 449 (Stewart, J., dissenting).

¹²² MADISON, *supra* note 50, at 209-11.

Jacob Duché to open its session with prayer.¹²³ When Duché defected to the British, on October 1, 1777, Congress appointed William White and George Duffield, each representing a different religious denomination, as his successors.¹²⁴ Church services were held in the House of Representatives until after the Civil War and literally used the podium of the Speaker as a preacher's pulpit.¹²⁵ Chaplains were used not only by Congress but also by the military and in state and federal prisons.¹²⁶

To this day every session of Congress is opened with a publicly financed prayer.¹²⁷ Since 1777, the salary of all such chaplains has been paid for with public funds.¹²⁸ Also, at the beginning of each United States Supreme Court Session, "one of our officials invokes the protection of God...[because since] the days of John Marshall our Crier has said, 'God save the United States and this Honorable Court.'"¹²⁹ Such practices surely reflect the notion that government may rely on religion but that it should strive to do so in a nondiscriminatory manner. Such an interpretation is consistent with the fact that in 1952 Congress enacted 36 U.S.C. §185, which calls upon the President to proclaim a National Day of Prayer each year.¹³⁰

It is also important to briefly survey early government aid and involvement with religion in the context of education. The United States is heavily reliant on educational institutions to produce moral and intellectual sustenance for the government. Such reliance was explicitly referenced in the Northwest Ordinance, which was adopted by Congress in 1787 to regulate territories northwest of the Ohio River. Specifically, Article three of the Northwest Ordinance

¹²³ Library of Congress Exhibition, *supra* note 114.

¹²⁴ *Id.*

¹²⁵ Library of Congress Exhibition, Religion and the Founding of the American Republic, <http://www.loc.gov/exhibits/religion/rel06-2.html> (last visited Nov. 15, 2006).

¹²⁶ *Engel*, 370 U.S. at 449 (Stewart, J., dissenting).

¹²⁷ *Id.* at 446.

¹²⁸ *Id.* at 449.

¹²⁹ *Id.* at 446.

¹³⁰ *Id.* at 449.

pronounces that “Religion, Morality and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall be forever encouraged.”¹³¹ As Justice Rehnquist observed, in 1789 the First Congress reenacted this ordinance on the same day that Madison proposed his religion amendment, which appears to “confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion.”¹³²

Kent Greenawalt, Professor of Law at Columbia University, remarks that from the outset “education in the early American colonies was almost entirely private and substantially religious.”¹³³ This is relevant because up to and throughout the nineteenth century, both state and municipal governments subsidized religious schools on a per pupil basis.¹³⁴ Religion also played a significant role in public schools. Professor Greenawalt found that “the character of the original public schools was indisputably a broad nondenominational Protestantism...[and although] schools were ‘non-sectarian’ their teaching and practice were significantly religious.”¹³⁵

This review is not intended to serve as a recommendation to reinstate all the religious practices of the forefathers of the United States. Rather, it is intended to survey the religious heritage of the United States and to indicate that the First Amendment was not understood to mandate impartiality towards religion and irreligion. Simply put, the history of early government aid and involvement with religion is inconsistent with Jefferson’s wall metaphor and can hardly be said to represent government neutrality towards religion.

¹³¹ The Avalon Project, *Northwest Ordinance*, <http://www.yale.edu/lawweb/avalon/nworder.htm> (last visited Sept. 11, 2007).

¹³² *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting).

¹³³ KENT GREENAWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* 13 (Princeton University Press 1995).

¹³⁴ *Id.* at 14.

¹³⁵ *Id.* at 14.

IV. GOVERNMENT MUST INTERACT WITH RELIGION AND SUCH INTERACTION IS GENERALLY FRIENDLY OR HOSTILE TOWARDS RELIGION

This section will review the natural connection between government and religion and the notion that this connection ensures that government must have some relationship with religion. In maintaining such a relationship, generally speaking, the government is either friendly or hostile towards particular religions. This phenomenon will be discussed in relation to the modern neutrality ideal. Further, a survey of modern case law and government practices will illustrate that government action has been friendly or hostile towards particular religions.

A. The Natural Connection between Government and Religion and its Implications

Government and religion share a natural connection as human *institutions*. More specifically, both government and religion are collective institutions as they coordinate the cooperative efforts of individuals and function as mechanisms of social order, progress, and advantage. By virtue of their status as collective institutions an inherent connection exists between the two entities. Inasmuch as humans are natural beings, both institutions are products of nature. For this reason, the connection existing between the two can be described as natural—in a literal sense.

Despite their natural connection, many insist that government and religion must occupy separate and distinct spheres in the realm of human existence. This presupposes that government and religion *are capable of being relegated* to separate and distinct spheres. Notably, such a separation would require relegation because the two are naturally intertwined by their status as human institutions. With regard to this it is important to briefly review the “state-society” distinction discussed by Harvard Professor Harvey

Mansfield, in his treatise, *America's Constitutional Soul*.¹³⁶ This distinction generally involves the notion that the “state, which is public, is in the service of society, which is private; and the state is limited to this service as a means is limited by its end.”¹³⁷ Professor Mansfield recognized that, “[m]odern constitutional government is limited government in which the limitation on government is expressed in the distinction between state and society.”¹³⁸ In order to consider the natural connection between government and religion, it is first necessary to define and develop an understanding of “state” and “society” as independent concepts. This is necessary, although perhaps counterintuitive, as human civilization naturally intertwines the two.

On one hand, the state encompasses the realm of constitutional government and is a product of human nature.¹³⁹ The state has power over the physical realm and in keeping with “the premise of modern constitutionalism ... government is constituted by humans to answer human needs.”¹⁴⁰ On the other hand, while it is also a product of human nature, society encompasses the realm of the conscience or soul.¹⁴¹ Society has power over the spiritual realm and as it encompasses religion “is primarily concerned with saving souls, not with constitutional freedom.”¹⁴² Both government and religion provide protection and sustenance—government protects and sustains the body and religion protects and sustains the soul. Overall, the glue that holds this system together is the byproduct of protection in both instances—stability. Because government and religion each require stability and when properly instituted government and religion each produce stability, the two crave, if not depend, on each other for survival.

¹³⁶ HARVEY C. MANSFIELD, *AMERICA'S CONSTITUTIONAL SOUL*, 102 (Johns Hopkins University Press 1991).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 101.

¹⁴⁰ *Id.* at 109.

¹⁴¹ *Id.* at 103.

¹⁴² *Id.* at 104.

Given interdependence of government and religion and the importance of protecting both the body and soul, it is prudent to institute an arrangement that does not secure one at the expense of the other. Yet, Mansfield implies that today the “self” passes for the soul and has replaced the soul’s search for spiritual perfection with the quest for material well-being.¹⁴³ Mansfield attributes this to an imbalance in the state society continuum whereby “the soul gradually abdicates its ruling function” and results in the “apathetic individualism Tocqueville feared, which we see in the wishy-washy liberal and the uncaring conservative.”¹⁴⁴

Ultimately, government and religion can be understood as representing two sides of the same coin. On one side of the coin is religion and on the other side of the coin is government. The coin itself is modern civilization. This is an apt metaphor for three reasons. First, state and society are the respective homes for government and religion. Government and religion protect and sustain the body and the soul respectively. Each of the preceding distinctions can be seen as representing two sides that combine to form one whole—as is true with a coin. Second, government and religion enjoy a symbiotic relationship in which they are dependent to a large degree on each other. In other words, if we try to separate the two sides of the coin, the coin itself will be destroyed.

Third, government and religion must be separated to some degree because “the soul, in its unruly desire to rule itself, [may try] to rule other souls.”¹⁴⁵ In other words, a religious faction existing in society may seek to use the power of the government to rule the whole of society. Government and religion, therefore, should not morph together to form a single institution just as the images on a double-sided coin cannot leave their respective locations to form a single sided coin. If we try to literally combine the two sides of the coin, the coin will again be destroyed. For this reason it is important that we try to find a state of

¹⁴³ *Id.* at 103.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

equilibrium where religion and government are neither separated as two unrelated institutions nor are merged together as one single institution.

From this understanding it is clear that government *must* have some relationship with religion. Finding the state of equilibrium is of course no easy task. The Religion Clauses do not provide a simple recipe with which to achieve this. Such a recipe, if it is to exist at all, must be discerned from practice—from a process of trial and error. Striving to reach that state of equilibrium is a difficult task indeed. The task, however, is made more difficult when government neutrality towards religion is established as the primary objective. This is true for three reasons. First, neutrality has been interpreted to mean that we must erect a high and impregnable wall separating government and religion. Such an approach favors irreligion by precluding the government from providing religion with nonpreferential support. Favoring irreligion as such is clearly hostile to religion and cannot accurately be characterized as fostering impartiality, which is the apparent objective of neutrality. Second, because it has produced hostility towards religion, neutrality does not treat religion and government as two sides of the same coin. This has the practical effect of reducing stability and producing a less stable government. Finally, pragmatically speaking, neutrality is impossible to achieve. True neutrality requires actual impartiality. Actual impartiality is seemingly unattainable, as it would require not only divorcing oneself from personal preferences and predilections, but also a consideration of all possible factors and contingencies.

In considering neutrality it is important to keep in mind the dualism, which is contained in the Religion Clauses of the First Amendment. A close examination of the Religion Clauses reveals an inescapable tension between the two. On the one hand, the First Amendment is inherently friendly to religion by virtue of its stipulation that Congress shall make no law prohibiting the free exercise of religion. On the other hand, the First Amendment is inherently hostile to religion in that it also prescribes that Congress shall make no law respecting an establishment of religion. Given this

dichotomy, it is not surprising that nearly all attempts at neutrality have produced an action or decision that is inherently friendly or hostile towards religion. That is, most governmental attempts at neutrality can be characterized as producing a result that is either favorable or unfavorable towards religion.

B. Case Law Illustrates that Government Interaction with Religion is Inherently Hostile or Friendly

In considering government interaction with religion it is helpful to review the jurisprudence surrounding the Religion Clauses. For this reason a summary will be made of the Supreme Court's modern Free Exercise and Establishment Clause jurisprudence. Specific attention will be given to the various tests formulated by the Supreme Court to identify violations of the clauses. The summary will also highlight the government and religion interaction and show that such interaction is generally hostile or friendly in nature.

The Free Exercise Clause of the First Amendment prescribes that Congress shall make no law prohibiting the free exercise of religion. While this language may seem straightforward to a casual observer, it must be considered relative to the First Amendment's mandate that Congress shall make no law respecting an establishment of religion. Applying these principles to cases or controversies has proven to be an arduous task due in large part to the ambiguity of the Religion Clauses. While the language contained in the clauses gives some guidance as to the proper relationship between government and religion, it does not provide a clear map with which to navigate the waters of every such interaction. This ambiguity in turn has resulted in a tumultuous body of jurisprudence, which can best be described as a swinging pendulum. At one end of the pendulum's arc, the Supreme Court has given great strength to the Establishment Clause at the expense of the Free Exercise Clause. This is the hostile arc of the pendulum. The

Pendulum, however, began to swing in the opposite direction with *Sherbert v. Verner*.¹⁴⁶

Sherbert involved a situation where a Seventh-Day Adventist was terminated by her employer for refusing to work on Saturday, which is considered to be the Sabbath Day for all Seventh-Day Adventists. Unable to find other work, Ms. Sherbert filed a claim for unemployment compensation benefits pursuant to the South Carolina Unemployment Compensation Act (hereinafter referred to as “Act”). The Act stipulated that an applicant is not eligible for benefits if they have failed to accept suitable work when offered without good cause. Consequently, the South Carolina Employment Security Commission denied her unemployment compensation on the ground that her refusal to work Saturdays prevented her from accepting suitable work. The decision of the commission was upheld by both the Court of Common Pleas for Spartanburg County and the South Carolina Supreme Court.¹⁴⁷

The Supreme Court reversed the decision of the South Carolina Supreme Court. Writing for the majority, Justice Brennan held the denial of unemployment benefits to Ms. Sherbert restricted the free exercise of her religion. Following this determination Brennan stated “[w]e must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant’s First Amendment right.”¹⁴⁸ The Supreme Court explicitly rejected the rational basis approach by stating, “no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.’”¹⁴⁹ Ultimately, the Supreme Court found that South Carolina’s interest in denying unemployment benefits to Ms. Sherbert did not justify the restriction of her right to freely exercise her religion.

¹⁴⁶ *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁴⁷ *Id.* at 400.

¹⁴⁸ *Id.* at 406.

¹⁴⁹ *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

The Supreme Court also found that compelling South Carolina to extend unemployment benefits did not violate the Establishment Clause. Brennan stated that in rendering such a holding the Supreme Court is not fostering the establishment of the Seventh-Day Adventist religion as “the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than *the governmental obligation of neutrality* in the face of religious differences, and does not represent that involvement of religion with secular institutions which it is the object of the Establishment Clause to forestall.”¹⁵⁰ But was the Supreme Court’s decision *truly* neutral? Would this decision and the adoption of the strict scrutiny standard be more accurately characterized as friendly towards religion? This conclusion was alluded to by Justice Stewart, who observed that the Supreme Court’s holding requires North Carolina to “prefer a religious over a secular ground for being unavailable for work.”¹⁵¹ Requiring such a preference, despite its benign motive, is friendly towards religion. Implementing strict scrutiny in place of the rational basis test is also friendly towards religion.

The same would not be true if the Supreme Court upheld the decision of the South Carolina Supreme Court. To deny unemployment compensation to an individual whose religious beliefs preclude her from working on Saturdays cannot be described as friendly toward religion. To the contrary, such a decision is more accurately characterized as hostile to religion. Therefore, neutrality was a red herring in the Supreme Court’s analysis as the Justices were forced to choose between two alternatives—one that is friendly towards religion and the other that is hostile towards religion.

In an effort to clarify the bounds of the Establishment Clause, in 1971 the Supreme Court created a three-prong test in *Lemon v. Kurtzman*.¹⁵² The *Lemon* test provides that to be consistent with the Establishment Clause, government action must have 1) a secular purpose, 2) a primary effect that

¹⁵⁰ *Id.* at 409 (emphasis added).

¹⁵¹ *Id.* at 416 (Stewart, J. concurring).

¹⁵² *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

neither advances nor inhibits religion, and 3) must not foster an excessive governmental entanglement with religion.¹⁵³ In *Lemon*, the Supreme Court relied on this test in striking down Rhode Island and Pennsylvania statutes that provided state aid to religious schools regarding instruction in secular matters. To deny such aid only to religious schools is hostile towards religion. Again, the alternative, upholding the Rhode Island and Pennsylvania statutes, would be favorable or friendly towards religion.

Ultimately, the *Lemon* test reflects an attempt “to add some mortar to *Everson’s* wall.”¹⁵⁴ At best the *Lemon* test provides little guidance to the Supreme Court and at worst it solidifies a misunderstanding of the Establishment Clause as it perpetuates the neutrality ideal. Further, the test functions primarily as a conduit for religious hostility. Justice Rehnquist observed that reliance on the *Lemon* test distorts the Establishment Clause as it “bristles with hostility to all things religious in public life.”¹⁵⁵ Rehnquist states that the *Lemon* test “has simply not provided adequate standards for deciding Establishment Clause cases...[because the test] represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service.”¹⁵⁶

In the 1972 case of *Wisconsin v. Yoder*,¹⁵⁷ the Supreme Court had an opportunity to review its Free Exercise jurisprudence. In *Yoder*, the Supreme Court considered whether the conviction of an Amish man, for violating Wisconsin’s compulsory school attendance law based on the tenants of his faith, could be upheld without violating the Free Exercise Clause.¹⁵⁸ Chief Justice Burger, writing for a

¹⁵³ *Id.* at 612-13.

¹⁵⁴ *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

¹⁵⁵ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting).

¹⁵⁶ *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting).

¹⁵⁷ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁵⁸ *Id.* at 205 (The Wisconsin compulsory school attendance law required that all children attend school until the age of sixteen. The defendant was charged and convicted in Green County Court of violating

six-justice majority, applied strict scrutiny and, although the law was neutral on its face, held that the Wisconsin law “in its application, nonetheless offend[s] *the constitutional requirement for governmental neutrality* [because] it unduly burden[ed] the free exercise of religion.”¹⁵⁹ Carving out a religious exception to a generally applicable law is more accurately characterized as friendly rather than neutral towards religion. In short, *Yoder* is another illustration that applying strict scrutiny in free exercise cases will produce a result inherently friendly towards religion. On the other hand, not carving out an exception—forcing *Yoder* to violate the tenants of his faith—would be hostile towards religion.

In 1983, the Supreme Court’s struggle to interpret the Establishment Clause turned a new page with *Marsh v. Chambers*.¹⁶⁰ In *Marsh*, the Supreme Court did not apply the *Lemon* test and extended a friendly hand towards religion in holding that Nebraska did not violate the Establishment Clause by using state funds to pay a chaplain to open its legislative sessions with prayer.¹⁶¹ In justifying its decision the Supreme Court relied heavily on the use of chaplains for public prayer by the First Congress.¹⁶² Unfortunately, instead of relying on the historical understanding of the Establishment Clause, the Supreme Court carved out an exception for this practice and did so despite the fact that it is entirely inconsistent with the spirit and letter of the *Lemon* test. Next, in the 1983 case of *Mueller v. Allen*,¹⁶³ the Supreme Court further undermined the *Lemon* test by upholding a Minnesota law, which provided a tax deduction to parents sending their children to religious schools. In

the law by refusing to send his two children, aged 14 and 15, to public school after they completed the eighth grade. The conviction was affirmed by the Wisconsin Circuit Court but was reversed by the Wisconsin Supreme Court, which found that the conviction violated the defendant’s Free Exercise rights under the First Amendment. *Id.*)

¹⁵⁹ *Id.* at 220 (emphasis added) (As support for this proposition Chief Justice Burger cited *Sherbert v. Verner*, 374 U.S. 398 (1963)).

¹⁶⁰ *Marsh v. Chambers*, 463 U.S. 783 (1983).

¹⁶¹ *Id.* at 791-95.

¹⁶² *Id.* at 790.

¹⁶³ *Mueller v. Allen*, 463 U.S. 388 (1983).

writing for the majority in this case, Justice Rehnquist started the trend away from Eversonian jurisprudence, as the Supreme Court's decision was "flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion."¹⁶⁴

In 1984, the Supreme Court applied the *Lemon* test in *Lynch v. Donnelly*¹⁶⁵ and upheld the constitutionality of an annual Christmas display.¹⁶⁶ This decision was friendly towards religion. In writing for the majority Chief Justice Burger confirmed that total separation between government and religion is not possible and that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any."¹⁶⁷ In her concurrence, Justice O'Connor formulated the basis for an endorsement test, which states that one runs afoul of the Establishment Clause if government action amounts to an endorsement or disapproval of a particular religion.¹⁶⁸ This test is less hostile to religion as it does not appear to mandate governmental neutrality between religion and irreligion and therefore is more aligned with the historical understanding of the clause.

In 1985 the pendulum swung back towards hostility when the Supreme Court struck down an Alabama law authorizing schools to set aside one minute each day for voluntary prayer or meditation in *Wallace v. Jaffree*.¹⁶⁹ Justice Stevens, in striking down the law, relied heavily on the *Lemon* test and "the established principle that the government *must pursue a course of complete neutrality* toward religion."¹⁷⁰ This decision resulted in a strong dissent from Justice Rehnquist who remained convinced that the "Establishment Clause did not require government neutrality between religion and

¹⁶⁴ *Id.* at 417 (Marshall, J., dissenting).

¹⁶⁵ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

¹⁶⁶ *Id.* at 668; *Cf.*, *Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding unconstitutional a freestanding nativity display on a county courthouse).

¹⁶⁷ *Lynch*, 465 U.S. at 672-73.

¹⁶⁸ *Id.* at 688 (O'Connor, J., concurring).

¹⁶⁹ *Wallace v. Jaffree*, 472 U.S. 38, 38 (1985).

¹⁷⁰ *Id.* at 60.

irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion.”¹⁷¹ Despite the force of his analysis, the Supreme Court later struck down programs in which publicly funded teachers offered supplementary classes in remedial math and reading in parochial schools.¹⁷² In the 1986 case of *Goldman v. Weinberger*,¹⁷³ the Supreme Court continued its trend of hostility towards religion and signaled a turning of the tide against the vigorous reading of the Free Exercise Clause established in *Sherbert* and *Yoder*, when it upheld an air force regulation prohibiting an Orthodox Jewish psychiatrist from wearing his yarmulke while on duty. In 1988 the Supreme Court seemingly adopted a *per se* rule that government land use decisions need not be curtailed by the impact that they may have on religious practices.¹⁷⁴ These decisions were the precursors for the hostile revolution, which was soon to dominate the Supreme Court’s Free Exercise jurisprudence.

This revolution was cemented in the 1990 case of *Employment Division v. Smith*.¹⁷⁵ In *Smith*, the Supreme Court held that the Free Exercise Clause does not require Oregon to demonstrate a compelling state interest to prohibit Native American religious use of Peyote through generally applicable state drug laws.¹⁷⁶ Writing for the majority, Justice Scalia distinguishes *Sherbert* and limits the application of strict scrutiny to unemployment cases and hybrid cases.¹⁷⁷ The Supreme Court’s decision is clearly hostile to the religious beliefs of the Native Americans. In dissent, Justice Blackmun describes such hostility as undermining religious

¹⁷¹ *Id.* at 106 (Rehnquist, J., dissenting).

¹⁷² *Aguilar v. Felton*, 473 U.S. 402 (1985); *Cf. Agostini v. Felton*, 521 U.S. 203 (1997) (the Court overruled *Aguilar* and held that such aid is permissible if it is made available to secular and sectarian beneficiaries on a nondiscriminatory basis).

¹⁷³ *Goldman v. Weinberger*, 475 U.S. 503 (1986).

¹⁷⁴ *Lyng v. Northwest Protective Cemetery Ass’n*, 485 U.S. 439 (1988).

¹⁷⁵ *Employ. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

¹⁷⁶ *Id.* at 872.

¹⁷⁷ *Id.* at 881.

liberty and as inconsistent with the American Indian Religious Freedom Act.¹⁷⁸

While the pendulum of religious liberty was swinging towards hostility in the Supreme Court's Free Exercise jurisprudence, the pendulum was swinging away from hostility in the Court's Establishment Clause jurisprudence. In 1992, the Supreme Court held in *Lee v. Weisman*,¹⁷⁹ that inviting a Rabbi to say prayers at a public middle school graduation violates the Establishment Clause because it subtly coerces support or participation in a religious exercise. For the majority Justice Kennedy stipulated that the Constitution guarantees a state religion will not be established and "that government may not coerce anyone to support or participate in religion or its exercise"¹⁸⁰ In advancing this standard, Kennedy put particular emphasis on the need to "distinguish between real threat and mere shadow."¹⁸¹ While this may not immediately appear friendly towards religion, Justice Kennedy's coercion test was actually a step in that direction Like Justice O'Connor's endorsement test, the coercion test is friendly towards religion because it does not mandate government neutrality towards religion and irreligion.

In 1993, Congress appeared to express its discontent with the religious hostility of the *Smith* decision by voting to pass the Religious Freedom Restoration Act [hereinafter "RFRA"]. Through RFRA Congress extended its imprimatur to the *Sherbert* decision and sought to mandate the application of strict scrutiny for all Free Exercise claims. Notwithstanding this enactment, the pendulum of religious liberty reached a hostile apex in its arc in 1997 with the

¹⁷⁸ *Id.* at 909, 920 (Blackmun, J., dissenting) (Blackmun quotes the American Indian Religious Freedom Act, 92 Stat. 469, 42 U.S.C. § 1996 (1982 ed.) as reciting that it shall be the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions..., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rights." *Id.*).

¹⁷⁹ *Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁸⁰ *Id.* at 587.

¹⁸¹ *Id.* at 598.

Supreme Court's decision in *City of Boerne v. Flores*.¹⁸² In *Boerne*, the Supreme Court held that Congress had exceeded its power with RFRA and found RFRA unconstitutional as it was applied to the states.¹⁸³ The decision can be seen as reaching an apex in religious hostility because it firmly establishes the *Smith* standard of review as the proper standard for considering free exercise claims. The Supreme Court affirmed *Smith* despite the fact that in doing so it was directly contradicting the expressed intent of Congress, over thirty years of free exercise jurisprudence, and the vast array of historical evidence in support of adopting strict scrutiny.¹⁸⁴

Characteristically, the pendulum swung back towards hostility in 2000 with the Supreme Court's decision in *Santa Fe Independent School District v. Doe*.¹⁸⁵ In *Santa Fe*, the Supreme Court held that merely giving students the opportunity to vote on whether to have prayer at public school football games facially violates the *Lemon* test.¹⁸⁶ In dissent, Chief Justice Rehnquist found this decision "bristled with hostility" towards religion and "[n]either the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause."¹⁸⁷ Fortunately, the pendulum was not

¹⁸² *Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁸³ *Id.* at 519 (Justice Kennedy noted that RFRA was an apparent attempt to alter constitutional protections (essentially the Court's decision in *Smith*) through a mere legislative act. He found this to pose problems in terms of both federalism and the separation of powers). *Cf.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1217 (2006) (unanimously deciding that the federal government may not burden the free exercise of religion unless they can demonstrate a compelling interest for doing so because RFRA is still binding on the Federal Government).

¹⁸⁴ This is true by virtue of 1) the 1963 *Sherbert* decision (*see Sherbert v. Verner*, 374 U.S. 398 (1963)), 2) the substantive intent of RFRA (*see Religious Freedom of Restoration Act*, 42 U.S.C. § 2000bb (1993)), and 3) the paramount importance that was given to religious liberty by our founding fathers.

¹⁸⁵ *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

¹⁸⁶ *Id.* at 315.

¹⁸⁷ *Id.* at 318. (Rehnquist, C.J., dissenting).

rooted as firmly in the arc of hostility for the Establishment Clause as it is for the Free Exercise Clause.¹⁸⁸

This point is further illustrated by the Supreme Court's 2002 decision in *Zelman v. Simmons-Harris*,¹⁸⁹ which upheld the Cleveland school voucher program. Writing for the majority, Chief Justice Rehnquist held that providing school vouchers, used primarily to attend sectarian schools at public expense, does not constitute a violation of the Establishment Clause.¹⁹⁰ This decision is friendly in nature and rests on the notion that government aid programs may benefit sectarian beneficiaries on a nondiscriminatory basis.¹⁹¹ Rehnquist went further by stating that the Constitution does not mandate governmental neutrality towards religion and irreligion.¹⁹² The Supreme Court was given an opportunity to address such notions in 2004 but did not elect to do so.¹⁹³

The current location of the pendulum's arc with regard to the Establishment Clause is difficult to pinpoint. This is true by virtue of the inconsistency between the Supreme Court's 2005 decisions in *Van Orden v. Perry*¹⁹⁴ and *McCreary County v. ACLU*.¹⁹⁵ In *McCreary*, the Supreme Court applied the *Lemon* test and held by a 5-4 majority that the display of the Ten Commandments in two Kentucky courthouses violated the Establishment Clause.¹⁹⁶ Justice Stevens, for the majority, cited *Epperson* and noted that the "touchstone for [his] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and

¹⁸⁸ See *Locke v. Davey*, 540 U.S. 712 (2004) (hostilely holding for a 7-2 majority that Washington State does not offend the Free Exercise Clause by offering scholarship programs for gifted students and excluding from eligibility students who wished to study devotional theology).

¹⁸⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹⁹⁰ *Id.* at 639-42.

¹⁹¹ *Id.* at 639-44.

¹⁹² *Wallace v. Jaffree*, 472 U.S. 38, 113 (Rehnquist, J., dissenting).

¹⁹³ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (dismissing free exercise and establishment clause challenges to the constitutionality of the phrase "under God" in the pledge of allegiance for lack of standing).

¹⁹⁴ *Van Orden v. Perry*, 545 U.S. 677 (2005).

¹⁹⁵ *McCreary County v. ACLU*, 545 U.S. 844 (2005).

¹⁹⁶ *Id.* at 844.

religion, and between religion and nonreligion.”¹⁹⁷ Stevens goes further and proclaims, “[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality.”¹⁹⁸ Justices Scalia, Rehnquist, Thomas, and Kennedy were not convinced by this argument. Historical and philosophical considerations aside, one is hard pressed to find real guidance from this case in light of the Supreme Court’s subsequent decision in *Van Orden*.

In *Van Orden*, the Supreme Court affirmed a U.S. District Court decision that the location of a Texas Ten Commandments monument on the Texas state capital grounds does not violate the Establishment Clause.¹⁹⁹ Chief Justice Rehnquist, in announcing the decision of the Supreme Court, indicates that the *Lemon* test is not a controlling test as “we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.”²⁰⁰ This is clearly incompatible with the Supreme Court’s earlier holding in *McCreary*. Noting as much, Justice Stevens dissents, remarking again that the “principle that guides my analysis is neutrality...[because neutrality is] firmly rooted in our Nation’s history and our Constitution’s text.”²⁰¹ Neutrality has roots in the nation’s history only in the dictum of the Court and even there it is a weed in the garden of Supreme Court jurisprudence. Neutrality is not expressly mandated by the Constitution and history indicates that the Framers did not view the Religion Clauses as mandating neutrality. Stevens himself concedes “the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers.”²⁰² Based on the religious history of the United States, it would be more

¹⁹⁷ *Id.* at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹⁹⁸ *Id.* at 860.

¹⁹⁹ *Van Orden*, 545 U.S. at 677-81.

²⁰⁰ *Id.* at 684.

²⁰¹ *Id.* at 733 (Stevens, J., dissenting).

²⁰² *Id.* at 734 (Stevens, J., dissenting).

accurate to state that a neutrality ideal would have seemed foreign to the vast majority of our founding fathers.

From this summary of the Supreme Court's jurisprudence, it appears that judicial interaction with religion is inherently friendly or hostile towards religion. Insofar as this is true, neutrality is a red herring in the Supreme Court's analysis. In most instances, therefore, establishing neutrality as *the* ideal functions only to distort the Supreme Court's analysis. This distortion has greatly magnified the tension between the Religion Clauses and has been a major contributing factor in creating instability and incongruence in the Supreme Court's First Amendment jurisprudence.

C. Modern Government Practices Illustrate that Government Interaction with Religion is Inherently Hostile or Friendly

In view of the swinging pendulum that is the Supreme Court's Religion Clauses jurisprudence, it is likely that other forms of government interaction with religion will also illustrate inherent hostility or friendliness. A review of modern government practices supports this conclusion. From the above review of early aid and involvement with religion, it is clear that most early government practices were friendly in nature towards religion.²⁰³ Similarly, there are many modern government practices, such as providing religious entities with property tax exemptions, which appear to be friendly towards religion.²⁰⁴

²⁰³ See *infra* section III, subsection B. Surely state establishments of religion and use of religious taxes, reliance on religion in the Declaration of Independence, the reliance on religious imagery in the quest for an official government seal, religious proclamations and presidential speeches, the prevalence of public prayer, and the presence of religion in virtually all educational institutions each support the notion that early government involvement with religion was primarily friendly in nature.

²⁰⁴ Justice Thomas observed "[t]he historical evidence of government support for religious entities through property tax exemptions is... overwhelming." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 859 (1995).

For instance, the motto “IN GOD WE TRUST” appears on United States currency and coins. The United States Department of the Treasury states that during the Civil War it began to receive many appeals to recognize God on coins.²⁰⁵ The first such recorded appeal came in a November 13, 1861 letter to Secretary of the Treasury Salmon Chase, which was written by Rev. M.R. Watkinson of Ridleyville, Pennsylvania.²⁰⁶ Watkinson wrote that recognizing God on the coins “would make a beautiful coin, to which no possible citizen could object...[and] would place us openly under the Divine protection we have personally claimed.”²⁰⁷ Secretary Chase then wrote a letter to James Pollack, Director of the mint at Philadelphia informing him that the “trust of our people in God should be declared on our national coins” and thereafter instructing him to create “a motto expressing in the fewest and tersest words possible this national recognition.”²⁰⁸ Pollack subsequently suggested “OUR COUNTRY; OUR GOD” or “GOD, OUR TRUST”, which was later modified by Secretary Chase to read “IN GOD WE TRUST.”²⁰⁹

This motto first appeared on the 1864 two-cent coin and later was approved by Congress to appear on all coins.²¹⁰ The motto was approved to appear on paper currency beginning in 1957 and eventually was included on the back of all currency by 1966.²¹¹ This formal reliance on divine protection was cemented in 1956 when the 84th Congress passed a joint resolution, approved by the President, which established IN GOD WE TRUST as the official motto of the United

²⁰⁵ United States Department of the Treasury, *Fact Sheets: Currency & Coins- History of 'In God We Trust'*, <http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.shtml> (last visited Nov. 28, 2006).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* On February 12, 1873 Congress passed the Coinage Act, which authorized “the motto IN GOD WE TRUST to be inscribed on such coins as shall admit of such motto.” *Id.*

²¹¹ *Id.*

States.²¹² The use and adoption of this motto is seemingly friendly towards religion in that it memorializes, on all forms of currency, a national reliance on divine protection. This is particularly friendly to some religions in that currency qua currency allows this message to be transmitted and perhaps internalized by a large number of people. On the other hand, this message can be viewed as biased or hostile towards religion in that not all religions believe in God. Notably, in its redeeming capacity, ceremonial deism perpetuates religious hostility.²¹³ Ceremonial deism prevents the Supreme Court from subjecting longstanding government practices to fair scrutiny under the Religion Clauses of the First Amendment. Because such practices favor particular religions, ceremonial deism aids certain religions at the expense of others. Still, in its reliance on tradition, ceremonial deism does serve to reinforce the notion that the United States was friendly towards religion by virtue of its religious heritage.

The Pledge of Allegiance [hereinafter “Pledge”] is another important example of officially sanctioned government involvement with religion. The Pledge was initially proposed in 1892 and stated, “I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all.”²¹⁴ In 1942 the President approved a joint resolution of Congress codifying as the official Pledge, “I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all.”²¹⁵ In 1956, Congress amended the Pledge to include the words “under God” resulting in its current form which states “I pledge allegiance to the flag of the United States of

²¹² *Id.*

²¹³ Ceremonial deism carves out a special exception under the Religion Clauses for certain longstanding government practices involving religion on the basis that such practices currently represent ceremonial traditions and not simply religious exercises. *See, Elk Grove Unified Sch. Dist. V. Newdow*, 542 U.S. 1,36-39 (2004) (O’Connor, J., concurring).

²¹⁴ *Id.* at 6. Justice Stevens explained that approximately thirty years later the phrase “my Flag” was replaced with “the flag of the United States of America” pursuant to the National Flag Conferences. *Id.*

²¹⁵ *Id.*

America and to the Republic for which it stands, one Nation under God indivisible, with liberty and justice for all.”²¹⁶ Further, Justice Stevens points out that the “House Report that accompanied the legislation observed that, ‘[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.’”²¹⁷

In keeping with the religion infused national motto, the Pledge’s religious reference is inherently friendly towards religions believing in God and hostile towards religions not believing in God.²¹⁸ The Pledge is perhaps inherently friendly to monotheistic religions because it describes our nation as existing under a God. Inasmuch as God is not a central component of all religions the phrase “under God” seems to undermine the tenants of other religions, which can be seen as hostile towards them.

A brief survey of educational practices and institutions also reflects that government interaction with religion is friendly or hostile in nature. This is exemplified by government financial assistance to religious schools, school prayer, and the debate surrounding evolution, creationism, and intelligent design. In terms of financial assistance it is helpful to consider the decisions produced in *Everson*, *Lemon*, and *Agostini v. Felton*.²¹⁹ In *Everson*, the Supreme Court issued a decision upholding the constitutionality of using public funds to provide busing for children to private religious schools.²²⁰ This decision is friendly to religion in that it provides transportation to religious schools, which is helpful to students wishing to attend such schools. If the Supreme Court had struck down this program, however, it would have had the effect of denying such aid only to religious schools. Such a denial, rooted exclusively in the fact

²¹⁶ *Id.* at 7.

²¹⁷ *Id.* (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p 2 (1954)).

²¹⁸ See section V, subsection C, *infra*, for a discussion of the apparent Constitutional implications of overt government references to God.

²¹⁹ *Agostini v. Felton*, 521 U.S. 203 (1997).

²²⁰ *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

that such schools are religious in nature, would be hostile towards religion.

Next, in *Lemon*, the Supreme Court held that public funds could not be used to subsidize the salaries of teachers in religious schools. Striking down such programs is hostile to religion inasmuch as such subsidization is otherwise allowed for nonreligious private schools.²²¹ Therefore, this decision has the effect of denying a government benefit to select schools on the basis of religion only. However, if the Supreme Court upheld the subsidization scheme it would have provided significant financial assistance to religious schools, which is friendly towards religion. Similarly, in *Agostini*, the Supreme Court held that public funds might aid religious institutions provided that such aid is available to both religious and nonreligious beneficiaries on a nondiscriminatory basis.²²² The *Agostini* decision has the effect of allowing religious schools to receive the same aid that nonreligious schools receive, which is favorable—and therefore friendly to religion. Denying financial assistance to religious schools in this context, however, is hostile to religion.

The debate over school prayer provides another example that government interaction with religion is either friendly or hostile in nature. In surveying this debate, it is helpful to consider the decisions produced in *Abington School District v. Schempp*,²²³ *Wallace*, and *Santa Fe Independent School District*. In *Abington*, the Supreme Court held that a state law allowing teachers to read passages from the bible or lead prayers on a voluntary basis violated the Establishment Clause.²²⁴ This decision is hostile to religion insofar as it precludes students from learning about religion and practicing their beliefs in public schools—even on a voluntary basis. On the other hand, allowing such practices would be friendly to religion, as it would allow students to

²²¹ *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

²²² *Agostini*, 521 U.S. at 203-04.

²²³ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

²²⁴ *Id.* at 203-05. (The state law allowed students who did not wish to participate to be excused from such exercises. *Id.* at 205.)

learn about religion and would increase their ability to practice their religious beliefs. The Supreme Court extended the hostility encapsulated in *Abington*, one step further in its *Wallace* decision. The Supreme Court held in *Wallace* that the Constitution prevents a state from authorizing its schools to set aside one minute of silence each day for voluntary prayer or meditation.²²⁵ This is hostile in that it prevents students from having the opportunity for one minute of silent, self-initiated religious reflection. The Supreme Court solidified this hostility in the *Santa Fe* case when it held that students could not vote on whether to have a prayer at a school football game.²²⁶ If the Supreme Court allowed the voluntary prayers in *Wallace* and *Santa Fe* they would have provided students with an outlet for religious expression, which is favorable towards religion.

In addition, the debate surrounding evolution, creationism, and intelligent design in public school curriculums has produced similar results. In *Epperson v. Arkansas*,²²⁷ the Supreme Court held unconstitutional an Arkansas law, which sought to prevent evolution from being taught in public schools. This result is hostile to many religions as the theory of evolution instructs that all creatures have evolved, which undermines and contradicts important tenants of their religious faith. This in turn prompted religious adherents to push for creationism and intelligent design to be taught alongside evolution.²²⁸ In an effort to secure this result the Louisiana legislature passed the Creationism Act, which was struck down by the Supreme Court in *Edwards v. Aguillard*.²²⁹

In the *Edwards* case, the Supreme Court held the Creationism Act was unconstitutional on the basis that it violated the *Lemon* test by requiring that creationism be

²²⁵ *Wallace v. Jaffree*, 472 U.S. 38, 38 (1985).

²²⁶ *Santa Fe Ind. Sch. Dist. V. Doe*, 530 U.S. 290, 315 (2000).

²²⁷ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

²²⁸ Creationism teaches that humans were created by a supreme being and did not evolve whereas intelligent design theorizes that nature was created by a supreme or intelligent being and was not created by chance.

²²⁹ *Edwards v. Aguillard*, 482 U.S. 578 (1987).

taught alongside evolution.²³⁰ Similarly, in *Kitzmiller v. Dover Area School District*, the United States District Court for the Middle District of Pennsylvania ruled that a local school district that required public school science classes to teach intelligent design as an alternative to evolution, violated the Establishment Clause because intelligent design is essentially religious in nature.²³¹ The decisions in both *Edwards* and *Kitzmiller* are hostile to religion because they prevent alternative theories from being required components in public school curriculums simply by virtue of their religious implications. On the contrary, if the decisions had upheld such requirements this would have been friendly to religion as both creationism and intelligent design are religious doctrines.

The polarized outcome of government interaction with religion is particularly evident with regard to moral considerations. This is true even for moral considerations that involve government and religion indirectly and is exemplified by the debates surrounding euthanasia, capital punishment, abortion, and gay marriage. With regard to euthanasia, in *Washington v. Glucksberg*, the Supreme Court upheld a Washington law proscribing assisted suicide.²³² The Supreme Court held that assisted suicide was not protected by the Due Process Clause.²³³ While there are several secular considerations in support of this decision it is nevertheless friendly towards religion because it is consistent with the proscription of suicide in many religions. Notwithstanding the outcome in this instance, the Supreme Court's resolution of decisive moral issues is not always so favorable to religion. For instance, the Supreme Court has upheld the constitutionality of capital punishment despite the fact that

²³⁰ *Id.* at 578-79. The Creationism Act did not mandate that creationism or evolution be taught. Rather it specified that if one was to be taught the other must be taught alongside it. *Id.* at 581.

²³¹ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp.2d 707 (M.D. Pa 2005).

²³² *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²³³ *Id.* at 702.

religious authorities almost universally reject it.²³⁴ The Supreme Court has also held that women have a constitutional right to choose to have an abortion.²³⁵ Similarly, the Supreme Judicial Court of Massachusetts held that homosexuals have a right to marry under the Massachusetts State Constitution.²³⁶ In all three instances, the Court's decisions are hostile to some religions because the tenants of some religions proscribe such practices. For this reason, if these issues had been decided the other way around they would be friendly towards religion.

All of the aforementioned practices and decisions highlight the fact that government interaction, including interaction of an indirect nature, is inherently friendly or hostile towards religion. In each of these situations, many important governmental and religious interests are at stake and a myriad of variables must be considered. In making such considerations it is quite difficult to truly divorce oneself from personal bias. Further, even if actual impartiality could be achieved, it is impossible to fully consider and equally balance all aspects of every variable. Most important prudence seems to advise against government neutrality towards religion. Establishing neutrality as the benchmark in the Supreme Court's jurisprudence, therefore, is both unrealistic and counterproductive.

²³⁴ See *Gregg v. Georgia*, 428 U.S. 153 (1976) (ending the moratorium on the death penalty that began in *Furman v. Georgia*, 408 U.S. 238 (1972), and reaffirming its constitutionality as it is currently employed).

²³⁵ *Roe v. Wade*, 410 U.S. 113 (1973) (finding that most laws against abortion violate women's constitutional right to privacy under the liberty clause of the Fourteenth Amendment).

²³⁶ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the state's constitution "affirms the dignity and equality of all individuals" and that with regard to this there is no constitutionally adequate reason for denying marriage to same-sex couples. *Id.* at 948.).

**V. LEGAL COERCION AND THE PRUDENCE OF
ADOPTING A NONPREFERENTIALIST APPROACH
TO GOVERNMENT AID AND INVOLVEMENT WITH
RELIGION**

Jefferson's wall metaphor and the associated neutrality ideal have dominated the Supreme Court's jurisprudence for well over forty years. Not all have embraced the two with open arms though. Over the past twenty years there has been a growing trend in the Supreme Court's jurisprudence in favor of nonpreferentialism. This section will explain how the nonpreferentialist approach is consistent with the intent of the Framers and the express language of the Religion Clauses. In addition, the views of Alexis de Tocqueville will be considered relative to the prudence of adopting a nonpreferentialist approach. Finally, a review will be made of two important cases that are currently making their way through the Federal Court system. These two cases are important as they may present the Supreme Court with an ideal opportunity to implement nonpreferentialism. The cases are also important because implementing nonpreferentialism would abolish two longstanding practices that undermine true religious liberty.

**A. The Nonpreferentialist Approach is Consistent
with the Intent of the Framers and the Express
Language of the Religion Clauses**

The First Amendment does not mandate neutrality or strict separationism. Rather, the Religion Clauses of the First Amendment stipulate, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²³⁷ The Religion Clauses were intended by the Framers to prevent the national government from favoring a particular religious sect and to prevent a national church or religion from being established. The truth of this assertion is apparent from the debates of the First Congress surrounding

²³⁷ U.S. CONST. amend I.

the proposed religion amendment and is reflected throughout early government practices in the United States. Former Chief Justice Rehnquist states that from such evidence it appears “that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations.”²³⁸ Similarly, Justice Thomas performed an exhaustive survey of religion in the revolutionary era and found that “the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others.”²³⁹ Strong support for this position can be found in Justice Story’s *Commentaries on the Constitution of the United States*. Justice Story’s treatise is particularly relevant given his prominent role on the Supreme Court during the post-revolutionary period.²⁴⁰ As Justice Rehnquist observed in *Wallace*, Justice Story confirms that there was almost universal acceptance that religion should “receive encouragement from the State so far as [such encouragement] was not incompatible with the private rights of conscience and the freedom of religious worship.”²⁴¹

Both the express language of the Religion Clauses and the Framers’ apparent understanding of them are consistent with nonpreferentialism. Nonpreferentialism is the view that government may not prefer one religion to another religion but may support religion in general. Former Chief Justice Rehnquist and Justice Thomas have vigorously endorsed this approach.²⁴² Justice Thomas has advocated for the adoption

²³⁸ *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

²³⁹ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring).

²⁴⁰ *Wallace*, 472 U.S. at 104 (Rehnquist, J., dissenting) (observing that Story was a Harvard Professor, ascended to the Court in 1811, and wrote the first comprehensive treatise on the Constitution).

²⁴¹ *Id.* at 104 (Rehnquist, J., dissenting) (quoting Justice Joseph Story’s *Commentaries on the Constitution of the United States* 630-32 (5th ed. 1891)).

²⁴² See *Rosenberger*, 515 U.S. at 855 (Thomas, J., concurring). See also *Wallace*, 472 U.S. at 106 (Rehnquist J., dissenting).

of a “legal coercion” standard, which would put nonpreferentialism back into practice.²⁴³ Under the legal coercion test, the government violates the Establishment Clause “when it uses legal means to directly coerce religious beliefs”²⁴⁴ This provides a reliable and manageable way of enforcing the Establishment Clause, which is consistent with both the intent of the Framers and the express language of the Constitution.²⁴⁵ The legal coercion test is also friendly towards religion because it would allow government to provide support for religion. Prudence also dictates that the Supreme Court should adopt a friendly approach in its Free Exercise jurisprudence. Reinstating Brennan’s strict scrutiny standard of review would provide a reliable, manageable, and friendly way of enforcing the Free Exercise Clause, which is more consistent with the express language of the Constitution.

Still, many Justices on the Supreme Court have responded to nonpreferentialism with firm resistance. For instance, Justice Souter responded to the overwhelming evidence in support of a nonpreferential approach with his concurrence in *Weisman*. In this case, Souter suggests that “[a]lthough evidence of historical practice can indeed furnish valuable aid in the interpretation of contemporary language”²⁴⁶ acts such as inviting a Rabbi to give a speech at a public school graduation ceremony “prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle.”²⁴⁷

In view of the religious history of the United States and its associated aid and involvement with religion, this characterization attempts to establish the exception as the

²⁴³ Elk Grove Unified Sch. Dist. V. Newdow, 542 U.S. 1, 52 (2004) (Thomas, J., concurring).

²⁴⁴ James A. Campbell, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas’s “Actual Legal Coercion” Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541, 569 (2006).

²⁴⁵ *Id.* at 567-572.

²⁴⁶ Lee v. Weisman, 505 U.S. 577, 616 (1992) (Souter, J., concurring).

²⁴⁷ *Id.*

rule. Souter's argument is flawed because history shows that strict separation was the exception and not the rule. The overwhelming evidence in support of this conclusion is manifest throughout the nation's history. Surely, if one turns a blind eye to our nation's history, one cannot help but turn a blind eye to its constitutional principles in the process. This begs the question as to why neutrality and strict separationism have enjoyed such prevalence in the Supreme Court's jurisprudence? Historical consistency, fidelity to the intent of the Framers, and the express language of the First Amendment cannot justify this prevalence. The only apparent justification is that separationist proponents believe it is advantageous to erect a high and impregnable wall separating government and religion. This justification fails because the approach intended by the Framers and adopted in practice by the government is the more prudent approach.

B. Alexis De Tocqueville and the Prudence of Adopting the Nonpreferentialist Approach

Adopting nonpreferentialism is prudent because it is in accord with the demonstrated intent of the founding fathers and is consistent with the express language of the Religion Clauses. The prudence of adopting a nonpreferentialist standard is illustrated by three important observations that Alexis de Tocqueville made in *Democracy in America*. By virtue of these observations it is clear why Tocqueville fears that the "religious spirit" of America may be in jeopardy.²⁴⁸ This inquiry could not be complete without at least briefly discussing the views of Tocqueville, as he is perhaps the most famed proponent of maintaining a religious and political fellowship in America.

Tocqueville cautions that a new kind of despotism should be feared in democratic nations such as America.²⁴⁹ In describing the form of despotism that democratic nations ought to fear, Tocqueville describes a "mild" despotism that

²⁴⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Harvey Mansfield & Delba Winthrop eds., University of Chicago Press 2000).

²⁴⁹ *Id.* at 661-61.

is rooted in “*general apathy*, the fruit of individualism.”²⁵⁰ Tocqueville fears that such apathy “does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd.”²⁵¹ In turn, Tocqueville hopes that “[r]eligion may diminish the threat of mild despotism by reminding citizens of the seriousness of life outside the busy search for material well-being in democracies.”²⁵² Nonpreferentialism is prudent, therefore, because it allows government to support religion and religion provides vital protection from mild despotism.

Tocqueville describes such despotism as being produced “in the very shadow of the sovereignty of the people” and as consisting of “an innumerable crowd of like and equal men who revolve on themselves without repose, procuring the small and vulgar pleasure with which they fill their souls.”²⁵³ From this it appears that equality, homogeneity, and materialism are three principle components of mild despotism and American democracy. Tocqueville indicates that the combined effect of these components is to soften and weaken individuals—to prevent exceptional individuals from rising up from among the crowd.²⁵⁴ Religion is therefore useful as it “may serve as a reminder of what transcends the mediocrity of democratic public life, and thus of a greatness not usually within its scope.”²⁵⁵ Insofar as religion is able to inspire greatness, nonpreferentialism is prudent as it allows religion to receive support from government.

Tocqueville also notes, “in the United States religion is...intermingled with all natural habits and all the sentiments to which a native country gives birth; that gives it particular strength.”²⁵⁶ The strength that Tocqueville finds in religion

²⁵⁰ *Id.* at 704 (emphasis in original).

²⁵¹ *Id.* at 663.

²⁵² *Id.* at lxxxii (Introduction of Harvey Mansfield and Delba Withrop).

²⁵³ *Id.* at 663-664.

²⁵⁴ *Id.* at 672, 676.

²⁵⁵ *Id.* at lxxxiii (Introduction of Harvey Mansfield and Delba Withrop).

²⁵⁶ *Id.* at 405-06.

involves not only its ability to safeguard against the perils of mild despotism. Rather, Tocqueville is also cognizant of the role of religion in developing and maintaining the morality, which is necessary to sustain our form of government.²⁵⁷ In fact, Tocqueville thinks that there is an “intimate union of the spirit of religion and the spirit of freedom” such that freedom “considers religion as the safeguard of mores; and mores as the guarantee of laws and the pledge of its own duration.”²⁵⁸

Tocqueville was not alone in linking religion and morality or in finding that the United States is dependent on religious morality to maintain security and stability. Many prominent Americans, including many of the founding fathers, shared such sentiments. For instance, in 1796 during his celebrated Farewell Address, George Washington proclaimed, “reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”²⁵⁹ Similarly, John Adams stated that our government is not “armed with power capable of contending with human passions unbridled by morality and religion” and that in their unbridled form “[a]vorice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net.”²⁶⁰ Perhaps surprisingly, it is well established that Thomas Jefferson also publicly favored religion over irreligion.²⁶¹ Jefferson thought that the only secure basis for preserving liberty was “a conviction in the minds of the people that these liberties are of the gift of God.”²⁶²

²⁵⁷ *Id.* at 44, 282-84.

²⁵⁸ *Id.* at 27, 44.

²⁵⁹ The Avalon Project at Yale Law School, *Washington's Farewell Address 1796*, <http://www.yale.edu/lawweb/avalon/washing.htm>, (last visited Nov. 30, 2006). Alexander Hamilton appears to have endorsed this same position. This is exemplified by the fact that he included the above-quoted language in his initial draft of Washington's Farewell Address.

²⁶⁰ CHARLES E. RICE, *THE SUPREME COURT AND PUBLIC PRAYER* 47 (Fordham University Press 1964) (quoting letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts Oct. 11, 1798).

²⁶¹ Aristide Tessitore, *Thomas Jefferson on Legitimate Government, Religion, and Education*, in *HISTORY OF AMERICAN POLITICAL THOUGHT* 141 (Bryan-Paul Frost & Jeffery Sikkenga eds., Lexington Books 2003).

²⁶² JEFFERSON, *supra* note 30, at 156.

Professor John Koritansky finds that even Thomas Paine, the quintessential American radical, “is confident that religions in general, the genus religion, is benign.”²⁶³ The benign nature of religion was also discussed by Dr. Martin Luther King, Jr., who said that “[r]eligion operates not only on the vertical plane but also on the horizontal...[i]t seeks not only to integrate men with God but to integrate men with men and each man with himself.”²⁶⁴ Religion as thus understood is an important tool in our society. Professor Mansfield remarks that if “government is to remain limited, individuals must be able to rule themselves, at least to some extent, and to do this, religion—which reminds of the importance of our souls—might seem indispensable.”²⁶⁵ All in all, because morality is a necessary component for a stable government and because religion produces morality, it is prudent to adopt nonpreferentialism as it enables the government to be supportive of religion.

C. Important Cases on the Horizon

In 2005 Dr. Michael Newdow brought two important cases in Federal Court. Newdow filed the first case *pro per* and as counsel and is again challenging the Constitutionality of “under God” in the Pledge.²⁶⁶ This case was filed in the U.S. District Court for the Eastern District of California on January 3, 2005. District Court Judge Lawrence Karlton ruled in favor of Newdow and an appeal was filed in the Ninth Circuit Court of Appeals, which has yet to render its decision. Newdow brought the second case *pro per* and is challenging the Constitutionality of “IN GOD WE TRUST” on United

²⁶³ John Koritansky, *Thomas Paine: The American Radical*, in *HISTORY OF AMERICAN POLITICAL THOUGHT* 75 (Bryan-Paul Frost & Jeffery Sikkenga eds., Lexington Books 2003).

²⁶⁴ MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM* (Harper & Row 1958).

²⁶⁵ MANSFIELD, *supra* note 136, at 104.

²⁶⁶ As mentioned above, Newdow’s previous attempt at challenging the pledge failed because the Court decided that he did not have standing to sue. *See*, *Elk Grove Unified Sch. Dist. V. Newdow*, 542 U.S. 1, 1 (2004).

States currency. This case was filed in the U.S. District Court for the Eastern District of California on November 18, 2005. The District Court granted a motion to dismiss the case and an appeal has been filed with the Ninth Circuit Court of Appeals.

In the event that favorable decisions are obtained in the Ninth Circuit Court of Appeals, it appears quite likely that the cases will end up before the Supreme Court. This will give the Supreme Court an excellent opportunity to officially adopt nonpreferentialism. Perhaps counter-intuitively, adopting such an approach may actually *support* Newdow's position in both instances. While nonpreferentialism allows for government support of religion, it requires that in rendering such support preference not be given to one religion at the expense of another. Yet including "God" in both the Pledge and on all United States currency appears to inherently favor monotheistic religions at the expense of non-monotheistic religions. Such a result is inconsistent with the principal tenet of nonpreferentialism. Therefore, if the Supreme Court were to strictly apply nonpreferentialism, the explicit references to God on our currency and in the Pledge would seemingly represent violations of the Establishment Clause.

Some might seek to assert ceremonial deism as a means of escaping this conclusion. To adopt nonpreferentialism in this instance and immediately thereafter employ ceremonial deism would be an unfortunate and unsatisfying result. If nonpreferentialism is to maintain its integrity and function properly, ceremonial deism must not be allowed to prevent government practices from withstanding the scrutiny of an objective nonpreferential analysis. Practices that cannot stand up to such scrutiny should be held unconstitutional regardless of ceremonial legacy. Because memorialized government references to "God" prefer religions believing in God they are unlikely to withstand such scrutiny. Overt references to "God" on United States currency, in the Pledge, and in the national motto, favor monotheistic religions at the expense of other religions. At bottom, true religious liberty must mean the freedom to practice any religion on an equal basis.

Favoring one religion over another stifles the freedom to practice religion on such a basis.

This does not mean, however, that government may not demonstrate support for religion. Surely, if the currency were to state “IN RELIGION WE TRUST” it would not violate the Establishment Cause. Also, a strict application of nonpreferentialism would allow the government to provide nondiscriminatory aid to religious institutions.²⁶⁷ This aid will help to strengthen the “*genus* religion” and will allow the government to reap the benefits of its benevolence. For these reasons, maintaining the religious references in the currency and Pledge undermines fundamental principles of *true* religious liberty.

²⁶⁷ In providing such support it will be necessary to define what beliefs and practices merit formal recognition as “official” religions. Defining religion as such could become a slippery slope. For this reason we must navigate the slippery slope at the outset and define religion in such a manner as to prevent misuse and abuse of the term and to facilitate protection of the institution.