CHAPTER 4

FEDERAL FOUNDERS' INTENT: PART II: SEPARATIONISM

Introduction.

The second variety of federal founders' intent involving separation of church and state, is "separationist" history. Separationist history maintains that the federal and state framers wished to separate church and state *absolutely*. The judicial versions of separationist history has its roots in church property litigation, where the courts developed the notion of "jurisdictional separation" based on the belief that the courts were incompetent to determine religious truths; early state aid to parochial schools controversies, where the courts developed the principle that aid to sectarian schools was unconstitutional (discussed in **Chapter 2** *supra*); and in the free exercise cases of the 1940's, where the history of religious liberty in America which emphasized freedom *from* a state imposed religion, and the "rediscovery" of Thomas Jefferson were invoked.

The major premise of separationist history is that the history of the religious and political past in America and Europe was one of discrimination and intolerance. And that the only way to prevent these twin evils was to separate church and state. Early practices of state aid to a state religion, or to Protestantism (e.g., the religious oaths for office were evidence of this discriminatory past), represented the dark side of the history of religious freedom in this country. From this history, it was inferred that it was the state and federal founders' intent to protect religious freedom by preventing government from engaging in discriminatory actions or persecutions. The vice of church-state unions was one of

allowing government to aid an official religion, which gave the government the authority to determine what were religious truths. Evidence of this intent is seen in the negative language of state charters, state constitutions, the First Amendment to the U.S. Constitution, and in the works of Thomas Jefferson and James Madison.

When judges invoke separationist history, unlike the accommodationist variety, rarely rely on documentary legal history, but rather on the overall purposes of separation that the judge wishes to identify separation with. Separationist history is linked to three main purposes: to prevent persecution, to guarantee freedom *from* religion, and to secure religious pluralism.

I. Purposes of Separation:

A. Preventing Persecution.

Separationists often argue that the primary purpose of separation was to prevent persecution for belief or non-belief. Government was to have no authority over religion. This position is supported by references to European history of inquisitions and the colonial oppressions of religious minorities. Neither the legislature, nor the judiciary, was to be used by sectarian groups as a tool of persecution. This position was based on the principle that government should not determine what was the religious truth. Hence, many judges adapted a Millsian "marketplace of ideas" to characterize separation -- the freedom to believe or not to believe, with "the widest toleration of conflicting views."[1] No doubt, this attitude toward the free conflict of ideas had its roots in the English Lord Mansfield's celebrated *Evans* speech, which articulated the idea that it was the principle of the common law that no one should be subjected to persecution because of his or her

religious opinions.[2] In short, religious belief would be treated as an intellectual freedom.

B. Guaranteeing Freedom from Religion.

Separationists have also argued that separation serves the purpose of guaranteeing freedom *from* religion. Not only was government not to coerce belief or non-belief, force church attendance, or use religion as a standard in decision-making, it was to be *neutral*. Several state judges argued early on that separation or neutrality meant the legal equality of all religions and non-religion before the state. As the U.S. Supreme Court later put it: "The Law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[3]

C. Securing Religious Pluralism.

Finally, separation was to serve the purpose of securing religious pluralism and religious change in society. By not aiding or giving preference to any religion, political entanglements and competition by religious groups for the public purse,[4] separation offered a pluralistic remedy for the evils of church-state unions. Religious conflicts were removed from the realm of politics and placed in the realm of private society. Pluralism in religion was seen as a positive good. Often, judges invoked the civil wars in Europe as evidence of the civic turmoil that results when the state aided religion or pointed to the lack of religiosity in countries which had church-state unions, where religion often becomes stale because it is the "state" orthodoxy.

II. What Judges Cite as History: The Documentary Sources of Separationism.

Separationist histories generally invoke seven documentary authorities:

A. Thomas Jefferson and the Wall of Separation.

The best known "federal" founder on the issue of religious liberty and separation is Thomas Jefferson. Jefferson coined the term that the First Amendment had set a wall of separation between church and state. The term is taken from his letter to the Danbury Baptists, January 1, 1802, one of several letters Jefferson wrote to explain, why he, as President, declined to issue a Thanksgiving Day proclamation. First cited by Justice Waite of the U.S. Supreme Court in *Reynolds v. United States* (1898),[5] Jefferson maintained that the First Amendment had built a "wall of separation of Church and State."[6] What he meant was that government had no authority, for better or worse, over religion.[7] Government was incompetent to use religion as a measure of civil policy. Jefferson's concept of separation was a rational-secular argument, a product of the Enlightenment, invoked to protect the state from the evils of religion, and to protect religion as a type of "opinion," from the state.[8] Another popular document was Thomas Jefferson's *Bill for Religious Freedom (1786)* and his *Notes on Virginia*, the former for its definition of "freedom" and the latter for the belief/action dichotomy in free exercise.

1. Early Uses of Thomas Jefferson: From No Right to Religious Conscience to No Monetary Aid to Religion.

Central to the American concept of separation is the life and works of Thomas Jefferson. The American judiciary has made various arguments, even contradictory ones, using Thomas Jefferson's views. He has been invoked to make four arguments involving religion: 1) That there are *no* rights of conscience against social duties or legitimate state interests; 2) Jefferson replaced Lord Mansfield as authority for the belief/action distinction in law; 3) State judges cited Jefferson's influence on their own state

constitutional provisions concerning religion, since many states copied Virginia's *Bill for Religious Freedom*; and 4) Only in modern times was Jefferson cited for the argument that "separation" meant "no support" and no monetary aid to religion.

For the most part, Jefferson was cited in the nineteenth century to address the thorny issue of the limits of free exercise. The state courts looked to Jefferson, not to expand the definition of religious liberty, but to justify limits on religious liberty. This was seen in the very first judicial reference to Jefferson, in the case of *Commonwealth v. Lesher* (1828), where lawyers for a man convicted of murder requested a new trial on the grounds that one of the jurors had conscientiously objected to capital punishment. The court held that the juror could be challenged and excluded, denied the request for a new trial, and let the conviction stand.[9] The dissenting opinion, written by Chief Justice Gibson, quoted from Jefferson's *Notes on Virginia* in support of the argument that the juror could not claim a religious exemption from serving on a jury.[10] Chief Justice Gibson's reference to Jefferson was later cited by several state courts, which reached a variety of conclusions involving religion and the state.[11]

The first time the U.S. Supreme Court cited Jefferson on the issue of the First Amendment's religion clauses was for authority for the law's distinction between belief and action, e.g., belief is protected, action which harms the public is not. In *Reynolds v. United States* (1878), the Court invoked both Jefferson and James Madison as authors of the First Amendment.[12] The Court had been asked whether religious beliefs could be used as a justification for the criminal act of bigamy in the territory of Utah. The Court replied in the negative, and argued that "religion" in the First Amendment only

encompassed opinions, not actions. Chief Justice Waite quoted from Thomas Jefferson's Virginia *Bill for Religious Freedom (1786)*, his letter to the Danbury Baptists, and James Madison's *Memorial and Remonstrance (1785)*, for the view that actions against the public peace were not protected because the First Amendment had erected a "wall of separation" between religion and the state. Chief Justice Waite's separationist history, embellished by both the example of Virginia to prevent Patrick Henry's proposed tax assessment to support the town minister, and the successful attempt to add a bill of rights to the federal constitution, was later quoted in several state and federal opinions.

Waite's treatment of both Jefferson and Madison is significant because it established the view that Jefferson and Madison were authors of the First Amendment, and that their views were clearly strict separationist. Here, "separation" was the belief/action distinction in free exercise law. Waite's reference to these founders became a popular citation for separationists.[13]

Chief Justice Gibson's and Chief Justice Waite's view of Jefferson eventually became the support of the second general use of Jefferson found in the case law, that is, to support the argument that the law distinguished between belief and actions, whereby harmful acts to society would not be protected. Jefferson thus replaced Lord Mansfield on this issue. For example, in *Commonwealth v. Herr* (1910), the Pennsylvania Supreme Court upheld the constitutionality of a state statute prohibiting public school teachers from wearing religious garb in the classroom.[14] For authority, the court cited Chief Justice Gibson's dissent (i.e., the reference to Jefferson). The court had previously upheld the action of a nun wearing her habit in the public classroom as not constituting

"sectarian" instruction prohibited by the state constitution (no state law existed on the subject at the time).[15] *Herr* thus dealt with a state law prohibiting the wearing of religious garb in the public classroom.

Chief Justice Gibson's reference to Jefferson was later cited in a free exercise case that also invoked a separationist history of the founding period. In *Lawson v. Commonwealth* (1942), the Kentucky Court of Appeals upheld the validity of an act making it a misdemeanor to use or handle snakes or reptiles in religious services.[16] The court argued that the states provided for religious freedom in their constitutions, but that freedom did not prevent the state from prohibiting actions that may harm the public. Linking Jefferson's ideas to the state and federal provisions [by 1942, the U.S. Supreme Court had applied the federal free exercise clause to the states through the due process clause of the Fourteenth Amendment], the court invoked Jefferson as a federal founder. The court argued that the federal founders wanted absolute separation of church and state, as evidenced in Washington's Treaty with Tripoli (1796).[17]

A third general use of Jefferson was to identify him as the author, not of the First Amendment, but of Virginia's ***Bill for Religious Freedom***, and the influence that bill had on other state constitutional drafters. No doubt, many states copied from the Virginia provision as well as from the Pennsylvania and New York provisions (because they were very liberal). The Oklahoma Supreme Court in 1912 noted that Jefferson's bill was the "first legislative act passed toward the separation of church and state."[18] A few years later, a state court noted Jefferson's authorship his bill and its influence on the Georgia constitution, in a case upholding Bible reading in the public schools of Georgia.[19]

The early eighteenth century view of Jefferson was to support arguments about the nature of the limits on religious liberty. It was not until the early twentieth century that Jefferson was cited to say that separation meant *no monetary aid* to religion. The first cases come from the state of Oklahoma. In 1912, the Oklahoma Supreme Court held that the state college could not use student fees to support the Y.M.C.A. or the Y.W.C.A. because such aid was aid to religion, prohibited by the state constitution.[20] The court noted how Jefferson's bill was identical in wording to the provisions of both the Missouri and Michigan constitutions, states where Bible reading in the public schools had been declared unconstitutional. The State of Oklahoma, in drafting its constitution, had borrowed freely from Missouri and Michigan. *Connell* became the first state court argument that Jefferson's wording of "no support" meant no monetary aid to religious purposes, and struck down the state aid.

The first case to link Jefferson to the argument that the First Amendment prohibits monetary aid to religion was the Oklahoma case of *Murrow Indians Orphan Home v. Childers* (1946), involving cash grants to an orphan asylum.[21] The Oklahoma Supreme Court, observing that the home denied it engaged in proselytizing, upheld the validity of the contract as a fulfillment of the state's constitutional duty to care for the needy. State aid to the home for the state's orphans involved neither the adoption of sectarian tenets nor the support of any religious sect, both of which were prohibited by the state constitution.

Justice Riley's dissent argued that since the expenditure of public money went directly to sectarian agents, the cash grant violated section five of the Oklahoma

constitutional prohibition against any monetary aid to sectarian institutions.[22] To support this argument, Riley invoked two histories: 1) European history, the privilege of "benefit of clergy" i.e., the English practice of granting immunity to ministers from civil prosecution; and, 2) American history, the life and motives of both Roger Williams and Thomas Jefferson.[23]

Not content to rely solely on history, Justice Riley also pointed to state precedent that had previously rejected the "child benefit" rationale in striking down aid in the form of bus transportation. If anything, giving cash grants to a Baptist group was more of a violation of the state constitution than was bus aid. Justice Riley argued that in this case the aid was analogous to *Gurney*-type aid.[24]

Justice Riley's histories were noteworthy in two respects. First, he used history to support a strict reading of the constitutional prohibition. Indeed, very few invoked history in defense of strict legal formalism. Second, Oklahoma's constitutional "no monetary aid" clause made explicit what was implicit in the First Amendment's establishment clause, which reflected the separationist views of both Williams and Jefferson. Jefferson and Williams had played a minor role in state jurisprudence up to that time. Although Jefferson was not an author of the First Amendment, Justice Riley, following Chief Justice Waite's example, looked to Jefferson for an intellectual understanding of separation in his own state constitution. Thus in the *Connell* case, Jefferson's bill was quoted, and in *Murrow*, Jefferson's ideas were finally and permanently linked to the idea that the First Amendment prohibits a financial alliance between church and state.

B. Civic Virtue: More than Toleration.

Separationists argue that separation also meant the complete divorcement of civic virtue from religion and religious education. The idea was that civic virtue was not to depend upon religious morality, but upon good citizenship. James Madison had argued that to aid religion would have the effect of corrupting citizenship and would hurt the citizen's regard for government. To ensure a viable republic, not just English "toleration" (i.e., religious liberty for religious dissenters), but complete divorcement of religion the requirements of citizenship was required. Indeed, the federal constitution prohibits religious oaths for federal office.[25] This position finds support in the founders' writings. George Washington, for example, expressed this view in a letter to the Hebrew congregation in Newport in 1790, where he said that it "is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise, of their inherent natural rights. . ."[26]

The founders' concept of religious liberty meant more than a guarantee of "toleration," it meant the rejection of English toleration (e.g., privilege from the sovereign) and the guarantee of religious liberty as a legal right.[27] Indeed, Thomas Jefferson expressed, in the strongest terms, the view that civic virtue was divorced from religion.[28] Thus separation of church and state ensured good government and promoted civic virtue.[29]

C. James Madison: From Three Pence Warning to No Tax Aid to Religion.

A very popular judicial citation was to James Madison's "three pence warning" from his *Memorial and Remonstrance (1785)* (a pamphlet written to defeat a proposed

tax assessment in support of Christian ministers), to support the argument that government should not give monetary aid to religion, because to do so, would lead to more demands on the state.[30] Madison had argued against, not just a formal establishment of one official religion, but against any monetary aid to the Christian religion. The central concern for Madison was that government was to have no authority for good or ill over religion. He feared that monetary support would entangle religious groups in politics in the quest for more money.

D. Constitutional Texts: No Means No.

Another source of evidence that the state and federal founders wished to separate church and state is the language of the state and federal constitutions. No doubt, the judiciary has primarily relied upon the strong negative language of constitutional texts as evidence of strict separationism. For example, the First Amendment itself says "Congress shall make no law respecting an establishment of religion . . . ." State judges can point to the negative language contained in their state constitutions and laws, e.g., "no preference," "no support," "no money shall be appropriated," or "no sectarian instruction" in the public schools. The Washington constitution provides for "no public money or property shall be appropriated for, or applied to any religious worship, exercise, or instruction . . ." and that the public schools "shall be forever free from sectarian control."[31] History becomes unnecessary when "no" can be inferred from the language of the texts.

E. General History of the Times: History as Experience.

The judiciary often invokes the examples of religious and intellectual oppression

from European and colonial history to illustrate, in a comparative fashion, the "lessons" of history. e.g., the evils of church-state unions. *Experience* has taught that unions of church and state has led to strife, torture and the "bondage of laws." A parade of horribles is presented as evidence of human experience and a precautionary warning for the future. Thus judges have made reference to: the Spanish inquisition; Roman history and the persecutions of the Christians; the inquisition against Galileo and Bruno, which forced the former to recant this science and burned the latter for maintaining the heretical belief that the earth revolved around the sun; religious wars in Europe; the example of Roger Williams, who was first forced to flee England for refusing to accept the state's Book of Common Prayer , and who later was forced to flee the Massachusetts Colony when he opposed the orthodoxy there; the English "benefit of clergy" which put state-church ministers above the law; colonial oppression and intolerance of the Quakers and Catholics; and oppressive colonial laws, e.g., blasphemy, Sunday closing, taxation to support the parish minister. Almost always, these histories are presented in the form of legal history. Indeed, they are often used to warn of the need to protect minority and unpopular opinions from the tyranny of the majority. "History," then, could reveal the evils of what power of authority could do if corrupted.

F. George Washington and the First Congress.

One of the first historical documents, used by lawyers in a legal argument to counter accommodationist founders' intent, was a reliance on George Washington's **Treaty with Tripoli**: "That government of the United States of America is not in any sense founded on the Christian religion."[32] Although an obscure document; it was very

popular among lawyers to cite.[33]

Surprisingly, there are few citations of the debates of the First Congress over the drafting of the First Amendment or to state constitutional conventions (for state framers' intent).[34] When observed, references to convention notes were cited mainly to decipher the definitions of words and the language of the constitutional texts. Indeed, the U.S. Supreme Court has rarely relied on the debates during the drafting of the First Amendment as authority.

G. State Judge Thomas Cooley: Contradictory Uses.

The most popular authority on state law was Michigan Judge Thomas Cooley's *Constitutional Limitations (1878).*[35] His treatise detailed what was prohibited and permitted in the laws of several states, including state aid to religion. Cooley was cited by both accommodationists and separationists in support of a variety of positions. Citing Cooley often served the function of affirming established principles that the legal community itself accepted, e.g., no sectarian instruction in the public schools.

II. Two Roots of Separationism: From English Common Law to Free Exercise of Religion.

A. Early Development of Separationist Principle of Neutrality between Government and Religion: English Common Law and Jurisdictional Separation in Church-Property Dispute.

1. The Louisiana Case: Separation as a Check on the Judiciary.

The American judicial concept of "separation" between church and state, which developed in the early Nineteenth Century, was the doctrine of "neutrality." Government

is to be neutral, that is, act as arbitrator among religious groups or between believers and non-believers. The language of "neutrality" had its origins in church property litigation in early Nineteenth Century state courts. Thus the roots of the American doctrine of neutrality lay, not in any particular historical interpretation of the First Amendment or in a view that individual rights must be protected, but rather in the principles the state courts developed in property dispute case law. In fact, when the U.S. Supreme Court articulated its celebrated definition of "establishment," its definition was preceded, not by reference to original intent, but by a quote from a South Carolina court opinion involving a church-property dispute.[36] Such early dicta of strict neutrality first developed in church-property dispute case law later became part of the legal tradition of strict neutrality or separationism. This was mainly due to the fact that, when confronted with an "establishment" issue, state courts turned to the only precedent they had, which often consisted of principles found in church property dispute litigation which had been litigated by state courts before modern aids to religion were challenged.

The doctrine of neutrality found in the church property dispute litigation became the legal notion of neutrality which reflected twin ideas: 1) the state courts' posture of equal treatment of conflicting religious factions, and 2) the state courts' deference to the institutional autonomy of religious association. The nature of the legal process (e.g., adversarial) and the search for remedies for feuding church factions resulted in a unique American judicial posture of formal neutrality.[37]

Indeed, the recurrent cycles of religious change in American society, noted by American historians, resulted in numerous church disputes over property, which were

presented to the civil courts for resolution. These church feuds involved the question of which faction remained faithful to the true creed in order to lay claim to the property. The continual stream of claims involving church doctrines eventually forced the state courts to articulate the central principle of separation, that is, that government could not determine religious truths, because government was incompetent to do so. Thus, the doctrine of separation was not born out of claims of individual liberty alone, but rather from feuding claims over religious truths.

The most remarkable early case to make such an argument, and at the same time link the First Amendment to separationist principle, was *Wardens Church of St. Louis of New Orleans v. Blanc* (1844).[38] The Wardens of a Catholic church in Louisiana sued their Bishop when a new priest was appointed and money for his salary was demanded from the parish. The Wardens claimed that, because they paid the priest's salary, they had the right to select their own priest. They argued that the laws of the Spanish civil code and the provisions of their charter, which had been approved by the state legislature, gave them the right of patronage or a "right of advowson," i.e., a property interest in the clerical office.[39] They also argued that, even though such a right was based on Spanish law, the recognition would offend neither the U.S. Constitution nor Louisiana law. Indeed, they argued that American courts would violate both the federal and state constitutions if the court recognized the Bishop's claim to the priest's office, since such a claim was based on the ecclesiastical law of the Catholic Church, which had never been enforced in Spain, France or in the American colonies. The right of patronage, the Wardens' lawyers argued, rested solely in Spanish secular law, which was enforced in the

territory of Louisiana. In short, if the court recognized the Bishop's right to appoint a priest, a power secured by Papal law, the court would violate religious liberty.

Lawyers for the Bishop countered with the argument that the Wardens were wrong to invoke the U.S. Constitution to defend the right of patronage. One of the lawyers argued that the power to legislate over the right of patronage had been "denied to the general government" and that the judiciary did not have the power "to enforce ecclesiastical discipline." He argued that the court could not recognize the Wardens' claim because this would require the court to enforce the very laws, which the Wardens said that the court could not enforce (e.g., church law). It was the Wardens who had misunderstood the principles of religious liberty. In short, counsel argued that the court could not recognize a right of advowson, which is an ecclesiastical privilege, without violating federal law.

The Bishop's second lawyer invoked the legal history of federal treaty and territorial law to demonstrate that the ecclesiastical laws of Spain had ceased to exist the moment Louisiana passed into U.S. hands. Counsel argued that the court could not recognize a right of patronage because the right no longer existed. As evidence of the complete break with Spanish law, he cited the treaties and the territorial laws of the United States: the Northwest Ordinance of 1787 guaranteed "the fundamental principles of civil and religious liberty," and provided that "No person demeaning himself in a peaceable and orderly manner, shall never be molested on account of his mode of worship or religious sentiments in the said territory," and also guaranteed a republican form of government;[40] the Act of Congress in 1804 guaranteed to Louisiana that "no law shall be

valid which is inconsistent with the constitution and the laws of the United States:"[41] the Act of Congress of 1805 guaranteed "the inhabitants of the said territory of Orleans shall be entitled to, and enjoy all the rights, privileges, and advantages secured by the said ordinance [Northwest Ordinance];"[42] the Act of Congress of 1811 guaranteed that the new state "shall be republican, and consistent with the constitution of the United States, that is shall contain the fundamental principles of civil and religious liberty;"[43] and the Act of Congress of 1812, the final act of union, applied all conditions of the 1811 act to the state of Louisiana.[44] From this legislative history, illustrating that both the territory and the state had been guaranteed all rights and privileges of U.S. citizenship, counsel concluded that the ecclesiastical laws of Spain had never been enforced in the territory or in the state. To recognize a right of patronage would violate the guarantée of the rights and immunities guaranteed by the Northwest Ordinance of 1787 to the territory. The legal origin of the right of patronage, secular of ecclesiastical, was irrelevant. A right of patronage was an "establishment," whatever its origin, and its recognition would violate federal law.

The Louisiana Supreme Court dismissed the Wardens suit on the grounds that there was no right of patronage under the federal or state constitutions. The court held that no right of property could be obtained by the Wardens from their contract to pay the priest's salary, because to recognize this property right would take "a first step towards a church establishment by law."[45] In reaching this result, the court addressed two issues: 1) the nature of the contract right claimed, and 2) the privileges and immunities of U.S. citizenship.

Concerning the first issue, the Louisiana Supreme Court said that what the Wardens wanted was a property right that could not be recognized in the United States. No civil contract existed, even though the Wardens had a corporate charter that had been recognized by the state legislature. There existed no right of patronage or the right of advowson in the state, since there could be no vested right in church office.[46] A right of advowson, the court reminded the parties, was the Crown's right to appoint the clergy, which was a property right in English, Spanish, and French law, where state churches existed. Because the right of advowson was a form of church establishment in Europe, the court declined to recognize that such a right could exist here.

Could a contract confer the right that the Wardens claimed? The court said to recognize a property right of this kind incident to church ownership would require the court to interfere with church discipline or doctrine, a power the judiciary did not possess. The state legislature could not grant the Wardens the right to elect their priest in the charter without taking the first step toward establishment of a religion. The issue, then, was one of church autonomy. Conferring the right of advowson in the Wardens' charter implied that the state could interfere with church matters in order to enforce the rules of the charter. This, the state could not do without interfering with the autonomy of the church.

The hesitancy to interfere with church autonomy was based on the court's perception that it lacked competence. The court admitted that as a civil institution it lacked standards to judge by and could provide no remedies for religious issues. To interfere, said the court, would set up the courts as ecclesiastical tribunals, which could

determine both discipline and doctrine. The court cited the dicta of a previous Louisiana case which said "the courts of justice sit to enforce civil obligations only: they do not attempt to coerce the performance of spiritual ones."[47]

An additional issue addressed by the court involved the Wardens' accusation that the Bishop had written a libelous letter against them. The court resolved that issue by arguing that Spanish secular and ecclesiastical law no longer applied in Louisiana. This was evident from the state's Act of Union with the United States. While Spanish law recognized the union of church and state, here, "this whole Union the separation of church and state is complete, and we trust eternal."[48] "That these laws of Spain have ceased to exist, by their absolute repugnance to the fundamental principles of our American governments."[49] The court found that when Louisiana revised its civil code in 1828, the revisers were careful to leave out the articles of the old code, which referred to the established Catholic Church. This deliberate omission was evidence of the state's intent to completely break with the Spanish ecclesiastical law.

In addition, the court read the Treaty of Cession with France of 1804 as applying the First Amendment to the territories.[50] The court applied the First Amendment to the territories through the rights and immunities clause of the Act of Cession of 1804.[51] The court also pointed to the language of the Act of Louisiana of 1805, in the Northwest Ordinance of 1887, and in the 1805 Act of Union, all of which carried this guarantee into effect.

Moreover, the act of statehood did not change the status of the territorial rights. The court went on to argue that the Act of 1805, which guaranteed the state a *republican*

form of government, applied the rights and immunities of U.S. citizenship. The court read the guarantee of *republican government* as applying all the guarantees afforded through the territorial laws, including the Bill of Rights of the U.S. Constitution. A guarantee of republican government was a guarantee of civil and religious liberty and no state church.[52]

In rejecting the Wardens' suit, the Louisiana court invoked significant separationist argument and principle. First, the court held that a right of advowson was an "establishment" in a formal sense. It is important to note that an "establishment" involved more than a guarantee of "liberty" since the case involved a property claim. What is novel about this case is that we see both sides arguing over what was a central feature of state churches in Europe. Both sides *assumed* separation existed under both state and federal constitutions; they only disagreed over whether patronage was or was not permitted. What is significant about this assumption of separation is that was made in an early period of American law, long before First Amendment establishment clause challenges and references to Jefferson and Madison were made.

In addition, the court assumed that the First Amendment applied to the territories through the privileges and immunities clause, and the guarantee of republican government in federal treaty. This position was made long before the "incorporation" of the Bill of Rights on to the state governments through the Fourteenth Amendment. Also noteworthy is the courts' argument that the guarantees of the First Amendment continued once the state entered the union. The court also used the Northwest Ordinance to defend separationism, before it was used by accommodationists to defend the accommodationist

variety of federal founders' intent, as was seen in **Chapter 2** above. There was also clearly evidence of separationism in the laws of Congress. Congress, in acquiring French and Spanish territory, was aware of the Catholic state churches' status in the former territories, and provided laws forbidding the continued "unions" of church and state. No doubt, Congress "broke" with past practices, underscoring the idea that the guarantee of religious liberty included securing separation as a limit on government as well as freedom of opinion.

Finally, the Louisiana opinion is significant because it illustrates how a church property dispute articulated separationist principle. Here, separationist principle was invoked as a check on the judiciary -- the courts were hesitant to decide religious truths. Thus separationist principle was developed as a tool of judicial self-restraint, not out of a concern over protecting individual liberty, but rather maintaining judicial competency and church autonomy. It was an institutional argument, not in defense of liberty argument.

2. The Celebrated Opinion of Justice Doe: Government is Incompetent to Determine Religious Truths.

The principle that government should not determine religious truths because it is incompetent to do so, was again illustrated in the celebrated dissenting opinion of New Hampshire Justice Doe in *Hale v. Everett* (1868).[53] The case involved a Unitarian minister in New Hampshire who had declared before his congregation that he was neither Unitarian nor a Christian. A faction of the church objected and refused to pay their church taxes as long as the Reverend was employed. The Wardens of the church voted to employ only "Unitarian Christians" as a means of ousting the Reverend Abbot.[54]

Unsuccessful in their attempt, the Wardens then sought a court restraining order to prevent the Reverend from occupying or preaching. The state courts granted the injunction on the ground that the members of the church, having seceded from the society by changing their faith, were by definition, no longer "Unitarian Christians." The membership had forfeited all the rights and privileges of its society by following Abbot. The court also noted that no contract existed since Abbot submitted a resignation. In its opinion, the court invoked the legal history of both English and state case law which defined "Protestant" (because the state constitution still required that only "Protestants" were qualified for state office, there was state case law on the definition of who was a "Protestant").

To be sure, the New Hampshire Supreme Court, as noted by Chief Justice Doe's dissent, did exactly what the Louisiana Supreme Court said that a court could not do in settling disputes over church doctrine and organization. If the court could decide if Abbot was not a "Christian," then the courts could define what is "Christianity." In short, the courts could determine religious truths. Justice Doe argued that Abbot had been duly elected and appointed under church laws, and if the Wardens wanted to get rid of him they had to follow their own rules, not go the civil arm of the state.

Justice Doe's dissent is very significant among judicial histories of church and state. The dissent was often cited, because Justice Doe had invoked a comprehensive legal history and review of case law, which covered over one hundred pages. Justice Doe began by noting that no religious society under American law had the legal status of an English ecclesiastical corporation (thus, asserting that the American Revolution and the

adoption of the state constitution represented a break with the past and beginning of the American era).[55] Justice Doe's survey of legal history covered the following: the religious oaths for office once found in English and colonial laws; state laws concerning religion (e.g., property and trusts), and the legacies of those colonial laws; New Hampshire's state constitutional history and the meaning of the state's religious freedom guarantees, including the state clause authorizing taxation for the support of the clergy; English case law concerning religious trusts; and the entire legal history of anti-Catholic legislation in England and in the American colonies, including early state laws. Two major themes emerge from his detailed account: 1) the constant change in Protestant theology, and 2) the continual conflict between religious groups or within groups over doctrine and property that had flooded the courts. These histories illustrated that both England and the American colonial courts had problems defining who was a "Protestant." In fact, counsel for Abbot had demonstrated that the theologians could not define who was Unitarian. The only common ground found in the legal authorities was to define "Protestant" as the religion of the non-Catholics.

The legal history illustrated the falsity of the notion that, because the English courts involved themselves in religious conflicts, somehow Christianity was part of the common law. Justice Doe argued that Christianity was not part of the common law; if it were, then the courts could define it and determine religious truths and enforce it on all, since the common law is common to all. He cited George Washington's Treaty with Tripoli, and the separationist dicta from *Bloom v. Richards* (1853) (upholding Sunday closing laws as secular regulations) and Justice Kent's remarks in the New York

Constitutional Convention of 1821, where he asserted that Christianity had not been declared part of the common law (in a case upholding a blasphemy law).[56] Justice Doe went so far as to argue that the common law had been invented, not by Christians, but by pagans. In short, he argued that the superiority of the common law and that of legal reasoning, accommodated societal and religious change, while religion could not.

Justice Doe understood the guarantee of religious freedom as the guarantee of religious equality and non-interference. To follow English case law in the area of church organizations (which did not recognize the right of congregations to elect their own ministers, and where all property rights were forfeited if members changed their religion), would be inconsistent with democratic government. The idea of free institutions, according to Justice Doe, meant that religious associations had independence from government. To alter their freedom was to impose a state religion. Thus, no remedy could be afforded in Abbot's case without setting up the courts as ecclesiastical tribunals.

The articulation of separationist principle in church property disputes was a result of a the problem of addressing *remedies* rather than arising from a clash of *rights*. Both the Louisiana court and Justice Doe's dissent linked the problem with republican or democratic government. The same is true of state courts' treatment of executing bequests. The principle that the courts could not determine religious truths without establishing a state religion was thus articulated in the New York Superior Court opinion in *Andrew v. New York Bible and Prayer Book Society* (1850).[57] The case involved a religious bequest, including the establishment of a lectureship to promote the "true Christian religion." When it turned out that the original trustee, the Auxiliary New York Bible Society, had

dissolved and had been incorporated as the New York Bible and Prayer Book Society, the Society and other religious groups mentioned in the will lay claim to the estate of Henry Pope. The court said that the question was whether it could appoint a trustee of a strictly religious trust. The court reasoned it could not, because it would involve it in the determination of religious truths, and that this was not a country where ". . . the truths of religion have been settled and defined by law, or judges have a discretionary power to determine and declare them."[58] Jurisdiction over religious truths had been abolished by the state constitution of 1777 which extends ". . . the same protection to every religion and to every form and sect of religion, which establishes none and gives no preference to any. . . ."[59]

The *Andrew* court had resorted to separationist principle to clarify the problem of remedies involved in executing a will, which contained a religious trust. The court invoked strict legal formalism – and observed that if Christianity was part of the common law, then, the courts would have the jurisdiction to say what it was and enforce it. However, American courts, of course, could not do this because unlike British courts, they were not provided with standards for measuring religious truths by either an established church or a sovereign legislature. The court's separationist *dictum*, to the effect that Christianity could not be part of the law, was an argument later cited in the famous case of *Board of Education v. Minor* (Ohio 1872) (declaring that the Ohio constitution would not permit Bible reading in the public schools, discussed in **Chapter 2** *supra*), and later by Justice Doe's celebrated dissenting opinion in *Hale v. Everett* (1868).[60] *Andrew*'s *dictum* was often cited for its strict legal positivism -- that "since a

law without sanction is an absurdity in logic and a nullity in fact."[61]

3. The Impact of English Common Law.

Thus the separationist principle that government could not determine what were the religious truths was first seen and developed, not from the courts applying original intent, but rather from factors involved in church property litigation -- namely, a perception of jurisdictional incompetence to determine religious truths, and a fear of employing judicial power to coerce religious beliefs. As a consequence, the American judiciary has consistently maintained the position that it has no jurisdiction over doctrine disputes that involve churches. This attitude of "jurisdictional" separation derived partly from the legacy of the English legal system where the ecclesiastical courts and the common law courts were separate.[62] This division between the ecclesiastical courts and the common law courts had a lasting effect in both English and American case law.

"Jurisdictional" separation, for example, was a central principle in the U.S. Supreme Court's handling of the issues raised in the church dispute in *Watson v. Jones* (1871).[63] Counsel had argued that the English civil courts' deference toward final decision making of the church's highest tribunals of the Presbyterian Church was controlling here. The U.S. Supreme Court acknowledged the precedent, but reminded counsel that the deference to church hierarchy was a result of the fact that England had a state church, the Presbyterian church being the state church of Scotland. The Court argued that in doctrinal disputes, American courts should defer to the highest body of a church if it was organized hierarchically, not because American law aided religion, but because America had separation of church and state, which granted churches institutional

autonomy from the state.

The judicial attitude toward religious institutional autonomy was not entirely deferential. For example, both Louisiana opinions in *Wardens* and *Wardens v. Martin* (1843) argued that church law had no legal authority in America.[64] The often cited *dictum* from *Wardens v. Martin* maintained: "Neither pope, nor any bishop, has, within this state, any authority, except a spiritual one."[65] The often cited *dictum* from *Harmon v. Dreher* (1843) maintained that churches were stripped of any power to coerce their members.[66] This attitude of setting jurisdictional limits on church authority is rooted in English legal attitudes, where the common law courts since the middle ages had asserted their jurisdictional superiority over the ecclesiastical.

In addition, the church property disputes in the states raised the question, which was central to James Madison's concerns over establishments of religion, of what was to happen when churches, when granted the status of legal corporations, resorted to the civil courts to enforce their internal rules?[67] This very prospect was one which Madison feared when he unsuccessfully protested the state of Virginia's designation of the Anglican Church as a private corporation in 1777, after the state had formally disestablished the Anglican Church as the official state church. Indeed, as President, Madison vetoed Congress' attempt to incorporate the Presbyterian Church in the District of Columbia in the strongest terms.[68] Madison's fears never materialized, because the American judiciary has held that church corporations were not true corporations in American law, or treated them as nonprofit organizations.[69]

Before litigation over aid to church schools or the practice of Bible reading in the

public schools reached the state courts, state courts articulated the principles of separation. As a 1879 Louisiana court put it:

> The entire Separation of Church and State is not the least of the evidence of the wisdom and forethought of those who made our national constitution. It was more than a happy thought—it was an inspiration.[70]

This assumption extended to federal territorial law as well.[71]

Thus, the articulation of strict separationist principle evident in the early church property disputes derived, not from original intent or the incorporation of the First Amendment to the states, but rather out of a view of judicial competency and from the problem of fashioning remedies. The state courts articulated a measure of self-restraint in terms of constitutional prohibition of intervention. Hence, the first exercise of separation of church and state was exercised as a method of judicial self-restraint. The American judiciary assumed separation as the legal status quo;, it only needed to apply it in the context of resolving property disputes.

B. The Impact of Free Exercise: Freedom from Religion.

Histories, which emphasized the idea that the federal founders' intended to separate church and state, were commonplace in the free exercise opinions of the 1940's. Several free exercise cases carried on the separationist dicta of *Board of Education v. Minor* (1872), articulating the separationist principle that government could not use religion as a standard in its decision making.[72]

Most noteworthy was *Miami Military Institute v. Leff* (1926), where a New York Superior Court invoked the intent of the early settlers.[73] The Ohio military school had

sued Leff to recover unpaid tuition of Leff's son, who had been expelled from the private school for not attending church in the village on Sunday. Although Jewish, Leff's son had attended daily chapel. The court noted that while the school's catalog described the students attending churches in the village, the requirement was not included as part of the schools regulations. The court held that there was no contractual understanding that attendance at various Christian churches was required. Such a contract, the court reasoned, would be unreasonable because it would violate the student's rights under the Ohio constitution, which provided in Article I that " No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent. . . ."[74]

The New York court said that counsel had gone "far afield."[75] Quoting liberally from *Board of Education v. Minor* (1872) (that Bible reading in the public schools violates the principle of separation), the court emphasized that it was government's role to keep its "hands off" religious doctrine, debate and practice. As the court put it: " This republic was founded by our forefathers, not to escape the injustice of political aggressions, but to seek freedom in a region where every man could worship God according to his own conscience. . . ."[76] The court looked to Leff's son as demonstrating the founders' principle of defying religious orthodoxy in the name of religious liberty.

Separationist history in defense of religious liberty was once again invoked, but this time to check the judiciary, in *Reynolds v. Rayborn* (1938).[77] There, a Texas court of appeals overturned a trial court action which had deprived a father of the custody of his daughter because the father belonged to the Jehovah's Witnesses, a sect which refused to

salute the flag of the United States. The court read its state constitutional provision guaranteeing religious liberty as equivalent to the First Amendment's religious clauses. However reprehensible the Witnesses' beliefs were, their refusal to salute the flag did not constitute a sufficient cause under state law to disqualify a parent and declare him "unfit" to retain custody of his daughter. As the court noted, "History is replete with bigotry, intolerance, and dogmatism of religious sects, ..."[78]

Reynold's v. Rayborn's historical dictum was later cited in *Cory v. Cory* (1945).[79] The court of appeal held that a lower court could not base a custody decision on the religious views of a parent. The lower court had awarded custody on the basis that one parent, a Jehovah's Witnesses, refused to salute the American flag. The legal issue was not whether Jehovah's Witnesses were good citizens, but whether the court could show that the mother was "unfit." The court cited the separationist dicta from *Board of Education v. Barnette* (1943) (which held unconstitutional a state compulsory flag salute) and *Reynolds v. Rayborn* (1938).[80]

Like *Reynolds v. Rayborn*, *Cory*'s references to separationist history were used to scold lower courts for using religion as the sole criteria in its decision making. Religion could not be used in government (judiciary) decision making. In the final analysis, the holdings were based on state law, which did not include religion as criteria in determining fitness for custody.[81] In the custody cases, the use of history had a dramatic effect (to scold) rather than resolving the issues involved.

Cited in *Cory*, the celebrated U.S. Supreme Court opinion in *Board of Education v. Barnette* (1943) was a popular source for separationist and free exercise *dicta*.[82] The

U.S. Supreme Court had held unconstitutional a state-compelled flag salute as a violation of the First Amendment. The decision was based upon broad principle and did not rely on founders' intent, history or precedent as authorities. The argument, that the First Amendment guaranteed freedom from state imposed orthodoxy, was later cited in separationist arguments and histories, and sometimes treated as if the Court had announced founders' intent. In short, freedom from a state imposed orthodoxy became the legal tradition.

Separationist history as a check on the judiciary was again invoked in *Jones v. Commonwealth* (1946).[83] A juvenile court's judgment, which required Sunday school and church attendance every Sunday for a year, was overturned. In support of its decision, the court of appeals noted that Virginia had secured complete religious liberty in Jefferson's *Bill for Religious Freedom (1786)* and in the state bill of rights (1776). These statutes, the court said, were examples of the "fundamental principles of the separation of church and state."[84] After citing the popular Michigan Judge Thomas Cooley, the court said that the judiciary could not compel anyone to attend or support a church. Here, history was used to scold a lower court for abusing its discretion. The lower court had imposed a penalty, which it had no power to do under state law.

In sum, the 1940's free exercise opinions, borrowing separationist *dicta* from *Board of Education v. Minor*, carried on the separationist tradition begun by Justice Welch that the principle of separation meant freedom *from* religion. Thus, what appeared to be a gap in establishment clause-type cases between *Reynolds v. United States* (1878) and the U.S. Supreme Court's first modern establishment clause case, *Everson v. Board of*

Education (1947), was filled with separationist histories supplied by free exercise opinions. These cases were noteworthy for applying the principle that government could not use religion as a standard in decision making.

IV. The U.S. Supreme Court and the Meaning of the First Amendment's Establishment Clause.

One year after the *Murrow* decision, the U.S. Supreme Court embraced separationist history in *Everson v. Board of Education* (1947); where the court *upheld* a state statute reimbursing parents for money expended for bus transportation to private schools, which included church schools, as not violating the establishment clause of the First Amendment (*i.e.*, "Congress shall make no law respecting an establishment of religion. . . ") since the state contributed no money to the schools and the primary beneficiaries were the children.[85]

The lower courts had initially invalidated the bus aid on the ground that it violated the state constitutional prohibition against appropriating school funds for any purpose other than the support of the public schools. A court of appeals overturned the decision on the grounds that the funds did not come out of the school fund but rather had come out of the general fund. This would be an important distinction for the state courts. Neither state court invoked history or founders' intent in addressing the issues, which were settled on state law.[86]

In upholding the New Jersey appellate decision, the U.S. Supreme Court for the first time invoked establishment clause history in a modern establishment clause case.[87] Justice Black, for the majority, argued that it was proper to examine history, since the

federal founders' intent was reflected in the words that they had adopted. As John Wofford has observed, the use of history is a search for the meanings of words in their historical context.[88]

Justice Black recounted how the original settlers had come to America to escape oppression and the "bondage of law" that had taxed and tortured people because of their religious beliefs. These oppressions continued in the American colonies, where some official churches imposed taxes in support of their ministers. Justice Black pointed to Virginia as the example of colonists breaking with the oppressive past. Events in Virginia led to the disestablishment of its state church, and later, the prohibition of governmental monetary aid to religion. The "able leadership" of Thomas Jefferson and James Madison led to the defeat of Patrick Henry's attempt to provide a tax in support of the parish Christian minister, or public "teachers," as they were called. Justice Black linked the defeat of Henry's bill to the meaning of the First Amendment because of the influence of James Madison's pamphlet, *Memorial and Remonstrance (1785)*, which argued against aid to religion. The following legislative session, the state of Virginia adopted Thomas Jefferson's *Bill for Religious Freedom* which provided: "That no man be compelled to frequent or support religious worship, place, or ministry whatsoever. . ."[89]

Both state constitutional provisions and case law embodied Jefferson's notion of the prohibition against the use of public money to aid religion. Justice Black introduced in the celebrated *Everson* of what "establishment" in the First Amendment meant.[90] His definition addressed for the first time, not "what was religious liberty?" but rather, "what

was establishment?" Justice Black's definition did not entirely derive from Virginia's history, because the celebrated definition did not follow his historical discussion, but followed his review of state constitutional provisions and case law banning tax aid to religion. His definition is a concise summary of what is prohibited in state constitutional law, and not, as some scholars view it, of historical *dictum*.

It is important to note that the invocation of Jefferson's and Madison's strict separationist intent of the founders was completely irrelevant to the court's legal outcome upholding the bus aid legislation, which primarily benefited church schools. This aid to religion was upheld on the basis of the "child benefit" theory, i.e., no money went to a church and the effect of the aid was to benefit the children. On closer examination, Justice Black's historical discussion was sandwiched between two discussions of the child-welfare argument, an argument, which the state appellate court had relied upon in upholding the aid in the first place.

The *Everson* outcome invoked a sharp dissent by Justice Rutledge, which was joined by Justices Frankfurter and Burton. Justice Rutledge argued that the bus aid was substantial aid that assisted religious training and thereby directly aided religion. Anticipating the accommodationist argument, he argued that the First Amendment prohibited more than a state church, it prohibited all relationships between church and state. The key phraseology was not "establishment" but rather was "any law respecting." He agreed that the historical intent of the First Amendment was to prohibit direct tax aid to religion, but unlike the majority, Rutledge closely examined Madison's argument in the *Memorial and Remonstrance (1785)* against tax aid to religion. Justice Rutledge

analogized New Jersey's bus aid scheme to Patrick Henry's proposed tax, applying each of Madison's objections and concluded that the underlying principle of Madison's arguments was that of no tax aid to religion under any circumstance. The application of Madison's arguments was something the majority did not do. He included copies of both Madison's pamphlet and Henry's proposed bill in an appendix.

On the surface, it appears that both Black and Rutledge invoked the very same separationist history and the views of Jefferson and Madison. However, on closer examination, the opinions differed in their treatment of the historical sources. The most significant difference was in their treatment of Madison's pamphlet. Justice Black mentioned it only twice (once to note its influence in defeating Henry's assessment bill; and the second time, to footnote that it had been well-recieved at the time it was written). In contrast, Rutledge relied upon Madison's arguments, citing the pamphlet twenty-five times and referring to specific paragraphs seventeen times. He also analogized the New Jersey statute to Henry's proposed bill. Thus, for Rutledge, Madison's *Memorial* provided all the relevant objections to the New Jersey aid. It is also important to note that Justice Black never quoted from the pamphlet nor relied upon its arguments against aid to religion. Only Rutledge provided an extensive examination of Madison's objections to aiding religion in any amount, and he was in the minority.

A second historical document that is cited as "history," is Jefferson's *Bill for Religious Freedom (1786).* Justice Black quoted from its preamble and its "no support" clause in his discussion of the role Madison and Jefferson played in defeating Henry's bill. Justice Rutledge mentioned the bill some seven times, and also quoted from it. For

Rutledge, the bill was important because it emphasized Jefferson's (and his own) view that aid to religion threatened not only the no-establishment principle, but more importantly, the very guarantee of religious freedom.

Another historical document mentioned is Jefferson's *Danbury letter (1802)*, written to explain why Jefferson, as President, refused to proclaim a Thanksgiving Day.[91] Justice Black used Jefferson's metaphor of a "wall of separation" as a summary statement of his definition of what constituted an establishment. The authoritative source in referring to Jefferson's metaphor was Chief Justice Waite's opinion in *Reynolds v. United States* (1878). Justice Rutledge did not cite the letter. However, he incorporated the "wall" metaphor as a means to criticize the majority holding. For one, Jefferson's "wall" metaphor was a tool of summation, for the other, a tool of ridicule. In short, both used the "wall" metaphor rhetorically.

An additional historical source was the debate of the First Congress over the drafting of the First Amendment. Justice Rutledge relied on the debate to emphasize the expansive meaning of "no law respecting." Justice Black never mentioned the debate. There exists sparse dialogue on the First Congress' drafting of the First Amendment, as noted by Justice Rutledge (the Senate met in secret, no record exists of the upper house debate). Rutledge's discussion of the debate can be found in a footnote to his opinion where he noted the objections in the lower house to Madison's original wording for the First Amendment. Rutledge came to the conclusion that the Congressional debate meant that the First "Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. . ." and "showing unmistakably that

'establishment' meant public 'support' or religion in the financial sense."[92]

One historical document ignored by both Justices was Madison's *Memoranda*. However it was alluded to in footnotes.[93] Justice Black referred to it in footnote 12, where he quoted Madison's remarks concerning the influence of the *Memorial* pamphlet in defeating Henry's bill. Justice Rutledge mentioned the *Memoranda* in footnote 21 as an additional source for Madison's ideas concerning establishment. Neither Justice examined its content nor borrowed arguments from it. The *Memoranda* is a more authoritative document than the *Memorial*, because, written after the ratification of the First Amendment, it outlines what Madison thought violated the First Amendment's establishment clause. The court's lack of attention to this document demonstrates the desire to focus only on documents that predate the drafting of the First Amendment. This is legal history, not intellectual history. Thus "history" for Justice Black meant reaching the legal definition or the legal status quo of 1789, by relying on Jefferson's *Bill for Religious Freedom*.

Another difference was the Justices' use of secondary sources. While both relied primarily on primary sources, they cited very different history books. Justice Black cited the works of Charles Beard, Sanford Cobb, William Sweet and Ellen C. Semple, historians who had established the early paradigm that the founders came to America to escape religious oppressions back home, and sought separation of church and state here. Rutledge, also relying on Sanford Cobb, footnoted the works of Hamilton Eckenrode and Irving Brant. Brant's multi-volume biography of James Madison is a classic and one of very few historical works to examine Madison's role in the drafting of the First

Amendment. References to historians seem to contribute little to the Justice's arguments: they were cited as sources for facts, quotations of Madison or Jefferson, and as general references. The exception was Justice Rutledge, who relied upon Brant as authority that Madison was *the* author of the First Amendment.

While both Justices agreed on the issue of what was the founders' intent involving no establishment, they differed greatly in their use of historical sources and documents. Justice Black's history was a "history of the times" type of argument, which focused on the evils of financial aid to religion, which the First Amendment was to guard against for all times. Justice Rutledge's history was broad and was used for analogy. He sought broad principles and purposes behind the First Amendment. At the level of detail, he recounted the details surrounding the Virginia debates over Henry's bill and Madison's objections. In sum, it was Justice Rutledge who used history as a tool of traditional legal analogy -- that the New Jersey scheme was aid to religion disguised as public welfare legislation.

A. The Impact of Everson.

The invocation of First Amendment history in the *Everson* decision has had two legacies: the acceptance of *Justice Rutledge's* intepretation of history as *the* history of the First Amendment; and the creation of a scholarly tradition to refute Justice Black's summary use of Jefferson's "wall of separation" metaphor. It has been Justice Rutledge's history, rather than Justice Black's, that has been footnoted and quoted from in subsequent judicial opinions involving separationist history.[94] Rutledge's use of Madison's "three pence" warning (not even three pence should be given to religion)

became a popular quote in judicial opinions. As one lawyer noted, Justice Rutledge's "*Everson* dissent is undoubtly one of the most influential in the history of the Court."[95]

The second legacy was the creation of a scholarly tradition to refute the meaning and use of Jefferson's "wall of separation" metaphor as an accurate depiction of the First Amendment. The Court's critics have assailed the Court's reliance upon Madison and Jefferson for an interpretation of the First Amendment, often charging that Jefferson was not the author (he was in France during the drafting), and that Madison, although present at the drafting, was neither the author of the First Amendment nor were his ideas embodied in it. Others have argued that both Madison's and Jefferson's ideas were irrelevant to an understanding of the First Amendment. In short, the Court's critics have argued that *Everson*'s history was bad history.[96]

The U.S. Supreme Court met its critics directly during oral arugments in the very next establishment clause case it heard, that of *McCollum* (1948), where Justice Black rejected counsel's suggestion that *Everson* was wrong and that "no law" meant only to prohibit a state church. Justice Black maintained that "the First Amendment has erected a wall between Church and State which must be kept high and impregnable."[97]

The real impact of *Everson*, however, was not its historical discussion, but rather sanctioning bus aid to parochial schools. The real legacy of the U.S. Supreme Court's opinion was outlining what was *permitted* by the First Amendment, as well as what was prohibited.

B. Justice Brennan's Rebuttal to the Court's Critics.

Justice Brennan later challenged, in his *Schempp* concurrence, the Court's critics'

claim that the establishment clause was not incorporated through the due process guarantee of the Fourteenth Amendment. He provided in advance a rebuttal to Judge Hand's arguments in *Jaffree v. Board of School Commissioners* (1983).[98] The critics had argued that the Fourteenth Amendment protected existing state establishments, because the First Amendment protected existing establishments against federal interference. However, Justice Brennan pointed to the historical fact that the last establishment (i.e., Article III of the Massachusetts constitution) was dissolved in 1833, so the Fourteenth could not protect that which did not exist in 1868. Justice Brennan argued that the Fourteenth Amendment was itself a source of new rights, countering Edward Corwin's claim that the establishment clause did not involve a new "freedom" and therefore could not be absorbed through the "liberty" rubric of the due process clause. The critics have also pointed to the abortive Blaine Amendment, offered several years after the ratification of the Fourteenth Amendment, as further evidence of the residual powers of the states to aid religion. Brennan replied that the Blaine example "proves too much. . . that the religious liberty embodied in the Fourteenth Amendment would not be viable if the Constitution were interpreted to forbid only establishments ordained by Congress."[99] The Justices have had no trouble agreeing that the establishment clause is incorporated through the due process clause of the Fourteenth Amendment on to the states.

Justice Brennan's use of history is of interest because he was at extreme pains to disavow that history dictates the legal results in modern cases. Even when history supported his result (i.e., Jefferson's views on religious education in the public schools), Brennan nevertheless makes it clear that the Court should not rely upon such evidence.

He was willing to use legal history to refute the courts' critics. In short, Justice Brennan used history negatively, to critique the faulty arguments of the scholars. This use of history would be consistent with his later behavior in *Marsh v. Chambers* (where he dissented) and *Lynch v. Donnelly* (where he dissented).[100]

In addition, Justice Brennan's examination of the accommodationist "list" of governmental aids to religion is of interest. He considered those aids as examples of church-state "involvements" which only revealed "strict neutrality in matters of religion" under the First Amendment. Hence the "list" to Justice Brennan was merely permissible involvements; those included: military chaplains; draft exemptions; excusing students from public school for religious holidays; legislative chaplains; use of the Bible as history or literature; tax exemptions for church property; the inclusion of public welfare programs which involve religion; Sunday laws; the motto "In God We Trust," and the reference to God in the Pledge of Allegiance. For Brennan, the list of aids to religion illustrated that strict neutrality did not lead to hostility to religion. Why Brennan included a discussion of the "list" in his concurrence is unclear. Several items on his "list" would seem to violate his own establishment clause tests, and further, he did not use the "list" to either justify the practice of Bible reading in the public schools (which he clearly thought was unconstitutional) or to strike down the practice. His lengthy concurrence was probably written to address the narrowness of the majority opinion, which applied the "purpose and primary effect" test to the facts generated by the lower courts, and to calm any public fear about the consequences of applying the doctrine of strict neutrality. Nevertheless, his lengthy discussion would haunt him in later decisions.

V. From European History to American Experiences: Bibles in the Public Schools.

A. The Legacy of Justice Vanderbilt: European History and the Beginnings of the Purpose and Effect Test under State Law.

The first separationist history to appear after *Everson* was in the famous case of *Tudor v. Board of Education* (1953), where the New Jersey Supreme Court enjoined the distribution of Gideon Bibles in a public school on the grounds that such distribution violated both federal and state constitutions by giving preference to one religious group.[101] The vice in the distribution consisted in providing a place for distribution, giving the appearance of state endorsement of the Christian religion. The court found the facts of this case differed from an earlier decision where the very same court had upheld the practice of reading from the Old Testament in the public schools.[102] The significant difference was that the Gideon Bible contained the New Testament -- this made it offensive.

A unanimous court, speaking though Chief Justice Vanderbilt, presented a very comprehensive legal history of the struggles for religious toleration both in Europe and America.[103] Chief Justice Vanderbilt's sweeping legal history sought to make the point that religious toleration was won only after Christianity struggled to free itself from Rome, and then free itself from the state. Thus, the history of religious toleration is one of two struggles: 1) the struggle of Christianity for supremacy between crown and church (i.e., the investiture conflict), and 2) the struggle to free the citizenry from state-imposed Christianity (i.e., the rejection of the Erastian doctrine). It was a long process to free both the state and citizen from the official church.[104]

In recounting the American colonial experience, including his own state's history, the court quoted from lawyer-historian Leo Pfeffer's *Church, State and Freedom (1953)*, one of the first books on the subject, to the effect that the early proprietary charter had granted considerable religious toleration in the interests of business, but after their demise, there was considerable "backsliding" on part of the colonists who hated Quakers and Catholics.[105] Summarizing the state of Virginia's struggle with Patrick Henry's proposed tax to support the parish minister, the court relied upon Justice Rutledge's *Everson* dissent and Chief Justice Waite's *Reynolds* opinion as sources for Thomas Jefferson and James Madison's arguments against assessment. Chief Justice Vanderbilt concluded that the First Amendment was the culmination of the movement for religious liberty which began with the original grant of toleration to the Christians from Rome in 313 AD.

Chief Justice Vanderbilt, noting that the historical meaning of the First Amendment was in dispute, relied on the "no preference" doctrine, explicit in his state constitution, to reach the final legal conclusion of this case.[106] Based on the court's analysis of the facts of the case, Chief Justice Vanderbilt concluded that the Gideon Bible was a "sectarian" book because it was published by a Protestant sect. That version of the Bible also contained the New Testament, which made it a Protestant Bible; its distribution in the public schools would show a preference for one sect over others and toward Protestantism. An additional vice consisted in the use of the public schools as a point of distribution. Here, the court relied upon the holding in *Miller v. Cooper* (1952), where a New Mexico court enjoined the distribution of Presbyterian pamphlets in the

public schools.[107] Relying on the precedent of *Miller* allowed the court to distinguish the facts of this case from its earlier ruling in the *Doremus* case, on the grounds that the facts in *Tudor* dealt with the distribution of Protestant New Testaments, which would be offensive to those of the Jewish, and presumable of Catholic faith.

The court also distinguished the facts from those of the U.S. Supreme Court opinion in *Zorach v. Clauson* (1953) (permitting off campus religious instruction), by noting that the distribution of Bibles actively promoted a particular sect which, by its own admission, was dedicated to converting others. An additional vice was found in the fact that the school collected consent slips, which authorized the use of recipients' names in announcements. This constituted a form of declaring one's belief or non-belief before government officials, which would violate the free exercise clauses of both the federal and New Jersey constitutions. Although no one was forced to take home a Bible, parental consent forms were required, and the children who did not participate would be subjected, said the court, to "peer pressure."[108] For authority that the absence of state coercion could not save the practice, the court cited Justice Frankfurter's concurrence in *McCollum* (1948) (striking down on campus religious instruction in the public schools), the opinion in *State v. District Board* (1890) (striking down Bible reading in the Wisconsin public schools), and *People v. Board of Education* (1910) (striking down Bible reading in the Illinois public schools).

It was with the attitude and judicial temper of a modern Lord Mansfield, that Chief Justice Vanderbilt concluded by noting the special and positive role the courts had in preventing the recurrence of the religious oppressions that had characterized the past. It

was the positive duty of the judiciary to keep church and state separate.[109]

Chief Justice Vanderbilt's historical narrative was an original history, which focused on the issue of sovereignty rather than on the history of liberty. The historical discussion of struggles to free the state from the Catholic church and, later, to free the citizen from a state imposed religion, was unique contribution by Vanderbilt of the evolution of the definition and limits on sovereignty. Vanderbilt was unique in citing the most recent historical works. The 1950's witnessed a proliferation of secondary works on American religious liberty and the origins of separation of church and state.[110] Historical works did not influence the final conclusion, which was based on the state's "no preference" clause, but were mainly used as source books for New Jersey colonial history.

1. The Impact of Tudor.

Chief Justice Vanderbilt's historical narrative and legal holding were subsequently employed in *Brown v. Orange County Board of Public Instruction* (1960), where a public school attempted to distribute the King James Bible in the public schools of Florida.[111] The District Court of Appeals held that the distribution along with the policy of requiring pupil attendance, constituted an annual promotion and endorsement of one religion, that of Protestantism, in violation of both the federal and state constitutions.

Judge Allen, acknowledging the importance of history, recommended the reading of *Tudor* and Justice Rutledge's *Everson* dissent. Applying the state's "no preference" and "no money" to any religion clause of his state constitution, Judge Allen concluded that the distribution of Bibles was clearly unlawful under the state constitution. No doubt, the issue of the required attendance at the distribution assembly was troubling. Judge Allen

concluded that requiring attendance violated the free exercise rights of the parents, who had a right to teach their faith or no faith at all. In the court's conclusion, Judge Allen quoted from Jefferson's celebrated "wall of separation" statement from the Danbury letter.[112]

Tudor was employed again by the New Jersey Supreme Court in *Two Guys from Harrison v. Furman* (1960) (which later reached the U.S. Supreme Court), where the state court upheld the state's Sunday closing law.[113] The state court quoted liberally from the separationist historical accounts drawn by lawyer-historian Leo Pfeffer and from Chief Justice Vanderbilt's *Tudor* history. Yet the court did not reach a separationist conclusion, but rather an accommodationist one.

The court upheld the Sunday laws, not because they helped religion or were once religious in origin, but on the grounds that general purposes laws would be constitutional if they were motivated by a secular concern for the economic and social well-being of labor. When passed under the state's police power to establish a common day of rest, such laws were perfectly consistent with the principles of separation of church and state. Chief Justice Weintraub's use of history served the purpose of supporting the argument that laws must have secular legislative purpose if they were not to offend the state constitution. His opinion anticipates what the U.S. Supreme Court would later deem the "purpose and effect" test of the establishment clause. It was not the "history" of the Sunday laws that saved them, but rather their present day purposes.

B. The Legacy of Justice Clark: American History and the Principle of Neutrality.

The question of reading from the Bible in the public schools was finally laid to rest in the majority opinion in *Abington School District v. Schempp* (1962), where the U.S. Supreme Court held that voluntary daily Bible reading and recital of the Lord's Prayer in the public schools was a religious ceremony which expressed a preference toward Christianity and thus violated the First Amendment.[114] There were several vices in the practices, including the supervision by school authorities, that it was intended as a religious exercise, and that the school, admitted its sectarian purpose in the practice by permitting the use of the Catholic version of the Bible.

Justice Clark's opinion for the majority is noteworthy for reintroducing the concept of "neutrality." He viewed the use of history as a type of "light" that could illuminate the core principles of the First Amendment. He contented that the First prohibited more than a single state church, rejecting the current "non-preferential" interpretation of the First Amendment, thus countering Edward Corwin's contention that the First Amendment only prohibits a national church.[115]

Justice Clark's review of the judicial development of the concept of "neutrality" began with an account of Judge Alphonso Taft's (father of Chief Justice Taft) dissent in the Superior Court decision in the famous case of *Board of Education v. Minor* (1872), where the Ohio Supreme Court said that Bible reading in the public schools would separation of church and state. Judge Taft's dissent in the lower court, which had upheld the practice, was later the core philosophy of the Ohio opinion. Judge Taft maintained that "The government is neutral, and, while protecting all, it prefers none, and it disparages none."[116] From this earliest articulation of government "neutrality." Justice

Clark argued that the doctrine of "wholesome neutrality" stemmed from of two concerns: 1) the prevention of the fusion of government and religious functions, and 2) the protection of the free exercise of religion. Clark introduced a two-prong test for the establishment clause: What are the purposes and primary effects of the state enactment? There must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

The significance of the *Schempp* decision was not its "history," but the formal acceptance of an establishment clause test, which later became the purpose and primary effect standard of the later *Lemon* test for the establishment clause.[117] The acceptance of a formalistic test, along with its emphasis on applying settled rules to the facts of a case, has resulted in the substitution of legal formalism for founders' intent, since invoking original intent was no longer necessary. Thereafter, when original intent has been invoked, it has been the narrow history of legislative intent used to determine the purpose of the challenged practice. In short, by invoking original intent, legalism hijacked the argument in service of an examination of the facts of the case.

Justice Brennan also contributed an interesting concurrence full of references to the role of history in legal reasoning, and founders' intent, in *Schempp*. He examined three histories: 1) Justice Frankfurter's *McGowan* concurrence, to argue that the founders intended to prohibit more than an establishment of a single state church; 2) an examination of founders' intent involving Bible reading in the public schools (Thomas Jefferson was against the practice), finding little in the documentary record. Since no public schools existed at that time, Brennan came to the conclusion that the broad

principles of the First Amendment, not the founders' specific intent, which must be applied; and 3) the legal and judicial history of the practice of Bible reading in the states, finding that states had always considered the practice a religious exercise, many states prohibiting the practice.

C. The Legacy of Washington State: The Bible as Literature

In *Calvary Bible v. Board of Regents* (1967), the Supreme Court of Washington held that an elective English course at the University of Washington on the Bible did not violate the state constitution's provisions against the use of public funds for any sectarian instruction.[118]

While the majority emphasized the nonsectarian nature of the instruction, the dissent, however, argued that the facts of the case demonstrated otherwise. At trial, the professors admitted that they taught that some of the Biblical stories were myths. This, according to the dissent, expressed a liberal theological viewpoint, which was offensive to most. Relying on the court's previous opinion in *State v. Frazier* (1918), where the court struck down course credit for a high school class on the history and literary features of the Bible, on the grounds that the use of the Bible in any context was too controversial and partisan Justice Hunter argued that the court was correct to conclude that state framers, wishing to avoid all evils of religious controversies, banned all state support of religious instruction.[119]

Justice Hunter's reliance on state framers' intent from *State v. Frazier* is of interest because *State v. Frazier* had quoted from the state attorney general's opinion (1891) interpreting federal founders' intent on the constitutionality of Bible reading and the

reading of prayers in the public schools.[120] The attorney general had utilized broad history to argue that the early colonial settlers had fled religious persecution and oppression, and that the colonists and the state settlers intended to separate church and state absolutely and banned all aid to sectarian instruction in the public classroom. Although the majority in *Calvary Bible* distinguished the facts of the case from those in *Frazier*, it was Justice Hunter, who, quoting from *Frazier*, argued that the state framers' intent to avoid all religious controversies would be breached by offering an "objective" course on the Bible in a state university. Hunter's use of state framers' intent illustrates how the motives of the early colonial settlers became accepted as state framers' intent which supported a separationist interpretation of the Washington constitution.

VI. The Legacy of English Sunday Laws.

A. Sunday Laws: The Purpose and Effect Test.

Two Guys from Harrison v.Furman (1960) illustrated the subtle transformation of the changing historical dicta and non-changing legal principles which can be found in the Sunday law litigation. In the 1920's, state judges invoked accommodationist history, often arguing Sunday laws were one of many aids the state gave religion. In the 1960's, however, after *Everson*, state judges begin to cite separationist history. Indeed, all judges adhered to the Blackstonian principle that Sunday laws were a secular regulation of labor. When Sunday laws were challenged in the modern era, the U.S. Supreme Court, in *McGowan v. Maryland* (1961) and its three accompanying cases, invoked both separationist history and Blackstonian history to uphold the state laws.[121]

Three separationist histories can be found in the U.S. Supreme Court's opinion in

McGowan: the opinion of the Court: the concurrence, and the dissent. All invoked the very same history, but each reached different conclusions from it.

The majority's separationist history, authored by Chief Justice Warren, consisted of a recitation of *Everson*'s and *Reynold*'s accounts of the Virginia's struggle to defeat Henry's proposed assessment, Jefferson's role in the passage of his *Bill for Religious Freedom*, and James Madison's role in drafting the First Amendment in the First Congress. Recognizing that English and colonial Sunday laws were motivated by religion, Warren noted that the founders were not concerned that, in adopting such laws, that they may have violated their own state Declarations of Rights.

Despite the religious origins of the laws, Chief Justice Warren maintained that the ". . . present purpose and effect of most of them is to provide a uniform day of rest for all citizens," which today would not offend the establishment clause.[122] The majority thus utilized the beginnings of a two-prong test – the current purpose and effect of the law in order to justify the state regulation which, coincided with the Christian Sabbath.

Warren's accommodationist result (upholding Sunday closing laws) was not dictated by his account of separationist history. Rather, the legal result flowed from the secular purpose test, which can be seen in *Everson*. It was Warren's reading of *Everson* from which he extracted the "purpose and effect" test and the idea that a valid secular purpose would not offend the First Amendment. This was consistent with the Court's separationist history, which was read as embodying a "purpose" test, i.e., that any law *respecting* an establishment, not merely the establishment of a single church, was unconstitutional. In other words, Warren's strict separationist history provided a

minimum condition of the establishment clause. a secular or public welfare purpose.

Justice Douglas' dissent agreed that the state could require a day of rest from work: however. he maintained that the Sunday laws aided the Christian religion directly and imposed economic penalties on non-Christians. especially orthodox Jews. Justice Douglas did not view the laws as secular, rather a preference toward Christianity. He cited Jefferson and Madison's efforts against Henry's proposed tax assessment, which led to Jefferson's *Bill for Religious Freedom (1786)*, which forbade public tax support of any religion. Douglas was persuaded that the *effect* of the Sunday closing laws was to aid and compel the observance of a Christian Sabbath. Thus he differed from the majority on the "effect" test.

In addition, a concurrence by Justice Frankfurter, joined by Justice Harlan, invoked both Anglo-American history of Sunday legislation from the time of Constantine up to and including contemporary English law, as well as the intent of the First Amendment. Frankfurter cited Madison's efforts in defeating Henry's proposed bill and agreed with the majority that history showed that the founders, by their wording of the First Amendment, "did not limit the constitutional proscription to any particular, dated form of state-supported theological venture."[123] He also noted that the Sunday laws in both England and in America had, over time, become a secular institution. Providing detailed appendices of current state laws, Justice Frankfurter's view was that the long history of state Sunday laws reflected the continuity of the Anglo-American pattern of life. Unlike the majority, who viewed the American Revolution as a complete break with the past, Justices Frankfurter and Harlan saw consensus and continuity of tradition.

The use of separationist history in *McGowan* is an oddity. On one hand, both the majority and the minority cited the Virginia history of Madison's efforts to defeat Henry's bill, concluding from that struggle that the founders intended the First Amendment to prohibit more than a single state church. The majority and minority disagreed, however, on the purpose and effect of the present-day laws. In other words, there existed agreement on what the historical intent of the First Amendment was (i.e., to prohibit more than a state church), but disagreement on the facts of this case. Madison and Jefferson thus became irrelevant to the legal outcome -- the upholding of state Sunday laws on the grounds that they were no longer aids to religion. On the other hand, the invocation of the legal history of Sunday laws was significant to the majority decision, because the legal history demonstrated that the purpose and effect of those laws *had changed*. In this case, legal change became evidence of social change, which was evident in relaxation in the penalties, the exercising of the "Christian" language, and the inclusion of a vast array of exemptions from the closing laws.

Thus the use of legal history in *McGowan* followed traditional legal reasoning. The relevant "history" turned out to be legal history, which showed change, not the intent of the founders (i.e., Madison or Jefferson), which was used as evidence of the secular purpose tests. The legal conclusion was based on the application of the court's new "purpose" and "effect" test, first seen in Chief Justice Weintraub's opinion, construed from Warren's reading of *Everson*'s "child benefit" theory. Thus, *McGowan* is unique for anticipating the later *Schempp* test.[124] The test derived from neither separationist nor accommodationist history, but rather from traditional legal reasoning.