

THOMAS JEFFERSON AND THE ESTABLISHMENT CLAUSE

*Mark J. Chadsey**

Perhaps no other founder has influenced our understanding of the meaning of the Establishment Clause more than Thomas Jefferson.¹ His name is frequently invoked when scholars or the Supreme Court attempt to discover the original intent of that crucially important provision of the Bill of Rights. Sydney Ahlstrom, the foremost scholar on American religious history, noted: "Jefferson was . . . so important an architect of the United States' solution of the church and state problem that some have seen his 'solution' as the virtual establishment of his own theology."² Likewise, starting with the first significant Establishment Clause case in the nineteenth century, *Reynolds v. United States*,³ the Supreme Court pointed to Jefferson as "an acknowledged leader of the advocates of [the Establishment Clause]," and then went on to say that his views "may be accepted as authoritative declaration of the scope and effect of the [Establishment Clause]."⁴ In the modern era, the focus upon Jefferson as a guiding light to understanding the Establishment Clause for the Supreme Court began in *Everson v. Board of Education of Ewing*,⁵ where both the majority and dissenters turned to statements from Madison and Jefferson to justify their positions. The majority claimed that "the provisions of the First Amendment, in the drafting and

* Dr. Chadsey is an Associate Professor in the Department of Political Science and International Studies at SUNY Brockport College at Brockport. Dr. Chadsey earned his Ph.D. at the University at Buffalo in 1996 and his Juris Doctorate at Columbia University in 1986. Dr. Chadsey would like to thank his graduate assistant Ms. Megan K. Wilson for her research assistance as well his wife Deborah for her support and the editors at Akron Law Review for their assistance with the editing of this article, most particularly Mary Bokisa.

1. Jefferson's only rival in this respect is his fellow Virginian James Madison.
2. SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 367-68 (1972).
3. *Reynolds v. United States*, 98 U.S. 145 (1878).
4. *Id.* at 164.
5. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947). In *Everson*, the question before the Court was whether New Jersey could direct local school boards to reimburse parents of students, including some attending parochial schools, for money spent on public bus transportation to and from school. *Id.* at 3, 5.

adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the [Virginia Bill for Religious Liberty].”⁶ Moreover, the belief in Jefferson’s influence on the adoption of the Establishment Clause continued unabated right through the most recent twenty-first century Ten Commandments cases.⁷ Undergirding Jefferson’s reputation as one of the chief architects of the Establishment Clause has been a constant, if sometimes unarticulated assumption, that Jefferson’s views on church and state were well known and widely accepted by those involved in the adoption of the Establishment Clause. Part and parcel of the Jeffersonian church-state tradition has been a further assumption that he was a strict separationist who would brook no interplay between church and state. The purpose of this paper is to ask whether the historical record actually supports either of these assumptions.

A note about my mode of analysis is necessary at this juncture. When inquiring about Jefferson’s influence on the Establishment Clause, it is important to focus on the entire process by which it was adopted rather than its mere introduction by Madison in the House of Representatives. Its adoption, after all, required the assent of two-thirds of both chambers of Congress, three-fourths of the state legislatures, and the support of a majority of the American public. Without the requisite support of all three groups the Establishment Clause would never have become part of the Constitution. To argue that Jefferson’s views regarding original intent ought to be accepted as definitive, as members of the Court have done, is implicitly to argue that his views were known to, and supported by, all three groups. If a single individual, or a handful of individuals, knew of and wished to incorporate Jefferson’s views into the Establishment Clause, while the vast majority of the rest of the participants in the process had no such knowledge or intention, then it would not be fair to assume that Jefferson’s views ought to be regarded

6. *Id.* at 13 (citations omitted). For references to Madison and Jefferson by the dissenters, see *id.* at 28-42. Jefferson drafted The Virginia Bill for Religious Liberty in 1777. *Id.* at 12 (majority opinion).

7. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). In *McCreary*, Justice Souter offered President Jefferson’s refusal to offer Thanksgiving proclamations to support the Court’s finding that the display of the Ten Commandments in a Kentucky courthouse was unconstitutional. 545 U.S. at 878 (citing Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808)). In *Van Orden*, Justice Stevens, writing for the dissenters, argued that “[i]f any fragment of Jefferson’s metaphorical ‘wall of separation between church and State’ is to be preserved” then the Court should find the posting of the Ten Commandments on public grounds in Texas unconstitutional. 545 U.S. at 708 (Stevens, J., dissenting).

as a guidepost to original intent for his intent was not theirs. Thus, throughout this paper I will write in terms of the adoption process rather than merely the drafting process, thereby reminding myself and the readers that we are considering the influence of Jefferson on this wider group.

It is indisputable that Jefferson had been a leading spokesperson for the freedom of conscience movement in Virginia and in that capacity he *may* have inspired others throughout the nation; but this belief has long been assumed and never proven. In 1777 Jefferson wrote the first draft of the Act For Establishing Religious Freedom in Virginia, which was presented to the General Assembly of the Commonwealth of Virginia in 1779 and it was not adopted until 1785.⁸ Jefferson, along with Madison, also led the fight in 1776 to repeal a law which made it a crime to hold religious views other than those of the established Episcopal Church, and another that required worshipers to attend Episcopal services (neither of which had been enforced for some time) and to suspend the practice of raising taxes to support Episcopal ministers.⁹

But, as I have noted, for Jefferson's actions to have influenced the members of both chambers of Congress that proposed the Establishment Clause, the state legislatures that ratified it, and the broader public who endorsed it, his views would have to have been fairly widely known outside Virginia. Relatively few avenues for disseminating those views existed in eighteenth century America. Jefferson did not write anything on the topic that was likely read outside Virginia until his *Notes on the State of Virginia*¹⁰ ("Notes") were published in England and France in the 1780s.¹¹ In 1785, Jefferson commissioned the printing of 200 copies of the Notes in France, for limited "private" distribution.¹² Thereafter, in

8. SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 497 (Cooper Square Publishers, Inc. 1968) (1902).

9. *Id.* at 490-98. See CHARLES F. JAMES, *DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA* 68-83 (Leonard W. Levy, ed., Da Capo Press 1971) (1900).

10. Thomas Jefferson, *Notes on the State of Virginia* (1787), reprinted in 2 *THE WRITINGS OF THOMAS JEFFERSON*, 1 (Andrew A. Lipscomb ed., 1903). Jefferson first began writing the *Notes on the State of Virginia* in 1781 in response to questions posed by François de Barbé Marbois, the secretary of the French legation to the United States. Andrew A. Lipscomb, *Introductory Notes to id.* Its primary purpose was to provide a natural history of Virginia, but it goes well beyond that limited purpose both in terms of geography and scope. *Id.* Geographically it covers many of the then colonies and, in terms of substantive scope, it addresses many political as well as scientific issues. *Id.*

11. See 2 DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 105 n.66 (1951). Although most of the Notes addresses other topics, the work does contain a short, spirited statement of Jefferson's views on church-state relations. Jefferson, *supra* note 10, at 217-25.

12. 2 MALONE, *supra* note 11, at 94. There appears to be some confusion about just when the French edition was actually published. Malone states that the French edition was not actually

1787 he published an English translation in Britain that was intended for a more “public” distribution.¹³ If either the 1785 “private” or the 1787 “public” printings were widely distributed in America prior to the 1789 drafting of the Establishment Clause, then it may be reasonable to conclude that Jefferson’s view may have influenced those that adopted the Establishment Clause. The historical record does not appear to support such a conclusion.

Jefferson’s letter to James Madison on May 11, 1785 from Paris provides some indication of just how restricted the “private” French distribution was:

They yesterday finished printing my notes. I had 200 copies printed, but do not put them out of my own hands, except two or three copies here, and two which I shall send to America, to yourself and Colo. Monroe, if they can be ready this evening as promised . . . I wish to put it into the hands of the young men at the college, as well on account of the political as physical parts. But there are sentiments on some subjects which I apprehend might be displeasing to the country perhaps to the assembly or to some who lead it . . . [I]f you think it will give no offence I will send a copy to each of the students of [William and Mary College] and some others to my friends and to your disposal. Otherwise I shall only send over a very few copies to particular friends in confidence and burn the rest . . . [I]n no event do I propose to admit them to go to the public at large.¹⁴

Dumas Malone remarked that the first printing of Jefferson’s Notes “was in reality a small private printing” and that Jefferson specified “he was unwilling to expose these sheets to the public eye.”¹⁵ Jefferson stated exactly that on the flysheets of a copy he sent to Thomas Barclay, on which he wrote: “unwilling to expose them to the public eye, [I] ask the favor of Mr. Barclay to put them into the hands of no person on whose care & fidelity he cannot rely to guard them against publication.”¹⁶ According to Malone, the list of Americans who

published until 1787. *Id.* at 105. However, there were distinct differences in the two editions: unlike the 1787 “public” printing, the 1785 “private” publication did not include a copy of the Act For Establishing Religious Freedom in Virginia in the appendix. *Id.* at 105.

13. *Id.* at 104-05.

14. Letter from Thomas Jefferson to James Madison (May 11, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON 147, 147-48 (Julian P. Boyd ed., 1953).

15. 2 MALONE, *supra* note 11, at 94-95.

16. Jefferson, *supra* note 10, at 124-25. In a letter Jefferson wrote to Madison on February 8, 1786, Jefferson indicated that he had written a similar restriction against publication in “every copy” he had distributed which he further indicated had included “few copies” to “confidential persons.” Letter from Thomas Jefferson to James Madison (Feb. 8, 1786), in 9 THE PAPERS OF THOMAS JEFFERSON 264, 264-65 (Julian P. Boyd ed., 1954).

received copies of the Notes was indeed small.¹⁷ Initially, it included no more than a handful of men such as Benjamin Franklin, John Adams, the aforementioned Thomas Barclay, the American consul general to France, and William Carmichael, “chargé” in Madrid,” all of whom were in Europe with Jefferson at the time of the printing.¹⁸ In America, Malone’s list included James Madison and James Monroe, both fellow Virginians, and three members of a very select group with whom Jefferson shared a kindred scientific spirit, Charles Thomson, David Rittenhouse, and Francis Hopkinson, all in Philadelphia.¹⁹ As to the students at William and Mary, their receipt of the Notes was initially delayed by Jefferson’s request that Madison review and comment on the Notes and the appropriateness of their distribution to this wider, but still selective audience.²⁰

Jefferson’s initial reticence about the Notes getting out to the public appears to have had nothing to do with his comments on church and state. His fears apparently stemmed from concerns that comments he had made about slavery might upset his fellow Virginians. Indeed his fears in this regard were strong enough that he encrypted his references to slavery in his letter to Madison, and Madison followed suit in his reply. Madison agreed that Jefferson’s comments regarding slavery “will displease” some in Virginia,²¹ but he further counseled Jefferson that “[w]e think both the facts and remarks which you have assembled too *valuable* not to be made known, at least to those for whom *you destine* them. . . .”²² But Madison cautioned Jefferson against sending copies to the students at William and Mary, suggesting instead that the copies be sent to the school’s library: “Mr. Wythe suggested that it might be better to put the number you may allot to the University into the library, rather than to distribute them among the Students. . . . Perhaps too an *indiscriminate gift* might offend *some narrow minded parents*.”²³ Responding to Madison’s reply, Jefferson promised that “[t]he copies I have remaining shall be sent over to be given to some of my friends and to select subjects in the college.”²⁴ Just when the students (or their

17. 2 MALONE, *supra* note 11, at 95

18. *Id.*

19. *Id.*

20. Letter from James Madison to Thomas Jefferson (Nov. 15, 1785), in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 16, at 38, 38.

21. *Id.*

22. *Id.* (emphasis in original).

23. *Id.* (emphasis in original).

24. Letter from Thomas Jefferson to James Madison, *supra* note 16, at 264, 264-65.

professors)²⁵ at William and Mary College received copies of the notes is unclear. Malone notes with respect to their arrival date, “[i]t is hard to say just when they did arrive”²⁶ We can know, however, that they had not been received before December 28, 1886, because the Reverend James Madison,²⁷ President of William and Mary College, wrote a letter on that date to Jefferson stating, with reference to the Notes, “I flatter myself you would favor our University with some Copies, and I have not yet relinquished the Hope.”²⁸ Whether Reverend Madison’s tone indicates Jefferson had communicated some further reservation about sharing the Notes is not clear. It is almost certain that Jefferson had not sent the books to the students or the school library prior to August 14, 1787, because on that date he wrote a letter to his English publisher John Stockdale, who had earlier claimed that an unauthorized version had been printed in Philadelphia, in which he refuted the claim by noting that, “I never sent but six copies to America, and they were in such hands as I am sure would not permit them to be published.”²⁹

It seems reasonable to assume that this small, private printing with its extremely limited distribution did little to spread Jefferson’s views regarding religion to the rest of the America. Malone writes:

[The French work] had no . . . enduring literary importance, and its public reception at the time may have seemed disappointing It appealed most strongly to the small group of savants and political liberals who already knew the author or would naturally appreciate such a spirit and such a mind Thus, while the book gained no large French audience, it improved the author’s standing in the little circle of men whose approval he valued most³⁰

25. In a letter from Madison to Jefferson, which apparently crossed paths with Jefferson’s February 8, 1786 letter to Madison, Madison again writes that Mr. Wythe suggested that the Notes be distributed to the students at the discretion of the professors. Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 16, at 194, 194.

26. 2 MALONE, *supra* note 11, at 97.

27. *Id.* at 85. Not to be confused with James Madison, fourth president and personal friend of Jefferson, Malone identifies the Reverend Madison as an old school friend of Jefferson. *Id.*

28. Letter from the Rev. James Madison to Thomas Jefferson (Dec. 28, 1786), in 10 THE PAPERS OF THOMAS JEFFERSON 642, 644 (Julian P. Boyd ed., 1954).

29. Letter from Thomas Jefferson to John Stockdale (Aug. 14, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 35, 35 (Julian P. Boyd ed., 1954).

30. 2 MALONE, *supra* note 11, at 105-06. Perhaps a further cause of the minor impact of the Notes in France can be found in a letter from Jefferson to Stockdale written July 16, 1788, in which Jefferson indicated that the sale of his Notes were prohibited in France. Letter from Thomas Jefferson to John Stockdale (July 16, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 366, 366-67 (Julian P. Boyd ed., 1956).

Moreover, if we tally those in Europe destined to return to America and those in America living outside Virginia who were sent copies of the French “private” edition, the list of recipients who could have helped spread Jefferson’s views in America appears to include a mere handful of individuals.³¹ Therefore, if we are to find evidence that Jefferson’s views regarding religion were widely enough known outside Virginia to have influenced the adopters of the First Amendment’s Establishment Clause we must look elsewhere.³²

31. The index to the first twenty volumes of the Jefferson’s Papers, which is no doubt incomplete because some copies sent to individuals are probably missing and some were likely never recorded by Jefferson, indicates that Jefferson sent somewhere around fifty individuals copies of the Notes. 21 THE PAPERS OF THOMAS JEFFERSON 392, 392-93 (Julian P. Boyd ed., 1955). Many, if not most, of these individuals were in Europe. *Id.*

32. There is a third, albeit unlikely, manner in which Jefferson’s views on church-state relations may have been spread through the publishing of his Notes. In a letter written from Hartford Connecticut to Jefferson on June 15, 1787, Joel Barlow wrote the following:

Your Notes on Virginia are getting into the Gazetts in different States, notwithstanding your request that they should not be published here. We are flattered with the idea of seeing ourselves vindicated from those despicable aspersions which have long been thrown upon us and echoed from one ignorant Scribbler to another in all the languages in Europe.

Letter from Joel Barlow to Thomas Jefferson (Jun. 15, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 473, 473 (Julian P. Boyd ed., 1955). For a number of reasons it seems unlikely that these unauthorized printings of Jefferson’s Notes did much to spread his vision of church-state relations. First, this is the only reference to such publications by anyone corresponding with Jefferson from America in any of his various published collections of papers. Given Jefferson’s near paranoid desire to control publication of his Notes, one might expect that others would have informed him if such publications were widespread. The British publisher of the Notes, John Stockdale, did report hearing that another unauthorized version had been published in Philadelphia in 1787, but Malone writes, “Jefferson doubted this report, which afterwards proved to be erroneous, although a pirated edition, inferior to Stockdale’s and without a map, did appear there in 1788.” 2 MALONE, *supra* note 11, at 506. Second, given the length of the Notes and the fact that Barlow writes that the unauthorized versions were being published in “Gazetts” it seems doubtful that anything more than excerpts were being published. A letter written by Jefferson to Stockdale on August 14, 1787 in which, in addition to denying Stockdale’s claim that an unauthorized copy had been printed in Philadelphia, Jefferson notes that a Mr. Hopkins had requested permission to print excerpts of the Notes supports this suspicion. Letter from Thomas Jefferson to John Stockdale, *supra* note 28, at 35. The second line of Barlow’s reference to the Notes (quoted above) gives us an indication of just which excerpts were likely being published. Barlow’s sense of vindication arising from Jefferson’s rebuttal of the “despicable aspersions” thrown upon America suggest that the excerpts were those which refuted the claims of some European scholars that American flora and fauna, as well as native Americans, were inferior to their European counterparts and that Europeans had regressed as a species upon immigrating to America. For a discussion of these issues in Jefferson’s Notes, see 2 MALONE, *supra* note 11, at 98-104. Coolie Verner does document that an American version of the Notes was published in 1788. COOLIE VERNER, A FURTHER CHECKLIST OF THE SEPARATE EDITIONS OF JEFFERSON’S NOTES ON THE STATE OF VIRGINIA 9 (1950). Just how many copies of this edition were published is impossible to determine at this time. *Id.* For several reasons it appears unlikely that edition was broadly distributed. To begin with, this edition, printed by Prichard and Hall in Philadelphia, was an unauthorized publication made from a pirated copy of the

Another possibility is the 1787 “public” edition published in England by John Stockdale.³³ Certain facts raise immediate doubts about whether the distribution of the 1787 English publication could possibly have been vast enough to have resulted in wide broadcast of Jefferson’s views in America. The first cause for doubt arises from the extremely small number of copies printed. On February 13, 1787, Stockdale wrote to Jefferson informing him that he intended to print 500 copies of the Notes,³⁴ but a letter written on July 10, 1787 indicates that he increased that number to 1,000.³⁵ Between those two dates, on February 27, 1787, Jefferson suggested that Stockdale print 400 copies for America, 200 of which were to be shipped to Richmond, Virginia, and 200 to Philadelphia.³⁶ A letter from Jefferson to Stockdale on September 10, 1787 indicates that Stockdale had “decline[d] sending any copies of the ‘Notes on Virginia’ to America”³⁷ sometime prior to that date. In that letter Jefferson informed Stockdale that he had sent forty copies of the notes to Richmond upon learning of Stockdale’s decision not to send copies to America.³⁸ Jefferson further indicated that he believed “that some copies would sell in Boston, N. York, Philadelphia and Baltimore.”³⁹ How, and if, Stockdale’s decision to increase the number of copies printed to 1,000 impacted this distribution is unknown. Assuming Stockdale eventually sent copies to America at all, it appears that the number of copies of Jefferson’s Notes available outside Virginia was likely somewhere between 200 and 400 copies.⁴⁰ That number is

Stockdale edition. *Id.* In addition, Coolie’s notes seem to suggest that Prichard and Hall focused their sales efforts in Virginia. *Id.*

33. The exact date of the “public” publication of Jefferson’s Notes is a matter of some confusion. Malone says that the English edition was published in August of 1787. 2 MALONE, *supra* note 11, at 505-06.

34. Letter from John Stockdale to Thomas Jefferson (Feb. 13, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 142, 143.

35. Letter from John Stockdale to Thomas Jefferson (Jul. 10, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON, *supra* note 32, at 576- 77.

36. Letter from Thomas Jefferson to John Stockdale (Feb. 27, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 183, 183. These numbers both in terms of totals and distribution were confirmed in a letter from Jefferson to Edward Rutledge on July 14, 1787. Letter from Thomas Jefferson to Edward Rutledge (July 14, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON, *supra* note 32, at 587, 588.

37. Letter from Thomas Jefferson to John Stockdale (Sep. 10, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 29, at 115, 115-16.

38. *Id.*

39. *Id.* at 116.

40. Two hundred of Jefferson’s original instructions, based upon a printing of 500 copies, were followed, 400 if Stockdale increased the number shipped to Philadelphia proportional to the increased printing of 1,000 copies. *Id.*

miniscule compared, for instance, to the printing of 500,000 copies of Thomas Paine's *Common Sense*, which unquestionably did have a wide audience and greatly influenced the colonist on the eve of the Revolutionary War.⁴¹

The editorial notes to the Boyd edition of Jefferson's papers, on the other hand, state that, "[t]he demand for copies of [Thomas Jefferson]'s work was increasing, in America as well as in Europe."⁴² Exactly what "increasing demand" means is impossible to say since Boyd does not tell us how he arrived at this conclusion other than to suggest that it appeared that Jefferson was now picking and choosing which individuals to send copies to.⁴³ But even Boyd's remarks indicate that it was individuals and not a mass audience that were demanding copies.⁴⁴

In addition, the very limited geographic distribution suggested by Jefferson likely prevented many Americans from having an opportunity to read his works. The copies sent to Richmond did nothing to further his reputation on church-state relations inasmuch as Virginia is the one place we can be certain his views were already relatively well known. Assuming that most of the other 200 (or 400) copies were sent, as Jefferson had originally suggested, to Philadelphia, then the limited geographic range of distribution would also have done nothing to spread Jefferson's view.⁴⁵

Even a limited distribution might have had some impact if it resulted in the Notes being read by a significant number of the key persons involved in the adoption of the Establishment Clause. This does not appear to be the case however. Of the eleven House members who were selected on July 21, 1789 to the committee appointed to draft amendments to the Constitution,⁴⁶ it appears that only Madison received a copy of Jefferson's Notes. (Madison is the only member of the committee whose name appears in the index of *The Papers of Thomas Jefferson* among the list of names of prominent people to whom

41. NORMAN PHILBRICK, *Introduction to TRUMPETS SOUNDING; PROPAGANDA PLAYS OF THE AMERICAN REVOLUTION* 10 (Norman Philbrick ed., 1972) (noting that the pamphlet distribution was to about one out of four colonists).

42. 10 THE PAPERS OF THOMAS JEFFERSON, *supra* note 28, at 632, 634.

43. *Id.* at 635.

44. *Id.*

45. We know that a few copies were sent outside Philadelphia and Richmond because Stockdale wrote to Jefferson in August 1787, telling him that he "sent a small number to Dr. Ramsay and Mr. Laurens at Charleston. Mr. Dilly has sent a few copies to New York." Letter from John Stockdale to Thomas Jefferson (Aug. 31, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 29, at 73, 73. But nothing about this letter suggests that the recipients received more than a few copies for their personal consumption. *Id.*

46. *See infra* note 48.

Jefferson sent a copy of the Notes.)⁴⁷ Moreover, there appears to be no evidence available to suggest that any member of the committee, other than James Madison, was familiar with Jefferson's views on church and state.⁴⁸ No record of any correspondence between Jefferson and any member of the committee, other than Madison, on the topic of the Bill of Rights, much less the Establishment Clause, is to be found in Jefferson's papers. Indeed, with few exceptions, Jefferson does not appear to have communicated with most of the members on the committee prior to the adoption of the Bill of Rights.⁴⁹

Of the few letters that were exchanged between Jefferson and members of the committee, most occurred after Jefferson's appointment to the position of Secretary of State in the Washington Administration. These tended to be official letters written by Jefferson, informing the Representatives that they had been selected by President Washington to fill some post, seeking information about some issue before Congress, or letters from the congressman in support of some candidate seeking a position in the federal government.⁵⁰ With one possible exception, none of these letters suggest that either party was all that familiar with the other, and none hint at familiarity on the part of the Congressman with Jefferson's views regarding church-state relations.

47. 21 THE PAPERS OF THOMAS JEFFERSON, *supra* note 31, at 392-93.

48. The eleven members were: John Vining (Delaware), James Madison (Virginia), Abraham Baldwin (Georgia), Roger Sherman (Connecticut), George Gale (Maryland), Aedanus Burke (South Carolina), Nicholas Gilman (New Hampshire), George Clymer (Pennsylvania), Egbert Benson (New York), Benjamin Goodhue (Massachusetts), and Elias Boudinot (New Jersey). See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, S. DOC. NO. 100-34 (1989) (listing biographical information for the above listed House members and displaying a lack of affiliation to Jefferson). See also Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, Loyola Law School (2007), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=9485&context=expresso>.

49. Jefferson did work closely with Elias Boudinot in 1792, likely after the Bill of Rights had been ratified by the states and long after anyone in Congress had worked on it, in preparing a paper refuting British claims that New Jersey had violated the terms of the Treaty of Paris in its treatment of Loyalist John Smith. 23 Charles T. Cullen, *Illustrations to THE PAPERS OF THOMAS JEFFERSON* xxxiii-iv (Charles T. Cullen ed., 1990).

50. See Letter to George Clymer & George Gale (Mar. 4, 1791), in 19 THE PAPERS OF THOMAS JEFFERSON 363, 363-64 (Julian P. Boyd ed., 1974) (noting an eighteenth century letter that informed certain individuals they had been selected by President Washington to serve as supervisors of Excise in their respective states); Letter from John Vining to Thomas Jefferson (Mar. 1, 1791), in 19 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 354, 354-55. (recommending a Mr. Feliechy as a candidate for the Consulate of Leghorn); Letter from Thomas Jefferson to Elias Boudinot (Jun. 29 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 581, 581 (Julian P. Boyd ed., 1961) (suggesting rate of payment to American consuls for recording number of American vessels docking abroad); Letter from George Clymer to Thomas Jefferson (Sep. 1, 1791), in 22 THE PAPERS OF THOMAS JEFFERSON 117, 117 (Charles T. Cullen ed., 1986) (regarding trade regulations in Danish West Indies).

The one letter which does suggest a degree of personal familiarity was written shortly after Jefferson's appointment as ambassador to France.⁵¹ His trip to France apparently necessitated a journey to Boston where he set sail for Europe in 1784. In order to assist Jefferson on his journey north, Roger Sherman, who had previously served on the committee assigned to write the Declaration of Independence with Jefferson, wrote a letter of introduction for him.⁵² It appears to be the only written correspondence between the two men during their lives. In May or June of that year, Jefferson evidently intended to spend some time in Connecticut and the letter from Sherman introduced him to Ezra Stiles, then President of Yale College, in New Haven. Sherman's letter introduced Jefferson as a "Gentleman of much Philosophical as well as political knowledge."⁵³ This letter, which does not touch on the subject of Jefferson's views on church and state, may nonetheless offer some clues about Jefferson's national reputation. Sherman's reference to Jefferson as a "Gentleman of much Philosophical . . . knowledge" may suggest that Sherman was familiar with at least some of Jefferson's broader views. Indeed, it would be difficult to imagine the two of them serving on the committee to draft the Declaration of Independence without their having acquired some familiarity with each other's views. But there is no guarantee that the issue of church-state relations ever came up at the national level during the turbulent times prior to the Revolution. Certainly more immediate concerns were the order of the day. The letter does however say a good deal about Jefferson's general lack of reputation, beyond Virginia, on any topic. That he needed, or would use, a letter of introduction in 1784 suggests that he was not well known at all outside of Virginia.⁵⁴ Such a letter would have been

51. Extract from the Diary of Ezra Stiles (Jun. 8, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON 302, 302-04 (Julian P. Boyd ed., 1953).

52. *Id.* The editorial note to another letter in the Boyd edition states that in addition to the letter from Sherman, Jefferson carried with him several other letters of introduction from "Gerry, Howell, and no doubt others [as he] made his first tour through New England." Letter from Thomas Jefferson to David Humphreys (Jun. 21, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 51, at 311-12.

53. Extract from the Diary of Ezra Stiles (Jun. 8, 1784), *supra* note 51, at 303.

54. One might assume that as the author of the Declaration of Independence in 1776, Jefferson would have acquired a national reputation of the first class by 1784. However, Jefferson's authorship of that most famous American document was not yet widely known, as evidenced by a notice printed in a Boston newspaper upon his arrival in 1784 which proclaimed:

Friday last the Honourable [sic] Thomas Jefferson, Esq; late Governor of Virginia, arrived here by land from that State. He is shortly to embark for Europe, as a Minister Plenipotentiary from the United States. . . . Governor Jefferson, who has so eminently distinguished himself in the late glorious revolution is a gentleman of a very amiable character, to which he has joined the most extensive knowledge. He is mathematician

unnecessary for someone of real national reputation like Washington or Franklin.

There is no way of knowing for certain what topics Jefferson discussed with men like Ezra Stiles on his journey to Boston. He may have used this opportunity to discuss church-state relations with the leading men of the day and thereby spread his reputation nationally. What few clues we have about his discussions suggest otherwise. Jefferson and Ezra Stiles exchanged letters shortly after Jefferson left Connecticut and the topic of religion was not broached by either man.⁵⁵ The letters instead focused on Jefferson's scientific views particularly about extinct American fauna and his dispute with French naturalist M. Buffon.⁵⁶

With the exception of John Page of Virginia, there is likewise no evidence that Jefferson's views regarding church and state were known by any of the remaining fifty-five members of the House of Representatives that approved the Establishment Clause. None, again with the exception of John Page, appear to have received a copy of Jefferson's Notes.⁵⁷ Excepting Page, Jefferson also did not exchange written correspondence with any remaining members of the House on the issue of church and state. Indeed, as with the House members of the committee charged with drafting the Bill of Rights, Jefferson engaged in only limited written communication of any type with most of the other members of the House and few appear to have been particularly familiar with him at all.

The one exception to this statement was the aforementioned John Page of Virginia. This exception does not appear significant for two reasons. First, Page was a Virginian⁵⁸ and as such he does not testify to broader geographic dissemination of Jefferson's views throughout America. Second, while it is unquestionably the case that Page knew of Jefferson's views, it is fairly clear he did not subscribe to them. In a letter he wrote from Virginia to Jefferson in Paris on August 23, 1785 he

and philosopher, as well as a civilian and politician, and the memorable declaration of American independence is said to have been penned by him.

7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 51, at 312 (quoting THE CONTINENTAL J. & WEEKLY ADVERTISER (Jul. 1, 1784)).

55. Letter from Ezra Stiles to Thomas Jefferson (Jun. 21, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON, *supra* note 51, at 312-17.

56. *Id.*

57. John Page is the only member of Congress, besides Madison, to appear in the index to the first twenty volumes of the Boyd edition of Jefferson's papers as a recipient of Jefferson's Notes. 21 THE PAPERS OF THOMAS JEFFERSON, *supra* note 31, at 392-93.

58. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, *supra* note 48, at 52.

argued for the resumption of official state tax support for religion:

Nothing but a general Assessment can prevent the State from being divided between immorality, and Enthusiastic Bigottry.[sic] We have endeavored 8 years in vain to support the rational Sects by voluntary Contributions. I think I begin to see a Mischief arising out of the Dependence of the Teachers of the Christian Religion on their individual Followers, which may not only be destructive to Morality but to Government itself. The needy dependent Preacher not only can not boldly reprove the vicious Practices of his Friends and Benefactors, his only Support; but he must, to keep well with them, fall into their Opinions, and support their Views and Interests: so that instead of being bound by the strongest Ties of Interest to discountenance Vice and support and strengthen the Hands of Government, they may be supporting the jarring Interests of the Enemies to all Government.⁵⁹

Such a position was inimical to that of Jefferson's who, in his efforts to abolish the establishment in Virginia, had argued against tax support for religion of any kind. It is interesting to note that in Jefferson's reply written from Paris on May 4, 1786, he responds to virtually every other major issue raised by Page's August 23rd letter, but ignores the question of church-state relations altogether, thus avoiding any confrontation over the issue of church and state.⁶⁰

Jefferson's influence in the Senate is equally nonexistent. Barring James Monroe from Virginia, there is no evidence that Jefferson's views were known by any members of the Senate. Jefferson's papers indicate that he never corresponded with any Senate member on the topic of church and state relations. No member of the Senate, other than Monroe, is recorded as having received a copy of his Notes. Nor, based on the scant record of the Senate's debates on the Bill of Rights, is there any indication that any member of the Senate referenced Jefferson during their deliberations on the Establishment Clause.

James Monroe, the one Senator who unquestionably knew of, and agreed with, Jefferson's views regarding church and state, almost certainly did nothing to spread his views among the Senators who drafted and approved of the Establishment Clause. The reason Monroe could not have played such a role is that he took his seat in the Senate on December 6, 1790, well over a year after Congress had already voted to approve the Bill of Rights and send them on to the states for

59. Letter from John Page to Thomas Jefferson (Aug. 23, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON, *supra* note 14, at 428, 428-29.

60. Letter from Thomas Jefferson to John Page (May 4, 1786), in 9 THE PAPERS OF THOMAS JEFFERSON, *supra* note 16, at 444, 444-46.

ratification.⁶¹

As to the ratification process itself, Bernard Schwartz cites one letter from a Christopher Gore of Boston to Jefferson, dated August 18, 1791, in which Gore informs Jefferson of the actions of the Massachusetts's legislature on the Bill of Rights.⁶² However, the letter contains no substantive discussion of the Amendments in general or anything regarding religion in particular.⁶³ There is simply no evidence to suggest that the members of the state legislatures who ratified the Bill of Rights had any idea what Jefferson thought about church-state relations. Thus, given the limited distribution of Jefferson's Notes, and the lack of any other printed statement on the topic from him, there is no reason to believe that either the men who served in the various state legislatures that ratified the Establishment Clause or the public that supported it knew of Jefferson's views.

The assertion made by the Court in *Everson* that Jefferson played a "leading role" in the "drafting and adoption" of the Bill of Rights does not appear to be supported by historical evidence. He played no role in the drafting process other than to urge Madison and a few others, none of whom served in Congress, to support such a document. He never, for instance, sent to Madison or anyone else a "draft" copy of language he wished considered, nor did he review and comment on the language proposed by the First Congress. Nor is there any evidence that his views on the topic of the relationship between church and state were well known outside Virginia before the mid-1790s, long after the Bill of Rights had been adopted. Sydney Ahlstrom suggests that it was not until after 1795, more than six years after Madison first introduced the proposal for a Bill of Rights in Congress, that New England's conservative clergy became aware of Thomas Jefferson's views on church and state.⁶⁴ In addition, Sanford Cobb's detailed history of *The Rise Of Religious Liberty in America*, written in 1902, makes no mention of Jefferson's influence on the issue outside of Virginia.⁶⁵ Certainly

61. James Monroe was elected to replace William Grayson after Grayson died on March 12, 1790 while serving as Senator from Virginia. H.R. Doc. No. 108-222, at 46 n.30 (2005), available at <http://www.gpoaccess.gov/serialset/cdocuments/hd108-222/1st.pdf>. See also GARY HART, JAMES MONROE 158 (2005).

62. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1175-76 (1971).

63. *Id.*

64. AHLSTROM, *supra* note 2, at 364. Elsewhere Ahlstrom writes that "Jefferson was also so important an architect of the United States solution of the church and state problem that some have seen this 'solution' as the virtual establishment of his own theology." *Id.* at 367-68.

65. COBB, *supra* note 8.

Madison, who wrote the first draft of the Bill of Rights, was intimately familiar with Jefferson's views and may well have considered them in offering his proposals. But Madison was a strong advocate of religious freedom in his own right and would not have needed instruction on the topic from Jefferson. Moreover, Madison, who may well have wished to complete the Congressional portion of the amendment process quickly, may have had good reason to avoid muddying the waters with a discussion of Jefferson's view on the topic of religion. At any rate there is nothing in the records of the First Congress to indicate that Madison shared his knowledge of Jefferson's views with his Congressional colleagues. Jefferson's name is never once invoked during the debates over the Bill of Rights in Congress. Thus, other than Madison, it seems unlikely that most of those who participated in the adoption of the Bill of Rights, knew a good deal about Jefferson's views on the topic.

Jefferson did play one formal role in the adoption of the Bill of Rights. On March 1, 1792, as Washington's Secretary of State, he sent letters to the governors of the several states announcing the official notice of ratification of the Bill of Rights. Somewhat oddly, nothing about this letter suggests that Jefferson viewed the passage of the Bill of Rights as a momentous occasion:

Sir,

I have the honor to send you herein enclosed, two copies duly authenticated, of an Act concerning certain fisheries of the United States, and for the regulation and government of the fisherman employed therein; also of an Act to establish the post office and post roads within the United States; also the ratifications by three fourths of the Legislatures of the Several States, of certain articles in addition and amendment of the Constitution of the United States, proposed by Congress to the said Legislatures, and of being with sentiments of the most perfect respect, your Excellency's &.

*Th. Jefferson*⁶⁶

For those imagining a glorious pronouncement to the nation signaling the passage of the Bill of Rights, Jefferson's announcement comes off as an afterthought. The tone of the announcement may itself be an indicator of how little Jefferson was involved in the entire process. Had he been the chief architect of any part of the Bill of Rights, as assumed all these years by the Court, one could imagine him paying

66. 2 SCHWARTZ, *supra* note 62, at 1203.

their passage far greater respect.

There is no disputing that Jefferson played an instrumental role in ending religious establishments in Virginia. Any claim that his views informed members of the first Congress which proposed the Bill of Rights, the representatives at the state ratifying conventions which ratified it, or the American public which supported its adoption, however, is not supported by the historical record.

Starting from the false premise that Jefferson played a “leading role” in the drafting of the Establishment Clause, the *Everson* Court compounded its mistake by asserting: “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”⁶⁷ Even if it were true that this oft-quoted line encompassed the sum total of Jefferson’s beliefs respecting the Establishment Clause, there are numerous reasons to believe that this interpretation had no influence on those who passed the Establishment Clause.

As Justice Rehnquist suggested in *Wallace v. Jaffree*,⁶⁸ perhaps the most important reason for doubting whether those that proposed and ratified the Establishment Clause were influenced by Jefferson’s “wall of separation” remarks is that he penned that phrase many years after the Bill of Rights were proposed and ratified.⁶⁹ It would have been an astonishing act of political prophesy for the members of the First Congress, meeting in 1789, to have foretold Jefferson’s remarks, written

67. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947). Thomas Jefferson used the phrase to describe his understanding of the meaning of the Establishment Clause in a letter to the Danbury Baptist Association of Connecticut. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (referencing, for the first time, Jefferson’s now ubiquitous “wall of separation between Church and State” statement). The phrase did not become a virtual substitute for the words of the Establishment Clause in the public’s mind, however, until after *Everson*. Its value as an interpretive guidepost for the Establishment Clause was first challenged by Justice Reed in his dissenting opinion in *McColum v. Board of Education*, when he argued with reference to the “wall of separation” phrase that “[a] rule of law should not be drawn from a figure of speech.” 333 U.S. 203, 247 (1948) (Reed, J., dissenting). Chief Justice Burger raised further questions about the value of the phrase in *Lynch v. Donnelly*, when he noted, “[T]he metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.” 465 U.S. 668, 673 (1983). It is not clear how useful Justice Burger’s observations were inasmuch as the phrase was never intended to be a “description of the practical aspects of the relationship that in fact exists between church and state,” but rather a description of the founders’ original intent. *Id.*

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

69. *Id.* Rehnquist calculated that Jefferson penned the letter fourteen years after the Bill of Rights were passed by Congress. *Id.* Inasmuch as Congress passed the Bill of Rights in the fall of 1789 and Jefferson wrote the letter on New Year’s Day 1802, it appears that Rehnquist miscalculated. *Id.* That apparent miscalculation does nothing to diminish the correctness of the conclusion he drew regarding the impact of Jefferson’s subsequent letter on the members of the First Congress.

in 1802, and incorporate them into the Establishment Clause. This revelation alone should have disabused any members of the Court from asserting that the Establishment Clause was founded upon Jefferson's "wall of separation." Somewhat shockingly it has not. Seven years later in *Lee v. Weisman*,⁷⁰ Justice Blackmun, with whom Justices Stevens and O'Connor joined, wrote a concurring opinion in which he twice used the phrase "wall of separation"⁷¹ and, with apparent approval, repeated the language from *Reynolds* arguing that Jefferson's phrase was "'an authoritative declaration of the scope and effect' of the First Amendment."⁷² In *Capitol Square Review v. Pinette*,⁷³ Justice Stevens opened his dissent by urging the Court to rebuild the "'wall of separation between church and State' that Jefferson envisioned."⁷⁴ In *Mitchell v. Helms*,⁷⁵ Justice Souter, with whom Justices Stevens and Ginsburg joined in a dissenting opinion, again affirmed the proposition that the Establishment Clause incorporated Jefferson's wall of separation.⁷⁶ Most recently in *Van Orden v. Perry*,⁷⁷ Justice Stevens, with whom Justice Ginsburg joined in dissent, argued that "If any fragment of Jefferson's metaphorical 'wall of separation' between church and state is to be preserved" the Court must declare Texas's public display of the Ten Commandments unconstitutional.⁷⁸ (Ironically, Justice Stevens admonishes the plurality in the same dissent for citing "early religious statements and proclamations made by the Founders" on the grounds that "those views were not espoused at the Constitutional Convention in 1787 nor enshrined in the Constitution's text.")⁷⁹ In each of these instances the offending Justices either quoted from or cited *Reynolds* and *Everson* without any mitigating remarks acknowledging that those cases were premised upon what Justice Rehnquist accurately described as a "mistaken understanding of constitutional history."⁸⁰

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

71. *Id.* at 601 n.1. (Blackmun, J., concurring).

72. *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

73. *Capitol Square Review v. Pinette*, 515 U.S. 753 (1995).

74. *Id.* at 797 (Stevens, J., dissenting).

75. *Mitchell v. Helms*, 530 U.S. 793 (2000).

76. *Id.* at 873 (Souter, J., dissenting).

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

78. *Id.* at 708.

79. *Id.* at 724.

80. *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). Inasmuch as it is simply indisputable that the founders could not have intended that the Establishment Clause incorporate Jefferson's phrase, I do not believe any further search for the metaphor's meaning useful for purposes of this paper. See DANIEL L. DREIBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002) (discussing further the metaphor's meaning).

If, despite the evidence that Jefferson played no role in the adoption of the Establishment Clause, the Court continues to insist on looking to him as a guidepost for interpreting it then we must strive to better understand how he understood it.

For instance, two days after he penned his famous “wall of separation” letter, President Jefferson attended, along with members of both chambers of Congress, religious services in the Hall of the House of Representatives.⁸¹ It is worth noting that the religious services were conducted by Baptist preacher John Leland, whom historian James Hutson described as “one of the nation’s best known advocates of religious liberty”⁸² Hutson also notes that Jefferson continued to attend House church services throughout the remainder of his presidency and that he granted permission “to various denominations to worship in executive buildings where four-hour communion services were held.”⁸³ Attending church services in the halls of Congress and granting permission to others to use executive buildings for religious services are hardly the acts of a leader wedded to strict separation of church and state.

Supporters of strict separation have, however, cited other actions by Jefferson to support their position. On at least five occasions members of the Court have pointed out that Jefferson refused to declare proclamations of Thanksgiving because of his interpretation of the Establishment Clause. (Jefferson’s Letter to the Danbury Baptist church, which contained the “wall of separation” phrase, was an attempt to explain why he refused to follow this custom.) For example, in *Marsh v. Chambers*⁸⁴ Justice Brennan, with whom Justice Marshall joined in dissent, claimed, “Thomas Jefferson and Andrew Jackson, during their respective terms as President, both refused on Establishment Clause grounds to declare national days of thanksgiving or fasting.”⁸⁵ More recently Justice Souter, writing on behalf of the majority in *McCreary County v. ACLU of Kentucky*⁸⁶ noted, “Jefferson, for example, refused to issue Thanksgiving Proclamations because he believed that they violated

81. James H. Hutson, *A Wall of Separation: FBI Helps Restore Jefferson's Obliterated Draft*, 57 LIBR. CONGRESS INFORMATION BULL. 137 (1998), available at www.loc.gov/loc/lcib/9806/danbury.html.

82. *Id.*

83. *Id.*

84. *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh* a taxpayer/state legislator sued the state of Nebraska claiming that its practice of opening its legislative sessions with a prayer offered by a chaplain paid for by state funds was unconstitutional. *Id.* at 784-85.

85. *Id.* at 807 (Brennan, J., dissenting).

86. 545 U.S. 844 (2005).

the Constitution.”⁸⁷ And in the companion case to *McCreary, Van Orden v. Perry*,⁸⁸ Justice Stevens, joined in his dissent by Justice Ginsburg, wrote:

In according deference to the statements of George Washington and John Adams, THE CHIEF JUSTICE and JUSTICE SCALIA, fail to account for the acts and publicly espoused views of other influential leaders of that time. Notably absent from their historical snapshot is the fact that Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment Clause.⁸⁹

Evidence that Jefferson refused to publicly acknowledge or thank God for the nation’s blessings certainly appears to support the position that he was a strict separationist. (That he took such positions during his two terms as President from 1801 to 1809 tells us nothing about the original intent of the participants, of whom he was not one, who drafted and adopted the language of the First Amendment between 1789 and 1792.)

But other actions by Jefferson belie such strong conclusions. Daniel Dreisbach, having acknowledged Jefferson’s official refusal to declare days of Thanksgiving, notes “Yet, as president, he employed rhetoric in official utterances that, in terms of religious content, was virtually indistinguishable from the traditional thanksgiving day proclamations issued by his presidential predecessors and by state chief executives.”⁹⁰ Examples of such rhetoric abound. In his first inaugural address, delivered March 4, 1801 (less than a year before writing his “wall of separation” letter) he acknowledged an “overruling Providence, which by all its dispensations proves that it delights in the happiness of man”⁹¹ And elsewhere in the same speech Jefferson stated, “And may that Infinite Power which rules the destinies of the universe, lead our councils to what is best, and give them a favorable issue for your peace and prosperity.”⁹² In his first annual message to Congress, written

87. *Id.* at 878 (citing Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808)).

88. 545 U.S. 677 (2005).

89. *Id.* at 724. *See also* *Lynch v. Donnelly*, 465 U.S. 668, 716 n.23 (Brennan, J., dissenting) (“The constitutional problems posed by the religious antecedents of the early Thanksgiving celebrations were well recognized by Thomas Jefferson.”); *Lee v. Weisman*, 505 U.S. 577, 623 (1992) (Souter, J., concurring) (“President Jefferson, for example, steadfastly refused to issue Thanksgiving proclamations of any kind, in part because he thought they violated the Religion Clauses.”) (citing Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808)).

90. DREISBACH, *supra* note 80, at 57.

91. SAUL K. PADOVER, *THE COMPLETE JEFFERSON* 385 (1943).

92. *Id.* at 387.

December 8, 1801 (less than a month before composing his “wall of separation” letter explaining why he did not offer public thanks to God) Jefferson, announcing the end of the Napoleonic wars, wrote:

While we devoutly return thanks to the beneficent Being who has been pleased to breathe into them [the warring parties in Europe] the spirit of conciliation and forgiveness, we are bound with peculiar gratitude to be thankful to him that our own peace has been preserved through so perilous a season⁹³

Again in his second annual message to Congress, on December 1802, the year in which he wrote his “wall of separation” letter, Jefferson began his address: “When we assemble together, fellow citizens, to consider the state of our beloved country, our just attentions are first drawn to those pleasing circumstances which mark the goodness of that Being from whose favor they flow, and the large measure of thankfulness we owe for his bounty.”⁹⁴ In his third annual message to Congress, on October 17, 1803, Jefferson, announcing the resumption of war between England and France, wrote:

While we regret the miseries in which we see others involved let us bow with gratitude to that kind Providence which, inspiring with wisdom and moderation our late legislative councils while placed under the urgency of the greatest wrongs, guarded us from hastily entering into the sanguinary contest, and left us only to look on and to pity its ravages.⁹⁵

Jefferson’s fourth annual message to Congress in 1804, the year in which he ran for his second term as president, did not make reference or give thanks to God.⁹⁶ He returned to the habit of public prayer and thanksgiving immediately after his reelection. In his Second Inaugural Address in 1805, he stated:

I shall need, too, the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land, and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with his providence, and our riper years with his wisdom and power; and to whose goodness I ask you to join with me in supplications, that he will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you

93. *Id.*

94. *Id.* at 394.

95. *Id.* at 404.

96. *Id.* at 406-10.

the peace, friendship and approbation of all nations.⁹⁷

Jefferson made no reference to God in either his sixth⁹⁸ or seventh⁹⁹ annual messages to Congress. In the final line of his last annual message in 1808, however, he offered one last prophetic thanks to God when he wrote, "I carry with me the consolation of a firm persuasion that Heaven has in store for our beloved country long ages to come of prosperity and happiness."¹⁰⁰

Nor were his Inaugural speeches or his Annual Addresses the only times when President Jefferson invoked the name of God as the head of the state. President Jefferson invoked the image of the Great Spirit in sixty percent (twenty-one of the thirty-five) of the Addresses to Native Americans recorded by Saul Padover in *The Complete Jefferson*.¹⁰¹ Most of these references take the form of benign thanks to God, of the type strict separationists tell us he did not offer, for the safe arrival of Indian Chiefs in Washington. In his December 30, 1806 address to the Wolf and People of the Mandam Nation, for instance, President Jefferson wrote the following, "I thank the Great Spirit that he has protected you through the journey and brought you safely to the residence of your friends, and I hope He will have you constantly in his safe keeping, and restore you in good health to your nations and families."¹⁰²

Occasionally, however, President Jefferson used the image of God for far more explicit political purposes. In his December 31, 1806 address to the Chiefs of the Osage Nation he wrote, "The Great Spirit has given you strength and has given us strength, not that we should hurt one another, but to do each other all the good in our power."¹⁰³ In his address to Manchol, the Great War Chief of the Powewatamies, President Jefferson attempted to dissuade the Powewatamies from engaging in further warfare with the Osages, a neighboring tribe, by invoking the authority of the supreme being, "Be assured that the Great Spirit will not approve of this, [attacking innocent neighbors] He did not

97. *Id.* at 414-15.

98. *Id.* at 421-26.

99. *Id.* at 434-39.

100. *Id.* at 446-47.

101. *Id.* at 449-514. In at least two of the Addresses, To the Delaware and Shawanee, and To the White Hairs, Chiefs, and Warriors of the Osage Nation, President Jefferson makes multiple references to a supreme being. *Id.* at 459-60, 466-68. These multiple references are not considered in the calculation above.

102. *Id.* at 483.

103. *Id.* at 486.

make men strong that they might destroy all other men.”¹⁰⁴ In his address to Beaver, the Head Warrior of the Delawares he warned:

Your having committed one wrong on them [the Osage tribe] gives you no right to commit a second; and be assured, my son, that the Almighty Spirit which is above will not look down with indifference on your going to war against his children on the other side the Mississippi, who have never come to attack you. He is their father as well as your father, and He did not make the Osages to be destroyed by you. I tell you that if you make war unjustly on the Osages, He will punish your nation for it. He will send your nation famine, sickness or the tomahawk of a stronger nation, who will cut you off from the land. Consider this thing well, then, before it is too late, and before you strike. His hand is uplifted over your heads, and His stroke will follow yours.”¹⁰⁵

Finally, Jefferson told Chief Kitchao Geboway that “The Great spirit did not make men that they might destroy one another, but doing to each other all the good in their power, and thus filling the land with happiness instead of misery and murder.”¹⁰⁶

In these latter cases Jefferson was invoking the idea of God to achieve explicitly political purposes. He sought to manipulate the image of the Great Spirit to get warring Indian tribes to lay down their weapons. However certain Jefferson was about the corrupting influence of government on religion, and religion on government, it is clear that he understood that religion had a place in political life and that it could be used as a unifying force for public good. In these instances Jefferson appears to have much in common with the unnamed Presbyterian minister (a contemporary of Jefferson’s) whom Hutson quotes as having observed that “if we consider the end of civil society and the evils it was designed to remedy, we will be convinced that from its very nature, that it [government] cannot reach that end, nor guard against those evils, without the aid of religion.”¹⁰⁷

Perhaps to insure that the Chiefs understood the teaching of the Great Spirit to which he referred President Jefferson personally authorized the use of public revenues to support the building of a church

104. *Id.* at 499.

105. *Id.* at 501.

106. *Id.* at 504.

107. James Hutson, Library of Congress, James Madison and the Social Utility of Religion: Risks vs. Rewards (March 16, 2001), available at <http://www.loc.gov/loc/madison/hutson-paper.html>.

and a Catholic priest among the Kaskaskia tribe.¹⁰⁸ His war Department also provided public funds for building a Presbyterian school for the Cherokees.¹⁰⁹

Moreover, in one of the Court's early church/state cases Justice Reed pointed out that Thomas Jefferson also encouraged the President and Directors of the University of Virginia, which he helped establish, to allow religious instruction on that publicly funded campus. Jefferson argued that "[s]uch an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on *principles which would leave inviolate the constitutional freedom of religion . . .*"¹¹⁰

Too many acts and writings of Thomas Jefferson contradict the image of him as a strict separationist to allow us to conclude that he sought to build a high and impregnable wall of separation between church and state. As President he attended religious services in the halls of Congress and allowed others to engage in such services in federal buildings.¹¹¹ While it is true that he refused to proclaim official days of thanksgiving, he frequently made official public announcements that accomplished the same thing.¹¹² Indeed he went so far as to use religion for explicitly political purposes as President, particularly in his dealing with Native Americans.¹¹³ He gave his approval to both the use of public tax dollars for the purpose of promoting Christianity among Native Americans and to the teaching of religion in public schools in Virginia.¹¹⁴ None of these acts demonstrate that Jefferson was not serious about allowing individuals freedom of conscience when it came to religious matters because none of them interfered with such freedom. But almost all of these activities suggest that Jefferson was willing to allow a certain level of interplay between religion and the state where such interplay did not infringe upon individual religious freedom.

CONCLUSION

Much of the Court's understanding of Jefferson's role in the

108. Thomas E. Buckley, S.J., *Reflections on a Wall*, 56 WM. & MARY Q. 796, 799 (1999).

109. *Id.*

110. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 246 n.11 (Reed, J., dissenting) (quoting 19 THE WRITINGS OF THOMAS JEFFERSON 414-17 (Memorial ed., 1904)) (emphasis added).

111. See Hutson, *supra* note 81, at 5.

112. DREISBACH, *supra* note 80, at 57. See PADOVER, *supra* note 91, at 387-447.

113. PADOVER, *supra* note 91, at 449-514.

114. Buckley, *supra* note 108, at 799.

adoption of the Establishment Clause appears mistaken. Not only did he not play the “leading” role the Court has long attributed to him, he appears to have played almost no role at all. His views regarding Church and State were apparently unknown to the overwhelming majority of the participants in the adoption process. The only work he published which touched on the topic was not widely distributed outside of Virginia. He engaged in no apparent intercourse on the topic with any of the members of the congressional committee that drafted the Establishment Clause other than Madison, who appears not to have discussed Jefferson with his fellow committee members, nor with any of the other House or Senate members who approved of the Establishment Clause. Moreover, there is no reason to believe that the members of the state legislatures that ratified the Establishment Clause or the public that supported it were aware of his views.

If, despite Jefferson’s lack of involvement in the adoption of the Establishment Clause, the Court wishes to look to him for guidance in interpreting the First Amendment it must begin to look at a broader range of his acts and writings than it has traditionally done. Simply relying on Jefferson’s “wall of separation” letter to the Danbury Baptist and his refusal to offer official prayers of thanksgiving does not tell us the whole story about Jefferson’s views on church and state. Too much evidence, gleaned from both his actions and writings, suggest that his views were more complex than has traditionally been acknowledged by the Court.