Summer 1991

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The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined†

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INTRODUCTION

The complete separation of church and state is one of the abiding myths of modern American constitutional theory and thought. The insistence on that separation has long been the source of important judicial and legislative decisions in such areas as the role of prayer in schools,¹ government support of parochial education² and the display of religious symbols in public spaces.³ The establishment clause of the American Bill of Rights is commonly understood to be the source of this wall of separation;⁴ yet, such a wall was never intended by its framers.

The establishment clause in the American Bill of Rights (1789) and the English Act of Toleration (1689) are often interpreted and commonly understood as legislative efforts to promote religious liberty. On closer examination, however, it seems that both were significant political tools whose primary importance was in achieving political stability after the turmoil of revolution. The political nature and utility of the Act of Toleration, and in turn, of the establishment clause, is striking.⁵ Yet, the political nature of these documents is even more obvious when seen in the context of the history of toleration declarations from the Declaration of Breda

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5. William III begins his 1689 Act of Toleration by stating “some ease to scrupulous consciences in the exercise of religion may be an effectual means to unite their Majesties’ Protestant subjects in interest and affection.” 8 English Historical Documents: 1660-1714, at 400 (A. Browning ed. 1953) (emphasis added) [hereinafter English Historical Documents]. In the congressional debates on the establishment clause, Delegate Carroll asserted that the establishment clause “would tend more toward conciliating the minds of the people to the Government than almost any other amendment.” 1 Annals of Cong. 730 (J. Gales ed. 1834) (emphasis added).
While these documents all profess a desire to grant "liberty of tender conscience" all came into being at moments of political crisis or show an express awareness of the need for political unity and stability. In the English documents the very language used suggests the primacy of political conformity and unity over religious toleration.

There are, of course, differences in the historical and political circumstances that gave birth to the Act of Toleration and the establishment clause, but there are also striking similarities. The most striking of the similarities between 1689 and 1789 is the state of political turmoil and the urgent need for unity. The Act of Toleration was declared after the demise of the legitimate monarch, the invasion of England by the armed Dutch Staatsholder, William of Orange, and his "election" to the English crown. The American establishment clause was drafted in the wake of a revolutionary war and the failure of the Articles of Confederation to bind the disparate colonies into a unified nation.

An understanding of the political origins and uses of toleration declarations may provide an important guide to that part of the American jurisprudential community concerned with original intent. This understanding is

6. See 8 ENGLISH HISTORICAL DOCUMENTS, supra note 5, at 57 (the Declaration of Breda); id. at 371 (Charles II's 1662 Declaration in Favor of Toleration); id. at 387 (Charles II's 1672 Declaration of Indulgence); id. at 395 (James II's 1687 Declaration of Indulgence); id. at 400 (William III's 1689 Act of Toleration).

7. See THE STUART CONSTITUTION 1603-1688: DOCUMENTS AND COMMENTARY 379 (J. Kenyon ed. 1986) [hereinafter THE STUART CONSTITUTION] (His Majesty's declaration to all his loving subjects, 26 December 1662 (Charles II)). This was a phrase widely used in English political discourse in the 17th century to refer to religious liberty.

8. Charles II was at war in 1672 (war was declared on March 13, 1672). J. JONES, COURT AND COUNTRY: ENGLAND, 1658-1714, at 106 (1978). James II understood that because of his religion, and his desire to include Catholics in the political power structure, he could not rely on the Anglican Establishment alone for support. J. MILLER, JAMES II: A STUDY IN KINGSHIP 169-75 (1978). William III, like Charles II, was at war and in need of full support of his country when his Act of Toleration was promulgated. H. HORWITZ, PARLIAMENT, POLICY AND POLITICS IN THE REIGN OF WILLIAM III 27-28 (1977).

9. See 8 ENGLISH HISTORICAL DOCUMENTS, supra note 5, at 57-58 (Declaration of Breda: "[T]he times have produced several opinions in religion, by which men are engaged in parties and animosities against one another, which, when they shall unite will be better composed "); Charles II's 1672 Declaration of Indulgence: [W]e do now accordingly issue this our declaration, as well for the quieting the moods of our good subjects and for the better encouragement of all to a cheerful following of their trade and callings, from whence we hope by the blessing of God to have many good and happy advantages to our government

Id. at 387; id. at 371-73 (Charles II's 1662 Declaration in Favor of Toleration); id. at 295 (James II's 1687 Declaration of Indulgence: "[T]here is nothing now that we so earnestly desire as to establish our government on such a foundation as may make our subjects happy, and unite them to us by inclination as well as duty "); id. at 400 (William III's 1689 Act of Toleration: "[S]ome ease to scrupulous consciences in the exercise of religion may be an effectual means to unite their Majesties' Protestant subjects ").
important not only because of the parallels between English and American toleration declarations, but also because of the American awareness of the English "precedent." A jurisprudence of original intent must recognize that the establishment clause was neither intended to erect a wall of separation between church and state nor to prevent individual states from regulating religion, as the Supreme Court has frequently suggested. However, this recognition is not enough. A jurisprudence of original intent must also recognize that the framers explicitly intended to promote political and social harmony through the establishment clause. Originalists must therefore acknowledge that any governmental intrusion into matters of religion that creates political and social discord would not comport with original intent and therefore must be validated through activist jurisprudence.

I. THE ACT OF TOLERATION

A. The Historical Context of the Act of Toleration

In 1689 England embarked on a course of social retrenchment and political reclamation and reform. The Glorious Revolution, as the events of 1689 were later dubbed by Whiggish historians, was a reaction to the rule of James II—the first Roman Catholic monarch to rule England in almost 150 years. Through a series of political maneuvers, James II had attempted to displace the Anglican power elite. In November of 1689 that elite deposed the Catholic king who had threatened their power and prerogatives. In his place they imported his Protestant son-in-law and daughter, William and Mary, to take the throne.

The Glorious Revolution was spun from a web of political and religious motives, and these motives are difficult to separate from the religious claims and reasons which were often used to cover political and economic goals. While the most common contemporary explanation for deposing James II


11. See 1 ANNALS OF CONG., supra note 5, at 730.

12. Mary Tudor (Mary I) was the first Roman Catholic monarch in England after her father Henry VIII broke from the Roman Catholic Church and established the Protestant Church of England. Mary I reigned from 1553 to 1558. See R. SMUTS, COURT, CULTURE AND THE ORIGINS OF A ROYALIST TRADITION IN EARLY STUART ENGLAND 2 (1987).


was his Catholicism, it was not James' spiritual practices or beliefs that were worrisome to the Anglican elite. Rather, it was his promotion of the Roman Catholic Church, his attempts to insinuate his co-religionists into the power structure of English life and the threat of Catholic monarchy in perpetuity—realized with the birth of James Francis Edward Stuart in June of 1688—that worried the Anglican elite.

The traditional English fears of Catholicism in the seventeenth century were legion, and those who supported William skillfully played upon those fears. The English were reminded of the bloody religious persecution they had suffered under the last Roman Catholic monarch, Mary I, and the series of crises, or supposed crises, fomented by Jesuits: the Gunpowder Plot (1605), the Civil Wars (1642-46), the Great Fire of London (1666) and the Popish Plot (1678). These Catholic plots, a constant thread in the propaganda against James II after 1685, were used to bring home the threat to Protestant liberty that this king, and all subsequent Catholic kings, would pose. While the pamphlets cried out for political and religious liberty it was clear that Catholics, dissenting sectarians and Jews were not to be included.

Religion, as always, was a pliant and useful talking point. But what the Whigs and Tories who banded together to effect the revolution feared most was the loss of the Anglican monopoly on institutional powers: church authority, as well as ministerial, legal, social and educational power. James II clearly threatened the Anglican monopoly not only through the promotion of his co-religionists by means of the royal dispensing powers, but also by proposing a general religious toleration in his Declaration of Indulgence (1687).

To the Anglican elite the Declaration of Indulgence was dangerous on two levels. Enacted, it would have allowed those who refused communion in the Anglican Church to take royal offices that had been exclusively

15. See J. Jones, supra note 8, at 248.
17. See H. Horwitz, supra note 8, at 4-5, J. Jones, supra note 8, at 247 (James Francis Edward Stuart, the son of James II, was born on June 10, 1688); see also 5 Poems on Affairs of State: 1688-1697, at 19-36 (W Cameron ed. 1971) (Popular expressions of the fear of a Catholic monarchy in perpetuity are to be found in these contemporary satires.).
18. See J. Jones, supra note 8, at 247-48; J. Miller, supra note 13, at 252-57
20. See J. Jones, supra note 8, at 248-49.
21. See id. at 234-350.
22. See id. at 231; J. Miller, supra note 8, at 128, 256-57; The Stuart Constitution, supra note 7, at 377 & n.45, 378, 395. Notably, James II mentions his royal dispensing power in his 1687 Declaration of Indulgence. Id. at 395-97
23. See 8 English Historical Documents, supra note 5, at 395.
Anglican domain since the imposition of the Test Act of 1673. Further, the Declaration of Indulgence would have gained James II the sympathy and support of the large minority of dissenting Protestants, who had been politically and socially disenfranchised since the Restoration of 1660, thus shoring up his kingship and policies against attack by the Anglican majority.

With the "Revolution" completed, William III came to the English crown—the head of the English body politic. Because of the circumstances of James II's flight and because of his own arrival at the head of an invading army, William was immediately faced with the task of achieving political legitimacy and authority. William needed to retain the cooperation of both Whigs and Tories and the support of those Protestant dissenters who had favored the revolution. But, because of the need for social and political unity, he also had to attract those Protestant dissenters who had favored James' efforts at toleration without sacrificing the support of the Anglican elite and the broader base of the established church. As William faced these conflicting political interests the Act of Toleration must have seemed an obvious tool to resolve them. Through religious toleration William could garner the support of many of those Englishmen who had been politically disenfranchised and alienated from the crown and its government since the Restoration of 1660.

Both Charles II and James II had appreciated the potential for political unification through toleration before William, but Charles and James had not gained the necessary parliamentary support. William succeeded where the previous two monarchs had failed because he was careful not to insist on an overly general toleration. Instead, the Act he accepted was just barely broad enough in scope to achieve his political purposes. The scope of

24. Id. The Test Acts of 1673 and 1678 required all office holders—thus included seats in Parliament as well as commissions in the Army and Navy—to take communion in the Anglican Church. See id. at 390, 392.

25. See J. Jones, supra note 8, at 236; J. Miller, supra note 13, at 217.

26. See 8 English Historical Documents, supra note 5, at 57 (The Declaration of Breda (1660)); id. at 371 (Charles II's 1662 Declaration in Favor of Toleration); id. at 387 (Charles II's 1672 Declaration of Indulgence); id. at 395 (James II's 1687 Declaration of Indulgence). In fact, John Miller suggests that James II "was not a genuine believer in toleration. His concessions to Dissent were dictated by political expediency." J. Miller, supra note 13, at 228.

27. J.R. Jones explains that Charles II's "announcement of the Declaration of Indulgence, on 26 December 1672, produced a political explosion." J. Jones, supra note 8, at 150. Charles II's 1672 Declaration of Indulgence similarly failed in Parliament. See id. at 177-78. And in 1673 the first Test Act was passed, it would seem, as a backlash against Charles II's Declaration of Indulgence. See Schochet, The Act of Toleration: Persecution, Non-Conformity, and Religious Indifference, forthcoming in The World of William and Mary (1991) (copy of unpublished manuscript on file with the Indiana Law Journal). For a description of the immediate political backlash from James II's 1687 Declaration of Indulgence, which eventually lead to his loss of the Crown, see J. Jones, supra note 8, at 237-38.
William's toleration was purely Protestant, while Charles II and James II had both hoped to embrace Catholics as well as Protestants in their toleration.

That William proposed a scheme of toleration which encompassed only some Trinitarian Protestants suggests that liberty of conscience and un molested worship were not first on his agenda. If religious scruple motivated the Act of 1689, it is odd then that the Act was limited to Trinitarian Protestants, and of them, only to those willing to accept thirty-six of the thirty-nine Articles of the Anglican faith, to swear an oath of allegiance to the throne and declare their abhorrence of Catholicism. The circumscribed scope of the 1689 Act suggests some motive other than religious liberty.

The immediate historical context of William III's 1689 Act of Toleration was James II's Declaration of Indulgence of two years earlier and James' campaign to arrange a parliament that would support the royal policies on toleration. Ironically, William's Act of Toleration begins with language almost identical to that used by James in 1687, language alluding to the political utility of religious freedom. Through this language both monarchs hoped to achieve political stability and gain the support of their subjects; yet William succeeded in unification where James only succeeded in creating factions, tensions and alienation.

James' failure, in part, was due to contemporary political circumstances beyond his control. One such circumstance was the revocation of the Edict of Nants, an "irrevocable" promise by the French kings to respect and tolerate their Protestant subjects, only six months after James ascended the English throne. It must have occurred to English Protestants that if one Catholic king could ignore his oath and persecute Protestant subjects it was

28. In his 1689 Act of Toleration, William III explicitly states that he is promulgating this Act to "unite their Majesties' Protestant subjects." 8 ENGLISH HISTORICAL DOCUMENTS, supra note 5, at 400 (emphasis added). William goes on in this Act to lay out measures that explicitly excluded all non-Trinitarian Protestants from its scope. See id. at 400-03.
29. See J. JONES, supra note 8, at 241; J. MILLER, supra note 13, at 217-36.
30. James II began his 1687 Declaration of Indulgence "we so earnestly desire to establish our government on such a foundation as may make our subjects happy, and unite them to us by inclination as well as duty." 8 ENGLISH HISTORICAL DOCUMENTS, supra note 5, at 395. William III's 1689 Act of Toleration began with "some ease to scrupulous consciences in the exercise of religion may be an effectual means to unite their Majesties' Protestant subjects." Id. at 400.
31. See J. MILLER, supra note 13, at 228.
32. The Edict of Fontainebleau, issued by Louis XIV in October, 1685, revoked the Edict of Nants which promised toleration to the French Protestants. The Edict of Nants was intended to be irrevocable. Thus, the revocation by a monarch sworn to its maintenance shocked English Protestants who wondered if they could take a sworn Catholic monarch at his word. See J. KENYON, STUART ENGLAND 234 (1978); R. Thomas, Comprehension and Indulgence, in FROM UNIFORMITY TO UNITY 232 (1962). John Miller suggests that "[m]emories of the reign of Queen Mary and the present experience of that of Louis XIV combined to give a frightening picture of the behaviour of Papists in power towards their Protestant subjects." J. MILLER, supra note 13, at 1.
not unlikely that another would fail to keep his word. But James' failure to achieve national and Parliamentary approval of toleration was also due to his own stubbornness and his failure to take account of political reality. James continued a program of placing Roman Catholic supporters into important ministerial and military positions; he attempted to force Magdalen College, Oxford to elect a Roman Catholic president; and he prosecuted "the Seven Bishops" despite an inevitable political backlash. By forcing Catholics into the positions of power traditionally reserved for the Anglican elite James turned the Anglican majority, a power base necessary for any political action, against himself and his policies.

James' attempts to comprehend Catholics within English society and politics were enough in themselves to have alienated Protestant England almost entirely. However, James did not end his campaign for Catholic power there. In 1687 James declared a general indulgence for all those not belonging to the Church of England. This Declaration of Indulgence, and the support from the Protestant dissenters that it brought to the crown, fractured the English Protestant community and had the potential to lead to political turmoil. William had to repair this split between Protestant dissenters and Anglicans, or at least paper it over for his kingship to succeed. Not only did the rhetoric of a "Protestant saviour of a Protestant country" demand that William restore the unity of his Protestant subjects for reasons of royal image, but William also needed the resources of a unified country to prosecute a successful war in Ireland.

B. William III and His Act of Toleration

The motives and purposes of those who supported the 1689 Act of Toleration must have been mixed. Doubtless some supporters of the Act, both inside and outside of Parliament, were concerned with the spiritual, rather than the political, meanings and consequences of toleration. These men may have supported William's Act believing that some measure of religious toleration was better than none at all, or hoping that this Act would be a first step toward more complete religious toleration. However, William's aims for and uses of an Act of Toleration must have been

33. See J. Miller, supra note 13, at 218-28.
34. James intended to expand and remodel his army to increase the "proportion of catholic officers, which had been less than twelve percent in 1687." J. Jones, supra note 8, at 247.
35. See Magdalen College and King James II, in Oxford Historical Society 6 (J. Bloxam ed. 1886).
36. The Seven Bishops were Anglican Bishops who had refused to read James' Declaration of Indulgence from their pulpits. See J. Jones, supra note 8, at 239-40.
37. The 1687 Declaration appealed to Protestant Dissenters who had been politically disenfranchised since the Restoration. See J. Miller, supra note 8, at 272-73.
38. See H. Horwitz, supra note 8, at 27-28.
grounded in a desire to stabilize the country and his kingship, to achieve a national Protestant unity.

Early in the Convention of 1689, an assembly William called together in place of the disbanded Parliament, William addressed both houses of the former Parliament on the question of religious tests for office. He emphasized the necessity of restoring the government to a state of normalcy as soon as possible: "I am with all the expedition I can, filling up the vacancies that are in Offices and Places of trust, by this Revolution." In the same address, he stressed the importance of Protestant unification to the political health of England, urging Parliament to "leave room for the Admission of all Protestants that are willing and able to serve. This conjunction in my service, will tend to the better uniting you among yourselves, and the strengthening you against your common adversaries." William spoke in explicitly political language while dealing with an explicitly religious subject. He did not suggest any concern for the spiritual lives and consciences of his subjects in his objection to a narrow religious test, but rather, the political health and stability of his nation.

In urging that the new religious test for office be broad enough to allow Protestant dissenters to take office, William undoubtedly aimed at garnering the support of the large dissenting population of Protestants that had been barred from office for almost thirty years. Not unimportantly, he must also have been intending to make room in the new government for his Dutch supporters. While William made his desire for toleration clear to Parliament, he was also careful to distinguish himself from his Catholic father-in-law, James II. He assured Parliament, "I doubt not but you will sufficiently provide against Papists" before asking them to reconsider the place of Protestant dissenters in English government. Here William allowed a glimpse of the political purposes behind the later Act of Toleration, purposes that were obscured by the subsequent popularization of the Act in religious terms. In this address William urged neither the comprehension of Protestant dissenters into the Church of England nor the suspension of the penal laws that encumbered them. He simply asked that they be allowed to participate in government.

40. Id.
41. The 1673 Test Act would have barred all of William's Dutch favorites from holding office. 8 ENGLISH HISTORICAL DOCUMENTS, supra note 5, at 390-91. The 1678 Test Act would have prevented those Dutchmen whom William had granted noble status from taking their seats in the House of Lords unless they were willing to take an oath subscribing to the Anglican church. Id. at 391-94. William's Act of Toleration, however, allowed these men to take office to support the new king's government while remaining outside the Church of England. Id.
42. THE PARLIAMENTARY DEBATES, supra note 39, at 184.
43. Id.
William was not the only political actor to have seen the advantages of a limited form of toleration in 1689. The Earl of Nottingham also understood its political benefits; he hoped that a limited toleration "would reunite Anglicans and moderate Dissenters and so prevent any future attempts to divide the 'Protestant interest' in England as both Charles II and James II had sought to do." John Hampden, chairman of the Select Committee on the Bill for Comprehension, likewise saw the useful effects of political unification through religious toleration. He urged that the political benefits of toleration not be undermined by limiting the Act to a period of seven years, because such a limit would trouble Protestant dissenters and damage the sense of Protestant community. Hampden might also have been worried that the political purpose behind the Act would have been too blatant were it limited to such a short term of years.

The Act of Toleration enabled William to unite English Protestants behind his throne because it appeased both Protestant dissenters and the Anglican majority. The 1689 Act of Toleration admitted Protestant dissenters into the political arena from which they had been virtually excluded since the Restoration of 1660 while their admission was restricted enough not to alarm Anglicans. The Act of Toleration addressed the role of dissenting Protestants in the English government after the Revolution Settlement of 1689; however, it is also important that it addressed the standing of dissenting Protestants in the English religious community.

It is not clear from either its language or its history whether the Act's concessions to freedom of worship were included to render its political nature more palatable or because there were some members of the Convention who hoped to use the Act as a step toward a more complete toleration. Here the strands of political and religious motive are closely intertwined and difficult to separate. This intertwining of motives may be interesting to the legal historian seeking the intent of the framers; however, it may not have been so important to seventeenth-century Protestant dissenters. What was important to dissenting Protestants, and what created a sense of unity in 1689, was that Protestant dissenters were allowed to hold political office and to attend religious services at a church other than the Church of England. It is true that the scope of the Act of Toleration was clearly

44. H. Horwitz, supra note 8, at 24.
45. See The Parliamentary Debates, supra note 39, at 266.
46. Dissenters were excluded from holding offices in corporations by the Corporation Act (1661). The Stuart Constitution, supra note 7, at 351. The Uniformity Act (1662) required ministers to adhere to Anglican rituals and the Book of Common Prayer. Id. at 353-56. The Test Act of 1673 required all office holders to take sacrament in the Anglican Church. Id. at 385-86. The Test Act of 1678 required all members of Parliament to take sacrament in the Anglican Church. Id. at 386-87.
47. See 8 English Historical Documents, supra note 5, at 400-03.
48. Id.
limited to Trinitarian Protestants, perhaps to avoid the tensions created by the broader attempts of Charles II and James II, or perhaps because William had no personal or political interest in extending toleration to other groups.49 Yet, the Act swept broadly enough to include in the new political community the unpopular—but influential—Baptists and Quakers.50

William maintained the vital support of the Anglican majority because the Act of Toleration granted toleration of only a very narrow scope. The official title of the 1689 Act reveals its limited nature: "An Act for Exempting Their Majesties' Protestant Subjects Dissenting from the Church of England from the Penalties of Certain Laws."51 Clearly, the Act was not intended to extend unlimited religious liberty to all Englishmen. The Act applied only to dissenting Protestants, and only exempted those men from the penalties of the Clarendon Code—significantly it did not repeal those penal laws.52 Further, the Act extended only to Trinitarian Protestants willing to take the oaths required by an "Act for removing and preventing all questions and disputes concerning the assembling and sitting of this present Parliament,"53 to subscribe to the declaration in an "Act to prevent papists from sitting in either House of Parliament"54 and who adhered to thirty-six of the thirty-nine Articles of the Anglican Church.55

The High-Churchmen, and the members of the Tory-Anglican establishment, were not interested in granting any kind of true religious liberty to Protestant dissenters, let alone to Roman Catholics, Turks and Jews. The Act of Toleration shows to what extent these men in power were able to preserve the traditional hierarchy while under great pressure from William to soften the requirements for admission into the power structure. As Gordon Schochet noted:

> The Act of Toleration does not represent the triumph of righteous principle over narrow interest. Quite the contrary, it was the result of the continued pursuit of personal gain by members of the Tory-Anglican establishment, by men whose policies of persecution had failed to eliminate the non-conformist menace and who were apparently alarmed by the prospect of having to share status, place, and power with their enemies. Preserving the penal laws—and especially the Test Act—was not an act of defiance or even desperation; it was part of a calculated plan to preserve as much as possible of the traditional society and its distribution of power.56

49. As the Act of Toleration stood, its scope was broad enough to include his Dutch followers.
50. 8 English Historical Documents, supra note 5, at 402-03.
51. Id. at 400.
52. Id. at 400-01.
53. Id. at 401 (emphasis in original).
54. Id. (emphasis in original).
55. Id. at 402.
56. Schochet, supra note 27.
The Act of Toleration succeeded in achieving some measure of political unity and stability precisely because the religious concessions it made were very limited.

Both 1689 and 1789, first and foremost, were moments of political, rather than religious, crisis. Whatever the religious principles and convictions of the framers of the Act of 1689 and the establishment clause, the parties to those acts understood the political importance of the practice of religion, the fact of dissent and the fear of tyranny and absolutism in the spiritual realm. The religious content and the religious rationale of these declarations can best be understood as aspects of political conformity and as responses to the religious fears and fervor in both nations. The language of religious liberty was more appealing and more persuasive than the language of political conformity with its connotations of foreign absolutism. In publicizing "liberty of tender conscience" the framers of the Act of Toleration and of the establishment clause were able to promote political unity without exposing themselves to charges of political coercion.

II. THE ESTABLISHMENT CLAUSE

The establishment clause was framed at a time of political crisis and its purpose was to achieve political unity in a fragile confederation. The framers of the clause intended to achieve such unity by calming fears of religious tyranny conjured by the image of a national church. That image must have been shaped by the history of Anglican persecution of Protestant dissenters in England and, perhaps, by the experience of Protestant dissent under Roman Catholic religious hegemony. Examining this historical experience facilitates an understanding of the origins of the establishment clause.

At first glance, the continuity between the Act of Toleration and the establishment clause may seem tenuous. The two are separated by one hundred years, the Atlantic Ocean and, some would argue, by a gap in political and governmental assumptions. It also is true that there is no evidence to indicate that the framers of the American Bill of Rights looked directly to the Act of Toleration as a model when framing the religion clauses of the first amendment. However, there is no doubt that those present at the Constitutional Convention (1787) and the First Federal Congress (1789) were aware of the whole Revolution Settlement of 1689—especially the English Bill of Rights and the Act of Toleration. Furthermore, the passage of the Act of Toleration in England directly affected

57. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 314 (J. Elliot ed. 1836) [hereinafter ELLIOT'S DEBATES] (Patrick Henry's references to the English Bill of Rights and to the Glorious Revolution); 1 ANNALS OF CONG., supra note 5, at 436 (Madison's references to the English Declaration of Rights in the First Federal Congress on June 8, 1789).
colonial experience, for the laws of England were applied in the colonies, if not with the same force as they were applied in the "Mother Country." 58

Analogies and continuities between 1689 and 1789 can be perceived in other ways as well. In both periods there was a great fear of tyranny and absolutism, and an apprehension that the religious status quo might be upset by a central government with strong policies concerning religion. 60 To discover continuities between these two events is, of course, not to prove that the political nature of one is to be found in the other; but in fact, the Act of Toleration and the establishment clause are also similar in their foundation in political motivation. 61 The framers of the establishment clause spoke in terms as explicitly political as had their English counterparts one hundred years earlier. 62 As in 1689, the language of religious toleration was more appealing than that of political conformity because of the national fear of absolutism in politics and religion.

58. See T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 79 (1986).


60. In 1689 the Anglican majority feared a weakening of the position of their church in England. See H. Horwitz, supra note 8, at 5; J. Miller, supra note 8, at 169-75; J. Miller, supra note 13, at 209-13, 218-28. In 1789 many, both inside and outside of the First Federal Congress, feared that the religious policies in force in their states would be subjugated to the policies of the new central government if not wiped out by a national church. See 3 Elliot's Debates, supra note 57, at 313-14, 317-18; 2 Elliot's Debates, supra note 57, at 399; L. Levy, The Establishment Clause: Religion and the First Amendment 66 (1986).

61. The Act of Toleration and the establishment clause are not unique in the history of toleration policies. As noted before, English declarations of toleration from the Restoration (1660) to the Act of Toleration (1689) were clearly marked with political purpose. See supra note 6 (1660 Declaration of Breda, 1662, 1672 and 1687 Declarations of Indulgence). Another striking example of the pervasiveness of the politics of toleration was to be found in twentieth-century Rumania under its former leader Nicolae Ceausescu. Under Ceausescu, Rumanian Jews were given an unprecedented amount of religious freedom; the freedom to emigrate to Israel. The relationship between Ceausescu and the Rumanian Jews at first glance seems odd, but on closer examination it makes sense, and the politics of toleration become clear. While Rumanian Jews were allowed to emigrate freely to Israel, there was a price—between $2000 and $7000 for every emigrating person. It is thought that Ceausescu kept up to $50 million for himself. In addition to the direct economic benefits, Ceausescu was able to attain most-favored-nation status with the United States because of his toleration of Rumanian Jews. Clearly, political motive lay behind this religious toleration. See N.Y. Times, Jan. 3, 1990, at 6, col. 3.

62. William III began his 1689 Act of Toleration by stating that "some ease to scrupulous consciences in the exercise of religion may be an effectual means to unite their Majesties' Protestant subjects in interest and affection." 8 English Historical Documents, supra note 5, at 400 (emphasis added). In the 1789 congressional debates, Delegate Carroll asserted that the establishment clause "would tend more towards conciliating the minds of the people to the Government than almost any other amendment." 1 Annals of Cong., supra note 5, at 730.
The language of religious freedom enabled the framers of the Bill of Rights to attain their goal of political unity by quieting fears of a powerful national government and of the potential emergence of one national church. To those interested in using the original intent of the framers to inform modern jurisprudence, the explicitly political language used by the framers in their debates in Congress and in the Constitutional Convention must be significant. Madison urged debate on the Bill of Rights in Congress not to create a barrier between church and state but to ensure “that a reunion should take place as soon as possible” between those states that ratified the Constitution and those that did not.

A. Historical Context of the Establishment Clause

The wall of separation that modern Supreme Court doctrine has erected between church and state is consonant neither with the political history surrounding the establishment clause nor with an eighteenth-century understanding of the interaction between the spiritual and the political realms. Political turmoil and constitutional crisis were the backdrop for the framing of the establishment clause, just as they had been for the Act of Toleration. Like William III, the framers of the establishment clause were faced with the task of constructing a constitutional explanation for their new government and unifying their nation behind that new government. The framers of the American Constitution and Bill of Rights were confronted with an even more difficult political enterprise than their English predecessors because the United States had never been a unified nation. It is likely that the political necessity of unification was the driving force behind the establishment clause of the Bill of Rights since, as one member of the First Federal Congress commented, this amendment “would tend more towards conciliating the minds of the people to the Government than almost any other amendment.”

The history of the Confederation immediately after the Revolutionary War is a history of fragmented power and discordant policies. Under the Articles of Confederation the individual states retained independence from the Continental Congress, and at times went so far as to behave as though they were not subject to its power in any way. Not only did states flaunt

63. Certainly there were those in 1789, as there were in 1689, who must have supported the establishment clause for spiritual reasons. However, the reason most frequently stated in the Congress of 1789 for the enacting of the Bill of Rights in general and for the enacting of the establishment clause itself is unification of the country behind the new Constitution. See 1 Annals of Cong., supra note 5, at 431-32, 440-42, 704 (discussing the Bill of Rights generally); id. at 730 (discussing the establishment clause).
64. Id. at 432.
65. Id. at 730 (statement of Daniel Carroll of Maryland).
express provisions of the Articles of Confederation by "making war, providing for armies, laying embargoes, [and] even in some cases carrying on separate diplomatic correspondence and negotiations abroad," but there were also strong sentiments in the early 1780s against a complete union. The smaller states feared being overpowered, and perhaps feared eventual subjugation, by the larger states if a strong union were ever formed in which each state did not remain a "distinct person."

The resistance to political union, which had been present even during the war, became significantly more pronounced after the war had ended. The Continental Congress may have been a powerful policymaker for the whole Confederation while English armies threatened the colonies, but it rapidly lost power in peacetime. By the middle of the 1780s "Congress had virtually ceased trying to govern." It is not surprising that the states, which had so recently gained independence from their "English oppressors," were not eager to surrender it to a strong central government.

With the English threat no longer omnipresent, tensions among the states became more pronounced than their common interests. The records of debates in the Continental Congress during 1787 reveal the tension between large states and small states. There were also tensions between the slave-holding southern states and the northern states which resulted in the "slave compromise" provision of the Constitution in article I, section 9. There were also tensions stemming from the widely varied denominations and religious policies to be found in the original thirteen states. The Anti-Federalists seized upon this tension stemming from religious differences among the states as a powerful tool to block ratification, and played upon it heavily during the ratification debates. The fear of religious subjugation,

67. Id. at 356-57.
68. See id. at 357.
69. Id. Here John Witherspoon, Roger Sherman and Stephen Hopkins were speaking on behalf of the small states against the strong union for which John Adams was arguing. See id.
70. Id. at 359.
71. See id. at 357; 3 Elliot's Debates, supra note 57, at 314-15.
72. See U.S. Const. art. I, § 9, cl. 1. For tensions between the northern and southern states, see 3 Elliot's Debates, supra note 57, at 314-15, 322.
74. Patrick Henry insisted:

These most important human rights [liberty of conscience, liberty of press, trial by jury] are not protected by that section [section nine], which is the only safeguard in the Constitution. My mind will not be quieted till I see something substantial come forth in the shape of a Bill of Rights.

3 Elliot's Debates, supra note 57, at 462. Henry later demanded:

Wherefore is religious liberty not secured? There is many a religious man who knows nothing of argumentative reasoning; there are many of our most
which the Anti-Federalists had stirred, drove the framers of the establishment clause in their aim to achieve support and unity.\textsuperscript{75}

As early as 1783 it was clear to some that strong state governments were no substitute for a strong central government, and it was thus that the Articles of Confederation had failed to produce.\textsuperscript{76} By 1787 the restructuring of the central government was recognized as a project of foremost importance if the newly united colonies were to develop into a single country.\textsuperscript{77} Outside the halls of Congress Thomas Dawes of Massachusetts told listeners that instability in the states would continue ""should our\textit{National Independence} remain deprived of its proper\textit{federal authority}.\textsuperscript{78}"" Repeatedly in the ratification debates, unification, union and unity were touted as the most important goal of the new government and its constitution: Even the Anti-Federalist Patrick Henry stated, ""I have heard no word so often pronounced in this house as [union]. . . I admit that the American Union is dear to every man. I admit that every man, who has three grains of information, must know and think that union is the best of all things.""\textsuperscript{79}

\textbf{B. The Bill of Rights and the Establishment Clause as Tools to Achieve Consensus}

In 1787, consolidation of the disparate states into a strong union was uppermost in the minds of the framers.\textsuperscript{80} The recognition of the vital importance of union by the staunch Anti-Federalist Patrick Henry\textsuperscript{81} makes the contemporary consensus on this point even more striking.

The chances for political unity were threatened by the powerful force of the Anti-Federalists who insisted that the new Constitution would be unacceptable without a Bill of Rights. In the ratification debates, ""Patrick Henry, one of the most dramatic and skillful Anti-Federalists, drew upon his impressive oratorical powers to prey upon the apprehensions aroused by

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\textsuperscript{75.} \textit{See} 1 \textit{Annals of Cong.}, \textit{supra} note 5, at 730.
\textsuperscript{76.} 1. \textit{Wood}, \textit{supra} note 59, at 436.
\textsuperscript{77.} \textit{See} \textit{id.} at 466.
\textsuperscript{78.} \textit{Id.} (emphasis in original).
\textsuperscript{79.} 3 \textit{Elliott's Debates}, \textit{supra} note 57, at 318.
\textsuperscript{80.} \textit{James Wilson of Pennsylvania} went so far as to suggest that ""[t]he very manner of introducing this Constitution, by the recognition of the authority of the people, is said to change the principle of the present Confederation, and to introduce a consolidating and absorbing government."" 2 \textit{Elliott's Debates}, \textit{supra} note 57, at 455 (emphasis in original).
\textsuperscript{81.} \textit{See id.} at 313, 318.
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the omission of specific guarantees, such as that of religious freedom." 82
The work of Anti-Federalists like Henry was effective. By 1789, Federalists, who believed that no Bill of Rights was necessary, "were willing to go along with the idea of a Bill of Rights in order to ease the minds of those who feared the powers of the national government and to neutralize accusations that the Constitution menaced religious freedom." 83

Recognizing that political unification was the "greater consideration" 84 of the framers in 1787 makes it easier to understand that the same desire for unification must have played a role in the framing of the Bill of Rights two years later, despite the opinion of many of the framers that a Bill of Rights was not only unnecessary but dangerous. 85 The refusal of six of the thirteen states to ratify the Constitution without a Bill of Rights should have made it clear to the framers that political consensus could be achieved only by appending a Bill of Rights to the Constitution. 86

The framers of the Bill of Rights were aware of the political utility of their endeavor in 1789. As a whole, they conceived of the Bill of Rights as a tool to promote political consensus. 87 The establishment clause is no exception to that general rule. Delegates to the First Federal Congress (1789) suggested that the proposal for the establishment clause was the most effective way to unify the country behind the new government. 88 James Madison, a staunch opponent of the Bill of Rights in 1787, 89 supported the establishment clause in 1789 because it "had been required by some of the State Conventions" which feared usurpation of state authority over religious matters by the new federal government. 90 Madison's new-found support for

82. T. CURRY, supra note 58, at 194-95.
83. Id.
84. See 3 ELLIOT'S DEBATES, supra note 57, at 313.
85. In 1787, James Wilson asserted that "the truth is, a bill of rights would, as I have mentioned already, have been not only unnecessary, but improper." 2 ELLIOT'S DEBATES, supra note 57, at 453. In 1789, Mr. Sherman stated that he "thought the amendment altogether unnecessary." 1 ANNALS OF CONG., supra note 5, at 730.
86. See L. LEVY, supra note 60, at 66.
87 See 1 ANNALS OF CONG., supra note 5, at 431-32, 439-42, 704, 730. As Thomas Curry points out: "Repeatedly, in his [Madison's] correspondence, as well as in his speeches, he asserted that he sought achievable amendments that would eschew controversy and gain ratification of three-fourths of the states, and that he would oppose any proposal that altered the Constitution." T. CURRY, supra note 58, at 205.
88. See 1 ANNALS OF CONG., supra note 5, at 730. Delegate Carroll stated that "it would tend more toward conciliating the minds of the people to the Government than almost any other amendment." Id.
89. See 3 ELLIOT'S DEBATES, supra note 57, at 330.
90. 1 ANNALS OF CONG., supra note 5, at 730. Madison's argument for the establishment clause runs in full:

Whether the words are necessary or not he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution,
the establishment clause seems to have been based on political utility rather than a conviction that liberty of conscience was in real danger. Delegate Carroll's suggestion that the political utility of the establishment clause secured his support for the clause is striking by itself, but its force is even more apparent when his language is compared with that of his seventeenth century English counterparts. As in 1689 (as well as in 1660, 1662, 1672 and 1687), the politics of toleration in 1789 were the politics of civic unity and social amity.

It would be unfair to the framers of the Bill of Rights to assume, from the three pages of printed debates on the establishment clause which we have inherited, that their only motivation in adding the establishment clause to the Bill of Rights was political utility. There must have been men who supported this amendment out of religious scruple or moral conviction. In the Continental Congress of 1787 these men stood alongside the Anti-Federalists in calling for amendments to the Constitution to better secure liberty of conscience. Delegate Tredwell from New York stated that he wished that "sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing and the laws made under it enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit."

*Id.*

91. See *id.* Leonard Levy also suggests:

Not even Madison himself, dutifully carrying out his pledge to secure amendments, seems to have troubled to do more than was necessary to get something adopted in order to satisfy the popular clamor for a bill of rights and deflate Anti-Federalist charges that the new national government imperiled liberty. L. LEVY, *supra* note 60, at 79.

92. Charles II stated that because there were several "opinions in religion, by which men are engaged in parties and animosities against each other, which, when they shall hereafter unite in a freedom of conversation, will be composed." 8 ENGLISH HISTORICAL DOCUMENTS, *supra* note 5, at 58. James II stated that "we so earnestly desire as to establish our government on such a foundation as may unite them [Englishmen] to us by inclination as well as duty; which we think can be done by no means so effectually as by granting to them the free exercise of their religion." *Id.* at 395. William III stated that "some ease to scrupulous consciences in the exercise of religion may be an effectual means to unite their Majesties' Protestant subjects." *Id.* at 400. Delegate Carroll said that the establishment clause "would tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed." 1 ANNALS OF CONG., *supra* note 5, at 730.

93. The establishment clause did not mark the first time that toleration had been used for political purposes in America. By 1692, Congregationalist Massachusetts had been forced by England to adopt the Act of Toleration. T. CURRY, *supra* note 58, at 79. Cotton Mather's apparent acceptance of this novel situation in his sermon *Optanda* has been termed "mainly a political device [that] proved that New England was theoretically tolerant, but not that it actually tolerated." *Id.* at 84 (quoting historian Perry Miller).

94. See 1 ANNALS OF CONG., *supra* note 5, at 729-33.

over our consciences by a religious establishment—a tyranny of all others most dreadful.\footnote{96} On the related question of religious tests for office, the Reverend Backus from Massachusetts proclaimed his aversion to these tests on spiritual and Scriptural grounds.\footnote{97}

Men with beliefs similar to those of Reverend Backus and Delegate Tredwell did not speak up in 1789 when the amendment of the establishment clause to the Constitution was being debated by their more politically minded colleagues.\footnote{98} It may be assumed, however, that such men were sitting in the halls of Congress, and that they were voting on the proposed amendments. While there is some evidence to indicate that political utility was not the only intent of those framing the establishment clause,\footnote{99} there is nothing to support the modern Court’s assertion that it was the intent of the framers, in 1789, to erect a wall of separation between church and state.\footnote{100} And there is little in the debates of 1787 to support the modern Court’s doctrine.\footnote{101}

With so little evidence pointing to a specifically religious or spiritual intent, it seems foolhardy to discount the clear evidence of political motivation. The framers said they were amending the establishment clause to the Constitution in order to promote political concord, and neither the phrase, nor the idea of, a wall of separation was mentioned.\footnote{102} Unless we turn a blind eye to the words of the framers during the debates on the establishment clause,\footnote{103} we must recognize that political unity played an important role in the original intent behind the clause.

\textbf{C. Toleration, Church and State: A Contemporary Understanding}

The framers of the Bill of Rights did not conceive of the establishment clause devoid of context. The eighteenth-century understanding of toleration and of the proper relation between church and state were a part of that context. As was the case in late seventeenth-century England, the popular

\footnote{96. 2 Elliot's Debates, supra note 57, at 399.}
\footnote{97.  Id. at 148.}
\footnote{98.  See 1 Annals of Cong., supra note 5, at 729-33.}
\footnote{99.  See supra notes 94-98 and accompanying text.}
\footnote{100.  See id.}
\footnote{101.  There are some statements, like one of the Reverend Backus, which, taken out of context, might suggest that the speaker envisioned a wall of separation between church and state. "[N]othing is more evident, both in reason and the Holy Scriptures, than that religion is ever a matter between God and individuals." 2 Elliot's Debates, supra note 57, at 148. However, when these statements are read in their full context there does not seem to be an all encompassing separation of church from state intended. Rather, the speakers seem merely to be setting out areas into which government should not presume to intrude. In the above quote, Reverend Backus was objecting to the suggestion of a religious test for office. He did not end his oration by announcing the necessity of a wall of separation between church and state. See id.}
\footnote{102.  See 1 Annals of Cong., supra note 5, at 729-33.}
\footnote{103.  See id.}
understanding of toleration in eighteenth-century America was distinctly Protestant. While the framers of the establishment clause did not, as had William III, explicitly exclude certain sects from their offer of toleration, it is unlikely that their understanding of the scope of toleration was as expansive as is the modern understanding of the same term. Indeed, it is hardly likely that the modern Court's doctrine prohibiting the advancement of religion over nonreligion would have found much support in 1789. Although there is no direct evidence that the framers intended to exclude atheists from the sweep of the establishment clause, it is improbable that the original intent supports this modern doctrine.

If toleration in eighteenth-century America did not mean what it is generally understood to mean today, it should not be surprising that the eighteenth-century understanding of the relation between church and state was not as it is generally conceived of today. In the Congregationalist colonies of New England it was one of the duties of the magistrate to "protect and promote religion." Indeed, in 1722 John Hancock insisted that magistrates ""have a power of Jurisdiction over Churches, and ought by their Laws to provide for the Worship of God, to root out Heresies, [and] to prevent Schisms and Rents in the Church of God."" The close relation between church and state is also evidenced by the continuation of taxation in support of religion even after the Act of Toleration brought liberty of conscience to the colonies. Further, in 1789 it generally was agreed that designation of days of prayer, Sabbath laws and appointment of chaplains were within the purview of government. If the framers accepted state taxation in support of religion and state control over matters

104. See T. Curry, supra note 58, at 79.
105. The fact that the framers did not feel at liberty to specifically exclude Catholics and non-Trinitarian Protestants from the scope of the religion clauses of the first amendment is not surprising. The framers were faced with uniting a country in which there was a much greater "diversity of opinion and variety of sects" than there had been in England in 1689. 3 Elliot's Debates, supra note 57, at 645.
106. If it were not for the framers' broad and vague wording of the religion clauses of the first amendment the modern scope of toleration could not be as broad as it is. It would not encompass all denominations as well as giving protection to those who choose not to believe at all, but instead it would be a Christian-centered toleration.
108. See T. Curry, supra note 58, at 79. Reverend Moses Dickinson spoke for most of his contemporaries when he asserted that it was ""absurd, to speak of allowing atheists Liberty of Conscience."" Id. Similarly, Cotton Mather insisted that ""no pretence of conscience" could justify living 'without any worship of God, or to Blaspheme and revile his Blessed Name.'"" Id. at 85.
109. Id. at 85.
110. Id.
111. See id. at 89; Lovejoy, supra note 73, at 71-76. It must be kept in mind that while taxation in support of religion was commonplace in the colonies, the framers never intended to extend that power to the federal government. T. Curry, supra note 58, at 216.
112. See T. Curry, supra note 58, at 218-19.
concerning religion, they could not have intended a complete separation of
church from state.

Furthermore, the framers’ actions in 1787 and 1789 belie the assertion
that they intended a complete separation of church from state. While the
Federalists repeatedly asserted that the new government had no power to
regulate, control or organize religion, the mention of “God, Jesus Christ,
the Christian religion, and many other religious references” populate the
pages of the proceedings of the Continental Congress,113 a Congress that
considered funding for an American Bible.114 Congress, then as now, ap-
pointed chaplains for its own Houses and for the armed forces.115 Most
striking of all the examples of the intertwining of church and state in 1789
was the proposal by both Houses of Congress for a day of public thank-
giving and prayer in recognition of “the many signal favors of Almighty
God.”116 This proposal followed immediately after the passage of the Bill
of Rights.117

The framers used toleration outside of its spiritual context to achieve
political consensus;118 however, it is unlikely that they intended to discard
or alter the contemporary understanding of toleration, or of the proper
relationship between church and state. In the eighteenth century the proper
relation between church and state was one of intertwined, rather than
separated, institutions.119 While the framers perceived the role of the federal
government in religious matters as more circumscribed than that of the state
governments,120 there is no doubt that there was some role for the federal
government.121 The context of eighteenth-century meaning and of political
intent casts doubt on the modern Court’s “wall of separation,” unless that
doctrine is founded on something other than original understanding.

III. THE MODERN DOCTRINE

A. Everson v. Board of Education

The Supreme Court’s modern establishment clause doctrine was first
announced in *Everson v. Board of Education.*122 For this Note, *Everson’s*

113. *Id.* at 217
114. *See id.*
115. *See id.* at 218.
116. 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-91, at 197 (L. DePauw
ed. 1972) [hereinafter THE FIRST FEDERAL CONGRESS]; *see id.* at 238.
117  *See T. CURRY, supra* note 58, at 217
118. *See supra* notes 61-64, 80-103 and accompanying text.
119. *See supra* notes 109-117 and accompanying text.
120. *See L. LEVY, supra* note 60, at 65; *T. CURRY, supra* note 58, at 216.
121. *See supra* notes 113-118 and accompanying text.
122. 330 U.S. 1 (1947); *see G. GUNTHER, CONSTITUTIONAL LAW* 1465 (11th ed. 1985). That
importance lies in the fact that its assumptions about original intent and the meaning of the establishment clause have been the basis for all of the Court's subsequent analyses of this provision. The later cases have not questioned the Court's assumption that the framers intended the establishment clause to separate church and state\textsuperscript{123} or that the establishment clause's restrictions apply equally to the states and the federal government.\textsuperscript{124}

The Everson Court states, with no historical analysis, that "the provisions of the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion in religious matters" as had the Virginia Bill for Religious Liberty.\textsuperscript{125} This assertion of "historical fact" is doubtful at best. Although Madison and Jefferson played prominent roles in drafting both the Virginia Bill for Religious Liberty and the Constitution,\textsuperscript{126} it was not Madison who called for the establishment clause.\textsuperscript{127} Further, it is unlikely that the New England states would have supported the establishment clause if it had meant, as the Virginia Bill had,\textsuperscript{128} that states could no longer provide public support for

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  \item there was no real establishment clause litigation before Everson lends support to the notion that the establishment clause was adopted for political purposes rather than out of necessity. See supra notes 61-64, 80-103 and accompanying text. At the very least, the lack of establishment clause litigation for 150 years after the clause's framing suggests that Madison and the Federalists were correct when they insisted that no protection for religion, outside of the original Constitution, was necessary. Id.
  \item It is true that in Lemon v. Kurtzman, 403 U.S. 602 (1971), Chief Justice Burger asserted that we "must recognize that the line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier." Id. at 614. However, even here the Court did not completely dismantle the wall of separation. Chief Justice Burger again sought to temper the rigidity of the "wall of separation" concept in Lynch v. Donnelly, 465 U.S. 668, 672 (1984). Chief Justice Burger cited his language from Lemon and then suggested that in establishment clause cases the Court must "reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that total separation of the two is not possible." Id.
  \item Everson, 330 U.S. at 13.
  \item See T. CuRRY, supra note 58, at 146.
  \item See supra notes 87-93 and accompanying text.
  \item See T. CuRRY, supra note 58, at 146. The Virginia Bill which passed in 1786 "'prohibited any connection between religious belief and officeholding, forbade government to demand that its citizens attend or maintain any religious institution whatsoever, and decreed that any reversal of its provisions would violate the 'natural rights of mankind.'" Id.
religion or maintain an established church. The establishment clause was "aimed at allaying apprehensions on the part of those states that maintained their own establishments of religion." It was not aimed at promoting the modern views of religious liberty espoused by Madison and Jefferson.

The Everson Court went on to delineate the meaning of the establishment clause. What constitutes the source of this meaning for the Court is not clear. The meaning the Court discovers is not found on the face of the establishment clause, nor is the Court's reading obvious from the historical context surrounding its framing. The Court attempts to attribute its definition to the framers by asserting that, "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and State.'" However, Jefferson's "wall of separation" was neither contemporary with the framing of the establishment clause, nor would it have been acceptable to those for whom the establishment clause was crafted. In fact, the Senate Journal entries for September 3, 1789 suggest that the religion clauses were seen simply as a bar against the establishment of a national church and against the preference of one sect by the federal government. The delegates do not seem to have been concerned with erecting an impenetrable wall between church and state, or with eliminating all governmental aid to religion.

Another disturbing aspect of Everson is the Court's application of the establishment clause to the states without explanation or analysis. From

129. See id. at 164, 173, 175, 183, 189.
130. L. Levy, supra note 60, at 76.
131. See supra notes 80-93 and accompanying text.
132. See Everson, 330 U.S. at 15-16. The Court says:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. 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."

Id. (emphasis in original) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).
133. The establishment clause merely says "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.
134. See supra notes 65-80 and accompanying text.
136. Jefferson's letter describing the "wall of separation" was written in 1802, thirteen years after the framing of the establishment clause. See L. Levy, supra note 4, at 7-8.
137. See supra notes 109-21 and accompanying text.
138. See 1 The First Federal Congress, supra note 116, at 151, 166.
139. See Everson, 330 U.S. at 15-16. The Court merely starts its definition of the establishment clause: "Neither a state nor the Federal Government..." Id. at 15 (emphasis added).
the text of the establishment clause, it is clear that this provision was aimed exclusively at limiting federal power. Further, incorporation through the fourteenth amendment seems untenable in light of the historical context of the clause. The first amendment was enacted because it was "required by some of the State Conventions." It was adopted because it "tend[ed] more towards conciliating the minds of the people to the Government than almost any other amendment." The framers were not concerned with protecting individual liberty, but with "allaying apprehensions on the part of those states that maintained their own establishments of religion." Original intent cannot be used to support the incorporation of the establishment clause against the states through the fourteenth amendment.

B. Later Developments

There have been two major developments in the Court's establishment clause doctrine since Everson; however, neither of these developments questioned Everson's analysis of the original intent behind the establishment clause. The first development was the formulation of a standard test for establishment clause cases. This test was first announced fully in Lemon v. Kurtzman. Although Lemon is certainly important to the Supreme Court's analysis of establishment clause cases, its innovations are not important for

140. See U.S. CONST. amend. I. The first words of this amendment are "Congress shall make no law." Id.
141. States continued to designate days of prayer, draft Sabbath laws and appoint chaplains. See T. Curry, supra note 58, at 218-19. Some states even continued to tax in support of religion and maintain an established church after 1789. Id. at 164, 173, 175, 183, 189. Thus, the establishment clause looks more like a protection of states' rights rather than a protection of individual liberty. See Van Alstyne, Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly, 1984 DUKL J. 770, 772-79. It hardly makes sense to apply a federalism amendment against the states.
142. 1 ANNALS OF CONG., supra note 5, at 730.
143. Id.
144. L. LEVY, supra note 60, at 76.
145. Van Alstyne argues that incorporation is acceptable because by the 1830s the last of the state-established churches had disappeared leaving the establishment clause applicable to the states with the passage of the fourteenth amendment in 1868. See Van Alstyne, supra note 141, at 778-79. I agree with Van Alstyne that the establishment clause should be applied to the states; however, that goal cannot be accomplished by incorporation through the fourteenth amendment because the jurisprudence of original intent cannot accommodate the use of an amendment not in existence at the time of the framing. The framers' intent to promote political unity would lose its force if the establishment clause were not applied to the states because of the structure of our society today and the fluidity of state boundaries. Further, it makes sense to apply the establishment clause to the states because the framers' political purpose for not applying this clause to the states no longer exists after fifty years of activist application to the states.
146. 403 U.S. 602 (1971). The Lemon three-pronged test requires: (1) a secular legislative purpose, (2) a principle or primary effect that neither advances nor inhibits religion and (3) the statute must not create excessive government entanglement with religion. Id. at 612-13.
this Note. What is important is that *Lemon* did not question *Everson*'s creation of a "wall of separation" between church and state, nor its assertion that the establishment clause applied to both state and federal government.\footnote{147} In fact, the wall of separation is incorporated into the *Lemon* test through its third prong.\footnote{148}

The other major doctrinal innovation since *Everson* was Justice O’Connor’s development of an alternative establishment clause test in *Lynch v. Donnelly*\footnote{149} Like the *Lemon* test, Justice O’Connor’s test does not question *Everson*'s assumptions about the framers’ intent with respect to the establishment clause.\footnote{150} Because of its acceptance of *Everson*'s "wall of separation" and its application of the establishment clause to the states, Justice O’Connor’s test does not alter this Note’s analysis of modern Court doctrine. Justice O’Connor’s test, like *Lemon*'s, neither takes the framers’ intent into account nor acknowledges that the Court’s establishment clause doctrine is based on something other than the jurisprudence of original intent.\footnote{151}

The politics of toleration have not yet been recognized by the modern Court.\footnote{152} However, in recent establishment clause cases Chief Justice Rehnquist began to acknowledge that the Court’s doctrine is not consistent with the original intent of the framers.\footnote{153} In *Wallace v. Jaffree*, Rehnquist asserted that “unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”\footnote{155} It is clear from the floor debates in 1789, Rehnquist explained, that for Madison and the other delegates “[t]he evil to be aimed at appears to

\footnote{147} See *id*.

\footnote{148} The third prong of the *Lemon* test required that there not be excessive government entanglement with religion. *Id*.

\footnote{149} 465 U.S. 668, 687 (1984) (O’Connor, J., dissenting). Justice O’Connor’s test was first announced in *Lynch* as a clarification of the *Lemon* test. Justice O’Connor asserts that the “purpose prong of the *Lemon* test requires that the government activity have a secular purpose.” *Id* at 690. This she interpreted as meaning that the government not subjectively endorse religion. Justice O’Connor explained that the effect prong of the *Lemon* test means that the government may not be perceived objectively to endorse religion. *Id* at 690-92.

\footnote{150} See *id* at 687-94.

\footnote{151} See *id*.

\footnote{152} See *supra* notes 123-25, 132-38 and accompanying text.


\footnote{154} 472 U.S. 38 (1985).

\footnote{155} *Id* at 92 (Rehnquist, J., dissenting). Rehnquist explained:

Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

*Id*.
have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly. They did not intend to erect a "wall" between church and state.

Chief Justice Rehnquist has moved far from *Everson* toward an interpretation of the establishment clause that comports with the intent of the framers. However, he has stopped short. While Rehnquist recognizes that the framers did not envision a complete separation of church from state, he has not acknowledged the political intent of the framers. And, disappointingly, Rehnquist accepts the application of the establishment clause to the states on the strength of *Everson* without comment.

While Chief Justice Rehnquist is correct to question the "wall of separation," that issue must be balanced against the framers' desire to promote political unity. From the quantity of litigation driven by those who object to prayer in the schools and the use of public funds to support religion, we must conclude that promotion of religion by either state or federal government causes political and social disquiet. Rehnquist's analysis uses the framers' intent to go only halfway through a complete historical—"originalist"—analysis of the establishment clause. The world suggested by Rehnquist's stopping point looks more like Anglican hegemony in Restoration England than like Revolutionary America, let alone America at the close of the twentieth century. Rehnquist's analysis does not take into account the diversity of opinion on spiritual matters in twentieth-century America. Nor does it respond to the danger of social and political dislocation that might be caused if even a non-denominational prayer were to be recited in public school classrooms throughout the country.

The separation of church and state suggested by the early establishment clause decisions, in fact, may be what is demanded by our society today to promote political unity and social amity. However, we must acknowledge the accuracy of Chief Justice Rehnquist's challenge to the idea that strict separation comports with original intent. And in turn, Rehnquist's reconstruction of original intent should be completed by re-emphasizing the political goals and the political context of the establishment clause if a jurisprudence of original intent is to be used at all.

156. *Id.* at 99.
157. Rehnquist explained: The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

*Id.* at 106.
158. *Id.* at 113.
CONCLUSION

The original intent of the framers of the establishment clause may tell us much about what that amendment means and how it should be used. Clearly, the framers did not intend to erect a wall of separation between church and state. Their debates in Congress reveal this as do the historical context of the establishment clause and the eighteenth-century understanding of toleration and the proper relationship between church and state. However, this is only a part of the original intent of the framers, and the other part is as important. The framers not only intended to allow some intertwining of the institutions of church and state, but they also intended to promote political unity and stability and social amity by adding the establishment clause to the Constitution. This aim has been ignored in modern establishment clause jurisprudence. The failure to recognize this aim may cause conservative jurists to use the establishment clause improperly. An incomplete jurisprudence of original intent could be used to institute prayer in the public schools, to use public funds to promote and support religion and promulgate legislation which discriminates between those who adhere to a religious faith and those who do not. These uses would violate the original intent behind the establishment clause for they would create political disunity and social disharmony.

As Professor Daniel Conkle explained in a recent essay, there may be much to recommend some measure of separation of church from state despite the fact that this does not comport with original understanding. Conkle points out that the modern doctrine "respect[s] the religious and irreligious beliefs of individuals. maintain[s] a political community that embraces its members without regard to their religion . . . [and supports] the value of religion itself in American society." However, the Court could promote these values by using a complete historical analysis of the establishment clause. Today, to promote the framers' intent to foster political and social unity, government must continue to allow a full measure of toleration—the prevention of excessive government intrusion into the sphere of religion. As the framers of the Act of Toleration recognized, forced uniformity—such as that attempted by the Clarendon Code—is dangerous. Seventeenth-century Englishmen came to understand that social amity and political conformity could best be achieved by allowing some measure of religious toleration. The religious uniformity threatened by mandatory prayer in the schools is just as dangerous today as the Clarendon Code was in the seventeenth century. The modern Court seems to recognize

160. Id. at 1164.
161. See T. CURRY, supra note 58, at 83.
this in its current non-originalist doctrine; however, the best and most comprehensive judicial response to establishment clause cases rests on the complete historical understanding of original intent.