Constitutional Essay 1 First Draft

Intro

A theory of the Establishment Clause’s original meaning, and that of the 1st Amendment more generally, must precede the critique of Jefferson’s metaphor. Combined analysis of the plain text of the Constitution, the document’s broader structure, and the historical context surrounding its drafting must be the basis for such meaning under the framework of constitutional fidelity. The Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”[[1]](#footnote-1) The first operative clause places some limit on Congress’ ability to pass legislation related to religious organizations, but the nature of this relationship and extent of the limit aren’t obvious. Differing interpretations of the words “respecting” and “establishment” produce alternative conceptions of the clause’s meaning. The language is at best opaque. To echo Justice Burger’s description of the central conundrum, the amendment leaves unclear how to handle laws that near but fall short of establishment, cleverly obscure their intention of establishment, or make only incremental progress towards this goal. [[2]](#footnote-2)

Elsewhere in the Constitution the Framers were more detailed in expressing individual rights and the limits on governmental power, so the vagueness here seems intentional and instructive. Strong, polarizing debate over the exact nature of the relationship between church and state characterized American politics in the period around and following the Constitution’s drafting. [[3]](#footnote-3) In the absence of solid shared belief on this front, the Framers added layers of abstraction and generality to reach language that enough people found agreeable for inclusion. Thus, the text of the 1st Amendment succeeds in blocking the recurrence of the most egregious abuses against religious liberty from recent colonial history – TODO – but lacks clear guidance for the road ahead. The first step in building a “wall of separation” is choosing the dividing line, and the text of the 1st Amendment suggests that even this task proved too difficult.

Widening the scope of analysis to consider the Constitution’s broader structure, the unspecific protections afforded by the Religion Clauses confront expansive descriptions of governmental authority that again don’t square with Jefferson’s metaphor. Article 1 articulates the federal Legislative powers and at times construes them in exceptionally broad terms, specifically in reference to the General Welfare[[4]](#footnote-4) and Necessary and Proper[[5]](#footnote-5) clauses. Some may feel that the visionary statesmanship of the founders is overstated, but surely they could anticipate situations in which the government,

1. 1st Amendment of The United States Constitution, p. 28, para. 85 [↑](#footnote-ref-1)
2. Lemon v. Kurtzman. 403 U.S. 602 (1971), p. 130, para. 5 [↑](#footnote-ref-2)
3. FBI Notes on Jefferson’s Letter to the Danbury Baptists, para. 13-24 [↑](#footnote-ref-3)
4. Article 1, Section 8 of the United States Constitution, p. 23, para. 42 [↑](#footnote-ref-4)
5. Ibid., p. 22, para. 25 [↑](#footnote-ref-5)