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 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 lays out Federal Legislative powers and at times construes them in exceptionally broad terms, specifically with reference to the General Welfare[[4]](#footnote-4) and Necessary and Proper[[5]](#footnote-5) clauses. Surely, the founders could anticipate this leading to situations in which Congress, thinking it’s acting within its Constitutional mandate, enacts a policy that another entity perceives to violate the Establishment clause. Given the breadth of both legislative power and individual religious obligation, such clashes could happen in innumerable unique ways, with the particulars of each case determining its Constitutionality (which we see born out in actual Supreme Court jurisprudence). These competing Constitutional directives don’t square with the “wall of separation” metaphor and point towards a more murky, malleable boundary.

\*\* May choose to edit concluding sentence of above paragraph to talk more about giving future generations/courts discretion. Compare to a wall (if one exists, which should look doubtful by the end) that is repeatedly torn down and reconstructed

Proponents of Jefferson’s analogy will find the strongest evidence for their case in the historical context and debate surrounding the creation of the Establishment Clause. For a century preceding the 1st Amendment’s drafting, the colonies witnessed numerous assaults on religious liberty perpetrated by many different faiths that obtained governing power. Abuses included mandatory attendance and financial support of state-sponsored religious organizations, with punishments including fines, jail, torture, or even death for anyone who didn’t comply or expressed non-belief in their doctrines. [[6]](#footnote-6) This history left early Americans rightfully suspicious of any overlap between the political and ecclesiastical spheres. In response to a Virginia law that veered too near church-state alliance, James Madison wrote “We maintain, therefore, that in matters of Religion no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”[[7]](#footnote-7) He took the bold stance that both religious belief and conduct are protected against governmental intrusion: “The Religion, then, of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it, as these may dictate.” [[8]](#footnote-8) Reading these statements from the author of the Bill of Rights, one may start to agree with Jefferson that the 1st Amendment erects a wall that is high and impregnable.

Other relevant historical evidence, however, shows that the founders tolerated a limited presence of religion in government and vice versa, suggesting their understanding of separation meant something different than it does now. When Congress convened for the first time under the new Constitution, one of its earliest actions was to hire Senate and House chaplains and pay their salaries with public funds. Only days later, the same Congress introduced and approved the Bill of Rights including the Religion Clauses of the 1st Amendment.[[9]](#footnote-9) Add to this track record the longstanding tradition of recognizing religious holidays like Thanksgiving and others.[[10]](#footnote-10) America’s state and federal legislative chambers and courthouses contain countless religious references in the halls, laws, public rituals, and ceremonies the founders instituted and passed down.[[11]](#footnote-11) Certainly, the framers didn’t intend strict and absolute separation between church and state as it would be understood today.

So far in this analysis, their vision for this relationship feels convoluted or even imperceptible, but additional historical context regarding American culture at the time will prove illuminating. Freedom of religious belief and practice was tightly woven into the fabric of early American society, and it fueled feelings of pride and American exceptionalism. One priority in drawing the boundary between church and state was preserving an individual’s right to follow the religion of their conscience with no civic consequences for this choice. This is Jefferson’s primary message in his *Bill for Establishing Religious Freedom,* which historians credit as a precursor and inspiration for the 1st Amendment with much the same meaning.

A secondary goal in defining this separation, more directly related to the Establishment Clause, was ensuring an open market for religion, so to speak, where each faith has equal opportunity to flourish according to its public appeal. New York and Pennsylvania adopted this approach of uncompromising religious tolerance ahead of the pack, and Jefferson admired its idealistic aim and practical success, so he endorsed the same approach for Virginia and the newly constituted country as a whole: “The experiment was new and doubtful when they made it. It has answered beyond conception. They flourish infinitely. Religion is well supported; of various kinds, indeed, but all good enough; all sufficient to preserve peace and order; or if a sect arises, whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors.”[[12]](#footnote-12) Even in creating this religious free market, the framers created a role for government to act as overseer: “That it is time enough for the rightful purposes of civil government, for its offices to interfere when principles break out into overt acts against peace and good order”[[13]](#footnote-13)

Synthesizing all the previous textual and historical analysis will provide a cohesive idea of the 1st Amendment’s original meaning. The framers feared their government could force support for particular religions and constrain an individual’s right to worship the religion of their conscience in both belief and practice. Their main goals in drafting the Religion Clauses was protecting this religious liberty and ensuring no faith was preferred or disfavored over any other. Despite occasionally using strong language describing an absolute separation between church and state, the founders were familiar with some overlap between the two spheres. They even recognized the limited power of government to curtail certain religious practices in special circumstances. The founders wanted to create a society friendly towards religion, but

History shows that early America was a deeply religious society, and the framers felt that spiritual fulfillment would benefit community and government alike.

Founders were strong believers in the positive effects of religion on society and 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)
6. Everson v. Board of Education. 330 U.S. 1 (1947). p. 117, para. 2 [↑](#footnote-ref-6)
7. A Memorial and Remonstrance on Freedom of Conscience, p. 73, para. 4 [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. Town of Greece, N.Y. v. Galloway, 572 U.S. \_\_\_ (2014). p. 4, para. 3 [↑](#footnote-ref-9)
10. FBI Notes on Jefferson’s Letter to the Danbury Baptists [↑](#footnote-ref-10)
11. Zorach v. Clauson. 343 U.S. 306 (1952). p. 126, para. 4 [↑](#footnote-ref-11)
12. Notes on the State of Virginia, p. 71, para. 5 [↑](#footnote-ref-12)
13. A Bill for Establishing Religious Freedom, p. 69, para. 1 [↑](#footnote-ref-13)