God and the Founders

Madison, Washington, and Jefferson

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Introduction

The Founders, Religious Freedom, and the First Amendment's Religion Clauses

First Amendment religion jurisprudence may have reached the height of its incomprehensibility on the last day of the Supreme Court's 2004 term. Faced with two separate cases involving public displays of the Ten Commandments, the Court found postings of the Commandments in Kentucky courthouses unconstitutional but ruled a Ten Commandments monument on the grounds of the Texas state capitol constitutional. In the two cases, the nine justices issued ten separate opinions totaling 140 pages to explain their different positions. With one exception, every opinion included significant claims about the intentions of the Founding Fathers, and Justice Stephen Breyer's opinion – the only one that did not discuss the Founders – cited Tocqueville. Despite their common reliance on history, the ten opinions invoked at least four different tests to determine the outcomes of the cases – the "Lemon" test, prevention of "civic divisiveness" along religious lines, no "endorsement," and no "legal coercion" – a disagreement that reflected the justices' divergent interpretations of the Founders. David Souter, who wrote the majority opinion in the case that struck down the courthouse displays, claimed that the Founders' intentions made state-sponsored postings of the Ten Commandments unconstitutional. Looking at the same history, Antonin Scalia and Clarence Thomas reached the opposite conclusion.

The Court's confusing decisions regarding the Ten Commandments are emblematic of its church-state jurisprudence. For more than sixty years, the Constitution's protection of religious liberty has vexed the judiciary, spawning case law mired in bad history, unpersuasive precedents, and incongruous rulings. The Court's inability to settle church-state questions decisively has led

to confusion about the meaning of the First Amendment and has made church-state relations an enduring theater in the nation's culture war, a battle that flares up with almost every Supreme Court religious liberty decision.

One might have expected that by now the Founders' views would be well understood and the meaning of the Constitution's religion clauses would be decided. The Supreme Court first turned to Jefferson to elucidate the Free Exercise Clause in 1878, and since the landmark Establishment Clause case *Everson v. Board of Education* in 1947, both liberal and conservative jurists have repeatedly appealed to the Founding Fathers to guide church-state jurisprudence.[1] The last three generations of scholarship and constitutional argument, however, have failed to resolve the historical record. If anything, the opposite has happened. Scholars and judges are more divided now than ever on how the Founders intended to protect religious liberty and what they meant by the separation of church and state. Those on the left often claim that the Founders were skeptical deists who sought to erect an impenetrable wall of separation. Their counterparts on the right regularly contend that the Founders were religious men who expected a Christian spirit to infuse American political and public life.

Previous studies have failed because they have been too focused on utilizing the Founders and insufficiently interested in understanding them. In an effort to influence constitutional decision-making, most interpreters have accepted a paradigm established by the Supreme Court's twentieth-century Establishment Clause jurisprudence and, accordingly, have tried to categorize the Founders as either "strict separationists," who would not allow government support of religion, or "nonpreferentialists," who would allow such support on a nondiscriminatory basis. This approach has failed because the leading Founders did not address questions of church and state through the separationist/nonpreferentialist dichotomy. Grafting twentieth-century legal categories onto eighteenth-century texts has led to distortions of the Founders' positions. A methodological assumption of originalist jurisprudence, moreover, has led historical studies astray. Originalism presumes that each provision of the Constitution has one definitive original meaning and that that meaning should govern contemporary constitutional disputes. Its use in church-state jurisprudence has led to the assumption that because each of the religion clauses of the First Amendment must have one original

[1] According to Mark David Hall, between 1878 and 2005, Supreme Court justices made more than 200 different appeals to the Founders in First Amendment religious liberty judicial opinions. See Mark David Hall, "Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religious Clause Cases," *Oregon Law Review* 85, no. 2 (2006): 568.

meaning, the Founders more generally shared a uniform understanding of the proper relationship between church and state. But as this book attempts to demonstrate, the leading Founders disagreed about the meaning of religious freedom and how church and state ought to be separated. Ironically, the use of the Founders in modern legal disputes has created categories of thought and an approach to history that does not and cannot understand the Founders correctly.

This book attempts to set the historical record straight for three of America's leading Founding Fathers: James Madison, George Washington, and Thomas Jefferson. I argue that none of these Founders embraced strict separationism or nonpreferentialism as those positions are typically understood. Moreover, I contend that Madison, Washington, and Jefferson disagreed about the separation of church and state and embraced different understandings of the right to religious liberty. When we let go of the strict separationist/nonpreferentialist dichotomy and abandon the assumption that the Founders shared a uniform understanding of church-state separation, we can start to understand individual Founders more precisely and with greater accuracy.

Before proceeding, let me anticipate two objections to the focus of this study, which may help to clarify this book's scope and purposes. Readers who are primarily concerned with consulting history to adjudicate constitutional jurisprudence – we can call them "originalists" – might discount the importance of Madison, Washington, and Jefferson as individual political thinkers. For most originalists what matters is the original meaning of the Constitution's text, not the political thought of individual Founders.[2] Other readers – let us call them "progressives" – might contend that a concern with the Founders is misguided, especially if the Founders themselves disagreed about church-state matters. Progressives are more interested in settling contemporary disagreements in light of contemporary values. Why attempt to understand admittedly difficult historical records, progressives might ask, if the end result is only to discover that the Founders, too, disagreed about church-state matters?

In partial response to the originalists, let me make clear that this book does not attempt to uncover the original meaning of the First Amendment's

[2] For a discussion of the history and varieties of originalism, see Vasan Kesavan and Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," *Georgetown Law Journal* 91 (2003): 1134 48; Keith E. Whittington, "The New Original ism," *Georgetown Journal of Law and Public Policy* 2 (2004): 599 613; Jonathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore: The Johns Hopkins University Press, 2005).

religion clauses. By articulating Madison's, Washington's, and Jefferson's understandings of religious freedom, I am not claiming that any one of these Founders' individual positions represents the original meaning of the First Amendment. I will address the First Amendment's original meaning in a sequel to this volume.[3] This book does, however, have implications for originalist constitutional arguments. Madison, Washington, and Jefferson have been used by originalists in their attempts to articulate the original meaning of the religion clauses. To the extent that they misinterpret the leading Founders as individuals, originalist legal arguments lie on erroneous historical grounds. And, as already mentioned, originalist scholarship and jurisprudence tend to assume that the leading Founders shared a uniform understanding of the separation of church and state. This book attempts to show that that assumption is mistaken. Because the leading Founders disagreed, no one Founder can be cited to represent "the Founders' position."

A more complete response to the originalists also contains my response to the progressives. Somewhat ironically from the progressive point of view, it involves identifying what I believe to be a deep philosophical problem with the usual defense of originalism. A review of recent books on the subject states the problem succinctly:

> At the end of the day, words in a legal text, without more, cannot carry the philo sophical weight that originalists place upon them. It is one thing to point out, as originalists do most effectively, that such and such a phrase had, and was meant to have, a particular, relatively fixed meaning at the time of its adoption. Persuading others that the identified meaning has, or should have, binding effect in our own day is another argument altogether. Ultimately, that argument must rest on the reaffir mation of the enduring, self evident truths that must undergird the case for limited government, that is, on premises that are not explicitly identified in the constitutional text itself. A true originalism, in short, must look beyond the Constitution to justify the ground of its intellectual authority.[4]

One of the most well-known justifications for originalism was set forth by Attorney General Edwin Meese, who, in 1985 in a series of speeches explaining the Reagan White House's judicial philosophy, defended originalism in

[3] For initial statements of my interpretations of the original meanings of the First Amendment's religion clauses, see: Vincent Phillip Muñoz, "The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation," *University of Pennsylvania Journal of Constitutional Law* 8, no. 4 (2006): 585 639; Vincent Phillip Muñoz, "The Original Mean ing of the Free Exercise Clause: The Evidence From the First Congress," *Harvard Journal of Law and Public Policy* 31, no. 3 (2008): 1083 1120.

[4] Michael Uhlmann, "The Supreme Court v. the Constitution of the United States of America," *Claremont Review of Books* 6, no. 3 (Summer 2006): 37.

terms of democratic willfulness. "[B]elief in a Jurisprudence of Original Intention," Meese said, reflects "a deeply rooted commitment to the idea of democracy. . . . The Constitution is the fundamental will of the people; that is why it is the fundamental law."[5] In Meese's view, what justifies originalism and the use of the Founders' political theory for constitutional jurisprudence is the historical fact that the Constitution and Bill of Rights were willed by the American people. But, of course, only a fraction of the American people actually voted to ratify those documents, and no American living today has cast such a vote. If the will of the American people is the primary basis for constitutional authority, then it would seem that the will of contemporary democratic majorities ought to govern our fundamental law. In the name of democracy, Meese's position binds the living by the votes of the dead, which is an odd understanding of democracy to say the least.[6]

Whatever its merits, Meese's view is insufficient. The Constitution may have legal authority because it was originally willed by the people, but its contemporary moral authority cannot rest on those grounds alone. If the Founders' constitutionalism is worthy of respect today, it is because the rules it establishes and the rights it protects embody fundamental principles of justice, not because a powerful elite voted for the Constitution more than 200 years ago. The Founders' ideas should govern us today only to the extent that they are persuasive. To determine the extent to which their political theories are rationally defensible, we must attempt to understand them and the arguments that the Founders set forth in their defense.

Progressives discount such efforts because they believe history itself is progressive, making old ideas obsolete. The progressive position concludes the inquiry without having made it. The Founders may, in fact, be outdated, but to reach that conclusion we have to understand their arguments and explain why they are wrong or why they are no longer relevant. My response to the progressives is thus the same as my response to the originalists: Whether we are to follow the Founders (as originalists assume we should) or to dismiss them (as progressives assume we should), we have to

[5] Edwin Meese, speech before the American Bar Association, July 9, 1985, in *The Great Debate: Interpreting Our Written Constitution* (Washington, DC: The Federalist Society, 1986), 9.

[6] For different criticisms of Meese's position, see: William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," in *Interpreting the Constitution: The Debate Over Original Intent*, ed. Jack Rakove (Boston: Northeastern University Press, 1990), 23–34; Harry V. Jaffa, *Original Intent and the Framers of the Constitution* (Washington, DC: Regnery Gateway, 1994), 55–73. For a more recent defense of originalism, see Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999).

understand the Founders and judge the merits of their ideas. This book attempts to undertake that project for the church-state political philosophies of James Madison, George Washington, and Thomas Jefferson.

On the topic of religious liberty, the leading Founders also deserve our attention for another related reason. Around the same time that Thomas Jefferson wrote the "self-evident" truths of the Declaration of Independence, a young James Madison rewrote the religious freedom provision of the Virginia Declaration of Rights. George Mason's initial draft of the Virginia bill of rights had declared, "all Men should enjoy the fullest Toleration in the Exercise of Religion." Madison thought the language of "toleration" was inappropriate for citizens, who possessed rights by nature. He proposed instead, "all men are equally entitled to the full and free exercise of [religion]." In amended form, Madison's language would eventually appear in Article XVI of the 1776 Virginia Declaration of Rights and in the First Amendment of the United States Constitution. Perhaps thinking of Madison's revision of Mason's draft, George Washington wrote to a Jewish congregation a decade later, "It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights. . . ."[7]

Jefferson, Madison, and Washington did not believe that individuals possessed the right to religious liberty because it was willed by a democratic majority. Whatever their differences about church and state, all three Founders understood religious liberty to involve natural rights and, therefore, necessarily to limit the will of any just majority. We still use the language of rights today, but the idea of "natural rights" no longer holds much currency in America's law schools or among most contemporary political theorists. Whether the right to religious liberty can be defended persuasively without recurring to natural rights, however, is at least an open question and perhaps doubtful.

That partisans of liberal democracy need to articulate a defense of religious liberty is not in question or doubtful. In the first days of the twenty-first century, the world witnessed unspeakable acts of violence committed in the name of religion. As I write this, the United States is engaged in a costly war to bring freedom, including some forms of religious freedom, to a part of the world that has never embraced it. It would be naïve to think that arguments alone can win wars or deter those who would kill in the

[7] George Washington to the Hebrew Congregation in Newport, Rhode Island, August 18, 1790, *Papers of George Washington*, Presidential Series, ed. Mark A. Mastromarino (Charlottesville: University Press of Virginia, 1996), 6:285.

name of God. But if we wish to distinguish waging war in the name of freedom from terrorist acts committed out of religious fanaticism, we must be able to give an account of the freedoms that liberal democracies cherish and seek to spread. We must be able to explain why religious freedom is good and why it involves rights that belong to all individuals. Merely holding it as one of "our fundamental values" will never be persuasive to those who hold different values than we do, nor will it sustain the type of commitment and sacrifice needed to preserve freedom for ourselves or to secure it for others.

When the American Founders attempted to defend religious freedom, they turned to natural rights arguments.[8] Even if it is intellectually unfashionable, that path remains open to us today. We might consider traveling it not only because individuals actually may possess rights to religious freedom by nature but also because the idea of natural rights has profoundly aided the cause of human freedom. It is said that ideas have consequences, but for any idea to have consequences it must be articulated and understood. In American history, no three men did more to articulate and to constitutionally protect the natural right to religious freedom than Madison, Washington, and Jefferson. Their individual political thoughts and deeds may not reflect the original meaning of the First Amendment's religion clauses, but they help to illuminate the meaning of the right that the First Amendment seeks to protect. This study turns to Madison, Washington, and Jefferson because in coming to understand what they thought, what they did, and how they disagreed, we can think more clearly and more deeply about what it might mean for individuals to possess a natural right to religious liberty and how that right can be constitutionally protected.

PLAN OF THE WORK

This book contends that if any of the Founders are to be consulted to guide contemporary church-state questions, it should be because of the profundity of their thought, not because of their status as the Constitution's authors. The book argues that Madison, Washington, and Jefferson disagreed about the proper relationship between church and state. While each of these Founders believed that religious freedom included natural rights, they

[8] For a general discussion of the place of natural rights in the Founders' political theory, including the relationship between the Founders' political theory and Protestantism, see Michael P. Zuckert, *The Natural Rights Republic* (Notre Dame, IN: University of Notre Dame Press, 1996).

disagreed about what those rights consisted of and how they ought to be protected constitutionally. Part I consists of three chapters that explore, respectively, James Madison's, George Washington's, and Thomas Jefferson's different understandings of the right to religious freedom. Madison and Jefferson are selected for study because of their Herculean efforts to establish religious freedom in Virginia and in America. Washington is considered because he embodies the leading alternative to Madison and Jefferson. Others might have been discussed to reflect this alternative position – John Adams, for example – but as the first president, Washington established many of the constitutional precedents that individuals like Adams followed. Since Madison, Washington, and Jefferson understood the meaning of religious freedom differently, Chapters 1, 2, and 3 place particular emphasis on how each Founder defended religious freedom as a natural right. These chapters also attempt to explain how the Founders' different understandings of the right lead to their different positions on the proper relationship between church and state.

Part II of this work applies the Founders' positions to leading church-state constitutional issues. Chapter 4 attempts to extrapolate legal doctrines from the church-state philosophies of each Founder. Chapters 5 and 6 then apply those doctrines to modern church-state constitutional law. Rather than use hypothetical issues or facts, I attempt to explain how the Founders' different positions would have adjudicated actual cases that have come before the Supreme Court. Chapter 5 applies the Founders' doctrines to nineteen different Establishment Clause cases. Chapter 6 applies the Founders' doctrines to sixteen different Free Exercise Clause cases. The use of actual case law helps to clarify the Founders' different positions and reveals how and when Madison, Washington, and Jefferson agreed and disagreed.

The book concludes by comparing the Founders' different jurisprudential results with those reached by the Supreme Court and with the votes of a select group of Supreme Court justices who have been particularly influential on church-state questions. The concluding chapter also contains my evaluation of the strengths and weaknesses of each Founder's doctrine and a brief proposal as to how the Founders might best be employed to help guide contemporary church-state jurisprudence.

4

Madison's, Washington's, and Jefferson's Church-State Doctrines

The preceding three chapters attempted to articulate the different church-state political philosophies of James Madison, George Washington, and Thomas Jefferson. The next three chapters translate these philosophies into judicial doctrines and then apply those doctrines to leading church-state constitutional questions. Applying the Founders' approaches to legal cases helps to clarify their positions by showing how they might resolve specific constitutional questions. It also reveals how and when these leading Founders agree and disagree, which, in turn, can help us determine the degree to which their ideas remain relevant and persuasive today. This chapter attempts to deduce legal doctrines from each Founder. Chapters 5 and 6 apply those doctrines to Establishment Clause and Free Exercise Clause constitutional controversies, respectively.

THE FOUNDERS' CHURCH-STATE DOCTRINES

To apply the Founders' ideas to church-state constitutional controversies requires that their political theories be translated into legal doctrines. As constitutional scholar Keith E. Whittington states, "In order for the [Constitution's] text to serve as law, it must be rulelike."[1] The most useful judicial rules are sufficiently abstract to cover a multitude of similar

[1] Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999), 6. In full, the passage from which the quotation is taken is as follows:

> In order for the [Constitution's] text to serve as law, it must be rulelike. In order to be a governing rule, it must possess a certain specificity in order to connect it to a given situation.

situations yet specific enough to indicate a decision in a given case. Without requisite specificity and sufficient abstraction, those who interpret the Constitution are left without a standard or too vague of a standard to apply to a given set of circumstances. This necessarily increases the interpreter's discretion – which, for the judiciary, may or may not be attractive, depending on one's conception of the judicial role – but a corollary of increased discretion is decreased guidance by the rule that purportedly governs the case.

An overly simplified example might help to illustrate this point. The rule, "the state must safeguard religious liberty," accurately captures the intentions of Madison, Washington, and Jefferson. Its vagueness, however, makes the rule almost meaningless when applied to any specific case. Does a nonsectarian prayer in a public school violate religious liberty? Without further clarification of what Madison, Washington, or Jefferson meant by "safeguard religious liberty," it is impossible to determine. To resolve the case, a judge would have to introduce a secondary rule to specify what "safeguarding religious liberty" means, and this secondary rule – and not necessarily the position of any of the Founders – effectively would determine whether prayer in public school violated religious liberty. For any of the Founders' approaches to determine actual judicial decision-making, their political philosophies must be translated into judicial doctrines that can cover a multitude of different situations yet be specific enough to indicate an actual decision for a given set of circumstances.

This requirement demands the following caveat be mentioned. The application of general principles to a specific set of facts requires interpretive judgments. In what follows, I have attempted to be as transparent as possible when I have made such judgments either to translate the Founders' political philosophies into judicial doctrines or to apply those doctrines to the facts of a specific case. I attempt to render as accurately as possible how the Madisonian, Washingtonian, and Jeffersonian approaches would adjudicate the cases discussed in Chapters 5 and 6. With regard to Washington and Jefferson in particular, both the translation of their political philosophies to

Further, it must indicate a decision with a fair degree of certainty. Such certainty and specificity need not be absolute, but the law does need to provide determinate and dichoto mous answers to questions of legal authority. In order for the Constitution to be legally binding, judges must be able to determine that a given action either is or is not allowed by its terms. Similarly, the Constitution is binding only to the extent that judges do not have discretion in its application. Although the application of the law may require controversial judgments, the law nonetheless imposes obligations on the judge that are reflected in the vindication of the legal entitlements of one party or another. For the Constitution to serve this purpose, it must be elaborated as a series of doctrines, formulas, or tests.

requisitely specific judicial doctrines and the application of those doctrines to the facts of specific cases is more of an art than a science.

The Madisonian Approach

Madison offers a straightforward approach to church-state constitutional questions. Madison argued that the nature of religious beliefs and duties makes their exercise an "unalienable" natural right and, therefore, that religion must remain beyond the state's cognizance. A Madisonian approach to the First Amendment, accordingly, would require the state to remain noncognizant of religion. The government could not use religion as a basis for classifying citizens. Religion as such could not be the cause of state action, be the subject of criminal sanctions or government regulations, or be used to determine eligibility for governmental benefits. To borrow from contemporary civil rights discourse, the Madisonian position would require the state to remain "religion blind." Madison's doctrine can be stated as follows:

The Madisonian Doctrine:

Government must remain noncognizant of religion as such and of the religious beliefs and affiliation of individual citizens.

The Washingtonian Approach

A Washingtonian approach to church and state constitutional questions would focus on the purposes or ends of state action. Washington held that the state could support or burden religion as long as it did so in light of a legitimate civic interest. He thought good citizenship to be a fundamental civic interest, and he believed religion to be an essential aid in developing the moral character on which good citizenship depended. The Washingtonian approach, therefore, would allow the state to endorse and to financially support religion as a means to encourage good citizenship or to advance legitimate civic interests.

Because Washington premised government support on a religion's support of legitimate civic interest, Washingtonianism would not require the state to support all religions equally. Those religions that failed to support good citizenship or other legitimate civic interests would not need to be treated equally to those that did. The Washingtonian approach also would allow the state to impose civic obligations on religious individuals even if

those obligations conflicted with perceived religious tenets. Religious individuals could be relieved of such burden by legislative or executive accommodations – in his letter to the Quakers, Washington expresses that this was his "wish and desire" – but Washingtonianism would not recognize such accommodations as part of the right to religious freedom. As long as the state remained within the sphere of legitimate civic action, it would not have a constitutional duty to recognize or tolerate religiously based claims for exemptions from burdensome laws. The Washingtonian approach would hold that, within the realm of legitimate civic interests, state authority trumps perceived religious obligations.

As a judicial doctrine, Washingtonianism usually would defer to legislative determinations of civic interests, but it would not hold that any civic interest asserted by the legislature actually is legitimate. Washington declared that every man is "accountable to God alone for his religious opinions" and that men "remain responsible only to their Maker for the Religion, or modes of faith, which they may prefer or profess."[2] As discussed in Chapter 2, Washington understood the right of religious freedom to protect individuals from compulsion to practice a mode of faith in which they do not believe. His position also would prohibit the state from judging, evaluating, or being concerned with the truth or falsity of religious opinions and religious practices as such. State actors could not attempt to lead citizens to adopt religious beliefs or practices because the state thought them to be religiously true. Washington's position, similarly, denies the legitimacy of state discouragement of religion as such. Governmental aid or hindrance of religion would only be permissible in light of a legitimate civic interest, which means aid to religion or burdens on religion could never be the sole purpose of state action.

The civic interest that animates a given policy might also determine the degree of permissible sectarianism under the Washingtonian approach. Washington aimed to minimize the tension between governmental policies that supported religion and individuals' own religious professions. If the state used religion to further civic purposes, he wanted the state to support all the religions that furthered that civic purpose. His official public actions in support of religion reveal how he thought state endorsement of religion ought, as much as possible, to be of a general character. We might label this part of Washington's position "ecumenicalism" – government policies

[2] George Washington to the United Baptist Churches of Virginia, May 1789, *Papers of George Washington*, Presidential Series, ed. Dorothy Twohig (Charlottesville: University Press of Virginia, 1987), 2:424. George Washington to the Society of Quakers, October 1789, *Papers of George Washington*, Presidential Series, 4:266.

should be as ecumenical as possible in light of the legitimate civic end being advanced. Washingtonian ecumenicalism would not require the state to treat all religions equally or prohibit state support of specific religions, but it would require that state support be extended as widely as possible in light of the end of the policy in question.

We can set forth Washington's doctrine as follows:

The Washingtonian Doctrine:

1. State action must have a civic purpose.
2. State action may support or burden religion as a means to further that interest, but the state may not compel an individual to practice a religion in which he does not believe. The state may neither seek to discourage religion as such nor judge, evaluate, or be concerned with the truth or falsity of religious opinions and practices as such.
3. State endorsement of religion ought to be as ecumenical as possible in light of the civic purpose being advanced.

The Jeffersonian Approach

Converting Jefferson's approach into a legal doctrine is more complicated than translating Madison's or Washington's approach. If we limited our view to Jefferson's professed philosophical teaching in the Virginia Statute for Religious Freedom, a Jeffersonian approach to church-state constitutional questions would focus on the distinction between acts and opinions and prohibit the state from exercising jurisdiction over the opinions. But for the reasons discussed in Chapter 3, the act-opinion distinction fails to fully capture how Jefferson actually addressed church-state matters. Jefferson aspired to create a society in which clergy and sectarian theological dogmas did not guide human thinking. He wanted individuals to embrace what he considered to be rational religious beliefs – like the existence of a creator god that grants men rights – and to eschew irrational beliefs – such as Jesus' resurrection and the Trinity. Only when society developed to the point where it was free from the influence of sectarian religious dogmas and the mental tyranny that clergy imposed did he believe that the "natural rights" principles articulated in the Virginia Statute could be implemented equally for everyone. The Jeffersonian project to establish religious freedom, accordingly, is an evolving process that requires, first, freedom *from* certain types of religious beliefs and, then, the separation of civil rights and privileges from all religious beliefs.

The developmental nature of Jefferson's project means that it cannot be translated into a judicial doctrine that applies to all individuals equally. It also means that it might yield different results for similar sets of circumstances at different points in time. Context mattered for Jefferson, and the primary contextual consideration was the danger that religious sectarianism posed to society. His changing position on minister exclusions from public office reflects the evolutionary aspect of his thought. As discussed in Chapter 3, Jefferson's 1777 draft of the Virginia Statute asserted that individuals' civil capacities should not be affected by their religious opinions. In his 1783 draft constitution for Virginia, Jefferson sought to exclude religious ministers from eligibility for some political offices. In 1800, Jefferson wrote in a private letter that he had changed his position on minister exclusions because ministers' "measures for reducing them to the footing of other callings . . . were effectual."[3] Seventeen years later, however, he once again changed course and proposed to exclude clergymen from serving as overseeing visitors from public schools. These apparently contradictory policies can be reconciled if they are seen in light of Jefferson's intention to establish a society free of overbearing clerical influence. To the extent that clerical influence in society was "reduced," he thought clergy could be treated the same as other citizens. But to the extent that their influence posed a danger to society, he thought clergy ought to be subject to specific legal disabilities. While the end of reducing clerical influence remained consistent, the means Jefferson employed to achieve that end varied according to circumstances.

A necessary focus on context would seem to make it impossible to identify a single Jeffersonian rule that would be specific enough to determine constitutional decision-making in a variety of different circumstances. "Minimize clerical influence when it is dangerous to society" might be a consistent doctrine, but it is not one that can determine the outcome of specific cases with any regularity or predictability. Its vagueness would make the secondary judgments of those applying the doctrine determinative of the outcome of any given case. However, toward the end of his life, Jefferson described a level of societal and religious development that we can use to mark "sufficient progress" toward overcoming clerical influence from the Jeffersonian point of view. Jefferson predicted a general acceptance of Unitarianism. For him, Unitarianism represented the overcoming of traditional Christian dogmas like the Trinity – that is, irrational religious dogmas.

[3] Thomas Jefferson to Jeremiah Moor, August 14, 1800, in *Papers of Thomas Jefferson,* ed. Barbara Oberg (Princeton, NJ: Princeton University Press, 2005), 32:103.

Jefferson thought a "mature" society was one in which religion was limited to beliefs and practices confirmed by reason alone.

It is not easy to measure with precision the general societal or religious development of a nation. The religious revivals of the nineteenth century and the significant political influence of traditional religious clergy and orthodox religious beliefs throughout the twentieth century, however, suggest that the United States has never reached the point of religious development that Jefferson anticipated to be within a generation of his death.[4] Given the continued political influence of religious clergy and sectarian theological dogmas, a contemporary application of Jefferson's position might view religious freedom as still in the process of being established. Let me acknowledge explicitly that this is an inference from Jefferson's thought, not a necessary conclusion from it. If one concluded that religious clergy and nonrational religious beliefs no longer posed a danger to American society, then a Jeffersonian approach would focus on the impropriety of government affecting an individual's civil rights on account of religion. But it seems that Americans, by and large, have not accepted Jefferson's religion of reason alone. A contemporary application of his approach to church-state relations, accordingly, might remain particularly cognizant of the potential danger that clerical influence poses to society.

Religious sectarianism might be used to approximate the type of religious belief that Jefferson considered irrational and, thus, prone to clericalism and clerical misuse. Especially in matters of education, but not only in such matters, Jeffersonianism would seek to discourage clerical and sectarian influences on American society. It would not allow the state to advance or to finance through tax dollars sectarian religious opinions or sectarian institutions. Jeffersonian nonsectarianism contrasts with Washingtonian ecumenicalism. Washington thought it permissible for the state to support sectarian religious beliefs, but, at the same time, he wanted to minimize the potential tensions between governmental support of religion and individuals' own religious professions. Jefferson's concern was different. He sought to end state support for nonrational religious creeds. The Jeffersonian approach, thus, would categorically prohibit the kinds of state support of religion that Washingtonianism would allow.

Jeffersonianism, however, would not require that the state take affirmative action against every type of religious expression or all religious

[4] For a discussion of this point, see J. Judd Owen, "The Struggle between 'Religion and Nonreligion': Jefferson, Backus, and the Dissonance of America's Founding Principles," *American Political Science Review* 101, no. 3 (August 2007): 499–501.

institutions. Jefferson sought to free American society only from clerical and irrational religious influences, not from rational religious beliefs that could be politically useful. Under Jeffersonianism, the state could advance and endorse nonsectarian religious ideas and opinions consistent with the Jeffersonian ideal of "rational" Christianity. The approach would not demand governmental neutrality toward all religious beliefs or between religion and irreligion. It would require, instead, that the state act affirmatively against clerical and sectarian religion but allow the state to endorse "rational" religious beliefs that support liberal democratic political principles. For constitutional controversies that do not involve religious clergy, sectarian religious ideas, or sectarian religious institutions, the Jeffersonian approach could recur to the primary principle Jefferson articulated in the Virginia Statute for Religious Freedom: The state may not punish or affect an individual's or an institution's civil rights on account of religious opinions, religious professions, or religious worship (or lack thereof).

This multifaceted approach, which requires different types of analysis for different types of religious beliefs and different classes of individuals and institutions, reflects Jefferson's anticlerical politics, his endorsement of "rational" religion, and his qualified commitment to the natural rights principles articulated in the Virginia Statute. We can summarize the approach with the following two prongs:

The Jeffersonian Doctrine:

1. The state should not advance and may curtail the influence of religious clergy, sectarian religious beliefs, and sectarian religious institutions. No individual shall be compelled to support financially any religious worship, place, or ministry. The state may advance nonsectarian religious ideas and institutions.
2. Excluding individuals and institutions covered by the rule above, the state should not affect an individual's or institution's civil rights on account of religious opinions, religious professions, or religious worship (or lack thereof).

With the Madisonian, Washingtonian, and Jeffersonian legal doctrines articulated, we can attempt to apply these Founders' approaches to the First Amendment's Religion Clauses. The next chapter discusses how Madisonianism, Washingtonianism, and Jeffersonianism would adjudicate the different types of Establishment Clause cases that have come before the Supreme Court. Chapter 6 extends the analysis to Free Exercise Clause cases. As we shall see, in many cases the Founders' church-state political philosophies would lead to different jurisprudential results.