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Richard Albert
Boston College Law School, richard.albert@bc.edu

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Beyond the Conventional Establishment Clause Narrative

Richard Albert*

I. INTRODUCTION

Long departed, the founding fathers nevertheless continue to exert an appreciable influence upon constitutional jurisprudence. They retain a distinctly audible voice in the national discourse, and they remain conclusive authorities in public deliberation. This is so, despite strident calls for an end to the submissive deference afforded them in contemporary America.¹

The enduring practice to rely upon the founders is most prominent in the judiciary. Jurists have long looked to the founders for guidance in elaborating the freedoms and liberties enshrined in the Bill of Rights, particularly the Establishment Clause.² In expounding their Establishment Clause judgments, jurists have commonly invoked the views or actions of the founders as their decisional authority.

Scholars have taken note of this curious feature of American jurisprudence. “Because of the reverence most Americans have for the nation’s founders,” comments one writer, “the nation is generally committed, although sometimes excessively it would seem, to the founders’ intentions. We hang on their words as if they were Scripture.”³ This seems to candidly capture the curious inclination to seek validation from the nation’s colonial forefathers. As another scholar has observed in this re-

* J.D., B.A., Yale University. Email: richard.albert@aya.yale.edu. For invaluable comments and discussion, I am indebted to Akhil Amar, Southmayd Professor of Law, and Boris Bittker, Sterling Professor of Law, both of the Yale Law School. I am also grateful to the Editorial Board of the Seattle University Law Review, particularly to Peter Meyers, Editor in Chief, and Erica Horton, Article Editor, for thoughtful criticisms and helpful suggestions.

1. One scholar, for instance, has argued that “[t]he framers, after all, are dead, and in the contemporary world, their views are neither relevant nor morally binding.” CRAIG R. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION 103 (1978).

2. “Congress shall make no law respecting an establishment of religion . . . .” U.S. CONST. amend. I.

gard, the tendency to refer to the constitutional framers as a short answer to legal questions likely finds its origin in the founders’ time-honored and long-established image as a super-legislature of sorts. “Just as our representatives in Congress have the power to tell us how to act, so do, in a more indirect way, the Framers.” Another insightful thinker has articulated this point quite well with respect to religion: “The Framer’s [sic] model of religion is the most contested because of its legitimating power, the difficulty of uncovering its historical nature and its use to bolster current legal formulas.”

Indeed, jurists unwaveringly turn to the founders to substantiate their Establishment Clause decisions. The founding fathers, in effect, serve as an interpretative compass. But this should not necessarily be so—at least not exclusively. In giving meaning to the Establishment Clause, jurists should also turn to the framers and ratifiers of the Fourteenth Amendment, which was drafted and ratified nearly a full century

6. See discussion infra Part II.
7. U.S. CONST. infra Part II.
after the Establishment Clause and the other amendments that constitute the Bill of Rights. The Fourteenth Amendment transformed the original meaning of the civil protections preserved in the Bill of Rights. In light of the transformative effect of the Fourteenth Amendment, those responsible for its conception and confirmation must be consulted—of course in concert with Jefferson, Madison, and other founding leaders—in order to fully and properly gauge the meaning of the modern Establishment Clause.

A. Conventional Narrative

Akhil Reed Amar, hailed as "the leading liberal constitutional law professor of his generation," has illuminated a peculiar feature of American constitutional jurisprudence. In his sequel to The Bill of Rights As a Constitution, Amar explains that "in the very process of being absorbed into the Fourteenth Amendment, various rights and freedoms of the original Bill [were] subtly but importantly transformed in much the same way the Bill of Rights transformed language it had absorbed from still earlier sources." In a fuller book treatment of the questions he explores in these two articles, Amar eloquently sheds light upon a glaring deficiency in the current discourse on the meaning of the civil rights and liberties shielded under the cover of the Bill of Rights:

The conventional narrative focuses on those present at the Creation—on the hasty oversights and omissions in the last days of a hot summer in Philadelphia; on the centrality of the (absence of a) Bill of Rights in ratification debates; and on the quick repair worked by the First Congress, fixing in place the keystone of the arch of liberty. And we all lived happily ever after.

There is some truth in this stock story so far as it goes, but it doesn’t go far enough. Most dramatically, it ignores the ways in which the Reconstruction generation—not their Founding fathers or grandfa-

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State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.


thers—took a crumbling and somewhat obscure edifice, placed it on a new, high ground, and remade it so that it truly would stand as a temple of liberty and justice for all.11

The conventional narrative would therefore insist upon a narrow reliance on the founding fathers to understand the Bill of Rights. But, as Amar proves in compelling fashion, this conventional story fails to acknowledge the Fourteenth Amendment’s transformation of the Bill of Rights from its federalist roots to its reconstructionist timbre of individual and minority rights.12 Adherence to the conventional narrative results in a jurisprudential myopia that fails to fully appreciate American constitutional history. Instead of appealing exclusively to Madison, among other founding figures, as what Amar calls an “anachronistic trope” to give meaning to the Establishment Clause, those seeking to ascertain its meaning should also canvass the reconstructionist intentions of the principal draftsmen of the Fourteenth Amendment.13

In effectively juxtaposing “the emblematic drafters, poets, and orators of the Creation and the Reconstruction,” Amar concludes that, if his thesis is right (and the scholarly community generally believes it is14), “then many of us are guilty of a kind of curiously selective ancestor worship—one that gives too much credit to James Madison and not enough to John Bingham, that celebrates Thomas Jefferson and Patrick Henry but slights Harriet Beecher Stowe and Frederick Douglass.”15

B. Forsaken Authority

Amar is not alone in giving life to this thesis. Constitutional scholar Kurt Lash has drawn on this Amarian insight to develop a pointed critique of Establishment Clause jurisprudence. In an influential article, Lash suggests that jurists have long mistakenly sought to resolve Establishment Clause disputes by summoning the intentions of the founders as authority, instead of more properly summoning the views, actions, and words of those who drafted and ratified the Fourteenth Amendment.16

12. Id. at 291.
13. Id.
15. AMAR, supra note 11, at 293.
Lash's powerful thesis in this context is that the Fourteenth Amendment imbued the Establishment Clause with significance wholly different from its founding meaning. Specifically, Lash declares the following common assumption to be wide of the mark: "The historical period surrounding the adoption of the original Establishment Clause is directly relevant to determining the intent behind the incorporated Establishment Clause." This assumption is irrevocably flawed, contends Lash in his distinguishing wit, because it "places the Founding cart before the Incorporation horse." He continues, giving careful shape to his metaphor:

Incorporation doctrine assumes that, at some point, the people changed their collective mind about the role of federalism in the protection of individual liberties; what was once left to state discretion is now restricted by the Fourteenth Amendment. But if the people changed their mind about the role of federalism in the promotion of individual liberty, perhaps they also changed their mind about the role of the Establishment Clause.

Lash leaves little doubt that nineteenth century Americans did indeed change their minds about the meaning of the Establishment Clause. And this, he suggests, presents an indisputable reason to question jurists' enduring reliance upon the Establishment Clause views of the founding fathers.

To illustrate this misguided dependence upon the founders, Lash references the seminal Establishment Clause case in American constitutional history: "When the Supreme Court decided Everson v. Board of Education, it did so with citations to James Madison and Thomas Jefferson, not the members of the thirty-ninth Congress." But the Court should have looked to the thirty-ninth Congress, the body responsible for enshrining the revolutionary Fourteenth Amendment. As Lash writes, time did not stop at the founding. The Fourteenth Amendment has bestowed upon the Establishment Clause (or imposed upon the Clause, depending upon one's perspective) a connotation much different from its

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17. ld. at 1088.
18. ld. at 1087–88 (emphasis added).
19. ld.
20. ld.
21. ld. at 1099.
22. ld. at 1085 (referring to Everson v. Bd. of Educ., 330 U.S. 1 (1947)).
24. A number of scholars contend that the Fourteenth Amendment does not incorporate the Establishment Clause. See, e.g., Jonathan P. Brose, In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause, 24 OHIO N.U. L. REV. 1
original founding understanding. To Lash, the result is clear: The meaning of the transformed Establishment Clause is not to be found in the writings of James Madison or Thomas Jefferson. Instead, as Lash tells us in persuasive fashion, authority for interpreting the Establishment Clause more accurately lies in the contemporary understanding of those responsible for drafting and ratifying the Fourteenth Amendment, which forever changed the face of the Establishment Clause.

We may readily perceive two distinguishable elements to Lash’s thesis: (1) Establishment Clause jurisprudence has misguidedly relied only upon the founding fathers as interpretational authority; and (2) Establishment Clause jurisprudence should not forsake those individuals responsible for crafting the Fourteenth Amendment, which has everlastingly amended the original Establishment Clause.

C. Accepting the Invitation

In this piece, I take up the invitation extended by Amar and Lash to consider the views of the fathers of the Fourteenth Amendment on the Establishment Clause. The result takes two principal forms. First, I confirm the initial element of the Lashian thesis—that jurists look to the writings of Madison and Jefferson to the exclusion of the nineteenth century luminaries from whom emerged the transformative Fourteenth Amendment. This is chronicled in Part II, which focuses on Establishment Clause jurisprudence as shaped by the United States Supreme Court.

Specifically, I examine the practice of justices to rely on the founders in reaching their Establishment Clause decisions. In most instances where it has looked to the founding era for guidance, the Supreme Court has most often appealed to the establishment-related views of Thomas Jefferson and James Madison, although the Court has also invoked


26. Id. at 1088.
27. Id.
the "founders" or "framers" as its decisional authority. The Supreme Court has invoked these founding leaders to the exclusion of any similar or even nominal reference to the framers and ratifiers of the Fourteenth Amendment.30

This review of jurisprudence offers a systematic look at every Establishment Clause case to have reached the docket of the United States Supreme Court since 1947. That year is of particular significance, for it marks the incorporation of the Establishment Clause, which the Court articulated in its influential establishment case, *Everson v. Board of Education*.31 Through the intervening years there have been a total of forty-six other cases—forty-seven in total—in which establishment issues constituted the core legal quandary. I pose two questions as I review the Court's opinion in each suit: (1) In contemplating the meaning of the Establishment Clause, does the Court invoke an interpretational authority; and (2) if yes, does the Court brandish as its interpretational authority the founders, to the exclusion of any reference to the intentions of the reconstructionists who breathed new meaning into the Establishment Clause?

Significantly, for each of the forty-seven cases reviewed below, when the answer to the first question is affirmative, the answer to the second is invariably also affirmative. Moreover, when the Court has looked to historical sources to guide its thinking in resolving an establishment dispute, the Court has abidingly turned to Madison or Jefferson, or to the broader "framers" or "founders." The Court has neither consid-

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30. See discussion infra Part II.

ered nor appealed to authorities from the Reconstruction era. This finding is noteworthy, for it substantiates the first element of Lash’s establishment thesis. What is more, this finding reinforces the deficiency of the conventional constitutional narrative and bolsters Amar’s broader, more sweeping observation, from which Lash’s thesis derives. As a final note on this element of this article, the jurisprudence review includes only establishment cases. I do not consider free exercise cases, nor do I consider mixed religious cases.32

The second focus of this piece—which forms the remainder of the text—speaks to the other element of Lash’s thesis, one that overlaps with Amar’s. In order to understand the transformed Establishment Clause, one ought not look exclusively to the writings of James Madison or to those of Thomas Jefferson. Instead, as both Amar and Lash urge, one ought to also turn to the reconstructionists—women and men who were central in giving shape to the Fourteenth Amendment. Only in this way may jurists do away with what Amar calls “selective ancestor worship,”33 the practice of relying entirely, if not excessively, on the founding fathers in constitutional interpretation instead of including such revolutionary figures in American constitutional history as John Bingham, Frederick Douglass, and Harriet Beecher Stowe.

Taking up arms in response to Amar and Lash’s respective calls to action, I endeavor to turn the focus toward a central character in the story that was the Reconstruction: Frederick Douglass. This article will not offer a general biographical survey of his life and times, but will instead focus on Douglass’s views on religion.34 In particular, I will aim to extrapolate from his writings and secondary historical sources any insight that one may reliably draw about his philosophy on the interaction between, and the separation of, matters touching faith, governance, and public life. The two guiding questions for consideration will be the following: (1) What may one conclude about Frederick Douglass’s views on the role of religion in the public square; and (2) with Douglass’s phi-

32. “Mixed” cases are those in which free exercise issues predominate over others, including, for instance, due process questions, equal protection concerns, and establishment issues. HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 300 (6th ed. 1994).
33. AMAR, supra note 11, at 293.
losophy of church and state as the signpost, how could one address contemporary disputes arising under the Establishment Clause?

Thus, in Part III, I will outline three fundamental principles that one may discern from the life and writings of Frederick Douglass. In Part IV, I will review four Supreme Court cases and suggest how the Court could have invoked Douglass to help resolve the establishment disputes on its docket. The final Part will conclude with a few additional thoughts.

II. SELECTIVE ANCESTOR WORSHIP ON THE SUPREME COURT

The forty-seven establishment cases to have ascended to the Supreme Court since incorporation may be divided into three categories. First, those in which Supreme Court justices have invoked Jefferson or Madison, or both, in order to give meaning to the Establishment Clause and to answer the constitutional questions raised before the Court. Second, cases where the Court expounded the scope and design of the Establishment Clause by referring in expansive fashion to the founders, framers, founding fathers, or to early colonial and founding history. Third, cases in which the Court has relied wholly on precedent to resolve the dispute, finding it unnecessary to turn to the founders or history neither to substantiate its ruling nor to develop its understanding of the Establishment Clause. The first and second groups are distinguishable in that the former includes cases in which the Court expressly names Jefferson and Madison as an interpretative authority, whereas the latter consist of cases in which the founding fathers and history in general serve as the Court’s source of reference.

Thus the Supreme Court’s forty-seven establishment cases may be distinguished from one another on the basis of their respective sources of reference: (1) Jefferson and Madison; (2) founding fathers and history; or (3) precedent. Yet each of these cases also shares in common a conspicuous void: no substantive reference to the framers and the ratifiers of the Fourteenth Amendment, and no account of the Amendment’s transformative and enduring imprint upon the Establishment Clause.

A. Group I: Jefferson and Madison As Source of Reference

The Supreme Court’s seminal pronouncement on the Establishment Clause appears in Everson v. Board of Education.35 Everson is significant for a number of reasons, notably the incorporation of the Establishment Clause. But perhaps equally significant as a matter of constitutional

decisionmaking is that the *Everson* Court relied upon the views of Jefferson and Madison to articulate the purpose of the Establishment Clause, thereby establishing the framework for resolving future establishment disputes.

Decided by a vote of five to four, *Everson* upheld a statute that reimbursed parents for the cost of bus transportation to private (including parochial) schools.\(^{36}\) Outlining a thorough revisionist history of the adoption of the Establishment Clause, Justice Black addressed the core question at issue: how to delineate “the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.”\(^{37}\) In assessing the taxpayer’s establishment claim, the Court reviewed the post-colonial period in which the Clause was conceived, discussing the history of religious persecution in the colonies and the compelling impetus for state neutrality at the founding.\(^{38}\) Early Americans, wrote the Court, “reached the conviction that individual religious liberty could be best achieved under a government which was stripped of all power to tax, to support, or otherwise assist any or all religions, or to interfere with the beliefs of any religious individual or group.”\(^{39}\) The experiences of the early Americans in turn led to enshrining the First Amendment, which “requires the state to be a neutral in its relation with groups of religious believers and non-believers.”\(^{40}\)

The Court focused its attention on the views of Jefferson and Madison, noting that these authorities must continue to inform the Court’s interpretation of the Establishment Clause.\(^{41}\) The Court’s review of Jeffersonian and Madisonian thought spans a number of pages,\(^{42}\) coming astonishingly close to declaring that the Court should rule in a particular way only because Jefferson and Madison would have done so. Equally fascinating is that the dissent, too, appealed to the views of Jefferson and Madison.

Noticeably disappointed with the result, the dissent, led by Justice Rutledge, lamented that the test for what constitutes establishment does not remain “undiluted as Jefferson and Madison made it.”\(^{43}\) In Rutledge’s determination, religious education and observances in public schools and

\(^{36}\) *Id.* at 18.
\(^{37}\) *Id.* at 14.
\(^{38}\) *Id.* at 8–15.
\(^{39}\) *Id.* at 11.
\(^{40}\) *Id.* at 18.
\(^{41}\) *Id.* at 13.
\(^{42}\) *Id.* at 11–16.
\(^{43}\) *Id.* at 44.
public funding for private religious schools represented two "avenues [that] were closed by the Constitution."\textsuperscript{44} And, adds Rutledge, because these two important matters were settled long ago at the founding, "[n]either should be opened by this Court."\textsuperscript{45} What is perhaps most extraordinary is that Rutledge invokes the founders as a short answer to the establishment dispute in \textit{Everson}. Nowhere in the Court's decision—including dissenting opinions—does any justice make reference to the reconstructionist transformation of the Fourteenth Amendment, nor to its framers or ratifiers.

The following year, in 1948, the Court was again called upon to speak to the Establishment Clause. Again, the Court leaned on Jefferson and Madison to the virtual exclusion of other authorities. \textit{Illinois ex rel. McCollum v. Board of Education}\textsuperscript{46} concerned the validity of a "released time" program, which allowed public school students whose parents had completed the requisite permission forms to excuse themselves from class in order to attend religious instruction conducted by private instructors. The instructors conducted their sessions in public school buildings during regular school hours. The question at issue was whether a state may use its tax-supported public school system to advance religious instruction.\textsuperscript{47}

On the theory of incorporation, the Court concluded that the program was clearly violative of the American theory of separationism: "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."\textsuperscript{48} To support its conclusion that the "released time" program was unconstitutional, the Court turned to a familiar voice: "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.'"\textsuperscript{49} Nowhere in its opinion did the Court call upon any other historical authority to substantiate this ruling. Rather, the inquiry began and concluded with the founders, with no meaningful inquiry into the Fourteenth Amendment.

\textit{Engel v. Vitale}\textsuperscript{50} is a third case that exemplifies the Court's propensity to turn in blind faith to Jefferson and Madison. In \textit{Engel}, the New York Board of Education directed the district's principal to have all stu-

\begin{itemize}
\item 44. \textit{Id.} at 63.
\item 45. \textit{Id.}
\item 46. 333 U.S. 203 (1948).
\item 47. \textit{Id.} at 204–05.
\item 48. \textit{Id.} at 210.
\item 49. \textit{Id.} at 211 (quoting \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 15–16 (1947)).
\item 50. 370 U.S. 421 (1962).
\end{itemize}
dents recite aloud the following morning prayer in the presence of a teacher: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."51 The State Board of Regents had expressed an inspired hope for its prayer: "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program."52 A number of parents promptly filed suit, claiming that an official prayer in public schools violated the Establishment Clause.

Justice Black invalidated the prayer. He asserted that "[w]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."53 This is the minimum, readers were told, because government imposition of religious prayer is precisely what led early colonists to seek religious refuge in America.54 Resistance to such forms of government intrusion is what prompted the revolution against the Crown, wrote the Court.55 Indeed, explained Black, as his thesis took shape, Jefferson and Madison, who "opposed all religious establishments by law on grounds of principle, obtained the enactment of the famous 'Virginia Bill for Religious Liberty' by which all religious groups were placed on an equal footing so far as the State was concerned."56

The Court, here again, invoked these two founding giants as a short answer to giving meaning to the Establishment Clause. This would not be troubling had the Court also looked to the important historical period of the Reconstruction. But it neglected to do so. Instead, in its last substantive paragraph—having long discarded the possibility of any reference to the Fourteenth Amendment—the Court unveiled its clinching argument as to why the Engel prayer contravened the Establishment Clause: Madison would have thought so.57

Equally instructive in this regard is Lynch v. Donnelly,58 in which residents of Pawtucket filed suit against the city, contending that its annual practice of erecting a Christmas display—which included a Nativity

51. Id. at 422.
52. Id. at 423.
53. Id. at 425.
54. Id.
55. Id. at 428.
56. Id.
57. Id. at 436.
Establishment Clause

scene—violated the Establishment Clause. This local custom had spanned at least forty years. The District Court and the Court of Appeals both sustained the challenge, permanently enjoining Pawtucket from including the crèche in its Christmas display. On review, the Supreme Court reversed, declaring that Pawtucket’s display had not breached the metaphorical wall separating church and state.61

The Court again drew upon history to substantiate its ruling. The Constitution, stated the Court, does not “require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”62 In resolving present-day establishment disputes, the Court’s interpretation of the Establishment Clause must comport “with what history reveals was the contemporaneous understanding of its guarantees.”63 The most important history for the Court, in this regard, must necessarily be the history of the founding:

The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court’s emphasis that the First Congress “was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.64

According to the Court, the founders would have consented to the display, given their employment of congressional chaplains and their declarations of religious faith at Thanksgiving.65

The Court then listed a number of examples that supported the proposition that “there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”66 Executive orders and other official presidential announcements have included religious terms, as have congressional pronouncements and actions.67 Moreover, the national motto “In God We Trust” and the language “One nation under God” in the

60. 691 F.2d 1029 (1st Cir. 1982).
62. Id. at 673.
63. Id.
64. Id. at 674 (quoting Myers v. United States, 272 U.S. 52, 174–75 (1926)).
65. Id. at 674–75.
66. Id. at 674.
67. Id. at 676.
Pledge of Allegiance lay bare the government’s acknowledgement of America’s religious heritage. 68

In addition to its general references to the founders, the Court made specific reference to Madison, whose practice it was to issue religious Thanksgiving proclamations. 69 But as the Court charted the reasons why the display did not violate the Establishment Clause, it did not make mention of the Fourteenth Amendment, neither applying the Amendment to the facts in Lynch nor even contemplating how the Amendment’s framers and ratifiers would have reacted to the display, as the Court had investigated at great length and in remarkable detail with respect to the founders. The Court would have been better advised to also inquire into the meaning of the Establishment Clause in the context of the Reconstruction instead of, as it did, confining its deliberation to the original meaning of the Clause.

Consider also Wallace v. Jaffree, 70 which is particularly helpful in illustrating the extent to which the Supreme Court has steered clear of invoking the framers and ratifiers of the Fourteenth Amendment as Establishment Clause interpretational authorities. The Wallace Court invalidated an Alabama statute authorizing public school teachers to hold a one-minute period of silence for voluntary prayer as clearly violative of the Establishment Clause. 71 Because the statute subjected students to a form of religious indoctrination, reasoned the Court, even if students were free to use this time for either meditation or voluntary prayer, the state conveyed the improper impression of state endorsement of religion in public schools. 72

In this case, Alabama argued that the Clause did not apply to states and that therefore states were not bound by the nonestablishment rule. Having reviewed a number of Court opinions and undertaken historical research into the Establishment Clause, the District Court agreed with Alabama and concluded that the Clause did not impose any barrier to Alabama’s establishment of an official religion. 73 The appellate court reversed the District Court, unequivocally rejecting its view of incorporation. 74

With this opportunity to discuss the Establishment Clause’s equal force of application upon states as upon the federal government, the

68. Id.
69. Id. at 675 n.2.
71. Id. at 60–61.
72. Id. at 59–60.
73. Id. at 45.
74. Id. at 46.
Court, through Justice Stevens, proceeded to review the history of incorporation. The Court listed a number of cases in which the Clause had been applied against states and mentioned the due process notion underpinning the theory of incorporation.\textsuperscript{75} But, significantly, the Court did not cite those individuals who were central to crafting the amendments that made incorporation possible. Moreover, the Court did not describe in any great detail how the reconstructionist vision of a new America changed not only the Constitution in general, but the Establishment Clause in particular. Instead, the Court—in the very passage in which it reviewed incorporation—made reference to Madison’s \textit{Memorial and Remonstrance Against Religious Assessments}.\textsuperscript{76}

In a strong dissent in \textit{Wallace}, Justice Rehnquist concluded that the Establishment Clause serves to prohibit a single federal religion so as not to ally the government with one particular denomination over another.\textsuperscript{77} Rehnquist reached this conclusion by first expounding the history of the Establishment Clause, reciting the events leading to its drafting and also noting the determinative influence of James Madison.\textsuperscript{78} As evidence of Rehnquist’s reliance upon the intentions of the founders to inform his establishment views, consider his opening remarks: “It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”\textsuperscript{79} According to what Rehnquist views as a proper reading of history, the Clause does not “require government neutrality between religion and irreligion nor [does] 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 \textit{Everson}.”\textsuperscript{80} In his textualist and intentionalist dissent, Rehnquist called upon luminaries Jefferson and Madison—but not the framers and ratifiers of the Fourteenth Amendment—to advance his theory of accommodationism.

As a final example of the Supreme Court’s selective ancestor worship, \textit{Lee v. Weisman}\textsuperscript{81} bears mention. In \textit{Lee}, a middle-school principal invited a rabbi to deliver a commencement prayer. A graduating student’s father subsequently sought a permanent injunction prohibiting the

\textsuperscript{75}. \textit{Id}. at 50–55.
\textsuperscript{76}. \textit{Id}. at 53 n.38; 8 PAPERS OF JAMES MADISON, \textit{supra} note 29.
\textsuperscript{77}. \textit{Wallace}, 472 U.S. at 106, 113 (Rehnquist, J., dissenting).
\textsuperscript{78}. \textit{Id}. at 92–108.
\textsuperscript{79}. \textit{Id}. at 92.
\textsuperscript{80}. \textit{Id}. at 106.
\textsuperscript{81}. 505 U.S. 577 (1992).
principal from inviting a member of the clergy to deliver a prayer in future graduation exercises. In affirming the lower court’s grant of the injunction, the Court held that allowing prayer as part of official public school attendance violated the Establishment Clause.\textsuperscript{82}

On behalf of the Court, Justice Kennedy outlined for readers what precisely the First Amendment means. Kennedy turned to Madison, “the principal author of the Bill of Rights,”\textsuperscript{83} and cited his \textit{Memorial and Remonstrance Against Religious Assessments} as his interpretational authority.\textsuperscript{84} In addition, Kennedy appealed to legal scholarship\textsuperscript{85} and social science research to support his ruling.\textsuperscript{86} The Court, through Kennedy, invoked a multitude of sources in interpreting the Establishment Clause, but it did not turn to the framers or ratifiers of the Fourteenth Amendment. In his concurrence, Justice Souter, too, appealed to Madison and the framers.\textsuperscript{87} And, like Kennedy, Souter did not look to the revolutionary framers and ratifiers of the Fourteenth Amendment.

These are but six illustrations of the Supreme Court’s inclination to turn to Jefferson and Madison as a source of reference in elucidating the proper understanding of the Establishment Clause. To be sure, there are several other cases that fall in this first group of establishment cases.\textsuperscript{88}

\textbf{B. Group II: The Founding Fathers and History
As Source of Reference
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This second group of cases numbers roughly the same as those in the first. Whereas the first group consists of instances in which the Court named Jefferson and Madison as its decisional authority, the second

\textsuperscript{82} \textit{Id.} at 598–99.
\textsuperscript{83} \textit{Id.} at 590.
\textsuperscript{84} \textit{Id.}; \textit{8 Papers of James Madison, supra} note 29
\textsuperscript{85} \textit{Lee}, 505 U.S. at 589.
\textsuperscript{86} \textit{Id.} at 593–94.
\textsuperscript{87} \textit{See id.} at 612–16.
group comprises suits in which the founding fathers and history in general serve as the Court’s source of reference.

A typical example is County of Allegheny v. American Civil Liberties Union.\textsuperscript{89} Allegheny concerned the constitutionality of two holiday displays—one was a crèche and the other was an 18-foot Chanukah menorah—placed on public property in Pittsburgh. The local chapter of the ACLU filed an establishment suit seeking a permanent injunction barring the county from displaying these holiday symbols on public property.

The Court ruled that the county, in displaying the crèche, violated the Establishment Clause by endorsing a well-known Christian symbol which communicated a religious message.\textsuperscript{90} The Court had greater difficulty resolving the constitutionality of the menorah. Consider the following passage from the Court’s opinion:

The display of the Chanukah menorah in front of the City-County Building may well present a closer constitutional question. The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah’s message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions. Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. While no challenge has been made here to the display of the tree and the sign, their presence is obviously relevant in determining the effect of the menorah’s display. The necessary result of placing a menorah next to a Christmas tree is to create an ‘overall holiday setting’ that represents both Christmas and Chanukah—two holidays, not one.\textsuperscript{91}

The Court concluded that the crèche display violated the Establishment Clause but that the menorah display did not violate the Clause, “given its particular physical setting.”\textsuperscript{92}

In addition to referring to a number of scholarly publications, the Court took great care to properly define the terms, such as menorah,\textsuperscript{93} Talmud,\textsuperscript{94} and others, used in its opinion.\textsuperscript{95} The Court also discussed the founding historical dominance of the Christian faith, a status that has since evaporated under the weight of pluralism and emergent notions of

\textsuperscript{89} 492 U.S. 573 (1989).
\textsuperscript{90} \textit{Id.} at 598–601.
\textsuperscript{91} \textit{Id.} at 613–14.
\textsuperscript{92} \textit{Id.} at 621 (internal citations omitted).
\textsuperscript{93} \textit{Id.} at 583 n.14.
\textsuperscript{94} \textit{Id.} at 583 n.13.
\textsuperscript{95} \textit{Id.} at 583–87.
religious liberty and equality.\textsuperscript{96} In uncovering for readers the modern meaning of the Establishment Clause, various members of the Court cited early colonial history,\textsuperscript{97} the process of disestablishment during the 1800s in Massachusetts,\textsuperscript{98} and early presidential proclamations.\textsuperscript{99} But none of the justices looked to the Reconstruction or to the framers and ratifiers of the Fourteenth Amendment to inform their discussion of the meaning of the Establishment Clause.

Similarly, \textit{Lemon v. Kurtzman}\textsuperscript{100} may be cataloged in Group II. \textit{Lemon} decided two cases jointly: \textit{Lemon v. Kurtzman}, arising from Pennsylvania,\textsuperscript{101} and \textit{Early v. DiCenso}, from Rhode Island.\textsuperscript{102} Both cases concerned the use of public funds in parochial schools.\textsuperscript{103} Pennsylvania had reimbursed nonpublic elementary and secondary schools for the cost of teachers' salaries, textbooks, and instructional materials.\textsuperscript{104} Rhode Island's comparable statute provided for supplementing by fifteen percent the annual salary of nonpublic elementary school teachers.\textsuperscript{105} The \textit{Lemon} plaintiffs condemned both statutes as unlawful state establishments of religion.\textsuperscript{106} The Court agreed, unveiling what has become known as the \textit{Lemon} test.\textsuperscript{107}

\begin{itemize}
\item \textsuperscript{96} Id. at 589–90.
\item \textsuperscript{97} Id. at 604 n.54.
\item \textsuperscript{98} Id. at 648 n.3 (Stevens, J., concurring in part, dissenting in part).
\item \textsuperscript{99} Id. at 671 (Kennedy, J., concurring in part, dissenting in part).
\item \textsuperscript{100} 403 U.S. 602 (1971).
\item \textsuperscript{101} Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969).
\item \textsuperscript{102} Early v. DiCenso, 316 F. Supp. 112 (D.R.I. 1970).
\item \textsuperscript{103} Lemon, 403 U.S. at 607, 609.
\item \textsuperscript{104} Id. at 609.
\item \textsuperscript{105} Id. at 607.
\item \textsuperscript{106} Id. at 606.
\item \textsuperscript{107} In order to pass constitutional muster under the Court’s three-pronged \textit{Lemon} test, the government action in question must not exhibit any of the following: (1) a religious purpose; (2) a primary effect that either advances or inhibits religion; or (3) an excessive entanglement between government and religion. \textit{Id.} at 612–13. After \textit{Lemon}, the Court revised the test into a two-pronged analysis in \textit{Agostini v. Felton}, 521 U.S. 203 (1997). As a result, the government action in question must neither: (1) exhibit a religious purpose; nor (2) have a primary effect that either advances or inhibits religion. In determining the primary effect of the action, the Court will pose up to four questions to guide its analysis, including whether there exists the potential for political divisiveness and whether the action results in governmental indoctrination, defines recipients by reference to religion, or creates an excessive entanglement. \textit{See id.} at 234–35.

Making his determination on behalf of the Court, Chief Justice Burger invoked the intentions of the authors of the Establishment Clause. In invalidating both statutes, the Chief Justice relied upon the framers who, Burger believed, did not simply prohibit state involvement with a single religion over others but with religion in general. Moreover, the concurrences of Justices Douglas and Brennan admit of a parallel inclination, for they too summoned the views of the framers to substantiate their joining in the Court’s judgment. But no one on the high court looked to the intentions or views of the framers or ratifiers of the Reconstruction era.

A further illustration of the second group comes from Larkin v. Grendel’s Den. In Larkin, a Massachusetts statute authorized schools and churches to veto the issuance of a liquor license to an establishment within a 500-foot radius of the objecting school or church. A church located ten feet from an applicant restaurant registered its objection, and the restaurant was consequently denied permission to serve alcohol on its premises. The restaurant filed suit against Massachusetts, arguing that the statute violated the Establishment Clause.

The Court ruled that the statute clearly breached the terms of the Establishment Clause. A private, nongovernmental entity could not retain such powers as afforded to school or church institutions under the Massachusetts statute in question, explained the Court. This private veto embodied an unmistakably unconstitutional delegation of powers, as it constituted precisely what the Establishment Clause was conceived to


108. Lemon, 403 U.S. at 612.
109. Id. at 628–34.
110. Id. at 642–46.
112. Id. at 117.
113. Id. at 117–18.
114. See id.
115. Id. at 126–27.
116. Id. at 118–23.
prevent: a fusion of state and religious functions. The statute also collapsed under the stress of the Lemon test, which demands in part that the government action exhibit a primary effect that does not advance religion (and the Massachusetts law did indeed advance religion, wrote the Court) and that does not result in an excessive entanglement between government and religion (a standard that the statute also failed to meet).

What is instructive for our purposes is the Court’s discussion about the purpose and meaning of the Establishment Clause. “The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other eighteenth century systems.” This statement seemed innocuous enough, until the Court revealed the framers as its authority for this statement.

Indeed, it is the Jeffersonian metaphor of the “wall” separating church and state that principally informed the Court’s conception of the Establishment Clause. Moreover, the Court summoned the “framers,” who, in the Court’s terms, could not possibly have “set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.” Maybe not, but the framers and ratifiers of the Fourteenth Amendment had their own comprehension of the relationship between state and religious institutions. These individuals infused new meaning into the Establishment Clause. They transformed the Clause. And while it is true that they, too, would likely have disapproved of the kind of governmental delegation evident in the Massachusetts statute in question in Larkin, the Court chose not to explore their views and beliefs. This, I believe, is too narrow

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117. Id. at 126.
118. Id. at 125–26.
119. Id. at 127.
120. Id. at 122.
121. Id. at 122–23.
122. Many scholars and observers—including the Court here in Larkin—have mistakenly attributed the metaphor of the “wall” to Thomas Jefferson. Roger Williams, who was banished from Massachusetts and later founded what became a citadel of religious liberty, Rhode Island, first articulated the metaphor of the “wall.” TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 4–5, 82–83 (1998) (outlining Roger Williams’ philosophy of church and state). Jefferson may be more accurately viewed as having borrowed Williams’ powerful phrase.
123. Larkin, 459 U.S. at 127.
an appreciation of the Establishment Clause, for it denies the significance of the rebirth of the nation’s first liberty.\textsuperscript{124}

Third, consider \textit{Mueller v. Allen},\textsuperscript{125} where the Court assessed the validity of a Minnesota statute that allowed state taxpayers to deduct expenses incurred in providing tuition, textbooks, and transportation for their children attending elementary or secondary school. As a widely applicable program, the statute applied to parents of children who attended public schools, private nonreligious schools, and parochial schools.\textsuperscript{126} A group of Minnesota taxpayers brought an establishment suit against two parties: (1) parents who had taken a tax deduction for expenses incurred in sending their children to parochial schools; and (2) the state Commissioner of Revenue.\textsuperscript{127}

Over a vigorous dissent, the Court upheld the statute. The Court applied the Lemon test to the statute, finding the statute to have a secular purpose,\textsuperscript{128} a primary effect that did not advance the religious or religion in general,\textsuperscript{129} and a practical result that did not excessively entangle the spheres of state and religion.\textsuperscript{130} Specifically, the statute exhibited a number of valid secular purposes, including the development of a well-educated citizenry.\textsuperscript{131} Also, the statute could not be said to discriminately advance religion because the program was available to all parents, whether or not their children attended public schools or private schools.\textsuperscript{132} Finally, in satisfying the last component of the Lemon test, the statute did not produce a constitutionally violative fusion of state and religious functions.\textsuperscript{133}

The Mueller majority took great care in its opinion to outline the meaning of the Establishment Clause.\textsuperscript{134} The Court relied on the nation’s founding history and the views of the founding fathers. But, significantly, the Court did not take even a moment to discuss the meaning of the Establishment Clause in the context of the Fourteenth Amendment. This myopic view of the Constitution does an injustice not only to estab-

\textsuperscript{125} 463 U.S. 388 (1983).
\textsuperscript{126} \textit{Id.} at 397.
\textsuperscript{127} \textit{Id.} at 392.
\textsuperscript{128} \textit{Id.} at 394.
\textsuperscript{129} \textit{Id.} at 402.
\textsuperscript{130} \textit{Id.} at 403.
\textsuperscript{131} \textit{Id.} at 393–95.
\textsuperscript{132} \textit{Id.} at 394–403.
\textsuperscript{133} \textit{Id.} at 394–96.
\textsuperscript{134} \textit{Id.} at 399–400.
lishment jurisprudence but equally to the American constitutional tradition.

Two other instances of note include *Walz v. Tax Commission of the City of New York*135 and *Board of Education of Kirvas Joel Village School District v. Grumet.*136 In *Walz*, a New York real estate owner sought an injunction to prohibit the Tax Commission from extending state property tax exemptions to religious organizations for religious properties that were used exclusively for religious worship.137 The plaintiff argued that the exemption to church property indirectly required him to support religion and the religious, and therefore violated the Establishment Clause.138

The Court disagreed, recognizing that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."139 The City of New York, explained the Court in sustaining the exemption, "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."140

To defend its conclusion, the Court appealed to the early 1800s and to Congress, which has since its earliest days authorized statutory exemptions for religious organizations.141 In 1802, for instance, explained the Court, the seventh Congress exempted churches from a taxing statute applied in the County of Alexandria, Virginia. Comparable exclusions followed in 1813, when Congress enacted a number of real and personal property assessments that specifically excluded church property, and in 1870, when Congress exempted all churches from taxes in the District of Columbia.142 Given that such enactments were not violative of the Establishment Clause at that time, the Court reasoned that it could not plausibly invalidate the New York exemption.143

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138. *Id.*
139. *Id.* at 669.
140. *Id.* at 673.
141. *Id.* at 677.
142. *Id.* at 677–78.
143. *Id.* at 677–80.
The Court did not discuss the Fourteenth Amendment and its transformative impact upon the Establishment Clause, not even when the Court discussed the central meaning of the Clause.\textsuperscript{144}

In \textit{Grumet}, a New York statute created a special school district for a religious enclave, Satmar Hasidim.\textsuperscript{145} New York taxpayers and an association of state school boards filed suit on establishment grounds.\textsuperscript{146} Writing for the Court, Justice Souter declared that the statute violated the requirement of government neutrality that underscored the Establishment Clause.\textsuperscript{147}

Souter, who typically cites the founding fathers as authority for his establishment pronouncements, did not this time turn to such beacons as Madison or Jefferson. But neither did he look to the framers or ratifiers of the Fourteenth Amendment for guidance in discerning the meaning of the Establishment Clause in order to more properly and historically faithfully resolve the dispute before the Court.

Several other cases may also be filed under this second heading, cases in which the Court has looked to the founding fathers and history as a source of reference for declaring the reach of the Establishment Clause.\textsuperscript{148}

\textit{C. Group III: Precedent As Source of Reference}

In this third and final category of cases, the Supreme Court has relied principally on precedential authority to give meaning to the Establishment Clause. Jefferson, Madison, and the founding fathers do not figure prominently in the Court’s delineation of the permissible and the impermissible under the Establishment Clause. Other sources of reference may also include academic resources.

A representative illustration is \textit{Zorach v. Clauson}.\textsuperscript{149} The facts in \textit{Zorach} are strikingly similar to the dispute in \textit{McCollum}, in which the

\textsuperscript{144} Id. at 669.
\textsuperscript{145} 512 U.S. 687, 690 (1994).
\textsuperscript{146} Id. at 694.
\textsuperscript{147} Id. at 705.
\textsuperscript{149} 343 U.S. 306 (1952).
Court invalidated a program permitting Illinois public school students to attend religious instruction conducted by private instructors.\textsuperscript{150} In \textit{Zorach}, New York City had a “released time” program under which public school students, with parental authorization, could be released from class during regular school hours in order to participate in religious instruction. However, unlike the program in question in \textit{McCollum}, the New York program did not provide for religious instruction on public school grounds; students attended religious instruction at religious centers, away from school buildings and grounds.\textsuperscript{151}

The \textit{Zorach} Court upheld this particular form of “released time” program.\textsuperscript{152} On the strength of its observations that the New York program involved neither religious instruction on public school premises nor the expenditure of public funds in support of religious instruction—and, importantly, that all costs were borne by the sponsoring religious institutions\textsuperscript{153}—the Court distinguished this case from \textit{McCollum}.\textsuperscript{154} In its opinion, the Court did not invoke a non-precedential interpretational authority, citing only case law to reach its decision.

Another example is \textit{Board of Education v. Allen}.\textsuperscript{155} The state of New York in \textit{Allen} required local public school officials to loan textbooks free of charge to all students—including private school students—in grades seven through twelve. The question before the Court was whether the publicly mandated issue of textbooks to students attending parochial schools constituted a law respecting an establishment of religion.\textsuperscript{156}

The Court, through Justice White, relied upon \textit{Everson} to declare that the Establishment Clause does not preclude a state from evenhandedly extending the advantages of state laws to all citizens without regard to their religious affiliation.\textsuperscript{157} Moreover, because the New York law merely democratized a general book loan program and did not directly aim to extend funds or materials to parochial schools, but rather to parents and children,\textsuperscript{158} the Court found itself unable to rule that the law was repulsive to the principle of nonestablishment. In its majority opinion, the Court did not invoke a non-precedential interpretational authority,

\textsuperscript{151} \textit{Zorach}, 343 U.S. at 308–09.
\textsuperscript{152} \textit{Id.} at 315.
\textsuperscript{153} \textit{Id.} at 309.
\textsuperscript{154} \textit{Id.} at 308–09.
\textsuperscript{155} 392 U.S. 236 (1968).
\textsuperscript{156} \textit{Id.} at 238.
\textsuperscript{157} \textit{Id.} at 242 (citing \textit{Everson}, 330 U.S. 1, 17 (1947)).
\textsuperscript{158} \textit{Id.} at 243–44.
looking neither to history nor theory. Nowhere in its opinion did the Court refer to the framers or ratifiers of the Fourteenth Amendment.

Hunt v. McNair159 and Levitt v. Committee for Public Education and Religious Liberty160 may also be included in this group. The Hunt Court considered the legality of the South Carolina Educational Facilities Authority Act, which established a body to assist institutions of higher education to secure funding through the issuance of revenue bonds.161 The Act prohibited the Authority from assisting institutions that sought financing for buildings or facilities to be used for sectarian instruction or religious worship.162 The establishment problem arose when the Authority gave preliminary approval to a Baptist school’s application for capital improvements and completion of a dining hall.163

The Court upheld the Act. In applying the elements of the Lemon test, the Court found that the Act exhibited a secular purpose, evidenced a primary effect that neither advanced nor inhibited religion, and did not foster an excessive entanglement with religion.164

Likewise, the Court here did not invoke a non-precedential authority, for example the founders, the framers, or history, whether colonial, post-colonial, or from the Reconstruction. And again, the framers and ratifiers of the Fourteenth Amendment were imprudently left outside the sphere of influence.

In Levitt, plaintiffs questioned the constitutionality of New York’s $28 million appropriation to reimburse private schools for expenses incurred in performing such functions as administering, grading, compiling, and reporting examinations, and maintaining and reporting records on student enrollment and health records.165 Parochial schools were eligible to receive reimbursements.166

The Court struck down the enactment under the Establishment Clause on the following three principal bases: (1) The state awarded grants directly to the religious schools; (2) there were no mechanisms to ensure that the school examinations were free of religious instruction; and (3) there was nothing preventing the school from engaging in religious indoctrination.167 The essential inquiry, wrote the Court, “is

159. 413 U.S. 734 (1973).
161. Hunt, 413 U.S. at 736.
162. Id. at 736-737.
163. Id. at 738.
164. Id. at 741-44.
165. Levitt, 413 U.S. at 474.
166. Id. at 476.
167. Id. at 479-80.
whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution.\textsuperscript{168} The New York statute could not survive the Court's test.\textsuperscript{169}

Again, the Court neither called upon non-precedential sources nor referred to the framers or ratifiers of the Fourteenth Amendment to inform its judgment.

Two other instances of note are \textit{Texas Monthly v. Bullock}\textsuperscript{170} and \textit{Estate of Thornton v. Caldor}.\textsuperscript{171} In \textit{Texas Monthly}, the Court reviewed a Texas statute that exempted from sales tax "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."\textsuperscript{172} Justice Brennan inquired whether this exemption contravened the Establishment Clause.

"In proscribing all laws 'respecting an establishment of religion,'" wrote Brennan, "the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally."\textsuperscript{173} The Court ruled that the Texas statute ran afoul of the Establishment Clause:

Texas' sales tax exemption for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith lacks sufficient breadth to pass scrutiny under the Establishment Clause. Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious donors. Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause.\textsuperscript{174}

The Court's \textit{Texas Monthly} decision is particularly instructive insofar as it spent a great deal of time discussing the Establishment Clause and its jurisprudential development over time.\textsuperscript{175} Although the Court

\begin{footnotesize}
\begin{enumerate}
\item[168.] \textit{Id.} at 481.
\item[169.] \textit{Id.} at 482.
\item[170.] 489 U.S. 1 (1989).
\item[171.] 472 U.S. 703 (1985).
\item[172.] \textit{Texas Monthly}, 489 U.S. at 14–15 (referring to TEX. TAX CODE ANN. § 151.320 (Vernon 1982)).
\item[173.] \textit{Id.} at 8.
\item[174.] \textit{Id.} at 14–15 (internal citations omitted).
\item[175.] \textit{Id.} at 8–13, 21–25.
\end{enumerate}
\end{footnotesize}
thoroughly reviewed the applicable case law, the Court did not discuss
the impact of the Fourteenth Amendment on the Establishment Clause.
To be precise, the Court did not look to the framers and ratifiers of
the Fourteenth Amendment for guidance in giving meaning to the Clause.

The Caldor Court invalidated a Connecticut statute that provided
that "no person who states that a particular day of the week is observed
as his Sabbath may be required by his employer to work on such day. An
employee’s refusal to work on his Sabbath shall not constitute grounds
for his dismissal."176 The Court ruled that the statute offered Sabbath ob-
servers an absolute right to refrain from working. In so providing, the
statute had a primary effect that impermissibly advanced a religious prac-
tice.177 Therefore, it could not satisfy the Lemon test, which requires in
part that the governmental action in question remain neutral in its impact
upon religion.178

The Court’s relatively short opinion cited only precedential author-
ity as substantiation for its conclusion. When the Court explicated the
meaning of the Establishment Clause, it made no mention of the Four-
teenth Amendment, nor of its framers or ratifiers.

There are several other cases belonging to this third category in
which the Court has exhibited a similar decisional pattern.179

In this Part, I have divided the Court’s forty-seven establishment
cases into three groups based upon the principal source of reference de-
ployed to interpret the Establishment Clause. But each case bears the
mark of one shared feature: The Court has not, in any case, looked to the
framers or ratifiers of the Fourteenth Amendment to discern the meaning
of the Establishment Clause.

III. EXPANDING THE SPHERE OF INFLUENCE:
THE RELIGIOUS PHILOSOPHY OF FREDERICK DOUGLASS

In the previous Part, I surveyed Supreme Court jurisprudence with
the objective of demonstrating that the Court, in deciding establishment
cases and in delimiting the four corners of the Establishment Clause,
turns to a closed universe of sources. First and most frequently, the Court

176. Caldor, 472 U.S. at 706.
177. Id. at 710.
178. Id. at 709–10.
relies upon the views of Jefferson and Madison. Second, the Court invokes the founding fathers as well as colonial and founding history to substantiate its reading of the Clause. The third standard source of reference for the Court is precedential authority.

For our purposes, what is worthy of note is that the Supreme Court fails to examine the Establishment Clause through a reconstructionist lens. By casting aside the framers and ratifiers of the transformative Fourteenth Amendment, the Supreme Court deprives the Establishment Clause of its full scope and meaning.

Frederick Douglass is one such figure from the Reconstruction era who should be looked upon as an authority on the Clause much like Jefferson or Madison. In this Part, I will examine the thought of Frederick Douglass as it relates to the following three principal issues: (1) established churches, or state religion; (2) religious equality and egalitarianism; and (3) religion and education. I will outline each one in turn, beginning with Douglass’s views on established churches. I shall then, in the following Part, apply Douglass’s views on religion to recent Supreme Court cases.

A. Established Religion

Frederick Douglass was a deeply religious man. Having found God at age thirteen, Douglass strived to live what he perceived to be God’s way as well as to encourage others do the same.180 But as he grew older, he witnessed the corruption of the Christian faith.181 Slave owners and friends of slavery would trumpet their own righteousness in the same breath as they would speak of the Bible, somewhere along the way, believed Douglass, losing sight of the command of their Lord.182 Yet they honestly believed they were committing no wrong in the trade of flesh, convinced that they would find nothing to argue otherwise in the teachings of their faith.183

This occasioned a tremendous bitterness within Douglass, who saw his faith and its tenets despoiled. Before him lay a conspicuous hypocrisy among men claiming to do the work of his God. He understandably had great trouble reconciling these two conflicting realities:

We claim to be a Christian country and a highly civilized nation, yet, I fearlessly affirm that there is nothing in the history of savages

181. Id. at 131–35, 150.
182. Id. at 132–34.
183. See id. at 134.
to surpass the blood chilling horrors and fiendish excesses perpetrated against the colored people by the so-called enlightened and Christian people of the South. It is commonly thought that only the lowest and most disgusting birds and beasts, such as buzzards, vultures and hyenas, will gloat over and pretty upon dead bodies, but the Southern mob in its rage feeds its vengeance by shooting, stabbing and burning when their victims are dead.\(^{184}\)

Douglass continued, lamenting that what these individuals practiced could not properly be called Christianity.\(^{185}\) Indeed, to him, these women and men were not Christians. They could not possibly be God-fearing Christians, like him, who believed in all things good and noble and fair:

[B]etween the Christianity of this land, and the Christianity of Christ, I recognize the widest possible difference—so wide, that to receive the one as good, pure, and holy, is of necessity to reject the other as bad, corrupt, and wicked. To be the friend of the one, is of necessity to be the enemy of the other. I love the pure, peaceable, and impartial Christianity of Christ: I therefore hate the corrupt, slaveholding, women-whipping, cradle-plundering, partial and hypocritical Christianity of this land. Indeed, I can see no reason, but the most deceitful one, for calling the religion of this land Christianity. I look upon it as the climax of all misnomers, the boldest of all frauds, and the grossest of all libels. Never was there a clearer case of "stealing the livery of the court of heaven to serve the devil in." I am filled with unutterable loathing when I contemplate the religious pomp and show, together with the horrible inconsistencies, which everywhere surround me.\(^{186}\)

Moreover, not only did these individuals enslave his people and defile his faith, but they exacted further religious harm upon African-Americans by denying them the privilege of baptism.\(^{187}\) Slavery-friendly religious leaders denied the privilege because of African-Americans' perceived unfitness for baptism, and the fear that the full Christian membership conferred upon baptized African-Americans would unduly disturb the relationship between master and slave.\(^{188}\) This further widened

\(^{184}\) Frederick Douglass, Address by the Hon. Frederick Douglass, Delivered in the Metropolitan A.M.E. Church (January 9, 1894), in The Lessons of the Hour 3, 5 (1894).

\(^{185}\) See id.

\(^{186}\) Frederick DOUGLASS, AN AMERICAN SLAVE: NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS 120 (The New American Library 1968) (1845).

\(^{187}\) Frederick Douglass, Address Delivered in the Congregational Church on the Twenty-First Anniversary of Emancipation in the District of Columbia (April 16, 1883), in An Address by Hon. Frederick Douglass 1, 10 (1883).

\(^{188}\) Id.
the gulf that was growing between Douglass, on the one hand, and American Christian practice, the church as an institution, and organized Christianity, on the other.

Turning to the question of establishment, it is important to recall that Douglass had not experienced life in an establishmentarian regime. Born in 1818, Douglass had seen disestablishment reach fruition in Connecticut in the same year, in New Hampshire the following year in 1819, and when he was around fifteen years of age, in Massachusetts in 1833, which marked the disappearance of the final establishment jurisdiction in the United States.

However, Douglass did have extensive knowledge of and experience with at least the following two non-American established churches: (1) the Church of England; and (2) the Church of Scotland. Based upon his views on these churches, one can infer that he would not have been a proponent of established churches. Let us examine his writings and declarations on these churches.

Speaking in 1858, Douglass praised the virtues of the Church of England, which was then, and remains today, the established church of England. He contrasted the actions of the Church of England with regard to slavery with the actions of American Christianity and concluded that English Evangelical Christianity was a formidable foe of slavery, while American Evangelical Christianity was a gentle, enriching friend to slavery:

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192. Douglass spent nearly two years in Great Britain during 1845–47. See DOUGLASS, supra note 180 at 289–319.

193. See infra text accompanying notes 194–96.
My friends, it must be confessed that the slaves in our land have no more dangerous an enemy than in the religious bodies of America. In this respect, the anti-slavery movement in this country differs very widely from the anti-slavery movement in England. In our country, we find religion opposed to us, quoting scripture against us, preaching sermons against us; but in England, religion was allied to the cause of liberty. English Evangelical Christianity breaks fetters. American Evangelical Christianity rivets fetters.

But one must be careful not to interpret Douglass’s admiration of the Church of England as an endorsement of state-sponsored religion. His praise of the Church must be read in the context of the times in which he spoke. In 1858, emancipation had recently taken hold in the West Indies; the English had ceded to the force of freedom. Spurred to action in part by the Church of England, the English answered the call and produced a marvelous result:

Abolition was the act of the British Government. The motive which led the Government to act, no doubt was mainly a philanthropic one, entitled to our highest admiration and gratitude. The National Religion, the justice, and humanity, cried out in thunderous indignation against the foul abomination, and the government yielded to the storm.

This surprising outcome opened Douglass’s eyes, emboldened him to persist in his pursuit of virtue and all things right, and brought him newfound hope for the possibility of liberty in his own land:

That the event we thus comemorate [sic] transpired in another country, and was wrought out by the labors and sacrifices of the people of another nation, form no valid objection to its grateful, warm, hearty, and enthusiastic celebration by us. In a very high sense, we may claim that great deed as our own. It belongs not exclusively to England and the English people, but to the lovers of Liberty and of mankind the world over. It is one of those glorious emanations of Christianity, which, like the sun in the Heavens, takes no cognizance of national lines or geographical boundaries [sic], but pours its golden floods of living light upon all. In the great Drama of Emancipation, England was the theatre, but universal and every where

194. Frederick Douglass, Freedom in the West Indies, Address delivered in Poughkeepsie, NY (August 2, 1858), in 3 The Frederick Douglass Papers 214, 241 (John W. Blassingame ed. 1985).

applying principles of Righteousness, Liberty, and Justice were the actors. The great Ruler of the Universe, the God and Father of all men, to whom be honor, glory, and praise for evermore, roused the British conscience by his truth, moved the British heart, and West India Emancipation was the result. But if only Englishmen may properly celebrate this great concession to justice and liberty, then, sir, we may claim to be Englishmen, Englishmen in the love of Justice and Liberty, Englishmen in magnanimous efforts to protect the weak against the strong, and the slave against the slaveholder. Surely in this sense, it ought to be no disgrace to be an Englishman, even on the soil of the freest people on the globe.\footnote{196. \textit{Id.} at 199.}

In this regard, therefore, Douglass perceived that good things—godly things—could result from established religion, given the great sway held by the Church of England and its consequent success in convincing, encouraging, and guiding Englishmen to see what justice commanded of them.

Nevertheless, although the Church of England met in Douglass’s eyes with praise for its support of emancipation, another established church summoned only scorn and disdain within him. Douglass believed that the Church of Scotland, also an established faith, was just as bad as its American counterparts who had soiled the Christian faith by brandishing its principles in defense of slavery.\footnote{197. See \textit{DOUGLASS}, \textit{supra} note 180, at 309–13; see \textit{infra} text accompanying notes 198–200.} In a speech delivered in Scotland, Douglass unleashed his emotions fearlessly before the crowd assembled to hear this great orator. He began:

As a general thing, when any body of men commit a single wrong act in the name of religion, they almost invariably commit more sins in defending that action than the original one itself: I think this has been singularly the case in the present instance. I think I never saw it more prominently illustrated than in the attempted defence [sic] of the indefensible conduct of the Free Church of Scotland.\footnote{198. Frederick Douglass, \textit{Charges and Defense of the Free Church}, Address at an Anti-Slavery Soirée (March 10, 1846), in \textit{1 THE FREDERICK DOUGLASS PAPERS} 171, 172 (John W. Blassingame ed., 1979).}

Douglass continued, leveling charges at the Church:

1st, I charge the Free Church of Scotland with fellowshipping men-stealers, as the type and standing representatives of our Lord and Saviour Jesus Christ on earth.
2d, I charge the Free Church of Scotland with accepting money from well-known thieves to build her churches and to pay her ministers.

3d, I charge the Free Church of Scotland with sending a deputation into a community of well-known thieves to beg money which they had the best evidence was the result of the most foul plunder which has ever disgraced the human family.

4th, I charge the delegation of the Free Church of Scotland with going into a land where they saw three millions of immortal souls, for whom the Saviour poured out his blood on Calvary, reduced to the condition of slaves—robbed of their just and God-given rights—plundered of their hard earnings—changed from men into merchandise—ranked with the lowing ox or neighing horse—subject to the brutal control of rough overseers—herded together like brutes—raised like cattle for the market—without marriage—without learning—without God—without hope—groping their way from time to eternity in the dark—left to be consumed of their own lusts—compelled to live in concubinage—punished with death, in some instances, for learning to read the word of God; and yet that delegation professed ministers of the Gospel never whispered a single word of opposition to all this in the ear of the oppressor, or lifted up one prayer in the congregation for the deliverance of these wretched people from their galling fetters. The very idea is horrible, and ought to make every ear tingle and every heart quiver with terror.

5th, I charge the delegation of the Free Church of Scotland with having gone into the slave states and among men-stealers with a full understanding of the evils such a course must inflict on the Anti-Slavery movement,—they having been met and remonstrated with by the Committee of the American and Foreign Anti-Slavery Society, and appealed to by them in the most Christian and fraternal manner, in the name of Christ and the perishing slave, not to go into the South—that such a course would inflict a great and lasting injury upon the cause of emancipation.199

Douglass continued in this fashion, charging the Church with refusing to preach against slavery, turning a deaf ear to bleeding slaves, and misleading slaves into thinking that the Church was free, when in fact it was doing the work of slaveholders.200

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199. Id. at 176–77.

200. Id. at 177–78.
In the face of such observations about the horror that may be exacted by religion and those proclaiming to be acting on behalf of his God, Douglass was given pause to consider the relationship between church and state. Though he had not given up on the state as an engine of social progress, it was difficult for him to imagine that improved social conditions would come about without the help and urging of the church, as had been the case in the West Indies. Yet, to declare that the church as an institution was an indispensable component for pushing the state toward emancipation would have been nearly impossible for Douglass to do, given the corruption of religion he witnessed at home. Perhaps the most revealing statement Douglass uttered to this effect is the following short statement, which carries with it sharp imagery and an even sharper vision of what he saw as the spoiled scent of Christianity among the slaveholding masses: "Hence, my friends, every mother who, like Margaret Garner, plunges a knife into the bosom of her infant to save it from the hell of our Christian Slavery, should be held and honored as a benefactress." His aim, therefore, was to safeguard the sanctity of religion and to keep it free of debasing influences.

In many ways, Frederick Douglass's philosophy of church and state resembled the philosophy of Roger Williams, the founder of Rhode Island. Williams, like Douglass, believed in the separation of church and state. But the impetus for this belief was not to protect the state from the church, but instead to protect the church from the sullying reach of the state. To Williams, the church was the garden and all else represented the wilderness. In order to retain the sanctity and inviolability of the church as garden, it was necessary to shield it from negative, acidic influences, or from institutions or individuals who would breach the imaginary wall separating the garden from the wilderness.

Williams espoused a resolute policy of religious liberty and was an ardent detractor of established, state religion. The laws of his colony neither established a denominational church nor required compulsory church attendance. Rhode Island welcomed all people to its colony,

201. See Douglass, supra note 195, at 241; Frederick Douglass, Oration Delivered in Corinthian Hall (July 5, 1852), in 2 THE FREDERICK DOUGLASS PAPERS 359, 381 (John W. Blassingame ed., 1979).
202. Douglass, supra note 194, at 204.
203. HALL, supra note 122, at 81–82.
204. Id. at 82–83.
205. See generally id.
including nonconformists, Baptists, and Quakers, whom Williams personally disliked. 207

Douglass, like Williams before him, wished to establish a protective cover around religious institutions. 208 He had seen them dishonored and violated under the leadership of friends of slavery. The union of church and state was therefore among the most undesirable of coalitions for reasons that Douglass had himself witnessed. Thus, for the sake of his faith and its followers, he too sought to erect a wall separating church from state, though the wall would not serve the interests of the state but would instead be raised in defense of the purity of the church, its doctrine, and its people.

B. Religion, Equality, and Egalitarianism

Although Douglass believed in the democratization of public institutions, he acknowledged the right of private institutions to close their doors to the unwanted or those deemed unqualified for membership. Therefore, while he saw integration of public spaces as the greatest objective, he recognized the inappropriateness of state action to infringe upon or dictate practices in private corners.

A particularly fascinating dimension of Douglass’s political thought comes to us in his observations on the World’s Fair, which was held later in his life. Commenting that all the peoples of the world were to be represented at this festive occasion and appreciating that the World’s Fair was intended in part to acquaint the world’s great cultures with one another, he found it devastatingly unacceptable that his people—the American Negro, as he called himself—were left uninvited and unrepresented. 209 In order for the World’s Fair to have been accurately viewed as a World’s Fair, he thought, surely his people ought to also have been seated at the metaphorical table of civilizations. 210 But they were not and, for that, he accurately decries American liberty and American equality. Read his powerful words below, in which he underscores the American caste system:

While I join with all other men in pronouncing the Exposition itself one of the grandest demonstrations of civilization that the world has ever seen, yet great and glorious as it was, it was made to show just this kind of unfairness and discrimination against the Negro.

208. See Douglass, supra note 201, at 377–81.
209. See Douglass, supra note 184, at 19–20 (1894).
210. See id.
As nowhere else in the world it was hoped that here the idea of human brotherhood would have been fully recognized and most gloriously illustrated. It should have been, and would have been, had it been what it professed to be, a World’s Exposition. It was, however, in a marked degree an American Exposition. The spirit of American caste made itself conspicuously felt against the educated American Negro, and to this extend [sic], the Exposition was made simply an American Exposition and that in one of America’s most illiberal features.

Since the day of Pentecost, there has never assembled in any one place or on any one occasion, a larger variety of peoples of all forms, features and colors, and all degrees of civilization, than was assembled at this World’s Exposition. It was a grand ethnological lesson, a chance to study all likenesses and differences. Here were Japanese, Soudanese, Chinese, Cingalese, Syrians, Persians, Tunisians, Algerians, Egyptians, East Indians, Laplanders, Esquimaux, and as if to shame the educated Negro of America, the Dahomeyans were there to exhibit their barbarism, and increase American contempt for the Negro intellect. All classes and conditions were there save the educated American Negro.

What a commentary is this upon our boasted American liberty and American equality! It is a silence to be sure, but it is a silence that speaks louder than words. It says to the world that the colored people of America are deemed by Americans not within the compass of American law and of American civilization. It says to the lynchers and mobocrats of the South, go on in your hellish work of Negro persecution. What you do to their bodies, we do to their souls.211

Justice, clearly to him, would have dictated an African-American presence at the World’s Fair. But this was not to be. As the archetypical public square, the World’s Fair should have included everyone, in Douglass’s view. But it did not, and in speaking of the Fair, one may read his discussion of race as a fulcrum to religion. In public institutions and in the public square, there can be no justifiable exclusion of religious thought.

Nevertheless, the American caste system would persist to his great displeasure, though not in all parts of the country, as he was doubtless

211. Id.
delighted to note. Douglass was elated at the early steps of social progress and equality taking hold in the New England. In Massachusetts, he was pleased with educational integration, as he was with the progress made in Connecticut toward equal suffrage, which was also moving ahead in New York and Pennsylvania. He explained:

The States which have legislated in behalf of the Temperance Reform, have also made movements toward recognizing our rights as citizens thereof. But efforts on our own part have helped toward this good result; in Massachusetts, mainly by efforts of some colored citizens, one a member of this Council, the last vestige of caste in public schools has been abolished. In Connecticut, on the petition of her colored citizens, led by a member of this Council, both houses of the Legislature have done their share towards granting us equal suffrage, and the Governor has recently strongly recommended the same. In New York, through the efforts of a member of this Council and of the President of our State Council, aided by the moving eloquence of another member of our Council, the popular branch of the Legislature passed a vote in favor of equal suffrage, a vote for which during the past twenty years we have petitioned and struggled in vain. In Pennsylvania, a strong and able effort has been made to obtain the Franchise by our colored brethren, and not without some signs of success.

Fair, equal, and impartial treatment is the objective, proclaimed Douglass, however hard achieving, maintaining, and exhibiting this impartiality may be. Equality and impartiality must reign not only between and among the races, but also between and among religions. The world's eyes must remain fixed toward this goal, he urged, and all peoples must keep struggling to reach it. And struggle they would, cautioned Douglass, for seeing it through would be as difficult to do as it is for a slave owner to do justice to his own slave. Douglass struck a resonant chord with the following words:

Under the influence of adverse education and hereditary bias, few things are more difficult than to render impartial justice. Men hold up their hands to Heaven, and swear they will do justice, but what are oaths against prejudice and against inclination! In the face of high-sounding professions and affirmations we know well how hard

212. See infra text accompanying note 213.
213. Douglass is speaking here of the National Council of the Colored People.
it is for a Turk to do justice to a Christian, or for a Christian to do justice to a Jew. How hard for an Englishman to do justice to an Irishman, for an Irishman to do justice to an Englishman, harder still for an American tainted by slavery to do justice to the Negro or the Negro’s friends.215

In the public sphere and across all public establishments—including schools and government edifices and constructs—Douglass pursued equality and egalitarianism with undying vigor. He was a true champion of the masses. Thus in all things public and of a public fabric, including places of food and lodging, the public square, and governmental structures, the rule could be nothing short of full equality. As he so declared:

The right of every American citizen to select his own society and invite whom he will to his own parlor and table should be sacreditly respected. A man’s house is his castle, and he has a right to admit or refuse admission to it as he may please, and defend his house from all intruders even with force, if need be. This right belongs to the humblest not less than the highest, and the exercise of it by any of our citizens toward anybody or class who may presume to intrude, should cause no complaint, for each and all may exercise the same right toward whom he will.

When he quits his home and goes upon the public street, enters a public car or a public house, he has no exclusive right of occupancy. He is only part of the great public, and while has the right to walk, ride, and be accommodated with food and shelter in a public conveyance or hotel, he has no exclusive right to say that another citizen, tall or short, black or white, shall not have the same civil treatment with himself.216

But this fervor stopped at the foot of private institutions. On this question, Douglass conceded that the state should not impose itself upon a person’s personal wishes and preferences.217 To Douglass, the private realm included such spaces as one’s home—one’s castle, as he termed it—one’s church group, and one’s private organizational affiliations, for instance.218 The reach of the state could not extend into the private sphere.

215. Frederick Douglass, Address at the Fourteenth Anniversary of Storer College (May 30, 1881), in JOHN BROWN 3, 11 (1881).
216. Frederick Douglass, Address to the People of the United States at a Convention of Colored Men (September 24, 1883), in THREE ADDRESSES ON THE RELATIONS SUBSISTING BETWEEN THE WHITE AND COLORED PEOPLE OF THE UNITED STATES 3, 20 (1886).
217. See id.
218. See id.
C. Religion and Education

Douglass strongly believed that religious teachings had no place in public classrooms. But this resistance derived neither from an antagonism toward Christianity nor the lessons he had learned from his Bible readings. Quite the contrary, Bible study was, for him, a replenishing source of strength and reassurance. His opposition to the teaching of religious texts in public schools instead originated from what he observed to be the disconnect between the preaching and practice of Christianity. We may trace the roots of his beliefs to his distrust of public and religious officials who discharged their duties in the name of their faith.

As a proponent of religious liberalism—which, to Douglass, signified a more human-centric philosophy of religion as opposed to the traditional God-centric philosophy of religion—Douglass was accused of infidelity for a number of the manifestations of his religious philosophy. Two of his beliefs in particular merit attention, for they bring into focus his religious liberalism and reveal the reasons for the disdain with which some regarded him.

First, Douglass did not believe in divine providence, at least not to the point that it would ultimately, by itself, abolish the institution of slavery. Douglass instead held steadfastly to the conviction that the will of God could only be fulfilled through human intermediaries, who themselves needed to exhibit faith in the righteousness of their actions.

Douglass, for instance, himself a Christian, could feel only disgust and revolt in the face of Christian churches that supported slavery and its perpetrators. To him, the church had been corrupted by backward individuals—many of them ministers, in his view—who maintained and furthered the cause of slavery contrary to what he believed was the will of God. Keeping firm to his view that man determined his own course in life and retained the choice of heeding or ignoring the callings and urgings of God as man saw them, Douglass was not at all troubled by his label as an infidel. So what, he snapped, if earthly creatures saw him as such? At the end of the day, he knew that he would be welcomed into a righteous afterlife. Consider his words below, spoken in 1852:

For my part, I would say, welcome infidelity! welcome atheism! welcome anything! In preference to the gospel, as preached by the Divines! They convert the very name of religion into an engine of

219. See MARTIN, supra note 34, at 179.
220. Id. at 178–79.
221. Id. at 177.
222. Id.
tyranny and barbarous cruelty, and serve to confirm more infidels, in this age, than all the infidel writings of Thomas Paine, Voltaire, and Bolingbroke put together have done! These ministers make religion a cold and flinty-hearted thing, having neither principles of right action nor bowels of compassion. They strip the love of God of its beauty and leave the throne of religion a huge, horrible, repulsive form. It is a religion for oppressors, tyrants, manstealers, and thugs.223

Related to his disillusionment with the church was his view of religion in school classrooms. In addition to the contempt he suffered for his rejection of providence, Douglass was criticized for his belief that the Bible had no place in public schools.224 To be sure, Douglass did not oppose reading and belief in the Bible, for, as he writes in another text with palpable emotion, his introduction to the Bible gave him strength and newfound insight into the human condition and the promise of an after-life.225 Rather, Douglass's opposition to Bibles in public schools likely stemmed from the disconnect he witnessed among citizens, professionals, and even religious leaders around him, on the one hand, and on the other, between Christian moral philosophy and practice.

In a eulogy Douglass delivered of William Jay, a graduate of Yale College and a close friend of his, Douglass expressed his condemnation of "those who maintain the divine right of Christian white men to hunt down and to hold the black man in slavery . . . ."226 and hoped with all his being and for the sake of the sacred institution of religion, that "Doctors of Divinity shall find a better use for the Bible than in using it to prop up slavery, and a better employment for their time and talents than in finding analogies between Paul's Epistle to Philemon and the slave-catching bill of Millard Fillmore . . . ."227 In even more forceful words, though this time not in speech but in the written medium, Douglass gave further shape to these thoughts:

I assert more unhesitatingly that the religion of the south is a mere covering for the most horrid crimes,—a justifier of the most appalling barbarity,—a sanctifier of the most hateful frauds,—and a dark shelter under which the darkest, foulest, grossest, and most infernal deeds of slaveholders find the strongest protection. Were I to be

223. Douglass, supra note 201, at 377.
224. MARTIN, supra note 34, at 179.
225. DOUGLASS, supra note 180, at 110-11.
227. Id.
again reduced to the chains of slavery, next to that enslavement, I should regard being the slave of a religious master the greatest calamity that could befall me. For of all slaveholders with whom I have ever met, religious slaveholders are the worst. I have ever found them the meanest and basest, the most cruel and cowardly, of all others. 228

Indeed, nothing shocked Douglass more to the core of his being than the corrosion and deterioration that had overcome the hearts and minds of the leaders of his nation and of his faith. 229 Having seen how easily religion and the religious creed could be manipulated by malevolent men and women, he wished to withhold from the champions of slavery the chance to further damage his nation.

Specifically, by opposing the use of Bibles in public schools, he hoped to deny slave-friendly teachers the opportunity to inculcate young schoolchildren with perverse, twisted, and plainly backward interpretations of the Bible. Though wrongdoers would use the Bible to their unseemly advantage in advancement of their unjust aims, Douglass affirmed that:

[There is] no evidence that the Bible is a bad book, because those who profess to believe the Bible are bad. The slaveholders of the South, and many of the wicked allies at the North, claim the Bible or slavery; shall we therefore, fling the Bible away as a pro-slavery book? It would be as reasonable to do so as it would be to fling away the Constitution. 230

To him, the Bible was a singular book that he deemed “the oldest history, the truest philosophy, the purest system of morality, the groundwork of all other truth, the book of laws on which is based all human jurisprudence.” 231

IV. FREDERICK DOUGLASS AS SOURCE OF REFERENCE

In the interest of relocating the constitutional discourse from the conventional narrative to a broader and more historically accurate analysis of the meaning of the transformed Establishment Clause, the judiciary should rely on Frederick Douglass and other reconstructionists as sources of reference alongside, not instead of, such usual suspects as Jefferson

228. DOUGLASS, supra note 186, at 86–87.
229. See generally id.
231. MARTIN, supra note 34, at 179.
and Madison. As an illustration of how jurists might make use of reconstructionist thought in expounding the Establishment Clause, we may attempt to conclude by extrapolation how Douglass would have decided modern Supreme Court cases on establishment-related disputes, armed with the above outline of Douglass's vision of religion and how it relates to general questions of establishment, equality, and education.

Let us therefore imagine for a moment that Frederick Douglass was a justice of the Supreme Court at the time the following cases reached the Court's docket. How would Douglass have ruled? Though it is certainly difficult to determine with certainty how Douglass would have sided on contemporary questions of establishment, his philosophy of religion and its place in civil society may give us sufficient guidance to arrive at a plausible conclusion. Admittedly, Douglass did not pronounce himself on all constitutional questions of religious flavor. For instance, one would find it difficult to place Douglass on the question raised in *Reynolds v. United States*, a Utah case from 1878 that affirmed a conviction for bigamy. In *Reynolds*, the defendant invoked his Mormon religious beliefs as permitting him to practice polygamy, but the Court refused to recognize this as an allowable defense. I believe this case would have been difficult for Douglass to decide. Douglass would almost certainly have been repulsed by bigamy, given his reverence for the institution of marriage and the lengths he went to fight in support of interracial marriage. But this case also tests his belief in the inviolability of the private sphere. It is likely that Douglass would have ruled as did the Court, but it is hard to say so conclusively, because of his conviction that man is king in his home.

Nonetheless, in the absence of sureness, let us proceed with a thought experiment examining four cases that will help to illuminate Douglass's philosophy in practice. In reviewing these cases, let us remember the original aim of this effort, which is to illustrate that the central figures of the Reconstruction may be very effective resources in resolving disputes arising under the Bill of Rights. Before proceeding, I note that I am not so much interested in the result of this hypothetical investigation. Specifically, my concern is not necessarily whether, in applying Douglass's insights to Establishment Clause jurisprudence, we reach a conclusion different from the one reached by the Supreme Court. Rather, my interest is in broadening the sphere of influence on estab-

232. 98 U.S. 145 (1879).
233. *Id.* at 165–66.
234. See MARTIN, supra note 34, at 220–21.
235. See supra text accompanying note 216.
lishment matters, from a narrow focus on Madison and Jefferson, to a more inclusive and historically accurate survey of available decisional authorities.

A. Zelman v. Simmons-Harris

The dispute in Zelman concerned whether Ohio’s voucher program ran afoul of the Establishment Clause by covering tuition charges for students attending private and religious schools. The Sixth Circuit invalidated the state initiative, relying upon the Lemon test and found the program to have a primary effect of advancing and impermissibly endorsing religion. The Supreme Court overruled, holding that the voucher program did not violate the Clause.

In reaching its decision, the divided Court relied on previous cases, principally Mueller v. Allen, Witters v. Washington, and Zobrest v. Catalina Foothills School District. Chief Justice Rehnquist, for the Court, did indeed tip his hat to the Fourteenth Amendment, but only to note that it is the mechanism through which the Establishment Clause applies to the several states. Yet again, the Court failed to make reference to the fathers of the Fourteenth Amendment in articulating the meaning of the Establishment Clause.

Though the Court’s majority opinion did not cite any reconstructionists, Justice Thomas’s concurrence called upon the writings of Frederick Douglass for the proposition that “education . . . means emancipation.” Justice Thomas used this quote to sustain his own argument in support of Ohio’s voucher program. Having thoroughly considered Douglass’s writings as well as secondary materials on his life and beliefs, I disagree with the suggestion that Douglass would have been a proponent of vouchers. Douglass would have affirmed the Sixth Circuit’s decision, parting ways with the Supreme Court majority. Two reasons lead me to this conclusion.

First, Douglass was a strong supporter of public institutions insofar as he saw in them the promise of democratizing America for all peoples.

239. Id. at 961.
241. See discussion supra Part II.
242. 536 U.S. at 647–49.
243. In his dissent, Justice Souter called upon both Jefferson and Madison to expound the meaning of the Establishment Clause. 536 U.S. at 711–12 (Souter, J., dissenting).
244. 536 U.S. at 676 (Thomas, J., concurring).
And the vision of a truly free public school—free of twisted secular messages, and fully integrated with students of both black and white cultures—represented his model, his aim for social progress. He would therefore have fought for the continued support and improvement of public schools, and would have recoiled at the thought of public funds being redirected from these institutions of promise to their private counterparts. 245

Second, given his experience with ill-willed religious leaders, Douglass would have been appalled at funds from the public fisc flowing to private institutions, which could engage in teaching and preaching what they pleased beyond the core state-imposed educational requirements. Yet Douglass would not have forbidden private religious schools from operating. He would have conceded that private religious schools have a place in the state and enjoy the right to operate, whatever their message or mission. In this way, he was a libertarian. But he would have drawn an exceptionally bright line at the prospect of funding these institutions from the public purse. 246

B. Rosenberger v. Rector & Visitors of the University of Virginia

Rosenberger 247 is emblematic of the Supreme Court’s tendency to focus solely upon the views, words, and actions of the founding fathers in giving meaning to the Establishment Clause instead of more broadly considering the intentions of the framers and ratifiers of the Fourteenth Amendment, which forever changed the Establishment Clause.

Relying on the founders to ascertain the meaning of the Establishment Clause, the Rosenberger Court held that a public university could grant access to its facilities to student groups (including those of a sectarian nature) on a religion-neutral basis without violating the Establishment Clause. 248 In a concurrence, Justice Thomas drew on the events of Virginia’s 1776 Convention and also on his interpretation of Madison’s Memorial and Remonstrance to support his judgment. 249 To bolster his decision, Justice Thomas also referred to the legislative enactments of the First Congress, 250 particularly the Northwest Ordinance of 1787, 251 which sanctioned congressional land grants for denominational schools.

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245. See discussion infra Part II.B.
246. See discussion infra Part II.C.
248. Id. at 863.
249. Id. at 854–57.
250. Id. at 862–63.
In retort, Justice Souter began his dissent by summoning the writings of Madison, whose authority "is well-settled." In dissent, Souter also called upon the actions of the colonial Virginia legislature and Madison's *Memorial and Remonstrance*. But he did so to substantiate the opposite conclusion that Justice Thomas reached with the same evidence.

It may have served the Court well to consider the views of prominent reconstructionists in expounding the scope and sense of the Establishment Clause. Frederick Douglass is but one of many who could have served as a resource for the Supreme Court. Douglass, in my view, would have resolved *Rosenberger* on two bases: (1) the nature of public institutions; and (2) equality. His first thought would have concerned the nature of the institution. Public institutions, to him, were not forums for distinguishing among people or classes, and he would have found it inappropriate to exclude groups from such spaces. According to Douglass's philosophy, public establishments should champion the cause of equality and non-discrimination. Moreover as a tireless advocate of equality for all groups and individuals, Douglass would have viewed this dispute as one of equal access. Whether or not Douglass agreed with the views of the religious organizations seeking access to the school facilities would have been of no import to him in deciding this case. Consider, for instance, that although he regarded Judaism as the observance of "detestable practices," he nevertheless wished equal treatment, fairness, and impartiality for Jews.

On these two bases—the nature of public institutions and equal access—Douglass, too, like the Court, would have held that the University of Virginia must grant open access to its facilities, even to religious organizations.

C. School District of Abington Township v. Schempp

*Abington* decided two companion cases, both of which asked the Court to assess the propriety of daily religious exercises in schools. In the first case, the Court considered a Pennsylvania law that required a reading of at least ten Bible verses at the opening of the public school day. The statute exempted students whose parents submitted a written request to excuse them from the daily readings. The Schempp family

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253. *Id.* at 868–74.
sued the state to enjoin enforcement of the statute, arguing that its application violated the Establishment Clause.\(^{259}\) In the companion case, a Baltimore school had adopted a rule pursuant to a Maryland statute, which provided for daily opening religious exercises.\(^{260}\) The school mandated a daily morning reading from the King James Bible, a practice to which a student’s family objected on establishment grounds.\(^{261}\)

The Court wasted no time in striking down both enactments.\(^{262}\) The Court went on to develop its decisional logic by summoning as authorities the views of founding fathers and Madison’s *Memorial and Remonstrance Against Religious Assessments*, in particular.\(^{263}\) In fact, the Court took great care to stress that the views of Madison and Jefferson “came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.”\(^{264}\)

Later, the Court again quoted Madison, this time for the proposition that neutrality ought to govern state interaction with religious institutions.\(^{265}\) Significantly, however, references to the founders were neither preceded nor followed by any reference to the reconstructionists.

Had the Court turned to Douglass, it would have found a compelling ally. Leaning on Douglass to substantiate and give weight to its decision would have permitted the Court to not only diversify the voices marshaled in support of its position but perhaps more importantly to bolster the force of its judgment by expressly acknowledging the transformative impact of the Fourteenth Amendment on the Establishment Clause.

Given his strident belief that the Bible has no place in a public school,\(^{266}\) Douglass would have taken little time to likewise invalidate these laws. It is important to note, however, that Douglass was not an opponent of religion and, in fact, felt a great affinity to and drew great warmth from his Bible readings. His resistance to Bible readings in public schools arose out of his fear that men and women in positions of authority—teachers of course were party to this group—could manipulate the spirit and terms of this holy document into concurrence with their own cruel vision of the world.

\(^{259}\) *Id.* at 818.
\(^{260}\) *Murray* , 179 A.2d at 699.
\(^{261}\) *Id.*
\(^{262}\) *Abington*, 374 U.S. at 205.
\(^{263}\) *Id.* at 213.
\(^{264}\) *Id.* at 214.
\(^{265}\) *Id.* at 225.
\(^{266}\) See *supra* text accompanying notes 224–25.
D. Marsh v. Chambers

In *Chambers*, a member of the Nebraska Legislature argued that its practice of beginning each of its sessions with a prayer performed by a chaplain and paid for by the state violated the Establishment Clause.\textsuperscript{267} The legislator sought an injunction to discontinue this long-standing practice. He was successful in both lower courts,\textsuperscript{268} but lost his case at the Supreme Court.

In upholding the legislature’s chaplaincy practice, the Court drafted an opinion that reads like a history textbook. “The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country,” described the Court, adding that, “from colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.”\textsuperscript{269} Not only is this practice common in the nation’s courtrooms, explained Chief Justice Burger for the Court, but this is an American tradition that the Continental Congress adopted in 1774.\textsuperscript{270} The First Congress, too, adopted this policy.\textsuperscript{271} It stands to reason, then, that the nation’s founders did not regard the chaplaincy as repulsive to the liberties they later enshrined in the Establishment Clause.\textsuperscript{272} Therefore, wrote Burger, “historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.”\textsuperscript{273}

Echoing a familiar refrain, like the earlier-discussed cases, *Chambers* similarly fails to discuss the intentions of the framers and ratifiers of the Fourteenth Amendment. Instead, the intentions of the founding fathers occupy a conspicuously large part of the Court’s opinion. The Court invoked such prominent individuals as Madison\textsuperscript{274} and Samuel Adams\textsuperscript{275} in reaching its decision. But nowhere do we read mention of

\textsuperscript{267} 463 U.S. 783 (1983).
\textsuperscript{268} Id. at 783.
\textsuperscript{269} Id. at 786.
\textsuperscript{270} Id. at 787.
\textsuperscript{271} Id.
\textsuperscript{272} Id. at 790 (“It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.”).
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 788 n.8.
\textsuperscript{275} Id. at 791–92.
their nineteenth century counterparts, who conceived of the Fourteenth Amendment and, in later ratifying it, forever changed the fabric of American democracy.

Frederick Douglass, in my view, would have disagreed with the Court’s disposition of this case. In light of his Williamsian philosophy of the relationship between church and state, and given the terrors he had witnessed around him carried out both by men of the cloth and men of the state, such a close symbolic association between matters of faith and the government as was evident in the Nebraska Legislature’s practice would have awakened his sense of wrong and impropriety. He would have upheld the lower court judgments, finding the chaplain’s prayer an unacceptable union of church and state. But, importantly, his concern would not have been with the encroachment of the church upon the realm of public governance. More precisely, Douglass’s concern would have rested in preserving the purity of the garden, or the sanctity of religion and things religious.

Despite Douglass’s likely disagreement with the Court, it would nevertheless have been advisable, for either of two reasons, for the Court to refer to his and other reconstructionist views. First, the Court could have strengthened its reasoning by rebutting the discomfort that Douglass would have exhibited in the face of such an unholy union of personal faith and public governance. Second, and more significantly, the Court could have illuminated the transformative effect of the Fourteenth Amendment on the meaning of the Establishment Clause and other fundamental rights and freedoms.

V. CONCLUSION

My survey of Establishment Clause jurisprudence since 1947—the year in which the Court extended the reach of the Clause to states—has illustrated a point of some consequence. In each of the forty-seven establishment cases to reach the Supreme Court docket, the framers and ratifiers of the Fourteenth Amendment are conspicuously absent both in name and spirit. While Professors Amar and Lash have made plain the importance of a reconstructionist lens to the elaboration of the liberties and freedoms preserved in the Bill of Rights, jurists seemingly have yet to embrace this detail.

To be sure, were it the case that jurists recognized the indispensability of the Reconstruction era to the central meaning of the Establish-

276. See supra text accompanying notes 203–08.
277. See discussion supra Part II.A.
Establishment Clause

ment Clause, they would summon the words or views of the framers and ratifiers of the Fourteenth Amendment with a frequency comparable to their reference to the founding fathers or the framers of the Bill of Rights. But this is not the case. Indeed, one would even be mistaken to suggest that the Supreme Court invokes as its Establishment Clause decisional or interpretational authority the founding fathers or the framers of the Bill of Rights disproportionately more than the framers and ratifiers of the Fourteenth Amendment. By its terms, such a comparison is flawed, for the Court has never—through forty-seven establishment cases since and including Everson in 1947—appealed to the words or intentions of the framers or ratifiers of the Fourteenth Amendment in contemplating the meaning of the Establishment Clause. Not once. Instead, the Court has regularly invoked the founding fathers or the framers of the Bill of Rights, mostly Thomas Jefferson and James Madison, as authorities to give meaning to the Establishment Clause. For reasons outlined compellingly by Professors Amar and Lash, such a myopic view of the Establishment Clause fails to acknowledge the Reconstruction’s transformative imprint forever branded upon the Clause.

It is clear that the Supreme Court relies upon the founders to the exclusion of the framers and ratifiers of the Fourteenth Amendment. But whether this narrow reliance embodies a glaring deficiency in establishment jurisprudence or whether it has exacted a detrimental effect on establishment law—or has had any effect—is a question I shall leave for another day. In order to properly venture such an investigation, one would necessarily have to craft a well-defined understanding of the Fourteenth Amendment and how it relates to the Establishment Clause. Moreover, the legislative history from the Reconstruction would necessarily form a central source of reference for any meaningful assessment of the framers’ and ratifiers’ intentions.

In these pages I have examined the religious thought of Frederick Douglass, an influential reconstructionist who helped give shape to the modern Bill of Rights. I have outlined some principles that underpin his philosophy on questions involving the intersection of matters of faith and the state, hopeful that this effort will spur others to do the same, with other reconstructionists as subjects, and with other issues of public concern. I have also applied Douglass’s beliefs to contemporary religious establishment disputes. This was meant to accomplish two key objectives: (1) to illustrate, generally, that reconstructionists may serve as helpful resources to jurists in search of the intended meaning of constitutional civil rights and liberties; and (2) to suggest, specifically, that the life, times, and writings of Frederick Douglass may be a useful founda-
tion for giving meaning and shape to the Establishment Clause. Indeed, as establishment disputes continue to find their way through the judiciary, jurists would do well to look beyond Madison and Jefferson, expanding the sphere of authority on constitutional meaning to include Douglass and other reconstructionists.