



2007

## Religious Liberty That Almost Wasn't: On the Origin of the Establishment Clause of the First Amendment

Gregory C. Downs

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Jurisprudence Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Gregory C. Downs, *Religious Liberty That Almost Wasn't: On the Origin of the Establishment Clause of the First Amendment*, 30 U. ARK. LITTLE ROCK L. REV. 19 (2007).

Available at: <https://lawrepository.ualr.edu/lawreview/vol30/iss1/2>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

# RELIGIOUS LIBERTY THAT ALMOST WASN'T: ON THE ORIGIN OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

*Gregory C. Downs\**

*"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."*

U.S. CONST. amend. I

*"A page of history is worth a volume of logic."*

Justice Oliver Wendell Holmes<sup>1</sup>

## I. INTRODUCTION

Writing for the majority in *Everson v. Board of Education*,<sup>2</sup> Justice Black began his consideration of the constitutionality of tax-funded transportation of students to parochial schools by examining the Establishment Clause's "background and environment of the period in which that constitutional language was fashioned and adopted."<sup>3</sup> In the course of his opinion, Justice Black noted that the Court "previously recognized that the provisions of the First Amendment, in the drafting and adopting of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute."<sup>4</sup>

The purpose of this essay is to examine briefly the foundational origin of the Establishment Clause in the events sometimes referred to as the "Virginia Experience" and to consider the possibility that the significant "lead-

---

\* Gregory C. Downs is a law clerk for Justice Tom Glaze of the Arkansas Supreme Court. He previously served as a law clerk at the Arkansas Court of Appeals and the United States District Court, Eastern District of Arkansas following graduation in 2005 from the William H. Bowen School of Law, University of Arkansas at Little Rock.

1. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

2. 330 U.S. 1 (1947).

3. *Id.* at 8.

4. *Id.* at 13. Madison wrote a letter to Edmund Pendleton on March 3, 1788, stating that it would be his last letter from New York and that he was setting out for Virginia. The same day Madison wrote to George Washington and told him that "I am preparing to set out for Orange, and promise myself the pleasure of taking Mount Vernon in the way." JAMES MADISON, 5 THE WRITINGS OF JAMES MADISON 110–12 (Gaillard Hunt ed., G.P. Putnam's Sons 1904). George Washington wrote in his diary that "Mr. Madison on his way from New York to Orange came in for dinner and stayed all night." IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800 at 187 (Bobbs-Merrill 1950).

ing roles” in the First Amendment’s creation were not limited to Jefferson and Madison. Further, Madison’s leading role in the actual sponsorship of the First Amendment may not have been entirely voluntary. Justice Black’s opinion in *Everson* appears to omit that a denomination “peculiarly obnoxious” to the established church in Virginia played a crucial part in the existence of the First Amendment and Establishment Clause. His opinion also omitted an extraordinary, but largely forgotten, confrontation that is a fascinating combination of power politics, constitutional thought, and religion. More importantly, this political confrontation and the resulting compromise directly led to the protection of religious liberty found in the First Amendment. With the ever-present litigation and controversies revolving around the extent and meaning of the First Amendment’s Establishment Clause, this overlooked history is both interesting and instructive in the Constitutional debate.

## II. BAD NEWS FROM HOME: MADISON’S POLITICAL CRISIS

On a March evening in 1788, James Madison stopped to visit George Washington at Mount Vernon while traveling home to stand for election as a delegate to the Virginia Ratifying Convention for the proposed national Constitution.<sup>5</sup> Madison’s work as the Constitution’s principal architect and his collaboration with Alexander Hamilton and John Jay in its defense—resulting in *The Federalist*—had mentally and physically exhausted him.<sup>6</sup> But before he could relax along the Potomac and enjoy General Washington’s hospitality, a messenger arrived with a letter that warned Madison of a danger to his election—a danger that collaterally threatened the ratification of the Constitution itself.

The letter that arrived that night for Madison at Mount Vernon was from Captain John Spencer, a friend from Orange County, Virginia, where Madison’s home, Montpelier, was located.<sup>7</sup> Spencer’s letter warned Madison that he was in dire political trouble and would not be elected to ratify the Constitution that was largely the product of his own pen absent immediate steps to address the crisis. Madison would have known that the implications of such a defeat were enormous: his failure to be elected could potentially derail Virginia’s ratification of the Constitution, and in turn, other states could lose confidence in both Madison and his Constitution and prevent

---

5. BRANT, *supra* note 4, at 187.

6. Hamilton wrote fifty of the *Federalist* papers, Madison wrote twenty-nine, and Jay wrote six.

7. Letter from Joseph Spencer to James Madison (Feb. 28, 1788), in 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 525–29 (United States Dept. of State 1905). The original copy is held by the Manuscript Division of the Library of Congress.

ratification by a majority—resulting in its complete failure. A return to the chaos and instability of the Articles of Confederation was unthinkable.

As Madison read on, his friend wrote that the principal force behind the election crisis was John Leland, leader of the Virginia Baptists and a pastor known for his dynamic speaking and writing in the Revolutionary Era.<sup>8</sup> The letter stated that the Baptists, led by Leland, were concerned that the proposed Constitution had no explicit guarantees for religious freedom and that this organized and motivated group of voters was prepared to oppose the Constitution and Madison's election as a delegate to the Ratifying Convention. Enclosed within the letter was Leland's list of objections to the proposed Constitution. Spencer expressed confidence that if Madison could cure these objections he could swing the Baptists' critical votes in his favor and ensure his election. Spencer concluded the letter by urging Madison to meet with Leland on his way home to Orange County and work out a solution to the concerns, especially those related to religious liberty; otherwise, the letter stated, Madison would lose the election.

Leland's ten objections to the proposed Constitution ranged from a lack of freedom for the press to issues concerning the separation of powers. His key objection, however, was that "Religious Liberty is not sufficiently secured."<sup>9</sup> Leland wrote that the Constitution as proposed allowed for the possibility that a majority of Congress and the President could join forces to pass legislation favoring one denomination over others and enact various other forms of oppression.<sup>10</sup> Leland and the Baptists feared that without the Constitutional protection of an explicit guarantee of religious freedom, an established church could be created and taxation and support for a preferred denomination could be passed, resulting in general entanglement of church and state to the detriment of both. Before examining the resolution to Madison's crisis and the significance of the outcome, it is important to consider the leading players and their relationship to each other and to the "Virginia Experience," which Justice Black described as crucial for understanding the meaning of the Establishment Clause.

---

8. See AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 658, 971–89, 1189–1205 (Charles S. Hyneman & Donald S. Lutz eds., Liberty Press 1983); see generally JOHN LELAND, THE WRITINGS OF THE LATE ELDER JOHN LELAND (L.F. Greene ed., Church History Research & Archives 1986) (1845).

9. Letter from Joseph Spencer to James Madison, in 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, *supra* note 7, at 528.

10. *Id.*

### III. LEADING PLAYERS IN THE VIRGINIA EXPERIENCE: THOMAS JEFFERSON, JAMES MADISON, PATRICK HENRY, AND JOHN LELAND AND THE "PECULIARLY OBNOXIOUS" BAPTISTS

In *Everson*, Justice Black discussed the persecution and punishments that the state religions had inflicted upon dissenters in Europe:

[M]en and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.<sup>11</sup>

Justice Black noted that "[t]hese practices of the old world were transplanted to and began to thrive in the soil of the new America."<sup>12</sup> On the eve of the signing of the Declaration of Independence in 1776, there were codified legal penalties for religious groups dissenting from official denominations in nine of the thirteen colonies.

Leland and the Baptists based their fear that the proposed national Constitution was deficient, as expressed in the letter Madison received at Mt. Vernon, on European history and their experiences in the colonies—especially in Virginia, where the established denomination was the Anglican or Episcopal Church. According to an official Episcopal historian for Virginia, the colony's code of laws required (1) mandatory attendance for worship at the Episcopal Church, (2) that the doors of any dissenting group's services be unlocked during worship (allowing for easy disruptions and arrests), (3) that dissenting ministers be registered in their communities, (4) that dissenting ministers sign all articles of the Church of England, and (5) that dissenting ministers provide a court record of all the places they intended to hold church services of any type.<sup>13</sup> Violation of such laws carried penalties ranging from large fines to veritable life imprisonment. Punishment and imprisonment of Baptist and other dissenting ministers would reach a high point in the period just before the signing of the Declaration of Independence.

Dissenting denominations in Virginia and most other colonies were "compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning

---

11. *Everson v. Bd. of Educ.*, 330 U.S. 1, 9 (1947).

12. *Id.*

13. GEORGE MACLAREN BRYDON, *VIRGINIA'S MOTHER CHURCH AND THE POLITICAL CONDITIONS UNDER WHICH IT GREW* 372, 378-79 (Church Historical Society 1952). Dissenting ministers were also not allowed to perform legal marriages. *Id.* at 409.

hatred against the dissenters;”<sup>14</sup> but, as Justice Black notes in *Everson*, the “Baptists were peculiarly obnoxious” to the Episcopal Church.<sup>15</sup> Officials of the established church in Virginia repeatedly confronted Leland, but his combination of imposing physical stature and sense of humor proved to be a formidable force. Several sources tell of an amusing example of such an encounter that occurred when an Episcopal Church vestryman publicly challenged Leland as he preached against state support of religion. The vestryman interrupted Leland and argued that a minister *should* receive tax support so that he would have the time and freedom from labor to prepare his sermons adequately. Leland replied that, to the contrary, he himself could expound on the Bible without any special preparation, much less the support of public taxes. The vestryman threw down the gauntlet and challenged Leland: “What, for instance, would you do with Numbers 22:31, ‘And Balaam saddled his ass?’”<sup>16</sup>

Leland gave the audience the Biblical background to the verse and then replied to his challenger: “First, Balaam, as a false prophet, represents the state-hired clergy. Second, the saddle represents the enormous tax burden of their salaries. Third, the dumb ass represents the people who bear such a burden.”<sup>17</sup>

Other than his work as a minister, Leland had two great labors in life: denouncing slavery and advocating complete religious freedom. In eighteenth-century Virginia, Baptist and Methodist churches were almost all racially mixed congregations, and slaves were often allowed to attend services away from their plantations. Some slaves even served as preachers and church officers.<sup>18</sup> The religious dedication and fervor of the slaves despite their oppressed circumstances moved Leland, who noted that it was not

14. *Everson*, 330 U.S. at 10. The “historic connection between Baptist Faith and the struggle for religious freedom in America” is directly related to Baptist doctrine, particularly concerning baptism, where baptism follows a “declaration of faith as a condition of church fellowship . . . [Baptism] merely symbolizes regeneration; it does not ‘bestow or condition’ it.” L.H. BUTTERFIELD, ELDER JOHN LELAND, JEFFERSONIAN ITINERANT 164, 162 (American Antiquarian Society 1953). Because, according to this doctrine, spiritual salvation is a “conscious experience, voluntarily and responsibly accepted,” children are “incapable of such an experience” and infant baptism is therefore meaningless except as a form of parental coercion and, as practiced by established religions in Europe and the colonies, a “device that makes church affiliation coextensive with the population.” *Id.* at 162–63. Dissent from this practice is what triggered much of the persecution of Baptists and formed the basis of their opposition to any church-state ties. *See id.* at 163–64.

15. *Id.*

16. JOSEPH MARTIN DAWSON, BAPTISTS AND THE AMERICAN REPUBLIC 97 (Arno Press 1980).

17. *Id.*

18. MECHAL SOBEL, THE WORLD THEY MADE TOGETHER: BLACK AND WHITE VALUES IN EIGHTEENTH CENTURY VIRGINIA 180 (Princeton Univ. Press 1987).

unusual for slaves to walk twenty miles on Sundays to attend services.<sup>19</sup> In his *Virginia Chronicle*, published in 1790, Leland wrote that “[t]he whole scene of slavery is pregnant with enormous evils” and warned that divine judgment was certain if slaves were not voluntarily freed with “mercy.”<sup>20</sup>

Leland’s other driving goal was the elimination of preferences for an established denomination and of the persecution of those who were not members of the official church. For over sixty-seven years in his writings and speeches, Leland advocated for the cause of religious liberty—not only for Baptists, but for persons of all faiths, Christian and non-Christian, and even for atheists.<sup>21</sup> For example, he criticized the Christian oath of office required in an early draft of Article VI of the Constitution by asking, “Why should a man be proscribed, or any wife disgraced, for being a Jew, a Turk, a Pagan, or a Christian of any denomination, when his talents and veracity as a civilian entitles him to the confidence of the public?”<sup>22</sup> It was in this struggle for religious freedom and complete disestablishment in Virginia that Leland came to be well known by not just Madison, but by other Revolutionary leaders such as Thomas Jefferson and Patrick Henry.

Leland and Jefferson’s friendship apparently began when Leland served as pastor of a Baptist church near Jefferson’s home of Monticello. Jefferson occasionally attended services there, and Dolly Madison reportedly remarked that the Baptists had influenced Jefferson’s views on government, remembering that the Baptist church government “struck him with great force” and that Jefferson “considered it the only form of pure democracy that exists in the world.”<sup>23</sup>

At the Virginia Constitutional Convention in 1776, Jefferson opposed taxes to support religion and proposed that dissenters from the official Episcopal denomination be exempted from such taxes. When Jefferson’s proposal was blocked, Leland and an association of Virginia Baptists held an emergency meeting on Christmas Day. A resolution resulted that officially endorsed Jefferson’s proposal and declared that state monetary support for ministers made them dependent on—and responsible to—the state, which

19. JOHN LELAND, *THE VIRGINIA CHRONICLE* (1790), reprinted in *THE WRITINGS OF THE LATE ELDER JOHN LELAND*, *supra* note 8, at 98.

20. *Id.* at 96.

21. BUTTERFIELD, *supra* note 14, at 55–57.

22. JOHN LELAND, *THE YANKEE SPY* (1794), reprinted in *THE WRITINGS OF ELDER JOHN LELAND*, *supra* note 8, at 224. See Section 1, Article 19 of the Arkansas Constitution for an example of an existing religious test.

23. MARK A. BELILES, *THE CHRISTIAN COMMUNITIES, RELIGIOUS REVIVALS, AND POLITICAL CULTURE OF THE CENTRAL VIRGINIA PIEDMONT, 1737–1813*, in *RELIGION AND POLITICAL CULTURE IN JEFFERSON’S VIRGINIA* 18 (Garrett W. Sheldon & Daniel L. Dreisbach, eds., Rowman & Littlefield Publishers, Inc., 2000).

could then “regulate and dictate” to them.<sup>24</sup> Jefferson had the resolution, which Leland authored, printed in the *Richmond Gazette*. When Jefferson later offered his *Act for Establishing Religious Freedom* in 1779 as Governor of Virginia, Baptists were virtually alone in supporting it. Although the bill failed on this occasion, Madison successfully reintroduced it with slight modification in 1786 while Jefferson was in Paris. Jefferson would later write that the struggle for religious disenfranchisement in Virginia “brought on the severest contests in which I have ever been engaged.”<sup>25</sup>

Madison and Leland became acquaintances while both lived in Orange County during the period following the Revolutionary War. Ironically Madison’s father, an influential member of the Episcopal Church, had been instrumental in denying Leland a permit to preach in Orange County. Madison, however, disapproved of the treatment of dissenting ministers in Virginia. While recuperating from illness at his family home, Montpelier, Madison sent a letter to a friend lashing out at what he regarded as the unjust imprisonment of several Baptist ministers in a neighboring county, calling it “[t]hat diabolical Hell conceived principle of persecution.”<sup>26</sup> Because of his opposition to the religious persecution of dissenters, Madison “repeatedly appeared in court of his own county to defend the Baptist nonconformists,” and it was during this the period of his involvement in the defense of Baptists that Madison decided to choose a career in law and public service rather than the ministry.<sup>27</sup> Madison’s most significant involvement with Leland and the Virginia Baptists before the political confrontation and crisis in 1787 involved another key figure in the Virginia Experience—Patrick Henry, a lawyer renowned for his incredible courtroom skills. Jefferson described Henry’s courtroom talents as “such as I have never heard in any other man.”<sup>28</sup>

Although he was an active member of the Episcopal Church, Henry was an advocate for religious freedom for dissenting faiths to preach, and he often interceded on the behalf of Baptist ministers, who were usually arrested for violating the peace. An example is the case of Baptist minister Jeremiah Moore, who had been sentenced to life imprisonment for his religious activities in Fairfax, Virginia. George Washington reportedly asked

24. DAWSON, *supra* note 16, at 101. See also WILLIAM CABELL RIVES, 1 A HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 41–45 (Little, Brown, & Co. 1859).

25. THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in THOMAS JEFFERSON: WRITINGS 34 (Merrill D. Peterson, ed., Library of America 1984).

26. Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 THE PAPERS OF JAMES MADISON, at 106 (William T. Hutchinson, et al eds., Univ. of Chi. Press 1962); see also RIVES, *supra* note 24.

27. LEWIS PEYTON LITTLE, IMPRISONED PREACHERS AND RELIGIOUS LIBERTY IN VIRGINIA 130, 131 (J.P. Bell Co. 1938).

28. WILLIAM STERNE RANDALL, THOMAS JEFFERSON: A LIFE 78 (Holt & Co. 1993).



Henry to represent Moore in an appeal of Moore's harsh and unjust sentence. Henry's advocacy resulted not only in Moore's release from prison, but also resulted in the grant of a license to preach legally.<sup>29</sup> But when Henry submitted his General Assessment Bill to the Virginia Legislature to provide broad, non-discriminatory monetary support for "teachers of the Christian religion" through state taxes, Leland and the Baptists would quickly unite with Madison to oppose it.<sup>30</sup>

Henry, in effect, sought the legal establishment of multiple Christian denominations through his General Assessment Bill, including the dissenting groups such as Baptists. The Baptists however, while acknowledging that Henry had their interests in mind, were forcefully opposed to the bill due to their absolute separationist stance. Madison opposed Henry's legislation because he believed it not only represented a form of religious taxation that intertwined church and state and potentially imperiled both, but also because it would allow the Episcopal Church to maintain at least a quasi-established position by retaining public or "glebe" land and property.<sup>31</sup> After maneuvering Henry out of the Virginia Legislature and into the governorship to limit the effect of his skills of persuasion, Madison voiced his opposition to the bill by publishing an important statement of church-state separation—his famous *Memorial and Remonstrances Against Religious Assessments*.<sup>32</sup> Leland played an important supporting role by preaching in favor of the essay in churches throughout the state, and the Baptist General Committee of Virginia approved a resolution on August 13, 1785, that formally endorsed it and gave it political weight.<sup>33</sup>

Madison wrote a letter to James Monroe describing the battle over Henry's bill and cited the Baptist resolution. Madison's letter stated that although the Episcopal and Presbyterian clergy fully supported the bill, "the Baptists however, standing firmly by their avowed principle of the complete

---

29. DAWSON, *supra* note 16, at 90.

30. *Id.* at 105–07. Madison told Jefferson that he wrote the *Memorial and Remonstrance* at the request of some of the general assessment bill's "adversaries" in a letter dated August 20, 1785. MADISON, *supra* note 4, at 163.

31. Madison wrote Jefferson and described the basic operation of Henry's bill as creating an additional tax on a percentage of taxable property for support of teachers of the Christian religion, and that "[e]ach person, when he pays his tax, is to name the society to which he dedicates it; and in the case of refusal to do so, the tax is to be applied to the maintenance of a school in the county. As the bill stood for some time, the application, in such cases, was to be made by the legislature for pious uses." RIVES, *supra* note 24, at 610.

32. Thomas Jefferson offered a more direct solution for removing Henry from the legislature in a letter to Madison: "What we have to do, I think, is devotedly pray for his death." IRVING BRANT, *JAMES MADISON: THE NATIONALIST, 1780–1887*, at 345 (Bobbs-Merrill 1950).

33. Interestingly, while Madison's *Memorial and Remonstrance* garnered 1,552 supporting signatures on petitions circulated throughout Virginia, the resolution of the Baptist General Committee received 4,899 signatures.

separation of church and state, declared it to be ‘repugnant to the spirit of the Gospel for the Legislature thus to proceed in matters of religion, that no human laws ought to be established for the purpose.’”<sup>34</sup>

#### IV. MEETING AND COMPROMISE

Although Madison and Leland successfully joined forces to defeat both Henry and state support for religion in Virginia, they later came to a political confrontation over the proposed federal Constitution. Despite Jefferson’s arguments to the contrary, Madison felt that a bill of rights was unnecessary because of sufficient internal protection found within the various articles of the Constitution.<sup>35</sup> Leland, as Madison learned in the letter he received at Mount Vernon, entirely disagreed with Madison’s optimism. Patrick Henry’s strong states-rights position and persuasive oratory against the Constitution already threatened ratification by Virginia, which appeared to hold the deciding vote.<sup>36</sup> Additionally, because of Virginia’s recent prosperity, land, and population, the new nation needed its inclusion for survival. There was a tight margin between the numbers of those for ratification and those against it in Virginia; with the need for strong advocacy to counter Henry at the Convention, Madison’s election as a delegate was critical. Recognizing the crisis that would potentially ensue if he lost the election, Madison quickly left Mount Vernon. When he reached Fredericksburg he sent word ahead that he wanted to meet with Leland.<sup>37</sup>

When Madison and Leland met in Orange County they discussed the objections to the Constitution and reached a compromise. Madison pledged that if elected to the Virginia Ratifying Convention and then to the new Congress, he would propose the amendments Leland wanted, including the explicit protections for religious liberty. In exchange, Leland promised Madison the full support of the Baptists. With the Baptists’ votes secured, Madi-

---

34. MADISON, *supra* note 4, at 183–91.

35. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON, 1776–1826*, at 512–13 (James Morton Smith, ed., W.W. Norton & Co., 1995). During the Confederation Congress, Madison responded to concerns about the lack of a bill of rights: “A bill of rights [is] unnecessary because the powers are enumerated and only extend to certain cases.” See Melacton Smith, Notes, in 1 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 332–33, 335–36 (Merrill Jensen, et al, eds., 1976).

36. The Constitution required ratification by nine of the thirteen states. Virginia was the last state to hold its Ratification Convention. Virginia’s delegates met on June 25, 1788, and knew that New Hampshire had voted against ratification months earlier, leaving eight votes for ratification and leaving Virginia with the Constitution’s deciding vote. However, Virginia was unaware that New Hampshire had reconsidered and voted in favor of ratification on June 21.

37. FRANK S. WALLACE, JR., *REMEMBERING: A HISTORY OF ORANGE COUNTY, VIRGINIA* 118 (Orange County Historical Society 2004).

son was elected to the Virginia Ratifying Convention where the Constitution was approved by only ten votes. Madison was then elected to the First Federal Congress, where he offered the amendments he felt “bound in honor” to secure.<sup>38</sup>

Just west of Unionville, Virginia, in Orange County are two markers alongside Route 20 that commemorate this historic, but often forgotten meeting. The more recent marker was placed in 1953 when the site was dedicated as Leland-Madison Park. But there is also a much earlier marker that succinctly describes the consequential event that took place near there:

Near this spot in 1788, Elder John Leland and James Madison, the father of the American Constitution, held a significant interview which resulted in the adoption of the Constitution by Virginia. Then Madison, a member of Congress from Orange, presented the First Amendment to the Constitution guaranteeing religious liberty, free speech, and a free press. This satisfied Leland and his Baptist followers.

The debate on the exact meaning of the Establishment Clause of the First Amendment began as soon as Madison proposed it. Madison’s broad and sweeping draft of the amendment underwent revision following debate and compromise between Senate and House committees in the First Congress, resulting in religious protections extending textually only to the national government—“*Congress shall make no law.*” Because of this, the struggle to remove recognition and preference of official denominations would continue within the individual states for more than a decade.<sup>39</sup> In addition, there were those such as Justice Joseph Story who argued early on that the Establishment Clause allowed federal aid to religion on an equal,

---

38. JAMES MADISON, 1 ANNALS OF THE CONGRESS OF THE UNITED STATES: THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 441 (Joseph Gales, ed., Gales and Seaton 1834). Rumors, attributed to Patrick Henry, that Madison did not plan to honor his agreement were spread among the Baptists following Virginia’s ratification of the Constitution. Madison responded to these rumors in a letter written to Baptist minister George Eve, assuring him that it was his “sincere opinion that the Constitution ought to be revised” at the First Congress, and that amendments “for all essential rights, particularly the rights of conscience” should be drafted and submitted to the states for ratification. BRANT, *supra* note 4, at 240.

39. The 14th Amendment would finally resolve this issue by making the 1st Amendment applicable to the states. Although Madison initially opposed amending the proposed Constitution to add a bill of rights, he did see the need to create “a Constitutional negative on the laws of the States” in order to “secure individuals against encroachments on the rights,” adding that “[t]he mutability of the laws of the States is found to be so frequent and so flagrant as to alarm the most steadfast friends of Republicanism.” Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON, 1776–1826, *supra* note 35, at 500.

general basis.<sup>40</sup> Inapposite to Story's accommodationist view was Madison's explanation of his presidential veto of a federal land grant that included a parcel for a Baptist church in the Mississippi Territory: "[the bill] comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'"<sup>41</sup>

While the key history of the "Virginia Experience" involving Leland, Madison, and Jefferson in the battle for absolute religious freedom seems to argue for an absolute separationist view of the First Amendment, it was not the only position present at the Republic's founding, and even examination of the Jefferson and Madison presidencies show that their separationist stance was not anti-religious and primarily extended to opposition for the funding of religious activities. For example, Jefferson encouraged Leland to preach in the Hall of the House of Representatives on Sunday, January 3, 1801, an event Jefferson himself attended—two days after writing his famous and oft-quoted letter to the Danbury Baptist Church advocating "a wall of separation between church and state."<sup>42</sup>

Nevertheless, the seminal events in Virginia surrounding the letter Madison received at Mount Vernon warning of an election crisis—resulting in a political bargain that led directly to the First Amendment and its protection of religious liberty—should not be forgotten in the debates over the Establishment Clause. In *Everson*, Justice Black may have overlooked the leading roles of John Leland and the Virginia Baptists, but without their determination in the struggle for complete religious disestablishment in Virginia and their use of political power to force Madison to propose the First Amendment, it seems likely we would not have the explicit, positive guarantee for religious freedom found in the Constitution.

---

40. See JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 313–17 (Regnery Gateway 1986) (1840).

41. MADISON, *supra* note 4, at 132–33.

42. DANIEL L. DRIESBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 21 (New York University Press 2002).

